Reports of Cases

JUDGMENT OF THE COURT (Second Chamber)

24 October 2013 *

(Appeal — Competition — State aid — Aid declared illegal and incompatible with the common market — Aid granted to the Grazer Wechselseitige group (GRAWE) at the time of the privatisation of Bank Burgenland — Determination of the market price — Tender procedure — Unlawful conditions with no impact on the highest offer — 'Private vendor' test — Distinction between a State's obligations in cases where it acts as a public authority and where it acts as a shareholder — Distortion of evidence — Obligation to state reasons)

In Joined Cases C-214/12 P, C-215/12 P and C-223/12 P,

APPEALS under Article 56 of the Statute of the Court of Justice of the European Union, lodged on 7, 8 and 7 May 2012, respectively,

Land Burgenland, represented by U. Soltész, P. Melcher and A. Egger, Rechtsanwälte,

appellant,

supported by:

Federal Republic of Germany, represented by K. Petersen, T. Henze and J. Möller, acting as Agents,

intervener in the appeal,

the other parties to the proceedings being:

European Commission, represented by L. Flynn, V. Kreuschitz and T. Maxian Rusche, acting as Agents,

defendant at first instance,

Republic of Austria,

applicant at first instance (Case C-214/12 P),

Grazer Wechselseitige Versicherung AG, established in Graz (Austria), represented by H. Wollmann, Rechtsanwalt,

appellant,

* Language of the case: German.

the other party to the proceedings being:

European Commission, represented by L. Flynn, V. Kreuschitz and T. Maxian Rusche, acting as Agents,

defendant at first instance (Case C-215/12 P),

and

Republic of Austria, represented by C. Pesendorfer and J. Bauer, acting as Agents,

appellant,

supported by:

Federal Republic of Germany, represented by K. Petersen, T. Henze and J. Möller, acting as Agents,

intervener in the appeal,

the other parties to the proceedings being:

European Commission, represented by L. Flynn, V. Kreuschitz and T. Maxian Rusche, acting as Agents,

defendant at first instance,

Land Burgenland, represented by U. Soltész, P. Melcher and A. Egger, Rechtsanwälte,

applicant at first instance (Case C-223/12 P),

THE COURT (Second Chamber),

composed of R. Silva de Lapuerta, President of the Chamber, J.L. da Cruz Vilaça, G. Arestis, J.-C. Bonichot and A. Arabadjiev (Rapporteur), Judges,

Advocate General: M. Wathelet,

Registrar: M. Aleksejev, Administrator,

having regard to the written procedure and further to the hearing on 19 June 2013,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 By their appeals, Land Burgenland (Case C-214/12 P) and the Republic of Austria (Case C-223/12 P) seek to have set aside the judgment of the General Court of the European Union of 28 February 2012 in Joined Cases T-268/08 and T-281/08 *Land Burgenland and Austria* v *Commission* [2012] ECR ('the Burgenland judgment') dismissing their actions 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 contested decision').

2 By its appeal (Case C-215/12 P), Grazer Wechselseitige Versicherung AG ('GRAWE') seeks to have set aside the judgment of the General Court of the European Union of 28 February 2012 in Case T-282/08 *Grazer Wechselseitige Versicherung* v *Commission* [2012] ECR ('the GRAWE judgment') dismissing its action for annulment of the contested decision.

Background to the dispute

3 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). In 2005, BB had a balance sheet value of EUR 3.3 billion and was wholly owned by Land Burgenland (the Province of Burgenland).

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

5 That performance guarantee system for public credit institutions (called 'Ausfallhaftung'), particularly the guarantee provided by that 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.

6 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. After that, 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.

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

8 Two bidders, one being GRAWE, an Austrian undertaking offering a range of insurance services, financial services and leasing which, in 2006, held significant direct stakes in two entities in the banking and investment sector, together with GW Beteiligungserwerbs- und -verwaltungs-GmbH, 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.

9 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). The 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 states that, although on the basis of 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.

10 The sale of BB, which was formally approved by the authorities of the Province 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, EUR 320 million of which had been foreseen under the terms of the privatisation, the 'additional' bonds of EUR 380 million not being included, according to point 35 of the contested decision, in the draft contracts with GRAWE and the Consortium.

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

12 By letter of 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). On 30 April 2008 the Commission adopted the contested decision.

13 To determine whether GRAWE had received a selective advantage, the Commission examined whether the Province of Burgenland had behaved like any seller operating in a market economy (the 'private vendor' test). In that respect, the Commission observed, in points 120 to 122 of the contested decision, that a private vendor might accept the lower bid instead of the higher bid in two situations.

14 The first is the situation in which it is obvious that the sale to the highest bidder is not realisable, which means, in the present case, examining the transaction security by assessing the Consortium's economic viability and the probability that the Consortium would not obtain the required permission from the Finanzmarktaufsicht (the 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 Consortium could pay the purchase price of EUR 155 million that it offered, there was also no indication or any evidence that the FMA would have prohibited BB's sale to the Consortium.

15 The second situation covers the case where consideration of factors other than the price is justified, subject to the proviso that only those factors which would have been taken into consideration by a private vendor are taken into account, 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.

16 In that respect, the Commission explains that it is apparent from the case-law that the role of the State as the seller of an undertaking and its obligations in its capacity as a public authority should not be mixed up. No private vendors would have entered into a guarantee that did not conform to market conditions and the decision relating to the abolition of Ausfallhaftung confirms that Ausfallhaftung was not granted on those conditions.

17 In those circumstances, the Commission concluded, in point 175 of the contested decision, that the Republic of Austria had unlawfully granted State aid in favour of GRAWE in relation to the privatisation of BB, in breach of Article 88(3) EC, and that that aid was incompatible with the common market. Accordingly, Articles 1, 2 and 4 of that decision read 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 by in [points] 167-174 of this Decision.

