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[1] Text with EEA relevance

EN

Acts whose titles are printed in light type are those relating to day-to-day management of agricultural matters, and are generally valid for a limited period.

The titles of all other acts are printed in bold type and preceded by an asterisk.

II *Acts adopted under the EC Treaty/Euratom Treaty whose publication is not obligatory*

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Note to the reader (see page 3 of the cover)

EN

[1] Text with EEA relevance

I

(Acts adopted under the EC Treaty/Euratom Treaty whose publication is obligatory)

REGULATIONS

COMMISSION REGULATION (EC) No 871/2008

of 5 September 2008

establishing the standard import values for determining the entry price of certain fruit and vegetables

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation (EC) No 1234/2007 of 22 October 2007 establishing a common organisation of agricultural markets and on specific provisions for certain agricultural products (Single CMO Regulation) [1],

Having regard to Commission Regulation (EC) No 1580/2007 of 21 December 2007 laying down implementing rules for Council Regulations (EC) No 2200/96, (EC) No 2201/96 and (EC) No 1182/2007 in the fruit and vegetable sector [2], and in particular Article 138(1) thereof,

Whereas:

Regulation (EC) No 1580/2007 lays down, pursuant to the outcome of the Uruguay Round multilateral trade negotiations, the criteria whereby the Commission fixes the standard values for imports from third countries, in respect of the products and periods stipulated in Annex XV, Part A thereto,

HAS ADOPTED THIS REGULATION:

Article 1

The standard import values referred to in Article 138 of Regulation (EC) No 1580/2007 are fixed in the Annex hereto.

Article 2

This Regulation shall enter into force on 6 September 2008.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 5 September 2008.

For the Commission

Jean-Luc DEMARTY

Director-General for Agriculture and Rural Development

[1] OJ L 299, 16.11.2007, p. 1.
[2] OJ L 350, 31.12.2007, p. 1.

ANNEX

Standard import values for determining the entry price of certain fruit and vegetables

(EUR/100 kg)

CN code	Third country code (1)	Standard import value
0702 00 00	MK	20,7
	ZZ	20,7
0707 00 05	JO	156,8
	MK	64,6
	TR	106,2
	ZZ	109,2
0709 90 70	TR	95,3
	ZZ	95,3
0805 50 10	AR	73,6
	UY	72,4
	ZA	81,4
	ZZ	75,8
0806 10 10	IL	235,4
	TR	102,2
	US	188,9
	XS	61,0
	ZZ	146,9
0808 10 80	BR	55,2
	CL	104,1
	CN	111,7
	NZ	104,5
	US	94,6
	ZA	81,6
	ZZ	92,0
0808 20 50	CN	60,9
	TR	139,7
	ZA	93,1
	ZZ	97,9
0809 30	TR	138,3
	US	166,3
	XS	61,2
	ZZ	121,9
0809 40 05	IL	137,8
	MK	53,9
	TR	69,0
	XS	53,4
	ZZ	78,5

(1) Nomenclature of countries laid down by Commission Regulation (EC) No 1833/2006 (OJ L 354, 14.12.2006, p. 19). Code 'ZZ' stands for 'of other origin'.

COMMISSION REGULATION (EC) No 872/2008

of 3 September 2008

establishing a prohibition of fishing for anglerfish in VIIIc, IX and X; EC waters of CECAF 34.1.1 by vessels flying the flag of Portugal

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation (EC) No 2371/2002 of 20 December 2002 on the conservation and sustainable exploitation of fisheries resources under the Common Fisheries Policy [1], and in particular Article 26(4) thereof,

Having regard to Council Regulation (EEC) No 2847/93 of 12 October 1993 establishing a control system applicable to common fisheries policy [2], and in particular Article 21(3) thereof,

Whereas:

(1) Council Regulation (EC) No 40/2008 of 16 January 2008 fixing for 2008 the fishing opportunities and associated conditions for certain fish stocks and groups of fish stocks applicable in Community waters and for Community vessels, in waters where catch limitations are required [3], lays down quotas for 2008.

(2) According to the information received by the Commission, catches of the stock referred to in the Annex to this Regulation by vessels flying the flag of or registered in the Member State referred to therein have exhausted the quota allocated for 2008.

(3) It is therefore necessary to prohibit fishing for that stock and its retention on board, transhipment and landing,

HAS ADOPTED THIS REGULATION:

Article 1

Quota exhaustion

The fishing quota allocated to the Member State referred to in the Annex to this Regulation for the stock referred to therein for 2008 shall be deemed to be exhausted from the date set out in that Annex.

Article 2

Prohibitions

Fishing for the stock referred to in the Annex to this Regulation by vessels flying the flag of or registered in the Member State referred to therein shall be prohibited from the date set out in that Annex. It shall be prohibited to retain on board, tranship or land such stock caught by those vessels after that date.

Article 3

Entry into force

This Regulation shall enter into force on the day following that of its publication in the *Official Journal of the European Union*.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 3 September 2008.

For the Commission
Fokion FOTIADIS
Director-General for Maritime Affairs and Fisheries

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[1] OJ L 358, 31.12.2002, p. 59.
[2] OJ L 261, 20.10.1993, p. 1.
[3] OJ L 19, 23.1.2008, p. 1.

ANNEX

No	33/T&Q
Member State	Portugal
Stock	ANF/8C3411
Species	Anglerfish *(Lophiidae)*
Area	VIIIc, IX and X; EC waters of CECAF 34.1.1
Date	4.8.2008

COMMISSION REGULATION (EC) No 873/2008

of 5 September 2008

amending Regulation (EC) No 712/2007 opening standing invitations to tender for the resale on the Community market of cereals held by the intervention agencies of the Member States

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation (EC) No 1234/2007 of 22 October 2007 establishing a common organisation of agricultural markets and on specific provisions for certain agricultural products [1], and in particular Article 43 in conjunction with Article 4 thereof,

Whereas:

(1) Commission Regulation (EC) No 712/2007 [2] opens standing invitations to tender for the resale on the Community market of cereals held by the intervention agencies of the Member States. The closing date for the submission of tenders for the last partial invitation to tender is 10 September 2008.

(2) In order to guarantee livestock farmers and the livestock-feed industry supplies at competitive prices in the first few months of the 2008/09 marketing year, the intervention stocks held by the Hungarian intervention agency, the only agency with stocks currently still at its disposal, should continue to be made available on the cereal market, and the days and dates on which tenders may be submitted by operators should be specified in accordance with the meetings scheduled by the Management Committee for the Common Organisation of Agricultural Markets.

(3) Regulation (EC) No 712/2007 should be amended accordingly.

(4) The measures provided for in this Regulation are in accordance with the opinion of the Management Committee for the Common Organisation of Agricultural Markets,

HAS ADOPTED THIS REGULATION:

Article 1

The following subparagraph is hereby added to Article 3(1) of Regulation (EC) No 712/2007:

'From 15 September 2008, the closing dates for the submission of tenders for partial invitations to tender shall be 13:00 (Brussels time) on Wednesday 24 September 2008, 15 October 2008, 29 October 2008, 12 November 2008, 26 November 2008, 3 December 2008 and 17 December 2008.'

Article 2

This Regulation shall enter into force on the third day following that of its publication in the *Official Journal of the European Union*.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 5 September 2008.

For the Commission
Mariann FISCHER BOEL
Member of the Commission

[1] OJ L 299, 16.11.2007, p. 1.
[2] OJ L 163, 23.6.2007, p. 7.

DIRECTIVES

COMMISSION DIRECTIVE 2008/85/EC

of 5 September 2008

amending Directive 98/8/EC of the European Parliament and of the Council to include thiabendazole as an active substance in Annex I thereto

(Text with EEA relevance)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Directive 98/8/EC of the European Parliament and of the Council of 16 February 1998 concerning the placing of biocidal products on the market [1], and in particular the second subparagraph of Article 16(2) thereof,

Whereas:

(1) Commission Regulation (EC) No 1451/2007 of 4 December 2007 on the second phase of the 10-year work programme referred to in Article 16(2) of Directive 98/8/EC of the European Parliament and of the Council concerning the placing of biocidal products on the market [2] establishes a list of active substances to be assessed, with a view to their possible inclusion in Annex I, IA or IB to Directive 98/8/EC. That list includes thiabendazole.

(2) Pursuant to Regulation (EC) No 1451/2007, thiabendazole has been evaluated in accordance with Article 11(2) of Directive 98/8/EC for use in product-type 8, wood preservatives, as defined in Annex V to Directive 98/8/EC.

(3) Spain was designated as Rapporteur Member State and submitted the competent authority report, together with a recommendation, to the Commission on 9 May 2006 in accordance with 14(4) and (6) of Regulation (EC) No 1451/2007.

(4) The competent authority report was reviewed by the Member States and the Commission. In accordance with Article 15(4) of Regulation (EC) No 1451/2007, the findings of the review were incorporated, within the Standing Committee on Biocidal Products on 22 February 2008, in an assessment report.

(5) It appears from the examinations made that biocidal products used as wood preservatives and containing thiabendazole may be expected to satisfy the requirements laid down in Article 5 of Directive 98/8/EC. It is therefore appropriate to include thiabendazole in Annex I, in order to ensure that in all Member States authorisations for biocidal products used as wood preservatives and containing thiabendazole can be granted, modified, or cancelled in accordance with Article 16(3) of Directive 98/8/EC.

(6) However, unacceptable risks were identified for the *in situ* treatment of wood outdoors and for treated wood exposed to weathering. Therefore, authorisations for these uses should not be granted unless data have been submitted in order to demonstrate that the products can be used without unacceptable risks to the environment.

(7) In the light of the findings of the assessment report, it is appropriate to require that risk mitigation measures are applied at product authorisation level to products containing thiabendazole and used as wood preservatives to ensure that risks are reduced to an acceptable level in accordance with Article 5 of Directive 98/8/EC and Annex VI thereto. In particular, appropriate measures should be taken to protect the soil and aquatic compartments since unacceptable risks in these compartments have been identified during the evaluation and products intended for industrial and/or professional use should be used with appropriate protective equipment if the risk identified for industrial and/or professional users cannot be reduced by other means.

(8) It is important that the provisions of this Directive be applied simultaneously in all the Member States in order to ensure equal treatment of biocidal products on the market containing the active substance thiabendazole and also to facilitate the proper operation of the biocidal products market in general.

[1] OJ L 123, 24.4.1998, p. 1.
[2] OJ L 325, 11.12.2007, p. 3.

(9) A reasonable period should be allowed to elapse before an active substance is included in Annex I in order to permit Member States and the interested parties to prepare themselves to meet the new requirements entailed and to ensure that applicants who have prepared dossiers can benefit fully from the 10-year period of data protection, which, in accordance with Article 12(1)(c)(ii) of Directive 98/8/EC, starts from the date of inclusion.

(10) After inclusion, Member States should be allowed a reasonable period to implement Article 16(3) of Directive 98/8/EC, and in particular, to grant, modify or cancel authorisations of biocidal products in product-type 8 containing thiabendazole to ensure that they comply with Directive 98/8/EC.

