Reports of Cases

JUDGMENT OF THE GENERAL COURT (Sixth Chamber)

28 February 2012 *

(State aid — Aid granted by the Austrian authorities to the Grazer Wechselseitige group (GRAWE) in connection with the privatisation of Bank Burgenland — Decision declaring the aid to be incompatible with the common market and ordering its recovery — Private investor in a market economy test — Application where the State acts as vendor — Determination of the market price)

In Joined Cases T-268/08 and T-281/08,

Land Burgenland (Austria), represented by U. Soltész and C. Herbst, lawyers,

applicant in Case T-268/08,

Republic of Austria, represented by G. Hesse, C. Pesendorfer, E. Riedl, M. Fruhmann and J. Bauer, acting as Agents,

applicant in Case T-281/08,

v

European Commission, represented initially by V. Kreuschitz, N. Khan, K. Gross and T. Maxian Rusche, and subsequently by V. Kreuschitz, N. Khan and T. Maxian Rusche, acting as Agents,

defendant,

APPLICATION for annulment of Commission Decision 2008/719/EC of 30 April 2008 on State aid C 56/06 (ex NN 77/06) implemented by Austria for the privatisation of Bank Burgenland (OJ 2008 L 239, p. 32),

THE GENERAL COURT (Sixth Chamber),

composed of M. Jaeger, President, N. Wahl (Rapporteur) and S. Soldevila Fragoso, Judges,

Registrar: T. Weiler, Administrator,

having regard to the written procedure and further to the hearing on 18 May 2011,

gives the following

* Language of the case: German.

Judgment

Background to the dispute

Hypo Bank Burgenland AG and Ausfallhaftung

1 Until its privatisation, HYPO Bank Burgenland AG ('BB') was a regional bank taking the form of a company limited by shares under Austrian law with its registered office in Eisenstadt (Austria). Its activities, which initially primarily consisted of granting mortgage loans and issuing mortgage and municipal bonds, were gradually extended to every kind of banking and financial service. In 2005, BB had a balance sheet value of EUR 3.3 billion and was wholly owned by Land Burgenland (the Province of Burgenland).

2 Under Paragraph 4 of the Landes-Hypothekenbank Burgenland-Gesetz (Law on the mortgage bank of the Province of Burgenland, LGBl. No 58/1991), in the version published in LGBl. No 63/1998, if BB defaulted, the Province of Burgenland was liable as deficiency guarantor under Paragraph 1356 of the Allgemeines Bürgerliches Gesetzbuch (Austrian Civil Code) for all the bank's liabilities. Under those provisions, the creditors of the bank have direct rights against the guarantor, which is, however, only required to act when the assets of the bank are not sufficient to cover the debts.

3 That performance guarantee system for public credit institutions (called '*Ausfallhaftung*'), particularly the guarantee of the province in favour of BB and its predecessors, has existed in a virtually unchanged form since 1928. The system covered neither a specific period nor a specific amount. Under the statutory guarantee system (*Gewährträgerhaftung*) which came into force on 29 June 1991, the Province of Burgenland received a fee for providing that statutory guarantee. Following an agreement between the Commission of the European Communities and the Republic of Austria, on the basis of which Commission Decision C(2003) 1329 final of 30 April 2003, relating to aid E 8/02, was adopted (OJ 2003 C 175, p. 8), *Ausfallhaftung* had to be abolished by 1 April 2007. As a general rule, all liabilities existing on 2 April 2003 continued to be covered by *Ausfallhaftung* until their expiry. *Ausfallhaftung* could be maintained between 2 April 2003 and 1 April 2007 for newly created liabilities provided that they would expire by 30 September 2017.

Aid for the restructuring of BB authorised by the Commission in 2004

4 Following fraud linked to credit granted to HOWE Bau AG, established during the auditing of the annual accounts for 1999, BB found itself confronted with serious financial difficulties. The Province of Burgenland therefore concluded a guarantee agreement on 20 June 2000 for an amount of EUR 171 million, with interest of 5%, in order to cover BB's bad debts, which would have led to overindebtedness of that company. Also, in order to cover the additional doubtful debts discovered during a comprehensive audit, a framework agreement was concluded on 23 October 2000 with BB's main creditor, Bank Austria Creditanstalt AG. That agreement provided for a waiver by Bank Austria Creditanstalt of the reimbursement of loans to BB, an arrangement as to future profits concluded between those two parties and a guarantee by the Province of Burgenland of an amount of EUR 189 million.

5 By letter dated 18 June 2002 and supplementary communications dated 3 July and 9 September 2002, the Republic of Austria notified the Commission of the guarantee agreements concluded by the Province of Burgenland and presented a restructuring plan for BB to the Commission.

6 By letter dated 26 June 2003, the Commission notified the Austrian authorities of its decision to initiate the procedure provided for in Article 88(2) EC in respect of the aid described.

7 By letter dated 19 December 2003, the Austrian authorities announced that, in the context of the process of privatising BB, they intended to amend the aid measures in question.

8 By letter dated 21 January 2004, the Commission notified the Republic of Austria of its decision to extend the formal procedure initiated under Article 88(2) EC to the planned amendments to the aid measures for restructuring BB.

9 On 7 May 2004, the Commission adopted Decision 2005/691/EC on State aid C 44/03 (ex NN 158/01) which Austria is planning to implement for BB (OJ 2005 L 263, p. 8) ('the 2004 Decision'). The Commission was essentially of the view that the two guarantee agreements between the Province of Burgenland and BB constituted State aid, particularly because those measures had been adopted on conditions that would not have been acceptable to a private investor and thus gave BB an artificial advantage over its competitors. Furthermore, those measures and their effects on existing and potential competitors from other Member States distorted or threatened to distort competition and affected trade between Member States. However, the Commission concluded that the restructuring measures at issue were compatible with the common market, in accordance with Article 87(3)(c) EC in conjunction with the Community guidelines on State aid for rescuing and restructuring firms in difficulty (OJ 1999 C 288, p. 2). In the course of its review of the long term viability of the undertaking benefiting from the aid, the Commission pointed out that it had based its assessment on the information provided by the Austrian authorities, including the schedule for completing the planned privatisation of BB.

The disputed measure taken when privatising BB

10 After two unsuccessful attempts in 2003 and in 2005, the Province of Burgenland launched a third procedure for the privatisation of BB, whose carrying out was entrusted to the investment bank HSBC Trinkaus & Burkhardt KGaA in Düsseldorf (Germany) in collaboration with HSBC plc in London (United Kingdom) (together 'HSBC'). That procedure started in October 2005 with the publication in the press of a call for tenders.

11 Out of the 14 bidders who formally signalled an interest in making an offer, only three came forward with complete indicative offers in time — which were pitched at EUR 65 million, 100 million and 140 million respectively — and took part in the second phase of the tender procedure, at the end of which a binding offer had to be made by 6 February 2006 at the latest. Two bidders, one being the Austrian insurance company Grazer Wechselseitige Versicherung AG together with GW Beteiligungserwerbs- und -verwaltungs-GmbH ('GRAWE') and the other being an Austro-Ukrainian consortium consisting of the Austrian undertakings SLAV AG and SLAV Finanzbeteiligung GmbH and the Ukrainian joint-stock companies Ukrpodshipnik and Ilyich ('the Consortium'), made binding offers. Those offers subsequently formed the subject of an individual examination and of contractual negotiations which ended on 4 March 2006.

12 On 5 March 2006, the Province of Burgenland awarded BB 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). That decision was based in particular on a written recommendation by HSBC 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. HSBC's recommendation essentially stated that while, having regard to the proposed purchase price, the decision should be made in favour of the Consortium, it was recommended that BB be sold to GRAWE, in view of the other selection criteria, namely the reliability of the purchase price payment, the continued operation of BB while avoiding the use of *Ausfallhaftung*, capital increases and transaction security.

13 The sale of BB, which was formally approved by the authorities of Burgenland on 7 March 2006, was closed on 12 May 2006. Before that closing, BB issued bonds, within the framework of *Ausfallhaftung*, in the amount of EUR 700 million, of which EUR 350 million were subscribed by a subsidiary of GRAWE. Finally, as a result of the privatisation, the transitional period for applying *Ausfallhaftung*, referred to in paragraph 3 above, ended prematurely on the day of the closing.

Administrative procedure

14 On 4 April 2006, the Commission received a complaint from the Consortium claiming that the Republic of Austria had infringed the State aid rules during the privatisation of BB. The complainant contended inter alia that the tender procedure, which had been unfair, untransparent and discriminatory towards the complainant, had resulted in the sale of BB not to the highest bidder (the Consortium) but to GRAWE.

15 The Austrian authorities responded by letters dated 15 May and 1 June 2006 to a request for information made by the Commission on 12 April 2006. Subsequently, on 27 June 2006, a meeting was organised between representatives of the Republic of Austria and the Commission and, on 17 July 2006, the Commission sent a second request for information, to which the Austrian authorities responded on 18 September 2006. The Consortium sent further information to the Commission on 21 April and 2 June 2006.

16 By letter dated 21 December 2006, the Commission informed the Austrian authorities of its decision in respect of the sale of BB to GRAWE to initiate the formal examination procedure laid down in Article 88(2) EC. That decision was published in the *Official Journal of the European Union* on 8 February 2007 (OJ 2007 C 28, p. 8).

17 On 1 March 2007, the Republic of Austria submitted its observations on that decision to the Commission. In addition, the Commission received observations and information from interested third parties, including GRAWE and the Consortium, upon which the Austrian authorities commented. Furthermore, several meetings took place between representatives of the Republic of Austria and the Commission. Finally, the Austrian authorities sent additional observations and documents to the Commission on several occasions.