Article 2

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

…

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;

…'

The procedure before the General Court and the Burgenland and GRAWE judgments

18 By applications lodged at the Registry of the General Court on 11, 15 and 17 July 2008 respectively, the Province of Burgenland, the Republic of Austria and GRAWE brought actions seeking annulment of the contested decision (Cases T-268/08, T-281/08 and T-282/08).

19 By order of the President of the Eighth Chamber of the General Court of 20 April 2009, after hearing the parties, Cases T-268/08 and T-281/08 were joined for the purposes of the written procedure, the oral procedure and the judgment.

20 In support of their actions, the Province of Burgenland and the Republic of Austria raised nine pleas in law, which included, in particular, the following:

— the first plea, alleging 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 privatisation of that bank;

— 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 BB's sale to the Consortium;

— the fourth plea, alleging 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;

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

— the eighth plea, alleging erroneous assessment of the issuing of bonds in the framework of Ausfallhaftung at the time of BB's privatisation.

21 In support of its action, GRAWE raised several pleas, some alleging misapplication of Article 87(1) EC, first, in the determination of BB's market price, then, in the refusal to take Ausfallhaftung into account and, finally, in so far as the Commission failed to have regard to the possibility of a negative difference in the purchase prices.

22 In the Burgenland and GRAWE judgments, the General Court dismissed the actions before it in their entirety. In particular, it found, in substance, that:

— the Commission could, in the present case, rely exclusively on the offer submitted by the Consortium in order to determine BB's market price, and it did not have to make use of any studies;

— the Commission did not err 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;

— the Commission could not be criticised for having rejected taking Ausfallhaftung into account when evaluating the offers, because this was State aid which was not entered into on normal market conditions and could not, therefore, be taken into account in the assessment of the conduct of the authorities in the light of the private vendor test; and

— the assessment of the bond issue in the framework of Ausfallhaftung was not incorrect, since it had been established that the Consortium had not taken into account in its offer the additional bonds of EUR 380 million and, moreover, it had not been established that GRAWE did not obtain any additional advantage because of the additional bonds or that any advantage would have been otherwise cancelled out.

Procedure before the Court

23 By document lodged at the Court Registry on 25 July 2012, the Federal Republic of Germany applied for leave to intervene in Cases C-214/12 P and C-223/12 P in support of the forms of order sought by the Province of Burgenland and the Republic of Austria respectively.

24 By orders of 20 September 2012, the President of the Court granted leave to the Federal Republic of Germany to intervene in those cases.

25 By order of the President of the Court of 26 September 2012, Cases C-214/12 P, C-215/12 P and C-223/12 P were joined for the purposes of the oral procedure and the judgment.

Forms of order sought by the parties

26 The Province of Burgenland and the Republic of Austria claim that the Court should:

— set aside the Burgenland judgment, give final judgment in the matter by annulling the contested decision, and order the Commission to pay both the costs of the present proceedings and those of the proceedings before the General Court, or

— in the alternative, set aside the Burgenland judgment, refer the case back to the General Court for a decision, and reserve the decision on costs.

27 GRAWE claims that the Court should:

— set aside the GRAWE judgment, give final judgment in the matter by annulling the contested decision, and order the Commission to pay both the costs of the present proceedings and those of the proceedings before the General Court, or

— in the alternative, set aside the GRAWE judgment, refer the case back to the General Court for a decision, and reserve the decision on costs.

28 The Commission claims that the Court should:

— dismiss the appeals and order the Province of Burgenland, GRAWE and the Republic of Austria to pay the costs, or

— in the alternative, declare that final judgment may be given in Case C-215/12 P, dismiss the action in Case T-282/08 as unfounded, and order GRAWE to pay the costs.

The appeals

29 The Province of Burgenland, GRAWE and the Republic of Austria put forward, respectively, four, three and two grounds in support of their appeals.

30 In so far as the grounds of appeal put forward in the three appeals are identical or similar, they should be addressed together. Accordingly, it is appropriate to start by examining the second ground of appeal of the Province of Burgenland and the first grounds of appeal of GRAWE and the Republic of Austria, relating to the relevance, for the evaluation of the offers made for BB, of the risks associated with Ausfallhaftung.

The grounds relating to the relevance, for the evaluation of the offers made for BB, of the risks associated with Ausfallhaftung

Arguments of the parties

31 The Province of Burgenland, by its second ground of appeal, and the Republic of Austria and GRAWE, by their first grounds of appeal, contend that the General Court breached Article 87(1) EC by deciding that the Commission had not erred in law by failing to take account, in the evaluation of the offers made for BB, of the risks associated with Ausfallhaftung.

32 First, according to the Province of Burgenland and the Republic of Austria, the General Court erred, in paragraphs 154 to 158 of the Burgenland judgment, by relying on the judgments in Joined Cases C-278/92 to C-280/92 *Spain* v *Commission* [1994] ECR I-4103 and Case C-334/99 *Germany* v

Commission [2003] ECR I-1139, which make a distinction between the State's obligations when acting as a public authority and its obligations in its capacity as owner and shareholder of a company. Since Ausfallhaftung provides for a remunerated guarantee under private law, the Province of Burgenland as owner and shareholder of BB is liable for the risks associated with it. In addition, at the time, BB was not a firm in difficulty, contrary to the circumstances of the *Germany* v *Commission* case.

