

COMMISSION

COMMISSION DECISION

of 27 June 2007

State aid C 50/2006 (ex NN 68/2006, CP 102/2006) implemented by Austria for BAWAG-PSK

(notified under document number C(2007) 3038)

(Only the German version is authentic)

(Text with EEA relevance)

(2008/263/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Aktiengesellschaft (hereafter BAWAG-PSK, or the Bank), the Commission sent a request for information to Austria. On the same day, the Commission received a letter from Austria providing information on a State guarantee granted to BAWAG-PSK.

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

(2) By letter dated 30 May 2006, the Commission sent Austria a further request. Austria replied by letter dated 16 June 2006.

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

(3) On 27 June and 4 December 2006, meetings with the Austrian authorities and representatives of BAWAG-PSK took place. Following the meetings Austria submitted additional information by letter dated 18 July and 21 September 2006.

Having regard to the Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty ⁽¹⁾,

(4) By letter dated 22 November 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 aid.

Having called on interested parties to submit their comments pursuant to the provision cited above ⁽²⁾,

(5) The Commission invited interested parties to submit their comments on the aid by a publication of the decision to initiate the procedure in the *Official Journal of the European Union* ⁽³⁾. No comments were received following this publication.

Whereas:

(6) In response to Commission requests, Austria supplied further information by letter dated 31 December 2006 and 31 January 2007.

I. PROCEDURE

(1) By letter dated 5 May 2006, following press articles relating to the difficult financial situation of Bank für Arbeit und Wirtschaft und Österreichische Postsparkasse

(7) On 28 February, 30 March, 25 April and 8 May 2007 meetings with the Austrian authorities and representatives of BAWAG-PSK and Cerberus took place. Following the meetings, Austria submitted additional information by letter dated 28 March, 19 April, 4 May, 21 May, 31 May, and 13 June 2007.

⁽¹⁾ OJ L 83, 27.3.1999, p. 1. Regulation as amended by the 2003 Act of Accession.

⁽²⁾ OJ C 232, 30.12.2006, p. 11.

⁽³⁾ See footnote 2.

II. BACKGROUND

BAWAG-PSK

(8) BAWAG-PSK is the fourth largest bank in Austria. As an unlisted banking and financing corporate group, it is active in all areas of financial services in Austria and abroad. It operates the largest centrally managed distribution network in the country (about 157 BAWAG and 1 300 post office PSK outlets), has 1,2 million private and more than 60 000 business customers. On 31 December 2005, the balance sheet total was EUR 57,9 billions with savings deposits of around EUR 18 billion.

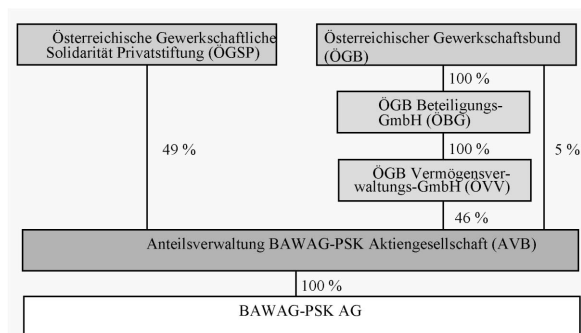
(9) The following Table 1 gives an overview of the key figures of the BAWAG-PSK group in the period 2004-06:

Table 1

BAWAG-PSK	Total assets (billion EUR)	Number of employees	Savings deposits (billion EUR)	Operating result (million EUR)	Net profit (million EUR)
2004	56,3	6 275	18,7	280	160,3
2005	57,9	6 632	18,2	217	6,2
2006	50,8	6 670	14,6	140	40,4

(10) Until 2006, BAWAG-PSK was indirectly wholly owned by the Austrian federation of trade unions (Österreichischer Gewerkschaftsbund — ÖGB) ⁽⁴⁾. The bank's history goes back to 1922 when an 'Arbeiterbank' (bank for workers) was founded for managing the financial assets of the unions and Konsumgenossenschaften (i.e. worker-organised non-profit firms). The bank was re-opened by the Austrian Unions after World War II.

(11) The ownership structure of BAWAG-PSK in December 2005 was the following:



⁽⁴⁾ ÖGB directly owned 51 % and indirectly through its private foundation Österreichische Gewerkschaftliche Solidarität Privatstiftung (ÖGSP) 49 %. ÖGB is the founder of ÖGSP.

(12) On 1 August 2005 BAWAG spun off its entire banking operations and passed them to a new company, BAWAG-PSK. The transferring company, BAWAG, was subsequently renamed AVB. The assets remaining in AVB (previously BAWAG) are primarily the 100 % shareholdings in BAWAG-PSK in addition to securities. On the passive side of the AVB balance sheet some of the BAWAG liabilities owed to credit institutions in an amount of EUR [...] ^(*) billion as well as part of BAWAG's equity remained.

(13) As of 31 December 2005 the claims of BAWAG-PSK against the direct and indirect shareholders amounted to EUR [...] billion ⁽⁵⁾. The recoverability of these claims depended primarily on the amount of the purchase price achieved for the sale of shares in BAWAG-PSK. In order to recover 100 % of the claims the potential buyer would have had to make a minimum total investment of about EUR [...] billion ⁽⁶⁾.

(14) BAWAG-PSK divides the domestic market into five main business segments:

(a) the Private Customer Segment encompasses retail branch business, sales through post offices, mobile sales and eBanking. The relevant customers are jobholders and small and medium-sized enterprises;

(b) the Corporate Customers Segment encompasses institutional clients and social insurance institutions and domestic and foreign key accounts. Customers within Austria are assigned to this segment if their annual revenues amount to EUR 4 million or more;

(c) the Public Sector Segment includes mainly credit and payment services for the Federal Government, federal states and local communities;

^(*) Business secret.

⁽⁵⁾ Consisting mainly of two unsecured loans granted to AVB in the form of account overdraft lines in the amount totaling EUR 1,531 billion and two loans to ÖGSP in the form of account overdraft lines in the total amount of EUR [...] million.

⁽⁶⁾ Sum of the purchase price and required capital injections into BAWAG-PSK.

- (d) the Capital Markets Segment encompasses the Group's treasury activities, including in particular its earnings from the banking book, asset and fund management and its issuing activities;
- (e) the Real Estate and Finance Leasing Segment encompasses the earnings of the Group members operating in these fields and the credit financing of real estate projects primary with corporate clients.
- (15) The market shares of BAWAG-PSK for certain products and/or business segment in 2005 in Austria were the following (Table 2):

Table 2

Products per business segment		Market share
Deposit business with domestic clients	Private customers	12 %
	Corporate customers	8 %
Credit business with domestic clients	Private customers	6 %
	Corporate customers	8 %
	Public sector	25 %
Credit card business (private customers)	Debit card	13 %
	Credit card	11 %
Leasing business		7 %
Capital markets business		5 %

- (16) In addition BAWAG-PSK holds a [...] position as the principal provider of banking services to the public sector. [...] governmental transfers and wage payouts to public employees are handled by the Bank.
- (17) BAWAG-PSK is also engaged in the insurance sector through BAWAG Versicherung AG and P.S.K. Versicherung AG ⁽⁷⁾ and in non-banking activities. The most important of the latter are BAWAG-PSK real estate group, Stiefelkönig (shoe distribution chain) and ATV Privat-TV Services (TV broadcaster).

⁽⁷⁾ BAWAG Versicherung AG and P.S.K. Versicherung AG have [...] % market share in the Austrian life insurance segment.

- (18) The Bank has also expanded internationally. The share of its foreign branch assets in total assets increased from about [...] % in 1995 to about [...] % in 2004 and slightly more than [...] % when subsidiaries are included. The bank has branches, subsidiaries or participations in the Czech Republic, Slovakia, Slovenia, Hungary, Malta and Libya. Nevertheless, the market shares held by BAWAG-PSK in the new Member States remain rather small.
- (19) On 30 December 2006, ÖGB sold BAWAG-PSK to a consortium led by the U.S. private equity group Cerberus Capital Management L.P. (hereafter the consortium) ⁽⁸⁾. The closing took place after the granting of the suspensive formal administrative authorisations on 15 May 2007. The purchase price amounts to EUR [...] billion. In addition the consortium agreed to implement a capital injection of EUR [...] million.

BAWAG-PSK's financial difficulties

- (20) The economic difficulties of BAWAG-PSK resulted mainly from two specific transactions, the 'Caribbean transactions' and 'Refco', conducted by some members of the previous management. These transactions were made possible because of insufficient risk controlling and the circumvention of existing control instances by the participants.

'Caribbean transactions'

- (21) The Caribbean transactions were primarily conducted between 1995 and 2001. From 1995 through 1998, initially three tranches totalling USD 550 million were initially transferred in the context of senior deposit agreements via BAWAG International Finance, Dublin to companies with their registered offices in the Cayman Islands. A further loan in the amount of USD 89 million was granted in the year 1998. In September 1998, the engagement was such that BAWAG-PSK via its subsidiary in Dublin had loaned a total of USD 639 million to four companies for the purpose of diverse investments. These amounts were used in order to speculate on the development of the currency exchange rate of the Yen against the US dollar. The equity capital tranche employed as coverage which had been raised from a third party and the funds from the senior deposit agreements were successfully exhausted as margins for the speculations because the anticipated development in the exchange rates did not take place. With regard to the financings made in 1998, a total loss in the amount of USD [...] million was incurred in this manner.

⁽⁸⁾ The consortium consists of Cerberus European Investments, the Austrian Post, Generali Holding Vienna AG, Wüstenrot Verwaltung- und Dienstleistungen GmbH, other financial institutions and private persons.

- (22) By the end of the year 1998, additional financings for a total of USD [...] million were made, and in 1999 loans were granted in an amount of approximately EUR [...] million which also turned out to be losses. Again, an anticipated development in the exchange rate of the Yen did not occur, options which over the course of time had substantially fallen in value were sold at great losses. The liabilities at the end of 1999 amounted to EUR [...] billion. The large expansion of the liabilities was to a large part also the result of massive shifts within the structure of exchange rates.
- (23) At the end of 1999/beginning of 2000, a further, final attempt was made to compensate for the losses under these transactions which had been incurred up to that time. An additional EUR [...] million together with the USD [...] million remaining from the previous options were invested in funds. Investments were again made in Yen swaps speculations which again resulted in a new total loss of the invested funds. At the end of 2000, the total liabilities resulting from these transactions amounted to EUR [...] billion. From 2001 onwards up to October 2005, the losses were often restructured and reduced by partial write-offs to approximately EUR [...] billion.
- 'Refco'*
- (24) The business relationship of BAWAG-PSK with Refco Group Ltd. LLC (hereafter Refco)⁽⁹⁾ began in the year 1998 and lasted until October 2005. The main aspects of this business relationship consisted of:
- (a) a participation of BAWAG-PSK in Refco in the period 1999 through 2004,
 - (b) financings in the context of a proceeds participation agreement,
 - (c) cooperation between BAWAG-PSK and Refco in several areas in daily banking and the securities business,
 - (d) granting loans from BAWAG-PSK to Refco, beginning with a loan in the year 1998 which was repaid in connection with the termination of the participation by BAWAG-PSK in Refco in the year 2004, and ending with a loan for EUR 350 million in October 2005. In the interim period, there were repeated grants of loans to Refco or Refco companies, including, among others, several very short-term loans allowing Refco to close its balance sheet (Year-End Transactions).
- (25) In April 2006, complaints were filed against BAWAG-PSK in the USA by Refco, the creditors committee (committee of the unsecured Refco creditors), the Department of Justice and the Securities and Exchange Commission. During the course of these proceedings, an amount of approximately USD [...] billion was frozen by court order. Finally, a settlement was negotiated with the authorities of the United States and with the Refco creditors.
- (26) The relationship with Refco resulted in total expenses of EUR [...] million for BAWAG-PSK as of the end of 2005:
- EUR 350 million requirement for write-down from granting of a loan,
 - EUR [...] million loss from gold swaps,
 - EUR [...] million loss from the sale of senior secured loans,
 - EUR [...] million write-downs of other engagements as well as,
 - corresponding legal costs.
- (27) This amount had to be increased by the provision in the amount of EUR [...] million which was required to be established with retroactive effect at the beginning of May 2006 for the settlement with the Refco creditors. This resulted in a shortfall from the Refco transactions in the amount of EUR 1,0045 billion.
- (28) On 5 June 2006 BAWAG-PSK signed an agreement with the Refco creditors. BAWAG-PSK had to pay USD [...] million to the creditors and shareholders of Refco. Furthermore BAWAG-PSK renounced to credit claims in the amount of USD [...] million. The parties also agreed that [...] % of the sales price exceeding EUR [...] billion had to be paid to the Refco creditors and shareholders. This amount is limited to USD [...] million.
- Effects of 'Caribbean transactions' and 'Refco'*
- (29) In the year 2004, receivables from the Caribbean situation in an amount of approximately EUR [...] million were written off.