18 On 30 April 2008, the Commission adopted Decision 2008/719/EC on State aid C 56/06 (ex NN 77/06) implemented by Austria for the privatisation of BB (OJ 2008 L 239, p. 32) ('the contested decision').

The contested decision

19 In the contested decision, the Commission points out inter alia that, in order to assess a measure taken in the context of a privatisation in light of the rules relating to State aid, it relies on a number of principles which it has set out in the *XXIIIrd Report on Competition Policy* of 1993 (paragraph 402 et seq.) and in its previous practice. It states that the conditions set out in that report in order for a finding to be made that no State aid within the meaning of Article 87(1) EC is involved were not complied with in the present case.

20 Ruling on the question of whether the sale of BB to GRAWE constitutes State aid, the Commission firstly points out that the resources of the Province of Burgenland (which is one of nine provinces in Austria) must be regarded as 'granted by a Member State or through State resources'. Furthermore, the Commission notes GRAWE's international activities, so that any advantage from State resources would adversely affect competition in the banking sector and have an impact on intra-Community trade. As for the question of whether GRAWE received a selective advantage, the Commission points out that it must be established whether the Province of Burgenland behaved like any seller operating in a market economy (private vendor test).

21 As to that latter aspect, pointing out that the Province of Burgenland received a bid from the Consortium which at face value exceeded the offer of GRAWE by EUR 54.7 million, the Commission states that an economic operator operating in a market economy might nevertheless accept the lower bid in two situations.

22 The first is the situation where it is obvious that the sale to the highest bidder is not realisable, which means in the present case examining firstly transaction security through the economic soundness of the Consortium and secondly the probability that that Consortium would not eventually obtain the required permission from the Finanzmarktaufsicht (Austrian authority responsible for the supervision of financial markets, 'the FMA'). According to the Commission, not only was there no reason to doubt that the purchase price of EUR 155 million offered by the Consortium could be financed, but nothing indicated or proved that the FMA would have prohibited the sale of BB to the Consortium.

23 The second situation covers the case where the taking into account of factors other than the price is justified, subject to the proviso that only those factors can be considered which would have been taken into consideration by a market economy investor, which, according to the Commission, excludes risks stemming from potential liability to make payment under a guarantee which has to be classified as State aid, such as *Ausfallhaftung*, the only factor upon which the Austrian authorities relied. In that respect, the Commission explains that it is apparent in particular from the case-law that, when the way in which a market economy investor would have behaved is being assessed, the role of the State as the seller of an undertaking and its obligations as a public authority should not be mixed up. No market economy investor would have taken on a guarantee that did not conform to the market economy investor principle and the decision on the abolition of *Ausfallhaftung* confirms that *Ausfallhaftung* was not granted on market terms.

24 In the light of all those considerations, the Commission held that the competent Austrian authority did not behave as a market economy seller. The economic advantage granted to GRAWE is at least equal to the difference between the Consortium's bid and the actual sale price.

25 In the context of examination of the arguments submitted by the Republic of Austria regarding the relevance of *Ausfallhaftung*, the Commission adds that, even if the Province of Burgenland could have taken that guarantee into account as a criterion for evaluating the offers, GRAWE's offer was not the best one.

26 Finally, the Commission found that the State aid consisting of the sale of BB to GRAWE could not be declared compatible with the common market.

27 The operative part of the contested decision is worded as follows:

'Article 1

The State aid unlawfully granted by Austria, in breach of Article 88(3) [EC], 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 … in [recitals] 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.'

Procedure and forms of order sought

28 By applications lodged at the Registry of the General Court on 11 and 15 July 2008, registered as Cases T-268/08 and T-281/08 respectively, the Province of Burgenland and the Republic of Austria brought the present actions.

29 By order of 20 April 2009, the President of the Eighth Chamber of the General Court decided, after hearing the parties, to join Cases T-268/08 and T-281/08 for the purposes of the written procedure, the oral procedure and the judgment, in accordance with Article 50 of the Rules of Procedure of the General Court.

30 The composition of the Chambers of the General Court was changed and the Judge-Rapporteur was assigned to the Sixth Chamber, to which the present case was therefore allocated.

31 Upon hearing the report of the Judge-Rapporteur, the General Court (Sixth Chamber) decided to open the oral procedure.

32 The parties presented oral argument and replied to the General Court's questions at the hearing on 18 May 2011.

33 As a member of the Sixth Chamber was unable to sit, the President of the General Court designated himself to complete the Chamber pursuant to Article 32(3) of the Rules of Procedure.

34 By order of 18 November 2011, the General Court (Sixth Chamber), in its new composition, reopened the oral procedure and the parties were informed that they could present oral argument at a further hearing.

35 By letters of 23, 24 and 25 November 2011 respectively, the Commission and the applicants informed the General Court that they were waiving their right to be heard afresh.

36 Consequently, the President of the General Court decided to close the oral procedure.

37 In Case T-268/08, the Province of Burgenland claims that the General Court should:

— annul the contested decision;

— order the Commission to pay the costs.

38 In Case T-281/08, the Republic of Austria claims that the General Court should:

— annul the contested decision;

— order the Commission to pay the costs.

39 In Cases T-268/08 and T-281/08, the Commission contends that the General Court should:

— dismiss the actions as unfounded;

— order the applicants to pay the costs.

Law

40 In support of their actions, the applicants formally raise nine pleas in law.

41 Those pleas respectively allege:

— a misapplication of Article 87(1) EC in the determination of the market price of BB in so far as the Commission wrongly required the setting up of a tender procedure for the purpose of the contested privatisation;

— a failure to observe previous decision-making practice concerning the application of Article 87(1) EC;

— a misapplication of Article 87(1) EC in so far as the Commission refused to take account of the uncertain outcome and the possible long duration of the authorisation procedure before the FMA in the event of the sale of BB to the Consortium;

— a misapplication of Article 87(1) EC in so far as the Province of Burgenland was entitled to take account of the risks associated with *Ausfallhaftung* in order to compare the offers made by GRAWE and by the Consortium respectively;

— a misapplication of the principle of a private vendor in a market economy in connection with the examination carried out in the alternative of the financial risks associated with *Ausfallhaftung*;

— a misapplication of Article 87(1) EC by reason of a failure to have regard to the rules governing the burden of proof in the course of the tender procedure in question;

— a misapplication of Article 87(1) EC in so far as the Consortium's offer could not be used for determining BB's market price;

— an erroneous assessment of the issuing of additional bonds in the context of *Ausfallhaftung*;

— a misapplication in several respects of Article 87(1) EC in determining the aid element.

42 The General Court considers it appropriate to examine first of all the first, second, sixth and seventh pleas raised by the applicants, pleas which all relate to the general framework for examining the transaction at issue.

43 Before embarking upon the actual examination of the arguments of the parties, some initial observations should be made on the concept of State aid within the meaning of Article 87(1) EC and on the nature and scope of the judicial review which the European Union judicature finds it necessary to carry out in the present case.

Initial observations on the concept of State aid within the meaning of Article 87(1) EC and on the nature and scope of the judicial review

44 Article 87(1) EC states that, '[s]ave as otherwise provided in this 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'.

45 According to settled case-law, for a measure to be classified as aid within the meaning of Article 87(1) EC, all the conditions set out in that provision must be fulfilled. Firstly, there must be an intervention by the State or through State resources. Secondly, the intervention must be liable to affect trade between Member States. Thirdly, it must confer an advantage on the recipient by favouring certain undertakings or the production of certain goods. Fourthly, it must distort or threaten to distort competition (Case C-280/00 *Altmark Trans and Regierungspräsidium Magdeburg* [2003] ECR I-7747, paragraphs 74 and 75, and Case T-34/02 *Le Levant 001 and Others* v *Commission* [2006] ECR II-267, paragraph 110).

46 In the present case, it is clear that the only condition disputed by the applicants is whether there is an economic advantage. It is indeed apparent that the pleas raised in support of the present actions aim in essence to show that the Commission wrongly concluded that there was an advantage in favour of GRAWE, an advantage said to correspond to the difference between the offer made by GRAWE and that submitted by the Consortium.

47 In that respect, it should be pointed out that, in accordance with settled case-law, the supply of goods or services on preferential terms is capable of constituting State aid within the meaning of Article 87(1) EC (see, to that effect, Joined Cases 67/85, 68/85 and 70/85 *Van der Kooy and Others* v *Commission* [1988] ECR 219, paragraphs 28 and 29; Case C-126/01 *GEMO* [2003] ECR I-13769, paragraph 29; Case T-274/01 *Valmont* v *Commission* [2004] ECR II-3145, paragraph 44; and Case T-53/08 *Italy* v *Commission* [2010] ECR II-3187, paragraph 79).

48 When applied to the situation of a sale of property by a public authority to a private person, the consequence of that principle is that it must be determined whether, in particular, the sale price for that property is equivalent to the market price in that it corresponds to the price which could have been obtained by the purchaser under normal market conditions (see, to that effect, *Valmont* v

Commission, cited in paragraph 47 above, paragraph 45 and the case-law cited). From that viewpoint, the Commission must apply the private operator in a market economy test, to determine whether the price paid by the presumed recipient of the aid corresponds to the price which a private operator, operating in normal competitive conditions, would be likely to have fixed (see, to that effect, Case C-290/07 P *Commission* v *Scott* [2010] ECR I-7763, paragraph 68; and Case C-239/09 *Seydaland Vereinigte Agrarbetriebe* [2010] ECR I-13083, paragraph 34 and the case-law cited). The specific application of that test requires in principle a complex economic assessment (*Commission* v *Scott*, paragraph 68).