33 In their reply, limited to the effect of the judgment of 5 June 2012 in Case C-124/10 P *Commission* v *EDF and Others* [2012] ECR on the present appeals, the Province of Burgenland and the Republic of Austria explain that, according to that judgment, a Member State does not act as a public authority solely because it grants resources in the exercise of its prerogatives as a public authority. Therefore, the fact that the Province of Burgenland entered into contractual obligations towards BB by means of a law cannot take precedence over the fact that those obligations are binding on the Province of Burgenland as a shareholder of BB. In addition, as the Commission did not carry out a global assessment of all the relevant factors as required by *Commission* v *EDF*, the General Court could not find that Ausfallhaftung was binding on the Province of Burgenland as exercising its prerogatives as a public authority.

34 Secondly, the General Court wrongly failed to take account of the judgments in Case T-11/95 *BP Chemicals* v *Commission* [1998] ECR II-3235 and in Joined Cases T-29/10 and T-33/10 *Netherlands and ING Groep* v *Commission* [2012] ECR, from which it follows that the aid granted previously must be taken into account when assessing a measure under the private investor test, in order to determine the existence and, as the case may be, the intensity of any aid. It is undisputed that Ausfallhaftung was a lawful, existing aid which should, therefore, have been taken into account.

35 Thirdly, the unity and consistency of European Union law requires that Ausfallhaftung be taken into account. It would be inconsistent on the one hand to accept Ausfallhaftung as lawful and to require the Province of Burgenland to limit it to the minimum necessary and on the other hand to prohibit the Province of Burgenland from taking account of the risks associated with Ausfallhaftung when BB was sold. Such an interpretation of Article 87(1) EC would make the privatisation of public undertakings impossible in practice.

36 Fourthly, paragraph 158 of the Burgenland judgment is incomprehensible, since it refers to 'characteristics described above' in order to establish that Ausfallhaftung was not entered into under normal market conditions. None of the characteristics of Ausfallhaftung described in that judgment could lead to such a finding.

37 GRAWE criticises the General Court, first, for having incorrectly applied the judgment in *Spain* v *Commission*. The Province of Burgenland put Ausfallhaftung in place to cover the obligations of BB in the context of an economic activity. That liability is inseparable from the decision taken in 1928 to undertake commercial activities in the financial services sector. Ausfallhaftung's purpose was to provide BB with its own capital, which is economically comparable to opening a bank in the form of a partnership. Accordingly, Ausfallhaftung is an obligation assumed by the Province of Burgenland as BB's owner, so that it must be taken into consideration when applying the private vendor test.

38 In its reply, also limited to the effect of *Commission* v *EDF* on the present cases, GRAWE considers that it follows from that judgment that the method of granting an advantage, in the present case a law, is irrelevant to the question of whether it was granted by the State in its capacity as a public authority or in its capacity as a shareholder. The General Court applied an incorrect test because it relied on the legal origin of Ausfallhaftung. In addition, it never queried whether the Province of Burgenland took on Ausfallhaftung in its capacity as a shareholder. In that regard, GRAWE considers that there is nothing to prevent a Member State from pursuing both social objectives and, as in the present case, profit at the same time. The Province of Burgenland obtains dividends corresponding to

remuneration for Ausfallhaftung, which takes the place of equity capital. According to GRAWE, even where an advantage constitutes aid, that does not prevent its being granted in the capacity of shareholder.

39 Secondly, in addition to the differences between the circumstances of the present cases and those of *Commission* v *Germany*, as pointed out by the Province of Burgenland and the Republic of Austria, GRAWE adds that the Federal Republic of Germany also took into account the costs of clearing the plant site and that the measures in that case had been implemented in breach of Article 88(3) EC.

40 Thirdly, GRAWE claims that the GRAWE judgment infringes the principle of legal certainty and the need for consistency. Since it was held in Decision C(2003) 1329 final that Ausfallhaftung was in conformity with European Union law, all economic operators should be able to rely on it also as regards the economic consequences which are inextricably linked to it. However, the contested decision and the GRAWE judgment call into question that decision.

41 Fourthly, GRAWE contends, for the same reasons as put forward by the Province of Burgenland and the Republic of Austria, that the *Netherlands and ING Groep* v *Commission* judgment required the General Court to recognise that Ausfallhaftung had to be taken into account when applying the private vendor test.

42 Fifthly, GRAWE states that the scale of the negative effect on competition of Ausfallhaftung differs depending on whether the guarantee provided is something which actually comes into play or whether it constitutes merely a potential commitment by the Province of Burgenland towards BB. Payments which are only potential in nature have less of a bearing on competition than actual ones. Accordingly, the steps taken by the Province of Burgenland to avoid using Ausfallhaftung have limited the distortion of competition on the market. Therefore, the General Court's position undermines the effectiveness of Article 87(1) EC.

43 GRAWE adds that, at the time of the financial crisis, a number of Member States injected capital into credit institutions and that that public capital had to be replaced with private capital as quickly as possible, in order to protect competition and return to normal market operating conditions. However, the contested decision and the GRAWE judgment place substantial obstacles in the way of that process.

44 Concluding its arguments on this point, GRAWE emphasises that, if Ausfallhaftung is taken into account, GRAWE's bid was the best.

45 The Commission contests the arguments put forward by the Province of Burgenland, the Republic of Austria and GRAWE.

Findings of the Court

46 In their first argument, the Province of Burgenland, the Republic of Austria and GRAWE claim, in essence, that the General Court failed to appreciate, in the light of Ausfallhaftung's characteristics, both the role of the Province of Burgenland as owner and shareholder of BB and, therefore, the private investor test, such as it emerges from *Spain* v *Commission* and *Germany* v *Commission*.

47 In that regard, it must observed at the outset that, in paragraphs 155 and 156 of the Burgenland judgment and paragraphs 128 and 129 of the GRAWE judgment, the General Court correctly summarised that concept, as set out in the case-law of the Court relating to that test.

48 Next, in paragraph 157 of the Burgenland judgment and paragraph 130 of the GRAWE judgment, the General Court found, in line with that case-law that, when applying the private investor test, it must be determined whether the measures in question are those which such an investor, who counts on making a profit in the short or long term, could have granted.