⁽⁹⁾ Refco was at the time the largest derivatives broker in the USA.

- (30) In order to clean up the losses of the Caribbean involvement in 2005, liquid funds in the amount of EUR [...] million, write-offs in the course of the re-establishment in the amount of EUR 534 million and additional write-downs at the end of 2005 in an amount of EUR [...] million were made. [...]. The outstanding amount of EUR [...] million was fully written down.
- (31) In October 2005, BAWAG-PSK was hit by the insolvency of Refco and at the same time the losses of the 'Caribbean transactions' came to light.
- (32) These events lead to value adjustments requiring the provisioning of EUR [...] million in the [...] balance sheet⁽¹⁰⁾. BAWAG-PSK could only cover EUR [...] million through reserve accruals and the annual net income.
- (33) Alerted by the press, depositors massively withdrew the money on current and savings accounts in late April/early May 2006. Globally, between September 2005 and June 2006, the current accounts held by the bank were reduced by EUR [...] million, while the savings accounts were reduced by EUR [...] billion.
- (38) In addition Austria and the then direct and indirect owner of BAWAG-PSK (ÖGB, ÖGSP, ÖBG, ÖVV and AVB) concluded a comprehensive agreement, dated 6 June 2006. In Chapter 7 paragraph 3 of this agreement the use of the sales proceeds is determined. If the shares in BAWAG-PSK are sold, the sales proceeds are to be used in the following priority:
- (a) to satisfy any rights of third parties in order to secure the sale,
 - (b) to satisfy claims against the owners under the settlement in the Refco matter,
 - (c) to pay all remaining liabilities existing at the time of payment owed by AVB,
 - (d) to pay all liabilities still remaining at the time of payment owed by all (former) indirect owners of BAWAG-PSK,
 - (e) to reduce the guarantee of Austria by providing BAWAG-PSK equity.

III. THE MEASURE UNDER ASSESSMENT

- (34) The measure under assessment in the present decision is the State guarantee of EUR 900 million granted to BAWAG-PSK by a law, the BAWAG PSK Sicherungsgesetz, enacted on 8 May 2006 (hereafter the law). The law also included the obligation of the owners to sell BAWAG-PSK to a third party.
- (35) Without a guarantee, BAWAG-PSK would not have been able to comply with the solvency and equity capital provisions of the Austrian Banking Act (BWG) and therefore to close the 2005 annual accounts.
- (36) On 31 May 2006 the then direct and indirect owners of BAWAG-PSK (ÖGB, ÖGSP, ÖBG, ÖVV and AVB) signed a sales agreement which obliged them to sell their shares in BAWAG-PSK to an independent third party.
- (37) On 6 June 2006 Austria and BAWAG-PSK signed a guarantee agreement which specified the law. It included a description of the guarantee, the conditions, the fee to be paid, the responsibilities of BAWAG-PSK and the duration. The sales agreement was attached to the guarantee agreement.
- (39) The guarantee was abolished on 15 May 2007, the day of the closing of the sale of BAWAG-PSK to the consortium.
- The objectives of the guarantee*
- (40) According to Austria the guarantee aimed at:
- (a) stabilisation and strengthening the position of BAWAG-PSK,
 - (b) enabling the balance sheet to be prepared for 2005,
 - (c) enabling the beginning or the continuation of the sales measures,
 - (d) maintaining future-oriented functionality of BAWAG-PSK,
 - (e) strengthening the trust of the investors in the Austrian financial market.

⁽¹⁰⁾ [...]

The conditions attached to the guarantee

(41) Under the original conditions the guarantee would end 60 days after BAWAG-PSK was sold but, in principle, not later than 1 July 2007. However, an extension under certain conditions was possible.

(42) The fee to be paid by BAWAG-PSK was fixed at 0,2 % per year for the period ending 30 June 2007 and 1,2 % afterwards.

(43) The guarantee of Austria could only be drawn if cumulatively:

— BAWAG-PSK was not sold,

— BAWAG-PSK, its direct and indirect shareholders had been requested to pay and to disclose their financial situations and obliged to pay up to the limit of their capacities for payment before the guarantee could be called on,

— the economic threat to the bank (falling below the statutory requirements for equity capital) continued to exist,

— an insolvency of BAWAG-PSK (inability to meet ongoing payment obligations as a result of over-indebtedness) threatened or had already occurred.

(44) The drawdown of the guarantee was also permitted if insolvency threatened only because the guarantee would expire on 1 July 2007; the Federal Government could avoid the drawdown under the guarantee by extending it. However, this required an additional decision by the Federal Government.

(45) The guarantee only covered claims which were part of the calculation basis under paragraph 22(2) BWG and which were classified under the Regulation of the Financial Markets Supervisory Authority (FMA) ⁽¹¹⁾.

(46) The guarantee of Austria under the Guarantee Agreement, except for the claims which have already been made, would expire upon transfer of ownership (directly or indirectly) of the shares in BAWAG-PSK to a third party within the meaning of paragraph 3(1) BAWAG-PSK Act, but not later than on 1 July 2007. BAWAG-PSK was obliged to inform Austria about such a transfer of ownership without undue delay and had to present corresponding proof in writing as soon as BAWAG-PSK obtained corresponding knowledge. If required for the implementation of the sale of the shares to third parties within the meaning of paragraph 3(1) BAWAG-PSK Act, Austria would extend the guarantee for up to 60 days as of the transfer of ownership upon the reasoned request of BAWAG-PSK, but for no longer than 30 June 2007.

(47) Austria, acting through the Federal Minister of Finance (with the consent of the Federal Government) could extend the guarantee assumed under the Guarantee Agreement if the conditions set forth in paragraph 1(2) of the BAWAG-PSK Act would materialise. In particular, Austria could consider such an extension if the expiration of the guarantee would endanger the long-term recovery of BAWAG-PSK or its sale. BAWAG-PSK would submit a corresponding request to Austria as soon as it wished to have an extension, but not later than 31 March 2007. The request had to show and establish proof of the existence of the prerequisites for an extension. If a claim under the liability had been based on insolvency risks resulting from a future loss of the guarantee of Austria, Austria could avoid such a claim by extending the liability prior to its expiration. In this event, the consequences resulting from a claim under the guarantee would not occur.

(48) Another condition attached to the guarantee imposed that BAWAG-PSK and ÖGB had to sell their stakes in the Austrian National bank (OeNB). Taking into account the specificities of such operation, Austria stated that a market price for these stakes would be within a range of [...] to [...] times the nominal value of the shares. This estimate led to a 'market price' between EUR [...] and EUR [...] million. The final selling price to the Austrian authorities was EUR [...] million ([...] million for BAWAG-PSK). The sales proceeds corresponded to the book value of the participation.

(49) In addition to the State guarantee, two special-purpose vehicles (hereafter SPVs) had been created by private banks, on the one hand, and insurance companies, on the other hand, in order to strengthen the capital ratios of BAWAG-PSK. Under the deal agreed upon, the four

⁽¹¹⁾ In the Annex to the Audit Report, BGBl. II No 305/2005, in Part IV Z 14 point c and point d.

credit institutions Bank Austria-Creditanstalt, Erste Bank, Österreichische Volksbanken-AG and Raiffeisen Zentralbank Österreich AG and the four insurance corporations Allianz, Generali, Uniqa and Wiener Städtische founded two SPVs to provide support for BAWAG-PSK. While BA-CA, Erste Bank and RZB each contributed EUR [...] million and ÖVAG EUR [...] million in capital to one SPV, each of the four insurance companies contributed EUR [...] million to the second corporation. BAWAG-PSK held a controlling stake of [...] % in both SPVs. This arrangement enabled BAWAG-PSK to increase its eligible capital (tier 1 capital) by EUR 450 million. As a group, BAWAG-PSK thus again achieved an adequate capital ratio. To limit the risk exposure for the participating banks and insurance corporations as much as possible, the funds provided had to be invested exclusively in top-rated euro government bonds. Following the closing of the sale of BAWAG-PSK to the consortium on 15 May 2007, each shareholder was entitled to terminate the respective SPV. As a result of the subsequent liquidation, each shareholder received the corporate assets corresponding to that shareholder's portion of the capital contribution by way of a distribution in kind, i.e. by transferring the securities in which investments were made.

IV. GROUNDS FOR INITIATING THE PROCEDURE

(50) In its decision initiating the formal investigation procedure laid down in Article 88(2) of the EC Treaty, the Commission provisionally classified the measure under examination as State aid within the meaning of Article 87(1) and Article 61(1) of the EEA Agreement because they had been granted through State resources and because, by improving the recipient's financial position, they had likely affected the economic position of competitors from other Member States⁽¹²⁾ and consequently distorted or threatened to distort competition and affected trade between Member States.

(51) The Commission considered doubtful that BAWAG-PSK's insolvency/bankruptcy would have had systemic implications on the Austrian financial system and, more globally, on the whole Austrian economy. Therefore, Article 87(3)(b) would not have been applicable in this case. On the basis of its provisional assessment, the Commission concluded that the aid had to be assessed in the light of the Community guidelines on State aid for rescuing and restructuring firms in difficulty⁽¹³⁾ (hereafter the guidelines) and there were no other compatibility provisions of the Treaty or other Community guidelines that might render the aid compatible. It agreed with Austria that BAWAG-PSK was a firm in difficulty

within the meaning of Section 2.1 of the guidelines. However, it seriously doubted whether the aid measures were compatible with the common market.

Rescue aid

- (52) According to the guidelines, a rescue aid is by nature temporary and reversible assistance, and its primary objective is to make it possible to keep an ailing firm afloat for the time needed to work out a restructuring or liquidation plan. According to point 15 of the guidelines, such aid cannot be longer than six months.
- (53) While the guarantee was implemented on 6 June 2006, the Commission observed that it had effectively entered into force retrospectively as from 31 December 2005. Its duration thus already exceeded the six-month limit set by the guidelines.

- (54) The Commission therefore seriously doubted that the guarantee could be considered as compatible as a rescue aid.

Restoration of long-term viability

- (55) Paragraphs 34 to 37 of the guidelines state that, in the case of all individual aid measures, the Commission must endorse a restructuring plan by assessing whether the plan is capable of restoring the long-term viability of the firm within a reasonable timescale and on the basis of realistic assumptions.
- (56) The Commission took the view that the restructuring plan and the success of the reorganisation and the continuation of the bank depended decisively upon a high sales price. The sales scenarios, as presented, showed that the potential buyer would have had to make a minimum total investment of about EUR [...] billion in order to restore the long-term viability of the bank without further State intervention. Following the restructuring plan, a total investment below this threshold would not allow ÖGB and its affiliated companies the reimbursement of the loans, and the buyer the ability to conduct the necessary capital injections.

⁽¹²⁾ Judgment of the Court of Justice of 14 September 1994, Joined Cases C-278/92, C-279/92 and C-280/92 Spain vs Commission [1994] ECR I-4103.

⁽¹³⁾ OJ C 244, 1.10.2004, p. 2.

(57) The Commission did not exclude that BAWAG-PSK might have been confronted with additional difficulties due to the massive deposit withdrawals which occurred in spring 2006, and to the downgrading of its rating ⁽¹⁴⁾, which increased its re-financing costs. These aspects would only appear in the 2006 accounts. Moreover, promotion campaigns, based for instance on attractive remuneration offered on savings books, could impact the bank's profitability. Press articles indicated that BAWAG-PSK could still lose EUR 20 million in 2006.

(58) The Commission also drew attention to the fact that the guidelines require that the restructuring plan contains scenarios reflecting best case, worst case and intermediate assumptions. The Austrian authorities submitted only a base case scenario which corresponds to the disclosed data in the Information Memorandum provided to the interested parties. This business planning was established with a view to selling the Bank. The Commission has doubts that the underlying assumptions of the business planning meet the conditions of the base case scenario in a restructuring plan. The Commission expected the submission of a best and worst case scenario to prove the robustness and viability of the restructuring plan.

