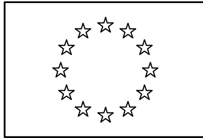

EUROPEAN COMMISSION

Brussels, 9 December 2008
C(2008) 8408 final

PUBLIC VERSION

WORKING LANGUAGE

This document is made available for information purposes only.

**Subject: State aid N 557/2008 – Austria
Measures under the Law on the stability of the financial markets and on strengthening the interbank market for credit institutions and insurance companies in Austria**

Dear Sir,

I. PROCEDURE

(1) On 31 October 2008 Austria notified the aid scheme to the Commission and sent additional information on 28 and 31 October, 13, 21 and 25 November and 2, 4, 7 and 8 December 2008. A comprehensive informal exchange of information also took place.

II. DESCRIPTION OF THE AID SCHEME

1. Legal bases

(2) The Republic of Austria published the Law on the stability of the financial markets and on strengthening the interbank market for credit institutions and insurance companies in Austria on 26 October 2008 in order to stabilise the financial market. The Law forms the legal basis for a package of measures aimed at strengthening the interbank market (Interbankmarktstärkungsgesetz (IBSG)) and a broader collection of measures for remedying a serious disturbance in Austria's economy (Finanzmarktstabilitätsgesetz

Seiner Exzellenz Herrn Bundesminister Dr. Michael SPINDELEGGER
Bundesministerium für europäische und internationale Angelegenheiten
Minoritenplatz 8
A-1014 Wien

(FinStaG))[1]. Further details concerning the relevant general conditions are laid down in an accompanying Implementing Order published on 30 October 2008.[2]

2. Objective of the measures

(3) The measures are aimed at strengthening the interbank market and remedying a serious disturbance in Austria's economy, securing macroeconomic equilibrium and protecting the Austrian economy and the financial market.

3. The beneficiaries

(4) Credit institutions and insurance companies licensed in Austria (hereinafter "institutions") are the beneficiaries of the measures.

(5) Austria pledges that the Federal Ministry of Finance and/or the bodies or private-law companies entrusted with implementing the provisions of this Law in the context of the notified package of measures take decisions according to their best judgment and in the light of how important the financial sector company covered by the stabilisation measure is for financial market stability within the scope of the law and in the light of the urgency of the situation and the principle of the most effective and most economical use possible of the funds. Covert discrimination against individual financial institutions/insurance companies can thus be averted, regardless of whether or not this concerns a subsidiary of a foreign company. The significance of the financial sector company for the stability of the financial market within the scope of the law is assessed, in particular, according to its balance-sheet total, the level of deposits, the part it plays in the nation's payments system and its general importance for maintaining confidence in the stability of the financial market.

(6) Measures under the IBSG and assumptions of liability or the granting of loans under the FinStaG, in so far as they serve the purposes of liquidity support, are intended only for solvent companies in the financial sector, and this generally requires that the beneficiary company has an adequate capital base. The Austrian authorities have given a commitment that only credit institutions with a Tier-1 ratio of at least 7% may avail themselves of such a measure. This commitment also applies to companies in the financial sector that are not credit institutions. With regard to companies that intend to carry out a recapitalisation pursuant to the FinStaG, the Austrian authorities have provided an assurance that only companies which undertake to bring their capital base into line with the above-mentioned requirements will be eligible for recapitalisation. Beneficiary credit institutions will also have to ensure, as part of the commercial policy under Section 2 of the Implementing Order aimed at viability, that they do not fall short of the minimum regulatory capital base under Basel II plus 2 percentage points, and this will be regularly reviewed as part of the reporting obligations.

---

[1] Federal Law 136: Law on strengthening the interbank market (IBSG) and Law on the stability of the financial markets (FinStaG), published on 26 October 2008, Austrian Federal Law Gazette I, No 136/2008.

[2] Order laying down more detailed provisions on the conditions and obligations for measures under the Law on the stability of the financial markets and the Law on strengthening the interbank market, published on 30 October 2008, Austrian Federal Law Gazette II, No 382/2008.

4. Description of the measures

(7) The Austrian package of measures is in two parts:

A. instruments for providing liquidity, which are set out in the IBSG, and

B. measures for strengthening an institution's equity or measures intended to stabilise the institution by other means, e.g. guarantees covered by the FinStaG.

A. Instruments for providing liquidity to the financial sector (Law on strengthening the interbank market – IBSG)

(8) The IBSG provides for two concrete measures, namely setting up a clearing bank and issuing declarations of acceptance of liability for securities issued by institutions.

i. General provisions

(9) The resources needed to fund the measures may not exceed a total amount outstanding of EUR 75 billion in each case. Interest and costs may not be charged in respect of this maximum amount.

(10) Austria undertakes to accept new liabilities after 30 June 2009 only if the Commission approves an extension of the aid scheme.

(11) However, without prejudice to the provision in the IBSG to the effect that the Law expires on 31 December 2009, existing liabilities remain in force.

ii. Clearing bank

(12) Austria has created the basic legal conditions for a clearing bank, granted it a banking licence and provided it with a capital guarantee. The purpose of the clearing bank is to increase the volume of transactions on the Austrian money market, which has contracted considerably owing to the current climate of mistrust in the banking sector. Banks and insurance companies deposit funds with the clearing bank, which then makes this liquidity available to other banks and insurance companies. It is also intended that securities be issued to raise funds. Austria can assume liability for the securities issued by the clearing bank.

(13) The clearing bank may be owned only by institutions or their legal representatives at professional association level. Austria undertakes to ensure that the clearing bank is a non-profit company - a fact taken into account in its commercial policy – and that the owners of the clearing bank seek only to reimburse their expenses and to receive the same remuneration for capital invested as the return on a comparable Austrian Government bond. Any excess profits will be retained. Were the clearing bank to avail itself of the State's guarantee, resulting in a burden on the State, any surplus liquidity over and above the invested capital must be paid to the State. Austria will submit a report to the Commission every six months regarding the clearing bank's profits.

(14) The clearing bank currently has at its disposal equity provided by institutions amounting to EUR 180 million, which can provide backing for a business volume – with the maturity period of the loans being less than one year – of EUR 10 billion.

(15) In a liability agreement, the Republic of Austria has committed itself – should the clearing bank's equity fall short of the statutory requirements owing to losses suffered during the course of business from unredeemed loans – to providing the bank with the necessary compensation for the resulting difference, up to a maximum of EUR 4 billion. If there are several instances in which the Austrian Government becomes liable, such

liability will exist only in so far as this maximum amount is not exhausted by all the demands for capital made on it. The clearing bank's equity is first used to cover losses from outstanding debts (first loss) as long as it does not fall short of the statutory requirements for equity. The clearing bank will exercise the necessary professional diligence so as to ensure that outstanding debts are collected.