49 Finally, in paragraph 158 of the Burgenland judgment and paragraph 131 of the GRAWE judgment, the General Court found, in its assessment of the facts which cannot be appealed, that Ausfallhaftung was not entered into on normal market conditions, given its characteristics.

50 In those circumstances, the General Court rightly concluded, in paragraphs 158 and 159 of the Burgenland judgment and paragraph 131 of the GRAWE judgment, that Ausfallhaftung could not be taken into account when assessing the conduct of the Austrian authorities in the light of the private vendor test and that, consequently, the Commission could not be criticised for having rejected Ausfallhaftung's relevance when evaluating the offers submitted by the Consortium and by GRAWE.

51 Further, as regards the impact of *Commission* v *EDF*, it must be pointed out that that judgment was principally concerned with whether the private investor test was applicable in the circumstances of that case, which was rejected by the Commission in the decision at issue in that case, and not how that test was applied in the particular case (see *Commission* v *EDF* judgment, paragraph 75). However, in the present cases, it is undisputed that the Commission applied the private vendor test and the Province of Burgenland, the Republic of Austria and GRAWE are in actual fact challenging the General Court's approval of the manner in which the Commission applied that test.

52 As regards the application of that test, *Commission* v *EDF* confirmed the case-law which emerges, in particular, from *Spain* v *Commission* and *Germany* v *Commission*, according to which, in order to assess whether the same measure would have been adopted in normal market conditions by a private vendor in a situation as close as possible to that of the State, only the benefits and obligations linked to the situation of the State as shareholder – to the exclusion of those linked to its situation as a public authority – are to be taken into account (see, to that effect, *Commission* v *EDF*, paragraph 79).

53 In *Commission* v *EDF* judgment, the Court further made it clear that, when carrying out that assessment, the manner in which the advantage is provided and the nature of the manner by which the State intervenes are irrelevant where the Member State concerned conferred that advantage in its capacity as shareholder of the undertaking concerned (see *Commission* v *EDF*, paragraphs 91 and 92).

54 Concerning the examination carried out in that respect by the General Court, it is apparent from the Burgenland and GRAWE judgments that the General Court did not base its rejection of the arguments of the Province of Burgenland, the Republic of Austria and GRAWE on the fact that Ausfallhaftung was established by law, contrary the what those parties claim. The General Court examined whether Ausfallhaftung had to be taken into account when implementing the private vendor test and found that a private vendor would not have entered into such a guarantee.

55 The Province of Burgenland, the Republic of Austria and GRAWE do not put forward any argument liable to put that finding into doubt, but claim themselves that Ausfallhaftung is a State aid, as the Commission had moreover found in Decision C(2003) 1329 final.

56 In those circumstances, and since, by granting aid, a Member State pursues, by definition, objectives other than that of making a profit from the resources granted to an undertaking belonging to it, it must be held that those resources are, in principle, granted by the State exercising its prerogatives as a public authority.

57 In so far as the Province of Burgenland, the Republic of Austria claim that, through Ausfallhaftung, the Province of Burgenland was none the less seeking to make profit or, at the very least, attempting to do so in addition to its other objectives, it must be recalled that, if a Member State relies on a test such as

the private vendor test, it must, where there is doubt, establish unequivocally and on the basis of objective and verifiable evidence that the measure implemented is to be ascribed to the State acting as shareholder (see, to that effect, *Commission* v *EDF*, paragraph 82).

58 That evidence must show clearly that, before or at the same time as conferring the economic advantage, the Member State concerned took the decision to make an investment, by means of the measure actually implemented, in the public undertaking (*Commission* v *EDF*, paragraph 84).

59 In that regard, it may be necessary to produce evidence showing that the decision is based on economic evaluations comparable to those which, in the circumstances, a rational private vendor in a situation as close as possible to that of the Member State would have had carried out, before making the investment, in order to determine its future profitability (see, to that effect, *Commission* v *EDF*, paragraph 84).

60 It is only in cases where the Member State concerned provides the Commission with the necessary evidence that the onus is on the Commission to carry out a global assessment, taking into account – in addition to the evidence provided by that Member State – all other relevant evidence enabling it to determine whether the Member State took the measure in question in its capacity as shareholder or as a public authority (see, to that effect, *Commission* v *EDF*, paragraph 86).

61 However, neither during the administrative procedure nor before the General Court did the Province of Burgenland, the Republic of Austria or GRAWE put forward any evidence showing that the introduction or retention of Ausfallhaftung was based on economic evaluations carried out by the Province of Burgenland for the purposes of establishing its profitability. It follows that the Commission was not required to undertake such a global assessment as regards Ausfallhaftung and that the Burgenland and GRAWE judgments were not vitiated by any errors in that regard.

62 As for the argument that the General Court did not take account of *BP Chemicals* v *Commission* and *Netherlands and ING Groep* v *Commission*, to which the Province of Burgenland, the Republic of Austria and GRAWE referred, it is important to point out that, given that the factual and legal circumstances of those cases are substantially different from those of the present disputes, those judgments are not relevant to the present case.

63 Finally, it is sufficient to note that paragraph 158 of the Burgenland judgment must be read in the light, in particular, of paragraphs 2, 3 and 149 of that judgment, which allows the full significance of paragraph 158 to be understood.

64 It follows that, in rejecting the arguments of the Province of Burgenland, the Republic of Austria, and GRAWE, the General Court did not err in law, as those parties alleged it has done, did not breach the unity and consistency of European Union law, and did not breach the principle of legal certainty or its obligation to state reasons.

65 Consequently, the second ground of appeal of the Province of Burgenland and the first grounds of appeal of the Republic of Austria and GRAWE must be rejected as unfounded.