(11) Directive 98/8/EC should therefore be amended accordingly.

(12) The measures provided for in this Directive are in accordance with the opinion of the Standing Committee on Biocidal Products,

HAS ADOPTED THIS DIRECTIVE:

Article 1

Annex I to Directive 98/8/EC is amended in accordance with the Annex to this Directive.

Article 2

Transposition

1. Member States shall adopt and publish, by 30 June 2009 at the latest, the laws, regulations and administrative provisions necessary to comply with this Directive. They shall forthwith communicate to the Commission the text of those provisions and a correlation table between those provisions and this Directive.

They shall apply those provisions from 1 July 2010.

When Member States adopt those provisions, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made.

2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

Article 3

This Directive shall enter into force on the 20th day following its publication in the *Official Journal of the European Union*.

Article 4

This Directive is addressed to the Member States.

Done at Brussels, 5 September 2008.

For the Commission

Stavros DIMAS

Member of the Commission

ANNEX

The following entry 'No 13' is inserted in Annex I to Directive 98/8/EC:

No	Common name	IUPAC name Identification numbers	Minimum purity of the active substance in the biocidal product as placed on the market	Date of inclusion	Deadline for compliance with Article 16(3) (except for products containing more than one active substance, for which the deadline to comply with Article 16(3) shall be the one set out in the last of the inclusion decisions relating to its active substances)	Expiry date of inclusion	Product type	Specific provisions (*)
'13	Thiabendazole	2-thiazol-4-yl-1H-benzo-imidazole EC No: 205-725-8 CAS No: 148-79-8	985 g/kg	1 July 2010	30 June 2012	30 June 2020	8	Member States shall ensure that authorisations are subject to the following conditions: in view of the assumptions made during the risk assessment, products authorised for industrial and/or professional use, with respect to the double-vacuum and dipping application tasks, must be used with appropriate personal protective equipment, unless it can be demonstrated in the application for product authorisation that risks to industrial and/or professional users can be reduced to an acceptable level by others means. In view of the risks identified for the soil and aquatic compartments appropriate risk mitigation measures must be taken to protect those compartments. In particular, labels and/or safety data sheets of products authorised for industrial use shall indicate that freshly treated timber must be stored after treatment under shelter or on impermeable hard standing to prevent direct losses to soil or water and that any losses must be collected for reuse or disposal. Products shall not be authorised for the in situ treatment of wood outdoors or for wood that will be exposed to weathering, unless data is submitted to demonstrate that the product will meet the requirements of Article 5 and Annex VI, if necessary by the application of appropriate risk mitigation measures.'

(*) For the implementation of the common principles of Annex VI, the content and conclusions of assessment reports are available on the Commission website: http://ec.europa.eu/comm/environment/biocides/index.htm

COMMISSION DIRECTIVE 2008/86/EC

of 5 September 2008

amending Directive 98/8/EC of the European Parliament and of the Council to include tebuconazole as an active substance in Annex I thereto

(Text with EEA relevance)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Directive 98/8/EC of the European Parliament and of the Council of 16 February 1998 concerning the placing of biocidal products on the market [1], and in particular the second subparagraph of Article 16(2) thereof,

Whereas:

(1) Commission Regulation (EC) No 1451/2007 of 4 December 2007 on the second phase of the 10-year work programme referred to in Article 16(2) of Directive 98/8/EC of the European Parliament and of the Council concerning the placing of biocidal products on the market [2] establishes a list of active substances to be assessed, with a view to their possible inclusion in Annex I, IA or IB to Directive 98/8/EC. That list includes tebuconazole.

(2) Pursuant to Regulation (EC) No 1451/2007, tebuconazole has been evaluated in accordance with Article 11(2) of Directive 98/8/EC for use in product-type 8, wood preservatives, as defined in Annex V to Directive 98/8/EC.

(3) Denmark was designated as Rapporteur Member State and submitted the competent authority report, together with a recommendation, to the Commission on 11 January 2006 in accordance with Article 14(4) and (6) of Regulation (EC) No 1451/2007.

(4) The competent authority report was reviewed by the Member States and the Commission. In accordance with Article 15(4) of Regulation (EC) No 1451/2007, the findings of the review were incorporated, within the Standing Committee on Biocidal Products on 29 November 2007, in an assessment report.

(5) The review of tebuconazole did not reveal any open questions or concerns to be addressed by the Scientific Committee on Health and Environmental Risks.

(6) It appears from the examinations made that biocidal products used as wood preservatives and containing tebuconazole may be expected to satisfy the requirements laid down in Article 5 of Directive 98/8/EC. It is therefore appropriate to include tebuconazole in Annex I for product type 8, in order to ensure that in all Member States authorisations for biocidal products used as wood preservatives and containing tebuconazole can be granted, modified, or cancelled in accordance with Article 16(3) of Directive 98/8/EC. However, unacceptable risks were identified for the *in situ* treatment of wood outdoors and for treated wood in continuous contact with water. Authorisation of these uses will require the submission of data demonstrating that the products can be used without unacceptable risks to the environment.

(7) In the light of the findings of the assessment report, it is appropriate to require that instructions are provided to indicate that treated timber must be stored after treatment on impermeable hard standing to prevent direct losses to soil and allow losses to be collected for re-use or disposal, in accordance with Article 10(2)(i)(d) of Directive 98/8/EC.

(8) It is important that the provisions of this Directive be applied simultaneously in all the Member States in order to ensure equal treatment of biocidal products on the market containing the active substance tebuconazole and also to facilitate the proper operation of the biocidal products market in general.

(9) A reasonable period should be allowed to elapse before an active substance is included in Annex I in order to permit Member States and the interested parties to prepare themselves to meet the new requirements entailed and to ensure that applicants who have prepared dossiers can benefit fully from the 10-year period of data protection, which, in accordance with Article 12(1)(c)(ii) of Directive 98/8/EC, starts from the date of inclusion.

(10) After inclusion, Member States should be allowed a reasonable period to implement Article 16(3) of Directive 98/8/EC, and in particular, to grant, modify or cancel authorisations of biocidal products in product-type 8 containing tebuconazole to ensure that they comply with Directive 98/8/EC.

[1] OJ L 123, 24.4.1998, p. 1.
[2] OJ L 325, 11.12.2007, p. 3.

(11) Directive 98/8/EC should therefore be amended accordingly.

(12) The measures provided for in this Directive are in accordance with the opinion of the Standing Committee on Biocidal Products,

HAS ADOPTED THIS DIRECTIVE:

Article 1

Annex I to Directive 98/8/EC is amended in accordance with the Annex to this Directive.

Article 2

Transposition

1. Member States shall adopt and publish, by 31 March 2009 at the latest, the laws, regulations and administrative provisions necessary to comply with this Directive. They shall forthwith communicate to the Commission the text of those provisions and a correlation table between those provisions and this Directive.

They shall apply those provisions from 1 April 2010.

When Member States adopt those provisions, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made.

2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

Article 3

This Directive shall enter into force on the 20th day following its publication in the *Official Journal of the European Union*.

Article 4

This Directive is addressed to the Member States.

Done at Brussels, 5 September 2008.

For the Commission

Stavros DIMAS

Member of the Commission

ANNEX

The following entry 'No 6' is inserted in Annex I to Directive 98/8/EC:

No	Common Name	IUPAC name Identification numbers	Minimum purity of the active substance in the biocidal product as placed on the market	Date of inclusion	Deadline for compliance with Article 16(3) (except for products containing more than one active substance, for which the deadline to comply with Article 16(3) shall be the one set out in the last of the inclusion decisions relating to its active substances)	Expiry date of inclusion	Product type	Specific provisions (*)
'6	tebuconazole	1-(4-chlorophenyl)-4,4-dimethyl-3-(1,2,4-triazol-1-ylmethyl)pentan-3-ol EC No: 403-640-2 CAS No: 107534-96-3	950 g/kg	1 April 2010	31 March 2012	31 March 2020	8	Member States shall ensure that authorisations are subject to the following conditions: In view of the risks identified for the soil and aquatic compartments appropriate risk mitigation measures must be taken to protect those compartments. In particular, labels and/or safety data sheets of products authorised for industrial use indicate that freshly treated timber must be stored after treatment under shelter or on impermeable hard standing to prevent direct losses to soil or water and that any losses must be collected for reuse or disposal. In addition, products cannot be authorised for the *in situ* treatment of wood outdoors or for wood that will be in continuous contact with water unless data is submitted to demonstrate that the product will meet the requirements of Article 5 and Annex VI, if necessary by the application of appropriate risk mitigation measures.'

(*) For the implementation of the common principles of Annex VI, the content and conclusions of assessment reports are available on the Commission website: http://ec.europa.eu/comm/environment/biocides/index.htm

II

(Acts adopted under the EC Treaty/Euratom Treaty whose publication is not obligatory)

DECISIONS

COMMISSION

COMMISSION DECISION

of 27 February 2008

on State aid C 46/07 (ex NN 59/07) implemented by Romania for Automobile Craiova (formerly Daewoo Romania)

(notified under document number C(2008) 700)

(Only the Romanian version is authentic)

(Text with EEA relevance)

(2008/717/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

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

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

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

Whereas:

1. PROCEDURE

(1) On 17 January 2007 the Commission requested information on several Romanian public undertakings, including SC Automobile Craiova SA (hereinafter Automobile Craiova), formerly Daewoo Romania (*), in the context of the national privatisation process. Romania submitted information by letter of 15 February 2007. The Commission requested further information on 8 March and 22 May 2007 which Romania submitted by letters of 21 March, 25 May and 31 May 2007. A meeting with the Romanian authorities was held on 3 May 2007.

(2) By letter of 5 July 2007, the Commission asked the Romanian authorities to remove the specific conditions attached to the privatisation contract for Automobile Craiova, indicating at the same time that failure to suspend any unlawful aid might lead the Commission to adopt a decision to initiate the formal investigation procedure on the basis of Article 88(2) of the EC Treaty and a suspension injunction on the basis of Article 11(1) of Council Regulation (EC) No 659/1999 [2].

(3) By letter of 18 July 2007, the Romanian authorities informed the Commission that the privatisation of Automobile Craiova would be notified to the Commission. By letter of 20 August 2007, the Commission reminded Romania that the privatisation of Automobile Craiova would have to be notified before any measure binding the public authorities was taken.

[1] OJ C 248, 23.10.2007, p. 25.

(*) Mistake: the text should read 'and its subsidiary Daewoo Romania'.

[2] Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ L 83, 27.3.1999, p. 1).

(4) In September 2007 the Commission learnt from the press that on 12 September 2007 Romania had signed a sale-purchase agreement (SPA) with the only bidder, Ford.

(5) By letter of 10 October 2007, the Commission informed Romania that it had decided to initiate the procedure laid down in Article 88(2) of the EC Treaty in respect of unlawful aid and to issue a suspension injunction. The Commission Decision to initiate the procedure together with a suspension injunction was published in the *Official Journal of the European Union* ([3]). The Commission invited interested parties to submit their comments on the aid.