(59) The Commission also doubted whether some specific risks had been taken into account in the business plan, in particular:

(a) complaints in the USA: it could not be excluded that additionally threatened complaints (with in part substantial claims) would not be pursued by the plaintiffs with chances for success. In order to cover a certain risk (settlements in advance of a possible trial), a precaution was taken in the context of the provision for Refco in the annual financial statements for 2005. It also could not be excluded that individual harmed persons would not want to receive payments from the funds available as a result of the settlement with the creditors committee. In this event, such harmed persons could file a complaint against BAWAG-PSK, and the creditors committee would have to refund the proportionate share of the funds to BAWAG-PSK, but it could not be excluded that the payments which would actually have to be made would exceed the refunded amount;

(b) non-performance of the obligations of the shareholders in BAWAG-PSK towards the US creditors – in this case, BAWAG-PSK would have had a subordinate liability;

(c) the Court ruling on variable rate clauses (Zinsgleitklauseln) mentioned in the 2005 annual financial statements may also have adversely affected BAWAG-PSK.

The Commission was of the view that an evaluation of these risks would have to be done, in order to set up a comprehensive restructuring plan.

Avoidance of undue distortion of competition

(60) The exception laid down in Article 87(3)(c) of the EC Treaty is subject to the condition that the aid does not adversely affect trading conditions to an extent contrary to the common interest. Paragraphs 38 to 42 of the guidelines state that measures must be taken to mitigate as far as possible any adverse effects of the aid on competitors. These measures may comprise divestments of assets, reduction in capacity or market presence and reduction of entry barriers on the markets concerned. The measures must be in proportion to the distortive effects of the aid and, in particular, to the relative importance of the firm on its market or markets and must go beyond those that are necessary in any event for the restoration of viability. When assessing whether the compensatory measures are appropriate the Commission will take account of the market structure and the conditions of competition to ensure that any such measure does not lead to a deterioration in the structure of the market, for example by having the indirect effect of creating a tight oligopolistic situation.

(61) The compensatory measures initially proposed by Austria consisted in the sale of Bank Frick & Co., BAWAG-PSK's share in the Austrian central bank, the sale of the Polish Kinomax Sp.z o.o. and the Vienna real property. Since the description of the measures and the extent to which they affect BAWAG-PSK business was rather vague the Commission was not in a position to assess their overall effect. The Commission therefore needed detailed information on the effect of each measure on the assets and the future market positions of BAWAG-PSK, as well as an explicit quantification of those measures and their reduction effects (e.g. in terms of the balance sheet total).

(62) The Commission doubted that additional compensatory measures would reduce the total value of BAWAG-PSK and therefore reduce the possibility to obtain the sales price necessary to service the liabilities. Additional divestments of assets would rather reduce the necessary sales price by the amount achieved for the asset.

⁽¹⁴⁾ BAWAG-PSK's rating by Moody was reduced from A2 to A3 for all short and long-term deposits and debt, while the financial strength ratio became E+.

- (63) The Commission doubted that the severe liquidity crisis of BAWAG-PSK would have lead to a stronger oligopoly in the Austrian banking markets not least because the activities of the bank could have been taken over by a new player on these markets.
- (64) The Commission also drew attention to the fact that the 'bank run' in the period September 2005 until June 2006 may not be comparable to a mitigating measure, in the meaning of the guidelines.
- (65) To summarise, the Commission lacked important information needed for a proper and sufficiently thorough assessment of the effects of the proposed compensatory measures. On the basis of the available facts, therefore, it had doubts as to whether the planned reduction measures were sufficient to mitigate the distortive effects of the aid on competition.

Aid limited to the minimum

- (66) Under paragraphs 43 to 45 of the guidelines, aid must be limited to the strict minimum needed to enable restructuring to be undertaken and to avoid providing the company with surplus cash which could be used for aggressive, market-distorting activities or even for expanding. The guidelines also state that aid beneficiaries will be expected to make a significant contribution to the restructuring plan from the sale of assets that are not essential to the firm's survival, or from external financing at market conditions. For a large undertaking like BAWAG-PSK, the guidelines impose that, in principle, the contribution should reach 50 % of the restructuring costs.
- (67) Austria argued that the State measure was not an injection of liquidity but that it intervened solely by granting a temporary guarantee. The Commission was unable on the basis of the available information to determine precisely whether the aid was the absolute minimum necessary and expressed doubts as to whether Austria adequately valued the aid element in the State guarantee since, in practice, the guarantee has a similar effect to that of a capital injection.
- (68) Austria argued that the restructuring costs would amount to EUR [...] billion and would be borne 100 % by BAWAG-PSK itself, and the present and future owners. The Commission doubted and requested further information to assess if the contribution of BAWAG-PSK effectively reached 50 % of the restructuring costs.

V. COMMENTS FROM AUSTRIA

- (69) On the basis of the available restructuring plan, Austria submitted comments on the decision to initiate the

procedure and has provided new information, in particular on the following points:

Existence of a serious disturbance in the Austrian economy

- (70) Austria considered that the guarantee was notified as an aid to remedy a serious disturbance in the economy of a Member State. An insolvency of BAWAG-PSK would have had unforeseeable negative wide-ranging effects on the economy. The panic anticipated in the case of a potential insolvency of BAWAG-PSK could have quickly spread to other banks, especially because under the statutory model for securing deposits in Austria, other banks could also be called upon in the case of an insolvency of a credit institution. This would have massive consequences for the entire Austrian economy and above all also for the approximately 70 000 employees in the banking sector. The creation of two special-purpose vehicles (see below) would also demonstrate the clear support for BAWAG-PSK by the largest participants in the Austrian financial market, willing to secure the stability of the financial market in Austria.
- (71) In addition to the major direct impact on the owner ÖGB, the insolvency of BAWAG-PSK would also have affected Austria:
- as holder of the public task for capital market stability,
 - because BAWAG-PSK is the bank which effects all payments for Austria, e.g. tax payments, pension payments, unemployment payments, family assistance, etc., and
 - as previous owner and guarantor for certain liabilities of the Österreichische Postsparkasse.

- (72) Moreover, Austria would have had the obligation to take on the federal civil servants working at the Österreichische Postsparkasse and their rights in the public administration (total annual salaries of EUR [...] million). Because BAWAG-PSK also uses the Austrian post offices as branch offices, the reduced business volume of the financial services at the Austrian post offices would also necessitate closing additional post offices and would therefore create structural problems in rural areas.

- (73) Austria considered that it is hardly possible to provide a quantitative estimate of the potential consequences of an insolvency of the bank for the entire economy.

The aid element in the State guarantee

- (74) Austria explained that the State aid was necessary in order to end the 'run on the bank' which started in September 2005 and to assume the solvency situation of BAWAG-PSK and the BAWAG-PSK group. Without the public guarantee for BAWAG-PSK no private investor would have been willing to provide funds which would be considered as equity capital in this case.
- (75) According to Austria the aid element of the guarantee must be determined on the basis of the notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees⁽¹⁵⁾ (hereinafter the Notice). The Notice would grant the Commission a broad discretion with regard to determining the amount of the State aid. The only binding requirement would be that the State aid element should be assessed by reference to the details of the guarantee. In reference to paragraph 3.2 of the Notice, where it is mentioned that 'where, at the time the loan is granted, there is a strong probability that the borrower will default, e.g. because he is in a financial difficulty, the value of the guarantee may be as high as the amount effectively covered by the guarantee' Austria commented that BAWAG-PSK is not a borrower for whom the State is guaranteeing the credit in favour of the credit grantor, but the credit grantor itself. Therefore in order to evaluate the default risk of the claim, the financial situation of BAWAG-PSK would be irrelevant. Thus the Commission cannot draw a conclusion about the default risk of the claim from the financial situation of the BAWAG-PSK.
- (76) Austria explained that Moody's Financial Strength Rating (hereafter FSR)⁽¹⁶⁾ would be an appropriate indicator of the financial situation of BAWAG-PSK, because the FSR is only based on the financial ability of the company to perform without any external support. It contains an implicit statement regarding future development of the Bank and thereby provides a significant picture of the overall payment default risk. The FSR of BAWAG-PSK of 'E+' would correspond to a baseline risk assessment rated from B1 to B3. The latter ratings would indicate payment default risk within one year of 3,2 % to 10,5 %.
- (77) According to Austria, the fact that BAWAG-PSK was to be classified as a company in financial difficulties at the time the guarantee was granted does not mean that the

aid element amounts to the nominal value of the guarantee of EUR 900 million. Instead, the Commission should exercise its discretion taking into account the specifics and the details of the Guarantee Agreement, especially the identified risk factor. According to this, the financial difficulties of a borrower would only be an indication for the existence of State aid; however, they would not enable any statement about the amount of the aid element involved. The Commission has in several restructuring cases determined the aid element in a guarantee granted in favour of a company in difficulty to be lower than the nominal value. In the case of *Crédit Foncier de France* (17) (hereafter CFF), the Commission calculated the amount of aid based on the market price the Bank would hypothetically have had to pay for such a guarantee on the market. In the case *Bankgesellschaft Berlin* (18) (hereafter BGB), the Commission determined the amount of aid in a guarantee, the so-called risk shield, to be the 'economic value' rather than the nominal value. Also in the case of the restructuring aid granted by Germany to *Chemische Werke Piesteritz* (19) (hereafter CWP), the Commission estimated the amount of aid in a guarantee far below the nominal value of the loan, although CWP was in financial difficulty at the time.

- (78) Regarding the short-term character of the guarantee, Austria explained that according to paragraph 3(2) last sentence of the law, the Federal Minister of Finance can extend the guarantee. However, this would require the consent of the Federal Government, which would have to be unanimous. An extension is thus left to the political discretion of the Federal Government. BAWAG-PSK could at best exert pressure on Austria with regard to an extension, if the requirements for a drawdown prevail. This would require the threat of insolvency of BAWAG-PSK. In such a case BAWAG-PSK would first have to request its owners to pay and force them to disclose their financial circumstances. These would be high hurdles for a drawdown so that the guarantee cannot be assumed to be of 'de facto endless duration'. Also from an economic point of view the guarantee could not be regarded as unlimited. BAWAG-PSK would avail itself of a series of other options to cover its capital requirements upon expiration of the one-year guarantee term, even in case the Bank cannot be sold. Firstly, the Bank's profits would lead to an improved equity. Secondly, it could reduce its capital requirement by reducing its risk assets. Thirdly, there would always be the possibility to recourse to third party equity. During the immediate 'bank run' crisis in May 2006, these possibilities were not made use of due to time pressure. Had the Bank not been sold, it would have had the possibility to follow these approaches.

⁽¹⁵⁾ OJ C 71, 11.3.2000, p. 14.

⁽¹⁶⁾ The FSR represents Moody's opinion of the bank intrinsic safety and soundness and, as such, excludes certain external credit risks and credit support elements that are addressed by Moody's Bank Deposit Ratings.

⁽¹⁷⁾ Commission Decision of 23 June 1999, C(1999) 2035, *Crédit foncier de France* (OJ L 34, 3.2.2001, p. 36), paragraph 49.

⁽¹⁸⁾ Commission Decision of 18 February 2004, C(2004) 327, *Bankgesellschaft Berlin* (OJ L 116, 4.5.2005, p. 1), paragraph 27, fourth indent.

⁽¹⁹⁾ Commission Decision of 2 March 2005, C(2005) 427, *Chemische Werke Piesteritz* (OJ L 296, 12.11.2005, p. 19), paragraph 107.