The grounds of appeal relating to the impact of the likely outcome and duration of the procedure before the FMA on the evaluation of the offers of the Consortium and GRAWE

Arguments of the parties

66 The Province of Burgenland, by its fourth ground of appeal, and the Republic of Austria, by its second ground of appeal, claim that the General Court breached Article 87(1) EC by holding, in paragraphs 106 to 140 of the Burgenland judgment, that the Commission did not err by concluding that BB's sale to GRAWE could not be justified by either the uncertain outcome or the probable longer duration of the procedure before the FMA in the event of the sale of BB to the Consortium.

67 First, the General Court was wrong to find, in paragraphs 119 and 120 of the Burgenland judgment, that the factors relied on by the Province of Burgenland and the Republic of Austria to show that the acquisition of BB by the Consortium would probably have been authorised were not relevant within the context of assessing the chances of success of the authorisation procedure, because it was not indicated whether or to what extent those factors would have been taken into account by the FMA. Both the Commission and the General Court knew in detail the criteria used by the FMA when granting authorisations and the Province of Burgenland and the Republic of Austria set out in detail the points raising significant doubts as to whether such a sale was capable of being authorised by the FMA. The General Court therefore evaluated their arguments in a manifestly incorrect manner and without any verifiable reasoning.

68 The General Court erred in so far as it stated, in paragraph 121 of the Burgenland judgment, that certain factors referred to in paragraph 119 of that judgment merely constituted 'concerns relating to the commercial future of BB' which were not decisive for a private vendor, because that evidence would have been taken into account by the FMA during the authorisation procedure and, therefore, by a private vendor. As regards the latitude of prognosis that the General Court explicitly recognised that the Province of Burgenland enjoys, in paragraph 136 of the Burgenland judgment, the Province of Burgenland was entitled to take the view that the FMA would have probably forbidden a sale to the Consortium. The probability of 50% only represents, in that regard, a simplified expression of the circumstance, which emerged from the informal contacts with the FMA, that a sale to GRAWE would be authorised, whereas, in case of a sale to the Consortium, the outcome of the procedure would be 'completely open'.

69 Secondly, the Province of Burgenland and the Republic of Austria primarily argue that, in the light of the above, the General Court's findings in paragraph 132 of the Burgenland judgment concerning the urgency of BB's sale are no longer well founded. In the alternative, they submit that the General Court's findings are based on an incorrect interpretation of Article 87(1) EC because, after two unsuccessful attempts, which were costly both in terms of time and money, to privatise BB and considering both the expiry of GRAWE's offer during the FMA's authorisation procedure and the possible prohibition by the FMA of a sale of BB to the Consortium, a private vendor would not have taken the risk of allowing its third privatisation attempt to fail and therefore would not have sold BB to the Consortium. In addition, contrary to what the General Court found in paragraph 132 of the Burgenland judgment, the Province of Burgenland and the Republic of Austria provided evidence showing that, as a result of the extension of the procedure before the FMA, the privatisation of BB would have been compromised. Therefore the General Court did not carry out a full examination of the facts and failed to provide adequate reasons for the Burgenland judgment.

70 Thirdly, the Province of Burgenland and the Republic of Austria considers that the General Court wrongly limited its examination to identifying manifest errors of assessment. In accordance with the Court's case-law and Article 47 of the Charter of Fundamental Rights of the European Union, the General Court was obliged to carry out a detailed judicial review.

71 The Commission contests the arguments of the Province of Burgenland and the Republic of Austria. In particular, it notes at the outset that those parties do not allege, in their grounds of appeal, that the General Court distorted the facts, and it submits that their arguments are therefore ineffective.

Findings of the Court

72 In the first place, clearly the question of the extent to which the evidence produced during the administrative procedure establishes or not, in the light of the applicable national legislation, the likelihood of the FMA prohibiting BB's sale to the Consortium falls within the General Court's definitive assessment of the facts. The same is true in respect of the effects of the duration of the procedure before the FMA on the prospects of BB's privatisation.

73 Therefore, since it has not been alleged that there was any distortion of the relevant evidence in that respect, those arguments of the Province of Burgenland and the Republic of Austria are inadmissible (see, to that effect, Case C-397/03 P *Archer Daniels Midland and Archer Daniels Midland Ingredients* v *Commission* [2006] ECR I-4429, paragraph 85, and C-352/09 P *ThyssenKrupp Nirosta* v *Commission* [2011] ECR I-2359, paragraph 180).

74 In the second place, in so far as the Province of Burgenland and the Republic of Austria submit that, having regard to the evidence put forward before the General Court, that court was wrong to reject, in paragraphs 120 and 121 of the Burgenland judgment, the relevance of the evidence referred to in paragraph 119 of that judgment, it is admittedly clear from the evidence produced before the General Court that, contrary to what was found in paragraphs 120 and 121 of the Burgenland judgment, the FMA would have taken the Consortium's business plan into account. However, it does not follow that the factors referred to in paragraph 119 of the Burgenland judgment other than that relating to the business plan would have been taken into account by the FMA.

75 In addition, it should be pointed out that the criteria for weighting the different factors taken into consideration by the FMA are not apparent from that evidence, so that the extent to which that business plan would have been decisive in the assessment to be carried out by the FMA cannot be determined.

76 In those circumstances, it is clear that the alleged distortion, in paragraphs 120 and 121 of the Burgenland judgment, of the evidence has not been established, since it is not obviously apparent from the documents in the case-file (see, to that effect, Case C-47/10 P *Austria* v *Scheucher-Fleisch and Others* [2011] ECR I-10707, paragraph 59 and the case-law cited).