(6) Romania submitted its comments by letter of 24 October 2007. By letter of 23 November 2007, Ford submitted its comments, which were forwarded to Romania on 30 November 2007. Romania submitted its observations on Ford's comments by letter of 7 December 2007.

(7) The Commission asked for additional information by letters of 12 October 2007, 17 October 2007, 19 October 2007, 14 November 2007 and 14 January 2008. Romania submitted the additional information by letters of 18 October 2007, 24 October 2007, 6 November 2007, 12 November 2007, 19 November 2007, 23 November 2007, 7 December 2007, 8 January 2008 and 23 January 2008.

(8) The Commission met with the Romanian authorities and representatives of Ford on 5 October 2007, 12 October 2007, 7 November 2007, 15 November 2007, 17 December 2007 and 24 January 2008.

2. **DESCRIPTION**

2.1. **The undertaking concerned**

(9) Automobile Craiova is a company active in the trade in automotive spare parts. It also produces exhaust boxes and PVC joinery. The Romanian State holds 72,4 % of its shares through the Romanian privatisation agency, AVAS. The remaining 27,6 % of the shares are held by a private investment fund (SIF Oltenia) and by private-law natural and legal persons. Its shares are listed on the Bucharest stock exchange. Automobile Craiova made profits of EUR 83 479 in 2005 and of EUR 51 125 in 2006. Its turnover was EUR 2,15 million in 2005 and EUR 2,14 million in 2006.

([3]) See footnote 1.

(10) The company has one subsidiary, Daewoo Romania ('DWAR'), which is also the majority shareholder in Mecatim. The car producer DWAR was established in 1994 as a joint venture, the Romanian State holding 49 % of the shares and Daewoo Motors South Korea 51 %. After Daewoo Motors went bankrupt, DWAR acquired in 2006 51 % of its own shares. In line with Romanian company legislation, the 51 % of the shares were annulled in November 2007 so that DWAR was wholly owned by Automobile Craiova.

(11) In 2007 DWAR employed 3 959 people. In 2006 it produced 24 898 cars, mostly small models. The plan in 2007 was to produce about 19 000 cars. In January 2008 car production stopped. In addition, DWAR produces engines for different GM Daewoo subsidiaries. The Craiova plant has a production capacity of 100 000 cars/year.

(12) DWAR generated losses of around EUR 350 million in 2006 and of around EUR 3,4 million until 30 April 2007. In 2006 it had total debts of around EUR 88 million, of which EUR 56 million to the public budget and EUR 25 million to suppliers.

(13) According to the financial statements, in 2006 the company had land and fixed assets worth EUR 193 million, raw materials and other materials worth EUR 55 million, available cash amounting to EUR 96 million, and receivables and settlements totalling EUR 108 million. In conclusion, according to the balance sheet at the end of 2006, DWAR had net assets of EUR 419 million in 2006.

(14) Mecatim is a subsidiary of DWAR which owns 75 % of its shares; 20 % are held by AVAS and the remaining 5 % by minority private shareholders. The company is situated in Timişoara. Its core activity is the production of spare parts for vehicles and vehicle engines. However, the company has stopped production and is currently trading in vehicles.

(15) Automobile Craiova is based in a region eligible for aid under Article 87(3)(a) of the EC Treaty.

2.2. **The privatisation process**

(16) On 19 and 21 May 2007 the Romanian privatisation agency, AVAS, announced the sale of its participation of 72 % in Automobile Craiova. Although several undertakings had previously submitted non-binding letters of interest, only two potential investors, Ford Motor Company ('Ford') and General Motors ('GM'), bought the Information Memorandum (i.e. the presentation file), which gave them access to the information contained in the Data Room and allowed them eventually to submit a final and binding bid.

(17) The presentation file contained certain conditions relating in particular to minimum production, employment and investment levels. The scoring grid showed that the price offered represented only 35 % of the total scoring, with aggregate investments accounting for 25 %, the achievement of a production integration level of 60 % in the fourth year accounting for 20 % and the commitment to a production level of 200 000 cars in the fourth year accounting for 20 %. If the offered integration level was below 60 % and/or if this level would be achieved only after four years, the investor would score 0 points. The same applied to the production level, where, if the offered production level was lower than 200 000 cars in the fourth year and/or if a longer period would be needed to reach this production level, the investor would also score 0 points.

(18) The deadline for submitting final offers was 5 July 2007. Being the only party to submit a binding bid, Ford was awarded the tender. Initially it offered a price of EUR 55 million and, after the subsequent negotiations, one of EUR 57 million.

(19) During the negotiation phase following the bidding process, the parties agreed that Ford, the buyer, would obtain through a reorganisation ownership of the industrial assets of Automobile Craiova, DWAR and Mecatim, while the non-core assets (mostly real estate and net excess cash) would be set aside and remain in state ownership. The State also undertook to use its best efforts to purchase the remaining 28 % from the private shareholders and sell them to Ford.

(20) The sales purchase agreement was signed on 12 September 2007.

3. **DECISION TO INITIATE THE FORMAL INVESTIGATION PROCEDURE AND TO ISSUE A SUPSENSION INJUNCTION**

(21) The formal investigation procedure was initiated on account of suspicions that the privatisation process entailed State aid.

(22) First, the Commission had doubts whether the tender itself was open, transparent and non-discriminatory. According to the information available at the time, which was based mostly on press articles, the Commission had grounds to assume that certain potential investors have been disadvantaged at an early stage and deterred from submitting a bid.

(23) Second, the Commission doubted that the conditions attached to the privatisation did not lead to a reduction in the sales price, thereby conferring an advantage on the undertaking to be privatised. According to the information available at the time of the decision to initiate the procedure, AVAS attached four conditions which were liable to reduce the sales price and might have deterred other potentially interested parties from submitting a bid. The price offered accounted for only 35 % of the total score.

(24) Further, the Commission wondered whether the Romanian authorities attached an employment guarantee to the privatisation. According to the presentation file, the potential bidders had to present a business plan, including their commitment to maintain the current number of employees. Also, the draft SPA attached to the presentation file stipulates the obligation for the buyer to maintain for the next five years the current number of employees; in the event of the buyer breaching its obligation, the SPA will *de jure* become null and void, without any notification or additional formality. Finally, the Romanian authorities informed potential buyers before the publication of the privatisation announcement that one of the main objectives of the privatisation was to maintain the current workforce.

(25) Lastly, the Commission had suspicions that the renegotiation of certain terms during the negotiation phase following the tender conferred an advantage on Ford, the buyer. According to the information available at that stage, it seemed that the Romanian State undertook to take over actual and potential claims against Automobile Craiova, including a customs claim of EUR 800 million. Further, during the subsequent negotiations, the State and Ford reached an agreement to reorganise the company in such a way that the core

activity (production of cars) would be separated from the non-core assets, in particular real estate. Following this reorganisation, Ford would acquire and pay for the industrial activity only and the State would retain ownership of the land.

(26) Since Romania went ahead and signed the privatisation contract despite its repeated warnings, the Commission issued at the same time a suspension injunction.

4. COMMENTS FROM ROMANIA

(27) First, Romania emphasises that the tender process was open, transparent, non-discriminatory and unconditional. The first announcement regarding the intention to privatise DWAR, published on 5 December 2006, and the announcement published on 9/12 March 2007 do not contain any pre-qualification or selection criteria, let alone any conditions which needed to be met by bidders. Moreover, the announcement on the privatisation published on 18/21 May 2007 did not contain any mandatory conditions, but simply award criteria which would allow the different bids to be scored. Further, Romania claims that the increase in the employment level was never a criterion in the tender procedure. In conclusion, all potential bidders had access to all the information available since the entire privatisation process was transparent. Therefore, no potential bidder was deterred from submitting an offer.

(28) Second, Romania argues that neither the presentation file nor the draft SPA imposed mandatory conditions without the possibility for potential bidders to negotiate them. It explains that AVAS initially intended to privatise DWAR as a whole but, during the privatisation process it decided to give potential bidders the option to bid only for the industrial assets (i.e. excluding the real estate). It stresses that, from the outset, all potential bidders were aware that the real estate was not included in the privatisation offer but would be sold separately.

(29) Third, Romania emphasises that the criteria in the presentation file did not have any effect on the bidders, especially since all potential interested parties were automotive undertakings. It also submits that these criteria had no influence on the purchase price offered by Ford, since they were compatible with its business plan. According to Romania, the production level of 200 000 cars per year, as required by AVAS in the presentation file, needs to be achieved for economic reasons: given the size and capacity of the car plant, which is equipped to build small models, production of less than 200 000 cars per year would not be profitable.

(30) Fourth, Romania argues that it acted as a market economy operator when selling its participation in Automobile Craiova. It claims that the price obtained represents the market value and presents the following arguments: DWAR purchased 51 % of the shares in 2006 from the former parent company Daewoo Motors Ltd. for a sales price of USD 50 million. Therefore, the total value of all the shares at that time was EUR 78 million. Ford offered EUR 57 million for 72,4 % of the shares in Automobile Craiova, corresponding to EUR 78 million for all of them. Also, taking the value per share traded on the stock exchange, the value of all the shares in Automobile Craiova on 16 March 2007 was about EUR 59 million. Therefore, the purchase price of EUR 57 million paid by Ford for 72 % of the shares is above the market price. In addition, under the restructuring process, AVAS will also remain owner of the non-core assets. Finally, according to the valuation of DWAR made by an independent expert KPMG after the bankruptcy of the parent company, the company was valued in 2004 at between USD 18 million and USD 81 million, depending on the valuation method used.

(31) Fifth, as regards the alleged indemnification, Romania submitted detailed information on the debt arrangement included in the special law on the privatisation of Automobile Craiova. It argues that, according to normal business practice, AVAS takes over only debts which are not foreseeable and cannot be quantified. It emphasises that Automobile Craiova and DWAR do not have any outstanding debts towards the State, except those deriving from the normal course of business. In addition, because of the payments amounting to USD 10 million paid in 2006 to the parent company ([4]), DWAR does not have any outstanding debts to former Daewoo subsidiaries.

(32) Sixth, as regards the customs claim of EUR 800 million, Romania explained its origin. According to Law 71/1994 on attracting foreign investors, Romanian companies were exempted from customs duties and profits tax if they fulfilled four conditions: the foreign subscribed capital is at least USD 50 million; at least 50 % of production is exported; a production integration level of at least 60 % is achieved; and the share capital does not decrease within 14 years of the date of the foreign subscription with the result that the foreign participation falls below USD 50 million.

([4]) In 2006 DWAR acquired 51 % of the shares from Daewoo Motors Ltd. for a sales price of USD 50 million plus a settlement payment of USD 10 million for any outstanding liabilities to other Daewoo subsidiaries.