- (79) According to Austria the guarantee could not be economically considered as having been durably paid into the assets of BAWAG-PSK (paid in). A new owner would have to replace this amount by its own contribution. There is no automatic mechanism concerning its extension. A purchaser would not simply inject equity in the same amount upon expiration of the guarantee but would have a number of options to handle possible financial straits of BAWAG-PSK. The probability of a drawdown would also be limited by the specific modalities of the guarantee. In particular, the fact that the guarantee is only a deficiency guarantee would minimise the risk. The liability of Austria is only conceivable in the event of threatened insolvency of BAWAG-PSK. Such insolvency would be very unlikely as a result of and after the granting of the guarantee.
- (80) Regarding the likelihood of the drawdown, Austria argued that at the time of granting the State guarantee, there was a high likelihood that BAWAG-PSK would be sold within a year for a total buyer investment of more than EUR 2,6 billion. A strong indicator of the effective value of BAWAG-PSK in April 2006, thus before the granting of the State guarantee, would be the sales price, i.e. the total investment stated by the bidders in their final offers of December 2006. Because of the basic soundness of BAWAG-PSK in spring 2006 and the limited character of the problems having led to its financial difficulties, the value of BAWAG-PSK at the moment of granting the guarantee was evaluated at about EUR 2,6 billion. This high value is also reflected in the tender, notably in the final offers made in December 2006 and finally in the total investment made by Cerberus. The bids were made as part of an international tender, an open and non-discriminating procedure that left bidders enough time to assess the potential sales object before making a bid. Regarding Austria's awareness of the effective value of BAWAG-PSK, given the activity of the FMA, Austria was, at the moment of granting the State guarantee, sufficiently informed about the economic situation of BAWAG-PSK. Up to the granting of the State guarantee, Austria saw BAWAG-PSK basically as an economically viable company, which temporarily needed support until its sale.
- (81) Regarding comparability with other financial instruments, Austria explained that the guarantee would not be similar to a capital injection, provided no drawdown takes place. The default likelihood at a FSR rating of E+ being as low as 5,49 % would mean that there would not be any payment to BAWAG-PSK with a probability of almost 95 %.
- (82) Austria concluded that for the purpose of calculating the aid element, the State guarantee would be indirectly comparable with a guarantee securing liabilities such as it was granted in the case of CFF. With a guarantee securing all liabilities of the Bank the rating of BAWAG-PSK would have considerably improved and clearly achieved an A rating. This improved rating would have had an immediate positive effect on the Bank's cost of funds. This in turn would have improved the performance of the Bank. Together with the rating, this would at least have clearly improved its chances of obtaining fresh capital. A guarantee securing liabilities could thus also indirectly ensure the necessary Tier 1 capital ratio. The calculation of the aid element should thus be based on the amount of economic benefit from the point of view of the recipient of the aid. Whether the government elects to recur to a State guarantee or to different means than a private investor must in no way influence the determining of the amount of the aid element involved.
- (83) As a result of the grounds resulting in a lower risk and the short duration due to the anticipated sale of the Bank in the near future, the probability of default of B2 would appear realistic and fair. The aid element in the guarantee would therefore amount to EUR 49 million⁽²⁰⁾. Considering the guarantee fee of 0,2 % for the first year, the net aid value would be EUR 47,2 million⁽²¹⁾. Austria explained that a plausibility check of this calculation would be that if Austria had granted the entire amount not as a guarantee but rather as a genuine loan, interest would have been owed for this in approximately the same range.
- (84) Austria added that the expected loss of the guarantee does not only result from the probability of default but also from the level of the losses in the default case. The above calculation is based on a default rate in the default case of 100 %. The consideration of an adequate default rate in the default case of 50 %⁽²²⁾ would lead to a significantly lower aid value of approximately EUR 25 million. In addition, a private investor would also consider capital costs of approximately EUR 10 million⁽²³⁾. Therefore in total the value of the guarantee would amount to approximately EUR 35 million minus the guarantee fee of EUR 1,8 million.

⁽²⁰⁾ EUR 900 million × 5,457 % = 49,1 million.

⁽²¹⁾ EUR 49,1 – (900 × 0,2 %) = 47,3 million.

⁽²²⁾ Compare Moody's Investor Service, 'Default and Recovery Rates of Corporate Bond Issuers: 2000'.

⁽²³⁾ Based on a standard solvency ratio of 8 %.

(85) Austria alternatively evaluated the value of the guarantee by determining the theoretical refinancing advantage for BAWAG-PSK resulting from the guarantee. Due to the guarantee the risk premium decreased by approximately 0,2 % ⁽²⁴⁾. In taking into account the EUR 24,7 billion liabilities affected by the rating the economic value of the guarantee would amount to EUR 49,4 million.

(86) Austria argued that the aid element would in any case be far from the nominal value of the guarantee. The capital market has hybrid equity instruments with clear features of liabilities, which the banking supervision regulations accept as Tier 1 capital. These instruments, due to banking supervision regulations, would have lengthy minimum terms, which as a rule are at least 10 years. Such instruments would be subject to a fixed rate of return, which is of course higher than the rate to be paid for a one-year instrument. Banks with a rating comparable to that of BAWAG-PSK issued hybrid

capital in spring/summer 2006 with a ten-year minimum term and bearing interest rates of approximately 5,1 %:

Table 3

Overview of hybrid capital emissions from banks with comparable ratings

Issuer	Date of issue	Rating at the time of issuing	Interest rate
Banca Italease	6 June 2006	Moody's: Baa2 Fitch: BBB+ Composite: BBB	5,159 %
AIB UK	6 June 2006	Moody's: A2 S&P: A- Fitch: A+ Composite: A	5,142 %

Restoration of the firm's long-term viability

- (87) Austria completed the restructuring plan by submitting an updated base case scenario and a sensitivity analysis including an optimistic and pessimistic scenario.
- (88) The base case scenario is the following (Table 4):

Table 4

(in million EUR)

Statement of income pursuant to Handelsgesetzbuch						
	2006	2007	2008	2009	2010	2011
Net interest yield	[...]	[...]	[...]	[...]	[...]	[...]
Income from investment	[...]	[...]	[...]	[...]	[...]	[...]
Income from commissions	[...]	[...]	[...]	[...]	[...]	[...]
Financial result	[...]	[...]	[...]	[...]	[...]	[...]
Other operational income	[...]	[...]	[...]	[...]	[...]	[...]
Operational income	[...]	[...]	[...]	[...]	[...]	[...]
Personnel expenses	[...]	[...]	[...]	[...]	[...]	[...]
Material expenses	[...]	[...]	[...]	[...]	[...]	[...]
Write-offs	[...]	[...]	[...]	[...]	[...]	[...]
Other operational expenses	[...]	[...]	[...]	[...]	[...]	[...]
Operating result	[...]	[...]	[...]	[...]	[...]	[...]
Risk management and evaluation of financial assets	[...]	[...]	[...]	[...]	[...]	[...]
Result of common business activities	[...]	[...]	[...]	[...]	[...]	[...]
Taxes	[...]	[...]	[...]	[...]	[...]	[...]
Annual net profit	[...]	[...]	[...]	[...]	[...]	[...]

⁽²⁴⁾ Based on the change of Swap spreads before and after the implementation of the guarantee.

- (89) Austria explained that in the context of the current market conditions the planning for 2007 had to be updated. In total the annual net profit of EUR [...] million decreased to about [...] % of the initial expected value. Austria also explained the underlying assumptions and key financial ratios of the base case scenario. The plan for the years 2008 and following was not changed.
- (90) The main reasons for the changes in the base case scenario are:
- the shift in the slope of the interest curve in the long term,
 - the slower return than expected of the lost savings deposits and clients accounts during the 'bank run',
 - the bottleneck in liquidity and necessity to sell asset positions in order to increase liquidity,
 - the continuation of negative communication about BAWAG-PSK in the media,
 - the stagnation of commercial credit business due to the lack of liquidity.
- (91) Austria expressed that the main assumptions which vary in the optimistic and pessimistic scenario are the net interest yield, income from investment and provisions, the growth of the commercial business, the personal and material expenses and the risk margin. In the pessimistic scenario the result of common business activities will increase from EUR [...] million in 2007 to EUR [...] million in 2011, being about [...] % below the result of common business activities in the base case. In the optimistic scenario the result of common business activities will achieve EUR [...] million in 2011 based on EUR [...] million in 2007. Thus in the optimistic case in 2011 the result of common business activities will be about [...] % above the result in the base case.
- (92) Austria explained that the restructuring plan would be appropriate to restore the long-term viability of BAWAG-PSK. The successfully completed tender procedure on 14 December 2006 would be the best market test in order to prove the plausibility of the restructuring plan. In offering a total investment of EUR [...] billion for BAWAG-PSK Cerberus clearly confirmed that it believes in the long-term profitability of the Bank.
- (93) According to Austria, the specific risks in particular related to the 'Refco' complaints in the USA, the non-performance of the obligations of BAWAG-PSK shareholders towards US creditors and the court ruling on variable rate clauses (Zinsgleitklausel) have been sufficiently taken into account in the restructuring plan:
- the risk resulting from complaints of 'Refco' complaints in the USA, would be marginal would therefore not have to be considered individually in the accounts and are covered by the general provisions,
 - the risk of non-performance of the obligations of the shareholders of BAWAG-PSK towards the US creditors would no longer exist. On 18 December 2006 BAWAG-PSK and its direct and indirect owners signed an agreement which clarifies the obligation of each party. According to the agreement BAWAG-PSK and its owners mutually renounce to their right of recourse,
 - the risk resulting from the Court ruling on variable rate clauses (Zinsgleitklauseln) has been globally provisioned in the BAWAG-PSK accounts.
- (94) Austria recalls that two special-purpose vehicles have been created by private banks on the one hand and insurance companies on the other hand, in order to strengthen the capital ratios of BAWAG-PSK.
- Avoidance of undue distortion of competition*
- (95) Austria explained that the creation of SPVs to strengthen the equity base of BAWAG-PSK in conjunction with various Austrian banks, on the one hand, and Austrian insurers, on the other hand, would show that competitors have in turn taken the financial difficulties of BAWAG-PSK as an occasion to implement short-term support measures in order to safeguard the reputation of Austria as a financial centre. It would be illogical for competitors of BAWAG-PSK to temporarily provide financial support for the Bank through the SPVs, if they expect a noticeable distortion of competition from the State guarantee. Indeed, the approach of banks and insurers rather shows that the continued existence of BAWAG-PSK, which the State guarantee secures, has never been and will not be regarded as a distortion of competition. Furthermore, no third party submitted comments regarding the Commission's opening decision. The State guarantee thus would not lead to a distortion of competition in the view of other competitors.

(96) Austria is of the view that an important compensation to be considered is the sale of BAWAG-PSK by its former owner ÖGB. The sale would underline the joint wish for a durable restructuring of the Bank. According to Austria, the sale of companies in difficulty constituted an essential step toward their durable restructuring. It could generally be assumed that a company will more likely be durably viable under the control of a new, private owner and that this ensures that the company will not have to rely on State aid again ⁽²⁵⁾. Although there is no privatisation in this present case, the transfer of BAWAG-PSK as a whole under the control of an experienced private investor is a step toward overcoming the difficulties of the past and

enabling positive economic development. Furthermore, the sale of the Bank would enable an extremely high contribution within the meaning of the guidelines, in order to finance the restructuring of BAWAG-PSK at de facto 100 %. The sale of BAWAG-PSK would secure the viability of the Bank, since the BAWAG-PSK owners are able to service their liabilities toward the Bank by recurring to the sales price. This allows them to restore the assured value of the present receivables of BAWAG-PSK. The sale thus would prove to be a central element of the restructuring of BAWAG-PSK. The associated costs are eventually financed entirely from the sale of the Bank rather than from the State guarantee.

(97) Austria informed the Commission that the following divestures had already taken place:

Table 5

Overview of already made divestures

Measure	Business field	Implementation date
Sale Bank Frick & Co.	Retail banking	19 July 2006
Sale Oesterreichische Nationalbank	Central bank	12 July 2006
Sale Kinomax Sp.z o.o.	Real property services	14 December 2006
Sale Vienna real property, 1010 Vienna	Real property services	8 May 2006
Sale HOBEX AG	Direct debiting authorisation	29 March 2007
Sale Funk International Austria GmbH	Insurance broker	1 January 2007
Sale Cosmos Elektrohandels GmbH & Co KG ODER COSMOS Geschäftsführungs- und Beteiligungs GmbH	Retail trade	14 September 2006
Voestalpine AG	Steel	9 November 2006 until 13 April 2007

(98) Austria also transmitted additional commitments from BAWAG-PSK vis-à-vis the Commission:

(a) BAWAG-PSK AG will sell the following assets to a third party that is independent of the BAWAG-PSK group:

⁽²⁵⁾ Commission Decision of 12 October 1994 concerning the grant of State aid by France to the Bull group in the form of a non-notified capital increase (OJ L 386, 31.12.2004, p. 1), paragraph 10; Commission Decision of 26 July 1995 giving conditional approval to the aid granted by France to the bank Crédit Lyonnais (OJ L 308, 21.12.1995, p. 92), paragraph 116; Commission Decision of 21 June 1995 on the aid granted by the Italian State to the company Enichem Agricoltura SpA (OJ L 28, 6.2.1996, p. 18), paragraph 26; Commission Decision of 3 July 2001 on State aid which Spain has implemented and is planning to implement for the restructuring of Babcock Wilcox España SA (OJ L 67, 9.3.2002, p. 50), paragraph 40; Commission Decision of 16 September 1998 authorising subject to conditions, aid granted by Italy to Società Italiana per Condotte d'Acqua SpA (OJ L 129, 22.5.1999, p. 30), paragraph 35; Commission Decision of 16 September 1998 authorising, subject to condition, aid granted by Italy to Italstrade SpA (OJ L 109, 27.4.1999, p. 1), paragraph 2.