(16) The clearing bank provides its services to institutions in return for market-oriented remuneration and interest, including the premium the bank must pay to the Austrian Government for assuming liability. Guarantees can be agreed upon. In addition, Austria pledges that the banks borrowing money from the clearing bank pay in principle at least the remunerations laid down in Section 9(1)-(3) of the Implementing Order (hereinafter "statutory remuneration for liability") as a liability premium[3], without prejudice to the non-mandatory provision in the Implementing Order. To this end, either every borrowing bank is charged the corresponding liability premium on the amount borrowed (case 1) or the clearing bank pays a corresponding remuneration on behalf of the beneficiaries (case 2).

(17) In case 2, the clearing bank is free to arrange a different system of remuneration internally, provided that this does not deviate from the principles in the previous paragraph. In this case, Austria has given a commitment that the clearing bank is to be regarded as a bank with no rating or CDS spread that must therefore pay the remuneration of a representative selection of single A banks chosen by the Eurosystem. Austria also undertakes to ensure that the clearing bank will charge the banks that own it at least the same interest as other banks, in order to prevent the owners enjoying possible advantages.

(18) Austria pledges that, if the clearing bank becomes liable or if a company fails to repay a loan at the due date to the clearing bank, it will submit a restructuring or liquidation plan for that company within six months.

(19) Austria reserves the right, if all the collateral needed for assumptions of liability under the IBSG is supplied and a regular value audit similar to the one in a repurchase agreement is carried out by an independent auditor, to reduce the supplement mentioned in Section 9(1) of the Implementing Order to 0.25% in accordance with Section 9(3).

---

[3] Section 9

(1) In the case of assumptions of liability pursuant to points 1 and 2 of Section 2(1) of the FinStaG and Section 1(4) of the IBSG, the annual liability premium – when liability is assumed for a period not exceeding one year – is to be set at 0.5% and, for the rest, on the basis of the lower of the two following values, including a supplement of 0.5% of the liability limit granted each year:

1. the median of the CDS spreads for the recipient's debt issues with a maturity of five years in the reference period from 1 January 2007 to 31 August 2008;

2. the median of the CDS spreads for the recipient's debt issues of the rating category with a maturity of five years in the reference period from 1 January 2007 to 31 August 2008, on the basis of a sample of large euro area banks defined by the Eurosystem.

(2) In the event that there no is CDS spread or credit rating available for a particular recipient, the calculation of an equivalent CDS spread within the meaning of paragraph 1 should be based on the median of the CDS spreads for a five-year period that are valid in the reference period pursuant to paragraph 1 for the rating category A on the basis of a representative sample defined by the Eurosystem of large euro area banks.

(3) The provision of guarantees must be taken into account accordingly when determining the liability premium.

iii. Additional liabilities

(20) Austria can assume liability for securities issued by institutions, for which the bank in question must pay at least the statutory remuneration, without prejudice to the relevant non-mandatory provision.

(21) Liabilities may be assumed only for a maximum duration of three years. Only in exceptional cases justified by the clearing bank's need for liquidity and the capital market's requirements regarding securities issued by individual banks can the assumption of liability be extended, for a maximum period of five years. This must be stated in the six-monthly report. At the same time, the company is also to issue a commercial paper programme with short maturities. The arrangements for submitting a restructuring plan in the case of liability apply correspondingly.

B. Measures laid down in the Law on the stability of the financial markets (FinStaG) regarding the recapitalisation of credit institutions and insurance companies

i. General provisions

(22) Measures under the FinStaG may not exceed the total amount outstanding of EUR 15 billion in each case. Interest and costs may not be charged in respect of this maximum amount. The amount of EUR 15 billion can be exceeded in so far as the funds intended for the IBSG have not yet been exhausted.

(23) Although the FinStaG has no time limit, Austria has committed itself to taking new measures under the FinStaG after 30 June 2009 only if the Commission approves an extension of the aid scheme.

ii. Proposed measures

(24) The following financial instruments are available:

a) the assumption of liabilities (particularly guarantees, sureties, assumption of debt) for debts owed by the institution in question (hereinafter "liability for debts");

b) the assumption of liabilities (particularly guarantees, sureties, assumption of debt) for debts owed to the institution in question (hereinafter "liability for assets");

c) the granting to institutions of loans that do not constitute equity (hereinafter "loans");

d) the contribution of equity to institutions (hereinafter "capital injection");

e) the purchasing of existing shares through a legal transaction (hereinafter "share acquisition");

f) the acquisition of ownership rights of institutions in exceptional cases (hereinafter "acquisition of ownership").

Liability for debts

(25) The statutory remuneration for liability under the IBSG (see paragraphs 16 (footnote 3), 20 and 21) also applies to the assumption of liabilities for debts of the institution in question.

Capital injection

(26) With regard to the capital injection, Austria pledges in general that only shares which have not been purchased by existing shareholders or placed on the market will be acquired.

(27) With regard to the acquisition of ordinary shares, Austria pledges that it will require the highest possible discount on the price prevailing before the capital increase was announced.

(28) In the case of preference shares or other capital injections for credit institutions or insurance companies that, economically speaking, contain an interest component, Austria will, in line with the Communication on recapitalisation,[4] require a market-oriented, institution-related remuneration (e.g. anticipated dividends for preference shares, participation capital or similar instruments) which, in the case of fundamentally sound companies, may not fall below 9.3% for core Tier-1 capital or below 7% annually for instruments governed by the law of obligations, unless Austria effects the capital injection along with a significant participation by private investors (at least 30%) under the same conditions. Territorial authorities and public undertakings within the meaning of the Transparency Directive[5] do not rank as private investors within the meaning of this paragraph. However, the Austrian Government's acquisition of equity does not depend on private investors participating in the issue. It is also possible to achieve a corresponding effective return by redeeming the capital at par.

(29) In the case of participation capital, Austria explained to the Commission in detail that the above-mentioned return is to be achieved through using one of the following methods of calculation. The institutions agree either an annual dividend of 9.3% with the Austrian Government and redeem the capital at par or a dividend of 8%, but their redemption rate is at least 110%, i.e. 10% above par, with the increased redemption having to be covered through a corresponding increase in the company's value. Redemption is ruled out in any case if the agreed amount to be repaid would not be obtained. The relevant company values must be determined through an expert valuation carried out by the bank auditor or another auditor; in the case of listed companies, the movements in the stock exchange price can also be used as a basis if they do not clearly deviate from the movements in the company's value. Both cases contain a step-up clause: the dividend increases in each case by 50 basis points in the sixth and seventh year, by an additional 75 basis points in the eighth year and by an additional 100 basis points from the ninth year; the total dividend is, however, restricted to the maximum value of the 12-month Euribor rate plus 1 000 basis points.

(30) In addition, the redemption rate after the tenth accounting year is 150% of the nominal value in the case of participation capital, with the increased redemption having to be covered through a corresponding increase in the company's value. If this rate was not achieved, the redemption value corresponds to the company value that was actually realised, and at least to the values mentioned in paragraph 29. The redemption rate for participation capital must, at any rate, be increased by the percentage points by which the dividend paid fell below the guaranteed dividend, in so far as distributable profits were retained, and this was not required by law or by the supervisory authority.