(33) The local customs authority calculated the production integration level of the company in 2005 and came to the conclusion that the 60 % ceiling was not reached. Thus, it claimed repayment of the tax exemptions, which amounted to EUR 800 million. DWAR challenged the decision before the National Customs Authority. Since the court of first instance upheld the repayment decision, DWAR filed a new appeal. The court of appeal, in a judgment of 27 June 2007, annulled the repayment order.

(34) In conclusion, Romania stresses that DWAR did not benefit from any debt waiver.

(35) Seventh, the Romanian authorities argue that maintaining the current workforce was never a condition of the privatisation since it was not an award criterion. In addition, the draft SPA attached to the presentation file was only indicative and so potential bidders could have understood that the individual terms of the contract could be subject to bilateral negotiations. Therefore, potential bidders who did not plan to maintain the current workforce could have nevertheless submitted an offer with a different business plan.

(36) Lastly, as regards the subsequent negotiations on other contractual terms, Romania claims that they were part of the normal negotiation process preceding the conclusion of the SPA.

5. COMMENTS FROM THIRD PARTIES

(37) By letter of 23 November 2007, Ford intervened as an interested party in the procedure initiated by the Commission.

(38) First, Ford argues that the privatisation process was open, transparent, non-discriminatory and unconditional. All the correspondence between Ford and AVAS during the privatisation process was disclosed in the Data Room.

(39) Second, the award criteria were not mandatory conditions liable to deter potential bidders. On the contrary, Ford declared that it was its understanding that these criteria were negotiable. Further, the scoring criteria had no impact on Ford's offer since Ford's business plan easily exceeded the requirements set out in the presentation file.

(40) Third, the purchase price paid by Ford to AVAS represents the market value of the shares covered by the tender procedure. Ford stated that it had intended paying a maximum purchase price of USD 100 million (i.e. EUR 71,4 million) for all the shares, which would correspond to a price of EUR 51,7 million for 72,4 % ([5]). It did not intend to offer a higher price, even in the absence of the award criteria. Initially, Ford offered a purchase price of EUR 55 million and, after negotiations with the Romanian authorities, one of EUR 57 million. Furthermore, Ford was the only bidder, so that its offer represents the market value.

(41) Lastly, Ford argues that indemnifications contained in the SPA were standard business practice for the acquisition of companies and thus in conformity with the market and did not lead to a sale at a price lower than the highest possible bid. Ford highlights the fact that such indemnifications relate only to risks outside the ordinary course of business and are impossible to assess by a new investor on taking over a company. Ford has assumed all the debts and liabilities of Automobile Craiova, including DWAR, that had arisen in the ordinary course of business and that were quantified and disclosed in the Data Room. However, Ford was not willing to assume potential risks which it could not assess and quantify on the basis of due diligence.

6. ASSESSMENT

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

(42) Article 87(1) of the EC Treaty states that, save as otherwise provided in the Treaty, any aid granted by a Member State or through state resources which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods is incompatible with the common market, in so far as it affects trade between Member States.

6.1.1. *State resources and conferring of an advantage*

(43) The conditions pertaining to the privatisation contract were attached by the Romanian public privatisation agency, AVAS. By attaching such conditions, which could lead to a fall in the sales price, as shown below, the Romanian State accepted that it would not obtain the highest possible price. The lower sales price for the 72,4 % stake is thus paid from the revenue forgone by the State. Therefore, the measures involve state resources.

([5]) Based on an exchange rate of EUR 1 = USD 1,4.

(44) In addition, the Commission takes note of the fact that the actions of the public privatisation agency, AVAS, are attributable to the State. This fact is not disputed by the Romanian authorities.

(45) A given measure cannot be regarded as constituting aid if it does not confer an advantage ([6]). Accordingly, the Commission must determine whether the measure in question confers an advantage.

(46) An undertaking benefits from an advantage if it obtains something positive from the State which it would not have obtained under normal market conditions. To this end, it has first to be assessed whether the State acted as a market economy operator or as a state authority which sold a company under conditions not corresponding to normal market conditions.

(47) According to Article 86(1) of the EC Treaty, public companies are subject to State aid rules. Article 295 of the EC Treaty stipulates that Community rules are neutral as regards public and private ownership.

(48) In conformity with the settled case law of the European courts ([7]) and with the rules and practice developed by the Commission regarding State aid in the context of privatisations ([8]), when a Member State either acquires or sells shares in companies, no advantage is conferred if the behaviour of the Member States is the same as that which a market economy investor would have.

(49) Consequently, when the privatisation takes place by way of the sale of shares on the stock exchange, it is generally assumed to be on market conditions and not to involve aid. However, when the privatisation is carried out through a trade sale, it can be assumed that no aid is involved only if the following conditions are fulfilled: first, the company is sold by a competitive tender that is open to all comers, transparent and non-discriminatory; second, no conditions are attached which are not customary in comparable transactions between private parties and which are capable of potentially reducing the sales price; third, the company is sold to the highest bidder; and, fourth, bidders must be given enough time and information to carry out a proper valuation of the assets being bid for ([9]). In other cases, trade sales must be vetted for any possible aid and must therefore be notified.

(50) In such cases, assessing whether a transaction concerning state assets involves aid generally means determining whether a market economy operator placed in a similar situation would have behaved in the same way, i.e. would have sold the company at the same price. In applying the market economy investor principle, non-economic considerations, such as industrial policy reasons, employment considerations or regional development objectives, which would not be acceptable to a market economy operator, cannot be taken into account as reasons for accepting a lower price but, on the contrary, point to the existence of aid. This principle has been repeatedly explained by the Commission ([10]) and constantly confirmed by the Court ([11]).

([6]) See Case T-471/93 *Tiercé Ladbroke SA* v *Commission*, at points 54 and 56-63.

([7]) See, for example, Case T-296/97 *Alitalia*, Cases T-228/99 and T-233/99 *WestLB v Commission*, Case T-366/00 *Scott SA*, Cases C-328/99 and C-399/00 *Italy and SIM 2 Multimedia* v *Commission* and Case T-358/94 *Air France* v *Commission*.

([8]) XXIIIrd Report on Competition Policy (1993), p. 255. This set of rules, specifically for the aviation sector, can be found in '*Application of Articles 92 and 93 of the EC Treaty and Article 61 of the EEA Agreement to State aids in the aviation sector*' (OJ C 350, 10.12.1994, p. 5), which states that '*Aid is excluded […] if, upon privatisation, the following conditions are fulfilled: the disposals made by way of an unconditional public invitation to tender […]. On the other hand, the following sales are subject to the pre-notification requirements of Article 93(3) of the EC Treaty because there is a presumption that they contain aid: […] all sales that are realised in conditions that would not be acceptable for a transaction between market economy investors.*'

([9]) Points 402 et seq. of the XXIIIrd Report on Competition Policy (1993). See also point 248 of the XXIst Report on Competition Policy (1991): '*[…] no aid is involved where the shareholdings are sold to the highest bidder as a result of an open and unconditional bidding procedure. If shareholdings are sold under other conditions, aid elements may be present.*'

([10]) See, for example, the Commission Decision on TASQ of 3 May 2000, which states that '*The French authorities also showed that the invitation to tender was transparent and unconditional […]. In particular, the documents submitted to the Commission showed that the sale of TASQ was not conditional on, for example, job maintenance, locations or continuation of activity.*' This fact enabled the Commission to conclude that no aid was involved in that privatisation.

([11]) See, for example, Cases T-228/99 and T-233/99 *WestLB* v *Commission*, Case T-366/00 *Scott SA*, Cases C-328/99 and C-399/00 *Italy and SIM 2 Multimedia* v *Commission* and Case T-358/94 *Air France* v *Commission*. In Case T-296/97 *Alitalia*, the Court states that '*It must be emphasised that the conduct of a private investor in a market economy is guided by prospects of profitability. The measure was motivated by the desire to keep the jobs and therefore, above all, by considerations pertaining to the applicant's viability and survival rather than by prospects of profitability.*'

(51) Therefore, if any of the above requirements are not fulfilled, the Commission considers that the privatisation should be assessed to determine whether it entails State aid and must therefore be notified ([12]). Consequently, compliance with these requirements would ensure that the State obtains the highest price, i.e. the market price, for its shares and no State aid is therefore involved.

(52) By imposing certain conditions on the buyer in the privatisation, the State potentially lowers the sales price and thus forgoes additional revenues. Also, some conditions can deter potentially interested investors from submitting a bid in the first place, so that the competitive environment of the tender is disturbed and even the highest of the offers eventually submitted does not necessarily represent the actual market value ([13]).

(53) By imposing such conditions and thus accepting that it will not receive the best price for the shares or assets owned by it, the State does not act like a market economy operator, who would try to obtain the highest possible price. Instead, the State chooses to sell the undertaking at a price below the market value. A market economy operator would not have an economic interest in attaching comparable conditions (in particular, such as maintenance of the level of employment, conditions beneficial for the geographical region concerned or ensuring a certain investment level) but would sell the company to the highest bidder, who would then be free to determine the future of the acquired company or assets ([14]).

(54) This does not mean that all the conditions of a privatisation automatically result in the presence of some State aid elements. First, the conditions that are also normally encountered in transactions between private parties (certain standard forms of indemnification on account of the solvency of the bidder or conformity with domestic legislation on labour relations) do not constitute a problem. Second, the conditions which do not normally seem to be present in transactions between private persons result in the presence of State aid only to the extent that they make it possible to reduce the sales price and can confer an advantage. The fact that these conditions do not result in aid must be demonstrated in each case in question ([15]).

Conditions attached to the privatisation of Automobile Craiova

(55) In the case in point, the tender procedure organised by the Romanian authorities was geared primarily to achieving a given level of production and amount of employment in Craiova. The Romanian authorities have not produced any evidence to show that these conditions were imposed for reasons that a market economy operator would have taken into account.

([12]) See the XXIIIrd Report on Competition Policy (1993), p. 255.

([13]) In several of the Commission Decisions, the absence of conditions. i.e. the unconditional nature of the tender, was a decisive argument that allowed the Commission to conclude that privatisation procedures did not include State aid. See, for example, the Commission Decisions of 15 February 2000 on Dessauer Geräteindustrie (OJ L 1, 4.1.2001, p. 10), of 13 December 2000 on SKET Walwerkstechnik (OJ L 301, 17.11.2001, p. 37) and of 30 January 2002 on Gothaer Fahrzeugtechnik (OJ L 314, 18.11.2002, p. 62), in which the Commission explained: ' *To rule out any aid element in the transaction, the BvS would have had to demand a price corresponding to the company's market value. The Commission therefore verifies whether the sales procedure was an appropriate one for the purpose of establishing the market value. […] the sales price is the market price if the sale is effected through an open and* ***unconditional*** *tender procedure and the assets go to the highest or only bidder.*'

([14]) See, for example, Commission Decision 97/81/EC of 30 July 1996 on Head Tyrolia Mares, where the Commission states that '*It is not in the interest of a market economy investor to ensure, without clear economic reasons, a certain employment level when taking his divesting decisions. Without the condition in question, a potential buyer would gain entrepreneurial independence and HTM's value would increase, which could result in a higher sale price or reduced funding by AT.*' and Commission Decision 2000/628/EC of 11 April 2000 on the aid granted by Italy to Centrale del Latte di Roma, in which the Commission spells out the criteria whereby a privatisation of a publicly owned company does not involve State aid (see recital 32 et seq., and in particular recital 36): '*The Commission believes that the market value of the company would have been the price a private investor would have paid had the sale been subject to no conditions, particularly those relating to the maintenance of a certain number of jobs and the supply of raw materials from local producers.*'

([15]) Such an analysis was carried out, for example, in the Commission Decision of 20 June 2001 on GSG and enabled the Commission to conclude that no aid was involved even in the presence of some unusual conditions because it found that those conditions could not lead to a reduction in the sales price.