49 As regards the scope and nature of the judicial review, it should be pointed out firstly that State aid, as defined in the Treaty, is a legal concept which must be interpreted on the basis of objective factors. For that reason, the European Union Courts must in principle, having regard both to the specific features of the case before them and to the technical or complex nature of the Commission's assessments, carry out a comprehensive review as to whether a measure falls within the scope of Article 87(1) EC (Case C-83/98 P *France* v *Ladbroke Racing and Commission* [2000] ECR I-3271, paragraph 25, and Case C-487/06 P *British Aggregates* v *Commission* [2008] ECR I-10515, paragraph 111). The European Union Courts must, inter alia, establish not only whether the evidence relied on is factually accurate, reliable and consistent but also whether that evidence contains all the relevant information which must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it (see *Commission* v *Scott*, cited in paragraph 48 above, paragraph 65 and the case-law cited).

50 However, when conducting such a review, the European Union Courts must not substitute their own economic assessment for that of the Commission. The review by the European Union Courts of the complex economic assessments made by the Commission is necessarily limited and confined to verifying whether the rules on procedure and on the statement of reasons have been complied with, whether the facts have been accurately stated and whether there has been any manifest error of assessment or misuse of powers (see *Commission* v *Scott*, cited in paragraph 48 above, paragraph 66 and the case-law cited, and Case T-196/04 *Ryanair* v *Commission* [2008] ECR II-3643, paragraph 41).

51 Secondly, it must be pointed out that the legality of a Commission decision concerning State aid must be assessed in the light of the information available to the Commission when the decision was adopted (Case 234/84 *Belgium* v *Commission* [1986] ECR 2263, paragraph 16; Case C-276/02 *Spain* v *Commission* [2004] ECR I-8091, paragraph 31; and *Valmont* v *Commission*, cited in paragraph 47 above, paragraph 38). It follows in particular that, since the concept of State aid must be applied to an objective situation appraised on the date on which the Commission takes its decision, it is the appraisals carried out on that date which must be taken into account in the conduct of the judicial review (Joined Cases C-341/06 P and C-342/06 P *Chronopost and La Poste* v *UFEX and Others* [2008] ECR I-4777, paragraph 144).

The first, second, sixth and seventh pleas

Arguments of the parties

52 In their first plea, the applicants essentially claim that the Commission, referring to the *XXIIIrd Report on Competition Policy*, wrongly concluded that the privatisation of a public undertaking had to be carried out through an open, transparent and unconditional tender procedure and that a market price determined solely on the basis of a study was not valid. The absence of a regular tender procedure for the purpose of a privatisation does not mean that State aid is present, but only that it is necessary to individually determine whether the sale in question contains possible aid elements, a determination which can only be carried out on the basis of a study. In other words, the *XXIIIrd Report on Competition Policy* merely reduces the burden of proving the absence of State aid in the case of privatisations carried out within the framework of a tender procedure. Even if the interpretation of

that report put forward by the Commission must be upheld, the fact still remains that that report, which only contains a description of the activities of the Directorate-General for Competition and of the policy objectives judged to be paramount for a given period, has no binding legal effect.

53 In the present case, the sale of BB to GRAWE indeed took place at the market price. That is clearly apparent from the independent studies, the indicative evaluation of BB carried out by HSBC at the beginning of the third privatisation process and the offers of the bidders during the second privatisation attempt (see recital 68 of the contested decision). The evaluations in question, including that carried out by the Consortium, found that BB's value lay between EUR 44.4 and 75 million. As is apparent from both the Commission's decision-making practice and the Commission Communication 97/C 209/03 on State aid elements in sales of land and buildings by public authorities (OJ 1997 C 209, p. 3), which was invoked by analogy, such independent evaluations must be considered to be valid when determining the value of the property forming the subject-matter of a sale.

54 By failing to rely on the independent evaluations which had been put forward to it (see recital 68 of the contested decision) or to ask for a new independent study, the Commission, which has the duty within the context of the formal examination procedure to obtain every opinion necessary in order to have a complete set of information on all of the facts of the case, did not carry out a diligent and impartial examination of the documents made available to it in order to establish precisely whether aid existed and, if necessary, its amount.

55 Finally, the applicants are of the opinion that the obligation to use a tender procedure, as envisaged by the Commission, is in conflict with the private vendor in a market economy test. They observe that, in the context of sales carried out by private persons, recourse to a formalistic tender procedure is non-existent or, at the very least, insignificant, and most often is replaced by negotiations with chosen bidders. In addition, in its decision-making practice, the Commission has allowed State authorities considerable freedom of action as regards the organisation of the tender procedure. Therefore, no empirical evidence exists that the offers submitted in the course of a tender procedure constitute a 'better proxy' (see recital 112 of the contested decision) than an evaluation by an expert. Furthermore, since private undertakings do not generally use tender procedures, the obligation to carry out a tender procedure, required by the Commission, results in unequal treatment to the detriment of public undertakings, which contravenes Articles 295 EC and 86 EC.

56 In their second plea, the applicants argue that the contested decision is in conflict with the previous decision-making practice of the Commission and therefore infringes the principle of equal treatment. Until now, in cases where no tender procedure was carried out in connection with a privatisation process or where a tender procedure was carried out in an improper manner, the Commission has always been satisfied with studies in order to determine the market price. Furthermore, they observe that, to their knowledge, the Commission has only once found the presence of an aid element in a privatisation process, that being in the case which gave rise to Commission Decision 2008/717/EC of 27 February 2008 on State aid C 46/07 (ex NN 59/07) implemented by Romania for Automobile Craiova (formerly Daewoo Romania) (OJ 2008 L 239, p. 12), where the Commission, in contrast to the position here, determined the market value on the basis of an evaluation of the privatised undertaking.

57 In their sixth plea, the applicants essentially claim that, by requiring the Austrian authorities to establish that the Consortium did not satisfy the tender criteria for BB from the point of view of, in particular, transaction security and avoidance of the use of *Ausfallhaftung* (see, inter alia, recitals 129, 132, 133, 145 and 156 of the contested decision), the Commission failed to have regard to the burden of proof and the obligations to provide information which are owed by bidders in the course of a tender procedure. Proof that a bidder satisfies the award criteria must be adduced by the bidder himself during the tender procedure and not *ex post facto* by the Commission. In the present case, the Consortium failed to adduce evidence of its creditworthiness and of the refinancing of BB within the time-limit, despite the fact that it had duly been informed of its obligation in that respect. To

avoid discriminating against the other bidders, evidence put forward *ex post facto* must be declared inadmissible. The applicants also state that, in the absence of such evidence, the Province of Burgenland was able legitimately to harbour doubts as to the creditworthiness of the Consortium.

58 Finally, in their seventh plea, the applicants essentially claim that, since the tender procedure was considered to be marred by irregularities, in so far as it was based on unlawful selection criteria such as the taking into consideration of *Ausfallhaftung* (see recitals 134 et seq. and 141 et seq. of the contested decision), the Consortium's purchase offer cannot be used to determine the market price of BB (see recitals 109 to 114 of the contested decision). Indeed, the decision-making practice of the Commission shows that it has refused to take account of the results of an irregular tender procedure when determining the aid element. In the present case, it is undeniable that the greater risk run by the Province of Burgenland from the point of view of calling upon *Ausfallhaftung* led the Consortium to increase its offer excessively by way of compensation comparable to a 'risk premium'. The exorbitant or even fanciful nature of the Consortium's offer to purchase is confirmed in concrete terms by the amount of the other offers made (see recital 66 of the contested decision) and by the independent evaluations (see recital 68 of the contested decision), which the Commission ought to have taken into account.

59 The Commission contests all of the complaints put forward by the applicants.

Findings of the Court

60 Consideration of the first plea essentially requires a ruling on two questions: the first is designed to establish whether the Commission, relying on the *XXIIIrd Report on Competition Policy*, actually required that the market price of BB could only be determined through a tender procedure. The second question concerns whether the Commission could, without committing a manifest error of assessment, exclude in the present case use of the studies which were submitted during the examination procedure for the measure at issue and upon which the applicants rely in order to evaluate the market price.

61 It follows from a reading of the contested decision as a whole that the applicants are wrong in asserting that the Commission 'starts from the principle that a privatisation must be carried out within the framework of an open, transparent and unconditional tender procedure'. In its assessment, the Commission did no more than mention the fact that its 'assessment in the context of a privatisation starts from a number of principles which are set out in the *XXIIIrd Report on Competition Policy* … and subsequent practice'.

62 Point 403 of the *XXIIIrd Report on Competition Policy* reads as follows:

'For the sake of transparency, it is worth reiterating the general principles which the Commission applies to privatisations and which have been built up over the years on the basis of scrutiny of individual cases.

As stated in Article 222 [EC], Community law is neutral with respect to the private or public ownership of undertakings. Accordingly, aid that facilitates privatisations may not as such benefit from a derogation from the basic principle of incompatibility of State aid with the common market laid down in Article 92(1).

When the privatisation is effected by the sale of shares on the stock exchange, it is generally assumed to be on market conditions and not to involve aid. Before flotation, debt may be written off or reduced without this giving rise to a presumption of aid as long as the proceeds of the flotation exceed the reduction in debt.

If the company is privatised not by stock-exchange flotation but by a trade sale, i.e. by sale of the company as a whole or in parts to other companies, the following conditions must be observed if it is to be assumed, without further examination, that no aid is involved:

— 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;

— the company must be sold to the highest bidder; and

— bidders must be given enough time and information to carry out a proper valuation of the assets as the basis for their bid.