---

4 See the Commission Communication on recapitalisation of 5 December 2008.

5 Commission Directive 2006/111/EC.

(31) Austria pledges that these rules will be applied only to fundamentally sound companies and that Austria will require market-oriented remuneration of at least 10% in the case of banks that are not fundamentally sound, in line with the Communication on recapitalisation.

(32) Austria has confirmed that the remarks made in regard to participation capital apply correspondingly to other similar instruments (e.g. preference shares).

(33) Furthermore, Austria pledges that companies which have received support through a capitalisation measure must first buy their shares back or sell them to third parties before the company is allowed to distribute profits to its shareholders within the meaning of Section 6 of the Implementing Order, unless the amount distributed by fundamentally sound banks is no more than 17.5% of the distributable profit before allocation to the reserves. Austria will notify any exceptions to this rule. The conditions do not apply if the Austrian Government effects the capital injection on the same terms together with significant private sector involvement (at least 30%), as long as this 30% is composed of existing shareholders to the extent of no more than 10 percentage points and of third parties to the extent of at least 20 percentage points. In the case of banks that are not fundamentally sound, there is a ban on dividends, with an easing or lifting of the ban being possible only in the context of a notified restructuring plan. Austria would notify any exceptions to these rules.

(34) Austria pledges that institutions receiving support through a recapitalisation measure are to submit a detailed viability report (in accordance with the Communication on recapitalisation) six months after the recapitalisation in the case of economically sound banks or a restructuring plan in the case of banks experiencing difficulties.

Liability for assets

(35) With regard to liability for an institution's assets, Austria pledges that this will last for no longer than three years. If liability is accepted for assets up to an amount valued by an auditor at the time of liability being assumed at the full book value (or a more recent valuation), then the remuneration must be set in accordance with the statutory remuneration for liability assumed for debts (pursuant to Section 9(1)-(3) of the Implementing Order). Where liabilities exist for assets up to an amount valued by an auditor at the time of liability being assumed at more than the book value (or a more recent valuation), the liability – to the extent that there is a difference between the amount of the liability and the established book value – is considered to be a capital injection, which means that the above-mentioned conditions for capital injections apply (in particular, the corresponding annual fee of at least 9.3%). The State becomes liable for amounts owed to an institution only if the institution becomes insolvent or if its insolvency is prevented solely by a supervisory measure[6]. In this case, a restructuring or liquidation plan must be notified.

<u>Loans</u>

(36) With regard to loans that do not constitute equity being granted to institutions, Austria pledges that the minimum rate will be the 12-month Euribor rate plus the statutory remuneration for liability for debts under Section 9(1)-(3) of the Implementing Order. It will notify any exceptions to this rule. Austria also pledges that corresponding loans will be granted only for a maximum duration of three years. Only in justified

[6] For example, a receivership order pursuant to Section 83 of the Austrian Banking Act, Austrian Federal Law Gazette (BGBl.) No 532/1993, in the version of BGBl. I No 136/2008.

exceptional cases can the maturity of the loans be extended up to a maximum of five years. Longer maturities can be explained and justified in the obligatory six-monthly report by reference to the banks' need for liquidity and the capital market's requirements. For the rest, the conditions in paragraphs 19 (footnote 3), and 20, which have been pledged in respect of the liability pursuant to the ISBG, apply correspondingly.

Share acquisition

(37) With regard to the purchase of existing shares, Austria pledges that this measure will be taken only as a safeguard, e.g. in connection with other measures pursuant to the FinStaG or the IBSG, by ensuring that it acquires controlling rights as a shareholder when assuming liability. Austria also undertakes to ensure that the existing shareholders will receive a maximum price for their shares corresponding to the price without state intervention (or any speculation in this regard) or, in the case of unlisted companies, the corresponding book value (i.e. fair value) of the shares. Austria has given a commitment that the purchase of existing shares will be considered only where other individual measures under the FinStaG prove inadequate.

Acquisition of ownership

(38) In addition, Austria can assume the ownership rights of institutions in exceptional circumstances. Pursuant to Section2(2) of the FinStaG, this rule applies only if there is a risk of the institution not being able to meet its obligations to its creditors. Austria states its intention to use this provision only to avert serious damage to the national economy. This provision is viewed as a "last resort" that may be necessary when other measures for obtaining the necessary cooperation from corporate bodies or owners fail. The possibility of a procedure in a court of law in order to determine the amount of compensation is provided for.

C. General provisions common to both the IBSG and the FinStaG

(39) Austria pledges that it will report to the Commission every six months on the application of the measures described above.

(40) Austria pledges that beneficiary institutions will have to comply with further behavioural rules in order to avoid distorting competition, such as, for example, where guarantees are relied upon, abstaining from soliciting business in any way by referring to the state support measures. Financial institutions taking part in the stabilisation measures undertake not to use the capital injection for purposes of aggressive competition.

(41) Austria pledges to observe the following institution-related ceilings:

- EUR 2 billion for assuming liability for individual bank issues, with an overall maximum per bank of EUR 15 billion depending on its size (liabilities under the IBSG and liabilities for debts under the FinStaG, including monies provided by the clearing bank);
- EUR 3 billion in total per bank for liabilities for assets under the FinStaG;
- EUR 3 billion in total per bank for measures other than assumptions of liability (as a rule, the issuance of share capital);
- for loans under the IBSG, the clearing bank will set a maximum per institution based on objective and clear criteria (including balance-sheet total, possible position as a

central institution, and volume- and risk-based large exposure limits under Section 27 of the Austrian Banking Act as determined by the clearing bank) and will ensure that no unbalanced allocation of funding to only a few institutions takes place.

Allocation within these bounds will take place in accordance with objective, market-based criteria ("principle of maximizing executions"). Austria has pledged to notify the ceilings to the Commission immediately. If a ceiling is exceeded by an institution, a restructuring plan will be submitted to the Commission.

(42) If the remuneration formulae laid down in Section 9(1)-(6) of the Implementing Order are deviated from, the Austrian Government will submit a restructuring plan for the institution concerned within six months.

(43) Under Section 3 of the Implementing Order, beneficiary institutions are required to use the resources provided to them for lending or investing on market conditions for the benefit of the real economy, with the focus on the provision of loans to small and medium-sized enterprises and mortgage lending to households.

(44) The Implementing Order also requires aided enterprises to fulfil a series of conditions and obligations with respect to all the measures provided for here, including (a) basing their business model on viability, (b) examining corporate remuneration systems for their incentive effect and appropriateness, (c) taking job-saving measures within the bank or insurance company concerned, and (d) taking steps to avoid distortions of competition.

III. AUSTRIA'S POSITION

(45) The Austrian authorities acknowledge that the notified scheme is in the nature of aid. They stress, however, that the Austrian Government is aiming to make the individual measures as market-oriented as possible.