(56) When privatising Automobile Craiova, the privatisation agency set four conditions in the form of award criteria in order to select the successful bidder: the price offered represented 35 % of the total score, the total investments 25 %, the achievement of a production integration level of 60 % in the fourth year 20 %, and the commitment to a production level of 200 000 cars in the fourth year 20 %. If the last two requirements were not fulfilled by the potential investor, the offer would score 0 points on those particular criteria. Thus, it was practically impossible for a potential investor making different industrial use of the car plant to win solely on account of a higher sales price, without achieving the production and integration levels required (assuming that the investment level was the same).

(57) Assuming that a competitive investor might have proposed a similar level of investments but would not have been able to fulfil the production level criterion, this competitive bidder would (in order to win the bid) have to propose a price equivalent to 230 % of the price proposed by Ford ([16]). In concrete terms, in order to outbid Ford's offer of EUR 57 million, a potential investor would need to propose a sales price in excess of EUR 133 (i.e. EUR 76 million higher) in order to compensate for the non-fulfilment of the condition relating to the production level. These factors must have been taken into account by both Ford and its potential competitors and thus influenced their decision to submit a bid and the price offered.

(58) The Commission notes that, although the formal announcement of the privatisation of Automobile Craiova did not contain any reference to conditions, the precise conditions being laid down only in the subsequent Information Memorandum, the general objective of the Romanian authorities as regards the maintenance of a certain level of employment and a certain level of car production at the site was publicly known. For the Commission, there are indications that certain potential investors who might have considered a different industrial strategy had been deterred from showing a concrete interest in the company at this initial stage.

([16]) In the above calculations, the Commission assumed that the impact of the condition relating to the integration level can be ignored. As rightfully pointed out by Ford and in line with the Commission's practice, this requirement is in breach of the internal market rules regarding the free movement of goods. Accordingly, Ford undertook to achieve a 60 % integration level within four years of the privatisation 'subject to consistency with EU law'. Since Ford highlighted this aspect in its correspondence with AVAS, which was also available to GM, it is assumed that GM too understood that this particular requirement could be accepted conditionally without having any practical consequences for its offer. However, if the price would also have to compensate for the failure to meet this criterion, the price differential would be even wider than explained above.

(59) It should here be emphasised that the production of 200 000 cars per year represents a doubling of the current capacity, which, particularly at the present time, is significantly underutilised. The production level that needs to be achieved is specified in detail and will therefore certainly lead to a substantial increase in market presence. The Commission considers that this situation is comparable to that in which the economic conduct of a company is influenced by state measures that reduce the costs normally borne by companies or by direct subsidies.

(60) As regards the distinction drawn by the Romanian authorities between conditions and the scoring model, the Commission does not recognise the relevance of the argument. Scoring the production and integration levels amounts *de facto* to the actual conditions attached to the privatisation, which, in the Commission's view, have reduced the sales price. It cannot accept the argument that the sales price obtained reflects the market value of the company. In this case too, there are indications for the Commission that potential investors with a different production strategy or industrial activity who did not envisage producing 200 000 cars per year and achieving a 60 % integration level might have been deterred from the start from submitting an offer and that their competitive position in the tender was without doubt significantly impaired. These appear to be circumstances in which the Romanian authorities opted for the scoring method described above. Indeed, a bidder with a different industrial strategy decided in the end not to submit an offer after participating in the tender procedure.

(61) As regards the negotiability of the conditions attached, the Commission cannot accept Romania's argument that the negotiability of the conditions was known to all potential investors and could be easily deduced from the tender documents. It is true that AVAS, in response to Ford's questions, confirmed that the draft SPA was only indicative and served as a basis for further negotiations. However, this statement refers only to those contractual negotiations which are inherent in a share sale by way of negotiations based on final, improved and irrevocable bids and does not generally provide confirmation that further negotiations on the mandatory terms set out in the public announcement and, in particular, the elements of the scoring grid were in fact possible. Romania did not provide any evidence which would show that the criteria of the scoring grid could have been considered negotiable. In fact, if the scoring criteria were negotiable, the scoring model would lose any practical relevance.

(62) The Commission does not agree with the argument put forward by Romania according to which AVAS confirmed that it was possible to change its position in the course of the negotiations. This answer refers exclusively to Ford's question regarding the planned requirement for the purchaser to renounce the right to claim protection and reimbursement from the State in the event of Automobile Craiova's assets being successfully claimed by third parties. It is the Commission's opinion that it cannot be deduced from this statement that all the conditions would generally be negotiable.

(63) The Commission cannot accept the calculations put forward by Romania, which aim at demonstrating that the price paid by Ford represents the market value of Automobile Craiova. First, the sales price paid by Ford for 72 % of Automobile Craiova, including DWAR and Mecatim, cannot be compared to the price that DWAR paid in 2006 for 51 % of its own shares. Also, the general economic context at the time of the latter sale has to be taken into account: when the bankrupt Daewoo Motors agreed to sell its 51 % in 2006, DWAR was confronted with significant liabilities (the pending customs claim, debts towards other Daewoo subsidiaries, etc.).

(64) Second, the comparison between the sales price and the stock exchange value of the shares in Automobile Craiova, which was about EUR 50 million, cannot be accepted. It does not take into consideration the fact that, for the acquisition of a majority holding, the value of the shares is significantly higher than the sum of the price for individual shares. In addition, since only a very small proportion of the shares are actually available on the market, the stock exchange price might not reflect the real value of the company.

(65) Accordingly, the Commission has to conclude that the conditions attached to the privatisation of Automobile Craiova have lowered the sales price and deterred other potential bidders from submitting a bid. As a direct result, the State has renounced the receipts from the privatisation.

(66) In the light of the above considerations, the Commission concludes that, in the case at issue, an economic advantage has been conferred by way of state resources on the economic activities privatised.

Open, transparent, non-discriminatory tender

(67) When initiating the procedure under Article 88(2) of the Treaty, the Commission had doubts whether the tender was transparent and non-discriminatory and, in particular, whether all potentially interested parties had equal access to information regarding the company to be privatised, the award criteria and the possibility of negotiating certain contractual terms with the privatisation agency. According to the information available at that time, the Romanian authorities held preliminary discussions with certain car producers before the official privatisation announcement was published.

(68) Romania argues that all potential investors had equal access to information, with none of them being favoured. The preliminary contacts that the government had with the potential interested parties did not affect the privatisation strategy and procedure.

(69) On the basis of the information supplied by them, the Commission notes that the Romanian authorities conducted informal preliminary discussions with several potential investors which addressed similar aspects regarding the company to be privatised: full ownership of the industrial assets, the company's debts and liabilities, and a swift privatisation process. It is presumed that the State as the seller would engage in those discussions with the aim of obtaining preliminary information such as market demand, minimum sales price, etc. Unless such discussions are conducted with the aim or result of establishing conditions to be attached to the tender, the Commission agrees that it can be considered usual for the government to engage in consultations and preliminary discussions with potential investors before publishing a privatisation announcement.

(70) After the publication of the privatisation announcement, only two potential bidders, Ford and GM, bought the presentation file, enabling them to obtain access to the Data Room and eventually to submit a final and binding offer. It is true that, after publication of the privatisation announcement, all correspondence between AVAS, on the one hand, and Ford and GM, on the other, was available to them in the Data Room. Therefore, the Commission concludes that, at that particular stage of the privatisation, both potential investors had equal access to information.

(71) In conclusion, on the basis of the information provided by Romania, the Commission's doubts as regards the open, transparent and non-discriminatory nature of the tender for the privatisation of Automobile Craiova have been allayed.

Waiving of debts

(72) When initiating the procedure under Article 88(2) of the EC Treaty, the Commission expressed doubts that AVAS might waive within the context of the privatisation certain debts of the company (in particular the customs claim amounting to EUR 800 million) and that it would offer a guarantee concerning the payment of debts towards the other former Daewoo subsidiaries.

(73) As regards the customs claim, Romania provided conclusive information showing that the customs claim was declared unfounded by a national court: the claim originated from the wrongful interpretation and application of national legislation. Thus, the customs claim was annulled. According to the case law of the Court of Justice, national courts must give full effect to Community law provisions regarding State aid. Further, national courts may refuse, if necessary, to apply any provision of national law that is contrary to Community law provisions ([17]). The Commission assessed the grounds for the annulment of the customs claim through the court judgment and concluded that it did not lead to the granting of new aid.

(74) As regards current liabilities deriving from the normal course of business, Romania argued that these will not be taken over by AVAS but will be paid by DWAR.

(75) As regards the guarantee offered by AVAS against contingent liabilities, the Romanian authorities explained that the state guarantee applies only to unknown claims related to DWAR's past activity, which no new investor could have assessed and quantified with due diligence. Further, Romania asserts that taking over such liabilities is normal business practice under the usual contractual negotiations.

(76) In conclusion, the Commission's doubts as regards the potential debt waiver expressed in the decision to initiate the procedure have been allayed.

Negotiation phase

(77) When initiating the procedure under Article 88(2) of the EC Treaty, the Commission had doubts whether, during the negotiation phase, AVAS changed the terms of the tender to such an extent as to favour Ford's business plan. Romania shows that the changes to other contractual terms which occurred during the negotiation phase are current business practice and are allowed under the privatisation strategy chosen for this company (i.e. negotiations based on final, improved and irrevocable bids). Romania also stressed that Ford's offer envisaged the acquisition of the production unit (currently DWAR); in exchange, Ford offered a package comprising the sales price of EUR 57 million plus the non-core assets which will remain in state ownership.

(78) During the negotiation phase, AVAS and Ford agreed on a corporate restructuring process which was also laid down in the SPA. Under this corporate restructuring, Automobile Craiova and Mecatim will be merged with DWAR. The core assets (i.e. industrial assets) of all three companies will remain in the ownership of DWAR. The remaining non-core assets (in particular real estate) will be hived off into a new company (Newco). The net excess cash available to DWAR will also be transferred to Newco. Further, AVAS has undertaken to use its best efforts to acquire the remaining shares of the new DWAR (i.e. core assets) from the minority shareholders and sell them to Ford.

(79) The arguments put forward by Romania have allayed the Commission's doubts regarding the negotiation phase.

6.1.2. *Selectivity*

(80) The measure is selective as it favours only Automobile Craiova, including the car producer DWAR.