(i) sale, no later than [...], of an interest of more than 50 % in P.S.K. Versicherung AG and BAWAG-Versicherung Aktiengesellschaft as reflected in the balance sheet, and the granting of a call option for the acquirer for the rest of the shares;

(ii) completion, no later than [...], of the sale of real estate valued at approximately EUR [...] million in total as reflected in the balance sheet;

(iii) sale, no later than [...], of the [...] % interest in [...] as reflected in the balance sheet;

(iv) sale, no later than [...], of the 42,56 % interest in ATV Privat-TV Services AG as reflected in the balance sheet;

(v) sale, no later than [...], of [...] as reflected in the balance sheet.

(b) The BAWAG-PSK Group will reduce the volume of its loans to the Federal Republic of Austria) from EUR [...] billion to EUR [...] billion as of the end of the [...] business year, and it will maintain this amount for a period of [...] (i.e. until [...]) as an upper limit. Excluded there from are existing obligations of companies of the BAWAG-PSK group relating to future instalments under previously transacted procurement processes.

(c) BAWAG-PSK AG will refrain, for a period of [...] beginning on [...], from participating in tender procedures in which the Republic of Austria seeks to commission Primary Dealers to issue bonds for the Federal Republic (state bonds).

(d) BAWAG-PSK AG will close [...] branches in Vienna by [...].

(e) No aid other than that referred to in Article 87(2) of the EC Treaty, or aid granted under research projects jointly financed by the European Union, or aid to general training within approved schemes, or aid for energy savings within approved schemes, shall be granted to BAWAG-PSK until 31 December 2010.

(99) Austria provided details on the value and the reduction effect of each compensatory measure. Notably, the compensation measures (including the 'bank run' — see below) would lead to a reduction of the group balance sheet total of [...] % versus 2005.

(100) Austria explained why further reductions would jeopardise the Bank's viability. Austria recalled that the Austrian banking market is already highly concentrated. It is dominated by the four banking groups, the Bank Austria Creditanstalt Group, the group consisting of ERSTE Bank and the savings banks, the group of cooperative banks (Raiffeisen) and BAWAG-PSK, which would dominate the private and the corporate customer business with a total market share between 90 % and 100 %. Other credit institutions would only play a subordinate role. Thus, the banking sector in Austria would already be very close to an oligopolistic structure. In the case of an insolvency of BAWAG-PSK, there would be a high probability that its market shares would have moved to the three large main competitors in the banking market. This would then strengthen the already existing strong market positions. The markets for banking services would be subject to special legal and institutional parameters. Due to the existence of considerable market entry barriers both in the private client area as well as in the commercial client field, market shares of 30 % could already establish dominant market positions ⁽²⁶⁾. In the case of insolvency, therefore, there is a risk that three banking groups would create or strengthen a dominant market position in Austria which considerably increases the risk of market dominance by an oligopoly. Thus a situation would exist in which State aid must be approved in order to avoid the creation or strengthening of a market dominant oligopoly.

(101) According to Austria BAWAG-PSK would have moderate market shares in private and corporate business areas, which have again clearly fallen even in 2006. This would become evident from the market shares ⁽²⁷⁾ for the year 2006 (Table 6):

Table 6

Products per business segment		Market share 2005	Market share 2006
Deposit business with domestic clients	Private customers	12 %	[...]
	Corporate customers	8 %	[...]
Credit business with domestic clients	Private customers	6 %	[...]
	Corporate customers	8 %	[...]

The corresponding market shares of the three largest banking groups in all those areas would exceed 20 %.

⁽²⁶⁾ Decision Bank Austria/Creditanstalt, IV/M.873, dated 10 February 1997, paragraph 46 et seq.

⁽²⁷⁾ Regarding market shares, Austria refers to the merger control decision of the Commission of 28 February, Cerberus/BAWAG-PSK, COMP/M. 4565.

(102) Austria argued that, with regard to compensations to offset possible distortion effects already incurred market share losses as a result of the 'bank run', the regulation on the use of payment under the Guarantee Agreement and the possible effect of compensation measures on the banking sector in Austria would be of major importance.

(103) Concerning the loss of market share as a result of the 'bank run', Austria is of the view that the reduction of sight deposits and savings deposits of around EUR [...] billion from the end of September 2005 until June 2006 already considerably weakened the market position of the Bank. As the result of 'mass hysteria' triggered by media reports, BAWAG-PSK had no chance to hinder the collapse of its savings deposit business. The State aid had not, therefore, in any manner distorted the competition in favour of BAWAG-PSK. In itself, this 'bank run', leading to reduced market shares for BAWAG-PSK, is regarded by Austria as a mitigating measure.

(104) According to Austria the success of the reorganisation and the continuation of the Bank depended decisively upon a high sales price. Any reduction of the sales price below EUR [...] billion as the result of compensation measures would have had a direct influence on the Bank. A reduction of BAWAG-PSK's value caused by any compensatory measures would have reduced the possibility to obtain the sales price necessary to service the liabilities.

(105) Austria claimed that compensatory measures would also harm the market structure in the banking sector in Austria. For example, the sale of the bank branches of BAWAG-PSK in Austria to one of the three other large Austrian credit institutions would cause considerable concerns under merger control. A sale of the branches to a foreign institution would create the specific danger that bank customers of BAWAG-PSK, especially the private clients and mid-size corporate clients would change to other Austrian banks and, thus, further narrow the presently highly concentrated Austrian banking market. According to the guidelines, the Commission must in this case construe compensatory measures in such a way to avoid this situation.

Aid limited to the minimum

(106) Austria stressed that the aid in question was limited to the minimum since it was not a permanent liquid capital injection, but a granting of a temporary conditional guarantee which was necessary to maintain a satisfactory level of solvency.

(107) Austria explained that since the signing of the purchase agreement on 30 December 2006, it is clear that BAWAG-PSK can completely fulfil the own contributions requirement indicated in the restructuring plan. The financing of the restructuring would be 100 % secured by BAWAG-PSK itself. Also the capital injection of EUR 600 million must be regarded as own contribution.

VI. COMMENTS FROM OTHER INTERESTED PARTIES

(108) In response to the publication of the decision to initiate proceedings in the *Official Journal of the European Union*, the Commission did not receive comments from other interested parties.

VII. ASSESSMENT OF THE AID MEASURE

BAWAG-PSK is a firm in difficulty at the time of the granting of the guarantee

(109) According to paragraph 9 of the guidelines a firm is in difficulty where it is unable, whether through its own resources or with the funds it is able to obtain from its owner/shareholders or creditors, to stem losses which, without outside intervention by the public authorities, will almost certainly condemn it to going out of business in the short or medium term.

(110) In its observations following the opening decision, Austria has not contested the opinion of the Commission that BAWAG-PSK has been a firm in difficulty according to the guidelines.

(111) The Commission is indeed of the view that, without the guarantee, the bank would not have been able to cope with a continued considerable withdrawal of deposits. Notably, without the guarantee, as indicated in the 2005 annual accounts, the auditors would not have been in a position to certify the annual accounts of BAWAG-PSK as a going concern.

(112) Consequently, without the guarantee, BAWAG-PSK would have become insolvent/bankrupt within weeks.

(113) Besides, the Commission considers that ÖGB could not have dealt alone with the difficulties of its subsidiary. The fact that BAWAG-PSK already had to depreciate claims of EUR [...] million against its owner confirms this assessment.

(114) As a conclusion of the above, BAWAG-PSK is a firm in difficulty at the time of the granting of the guarantee according to paragraph 9 of the guidelines. In addition the difficulties of BAWAG-PSK are clearly imputable to the Bank and are too serious to be dealt with by the group to which it belongs. Indeed, neither ÖGB nor AVB would have been able to restructure BAWAG-PSK without public support. BAWAG-PSK is therefore eligible to rescue and/or restructuring aid according to paragraph 13 of the guidelines.

(115) The investments by the private banks and insurance companies in the two above mentioned SPV, with a view to strengthening the capital ratios of BAWAG-PSK, are not made on a similar basis as the State guarantee. The risk exposure for the private investors is considerably lower than the State's exposure in providing the guarantee. Austria confirmed that without the public guarantee for BAWAG-PSK no private investor would have been willing to provide funds which would be considered as equity capital. Therefore, the occurrence of private investments does not contradict the fact that BAWAG-PSK was in difficulty.

Existence of a State aid

(116) In order to ascertain whether a measure constitutes aid within the meaning of Article 87(1), the Commission has to assess whether this measure:

— is granted by the State or through State resources,

— provides an economic advantage,

— is capable of distorting competition by selectively favouring certain undertakings or the production of certain goods,

— affects trade between Member States.

Use of State resources

(117) In order to be qualified as State aid, financial resources must be imputable to the State and granted directly or indirectly by means of state resources.

(118) The two above mentioned cumulative conditions are met in the present case as the measure is a State guarantee implemented on the basis of a law.

Selectivity

(119) Article 87(1) prohibits aid which 'favours certain undertakings or the production of certain goods', that is to say, selective aid.

(120) The guarantee only benefits to BAWAG-PSK and is therefore selective.

Effect on trade between Member States and distortion of competition

(121) Article 87(1) prohibits aid which affects trade between Member States and which distorts or threatens to distort competition.

(122) In its assessment of those two conditions, the Commission is required not to establish that the aid has a real effect on trade between Member States and that competition is actually being distorted, but only to examine whether that aid is liable to affect such trade and distort competition⁽²⁸⁾. When aid granted by a Member State strengthens the position of an undertaking compared with other undertakings competing in intra-Community trade, the latter must be regarded as affected by that aid.

(123) The Commission recalls that the banking sector has been open to competition for many years. Progressive liberalisation has enhanced the competition that may already have resulted from the free movement of capital provided for in the EC Treaty.

(124) Moreover, BAWAG-PSK has branches or subsidiaries in several Member States, notably the Czech Republic, Slovakia, Slovenia, Hungary and Malta. Conversely, banks from different Member States operate in Austria, either directly through branches or representative offices, or indirectly by controlling Austrian-based banks and financial institutions.

(125) To conclude, there is trade between Member States in the banking sector. The guarantee strengthens the position of BAWAG-PSK in relation to banks undertakings competing in intra-Community trade. Therefore, the guarantee is liable to affect such trade and distort competition.

⁽²⁸⁾ See for instance Judgment of the Court in Case C-372/97, Italy vs Commission [2004] ECR I-3679, paragraph 44.

Existence of an economic advantage

(126) To constitute a State aid, a measure must confer on recipients an advantage.

(127) According to paragraph 4.2 of the notice on State guarantees, a State guarantee is not an aid because there is no economic advantage when the four following conditions are met:

(a) the borrower is not in financial difficulty;

(b) the borrower would in principle be able to obtain a loan on market conditions from the financial markets without any intervention by the State;

(c) the guarantee is linked to a specific financial transaction, is for a fixed maximum amount, does not cover more than 80 % of the outstanding loan or other financial obligation and is not open-ended;

(d) the market price for the guarantee is paid.

(128) The Commission considers that the condition under (a) is not met in the present case as BAWAG-PSK is in financial difficulty at the time of the granting of the guarantee.

(129) Moreover, no market operator would have granted the guarantee for a fee of 0,2 % paid by BAWAG-PSK. Austria confirmed that a 'market fee' would have been between EUR 32 and EUR 49 million per year. Therefore, the condition under (d) is not fulfilled.

(130) As a consequence, the State guarantee confers an advantage on BAWAG-PSK.

Conclusion

(131) The Commission concludes that the State guarantee granted to BAWAG-PSK is a State aid.