(46) The Austrian authorities point out that the package of measures is urgently needed to avert damage to the Austrian financial market due to the financial market crisis that has been steadily brewing since the summer of 2007. The insolvency of financial institutions and the resulting systemic risk would have dramatic consequences not only for Austria but also for the common market. In particular, difficulties in the Austrian banking industry would impact on neighbouring countries where Austrian banks have become a force in recent years.

(47) The Austrian authorities believe that the aid scheme is compatible with the common market in that it helps to "remedy a serious disturbance in the economy of a Member State" within the meaning of Article 87(3)(b) of the EC Treaty.

(48) A letter from the Austrian National Bank dated 26 November 2008 confirms that the aid scheme is needed to avert damage to the Austrian financial market.

(49) The Austrian authorities think that the notified aid scheme will not lead to any undue distortions of competition or any negative side effects for other Member States. The scheme is open to all Austrian financial institutions and all Austrian subsidiaries of foreign institutions in Austria and hence is non-discriminatory.

(50) The Austrian authorities pledge that Austria will not take measures under the IBSG and the FinStaG more than six months after the laws enter into force unless Austria has first

notified the measures to the Commission for an extension and the Commission has given its approval in good time. This is possible inasmuch as there is no legal entitlement to the measures contained in both laws.

IV. ASSESSMENT

1. Existence of aid

(51) Article 87(1) of the EC Treaty provides that 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.

(52) The Commission agrees with the Austrian authorities that the guarantees under the IBSG and the measures provided for in the FinStaG constitute aid within the meaning of Article 87(1) of the EC Treaty in favour of banks and insurance companies.

(53) The guarantees for new liabilities and the recapitalisation measures will enable beneficiaries to acquire the necessary capital and liquidity on more favourable terms than would have been possible under the conditions prevailing in the financial markets. Inasmuch as this will confer an economic advantage on beneficiaries and strengthen their position vis-à-vis their competitors in Austria and in other Member States, the measures at issue will distort competition and affect trade between Member States. The resulting advantage will be a selective one in that it will benefit only beneficiaries under the scheme and will be financed through state resources.

(54) It should be noted in particular that no market-economy investor would have assumed liability for debts, carried out recapitalisations, assumed liability for assets or provided liquidity, or would have taken any other measures provided for in the legislation on such terms[7]. With regard to the assumptions of liability, the Commission is convinced that, in view of the current financial crisis, no private investor would have been prepared to assume such a heavy liability for debt instruments and obligations of and towards participating financial institutions. This applies by analogy to the provision of liquidity and the liability for assets under the conditions described. With regard to the recapitalisation, the Commission would point out that a market-economy investor expects a reasonable return on his investment[8] - something which, under current market conditions, is either unusually low or else altogether unavailable. In the case of the scheme at issue, this is borne out by the fact that the State is only investing because no market-economy operator is willing to invest on a comparable scale on similar terms.

(55) As far as the clearing bank is concerned, the Commission considers it to be a mere vehicle the creation of which must be seen as being intended solely to revive the interbank market. Since the clearing bank is non-profit making and is committed to not passing on any profits - such as might be earned, for example, from the interest-rate

---

7 See Commission Decision of 13 October 2008 in Case N 507/2008 *Financial support measures to the banking industry in the UK*, not yet published, and Commission Decision of 22 October 2008 in Case N 512/2008 *Support measures for financial institutions in Germany*, not yet published, paragraph 42.

8 See Joined Cases T-228/99 and T-233/99 *Westdeutsche Landesbank Girozentrale* [2003] ECR II-435, paragraph 314.

spread - during its existence to its owner banks, ploughing them back instead into the business, the Commission sees no anticompetitive advantage here in favour of the clearing bank as such. The Commission reserves the right to verify this in the event of renewal of the measure's authorisation, in the light of the promised six-monthly reports. There does, however, exist an advantage for the institutions in that they may obtain liquidity through the clearing bank and the guarantee it provides. This advantage also constitutes a "favouring" within the meaning of Article 87(1) inasmuch as the market would likewise not provide a guarantee for the clearing bank, at least not without an appropriate annual remuneration (a surrendering of any profits upon dissolution, such as is currently provided for, would be insufficient for a market-economy investor).

(56) The Commission sees in the purchase of existing shares and the takeover of assets, where unaccompanied by a capital injection, an assumption of liability or some other state measure, no favouring of the institution inasmuch as the measure has a neutral effect on it, amounting as it does to a mere change of ownership[9]. This will be the case if the State pays the market price, as it will when it purchases existing shares under its commitment to pay the former shareholders no more for their shares than they would have been worth had there been no state intervention (and no speculation about such intervention) or, in the case of unlisted companies, no more than the book, or fair, value of the shares in the absence of state intervention (and of speculation about such intervention)[10]. In the event of a takeover of assets, i.e. nationalisation, an appropriate market price must also be paid, to be established on the basis of a separate statutory order or, failing that, by the ordinary courts.

2. Compatibility of the financial support measures

a) Application of Article 87(3)(b) of the EC Treaty

(57) Austria plans to grant operating aid in the form of guarantees and make fresh capital and liquidity available under a scheme in favour of financial institutions. In view of the current situation in the financial market, the Commission considers that this measure can be examined directly under the provisions of the EC Treaty, and in particular Article 87(3)(b) thereof.

(58) Under Article 87(3)(b) of the EC Treaty, the Commission may declare aid compatible with the common market if it helps "to remedy a serious disturbance in the economy of a Member State". The Commission would point out that the Court of First Instance has expressly stated that Article 87(3)(b) is to be applied restrictively, with the result that the aid may not benefit just one enterprise or one sector but must help to remedy a disturbance in the whole of the economy of the Member State concerned[11].

---

[9] See Commission Decision of 5 December 2007 in Case NN 70/2007 *Northern Rock* (OJ C 43, 16.2.2008, p. 1).

[10] See also the Commission communication of 5 December 2008 on recapitalisation, Annex 1.

[11] See Joined Cases T-132/96 and T-143/96 *Freistaat Sachsen and Volkswagen AG* v *Commission* [1999] ECR II-3663, paragraph 167. Confirmed in the Commission Decisions in Cases C 47/1996 *Crédit Lyonnais* (OJ L 221, 8.8.1998, p. 28, paragraph 10.1), C 28/2002 *Bankgesellschaft Berlin* (OJ L 116, 4.5.2005, p. 1, paragraphs 153 *et seq.*) and C 50/2006 *BAWAG*, not yet published, paragraph 166. See Commission Decision of 5 December 2007 in Case NN 70/2007 *Northern Rock* (OJ C 43, 16.2.2008, p. 1), Commission Decision of 30 April 2008 in Case NN 25/2008 *Rescue aid for WestLB* (OJ C 189, 26.7.2008, p. 3), and Commission Decision of 4 June 2008 in Case C 9/2008 *Sachsen LB*, not yet published.