6.1.3. *Distortion of competition and effect on trade between Member States*

(81) Automobile Craiova is a car and spare parts producer and DWAR a car producer, these products being widely traded across the European Union. Thus, the measure threatens to distort competition and to affect trade between Member States.

6.1.4. *Conclusion*

(82) In view of the considerations set out above, the Commission concludes that the conditions attached entail State aid because they lead to a reduction in the sales price for the 72,4 % stake in Automobile Craiova and confer an advantage on the privatised economic entity. The present decision applies only to this sale of the 72,4 % stake by AVAS to Ford. It does not prejudge any future assessment of a potential sale of the remaining 27,6 % of shares.

([17]) See, for example, Case C-119/05 *Italy v Lucchini*.

(83) The Commission notes that the economic activity benefits from the advantage conferred and from State aid.

6.2. **Quantification of the aid**

(84) The amount of State aid granted is equal to the difference between the market value of the company (i.e. the highest possible price which AVAS would have obtained for the 72,4 % participation in Automobile Craiova if no conditions had been attached) and the price actually received. This difference was borne by the State.

(85) Naturally, it is difficult to estimate what price would have been achieved in an open, transparent, non-discriminatory and unconditional tender. The best possible solution would be to annul the result of the tender and reorganise the privatisation, with no conditions being attached, thus ensuring that no State aid is granted. This solution was proposed to the Romanian authorities but they did not accept it.

(86) In order to assess the aid element granted to the privatised economic activity resulting from the privatisation, the market value of the company needs to be assessed. Following discussions with the Romanian authorities and Ford, and in the light of the particular circumstances of the case, the Commission considers it appropriate in the case at hand to base the analysis of the market value on the net asset value of the company sold.

(87) When looking at the book value of the company at the time of the tender, according to the balance sheet as of 31 March 2007 (i.e. the latest data available to the potential bidders for determining their bids), the total value of company's assets minus the total debts amounted to EUR – 465 million. This value does not include the real estate, which ultimately was not purchased by Ford. In addition, as explained above, in the SPA both parties decided that the sale would be followed by a corporate restructuring process. First, Ford would not acquire valuable non-core assets, which were to be carved out and to remain with AVAS. Second, AVAS would also retain the net excess cash of RON 310 million (around EUR 92 million), together with the corresponding liabilities of the company (it was estimated that the cash would be sufficient to pay the liabilities). Lastly, the balance sheet of March 2007 included the provisions for the potential repayment of the customs claim (described in points (25) and (73)), which significantly reduced the net asset value of the company; following the court's judgment this claim disappeared and the provision could be released.

(88) In addition to these elements, the Romanian authorities submitted arguments in favour of certain adjustments in the values in the balance sheet in order to adequately reflect the actual value of the assets. In particular, the value of land and buildings, machinery and equipment, other tangibles and inventories has been adjusted accordingly in order to reflect their actual market value.

(89) If all those factors are taken into account, i.e. the net excess cash is deducted, if liabilities and the provisions for the customs claim are disregarded and if, finally, the above adjustments are applied, the resulting net asset value of 100 % of DWAR would amount to EUR 115 923 000, meaning that the net asset value of 72,4 % of DWAR amounts to EUR 83 928 000.

(90) The difference between the net asset value as determined and the price actually paid by Ford (EUR 57 million) amounts to EUR 26 928 000. In conclusion, the State aid amounts to EUR 26 928 000 million.

6.3. **Classification of the state measure as unlawful aid**

(91) According to Article 1(f) of Council Regulation No 659/1999 'unlawful aid' means new aid put into effect in contravention of Article 88(3) of the EC Treaty.

(92) The Romanian authorities did not notify the measure before its implementation and put it into effect in contravention of Article 88(3). Consequently, the measure constitutes unlawful aid.

6.4. **Compatibility of the unlawful aid**

(93) Since it has been established that the state measure constitutes aid within the meaning of Article 87(1) of the EC Treaty, it is necessary to consider whether the measure could be compatible with the common market.

(94) The exemptions in Article 87(2) of the EC Treaty do not apply in the present case because the aid measure neither has a social character nor is granted to individual consumers. Moreover, the measure does not make good the damage caused by natural disasters or exceptional occurrences and is not granted to the economy of certain areas of the Federal Republic of Germany affected by its division.

(95) The exemptions provided for in Article 87(3)(b) and (d) of the EC Treaty do not apply either. They refer to aid to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State and to aid to promote culture and heritage conservation.

(96) This leaves the exemptions provided for in Article 87(3)(a) and (c) of the EC Treaty and in the relevant Community guidelines.

Rescue and restructuring guidelines

(97) The Commission does not possess any information which would show that the aid can be considered to be compatible with the EC Treaty on the basis of the Community guidelines on State aid for rescuing and restructuring firms in difficulty ([18]).

(98) Under these guidelines, the company receiving restructuring aid must be in difficulty, i.e. unable, whether through its own resources or with 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. It is true that DWAR made losses of EUR 350 million in 2006 and had debts of EUR 88 million; however, the company had assets valued at EUR 419 million (mainly real estate). Moreover, following the privatisation and the sale to Ford, DWAR would become part of a larger business group within the meaning of the guidelines which most likely could financially support it to overcome its difficulties. In conclusion, DWAR does not rank under the guidelines as a company in difficulty.

(99) In addition, the granting of restructuring aid is conditional on the existence of a sound restructuring plan the duration of which must be as short as possible and which restores the long-term viability of the firm within a reasonable timescale and on the basis of realistic assumptions as to the future operating conditions. Romania did not provide such a restructuring plan.

(100) Further, undue distortions of competition must be avoided. This usually takes the form of a limitation on the presence which the company can enjoy on its market or markets after the end of the restructuring period (i.e. compensatory measures). As regards Automobile Craiova, the conditions attached to the privatisation ensure a significant capacity increase and, thus, an increased presence on the relevant market.

(101) Despite the doubts raised by the Commission when initiating the formal investigation procedure, Romania did not establish that these conditions had been met. The Commission concludes therefore that the conditions laid down in the guidelines have not been met.

Regional aid guidelines

(102) The Commission notes that Automobile Craiova is located in an assisted area under Article 87(3)(a) of the EC Treaty that is eligible for regional aid. Nevertheless, Romania did not provide any information to show that the conditions for the granting of regional aid as laid down in the guidelines on national regional aid were met.

(103) The Commission notes that the conditions attached to the privatisation agreement did indeed relate to the planned investments and maintenance of employment, which could be compared to the objectives of regional aid. However, the point is made that the reduced price achieved by Ford was not made conditional on compliance with the rules set out in the guidelines on national regional aid, such as maintenance of the project in the region for a certain period of time, verification of eligible costs or rules concerning cumulation of aid, transparency and monitoring.

(104) In addition, the Commission notes that Romania notified the regional aid separately ([19]). This aid will be assessed in a new decision on its own merits.

Other guidelines and frameworks

(105) Furthermore, the Commission notes that the aid is not compatible under any other Community guidelines or frameworks. In any event, the Romanian authorities did not refer to any of these provisions.

([18]) OJ C 244, 1.10.2004, p. 2.

([19]) State aid N 767/07: Large Investment Project — Romania — Ford Craiova.

Conclusion

(106) In vies of the considerations set out above, the Commission concludes that the aid is incompatible with the common market.

7. **RECOVERY**

(107) Pursuant to Article 14(1) of Council Regulation (EC) No 659/1999, where negative decisions are taken in cases of unlawful aid, the Commission must decide that the Member State concerned must take all necessary measures to recover the aid from the beneficiary.

(108) Only incompatible aid can be recovered. The Commission has established that aid amounting to EUR 26 928 000 was unlawfully granted. This aid is not compatible under any of the EC State aid provisions and so needs to be recovered.

(109) The Commission concludes that the beneficiary of the State aid is the economic entity which has been privatised, i.e. the core industrial assets held by Automobile Craiova and DWAR or any subsequent entity. It notes that, according to the provisions of the SPA, following the corporate restructuring process, this economic entity will be the owner of only the core industrial assets, which have benefited from the conditions attached to the privatisation, and not of the non-core assets.

(110) In view of the specific suspension clauses in the SPA as well as the suspension injunction issued by the Commission, the SPA between AVAS and Ford has not yet entered into force. Consequently, the Commission concludes that the aid has not been put at the disposal of the beneficiary and so no recovery interest needs to be paid.

(111) The Commission notes that the net excess cash of Automobile Craiova and DWAR (as well as other non-core assets) is not part of the transaction between AVAS and Ford and is not therefore taken over by the latter. Thus, when calculating the net asset value of the company for the quantification of the aid, the Commission did not take into account this net excess cash. In conclusion, following the present decision, the aid will not be repaid out of this net excess cash. The Commission therefore, requests to be kept informed about the corporate restructuring and in particular to be given evidence on the level of the net excess cash at the date of the SPA and at the date of the repayment, as well as information on any differences arising between those two dates,

HAS ADOPTED THIS DECISION:

Article 1

The State aid which Romania has implemented under the privatisation process for Automobile Craiova, amounting to EUR 26 928 000, is incompatible with the common market.

Article 2

1. Romania shall take all necessary measures to recover from the beneficiary the aid referred to in Article 1 and unlawfully made available to the beneficiary.

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

3. Interest shall be calculated on a compound basis in accordance with Chapter V of Commission Regulation (EC) No 794/2004 ([20]).

4. Recovery shall be effected without delay and in accordance with the procedures of national law provided that they allow the immediate and effective execution of the Decision.

Article 3

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

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

Article 4

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

(a) the total amount to be recovered from the beneficiary;

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

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

(d) documents demonstrating that the aid has been repaid;

([20]) OJ L 140, 30.4.2004, p. 1.

(e) documents demonstrating that the aid has not been repaid out of the non-core industrial assets which are to be transferred to the newly created company owned by AVAS and the minority shareholders (in particular, net excess cash and real estate) as defined in the sale-purchase agreement;

(f) a detailed description of the implementation of the corporate restructuring process as defined in the sales-purchase agreement.

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

Article 5

This Decision is addressed to Romania.

Done at Brussels, 27 February 2008.

For the Commission
Neelie KROES
Member of the Commission

ANNEX

Information regarding the application of the Commission Decision in case C 46/07 (ex NN 59/07) on aid implemented by Romania for Automobile Craiova

Information about the amounts of aid received, to be recovered and already recovered

Identity of the beneficiary	Total amount of aid received (*)	Total amount of aid to be recovered (*) (Principal)	Total amount already repaid (*)	
			Principal	Recovery interest

(*) In of national currency (million)

COMMISSION DECISION

of 16 April 2008

on the measure C 29/07 (ex N 310/06) which Hungary is planning to implement in the form of a short-term export-credit guarantee for SMEs with limited export turnover

(notified under document number C(2008) 1332)

(Only the Hungarian version is authentic)

(Text with EEA relevance)

(2008/718/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

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

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

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

Whereas:

1. PROCEDURE

(1) By electronic notification dated 17 May 2006, the Hungarian authorities notified the above-mentioned measure (hereinafter referred to as the measure) pursuant to Article 88(3) of the EC Treaty. The notification was supplemented by letter dated 21 June 2006, registered at the Commission on 22 June 2006.