Illegality of the State aid

(132) The aid is illegal as it was granted by Austria on 8 May 2006, with retroactive effect from 31 December 2005, before the Commission decided on its compatibility.

Aid amount

(133) To determine the aid element in the guarantee, the Commission has to examine whether and under which terms and conditions, in similar circumstances, an investor/guarantor operating in normal conditions of a market economy would have granted the guarantee.

(134) The attitude of a hypothetical investor is that of a prudent investor ⁽²⁹⁾, whose goal of profit maximisation is tempered with caution about the level of risk acceptable for a given rate of return. ⁽³⁰⁾

(135) '... The comparison between the conduct of public and private investors must be made by reference to the attitude which a private investor would have had at the time of the transaction in question, having regard to the available information and foreseeable developments at that time' ⁽³¹⁾. It follows that events subsequent to the decision to invest are irrelevant ⁽³²⁾ in the assessment of the aid amount in the guarantee.

The specific nature of the guarantee granted by Austria

(136) According to paragraph 3.1 of the Notice on guarantees, the aid element should be assessed by reference to the specific details of the guarantee.

(137) In the present case, the guarantee provided collateral for specific non-performing loans of BAWAG-PSK in the amount of EUR 900 million. The consequence was that the assets remained valuable and no value adjustments, generating additional losses of EUR 900 million in the 2005 accounts, had to be carried out. In this regard, the effect and character of the guarantee is similar to that of a capital injection ⁽³³⁾. BAWAG-PSK's core capital ratio could thus be prevented from decreasing below the minimum statutory requirements.

⁽²⁹⁾ Case C-482/99 France vs Commission [2002] ECR I-4397, paragraph 71.

⁽³⁰⁾ Joined Cases T-228/99 and T-233/99, paragraph 255.

⁽³¹⁾ Joined Cases T-228/99 and T-233/99, paragraph 246.

⁽³²⁾ Cases T-16/96, Cityflyer Express vs Commission, paragraph 76.

⁽³³⁾ Compare State aid Case C 44/03 which Austria is planning to implement for Bank Burgenland (OJ L 263, 8.10.2005, p. 8), paragraph 36.

(138) The Commission concludes that the present guarantee is not comparable to guarantees securing all liabilities of a bank ⁽³⁴⁾. Such guarantees provide direct claims to the creditors of the bank. In the case of insolvency, the guarantor has to meet the liabilities, which cannot be satisfied from its assets. Economically, this type of guarantee reduces the cost of refinancing of the bank via debt/bonds. The Commission recognises that in guaranteeing the recoverability of about 1,6 % of the total assets of the Bank in the deficiency case, the guarantee has also a limited indirect effect on the security of the liabilities but the overall impact of the guarantee can not be considered as comparable. Thus from the guarantee granted by France in the CFF case ⁽³⁵⁾, covering all CFF's liabilities, no relevant conclusion can be drawn for the present case.

(139) Subject to the conditions set by the guarantee agreement, in the case of the continuation of the existence of an economic threat to the Bank, the guarantee can be drawn. BAWAG-PSK confirmed in its 2006 annual accounts that 'the guarantee can be drawn if the insolvency threatens only because the guarantee expiration date of 1 July 2007 approaches. Austria can avoid the drawdown in prolonging its duration.' The guarantor could then lose up to EUR 900 million without keeping any stake in the Bank, which would allow him to participate in a potential later upward trend.

The sale scenarios

(140) A key condition for the granting of the State guarantee is the declaration of commitment by the shareholders to the federal government to transfer all shareholdings in BAWAG-PSK or AVB to third parties.

(141) This selling commitment sets the main scene for evaluating the aid amount in the State guarantee.

(142) The Commission considers that the claim of the guarantee, and as a consequence the aid element in the

guarantee, depends directly on the total investment of the potential purchaser, consisting of the sales price and on the willingness of the buyer to invest in additional equity. In this context, it is recalled that Austria writes in the restructuring plan that 'the success of the reorganisation and the continuation of the Bank depend decisively upon a high sales price. Any reduction of the sales price below EUR [...] billion as the result of compensation measures has a direct influence on the Bank.'

(143) Any reduction of the total investment of the purchaser below EUR [...] billion would, in the absence of additional equity support or short-term reductions of the risk assets, increase the risk that the guarantee has to be triggered.

(144) The Commission has assessed the guarantee and the attached conditions and concluded that at the time the guarantee was granted, a private investor/guarantor would have considered three major scenarios in its risk assessment:

(a) First, the sale of the Bank before June 2007 at a total investment (sale price + capital investment) of the purchaser above EUR [...] billion with the consequence that the guarantee can be abolished on the day of the closing without being drawn.

(b) Second, the sale of the Bank before June 2007 at a total investment below EUR [...] billion with the consequence that the guarantee is partially or fully drawn.

(c) Third, the sale of BAWAG-PSK is not achieved before June 2007. In this scenario, the guarantee, even if progressively reduced (by the annual positive results of the Bank, the decreased risk assets, etc.), has to be prolonged for an unknown period. Otherwise, the guarantee is very likely to be drawn which would imply heavy losses by the State.

⁽³⁴⁾ Compare State guarantees for the German public banks (Gewährträgerhaftung) or the Austrian Sparkassen (Ausfallhaftung), which have been abolished by Commission decisions.

⁽³⁵⁾ Commission Decision of 26 June 1999, C(1999) 2035, Crédit Foncier de France (OJ L 34, 3.2.2001, p. 36), paragraph 49. The decision on the CFF case was adopted before the Notice on guarantee entered into force.

(145) While Austria asserted that BAWAG-PSK could generate the necessary capital reserves, through capital injection by new investors⁽³⁶⁾ or through successive annual positive results, or could establish another, less ambitious, restructuring plan, requiring less core capital, thus giving more room to the bank to reduce further the guarantee amount, the Commission is of the opinion that such hypotheses, which cannot be excluded, would however not have been taken into account by a private investor/guarantor at the time the guarantee was granted because the alternative scenarios would have been too hypothetical. In particular, in the case of a less ambitious restructuring plan than on which they are based, a private guarantor would have considered that Austria would prolong the guarantee in July 2007 if need be. The Commission does not share Austria's view that the prolongation of the guarantee in July 2007 would not be certain if the Bank were not sold before. Actually, absent the prolongation, the guarantee would be drawn close to its full amount because BAWAG-PSK had not yet rebuilt the necessary financial resources to respect the prudential ratios. Therefore insolvency would threaten again.

(146) The Commission assessed the other options asserted by Austria to cover the Bank's capital requirements upon expiration of the one-year guarantee term in case the Bank cannot be sold. The Commission is of the opinion that such hypotheses, which can not be excluded, would however not have been taken into account by a private investor/guarantor at the time the guarantee was granted because the alternative scenarios on which they are based are hypothetical or have a negative impact on the Bank's business plan. In the short and medium term, the planned profits would not allow the Bank to improve its equity considerably⁽³⁷⁾. The reduction of its capital requirement by reducing its risk assets would have a negative impact on the Bank's future profitability⁽³⁸⁾ and the recurrence to third party equity can be regarded as similar to a partial sale of the bank⁽³⁹⁾.

(147) Ideally, the Commission would grant a probability to each of the three scenarios at the time the guarantee

was granted. The aid amount could then be deducted. However, on the basis of the available information the Commission was unable to determine precisely the probability of each scenario. At the time the guarantee was granted the future development of BAWAG-PSK was not clearly predictable.

(148) Austria claimed that, in view of the activity of the FMA, it was, at the moment of granting the State guarantee, sufficiently informed about the economic situation of BAWAG-PSK, and that it made estimates on the three above mentioned scenarios. Its conclusion would have been that only the first scenario was relevant. However, no supporting evidence was provided by Austria on this issue. No precise data was transmitted to the Commission for instance on the valuation of the Bank, which would have been made before the granting of the guarantee by Austria.

(149) The value of BAWAG-PSK in April/May 2006, when the Law was adopted, can only be estimated through rough calculations:

(a) using available documents, a private guarantor may have used a methodology based on discounted cash flows (DCF). However, such an approach, based on prospective figures over a reasonable timeframe, leads to figures where the terminal value represents a very high percentage of the total value. As an example, using the net profit indicated in the business plan submitted by Austria in September 2006 (as proxy for the information available to the private guarantor in April/May 2006), the DCF results in a value of EUR [...] billion⁽⁴⁰⁾, with the terminal value equal to 85 % of the latter amount. Therefore, the Commission considers that the method does not allow for sound conclusions in the present case as it is too dependent on the terminal value;

(b) using the purchase price of BAWAG-PSK, of EUR [...] billion (which was not known in spring 2006), and the equity value as of 31 December 2005, of EUR 1,7 billion, a goodwill, representing the value of customers and branch network, can be computed. Its value is around EUR [...] billion. Then, the sum of equity as of 31 December 2005 and of the goodwill, minus the capital injection to be made by the new owners of EUR [...] million and the Refco payment of EUR [...] million linked to the purchase price, lead to an estimated value of BAWAG-PSK in spring 2006 of around EUR [...] billion⁽⁴¹⁾.

⁽³⁶⁾ Capital injections by minority shareholders are not likely in the context of the selling commitment imposed on ÖGB by Austria.

⁽³⁷⁾ For instance, the forecasted annual results of BAWAG-PSK, sum up to EUR [...] million over an initial three-year period (2006-08), which could constitute a reasonable time frame for the analysis of a private guarantor. However, the Commission remarks that these forecasted results do not include the real market fee for the guarantee, while the payment of this market fee would reduce considerably the ability of the Bank to reach the forecasted results over the restructuring period.

⁽³⁸⁾ Decreasing the total assets would considerably decrease the income basis of BAWAG-PSK. In general, in the short term assets can only be sold below market value.

⁽³⁹⁾ Capital injections by minority shareholders are not likely in the context of the selling commitment imposed on ÖGB by Austria.

⁽⁴⁰⁾ Based on a 10 % discount rate.

⁽⁴¹⁾ EUR 1,7 + EUR [...] – EUR [...] – EUR [...] billion = EUR [...] billion.

(150) The Commission has also to consider that a severe time constraint existed in April/May 2006, when the private guarantor would have had to intervene. Only a few weeks were available to assess in depth the Bank's financial situation and make an offer. A run on the bank had started, creating a major danger for the liquidity of the bank. A continuation of the development for even a short period of time would have had lethal consequences for BAWAG-PSK. The time constraint, associated to the significant amount of the required guarantee, made any intervention by a private operator extremely difficult, if not at all possible.

(151) In addition, various uncertainties remained, for instance in respect to the Refco case in the USA. Moreover, a private guarantor would have had to assess whether its intervention would have been sufficient, compared to a State guarantee, to stop the run on the bank.

(152) In view of the above described circumstances, the Commission concludes that:

(a) the timing of the sale and the level of the purchase price of BAWAG-PSK were unknown variables, bearing very important risks for a market oriented guarantor;

(b) the time constraints were increasing to a very significant extent the difficulty for an operator to intervene;

(c) the intrinsic value of the Bank was not so low as to fully exclude that a market guarantor would have granted the EUR 900 million, however conditioned on the high fees.

(153) In fact, the Commission is of the view that a private investor would have been more prone to intervene with a capital injection, which would have given a stake in the Bank, and decision-making power to ensure success of the restructuring. However, according to both the Commission and Austria, no private investor

would have been willing to provide funds which would be considered as equity capital ⁽⁴²⁾.

(154) Finally, a guarantee would not have appeared technically as a fully appropriate instrument for a market investor also because the very high fee requested would have hampered any prospect of profitability and therefore counteracted the effect of the guarantee. Actually, the granting of the guarantee reflects the interests of Austria, which were mainly to re-establish the trust of the investors and partners in the stability of the Bank and the financial sector in Austria. In addition, Austria has vast capacity and favourable conditions as a guarantor (triple A rating).

(155) As a consequence, the Commission considers that the aid amount involved in the guarantee could only be estimated within a range. The upper value of this range is EUR 898 million, i.e. the nominal value of the guarantee minus the guarantee fee of 0,2 % paid by the Bank. Fixing the lower value is the most complex; the Commission estimates that this lower value could be at least two-third of the nominal value of the guarantee.

Analyses put forward by Austria

(156) The Commission assessed the analyses conducted by Austria regarding the aid element in the guarantee and considers that these analyses are inadequate for different reasons.