Privatisations by flotation or competitive tender on the above conditions need not be notified to the Commission in advance for examination of aid implications, but Member States may notify if they desire the added legal security of a formal clearance. In other cases, trade sales must be examined for possible aid implications and must therefore be notified. This is so in particular in the following cases:

— sales after negotiation with a single prospective purchaser or a number of selected bidders;

— those preceded by the writing-off of debt by the State, other public enterprises or any public body;

— those preceded by the conversion of debt into equity or capital increases; and

— sales on conditions that are not customary in comparable transactions between private parties.

In all cases, there must be no discrimination based on the nationality of prospective buyers of the shares or assets concerned.

Any sales on terms that cannot be considered normal commercial terms must be preceded by a valuation carried out by independent consultants. Privatisations in sensitive sectors (synthetic fibres, textiles, the motor industry, etc.) must all be notified to the Commission beforehand.'

63 As the applicants themselves admit, the guidelines set out in that report are intended only to specify the cases in which it is presumed that privatisation measures envisaged by the Member States do not contain an aid element and where, therefore, there is no need to notify them, unless the national authorities wish to make sure of the legal safety of the transaction.

64 Therefore, it is not apparent from those guidelines that the Commission requires the setting up of an open, transparent and unconditional tender procedure in every situation. They only state that, where such a procedure is set up, it must satisfy several conditions in order for it to be presumed that the privatisation in question complies with the provisions of European Union law on State aid.

65 Also, that report does not provide anything of relevance to the present case as regards whether the studies submitted for the purpose of determining the market price of the entity whose privatisation is intended may be admissible. In that respect, the only guidance provided concerning studies is that '[a]ny sales on terms that cannot be considered normal commercial terms must be preceded by a valuation carried out by independent consultants'. However, that last situation is specifically not at issue here, since the Commission expressly ruled out, in the context of the tender procedure carried out with a view to the privatisation of BB, that a sale concluded on special commercial terms was involved (see, to that effect, recitals 111 and 112 of the contested decision).

66 It follows from all those considerations that there is nothing to back up the assertion of the applicants that, in disregard of the principle of equality between private operators and public persons, the Commission, relying on the *XXIIIrd Report on Competition Policy*, concluded that only a tender procedure enabled the market price to be determined in the case of a sale of an undertaking with a view to its privatisation.

67 For all of those reasons, there is no need to rule on the legal significance of the *XXIIIrd Report on Competition Policy* which, as mentioned above, was only intended to remind Member States, in the interest of transparency and clarification, of the general guidelines followed by the Commission for the purpose of examining the measures taken within the context of privatisations of undertakings.

68 Therefore, it remains to be determined, in connection with the first plea, whether the Commission committed no manifest error of assessment in refusing to take account of the various studies upon which the applicants relied in the present case for the purpose of determining BB's market price.

69 In that respect, it must be noted that the market price of an undertaking, which generally depends on the interplay of supply and demand, corresponds to the highest price that a private investor operating in normal competitive conditions would be prepared to pay for that undertaking (see, to that effect, Case C-277/00 *Germany* v *Commission* [2004] ECR I-3925, paragraph 80, and the case-law cited in paragraph 48 above).

70 When a public authority intends to sell an undertaking belonging to it and makes use of an open, transparent and unconditional tender procedure to do that, it can therefore be presumed that the market price corresponds to the highest offer, provided that it is established, firstly, that that offer is binding and credible and, secondly, that the taking into account of economic factors other than the price is not justified, such as the off-balance-sheet risks existing between the offers. Therefore, the Commission does not commit a manifest error of assessment in concluding that the aid element can be assessed from the market price, which in principle itself depends on the offers actually made in a tender procedure.

71 In those circumstances, it cannot be complained that the Commission did not take account of the independent studies, referred to in recital 68 of the contested decision, which are said to support the applicants' argument that the price offered by GRAWE for the purchase of BB is consistent with the market price.

72 Reliance on such studies for the purpose of determining BB's market price would only make sense if no tender procedure with a view to the sale of BB was carried out or, possibly, if it was concluded that the tender procedure set up was not open, transparent and unconditional. In that regard, it is unquestionable that the offers which have been properly and actually submitted in the course of the tender procedure launched for the purpose of the privatisation of a particular undertaking in principle amount to a better approximation of the market price of that entity than independent studies. Such studies, irrespective of the method and parameters selected for their drafting, are based on a prospective examination and therefore lead to an evaluation of the market price of the undertaking in question which is of less value than that which results from offers actually and properly submitted in connection with a lawfully set up tender procedure.

73 For the same reasons, the Commission can neither be reproached for not having considered it necessary to have an *ex post* study drawn up by an independent expert nor be accused of having in that way failed in its duty to undertake a diligent and impartial examination of the measures to which it must give attention. As is clearly apparent from recitals 112 and 113 of the contested decision, the Commission proceeded on the basis that, in the presence of binding offers to purchase BB, independent studies, irrespective of their author, the date on which they were drafted or the analysis method chosen, were, as such, irrelevant for determining whether the price paid by GRAWE to buy

BB corresponded to the market price. In addition, the applicants have failed to prove that the Commission failed to take into account all of the information and the evaluations which had been presented to it, by the Austrian authorities in particular, during the administrative procedure.

74 Consequently, the first plea must be rejected.

75 By their second plea, which is closely linked to the first, the applicants seek to show that the contested decision strays from the decision-making practice hitherto followed by the Commission in that it is the first time that the Commission has required a Member State intending to privatise an undertaking belonging to it to organise an open, transparent and unconditional tender procedure.

76 In that respect, the Court points out that State aid is a legal concept which must be interpreted on the basis of objective factors (see *Valmont* v *Commission*, cited in paragraph 47 above, paragraph 37 and the case-law cited). The classification of a measure as State aid cannot therefore depend on a subjective assessment by the Commission and must be determined regardless of any previous administrative practice of the Commission, assuming that it is established (see, to that effect and by analogy, Joined Cases C-57/00 P and C-61/00 P *Freistaat Sachsen and Others* v *Commission* [2003] ECR I-9975, paragraphs 52 and 53; and Case T-171/02 *Regione autonoma della Sardegna* v *Commission* [2005] ECR II-2123, paragraph 177).

77 In those circumstances, the applicants cannot allege an infringment of the principle of equal treatment by relying on previous decision-making practice. Since the Commission is required to carry out an individual appraisal of the circumstances specific to each case, it is not bound by previous decisions.

78 In any event, the applicants, which are using general assertions in stating that the Commission has always hitherto 'saved' privatisations, have failed to state the extent to which the circumstances having given rise to the decisions which they cite and the legal considerations which underlie them are comparable to those in question in the present case. In particular, it has not been proven that one of those decisions related to a situation where, as here, it was concluded that the market price of the property or of the entity to be sold had been validly fixed by means of an open, transparent and unconditional tender procedure.

79 It follows from all of the foregoing that the second plea cannot in any case be upheld.

80 As for the sixth plea, alleging that the Commission failed to have regard to the burden of proof and the obligations to provide information which are owed by the bidders in a tender procedure launched for the purpose of the privatisation of an undertaking, it is apparent from the outset that, by their arguments, the applicants confuse, on the one hand, the obligations to provide information which are owed by bidders in the course of any tender procedure and, on the other hand, the requirement of a diligent and impartial examination which is imposed upon the Commission in connection with the presumed aid measures.

81 As regards the obligations to provide information which are imposed upon bidders in the course of a tender procedure, the applicants contend essentially that the Consortium ought to have proved that it was creditworthy and that the FMA would have decided in favour of a sale of BB to the Consortium.

82 However, as the Commission has correctly observed, the Consortium was specifically not in a position to provide the slightest information as to whether the outcome of the authorisation procedure before the FMA would have been favourable if the Province of Burgenland had decided to opt for the Consortium's offer. Besides, since the amount of the purchase offer submitted by the Consortium was considerably higher than that submitted by GRAWE and, therefore, the existence of an advantage in favour of GRAWE could not be excluded, it was specifically for the competent authorities to provide solid evidence that the examination carried out by the FMA would have led to the prohibition of the sale of BB to the Consortium, which they failed to do.

83 As regards evidence of the financial capacity and creditworthiness of the Consortium, it is apparent that none of the parties to the formal examination procedure called into question the capacity of the Consortium to raise the funds necessary to honour the purchase price offered. In addition, it is apparent from the documents in the case that, in principle, evidence of the financial capacity of a bidder to honour the purchase price offered is assessed at an early stage in the tender procedure, namely at the due diligence stage, which, according to the applicants, entails examining the balance sheets and the personal and material resources of the bidders whose offers have been considered firm and admissible. However, the Consortium's offer was clearly not dismissed until the final stage of the negotiations pursued in connection with the tender procedure, since, as mentioned in recital 53 of the contested decision, Austria continued to expect that the Consortium would provide a financially strong business partner, as it had announced during the negotiations.

84 The other aspects mentioned by the applicants, concerning the ability of the Consortium to handle possible liquidity problems in the event of the acquisition of BB (see recitals 78 and 79 of the contested decision relating to the 'refinancing of BB after its sale'), apart from being relevant only if *Ausfallhaftung* ought to be taken into account, a hypothesis which will be examined later (see paragraph 149 et seq. below), are in any case equally unfounded. It is apparent from the contested decision that the Consortium never excluded the very principle of a risk of deposit withdrawal and the cancellation of inter-bank credit lines (even if it had estimated the risk at a lower level than the Commission) and that the Consortium provided, by way of guarantee, non-binding letters of intent from various banks (see recital 78 of the contested decision). Accordingly, it is not tenable to assert that the Consortium had not provided any evidence of its creditworthiness.

85 In addition, it must be pointed out that, in response to a question asked by the Court during the hearing on the issue of whether and to what extent the applicants called into question the economic ability of the Consortium to pay the purchase price for BB of EUR 155 million, the applicants confirmed that they had not called into question at all the ability of the Consortium to pay that price.