(2) By letters dated 1 August 2006, 30 October 2006 and 30 April 2007, the Commission requested additional information, which was provided by Hungary by letters dated 12 September 2006, 21 March 2007 and 30 May 2007, registered at the Commission on the same days.

(3) By letter dated 18 July 2007 (hereinafter referred to as the decision initiating proceedings), the Commission informed Hungary that it had decided to initiate the procedure laid down in Article 88(2) of the EC Treaty in respect of the measure.

(4) The Commission decision to initiate the procedure was published in the *Official Journal of the European Union* [2]. The Commission invited interested parties to submit their comments on the aid.

(5) The Commission received no comments from interested third parties. The comments of the Hungarian authorities were received by letter dated 21 September 2007.

2. DESCRIPTION OF THE MEASURE

2.1. Objective

(6) The objective of the measure is to provide short-term export-credit guarantees to finance export transactions by SMEs [3] with an annual export turnover not exceeding EUR 2 million (hereinafter referred to as SMEs with limited export turnover). Hungary wishes to implement the measure under point 2.5 of the Communication of the Commission to the Member States pursuant to Article 93(1) of the EC Treaty applying Articles 92 and 93 of the Treaty to short-term export-credit insurance [4] (hereinafter referred to as the 'Communication on short-term export-credit insurance' or 'Communication').

2.2. Terms and conditions of the guarantee

(7) The guarantee in relation to the repayment of a loan to finance export transactions can be given:

(a) to an exporting domestic SME with limited export turnover in order to enhance its ability to take out a loan from a commercial bank. In such a case, the risks may be associated directly with the seller (i.e. the exporting SME), and indirectly with the buyer;

(b) to a foreign buyer purchasing goods and services from a domestic SME with limited export turnover, in order to enhance the ability of the buyer to take out a loan from a commercial bank. In such a case, the risks are associated directly with the buyer. There is no restriction as to the country of the buyer, i.e. the buyer can be located either in one of the countries listed in the Annex to the Communication or in another country. Nor is there any restriction as regards the size of the foreign buyer (i.e. it can be a large enterprise).

[1] OJ C 234, 6.10.2007, p. 18.
[2] Idem.
[3] As defined in the Hungarian Act XXXIV of 2004. This definition of SMEs is in line with the relevant criteria contained in the Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises (OJ L 124, 20.5.2003, p. 36).
[4] OJ C 281, 17.9.1997.

(8) The Hungarian authorities state that in both the above cases the guarantee must finance an export transaction. The maximum maturity of the guarantee is two years.

(9) The amount of the guarantee may not exceed 70 % of the value of the export contract (reduced by an advance payment of at least 15 %) or 70 % of the underlying loan.

(10) Exporting SMEs with limited export turnover are not eligible for the guarantee if they are involved in bankruptcy or liquidation proceedings or are in receivership. No information has been submitted as to the existence of any such restrictions regarding guarantees given to foreign buyers.

Risk assessment

(11) In case of guarantees covering domestic risks (i.e. guarantee for the exporting SME), the fee depends on the credit-worthiness of the exporting SME and is set on the basis of a five-grade rating system based on objective criteria as well as subjective evaluation, carried out in line with commercial bank practice.

(12) In the case of guarantees covering foreign risks (i.e. guarantee for the foreign buyer), the buyers are assigned to risk categories on the basis of their countries.

Guarantee fee

(13) As for the guarantee fee, the Hungarian authorities specified that it would be in the range of 0,5 %-2,0 % annually.

(14) In addition to the above, a one-off management fee of 0,1 % of the guaranteed amount is also payable.

(15) The Hungarian authorities claim that revenues from the fees will cover the operating costs of the scheme and the guarantee claims. The fees are subject to quarterly review.

(16) The Hungarian authorities have also indicated that guarantee cover for the type of risks in question is not available on the Hungarian market. In order to substantiate this, Hungary submitted declarations by two Hungarian commercial banks having an international background stating that guarantee provision to finance export activities of SMEs with limited export turnover does not distort the market activity of commercial banks and enhances their willingness to take risks. Moreover, Hungary also submitted declarations by two large international export-credit insurers and one national credit insurer confirming the market gap and stating that they are not active in this segment of the market.

2.3. **Implementing body**

(17) The guarantee is issued by the Hungarian Export-Import Bank (hereinafter referred to as Eximbank), a fully state-owned export-credit agency.

(18) Eximbank benefits from state support in the form of a guarantee covering any liability resulting from the implementation of the measure.

2.4. **Legal basis**

(19) The measure is based on Article 6(1)(b) of Act XLII of 1994 on the Hungarian Export-Import Bank Corporation and the Hungarian Export Credit Insurance Corporation as well as on Articles 1(2) and 11/A(13) of Government Decree 85/1998 (V.6.).

2.5. **Budget**

(20) The total amount of guarantee cover to be given by Eximbank over the two-year period of the measure is HUF 15 billion (EUR 60 million).

2.6. **Duration**

(21) The duration of the measure is limited to two years after its approval by the Commission.

2.7. **Grounds for initiating the formal investigation procedure**

(22) In the decision initiating proceedings the Commission considered that the measure raised doubts since the export guarantee to be given by Eximbank and the export-credit insurance covered by the Communication appeared to differ in a number of respects, in particular:

(a) they cover different types of risk. While export-credit insurance always covers risks associated with the buyer (i.e. the risk that the buyer might not pay the supplier), the guarantee to be given by Eximbank to an exporting SME with limited export turnover covers the risks of non-repayment of a loan by the exporter itself, which is in fact a support for export activities of SMEs with limited export turnover not exclusively linked to the risks of the buyer. The Eximbank guarantee can also be provided for the buyer (including large companies), covering risks associated with the buyer. However, these risks involve the non-repayment of a commercial loan by the buyer, whereas export-credit insurance covers risks of non-payment for the purchased goods and services by the foreign buyer. It follows that the guarantee given to the foreign buyer enhances its ability to take out loans on more favourable terms, whereas export-credit insurance has no such effect;

(b) in Hungary the legal bases of the two activities concerned are well defined and different: a guarantee is a financial service which can be provided solely by financial institutions whereas insurance activity can only be performed by an insurer falling under the scope of the Insurance Act. This fact might explain the declarations submitted by the export-credit insurers stating that they do not operate in the segment of export-credit guarantees (in fact, they cannot do so under the law). The declarations made by two Hungarian banks are also ambiguous since the guarantee by Eximbank would decrease the risks they would have to bear without it and thus they seem to benefit from such a measure.

(23) In so far as the Communication is not applicable, the measure might rank as State aid directly linked to export (within as well as outside the Community), which is incompatible with the common market. The Commission has always strictly condemned export aid in intra-Community trade, and support for export outside the Community can also affect competition within the Community.

(24) Finally, even if export-credit insurance and the Eximbank guarantee were equivalent and the Communication was applicable, some concerns would remain. Since the Commission's approval on 22 January 2007 of the measure N 488/06 — 'Export credit insurance for SMEs with limited export turnover' for a period of two years, MEHIB (the other Hungarian state-owned export-credit agency) has already been providing short-term export-credit insurance for the risks incurred by SMEs with limited export turnover, so that such cover is already available on the market. Moreover, allowing two state-supported export-credit agencies to provide services and establish their client base in this segment might defer the entry of potential market players.

3. COMMENTS FROM HUNGARY

(25) No third parties commented on the Commission decision initiating proceedings. The comments submitted by the Hungarian authorities can be summarised as follows:

(a) Hungary agrees that, whereas insurance always covers risks associated with the buyer, the guarantee to be given by Eximbank to an exporting SME with limited export turnover covers the risks of non-repayment of a loan by the exporter itself. However, Hungary considers that even in that case the risks are primarily associated with the buyer, since the repayment of the loan taken out by the exporting SME depends primarily on the buyer paying for the purchased goods;

(b) Hungary agrees that the risks covered by export-credit insurance and those covered by the Eximbank guarantee that is given to the foreign buyer are different. Moreover, Hungary also refers to commercial bank practice which appraises guarantees more favourably than insurance as loan collateral since insurers often refuse to pay by designating the case as a commercial dispute;

(c) Hungary points to the fact that it submitted the declarations made by insurers, which the Commission had already accepted for measure N 488/06. Hungary furthermore agrees that the guarantee given by Eximbank would decrease the risks commercial banks would have to bear without it, which is why the banks provided their declarations as interested parties;

(d) Hungary indicates that the scheme would not be applied in parallel to the already existing export-credit insurance scheme N 488/06 with regard to the same transaction. Hungary also emphasises that a single export-credit agency cannot cover all SMEs with limited export turnover and this may lead to harmful selection among them. Hungary also claims that the Eximbank guarantee scheme would allow commercial banks to gather experience concerning the risks involved and to build up a commercial export-credit guarantee market over a period of 2-3 years;

(e) Hungary claims that the rules concerning medium and long-term export-credit [1] apply to export-credit insurance, guarantees and refinancing as well. Therefore, it is not appropriate to interpret the Communication setting out the rules on short-term export-credit insurance so that it only covers insurance and leaves out other short-term transactions, since that would discriminate against export-credit guarantee institutions.

4. ASSESSMENT OF THE MEASURE

(26) The notification concerns only one part of the public activities of Eximbank, namely the guarantee scheme for export contracts. Therefore, the assessment of this guarantee scheme is without prejudice to any Commission position on the overall relation between the State and Eximbank and on any other product of Eximbank.

4.1. Applicability of the Communication on short-term export-credit insurance

(27) The arguments put forward by the Hungarian authorities (summarised in paragraph 25 above) do not dispel the Commission's initial doubts. In particular:

(a) the decision initiating proceedings stated that, in contrast to export-credit insurance, Eximbank guarantees given to exporting SMEs with limited export turnover are not exclusively linked to the risks of the buyer. This difference seems to be confirmed by the Hungarian authorities, since according to them the risk of non-repayment of a loan by the exporting SME is not exclusively but only primarily linked to the buyer;

(b) the decision initiating proceedings also indicated that the risks covered by the Eximbank guarantee given to the foreign buyer and the risks covered by export-credit insurance are different. The arguments put forward by Hungary do not refute this;

(c) the decision initiating proceedings stated that the declarations submitted by commercial insurers confirming that they do not operate in this specific segment of the guarantee market are irrelevant, since they are not allowed to grant guarantees by law. In case N 488/06 the same declarations were relevant, since that measure concerned short-term export-credit insurance;

(d) the decision initiating proceedings stated that even though the two instruments (guarantee and insurance) would not be applied for the same transaction, a second measure might provide further benefits to Hungarian exporting SMEs with limited export turnover. This seems to be confirmed since the Hungarian authorities indicated that commercial banks are in general more willing to accept a guarantee as collateral, which means that the availability of such guarantees entails additional benefits for the SMEs;

(e) as regards the rules on medium- and long-term export-credit referred to by Hungary, those provisions are based on Treaty provisions relating to external trade (Article 132 of the Treaty). As the Court of Justice has confirmed, they can therefore not preclude the application of the State aid provisions of the EC Treaty [2]. Moreover, the Communication on short-term export-credit insurance has the declared aim of removing distortion of competition due to State aid in the sector of export-credit insurance business where there is competition between public and private export-credit insurers, i.e. the Communication refers and is applicable only to insurance.