(157) First, the Commission is of the view that BAWAG-PSK's FSR and the corresponding payment default risk does not reflect the risk of the guarantor in the three relevant scenarios. Essentially, Moody's FSR rating remains unchanged for each of the scenarios, because from an investor point of view the guarantee of EUR 900 million is similar to an already effected capital increase of the same amount. In fact, in the first scenario, the capital increase is fully executed by the future owner of the bank; in the second scenario, the capital increase is partially executed by the future owner of the bank and the remaining amount drawn on the guarantee; finally in the third scenario, the guarantee remains in place (even with a decreasing value) as long as no appropriate capital injection has been made or as long as the bank has not generated the necessary financial means. By contrast, the risk of the guarantor depends strongly on the probability of each scenario, because the duration of the guarantee and the triggered amount of the guarantee vary considerably as a consequence of the timing and price of the sale of BAWAG-PSK.

⁽⁴²⁾ The setting up by private operators of the two above mentioned SPVs does not invalidate this view as the SPVs would not have been created in the absence of the guarantee.

(158) In its assessment of the risk of the drawdown of the guarantee by means of the FSR, Austria only considered the scenario under which the sale of BAWAG-PSK will be completed at the latest on 1 July 2007 at a total investment by the purchaser of at least EUR [...] billion. Consequently the guarantee would only be triggered in the case of deficiency of BAWAG-PSK before the sale. The Commission is of the view that, at the time the guarantee was granted, the future development of BAWAG-PSK was not predictable and all major scenarios described above had to be evaluated in the risk assessment.

(159) As a conclusion, the Commission considers that the FSR and the corresponding payment default risk are inappropriate indicators for the evaluation of the aid amount in the guarantee.

(160) The Commission considers that the plausibility check brought forward by Austria is irrelevant. A loan is not qualified as equity capital under BWG and would not prevent the capital ratio from falling below the statutory requirements.

(161) The Commission is of the opinion that Austria's alternative evaluation of the guarantee by determining the theoretical refinancing advantage for BAWAG-PSK resulting from the guarantee is also inappropriate. The indicated Asset Swap Spread is based on ratings which take into account the potential support provided by the state and thus do not reflect the intrinsic stability of BAWAG-PSK.

(162) The Commission also notes that regarding the BGB case, the Commission conducted an in-depth analysis on the probability that the guaranteed risks would materialise. Because some risks were very unlikely, the reasonable scenario (economic value) assessed by the Commission lead to an aid element in the guarantee below the nominal value of the latter. Regarding the CWP case, the guarantees referred to by Austria enabled CWP to obtain loans on better financial terms than those normally available on the financial markets. This is not the situation encountered in the present case. However, after having analysed the specific situation of CWP, the Commission concluded that the market price of the guarantees at stake would have been the reference interest rate plus 400 basis points. In the BAWAG-PSK case, the Commission has also conducted a specific in-depth economic analysis of the occurrence of each aspect of the three possible scenarios in order to figure out the aid value in the State guarantee.

(163) Therefore, the Commission does not consider that its methodological approach in the present case departs from the previous cases quoted by Austria.

Compatibility of the illegal aid

Article 87(3)(b)

(164) The Commission is of the view that Austria has not demonstrated that BAWAG-PSK's insolvency/bankruptcy would have had systemic implications on the Austrian financial system and, more globally, on the whole Austrian economy.

(165) Austria acknowledged that it is hardly possible to provide a quantitative estimate of the potential consequences of an insolvency of the bank for the entire economy.

(166) In this context, the Commission is of the view that at least 95 % of the depositors' accounts would have had a deposit of less than EUR 20 000 and would therefore have been guaranteed against BAWAG-PSK insolvency by means of the legally minimum guaranteed deposit fund. The fact that other banks could have been called upon for securing deposits in the case of insolvency is not enough in itself to justify that all operators in the Austrian banking sector would have been endangered.

(167) In June 2006, the OeNB stated that, despite the problems encountered by BAWAG-PSK and Hypo Alpe-Adria Bank, the Austrian banking system had developed well over 2005. The results of stress tests demonstrated the high resistance to shocks of the banking system. In general, the Austrian banking system was considered in good shape.

(168) Furthermore, the Commission practice in applying Article 87(3)(b) has been very restrictive. The last time this article was applied was in the 80s, when the Greek economy faced serious economic imbalances following accession and when the Community itself had authorised specific exceptional measures aiming at correcting the situation ⁽⁴³⁾.

⁽⁴³⁾ Commission Decision 88/167/EEC of 7 October 1987 concerning Law 1386/1983 by which the Greek Government grants aid to Greek industry (OJ L 76, 22.3.1988, p. 18).

(169) The Commission considers in principle that an aid benefiting one operator only could not address the kind of situation targeted by the second part of Article 87(3)(b). In the *Crédit Lyonnais* case⁽⁴⁴⁾, where the bail out measures were worth around EUR 20 billion⁽⁴⁵⁾, the Commission did not consider that the aid was 'designed to remedy serious economic disruption, since its purpose is to resolve the problems of a single recipient, *Crédit Lyonnais*, as opposed to the acute problems facing all operators in the industry.' Therefore, the aid was not authorised pursuant to Article 87(3)(b) but on the basis of Article 87(3)(c) as a compatible restructuring aid.

(170) As a consequence, the Commission considers that Article 87(3)(b) is not applicable in the present case.

Rescue aid

(171) According to paragraph 15 of the guidelines, a rescue aid is by nature temporary and reversible assistance, whose primary objective is to make it possible to keep an ailing firm afloat for the time needed to work out a restructuring or liquidation plan. According to the same point 15 of the guidelines, such aid cannot be longer than six months.

(172) The guarantee was implemented on 6 June 2006 (and, in principle, until the sale of BAWAG-PSK or July 2007). Its duration exceeds the six-month limit set by the guidelines. In addition, it indeed entered effectively and retroactively into force as from 31 December 2005.

(173) In conclusion, the guarantee cannot be considered as compatible as a rescue aid according to the guidelines.

Restructuring aid

(174) The guidelines set out criteria all of which must be met if restructuring aid is to be authorised:

(a) a plan, that has to be fully implemented, will restore long-term viability;

(b) the aid has to be limited to the minimum;

(c) undue distortions of competition have to be avoided.

Restoration of long-term viability (paragraphs 34 to 37 of the guidelines)

(175) The transfer of BAWAG-PSK as a whole under the control of an private investor is regarded by the Commission as a central element for solving the difficulties of the past and enabling positive economic development for the Bank. Indeed, as recalled by Austria, it could be assumed that a company will more likely be durably viable under the control of a new, private owner and that this ensures that the company will not have to rely on State aid again. The sale proves to be a key aspect of the restructuring of BAWAG-PSK.

(176) An updated restructuring plan prepared by BAWAG-PSK was communicated to the Commission in January 2007. The Commission considers the changes (versus the initial restructuring plan) in the hypotheses and assumptions as relevant in order to accurately reflect the most recent economic conditions and assessed the key financial ratios as realistic and achievable.

(177) Overall, the Commission regards the market assumptions on which the plan is based as appropriate and is of the opinion that the expected return on capital is enough to enable BAWAG-PSK to compete in the Austrian and international financial market on its own merit.

(178) Furthermore, as shown by the detailed description of the circumstances that led the bank to difficulties, the strengthening of risk control is essential to avoid repeating the severe mistakes of the past. This issue has been comprehensively addressed by the bank's new management in 2006; three main measures have been implemented:

(a) the introduction of a corporate governance code and new rules of procedure for the managing directors,

(b) the changes in risk controlling and installation of a chief risk officer, and

(c) the improvement of the processes for instructing payment of invoices⁽⁴⁶⁾ from the point of view of risk.

⁽⁴⁴⁾ Commission Decision of 20 May 1998 concerning aid granted by France to the *Crédit Lyonnais* group (OJ L 221, 8.8.1998, p. 28).

⁽⁴⁵⁾ In 1995, the Commission authorised a first package of aid measures, estimated at a maximum amount of EUR 8 billion (Commission Decision of 26 July 1995 giving conditional approval to the aid granted by France to the bank *Crédit Lyonnais* (OJ L 308, 21.12.1995, p. 92)). In 1996, EUR 0,6 billion of aids were authorised (Commission Decision State aid N 692/96 — C 47/96 (OJ C 390, 24.12.1996, p. 7)). Finally, in 1998, additional aids were authorised; amounting to a value between EUR 8 and 15 billion (Commission Decision of 20 May 1998 concerning aid granted by France to the *Crédit Lyonnais* group (OJ L 221, 8.8.1998, p. 28)).

⁽⁴⁶⁾ Litigation resulting in the payment of invoices.

(179) The Commission regards these measures as appropriate.

(180) Regarding the specific risk mentioned in the opening decision, relating to Refco, the risk of non-performance of the obligations of the shareholders in BAWAG-PSK towards the US creditors, and variable rate clauses (Zinsgleitklauseln), the Commission is of the view that they are sufficiently reflected in the restructuring plan.

(181) The 2006 result (Bilanzgewinn) is already slightly positive at EUR 0,2 million, while the annual surplus (Jahresüberschuss) is EUR [...] million. The latter is better than forecasted in the restructuring plan. These figures show that the Bank is developing in line with the restructuring plan.

(182) The Commission also assessed the sensitivity analyses, including an optimistic and a pessimistic scenario, submitted by Austria and is of the view that they adequately reflect a potential worst and best case scenario. On the one hand, the pessimistic scenario which leads to a result of common business activities of EUR [...] million in 2011 is sufficiently robust to ensure the long-term viability of the bank. On the other hand, in the optimistic scenario, which leads to a result of common business activities of EUR [...] million in 2011 BAWAG-PSK expected profitability remains in the range of its competitors.

(183) Austria has confirmed that the Consortium will implement the updated restructuring plan prepared by BAWAG-PSK and has therefore fully endorsed it.

(184) If the aid element in the guarantee depends directly on the total investment of the potential purchaser, the Commission considers that the success of the restructuring of the Bank also depends decisively upon the capital increase to be achieved by the new owners⁽⁴⁷⁾. The total investments made by the Consortium, while ensuring that the guarantee will not be drawn, also allow for a proper base funding of the restructuring plan.

(185) The Commission acknowledges that the implementation of major restructuring measures of the restructuring plan, which includes a detailed plan of the Bank's future development until 2011, is planned in the period [...].

(186) To conclude, the improvement in viability of BAWAG-PSK derives mainly from internal measures and the

doubts expressed in the opening decision have all received a satisfactory answer. The Commission is convinced that the restructuring plan will allow BAWAG-PSK to restore its long-term viability.

(187) The Commission needs to be kept informed of progress in implementing the plan in full in line with paragraph 44 and 50 of the guidelines.

Aid limited to the minimum (paragraphs 43 to 45 of the guidelines)

(188) For a large undertaking like BAWAG-PSK, paragraph 44 of the guidelines imposes that, in principle, the contribution of the aid beneficiary should reach 50 % of the restructuring costs.

(189) The restructuring costs amount at least to EUR [...] billion. The State guarantee does not directly finance these costs, which are 100 % borne by the Bank and its owners. The divestments also contribute to the financing of the restructuring programme.

(190) Even if the Commission were to consider the full guarantee as an aid helping to finance the restructuring costs, the contribution of BAWAG-PSK, free of aid, would be higher than 50 %.

(191) The Commission is of the view that the form and amount of the aid, a State guarantee on non-performing loans allowing for the respect of prudential rules, avoid providing BAWAG-PSK with surplus cash, which could be used for aggressive, market-distorting activities not linked to the restructuring process. Moreover, the upper value of the aid range EUR 898 million, represents only 1,6 % of the balance sheet total of the bank. This amount is very low in comparison with other cases in which the Commission adopted a positive decision⁽⁴⁸⁾.

(192) It should also be mentioned that no rescue aid has been granted in the present case.

(193) In view of the above, the Commission considers that the aid is limited to the strict minimum needed to restore the long-term viability of the Bank and notes that the contribution by the beneficiary respects the provisions of the guidelines.

⁽⁴⁸⁾ See for instance Commission Decision 1999/508/EC of 14 October 1998 conditionally approving aid granted by France to Société Marseillaise de Crédit (Case C 42/96 ex NN 194/95), (OJ L 198, 30.7.1999, p. 1; Commission Decision 2005/345/EC of 18 February 2004 on restructuring aid implemented by Germany for Bankgesellschaft Berlin AG (Case C 28/2002 ex NN 5/2002) (OJ L 116, 4.5.2005, p. 1); Commission Decision 2001/89/EC of 23 June 1999 conditionally approving aid granted by France to Crédit Foncier de France (Case C 30/96 ex NN 44/96) (OJ L 34, 3.2.2001, p. 36).