77 In the third place, the Commission's examination of whether particular measures can be classified as State aid because the public authorities did not act in the same way as a private vendor requires a complex economic assessment (see, to that effect, Case C-525/04 P *Spain* v *Lenzing* [2007] ECR I-9947, paragraph 59, and Case C-73/11 P *Frucona Košice* v *Commission* [2013] ECR, paragraph 74).

78 In this connection, it must be observed that, in the context of the review conducted by the European Union judicature of complex economic assessments made by the Commission in the field of State aid, it is not for that judicature to substitute its own economic assessment for that of the Commission (see, to that effect, Case C-290/07 P *Commission* v *Scott* [2010] ECR I-7763, paragraphs 64 and 66, and *Frucona Košice* v *Commission*, paragraph 75).

79 However, the European Union judicature 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 (Case C-12/03 P *Commission* v *Tetra Laval* [2005] ECR I-987, paragraph 39; *Commission* v *Scott*, paragraph 65; and *Frucona Košice* v *Commission*, paragraph 76).

80 In the present case, since the Commission carried out, in accordance with what is stated at paragraph 77 above, a complex economic assessment, the examination that the General Court had to carry out was limited to that which has been set out in the preceding paragraph. It is clear that the examination carried out by the General Court in paragraph 109 et seq. of the Burgenland judgment is in conformity with the requirements of the judicial review that it had to undertake, contrary to what the Province of Burgenland and the Republic of Austria claim.

81 In the fourth place, as regards the claim by the Province of Burgenland and the Republic of Austria that the General Court breached the obligation to state reasons, it is apparent from the foregoing and from simply reading paragraph 132 of the Burgenland judgment that the General Court's reasoning in paragraphs 120, 121 and 132 of that judgment is such as to allow the applicants to know the reasons for which the General Court rejected their arguments and to provide the Court of Justice with sufficient material for it to exercise its power of judicial review in an appeal, so that it is in conformity with the established case-law of the Court on that matter (see, to that effect, inter alia, Case C-320/09 P *A2A* v *Commission* [2011] ECR, paragraph 97).

82 Accordingly, the fourth ground of appeal of the Province of Burgenland and the second ground of appeal of the Republic of Austria must be rejected as being in part inadmissible and in part unfounded.

The grounds of appeal relating to whether the Consortium's bid was a decisive factor in the evaluation of BB's market price

Arguments of the parties

83 The Province of Burgenland, by its third ground of appeal, claims that the General Court infringed Article 87(1) EC by holding, in paragraphs 69 to 73 and 87 to 91 of the Burgenland judgment, that the Commission did not err by establishing BB's market value on the basis of the Consortium's bid, without taking into account the independent studies in its possession or having another study carried out.

84 First, the General Court wrongly held that the Commission had not committed a manifest error of assessment by determining BB's market price on the sole basis of the Consortium's bid. According to the Province of Burgenland, it follows from the case-law that there are other methods which give an indication of the actual market price of the object to be sold. Since the bids submitted do not, in every case, constitute the best approximate estimate of that price, the General Court should have checked whether such was the case as regards that bid. It did not carry out such a check in the Burgenland judgment and limited itself to referring to the contested decision.

85 Secondly, the Province of Burgenland submits that the General Court fundamentally distorted the contested decision, which found that the tender procedure was unlawful on account of the presence of an unlawful condition whose purpose was to avoid the use of Ausfallhaftung, and that it contradicted itself by holding that the tender procedure was at the same time unlawful, as a result of that condition, and unconditional. The unlawful nature of that procedure marred the Consortium's bid.

86 Thirdly, the General Court erred in its assessment of the Province of Burgenland's arguments and failed to examine the facts by holding, in paragraph 90 of the Burgenland judgment, that the irregularity affecting the tender procedure had not affected the amount of the offers. The General

Court simply relied on the contested decision without having carried out its own checks, in particular without having verified whether the Commission had taken into consideration all the relevant evidence. However, the Commission itself merely found that those conditions did not distort the bids by pushing them down, but failed to examine whether they had distorted the bids by pushing them up. The Province of Burgenland pointed out to the General Court that the Consortium's bid was up to 200% higher than BB's value and was therefore fanciful.

87 Fourthly, if paragraph 89 of the Burgenland judgment implied that the Consortium's bid had to be taken into consideration despite being too high to reflect BB's market price, the General Court would have contradicted itself in its conclusions. It is inconsistent to take into account distortions pushing the bids lower and not take into account those pushing them higher, even though the same circumstances gave rise to both.

88 Fifthly, the findings made in paragraph 89 of that judgment breach the principle of equal treatment of public and private property enshrined in Article 345 TFEU. The deficiencies found by the Commission had been based on the condition relating to the need to avoid having recourse to Ausfallhaftung. If the Province of Burgenland could not take into account, according to the Commission and the General Court, the risks stemming from Ausfallhaftung, it must necessarily have been able to disregard the increase in the Consortium's bid because of those risks which made that bid excessive. By excluding that factor, the General Court put the Province of Burgenland at a disadvantage with respect to private vendors.

89 GRAWE, by its second ground of appeal, also contends that the results of a tender procedure are a valid indicator of the market price only where the call for tenders is open, transparent and unconditional. According to the Commission and the General Court, that key requirement was not satisfied when BB was privatised, on account of the condition relating to the need to avoid the use of Ausfallhaftung. In addition, that condition distorted the Consortium's bid by pushing it higher, as GRAWE argued before the General Court. However, the General Court did not examine that argument, but merely cited the Commission's position without checking the accuracy of the analysis by the Commission, which had itself failed to check whether a distortion existed which pushed the Consortium's bid higher.

90 GRAWE points out that, contrary to what the Commission claimed before the General Court, a distortion pushing BB's market price higher is relevant, because, when applying the private investor test, the market price corresponds to the highest price which a private investor acting under normal competitive conditions is prepared to pay. Accordingly, the General Court ought to have held that, in the context of its duty to examine the case in a careful and impartial manner, the Commission should have resorted to other methods to determine the market price.