86 In light of all those findings, the sixth plea must be rejected.

87 As regards, finally, the seventh plea, alleging that the Consortium's offer could not be used to determine the market price, it should be pointed out that, as is apparent from the examination of the first plea (see, in particular, paragraph 70 above), when a public authority intends to sell an undertaking belonging to it and makes use of an open, transparent and unconditional tender procedure to do that, it can be presumed that the market price corresponds to the highest offer, provided that it is established, firstly, that that offer is binding and credible and, secondly, that the taking into account of economic factors other than the price is not justified, such as the off-balance-sheet risks existing between the offers.

88 Therefore, the Commission does not commit a manifest error of assessment in concluding that the aid element can be assessed from the market price, which itself depends on the offers actually made within the context of the call for tenders.

89 In addition, from the viewpoint of the private vendor in a market economy, the subjective or strategic reasons which lead a certain bidder to submit an offer of a certain amount are not crucial. In principle, the private market-economy vendor will opt for the highest offer, regardless of the reasons which led the potential buyers to submit offers of a certain amount. As a result, the applicants' claim that the amount of the offer submitted by the Consortium is exorbitant must be rejected.

90 As for the applicants' argument that the Commission could not rely on the results of a tender procedure which it itself found to be unlawful, it need only be observed that, while, at the stage of the opening of the formal examination procedure, it had expressed doubts as to the lawfulness of the tender procedure, in particular from the point of view of observance of equal treatment between bidders (see, in that regard, recital 42 of the contested decision), the Commission reached the

conclusion that the deficiencies of the conditions of the call for tenders had not affected the amount of the offers actually submitted and that, therefore, the highest nominal offer amounted to a good approximation of the market price (see recital 143 of the contested decision).

91 In addition, by way of continuation of the findings set out in connection with the second plea, it must be held that the reference to the alleged settled decision-making practice of the Commission likewise does not support the view put forward by the applicants. As regards, in particular, the cases having given rise to Commission Decision 2000/513/EC of 8 September 1999 on aid granted by France to Stardust Marine (OJ 2000 L 206, p. 6) and Commission Decision 2000/628/EC of 11 April 2000 on the aid granted by Italy to Centrale del Latte di Roma (OJ 2000 L 265, p. 15), to which the applicants refer, it need only be stated that they concerned situations where the setting up of an open, transparent and unconditional tender procedure was specifically lacking.

92 As a result, the seventh plea must also be rejected.

The third plea, alleging misapplication of Article 87(1) EC in so far as the Commission refused to take account of the uncertain outcome and the possible long duration of the authorisation procedure before the FMA in the event of the sale of BB to the Consortium

Arguments of the parties

93 The applicants complain that the Commission, within the context of application of the private vendor in a market economy test, carried out an incomplete examination of transaction security. They allege, in essence, that, when evaluating and comparing the offers to buy BB, the Commission did not take enough account of the uncertain outcome and the possible duration of the authorisation procedure before the FMA in the event of sale to the Consortium. Precisely for those reasons, a private vendor would have chosen GRAWE's offer, which, despite being of a lower amount than the offer submitted by the Consortium, would expire on 31 March 2006 and which, in light of the studies cited in recital 68 of the contested decision and the experience derived from the previous attempts at privatising BB, was particularly attractive.

94 According to the applicants, the Commission's assertion that the duration of the examination procedure carried out by the supervisory authority cannot justify the exclusion of a bidder from a tender procedure, as that would allow discrimination against foreign bidders (see recital 130 of the contested decision), fails to have regard to the fact that a distinction should be drawn between the role of the State as a private vendor and the role which it performs in the exercise of public powers in its capacity as the regulatory authority for the financial markets. In that regard, given the independence of the FMA and the rules to which it is subject, the Austrian authorities are not in a position to obtain any information regarding the outcome of the authorisation procedure. Furthermore, the Commission's complaint concerns a matter which does not fall within the scope of the law on State aid (but rather the law on the freedom of establishment and the free movement of capital) and fails to have regard to the division of powers between the federal State and the provinces.

95 The applicants add that, in the present case, the approach of the Province of Burgenland, which consisted, firstly, of choosing the buyer in order, subsequently, to seek the required authorisations is not only consistent with the private vendor test, but also recognised in the decision-making practice of the Commission.

96 The applicants contend that, as is apparent from, inter alia, a letter from a consultant for HSBC dated 3 March 2008 and sent to the Commission on 5 March 2008, there were numerous factors in the present case indicating that the sale of BB to the Consortium was not capable of authorisation.

97 They firstly point out that the members of the Consortium did not have any rating from an internationally recognised rating agency, even though, as the Commission states in several of its communications and decisions, this is a necessary condition in order to be able to operate in the European banking and capital markets.

98 The applicants also submit that, in the absence of a creditworthiness analysis presented by the Consortium, they referred to the practice of rating agencies under which an undertaking cannot, in principle, be granted a more favourable rating than that of the State where it is established, in the present case Ukraine which has a maximum rating of 'BB' ('sub investment grade').

99 In addition, the applicants refer to the defects in the business plan presented by the Consortium (see the letter of the Austrian authorities dated 1 March 2007), the Consortium's lack of experience in the European banking market and the intention of the Consortium to pursue a new commercial policy for BB which, ultimately and as is apparent from the observations of HSBC, could have led to a substantial loss of equity capital and, therefore, to an intervention of the Province of Burgenland under *Ausfallhaftung*. The applicants contend that those considerations would necessarily have been taken into account by the FMA, which, under the criteria referred to in Paragraph 5(1)(3) of the Bankwesengesetz (BWG, Federal Law on the banking system), had to determine whether the Consortium offered a guarantee of management of BB in an economically solid and prudent manner after acquiring BB, a matter which the Commission failed to examine, in contravention of the duty to state reasons laid down in Article 253 EC.

100 The pessimistic assessments regarding authorisation from the FMA in the event of the sale of BB to the Consortium are also supported by the information relating to the structural and functional weaknesses of the Ukrainian banking sector, as evidenced by, inter alia, the periodical reports of the International Monetary Fund. Those reports were expressly mentioned by the Austrian authorities during the formal procedure and are, in any case, accessible to the public. In their reply, the applicants mention that recent developments in the Ukrainian banking sector have confirmed the concerns which they expressed at the time.

101 According to the applicants, it must also be taken into account that the carrying out by the FMA of its supervisory duty would have been made more difficult in the event of BB being purchased by the Consortium because of the absence of institutionalised cooperation between the FMA and the Ukrainian authorities, by means of, inter alia, a memorandum of understanding concluded with the Ukrainian national bank.

102 In addition, the applicants mention that the Province of Burgenland did not only rely on its own assessments, but made informal contact with the FMA in order to make sure of the reliability of its predictions regarding the authorisation to be granted by that authority to the Consortium. According to the information provided by the FMA, the outcome of the authorisation procedure for the acquisition of BB by the Consortium was completely open, but it is settled that that procedure would initially have led to a prohibition in the event of acquisition of BB by the Consortium. The uncertain nature and the longer duration of that acquisition were not acceptable to the Province of Burgenland in its capacity as a private vendor. It followed that, as the Republic of Austria had stated in a letter of 1 June 2006, the Province of Burgenland proceeded on the basis that 'the FMA was not going to and probably could not authorise the acquisition of the bank by the Consortium'. The findings in the interim order of the Landesgericht Eisenstadt (Regional Court of Eisenstadt) (Austria) of 26 May 2006 confirm that situation. The applicants have pointed out that it was apparent from the discussions that the competent authorities had with the FMA that an authorisation decision could be counted on within a period of several weeks in the event of the sale of BB to GRAWE. By contrast, the FMA suggested that, in the event of a sale of BB to the Consortium, that procedure would probably last six months or, in the worst case, a year. There is no doubt that the authorisation procedure before the FMA would, in the event of a sale to the Consortium, have been considerably longer and its outcome a lot more uncertain.

103 Finally, the applicants state that the Commission misapplied the private vendor test by requiring, as regards the sale of BB to GRAWE, proof that the sale to the Consortium would clearly not have been feasible or that the FMA would have certainly prohibited a sale to the Consortium. As the consultant for HSBC clearly explained in his observations of May 2006, a reasonable private vendor would have looked to maximise the anticipated value of the purchase price, defined as the offer weighted to take account of the likelihood of its being obtained. Given that the anticipated value of the purchase price proposed by GRAWE was considerably higher than that of the Consortium, the decision of the Province of Burgenland in favour of GRAWE was justified in light of the fact that the lower nominal purchase price offered by GRAWE was amply compensated for by the increased transaction security. In other words, the Commission did not integrate the 50% probability that the sale to the Consortium would not be authorised by the FMA into its analysis.

104 In their reply, the applicants state that the Commission contradicts itself as regards the accuracy with which the Province of Burgenland had to predict the outcome of the procedure before the FMA: while acknowledging that the outcome of that procedure could not be precisely assessed in advance, the Commission requires in other passages in its pleadings that the refusal of authorisation of the acquisition of BB by the highest bidder must be obvious.

105 The Commission contests the complaints put forward by the applicants.

Findings of the Court

106 The present plea concerns the question, mentioned at the end of recital 121 of the contested decision, of the authorisation which has to be granted by the competent financial markets authority within the context of the privatisation process, namely the FMA. The applicants claim that the uncertain outcome and the length of the authorisation procedure in the event of the sale of BB to the Consortium justified BB ultimately being sold to GRAWE, even though the offer submitted by GRAWE was of a lower amount.