⁽⁴⁷⁾ The sale price has an effect on the necessary capital increase.

Avoidance of undue distortions of competition (paragraphs 38 to 42 of the guidelines)

- (194) The guidelines state that measures must be taken to mitigate as far as possible any adverse effects of the aid on competitors. These measures may comprise divestments of assets, reduction in capacity or market presence and reduction of entry barriers on the markets concerned. The measures must be in proportion to the distortive effects of the aid and, in particular, to the relative importance of the firm on its market or markets.
- (195) The undertakings of BAWAG-PSK submitted to the Commission by Austria are part of the restructuring process. In particular the divestments implemented or to be implemented indeed help to finance the restructuring costs and address competition concerns identified by the Commission.
- (196) First, several measures affect the Bank's core business.
- (197) In the credit business with public authorities, where BAWAG-PSK has held its [...] market share (25 % in 2005), a reduction by [...] (EUR [...] billion) of the volume of its loans to the Republic of Austria will be achieved in [...], leading to a maximum value of EUR [...] billion. Furthermore, the ceiling of EUR [...] billion will be maintained until [...] ⁽⁴⁹⁾.
- (198) In addition, the Bank, which is one important 'Primary Dealer' of State bonds issued by the Republic of Austria, has undertaken not to participate in tender proceedings from [...], for a period of [...] ending on [...]. This measure prevents BAWAG-PSK from participating to bids amounting to an estimated total of around EUR [...] billion.
- (199) The reputational effect of these measures towards public clients could suffer and slow down future expansion of the Bank in this business. The measure as regards State bonds also limits the range of investment products that the Bank can propose in particular to private customers.
- (200) The two above mentioned measures take place in markets where the Bank will have significant market position after restructuring and go beyond anything necessary to restore viability.
- (201) Furthermore, the Commission recalls that, as a condition for the granting of the State guarantee, BAWAG-PSK had to sell its shares in the OeNB. This participation was of real significance for the Bank. Moreover, shares in Bank Frick & Co. AG and Hobex AG were sold respectively in July 2006 and March 2007. By selling its participation in HOBEX, which is active in debiting authorisation, BAWAG-PSK withdrew from an important sector, where the most important banks are present in Austria.
- (202) As far as a closure of three branch offices in Vienna is concerned, Austria indicated a preference not to consider such a closure as effective compensatory measure. The Commission does indeed not consider that the closure of three branch offices in Vienna could be regarded as effective compensatory measure in the present case because it has not been demonstrated that the relevant branches are not loss-making activities which would have to be closed at any rate to restore viability.
- (203) In the insurance sector, close to its core business, BAWAG-PSK will quickly sell an interest of more than 50 % in P.S.K. Versicherung AG and BAWAG-Versicherung AG, and also grant a call option for the buyer for the rest of the shares. The relating discounted value amounts to more than EUR [...] billion. In addition, the insurance broker Funk International Austria GmbH was sold in January 2007.
- (204) The Commission notes that the bank has also undertaken to sell the essential part of its non-core business activities (notably Cosmos Elektrohändels GmbH & Co KG, COSMOS Geschäftsführungs- und Beteiligungs GmbH, [...], and the 42 % share in ATV Privat-TV Services AG). This will lead BAWAG-PSK to refocus on its core business.
- (205) To allow for a smooth divestment process and the completion of the ongoing restructuring process, the Commission can accept that ⁽⁵⁰⁾ the sale of [...] only takes place before [...], and the sale of the 42 % share in ATV Privat-TV Services AG only takes places before [...].

⁽⁴⁹⁾ Excluded there from are existing obligations of companies of the BAWAG-PSK group relating to future instalments under previously transacted procurement processes.

⁽⁵⁰⁾ Because of unforeseeable circumstances, to be justified by Austria, the Commission may decide to prolong the deadlines set for the implementation of the compensatory measures. In exceptional cases, to be duly motivated by Austria, the Commission may also decide that some obligations and conditions are amended or replaced by equivalent measures.

- (206) In 2006, various real properties were sold for an amount of EUR [...] million. Other properties will be sold, before the end of 2008 valued at approximately EUR [...] million in total as reflected in the balance sheet. Industrial participation in Voestalpine and [...] will also be sold in 2007.
- (207) Besides, the sight deposits held at BAWAG-PSK for domestic and foreign clients were reduced from the end of September 2005 until June 2006 by more than EUR 560 million (market share sank by [...] percentage points to [...] %). The savings deposits during the same period were reduced by EUR 4 billion (market share sank by almost [...] percentage points to [...] %). While this 'bank run' may not be fully comparable to a compensation measure in the meaning of the guidelines, it considerably reduced the most important refinancing source for BAWAG-PSK. In this context, the Commission considers that the 'bank run' has to be regarded as a mitigating element in the global assessment of the occurrence of undue distortion of competition.
- (208) Globally, the total balance sheet of the Bank as of 31 December 2006 has diminished by 11 % in comparison to 31 December 2005 (minus EUR 6 billion)⁽⁵¹⁾ and by 9,3 % in comparison to 30 June 2006 (minus EUR 5 billion), after the granting of the State guarantee. Further measures, in particular the reduction by EUR [...] billion of the volume of the loans to Austria will have an impact as of [...] and should roughly represent an additional decrease of [...] % (versus 2005 basis).
- (209) Finally, the guidelines note that the provision of rescue or restructuring aid may be regarded as legitimate, exceptionally, by the desirability of maintaining a competitive market structure when the demise of firms could lead to a monopoly or to a tight oligopolistic situation. In this context, the Commission remarks that the disappearance of BAWAG-PSK in case of bankruptcy would probably have mostly benefited to the major competitors of the Bank, on a market which is already rather concentrated⁽⁵²⁾, with BA-CA, die Erste Bank/Sparkassengruppe and the Raiffeisengruppe, having together more than 80 % market share in retail banking in Austria.
- (210) As a conclusion, the Commission considers that the compensatory measures are in proportion to the distortive effects of the aid granted to BAWAG-PSK, taking into account the range identified for the element of aid involved in the guarantee.
- (211) The Commission does not regard the selling commitment imposed on ÖGB by Austria as compensation for the distortion of competition because BAWAG-PSK is the direct beneficiary of the aid and not ÖGB. The sale of the Bank to the Consortium is however regarded as a positive element for the restructuring process (see above).
- (212) Besides, the fact that BAWAG-PSK competitors created the SPVs to strengthen the equity base of the Bank does not mean that the distortions of competition induced by the State guarantee are not noticeable. Actually, it is of relevance to note that the SPVs were only created after the guarantee was granted to BAWAG-PSK.
- (213) The Commission will need to be kept informed of the progress in the implementation of the above mentioned compensatory measures.
- (214) Because of unforeseeable circumstances, to be justified by Austria, the Commission may decide to prolong the deadlines set for the implementation of the compensatory measures. In exceptional cases, upon request to be duly motivated by Austria, the Commission may also decide that some obligations and conditions are amended and/or replaced by equivalent measures.
- Specific conditions attached to the authorisation of aid (paragraph 46 of the guidelines)**
- (215) In addition to the measures adopted to avoid undue distortions of competition, the Commission may impose any conditions and obligations it considers necessary in order to ensure that the aid does not distort competition to an extent contrary to the common interest.

⁽⁵¹⁾ For the group as a whole, the balance sheet has diminished by 12,2 % over the same period.

⁽⁵²⁾ See also Commission Decision of 11 June 2002 relating to a proceeding under Article 81 of the EC Treaty (Case COMP/36 571/D-1: Austrian banks — Lombard Club), (OJ L 56, 24.2.2004, p.1), paragraph 8.

(216) In this respect, the Commission wishes to ensure that no additional aid is provided that would alter the proportionality of the aid measure as a whole which are the subject of the present Decision. Thus although the Commission has taken note of the commitments made by BAWAG-PSK and transmitted by Austria as regards the granting of other State aid until the end of 2010, the Commission also notes that in any event, there is a general prohibition on restructuring aid to the BAWAG-PSK group for 10 years hereafter in accordance with Section 3.3 of the guidelines. The Commission considers this commitment appropriate and necessary within the meaning of paragraph 46(c) of the guidelines. The Commission also notes that the general prohibition does not apply to aid covered by Article 87(2) of the Treaty. Moreover, because the proportionality assessment of the aid contained in the State guarantee would not be affected to a material extent, and in view of the objectives pursued, the Commission can accept that aid granted under research projects jointly financed by the European Union, and aid to general training⁽⁵³⁾ within approved schemes, and aid for energy saving⁽⁵⁴⁾ within approved schemes could be granted to BAWAG-PSK.

(217) The Commission also considers that the commitments mentioned under point (197) and (198) above also meet the requirements of paragraph 46(a) and (b) of the guidelines.

VIII. CONCLUSION

(218) The Commission finds that Austria has unlawfully implemented the aid in the form of the State guarantee of an amount of EUR 900 million in breach of Article 88(3) of the Treaty. However, the aid can be declared compatible with the common market provided that the conditions imposed are fulfilled,

HAS ADOPTED THIS DECISION:

Article 1

The State guarantee of EUR 900 million implemented by Austria for the restructuring of BAWAG-PSK constitutes State

aid within the meaning of Article 87(1) EC that is compatible with the common market subject to the obligations and conditions set out in Article 2.

Article 2

1. The plan for restructuring BAWAG-PSK, as communicated to the Commission by Austria on 3 January 2007, shall be fully implemented.

2. The following assets shall be sold to a third party that is independent of the BAWAG-PSK group:

(a) sale of an interest of more than 50 % in P.S.K. Versicherung AG and BAWAG-Versicherung Aktiengesellschaft, reflected in the balance sheet no later than [...], and the granting of a call option for the acquirer for the rest of the shares;

(b) completion of the sale of real estate, valued at EUR [...] million in total as reflected in the balance sheet, no later than [...];

(c) sale of the [...] % interest in [...], reflected in the balance sheet no later than [...];

(d) sale of the 42,56 % interest in ATV Privat-TV Services AG, reflected in the balance sheet no later than [...];

(e) sale of [...], reflected in the balance sheet no later than [...].

3. The volume of BAWAG-PSK loans to Austria shall be reduced to a maximum of EUR [...] billion as of the end of the 2007 business year. This amount shall not be exceeded for a period ending on [...]. Excluded there from are existing obligations of companies of the BAWAG-PSK group relating to future instalments under previously transacted procurement processes.

4. BAWAG-PSK shall not be selected for the issuing of State bonds for a period of [...] beginning on [...].

⁽⁵³⁾ According to Commission Regulation (EC) No 68/2001 of 12 January 2001 on the application of Articles 87 and 88 of the EC Treaty to training aid (OJ L 10, 13.1.2001, p. 20), Regulation as last amended by Decision 2007/72/EC (OJ L 32, 6.2.2007, p. 180)), 'general training' means training involving tuition which is not applicable only or principally to the employee's present or future position in the assisted firm, but which provides qualifications that are largely transferable to other firms or fields of work and thereby substantially improve the employability of the employee.

⁽⁵⁴⁾ According to the Community guidelines on State aid for environmental protection (OJ C 37, 3.2.2001, p. 3), energy-saving measures should be understood as meaning among other things action which enables companies to reduce the amount of energy used in their production cycle.

5. No aid other than that referred to in Article 87(2) of the EC Treaty, or aid granted under research projects jointly financed by the European Union, or aid to general training within approved schemes, or aid for energy savings within approved schemes, shall be granted to BAWAG-PSK until 31 December 2010. No restructuring aid can be approved within the next 10 years.

6. For the purpose of monitoring compliance with the conditions set out in paragraphs 1 to 5, Austria shall provide regular reports on the state of progress of BAWAG-PSK's restructuring until 2010. The first annual report shall be submitted in January 2009. The following reports will cover the years 2009 and 2010 and should respectively be submitted by end of March 2010 and 2011.

Article 3

Austria shall inform the Commission, within two months of notification of this Decision, of the measures taken to comply with it.

Article 4

This Decision is addressed to the Republic of Austria.

Done at Brussels, 27 June 2007.

For the Commission

Neelie KROES

Member of the Commission