91 The Commission disputes the arguments of the Province of Burgenland and GRAWE.

Findings of the Court

92 It is the Court's settled case-law that the market price is the highest price which a private investor acting under normal competitive conditions is ready to pay for a company in the situation it is in (see Case C-390/98 *Banks* [2001] ECR I-6117, paragraph 77, and Case C-277/00 *Germany* v *Commission* [2004] ECR I-3925, paragraph 80).

93 For the purposes of checking the market price, the national authorities may take into consideration, in particular, the form of the transfer of company, for example public tendering, deemed to ensure that a sale takes place under market conditions or any expert's report prepared at the time of the transfer (see, to that effect, Case C-214/07 *Commission* v *France* [2008] ECR I-8357, paragraphs 59 and 60).

94 It follows that the General Court was correct to find, in paragraphs 70 and 87 of the Burgenland judgment and paragraph 77 of the GRAWE judgment, that, where a public authority proceeds to sell an undertaking belonging to it by way of an open, transparent and unconditional tender procedure, it can be presumed that the market price corresponds to the highest offer, provided that it is established, first, that that offer is binding and credible and, secondly, that the consideration of economic factors other than the price is not justified.

95 In such circumstances, the Commission is not obliged to resort to other methods in order to check the market price, such as independent studies.

96 The General Court was also correct in holding, in paragraph 90 of the Burgenland judgment and paragraph 81 of the GRAWE judgment, that the highest bid submitted in a tender procedure which is unlawful on account of the presence of unlawful conditions can nevertheless correspond to the market price where the deficiencies of the conditions of the call for tenders did not affect the amount of that bid by pushing it lower.

97 In the present case, first, the Commission examined, within the framework of its complex economic appraisal of whether the Province of Burgenland had behaved like a private vendor, whether the defects detected in the tender procedure had an impact on the outcome of that procedure and it found, on the basis, in particular, of the Consortium's comments stating that it considered the contested unlawful conditions not to be applicable in future, that those defects did not cause the amount of the highest bid to be pushed down.

98 Secondly, since the Province of Burgenland and GRAWE did not put forward any argument before the General Court to show that that assessment by the Commission was incorrect, the General Court cannot be criticised for confirming the Commission's conclusion without carrying out its own checks.

99 In so far as the Province of Burgenland and GRAWE claim that the Commission failed to examine whether there was a distortion which pushed the amount of the highest bid up and that the General Court refrained from finding fault with that failure, it is sufficient to point out in that regard that the General Court correctly found, in paragraph 89 of the Burgenland judgment, that the private market-economy vendor will opt in principle for the highest offer, where that offer is binding and credible, regardless of the reasons which led the potential buyer to submit that offer, and that, as a result, the claim that the amount of the offer submitted by the Consortium was be exorbitant must be rejected.

100 It follows from the foregoing that the third ground of appeal of the Province of Burgenland and the second ground of appeal of GRAWE must be rejected as unfounded.

The grounds of appeal relating to the assessment of the bond issue amounting to EUR 320 million

Arguments of the parties

101 The Province of Burgenland, by its first ground of appeal, claims that the General Court breached its right to be heard by having failed to examine its arguments that the Commission should have taken into account, in point 171 of the contested decision, not only the advantages resulting from the issue of 'additional' bonds with a value of EUR 380 million, but also the advantages associated with the bond issue of EUR 320 million. In addition, it contends that it drew the General Court's attention to that argument in its observations on the report for the hearing, as that argument had not been included in that report.

102 Since taking into consideration the advantages associated with the issue of bonds of the value of EUR 320 million for the Consortium and for GRAWE respectively would remove any element of aid in BB's sale to GRAWE, the assessment of that argument should have resulted in the annulment of the contested decision. Given the difference in their ratings and therefore their classes of risk, the Consortium benefited, as a result of that bond issue, from a refinancing advantage of at least EUR 43.5 million, whereas the advantage accruing to GRAWE would have only been from EUR 3.52 million to EUR 8.32 million.

103 The Province of Burgenland states that it cannot be considered that paragraphs 171 and 172 of the Burgenland judgment include an evaluation of that argument, given that that argument is disregarded in those paragraphs and that, moreover, paragraph 171 of the judgment is vitiated by a failure to state reasons.

104 The Province of Burgenland adds that the General Court's assessment, in paragraphs 168 to 172 of the Burgenland judgment, of the rest of its argument relating to the eighth plea is based on insufficient reasoning and insufficient legal assessment, a failure to take account of the evidence that it provided, a contradiction with the findings in point 148 of the contested decision, and a failure to verify whether that decision had been based on an assessment of all the relevant evidence.

105 GRAWE, by its third ground of appeal, claims that it had contended at first instance that, given the difference in their ratings and therefore the classes of risk to which GRAWE and the Consortium belong, the Consortium benefited, as a result of that bond issue of EUR 320 million, from a refinancing advantage of EUR 42.5 million, whereas the advantage accruing to GRAWE from the total bond issues worth EUR 700 million amounted to only EUR 1.6 million, so that an adjustment of EUR 40.8 million in the purchase prices offered by the two competitors should have been made in favour of GRAWE. In the GRAWE judgment, the General Court failed to take that argument into account.

106 According to GRAWE, that failure cannot be justified by the fact that both the Consortium and GRAWE were aware of the bond issue of EUR 320 million, so that they could take that into account in their respective bids. Since the Commission and the General Court found that the advantages resulting from Ausfallhaftung could not be assessed in the framework of the private vendor test, they should therefore have been assessed separately to ensure that the reasoning was consistent.