(59) The Commission takes the view that the scheme at issue concerns the whole of the banking and insurance industry in Austria. It does not contest that – as the Austrian authorities have asserted – in the current global financial crisis access to liquidity has become more difficult for all financial institutions and confidence in financial institutions' creditworthiness has suffered. If the liquidity and confidence issue is not resolved, not only will this lead to difficulties in the banking industry but, owing to the key role that financial institutions play in providing capital to the rest of the economy, it will also have a systemic impact on the Austrian economy as a whole. The Commission does not question that the scheme at issue serves to overcome the liquidity bottlenecks and loss of confidence from which Austrian financial institutions are currently suffering. It concludes, therefore, that the scheme will help to remedy a serious disturbance in the Austrian economy.

b) Conditions for the application of Article 87(3)(b) of the EC Treaty

(60) According to the Communication from the Commission on the application of State aid rules to measures taken in relation to financial institutions in the context of the current global financial crisis,[12] it must be stressed in the context of the application of Article 87(3)(b) of the EC Treaty that an aid measure or scheme may be declared compatible with the common market only if it satisfies the general criteria for compatibility under Article 87(3), as viewed in the light of the general objectives of the Treaty and in particular of Articles 3(1)(g) and 4(2) of the EC Treaty, which entail compliance with the following conditions:[13]

a. *Appropriateness:* The aid measure must be precisely targeted at its objective, i.e. in this case to remedy a serious disturbance in the economy. This would not be the case if the measure were not appropriate to remedy the disturbance.

b. *Necessity:* The aid measure must, in its amount and form, be necessary to achieve the objective. This means that it must be of the minimum amount necessary to attain the objective and must take the form most appropriate to remedy the disturbance. In other words, if a lesser amount of aid or a measure with less distortive affect (e.g. a temporary and limited guarantee instead of a capital injection) were sufficient to remedy a serious disturbance in the economy, the measures in question would not be necessary. This is confirmed by settled case law of the European Court of Justice.[14]

---

12 See http://ec.europa.eu/comm/competition/state_aid/legislation/banking_crisis_paper.pdf

13 See Commission Decision of 10 October 2008 in Case NN 51/2008 *Guarantee scheme for banks in Denmark*, not yet published, paragraph 41; Commission Decision of 13 October 2008 in Case N 507/2008 *Guarantee scheme for banks in the United Kingdom*, not yet published, paragraph 45; Commission Decision of 13 October 2008 in Case N 481/2008 *Guarantee scheme for banks in Ireland*, not yet published, paragraph 58; Commission Decision of 22 October 2008 in Case N 512/2008 *Support measures for banks in Germany*, not yet published, paragraph 47, and all subsequent decisions on aid schemes for banks affected by the financial crisis.

14 See Judgment in Case 730/79 *Philip Morris* [1980] ECR 2671. This line of authority was recently reaffirmed by the European Court of Justice in its judgment of 15 April 2008 in Case C-390/06 *Nuova Agricast v Ministero delle Attività Produttive*, where the Court held that "As is clear from Case 730/79 […], aid which improves the financial situation of the recipient undertaking without being necessary for the attainment of the objectives specified in Article 87(3) EC cannot be considered compatible with the common market."

c. *Proportionality*: The positive effects of the measure must be properly balanced against the distortions of competition caused by it; this ensures that the distortions of competition are limited to the minimum necessary to attain the measure's objectives. This follows from Articles 3(1)(g) and 4(1) of EC Treaty, which provide that the Community must ensure the proper functioning of an internal market with free competition. Therefore, Article 87(1) of the EC Treaty prohibits all selective measures by the State or from state resources that are capable of distorting trade between Member States. Any derogation under Article 87(3)(b) of the EC Treaty which authorises state aid must ensure that such aid is limited to what is necessary to achieve its stated objective, reducing to a minimum any distortions of competition that arise as a result.

c) Assessment of the compatibility of the clearing bank arrangements

(61) First it must be pointed out that the purpose of setting up the clearing bank is to remedy a serious disturbance in the economy. The Commission recalls that the unusually favourable conditions obtaining on financial markets before the current crisis were accompanied by an exaggerated confidence in the solvency of companies operating in those markets. The crisis has brought this flawed risk assessment into the open. The reaction of market players has been a general and perceptible decline in mutual trust, so that even solvent banks are having difficulties in obtaining liquidity and are therefore unable to meet their obligations.

(62) One feature of the Austria scheme for restoring confidence is the clearing bank, which is designed to raise liquidity from the capital market and/or from other institutions and to channel it to the institutions that need it. The clearing bank's business policy is not geared to profit-making, and no provision is made for any other commercial banking activities. It is also important to bear in mind that the clearing bank was founded by a number of other banks; the State has no ownership rights over it. The Commission has therefore concluded that the clearing bank is a mere vehicle of the banks and that its foundation should be seen exclusively in the light of the above purpose, i.e. to revive the interbank market.

(63) The aim of the liability scheme, which is inextricably linked to the clearing bank, is to establish a safety net for investors in the newly issued debt of participating institutions in Austria, so that they can have sufficient access to liquidity. The Commission has established that such a liability scheme should help revive interbank lending and is therefore an appropriate means of overcoming the problems.[15] A clearing bank that is guaranteed by the State, together with a guarantee scheme that is also backed by the State, is therefore an appropriate means of overcoming the present crisis.

[15] See Commission Decision of 10 October 2008 in Case NN 51/2008 *Guarantee scheme for banks in Denmark*, not yet published, paragraph 42; Commission Decision of 13 October 2008 in Case N 507/2008 *Guarantee scheme for banks in the United Kingdom*, not yet published, paragraph 56; and Commission Decision of 13 October 2008 in Case N 481/2008 *Guarantee scheme for banks in Ireland*, not yet published, paragraph 59.

(64) The Austrian scheme also offers the possibility of assuming liability for securities issued by institutions. The Commission has already recognised this possibility as an appropriate instrument in other packages of measures.[16]

(65) Furthermore, the scheme is aimed at suitable recipients as only solvent companies can be considered for support. The Commission therefore believes that the design of the scheme is appropriate to resolve the refinancing problem currently affecting Austrian financial institutions.[17]

(66) As regards necessity, the guarantee scheme, whereby a safety net is established to cover debt newly issued by institutions in Austria, appears to be limited to the minimum necessary in terms of scope and duration.

(67) As regards scope, the Commission does not dispute the fact that the guarantee scheme is needed to restore the confidence of lenders.[18] A guarantee in respect of retail deposits would not be sufficient as it would only avoid bank runs but not restore the confidence of institutional lenders. Moreover, the Commission notes positively that Austria is limiting the guarantee to the forms of financing that are experiencing the greatest problems at the moment, viz. short- to medium-term interbank financing. First, subordinated debt is not guaranteed. Second, existing debt is not covered, but only newly issued debt and only such debt that is short- and medium-term in nature. Third, Austria has limited the scope of the guarantee scheme so that the institutions have a window of only six months to issue the new debt that will benefit from the guarantee.