107 In that regard, the parties agree on the fact, mentioned in recital 120 of the contested decision, that a market economy vendor can accept the lower bid if it is obvious that the sale to the highest bidder is not realisable. More specifically, it should be pointed out that, contrary to what the applicants have suggested, the Commission clearly acknowledged, in recital 125 of the contested decision, that a market economy vendor would not have chosen a buyer who in all probability would not have obtained the necessary permissions from the competent authorities.

108 The General Court must therefore determine whether the Commission committed a manifest error of assessment in concluding that the factors put forward by the applicants — with a view to showing, firstly, that authorisation by the FMA of the sale of BB to the Consortium was uncertain and, secondly, that the authorisation procedure before the FMA in the event of a sale of BB to the Consortium would be longer — did not justify, in light of the private operator in a market economy test, the decision to sell BB to GRAWE.

109 As regards, in the first place, the actual content of the authorisation procedure, it is apparent from the documents in the case that, in accordance with Paragraph 20(3) of the BWG, which was applicable at the material time, the acquisition of a qualifying holding in an Austrian credit institution is subject to declaration and to authorisation.

110 The examination of the acquisition of a qualifying holding is carried out according to a ‘fit and proper’ test, which is defined in Paragraph 5(1) of the BWG. As is apparent, in particular, from recitals 125 and 126 of the contested decision, which are not disputed by the parties, under Paragraph 20 of the BWG, the FMA can subject the buyer of a bank to this test of suitability and experience only when the parties to the negotiations have entered into a binding purchase

agreement. It follows that a simultaneous evaluation of several potential buyers cannot, in practice, be carried out by the FMA. Furthermore, the FMA confirmed to the Commission that it would initiate the examination of the acquisition of a qualifying holding only if a concrete and openly demonstrated intention to acquire and to sell existed on the part of the two parties to the transaction. In the present case, the Province of Burgenland therefore had to opt definitively for one of the offers to buy BB before the authorisation procedure for the acquisition could be initiated before the FMA. Furthermore, according to the information provided by the Austrian authorities themselves, the FMA is, as an independent administrative authority, subject to confidentiality and impartiality obligations. It cannot, therefore, make predictions in advance about the outcome of an authorisation procedure which is underway.

111 In addition, the parties agree on the fact that the FMA can prohibit the acquisition within a period of three months after the declaration, failing which the acquisition is deemed to be authorised. If the FMA is of the opinion that it needs more time for its examination than the three months which are given to it, it must firstly prohibit the acquisition before the end of the three-month period. That latter prohibition is, however, without prejudice to the definitive decision of the FMA on the acquisition of the qualifying holding.

112 In the second place, as for the arguments specifically put forward by the applicants, they mainly consist, firstly, of general considerations relating to the reserved or even hostile attitude that the supervisory authorities had or ought, in general, to have towards operators originating in Ukraine, secondly, of information relating to the situation of the members of the Consortium and, thirdly, of information provided by the FMA itself.

113 As regards, firstly, the general considerations relating to the very reserved attitude that the supervisory authorities actually had — as shown by the example of the decision of the Bundesanstalt für Finanzdienstleistungsaufsicht (German Federal Office for the Supervision of Financial Services), which, following an examination lasting 13 months, refused the acquisition of NordFinanz Bank AG by a Ukrainian group, or the refusal in 1994 to grant a banking licence to a predecessor of one of the members of the consortium (SLAV) — or ought, in general, to have (having regard, in particular, to the harmonisation at European level of the procedural rules and the evaluation criteria applicable to the prudential evaluation of acquisitions and increases in holdings in entities in the financial sector) towards natural or legal persons established in Ukraine, they are, for the purpose of the present case, neither relevant nor persuasive in substance.

114 First of all, those matters cannot give the slightest indication as to the actual outcome that the authorisation procedure before the FMA would have had in the event that the Province of Burgenland decided to sell BB to the Consortium. In the present case, it was not a question of determining whether entities in the Ukrainian banking sector are subject to obligations and to checks of sufficient quality, that is to say equivalent to that of the obligations and checks carried out in the Member States of the European Union. As the Commission has clearly stated, without being contested by the applicants, the examination carried out by the FMA of the acquisition of holdings in banking institutions aims to determine whether the potential buyers display, in the light of the criteria of suitability and experience referred to in Paragraph 20 of the BWG, evidence of reliability with a view to solid and transparent management of the credit institution concerned.

115 In addition, it is clear that some of the considerations put forward in the present case, in particular in the reply, relate to the development of new practices following the global financial crisis. However, as is apparent from the case-law cited in paragraph 51 above, the legality of a Commission decision concerning State aid must be assessed in the light of the information available to the Commission when the decision was adopted.

116 Consequently, it is not appropriate to take account of developments which took place after the adoption of that decision, which, by definition, did not come to the attention of the Commission. The arguments based on, firstly, the prudence which, following the financial crisis, supervisory bodies and financial regulatory authorities must display from now on and, secondly, any amendments to the applicable law which have resulted therefrom must therefore be rejected as inadmissible.

117 The arguments developed by the applicants also do not mention the fact that the wish expressed by the Consortium to buy BB could be analysed as an intention to establish a credit institution in Austria. In that regard, while the integration of one of the members of the Consortium, namely Active Bank, was addressed by the applicants, it was not, by contrast, established that that integration was envisaged only following a possible sale of BB to the Consortium. Therefore, that matter was not one which had to be taken into account at the stage of the examination procedure before the FMA.

118 Furthermore, those general considerations leave out the fact that the FMA must, as the applicants point out in their respective applications, examine every request to acquire holdings in a financial institution without any prejudice. The fact that some members of the Consortium were originally established in Ukraine cannot account on its own for a negative outcome of the authorisation procedure before the FMA.

119 As regards, secondly, the evidence presented by the applicants concerning the Consortium, namely the absence of a rating from an internationally recognised agency, the alleged deficiencies in its business plan, its lack of experience and the commercial policy which it intended to pursue within BB, they are likewise not relevant within the context of the evaluation of the chances of success of the authorisation procedure before the FMA.

120 First of all, the applicants have not mentioned whether or to what extent those matters would have been taken into account by the FMA in its evaluation.

121 Also, as the Commission has pointed out, by their arguments based on the alleged deficiencies in the Consortium's business plan, its lack of experience or the commercial policy that that Consortium intended to pursue within BB, the applicants are in actual fact setting out concerns relating to the commercial future of BB, namely the entity to be sold, which are, in principle, extraneous to those which drive a market economy vendor.

122 Thirdly, the applicants essentially contend that it is apparent from informal contact with the FMA that, in the event of sale to GRAWE, an authorisation decision could be counted upon in the few weeks following the sale of BB, whereas an authorisation procedure lasting six months, or even a year, had to be expected in the event of sale to the Consortium. That information, provided during a meeting on 31 January 2006, is stated to have been confirmed on 2 March 2006. Having therefore been informed that the outcome of the authorisation procedure was completely open, the Province of Burgenland 'proceeded on the basis that the FMA was not going to and probably could not authorise the acquisition of the bank by the Consortium', the reason for which it decided to sell BB to GRAWE.

123 However, as the Commission mentioned in recital 127 of the contested decision, by stating informally that the outcome of the authorisation procedure was open, the FMA did not prejudge whether or not the outcome would be negative. The Commission was not mistaken about the meaning of the information provided by the Austrian authorities.

124 In the third place, as regards taking into account the probable duration of the authorisation procedure before the FMA, it should be recalled at the outset that the Commission considered that the probably longer duration of the procedure before the FMA was not such as to constitute an obstacle to a sale of BB to the Consortium.

125 In that regard, the Commission stated its reasons for its view in the following terms (see recital 130 of the contested decision):

'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.'

126 It must be noted that the Commission concurred with the evaluation of the Austrian authorities that, in the event of the acquisition of BB by the Consortium, one had to expect an authorisation procedure which could last up to a year (even if a duration of six months seemed more probable to it), whereas, in the event of the acquisition of BB by GRAWE, the duration would have been three months (see recital 130 of the contested decision).

127 On the other hand, the Commission refused to hold that that circumstance was capable of excluding the Consortium, for two reasons: the first, of a theoretical nature, was due to the risk of discriminating against all non-Austrian bidders, while the second, linked to the present case, was based on the finding that BB was not in difficulty at the time of the sale and that there was therefore no particular urgency to sell BB to GRAWE.

128 As the applicants have pointed out, the first ground for the exclusion of taking into account the duration of the authorisation procedure before the FMA, namely the risk of discriminating against bidders established in other countries, leaves out the fundamental distinction which must be drawn, in the context of determining the existence of an advantage for the purposes of Article 87(1) EC, between the obligations which the State must assume as an undertaking exercising an economic activity and its obligations as a public authority (see, to that effect, *Ryanair* v *Commission*, cited in paragraph 50 above, paragraph 84).

129 In the present case, whilst the State acts as a private operator in a market economy in connection with the decision to sell BB, it exercises powers as a public authority when it acts as the authority responsible for the prudential evaluation of acquisitions of and increases in holdings in entities in the financial sector. Therefore the Province of Burgenland cannot be criticised for the fact that the FMA stated that, in the case of GRAWE, which was already known to that authority, an authorisation decision was able to be reached within a few weeks, whereas, in the case of the Consortium, which was unknown to the FMA — a fact which would mean a more thorough investigation — the authorisation procedure with a view to the privatisation of BB would probably take several months.

130 Therefore, the Commission wrongly put forward, in support of its refusal to find that the probably longer duration of the authorisation procedure before the FMA in the event of the sale of BB to the Consortium would be capable of preventing such a sale, that there was a risk of putting an end to the equal treatment of bidders. There is a conflict between, on the one hand, examining the conduct of the Province of Burgenland in the light of the private operator in a market economy test and, on the other hand, raising against it the risk of contravening the principle of non-discrimination because of the difference in duration between the authorisation procedure in the event of the sale of BB to GRAWE and that in the event of sale to the Consortium.