107 The Commission considers that the argument of the Province of Burgenland and GRAWE is inadmissible because neither the initial application of the Province of Burgenland nor that of GRAWE to the General Court contains a plea for annulment relating to the evaluation of the bond issue amounting to EUR 320 million. Accordingly, the observations made on the report for the hearing sought to introduce a new plea, which is inadmissible.

108 In the alternative, the Commission claims that the argument is unfounded.

109 In any event, an assessment by the General Court of the argument of the Province of Burgenland and of GRAWE could not have led to the operative parts of the Burgenland and GRAWE judgments being changed. Since the Consortium and GRAWE were aware of the bond issue in the amount of EUR 320 million, they took that into account in their respective bids.

Findings of the Court

110 In the first place, according to the documents in the case in which the Burgenland judgment was given, although the argument of the Province of Burgenland concerning the bond issue of EUR 320 million is not set out as a separate part of the eighth plea of the initial application submitted by the Province of Burgenland, it is nevertheless present within that plea. Following the clarifications on the report for the

hearing by the Province of Burgenland, the presence and the scope of that argument, which was already set out in the application, could not be in doubt. Therefore, contrary to what the Commission claims, those clarifications could not be considered as constituting an inadmissible new plea.

111 In addition, according to the documents in the case in which the GRAWE judgment was given, that argument was set out sufficiently clearly in GRAWE's application.

112 The General Court should therefore have examined that argument both in the Burgenland judgment and in the GRAWE judgment. However, contrary to what the Commission claims, it is not apparent from the Burgenland or GRAWE judgments that the General Court carried out such an assessment.

113 In this instance therefore, it is necessary to examine that argument, which is set out again, in substance, by the Province of Burgenland and GRAWE in their first and third grounds of appeal respectively.

114 In that regard, it is sufficient to recall that it was held in paragraph 99 above that the General Court correctly found that the private market-economy vendor will opt in principle for the highest offer, where that offer is binding and credible, regardless of the reasons which led the potential buyer to submit that offer. From the perspective of a private vendor, the reasons which lead a certain bidder to submit an offer of a certain amount are not decisive.

115 In the present case, it is undisputed that both the Consortium and GRAWE were aware of the bond issue of EUR 320 million and that, consequently, they took it into account in their respective bids. Since, having regard to what was said in the preceding paragraph, there is no need to examine the reasons which led the potential buyer to submit the highest offer, it follows that, in any event, the argument concerning the bond issue cannot succeed.

116 In particular, as the Commission correctly pointed out, since each element of the conditions relating to the privatisation of a publicly owned company is liable to have distinct advantages and disadvantages for each one of the bidders, the analysis referred to by the Province of Burgenland and GRAWE cannot, in the present case, be limited solely to the effects of the bond issue of EUR 320 million, but should also include, for example, the tax advantages which might accrue to certain bidders from a fiscal carry-forward of BB's losses. The Commission is not obliged to carry out such a detailed and differentiated analysis for each bidder.

117 According to the Court's settled case-law, where an undertaking is bought at the highest price which a private investor acting under normal competitive conditions was ready to pay for that company in the situation it was in, that company is valued in every respect at the market price and the acquirer cannot be regarded as having benefited from an advantage in relation to other market operators (see, to that effect, *Banks*, paragraph 77, and *Germany* v *Commission*, paragraph 80).

118 In the second place, as regards the claims of the Province of Burgenland concerning the General Court's assessments of its arguments on the bond issue of EUR 380 million, first, it is clear from paragraph 165 of the Burgenland judgment that the General Court took into account the entirety of the Province of Burgenland's argument in that respect and that it referred, in particular, to the evidence on which the Province of Burgenland is relying in its appeal.

119 Second, it is clear from paragraph 170 of the Burgenland judgment that the General Court dismissed that argument by finding that, despite that evidence, the Commission was able, without committing an error, to base its conclusion on the evidence contained in the contested decision.

120 Therefore, it must be concluded that, first, that reasoning enables the Province of Burgenland to know the reasons why the General Court rejected its argument and provides the Court of Justice with sufficient material for it to exercise its power of judicial review. Next, that reasoning neither contains

an insufficient legal assessment, nor fails to take account of the evidence provided by the Province of Burgenland, nor fails to verify whether the Commission had based the contested decision on an appreciation of all the relevant evidence. Finally, a reading, in particular, of the first sentence of paragraph 170 of the Burgenland judgment does not allow the conclusion that the alleged contradiction exists between that paragraph and the findings in paragraph 148 of the contested decision.

121 In the light of all of the foregoing, the first ground of appeal of the Province of Burgenland and the third ground of appeal of GRAWE must be rejected as unfounded.

122 Since none of the grounds raised by the Province of Burgenland, the Republic of Austria and GRAWE in support of their appeals can succeed, those appeals must be dismissed.

Costs

123 In accordance with the Article 184(2) of the Rules of Procedure of the Court of Justice, where the appeal is unfounded, the Court must make a decision as to costs.

124 Under Article 138(1) of those rules, which applies to the procedure on appeal by virtue of Article 184(1) of those rules, the unsuccessful party must be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs against the Province of Burgenland, the Republic of Austria and GRAWE and they have been unsuccessful, they must be ordered to pay the costs.

125 Under Article 140(1) of those rules, which also applies to the procedure on appeal by Article 184(1), Member States which intervene in the proceedings are to bear their own costs. Accordingly, the Federal Republic of Germany must be ordered to bear its own costs.

On those grounds, the Court (Second Chamber) hereby:

1. **Dismisses the appeals;**

2. **Orders Land Burgenland, Grazer Wechselseitige Versicherung AG and the Republic of Austria to pay the costs;**

3. **Orders the Federal Republic of Germany to bear its own costs.**

[Signatures]