(68) Austria's assumption of liability for newly issued debt will apply for up to three years or – in duly substantiated, exceptional cases – for five years, if a longer period is warranted because of the liquidity requirements of the company (clearing bank) and the needs of the capital market. Since any extension to five years remains the exception and must be justified, the need for such an arrangement is reasonable, also in the light of earlier decisions.[19] In any event, the Commission welcomes the fact that the deadline for assuming liability for debt is less than two years (six months initially).[20] This means that, after six months, liability can no longer be assumed for newly issued debt unless the Commission allows an extension to the deadline.

(69) As regards proportionality, the distortion of competition is minimised by various safeguards, in particular a market-oriented premium. Here the Commission has taken into account the fact that the clearing bank is a mere vehicle of the banks the foundation of which should be regarded solely as a means of reviving the interbank market.

[16] Idem.

[17] See Commission Decision of 10 October 2008 in Case NN 51/2008 *Guarantee scheme for banks in Denmark*, not yet published, paragraph 45; Commission Decision of 13 October 2008 in Case N 507/2008 *Guarantee scheme for banks in the United Kingdom*, not yet published, paragraph 56; and Commission Decision of 22 October 2008 in Case N 512/2008 *Support measures for banks in Germany*, not yet published, paragraph 61.

[18] See Commission Decision of 10 October 2008 in Case NN 51/2008 *Guarantee scheme for banks in Denmark*, not yet published, paragraph 47.

[19] See Commission Decision of 29 October 2008 in Case NN 533/2008 *Guarantee scheme for banks in Sweden*, not yet published, paragraph 44.

[20] Commission Decision of 13 October 2008 in Case N 507/2008 *Guarantee scheme for banks in the United Kingdom*, not yet published, paragraph 60. Communication from the Commission on the application of State aid rules to measures taken in relation to financial institutions in the context of the current global financial crisis, point 24.

Therefore, the clearing bank is only superficially an aid beneficiary; the real beneficiaries of the measure are the banks which borrow money from the clearing bank.[21]

(70) Since the real beneficiaries of the measure are the borrowing banks, it is important to ensure that they pay a corresponding remuneration for this advantage. Calculation of this amount must take into account at least the statutory remuneration for liability. The Commission has established that, on average, the financial institutions pay an appropriate premium corresponding to at least the amount referred to by the European Central Bank in points 3 to 8 of its recommendations of 20 October 2008. The ECB refers to a provision premium of 0.5% and a risk premium corresponding to the credit default swap spread of the individual financial institution. This formula for calculating the remuneration must be adhered to, unless Austria notifies individual cases as restructuring aid within six months. On the whole, this arrangement can be regarded as proportionate.[22]

(71) Lastly, the scheme also includes behavioural constraints to guarantee that the participating financial institutions review the viability of their commercial policy, to ensure lending to the real economy (see point 43) and to provide exit incentives by restricting the level of remuneration. The Commission regards these safeguards as sufficient to satisfy the requirements of point 39 of the Communication on recapitalisation.

d) Assessment of the measures under the Law on the stability of the financial markets (FinStaG)

(72) The purpose of measures under the Law on the stability of the financial markets is to increase the capital of a credit institution or insurance company and/or to stabilise such institutions by means of other suitable measures. The Commission finds that Austria has a very broad range of measures at its disposal to achieve these objectives. These measures are discussed in detail below.

<u>*Assumption of liability*</u>

(73) A general examination of the assumption of liability for a bank's debts has already been carried out in the part of this decision dealing with the IBSG. Since the assumption of liability under the FinStaG is similar in terms of both objectives and design, it can also in principle be regarded as compatible.

(74) This applies in particular to the instruments for obtaining liquidity, which were also examined in connection with the IBSG. In this case, however, the Commission assumes that – unlike under the IBSG – such guarantees can be applied only in exceptional cases as the FinStaG is to be applied only in *ad hoc* cases. In particular, it may be necessary to apply such a guarantee measure for the purpose stated in the FinStaG in conjunction with other measures provided for in the Law. In any event, the scope of such guarantees is limited – as is the scope of guarantees for liquidity instruments not covered by the

---

[21] The investing banks and capital market investors who make the liquidity available to the clearing bank also benefit as they obtain a secure place for their investments. However, they could also find other secure forms of investment, e.g. government loans.

[22] Commission Decision of 13 October 2008 in Case N 507/2008 *Guarantee scheme for banks in the United Kingdom*, not yet published, paragraph 61.

IBSG – because Austria has given an assurance that the value of such measures will not exceed a total of EUR 3 billion per institution.

(75) Since the FinStaG provides for the assumption of liability for all liquidity instruments on the liabilities side of the balance sheet, it may also serve to cover instruments other than those secured under the IBSG. The Commission has no objections to such an extension of coverage since, in the present crisis, it has already viewed as suitable and proportionate guarantees in other aid schemes for a wide variety of instruments on the liabilities side, including secured debt instruments (mortgage bonds), which under normal market conditions would be regarded as very secure.[23]

(76) Banks also face growing difficulties in placing on the market financial instruments not backed by a state guarantee. Because of the state aid programmes, investors have a choice between guaranteed and non-guaranteed instruments, so that the rate of interest paid is often regarded as a secondary consideration if the entire amount invested can be recovered without any appreciable risk.

Liability for assets

(77) The assumption of liability for debts owed (assets-side of the balance sheet) is also an appropriate way of reducing market distortions since it guarantees the continued value of the creditor's assets[24] and hence reduces the bank's risk-weighted capital requirements. In particular, an asset item guaranteed in this way becomes better collateral for business transactions with other market players, e.g. other banks or – in the case of refinancing transactions – the bank of issue. In that regard the measure is designed to secure the financial stability of the institution in question and is therefore suitable for remedying a serious disturbance in the Austrian economy, securing macroeconomic equilibrium and helping to protect the Austrian economy and the financial market.

(78) The time-frame also appears to be appropriate: liability can be assumed for no more than three years and will not remain in force permanently.

(79) The measure is also limited to the minimum, as is particularly evident from the time when the liability takes effect. The Commission notes positively that Austria has laid down that the liability will be triggered, i.e. the State will actually disburse funds, only if the bank itself becomes insolvent. This reduces the risk of the State actually having to pay out, as its liability will be triggered not when the debt is defaulted on but only when the bank fails, although this can also be caused by a default in relation to an asset item. If the trigger for assuming liability were linked directly to changes in the value of the asset item alone, an institution could get the State to guarantee an asset item it was about to write off in the knowledge that the State would intervene in the event of any default on claims without the institution itself suffering any damage to its credit rating. This would increase the incentive to abuse the measure by shifting high-risk balance-sheet items onto the State.