131 That error is, however, capable of invalidating the contested decision only if the Commission did not put forward any other valid reason in support of its position. According to settled case-law, an erroneous ground cannot justify the annulment of a measure if other grounds exist which are sufficient to justify it (see the judgment of 7 April 2011 in Case C-321/09 P *Greece* v *Commission*, paragraph 61 and the case-law cited).

132 The second ground put forward by the Commission in that context — based on the present case and according to which there was no particular urgency which justified the sale of BB to GRAWE rather than to the Consortium — cannot be criticised. It is true that the facts set out show that the actions carried out by the Province of Burgenland with a view to the sale of BB went back to 2003 and that, as the applicants contend, it is precisely because the process for the privatisation of BB had been particularly long and expensive that the Province of Burgenland did not want to lose a further opportunity to sell BB. It is also conceivable that, having regard to the doubts which it had regarding the outcome of the authorisation procedure before the FMA, the Province of Burgenland preferred to sell BB to GRAWE, whose offer was of a limited duration. However, the Province of Burgenland had, in addition, to adduce hard evidence to demonstrate that the length of the procedure before the FMA in the event of the sale of BB to the Consortium would have seriously compromised the chances of privatisation, a demonstration which is specifically lacking.

133 It follows from all of those considerations that the Commission did not commit a manifest error of assessment in concluding that neither the uncertain outcome nor the probably longer duration of the procedure before the FMA — had it been decided to sell BB to the Consortium — justified the Consortium being excluded as a buyer.

134 As regards, in the fourth place, the argument of the applicants that the Commission was too strict in applying the private investor in a market economy test by requiring, in the present case, that it had to be 'obvious that the sale to the highest bidder was not realisable' (see recital 120 of the decision), this argument likewise cannot be upheld.

135 A reading of the entire section of the grounds of the contested decision relating to transaction security clearly shows that the wording chosen is the result of misuse of language, since the Commission took care to examine attentively the arguments that the Austrian authorities had presented to show the uncertain nature and the probable length of the authorisation procedure before the FMA. Thus, the Commission clearly accepted that it was '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)' (recital 125 of the contested decision).

136 Therefore, the Commission did not deny the Province of Burgenland 'latitude for prognosis' in the present case. It simply concluded that there was neither any evidence nor any indication that the FMA would have forbidden a sale to the Consortium (see recital 133 of the contested decision).

137 Moreover, the applicants have not established how they reached the conclusion that there existed a probability of 50% that the sale of BB to the Consortium would not be carried out (and, conversely, a probability of 50% that it would be carried out).

138 Finally, as regards compliance with the duty to state reasons relating to the taking into account of the authorisation procedure before the FMA, it should be noted that it is settled case-law that the statement of reasons required by Article 253 EC must be appropriate to the measure at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in such a way as to enable the persons concerned to ascertain the reasons for it and to enable the competent Court to exercise its power of review. The requirements to be satisfied by the statement of reasons depend on the circumstances of each case, in particular, the content of the measure in question, the nature of the reasons given and the interest which the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining

explanations. It is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of Article 253 EC must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question (see *Chronopost and La Poste* v *UFEX and Others*, cited in paragraph 51 above, paragraph 88 and the case-law cited).

139 In the present case, given the detailed statements set out in recitals 125 to 133 of the contested decision, the applicants were able to understand the reasoning which led the Commission to conclude that a private market seller would not have ruled out the Consortium becoming the buyer of BB on the basis of the consequences of the authorisation procedure before the FMA. In addition, as is apparent from the examination of the present plea, the General Court, in the light of those statements, was in a position to conduct its review in respect of that reasoning.

140 In light of all of the foregoing considerations, the third plea must also be rejected.

The fourth plea, alleging misapplication of Article 87(1) EC in so far as the Province of Burgenland was entitled to take account of the financial risks associated with Ausfallhaftung

Arguments of the parties

141 Contrary to what the Commission states, the applicants are of the opinion that a private seller would have necessarily taken account of the risks stemming from *Ausfallhaftung*. The distinction which the Commission made between public sellers and private sellers is particularly artificial and formalistic in that it does not offer a realistic image of the behaviour of economic operators.

142 Firstly, they point out that, while reference is in fact made in the Gröditzer Stahlwerke case (Case C-334/99 *Germany* v *Commission* [2003] ECR I-1139, paragraph 136 et seq.), the Stardust Marine case (Case C-482/99 *France* v *Commission* [2002] ECR I-4397) and the BP Chemicals case (Case T-11/95 *BP Chemicals* v *Commission* [1998] ECR II-3235) to the question of whether the State had entered into obligations as a shareholder or as a public authority, the facts in question in those cases are clearly distinct from those in the present case.

143 In the present case, the Province of Burgenland did not act in relation to BB as a public authority and did not grant *Ausfallhaftung* in the exercise of its powers as a public authority. The applicants state, in particular, that that guarantee is based on a provision of Austrian private law, namely Paragraph 1356 of the Allgemeines Bürgerliches Gesetzbuch relating to *Ausfallbürgschaft* (guarantee in the event of non-payment). *Ausfallhaftung* corresponds to a 'comfort letter under civil law' — distinct from the State guarantees which have been granted by the German *Länder* (*Anstaltslast* and *Gewährträgerhaftung*) — through which the Province of Burgenland improves the economic situation of the bank and which only reflects the interests of the province as the owner. Indeed, that analysis corresponds to the case-law of the Oberster Gerichtshof (Supreme Court, Austria), which, in a judgment of 4 April 2006, held that '*Ausfallhaftung* performs the task of replacing equity capital' and 'therefore constitutes an instrument for the financing of equity capital'. The fact that the Province of Burgenland committed itself in respect of *Ausfallhaftung* within the context of a law results from the need to offer sufficient publicity to the commitment in question.

144 Secondly, the applicants put forward that the Commission has acknowledged that *Ausfallhaftung* granted in favour of the Austrian banks is existing State aid and, therefore, legal until the end of the transitional period. Its effects ought to have been taken into account within the context of the assessment of the privatisation measure at issue. The Commission's approach in that respect is contradictory and jeopardises the chances for a province to privatise a bank when it is not able to minimise, at the same time, the risk of having to intervene by way of *Ausfallhaftung*.

145 Thirdly, the applicants take the view that the failure to take *Ausfallhaftung* into consideration is not explained in a coherent fashion by the Commission in the contested decision. The Commission cannot at the same time refuse to assess the consequences of *Ausfallhaftung* at the stage of examining the decision to sell BB to GRAWE and take account of the amount which has to be paid in respect of that guarantee in the calculation of the aid element (see recital 170 of the contested decision).

146 Fourthly, the applicants consider that the Commission's approach constitutes an obstacle to privatisation and that it is in conflict with the 2004 Decision, which had made the grant of restructuring aid conditional on the privatisation of BB.

147 Fifthly and lastly, the applicants state that the Province of Burgenland greatly reduced the distorting effects of *Ausfallhaftung* on competition by taking the decision to sell BB to GRAWE, namely an undertaking benefiting from a solid rating and presenting a negligible risk profile. In addition, the Province of Burgenland wished to insert its action within the framework of the useful measures which had been agreed upon as regards the restructuring aid referred to in the 2004 Decision.

148 The Commission disputes all of those complaints.

Findings of the Court

149 In the contested decision (see, in particular, footnote 9 to recital 21), the Commission described *Ausfallhaftung* as a statutory guarantee measure, which involves the obligation for State authorities, inter alia regional ones, to intervene in the event of insolvency or liquidation of the credit institution in question. Under that guarantee, the creditors of the credit institutions can exercise a direct right against the public authority acting as guarantor in a situation where the credit institution is in liquidation or insolvent and the assets of that institution do not suffice to satisfy them. That description of *Ausfallhaftung* has not been formally disputed by the applicants.

150 It is apparent from the Commission's proposal concerning useful measures relating to *Ausfallhaftung* that the Republic of Austria had undertaken to abolish that guarantee at the end of a transitional period. Specifically, and as is apparent from paragraph 3 above, liabilities existing on 2 April 2003 are covered by *Ausfallhaftung* until their expiry date. During the transitional period, which ran until 1 April 2007 unless the financial institutions concerned were privatised at an earlier date, *Ausfallhaftung* was retained for new liabilities whose expiry dates are before 30 September 2017.

151 It follows that, even if BB were privatised, the Province of Burgenland would have to continue to act as guarantor for BB in regard, first, to liabilities entered into before 2 April 2003 (regardless of the expiry date of those liabilities) and, second, to liabilities entered into during the transitional period (ending on the date of the privatisation) whose expiry date is before 30 September 2017.

152 It is in this context that the applicants claim that, in its evaluation of the offers to purchase, the Commission had to take account of *Ausfallhaftung*, which, at the time of the sale, covered nearly EUR 3.1 billion of BB's liabilities. In their submission, since the Province of Burgenland could find it necessary to act as guarantor for the losses that BB might incur even after its privatisation, it was entitled to make sure that the buyer presented sufficient evidence of seriousness and of creditworthiness, going beyond its mere ability to pay the purchase price, with a view to counteracting any risk of the liquidiation or restructuring of BB. In short, the Austrian authorities have claimed that the sale of the bank to GRAWE at a considerably lower price than that offered by the Consortium was totally justified by the lower risk of having to discharge the guarantee obligation under *Ausfallhaftung*.

153 However, in the Commission's view, *Ausfallhaftung*, which had previously been classified as existing aid, could not be taken into account when, as in the present case, it was a matter of examining a given transaction in terms of the principle of a private operator in the market economy. The reason

put forward lies in the fact that, by definition, that guarantee, which has been classified as aid, is not one which a private vendor would be led to grant. In the contested decision, the Commission therefore rejected the taking into account of *Ausfallhaftung* in the following terms:

'(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.