(28) The comments of the Hungarian authorities confirm the interpretation set out in the decision initiating proceedings that the guarantee to be granted by Eximbank differs in important respects from export-credit insurance. Therefore, the measure cannot be assessed under the Communication on short-term export-credit insurance.

4.2. Presence of State aid

(29) Since the measure cannot be assessed under the Communication on short-term export-credit insurance, it has to be established whether it can be considered State aid within the meaning of Article 87(1) of the EC Treaty [3].

[1] Council Directive 98/29/EC of 7 May 1998 on harmonisation of the main provisions concerning export-credit insurance for transactions with medium and long-term cover.

[2] Case C-142/87 *Belgium* v *Commission* ('Tubemeuse'), [1990] ECR I-959, paragraph 32.

[3] The Commission notes that the scheme also does not fall under the 'guarantee notice' (OJ C 71, 11.3.2000). Point 1.2 of the guarantee notice states that it does not apply to export-credit guarantees. Since the measure provides guarantee against the non-repayment of loans which have been contracted to finance an export transaction, the Commission considers that the guarantee notice is not applicable.

(30) In order for a measure to fall within the scope of Article 87(1) of the EC Treaty, four criteria must all be met:

— the measure must involve the use of State resources,

— the measure must confer a selective advantage on the beneficiary,

— the measure must affect trade between Member States,

— the measure must threaten to distort competition.

Transfer of State resources

(31) The measure is imputable to the State since it is implemented by a fully state-owned export agency set up with the funds of the State, carrying out transactions as required by State regulations and benefiting from a state counter-guarantee for the types of risks in question.

Economic advantage

(32) The guarantee fee is set on the basis of a risk-rating system which should normally result in a higher fee for riskier clients. It should be noted in this respect that the risk rating system takes into account a wide range of factors as regards domestic risks but relies on only one criterion (i.e. the country of the buyer) as regards foreign risks.

(33) The Hungarian authorities claim that the fees to be charged are in line with the market fee charged by international commercial insurers or guarantors for the type of risks in question. However, Hungary has not demonstrated (e.g. through independent data or an independent study) that the fees resulting from the risk assessment are in fact aligned with the market level.

(34) The claim that the guarantee fees cover the operating costs of the scheme and the guarantee claims must be viewed as a positive aspect. However, this claim by Hungary has not been substantiated with data.

(35) Moreover, the Hungarian authorities argue that no guarantee cover for the type of risks in question is available on the Hungarian market. Therefore, the measure at hand provides an economic advantage also through the provision of guarantee cover which would otherwise not be available on the market.

(36) The Hungarian authorities have not provided comments on these aspects. The Commission therefore considers that the measure confers an economic advantage on the beneficiaries.

Selectivity

(37) The measure is selective since it concerns only export transactions carried out by SMEs with limited export turnover and because the annual Budget Act sets an overall limit to the amount of guarantee given by Eximbank and counter-guaranteed by the State.

Effect on competition and trade

(38) The measure has a potential effect on competition and trade between Member States since it is directly linked to export transactions of SMEs with limited export turnover. In addition, intra-Community export is not excluded.

(39) Consequently, the measure is to be considered State aid within the meaning of Article 87(1) of the EC Treaty.

4.3. **Compatibility of the measure**

(40) State aid can be declared compatible with the common market if it complies with one of the exceptions provided for in the EC Treaty. Article 87(2) provides for automatic exemptions from the general ban on State aid; however, it is clear that in the case at hand none of these exemptions apply.

(41) Article 87(3) specifies four types of cases in which State aid can be considered compatible with the common market. Article 87(3)(a) covers aid to promote the economic development of disadvantaged regions. It should be noted in this respect that, in the case at hand, the conditions of the guarantee are not modulated according to the level of backwardness of the region where the exporting SME operates. Also, the scheme covers the whole territory of Hungary whereas under the current Hungarian regional aid map 2007-2013 ([1]), only part of Hungary is eligible for aid under Article 87(3)(a). The measure does not fulfil other conditions of the Guidelines on national regional aid for 2007-2013 ([2]) either. Consequently, this exemption does not apply in the present case.

([1]) N 487/06 — Commission letter of 13.9.2006, OJ C 256, 24.10.2006, p. 7.
([2]) OJ C 54, 4.3.2006, p. 13.

(42) Article 87(3)(b) provides that aid to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State could be considered compatible with the common market. This provision is not applicable in the case at hand. Nor does Article 87(3)(d) covering aid to promote culture and heritage conservation apply.

(43) Article 87(3)(c) provides that aid to facilitate the development of certain economic activities or of certain economic areas can be considered compatible with the common market, where such aid does not adversely affect trading conditions to an extent contrary to the common interest. The Commission has developed various guidelines and communications setting out how it intends to implement this article. Since none of these apply to the present case, any State aid involved in the measure at hand is to be assessed directly under Article 87(3)(c) of the Treaty.

(44) In this context, it should be noted that an export insurance scheme benefiting export transactions of SMEs with limited export turnover already exists and has been approved by the Commission [1] in accordance with the provisions of the Communication on short-term export-credit insurance. The Commission considers that Hungary has not demonstrated the necessity of an additional instrument benefiting export transactions of SMEs with limited export turnover.

(45) Moreover, it is recalled that the Commission has in principle strictly condemned export aid in intra-Community trade, since export subsidies directly affect competition in the market between rival potential suppliers of goods and services. Since it is closely and inseparably linked to the underlying trade transaction, such export aid is likely to adversely affect trading conditions to a considerable extent. In its previous decisions [2] the Commission clearly indicated that guarantees offered at below market price in the context of export contracts within the Community constitute export aid which is incompatible with the common market. Moreover, Member States' support for their exports outside the Community can also affect competition within the Community.

5. **CONCLUSION**

(46) For the reasons set out above, the Commission concludes that the measure entails State aid within the meaning of Article 87(1) of the EC Treaty. Since it does not facilitate the development of certain economic activities or of certain economic areas without adversely affecting trading conditions to an extent contrary to the common interest, the measure cannot be justified under Article 87(3)(c) of the EC Treaty and is therefore not compatible with the common market. Since the measure has not been implemented, there is no need for recovery of state aid,

HAS ADOPTED THIS DECISION:

Article 1

The state aid which Hungary is planning to implement in the form of a short-term export-credit guarantee for SMEs with limited export turnover is incompatible with the common market.

The aid may accordingly not be implemented.

Article 2

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

Article 3

This Decision is addressed to the Republic of Hungary.

Done at Brussels, 16 April 2008.

For the Commission

Neelie KROES

Member of the Commission

[1] State aid N 488/06.

[2] Commission Decision of 17 May 1982 concerning the subsidising of interest rates on credits for exports from France to Greece after the accession of that country to the European Economic Community (OJ L 159, 10.6.1982, p. 44); Commission Decision of 27 June 1984 concerning the French Government's intention to accord special exchange risk cover to French exporters in respect of a tender for the construction of a power station in Greece (OJ L 230, 28.8.1984, p. 25).

COMMISSION DECISION

of 30 April 2008

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

(notified under document number C(2008) 1625)

(Only the German version is authentic)

(Text with EEA relevance)

(2008/719/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

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

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

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

Whereas:

I. PROCEDURE

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

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

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

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

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

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

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

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

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

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

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

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

II. DETAILED DESCRIPTION OF THE AID

1. The Consortium (the complainant)

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

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

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

2. GRAWE (the beneficiary)

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

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

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

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

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

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

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

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

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

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

(*) *Business secret*.

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

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

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

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

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

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

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

4. **The restructuring of BB**

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

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

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

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

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

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

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

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

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

5. **The privatisation of BB**

5.1. The privatisation process

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

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

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

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

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

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

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

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

5.2. The selection criteria in the process letter

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

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

(b) maintenance of the autonomy of BB;

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

(d) willingness to conduct any necessary capital increases;

(e) transaction security;

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

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

5.3. The warranty clause in the contract with GRAWE

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

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

5.4. The recommendation by HSBC

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

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

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

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

Doubts related to the tender procedure

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

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

Other considerations

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

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

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

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

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

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

IV. COMMENTS FROM INTERESTED PARTIES

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

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

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

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

V. COMMENTS FROM AUSTRIA AND GRAWE

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

1. Admissibility

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

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

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

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

The circumstances of the tender

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

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

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

The recommendation

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

The comparability of the offers by GRAWE and the Consortium

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

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

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

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

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

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

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

The warranty clause concerning State aid in the contract with GRAWE

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The liquidation scenario presented by Austria

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

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

The refinancing of BB after its sale

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

VI. **LEGAL ASSESSMENT OF THE AID**

1. **Admissibility**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2.2. Existence of State aid

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

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

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

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

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

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

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

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

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

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

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

The first element of the first aspect: transaction security

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2.3. The conditions attached to the sale of BB

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

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

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

2.4. Other considerations concerning 'Ausfallhaftung'

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Other methodologies presented by Austria and GRAWE

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

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

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

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

2.6. Final conclusion on the existence of State aid

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

3. **Compatibility with the common market**

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

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

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

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

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

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

5. **Recovery**

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

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

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

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

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

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

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

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

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

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

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

VII. **CONCLUSION**

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

HAS ADOPTED THIS DECISION:

Article 1

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

Article 2

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

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

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

Article 3

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

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

Article 4

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

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

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

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

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

Article 5

This Decision is addressed to the Republic of Austria.

Done at Brussels, 30 April 2008.

For the Commission

Neelie KROES

Member of the Commission

CORRIGENDA

Corrigendum to Commission Regulation (EC) No 116/2008 of 28 January 2008 amending Council Regulation (EC) No 423/2007 concerning restrictive measures against Iran

(Official Journal of the European Union L 35 of 9 February 2008)

On page 54, under I.9B.004:

for: 'goods specified in 9A005, I.9A.002',

read: 'goods specified in I.9A.002'.

Corrigendum to Commission Regulation (EC) No 117/2008 of 28 January 2008 amending Council Regulation (EC) No 329/2007 concerning restrictive measures against the Democratic People's Republic of Korea

(Official Journal of the European Union L 35 of 9 February 2008)

On page 121, under I.9B.004:

for: 'goods specified in 9A005, I.9A.002',

read: 'goods specified in I.9A.002'.

NOTE TO THE READER

The institutions have decided no longer to quote in their texts the last amendment to cited acts.

Unless otherwise indicated, references to acts in the texts published here are to the version of those acts currently in force.