---

[23] Commission Decision of 22 October 2008 in Case N 512/2008 *Support measures for banks in Germany,* not yet published, paragraph 64; Commision Decision of 29 October 2008 in Case NN 533/2008 *Guarantee scheme for banks in Sweden,* not yet published, paragraph 44.

[24] This factor has not yet been examined by the Commission in any of its decisions on the current rescue packages for financial institutions.

(80) On the question of proportionality, the Commission finds that this measure can have a similar effect to recapitalisation (which is examined below) as the institution's need for capital resources is – for a limited period – reduced, placing it in a better position to absorb any losses for the duration of the guarantee.

(81) In any event, where liability is assumed for assets, a distinction must be drawn in terms of effect and form, corresponding to the economic incentives and consequences. Thus, liability can be limited to the value of an obligation as shown in the bank's books, whereas liability for debts that have already been partly written off may exceed their book value.

(82) In the first case, if the amount of liability matches the book value, the guarantee has no direct impact on the profit-and-loss account but is only an aid for further depreciations.

(83) In the second case, liability for assets may be assumed for obligations which have already been partly written off, so that a higher value is again shown, as before the write-off. This has a direct impact on the profit-and-loss account and, consequently, this type of liability for assets has a more distortive effect on competition than a guarantee for the value shown in the bank's books, where the only risk covered is that of a further fall in value. A higher remuneration is therefore required in order to limit this type of measure to an absolute minimum. This requirement is met by the proposal that this kind of guarantee be regarded as a recapitalisation.

(84) The Commission therefore welcomes the fact that, in terms of assumption of liability and remuneration, Austria differentiates between different types of guarantee. On this basis and in view of the behavioural constraints mentioned in paragraph 71, the Commission regards the measure as proportionate. Once again it must be assumed here that Austria may depart from this formula for calculating the remuneration only if it notifies a restructuring plan in the first case within six months. In the second case a restructuring plan must be notified at all events.

Capital injection

(85) A recapitalisation scheme should be designed to ensure not only that financial institutions possess sufficient capital and are thus able better to withstand potential losses but also that the real economy is provided with sufficient credit.[25] The Austrian Government is, therefore, planning a capital participation in the public sector.

(86) The Commission notes in particular that the scheme applies to institutions whose capital base is being strengthened in order to bear possible losses. Capital is, therefore, to be made available in particular in order to prevent fundamentally sound institutions from getting into difficulties on account of the current crisis. The scope of the recapitalisation scheme is, therefore, suited to strengthening the banking sector in Austria and thus helping to revive the issuance of interbank loans as well as providing sufficient lending to the real economy.

(87) The Commission has already noted that various measures may be suited to restoring confidence in the banking sector and to ensuring lending to the real economy. Since, in

[25] See the Commission Communication on recapitalisation of 5 December 2008, point 3, with reference to the Ecofin meeting on 2 December and the indication of a corresponding policy change, with the possibility of subsequent improvements to existing decisions being explicitly provided for.

particular, the problem of write-offs cannot be resolved solely by liability guarantees, recapitalisation measures are, in the Commission's opinion, basically an appropriate measure[26]. Sufficient capital stock is also a necessary condition to be met if banks are to start lending again to the real economy under current market conditions.

(88) The recapitalisation scheme is also limited to what is necessary in terms of duration. Austria has restricted the duration of the scheme to an initial period of six months.

(89) As regards proportionality, the finality of the capital injections means that the scheme must lay down behavioural rules so that undue distortions of competition are avoided.[27]

(90) Appropriate pricing of capital provided by the State that is as market-oriented as possible is viewed by the Commission as the best way of ensuring the proportionate nature of a capital injection scheme;[28] Moreover, the price should increase over time so that there is an incentive for the banks to redeem the capital injections as soon as market circumstances permit.[29]

(91) On this basis, it is acceptable as a first step for the State, when taking a normal participation in ordinary capital, to undertake to ensure that the issue price of the shares is set on the basis of a market-oriented valuation reflecting as much as possible the behaviour of a market-economy investor.

(92) In addition, a market-oriented remuneration is needed for other forms of recapitalisation. In this connection, the Commission, in its Communication on recapitalisation, refers to the Eurosystem recommendations of 20 November 2008, which provide for an average minimum remuneration in the case of fundamentally sound banks that lies within a 7%-9.3% corridor.[30]

(93) The Commission notes here that Austria has undertaken to require, in accordance with the Communication on recapitalisation,[31] for such injections of own capital into credit institutions or insurance undertakings that, economically speaking, contain an interest component a market-oriented, institution-specific rate of return that, for fundamentally sound banks, may not be lower than 9.3% for core Tier-1 capital and 7% for debt instruments unless Austria effects the capital injection alongside a significant contribution from private investors on the same conditions (see paragraph 33).[32]

---

26 Commission Communication on recapitalisation of 5 December 2008, point 4; Commission Decision of 13 October 2008 in Case N 507/2008 *Guarantee scheme for banks in the United Kingdom*, not yet published, point 49; Commission Decision of 22 October 2008 in Case N 512/2008 *Support measures for banks in Germany*, not yet published, point 48; and Commission Decision of 12 November 2008 in Case N 560/2008 *Support measures for banks in Greece*, not yet published, point 48.

27 See, in particular, the Commission Communication on the application of State aid rules to measures taken in relation to financial institutions in the context of the current global financial crisis, point 27.

28 See, in particular, the Commission Communication on recapitalisation of 5 December 2008, point 11.

29 See, in particular, the Commission Communication on the application of State aid rules to measures taken in relation to financial institutions in the context of the current global financial crisis, point 39, and the Commission Communication on recapitalisation of 5 December 2008, point 11.

30 See also the Commission Communication on recapitalisation of 5 December 2008, points 27 *et seq*.

31 See the Commission Communication on recapitalisation of 5 December 2008.

32 The Commission notes here that the competition-distorting effect of the state aid is reduced if a significant number of private investors (at least 30%) underwrite the capital injections on the same terms as the State. A remuneration comparable to that for private investors is then acceptable because a scheme that overall

(94) More specifically, the Commission has established in a simulation that the rates of return essentially envisaged for capital injections for fundamentally sound institutions, namely those for participation capital (which, for the rest, are likewise applicable to other comparable instruments), generate for the State the overall returns described below according to the variant (see paragraph 29) and broken down in detail in Table 1, depending on the year in which the capital is paid back: [33]

- In the first variant (9.3% coupon, redemption at par but increase in the amount redeemed to 150% as of the tenth year), the average annual rate of return is at least 9.3% if redemption takes place after the first five years. In the event of redemption after the sixth to ninth year, however, the average rate of return increases under the step-up clause (from 9.37% to 9.79%) and, on average, rises to significantly more than 12% if the capital is redeemed only after the tenth year.