…

(137) … 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. 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.'

154 That position of the Commission must be approved.

155 It is apparent from the case-law that, when applying the private investor test, it is appropriate to draw a distinction between the obligations which the State must assume as owner of the share capital of a company and its obligations as a public authority (Joined Cases C-278/92 to C-280/92 *Spain* v *Commission* [1994] ECR I-4103, paragraph 22).

156 Thus, in Case C-334/99 *Germany* v *Commission*, cited in paragraph 142 above (paragraphs 133 to 141), the Court precluded various loans and guarantees, which a private investor would never have granted under the same conditions and which had to be classified as unlawful State aid, from being taken into consideration in connection with examination of whether the liquidation of Gröditzer Stahlwerke was more expensive than its privatisation at a negative price.

157 The applicants are wrong in claiming that that case is not relevant since it related to unlawful State aid and not existing aid. What is decisive when applying the private operator test is whether the measures in question are those which a private operator in a market economy, who counts on making a profit in the shorter or longer term, could have granted. Thus, regardless of how the commitments at issue could have been classified, the fundamental question which arises is that of whether those commitments are among those which could have been entered into by a private operator in a market economy.

158 Therefore, even supposing that, regardless of the binding nature of Decision C(2003) 1329 final, it is permissible for the Austrian authorities to dispute, in the present proceedings, the classification of *Ausfallhaftung* as State aid which was adopted in that decision, it must be concluded that, bearing in mind the characteristics described above of the regime set up by *Ausfallhaftung*, the latter was not entered into on normal market conditions and cannot, therefore, be taken into account in the assessment of the conduct of those authorities in the light of the private investor in a market economy test.

159 In the light of all of those considerations, the Commission cannot be criticised for having rejected the taking into account of *Ausfallhaftung* in connection with the evaluations of the offers submitted, respectively, by the Consortium and by GRAWE for the acquisition of BB.

160 Consequently, the fourth plea must be rejected.

The fifth plea, alleging misapplication of the principle of a private vendor in a market economy in connection with the examination carried out in the alternative of the risks associated with Ausfallhaftung

161 By the present plea, the applicants essentially claim that the examination, in the alternative, of the financial risks run by the Province of Burgenland if it had been decided to sell BB to the Consortium is incorrect. They state, inter alia, that the assessment of the extent of the losses of liquidity upon application of *Ausfallhaftung* is based on incorrect assumptions and is inadequately reasoned. In addition, in the scenario of the liquidation of BB, the Commission wrongly failed to take account of an independent study, upon which the Province of Burgenland had to rely.

162 It is to be pointed out that, for the sake of completeness, the Commission examined the arguments of the applicants in connection with the taking into account of *Ausfallhaftung* (see recitals 144 to 157 of the contested decision). At the end of that examination, it reached the conclusion that GRAWE's offer, even if the point of view of the Republic of Austria were followed and *Ausfallhaftung* were taken into consideration, did not constitute the best offer.

163 However, since the main argument set out by the Commission, namely the argument which leads to the conclusion that *Ausfallhaftung* could not be taken into account in the evaluation of the offers to buy BB (see the fourth plea), must be confirmed, there is no need to examine the substance of the present plea, which only concerns the argument set out in the alternative and which, by definition, is not capable of challenging the solution which was ultimately adopted by the Commission. According to settled case-law, an erroneous ground cannot justify the annulment of the measure which it affects if it is included for the sake of completeness and other grounds exist which are sufficient to justify the measure (see *Greece* v *Commission*, cited in paragraph 131 above, paragraph 61 and the case-law cited).

164 Consequently, the present plea must be declared ineffective.

The eighth plea, alleging erroneous assessment of the issuing of bonds in the context of Ausfallhaftung

Arguments of the parties

165 The applicants claim that the Commission wrongly concluded that GRAWE benefited from an advantage because of the issue to it on the day before the closure of the sale of the additional bonds amounting to EUR 380 million. The Commission in particular did not take into account that, as was apparent from various statements and from the schedule for bond issues disclosed by the Austrian authorities, the new bond issues were announced to both bidders and benefited them to the same extent. Furthermore, the Commission failed to compare the respective advantage which the two bidders could have derived from the issues of new bonds, bearing in mind the risk profile and their different rating. They submit in particular that, given that GRAWE had a very good rating, the advantage associated with *Ausfallhaftung* was very limited in its regard. The Consortium would have benefited massively from it, which would have, to a large extent, compensated for the purchase price. When comparing the two offers, the Commission entirely failed to take account of this, which amounts to a manifest error in connection with the determination of the facts.

166 Furthermore, the applicants are of the opinion that, assuming that the issue of additional bonds for a sum of EUR 380 million was promised only to GRAWE, the resulting advantage for GRAWE would be small in the light of its excellent risk profile.

167 The Commission contests all of those complaints.

Findings of the Court

168 It is to be noted that the Commission concluded as follows in recital 171 of the contested decision:

'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.'

169 It is those conclusions which are referred to by the applicants in connection with the present plea. They submit essentially that the upward adjustment to the total value of the advantage received by GRAWE by reason of the issue of additional bonds for a sum of EUR 380 million ignores the fact that that issue of bonds would have also benefited the Consortium.

170 While, as is apparent from recitals 148 and 171 of the contested decision, the Commission did not refuse to integrate that issue of additional bonds into the liquidation scenario — examined in the alternative — put forward by the Austrian authorites in the event of a sale to the Consortium, the Commission did no more, when assessing the amount of the advantage granted to GRAWE, than indicate that, in concrete terms, the offer submitted by the Consortium did not take account of the issue of additional bonds. In that context, the Commission took account of the fact that, first, the issue of additional bonds with a value of EUR 380 million was mentioned neither in the process letter nor in the draft contract with the Consortium and, second, that the Consortium had confirmed that it did not actually take their issue into consideration.

171 The argument of the applicants that, even assuming that the issue of additional bonds was only offered to GRAWE, GRAWE did not obtain any additional advantage, given its higher financial rating and more favourable risk profile compared with the Consortium, is not based on any convincing explanation and must, for that reason alone, be rejected.

172 Even if the applicants seek in actual fact to refer, in the present plea, to the financial risk run by the Province of Burgenland under *Ausfallhaftung*, it must be remembered that, as is apparent from the examination of the fourth plea (see paragraph 158 above), that guarantee is not a factor that is to be taken into account in the assessment of the measure at issue in light of the private investor in a market economy test. Furthermore, and as the Commission has pointed out, it was not a question, when evaluating the amount of the aid, of determining what the hypothetical advantage for BB would have been if it were to have been acquired by the Consortium, but rather of ascertaining what was the advantage that was actually and objectively granted to GRAWE.

173 The eighth plea must therefore be rejected.

The ninth plea, alleging misapplication in several respects of Article 87(1) EC in determining the aid element

Arguments of the parties

174 The applicants complain that the Commission concluded that aid existed without establishing with certainty that GRAWE had been advantaged. That constitutes a misapplication of Article 87(1) EC, given that the Commission does not make a sufficient distinction between the existence of aid and the amount of the aid element. They also complain that the Commission did not take the risk of non-payment of the price by the Consortium into consideration in recital 156 of the contested decision for the purpose of comparing its offer with that of GRAWE, which constitutes a manifest error in the determination of the facts. Finally, they complain that the Commission, in the second sentence of recital 174 of the contested decision, required that the potential benefit of the tax loss carry-over be taken into consideration, even though the tax benefits of the transaction for the Consortium were not examined.

175 The Commission disputes the merits of the applicants' arguments.

Findings of the Court

176 Through their arguments, the applicants complain that the Commission concluded that an advantage existed without even checking that the adjustments mentioned in recitals 167 to 174 of the contested decision, which aim to take account of the differences between the two offers submitted and the additional advantage that GRAWE obtained from the issue of additional bonds amounting to EUR 380 million, would lead to the conclusion that there was negative aid.

177 However, if the reasoning put forward in the alternative in connection with the liquidation scenario is excluded and account is taken of the fact that the Commission did not commit a manifest error of assessment in finding that only the additional advantage that GRAWE had obtained from the additional issue of bonds in the amount of EUR 380 million had to be taken into consideration (see paragraphs 168 to 171 above), the applicants have not been able to show that those adjustments would result in the financial advantage that GRAWE obtained through the privatisation of BB being cancelled out.

178 The starting amount of the aid to be recovered results in principle from the difference of EUR 54.7 million between the Consortium's offer and the purchase price actually paid by GRAWE, an amount which must be adjusted in the light of the differences in the parameters which GRAWE and the Consortium respectively in fact took into account in the submission of their offers to acquire BB. The contested decision, however, only provides for two types of downward adjustments, namely that of an amount of EUR 2.1 million which results from the difference in the amount of the compensation related to early discharge (see recital 168 of the contested decision) and that, of an amount to be established, which corresponds to the transfer to the Province of Burgenland of four real estate subsidiaries (see recitals 18 and 172 of the contested decision).

179 In conclusion, the ninth plea is unfounded and must be rejected.

180 It follows from all of the foregoing that the present actions must be dismissed.

Costs

181 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Republic of Austria and the Province of Burgenland have been unsuccessful, they must be ordered to pay the costs, as applied for by the Commission.

On those grounds,

THE GENERAL COURT (Sixth Chamber)

hereby:

1. Dismisses the actions;

2. Orders the Republic of Austria and the Province of Burgenland to pay the costs.

Jaeger Wahl Soldevila Fragoso

Delivered in open court in Luxembourg on 28 February 2012.

[Signatures]