- In the second variant (8% coupon, 110% redemption but increase in the amount redeemed to 150% as of the tenth year), the average rate of return for the State in view of the higher redemption price is 18% after the first year. This figure subsequently falls, to 9.21% on redemption in the eighth year, but climbs again to 11.56% on redemption after the tenth year.

Table 1 – Simulated average annual rate of return

SCHEME 1	1	2	3	4	5	6	7	8	9	10	11
Coupon	9,30%	9,30%	9,30%	9,30%	9,30%	9,80%	10,30%	11,05%	12,05%	13,05%	14,05%
Redemption price of capital	0%	0%	0%	0%	0%	0%	0%	0%	0%	50%	50%
Average rate of return for the State	9,30%	9,30%	9,30%	9,30%	9,30%	9,37%	9,47%	9,61%	9,79%	12,68%	12,48%
SCHEME 2	**1**	**2**	**3**	**4**	**5**	**6**	**7**	**8**	**9**	**10**	**11**
Coupon	8,00%	8,00%	8,00%	8,00%	8,00%	8,50%	9,00%	9,75%	10,75%	11,75%	12,75%
Redemption price of capital	10%	10%	10%	10%	10%	10%	10%	10%	10%	50%	50%
Average return for the State	18,00%	12,70%	10,99%	10,15%	9,65%	9,38%	9,25%	9,21%	9,25%	11,56%	11,37%

Source: Austrian figures and own calculations.

(95) The Commission thus concludes that, in the best-case scenario, the State can receive an average rate of return that, at times, easily exceeds 10% while, in the worst-case scenario, it can count on a rate of return at 9.1%-9.3%. And so, even in the worst-case scenario, the rate of return is very close to that advocated by the Communication on recapitalisation. In particular, the increases as from the sixth year resulting in a higher price of capital are significant. This provides an incentive to pay back the capital.

(96) The Commission would also point out that Austria has provided for two additional aspects that enhance the incentive effect:

(97) Firstly, a bank that does not pay the prescribed rate of return, the actual payment of which it can influence by way of balance-sheet measures for determining the profit available for distribution, even though it could pay with different arrangements, is

has to be regarded as aid since no private investor would take part in the total amount of the recapitalisation is nevertheless sufficiently market-oriented as regards the remuneration.

[33] Excluding the interest rate and assuming that the capital is paid back and that the higher repayment is covered by a corresponding increase in the value of the institution.

required to pay a higher redemption price to the State since the redemption percentage for the participation capital has to be increased by the percentage points by which the dividend fell below the dividend promised on the participation capital in so far as distributable profits were ploughed back into the business and in so far as this was not required by law or by the supervisory authority. This guarantees a higher rate of return.

(98) Another way of incentivising banks to pay back the capital provided by the State is for the Commission to restrict dividends, as provided for by the Austrian scheme (see paragraph 33). This can be regarded as a further incentive to pay back capital to the State as quickly as possible.

(99) Where recapitalisations have taken place for fundamentally sound institutions, Austria has also undertaken, as part of the six-monthly reporting obligations, to produce a detailed report establishing whether the institution is indeed fundamentally sound, the indicators for this being given in Annex 1 to the Communication on recapitalisation.[34] Moreover, the beneficiary institutions are required to use the funds received to lend to the economy on normal market conditions, with the focus being on the provision of loans to small and medium-sized enterprises and on mortgage lending to households.[35]

(100) Essentially, therefore, this remuneration can be accepted by the Commission as being proportionate for fundamentally sound institutions since the incentives for the bank to pay back the capital to the State are viewed as being sufficiently strong.[36]

(101) However, the Commission has also made clear in the Communication on recapitalisation that the Eurosystem recommendations of 20 November 2008 apply only to fundamentally sound institutions and that, in the case of other banks, a higher remuneration and/or stricter conditions must be required.[37]

(102) Austria has complied with this by pledging in accordance with the Communication on recapitalisation that it will demand a market-oriented remuneration of at least 10% for banks that are not fundamentally sound.

(103) In addition, for banks that are not fundamentally sound, there is an absolute ban on dividends that can be eased or lifted only if a restructuring plan has been notified. Austria has undertaken to present a restructuring plan for such institutions at the latest six months after the measure enters into force. In this connection, it goes without saying that at least the growth of such institutions should be restricted.[38]

(104) The Commission regards these additional rules as sufficient to cope with the special situation that exists when banks that are not fundamentally sound are recapitalised.

(105) Lastly, a further positive aspect is that the Implementing Order requires the institutions to verify their own remuneration arrangements in terms of the incentives they offer and

---

[34] If it should transpire that a bank is not fundamentally sound, the Commission expects a higher rate of return and the presentation of a restructuring plan, as described below.

[35] As stated in paragraph 71, the Commission views these as adequate safeguards consistent with point 39 of the European Communication on recapitalisation of 5 December 2008.

[36] It is assumed that deviations from the remuneration formula are allowed only if Austria notifies the granting of any restructuring aid within six months.

[37] See the Commission Communication on recapitalisation of 5 December 2008, points 43 *et seq*.

[38] See also in principle the Commission Communication on recapitalisation of 5 December 2008, point 35 and footnote 18.

their appropriateness and to ensure, within the framework of the civil-law possibilities available to them, that they do not result in inappropriate risks being incurred and that they are geared to long-term sustainable objectives and are transparent.

(106) The Commission would moreover note that the capital injections may be accompanied by the acquisition of existing shares and the takeover of business assets. As a rule, it regards such measures with scepticism. It is doubtful that these measures, and in particular the acquisition of existing shares by the State, are suited to helping overcome the financial crisis since they protect existing shareholders and not investors, who should be encouraged to invest.

(107) However, Austria has taken sufficient measures to reduce the scope of this scheme to the necessary minimum. For instance, it has pledged that the acquisition of existing shares is designed simply as a Federal safeguard and will be accompanied by other measures under the FinStaG or the IBSG, with the Federal Government securing controlling rights as a shareholder in conjunction, for example, with the assumption of liability. Austria also undertakes to ensure that the acquisition of existing shares will be considered only if other measures under the FinStaG are not sufficient to stabilise the institution.

(108) The Commission assumes that these capital injections, coupled with the acquisition of existing shares, involve in any event, on account of the restriction of the scope of the scheme, banks that are not fundamentally sound, with the result that this must ultimately be examined in greater detail within the framework of a restructuring plan. Until then, therefore, it regards these measures with this narrow framework as still being suitable to help overcome the current problems in the financial sector and regards them as being proportionate.

(109) A similar assessment is made of the takeover of business assets, which is similar to a purchase of existing shares. Here too, the Commission is looking forward to the measure being definitely clarified in a restructuring plan given what is an extremely restricted scope, i.e. only to prevent any serious damage to the economy and if there is a danger that the institution is unable to meet its obligations to creditors after all the other measures prove ineffective because corporate bodies or owners are not involved as they should be.

(110) For these reasons, the recapitalisation scheme can be regarded as being compatible with the common market.

Loans

(111) The Commission acknowledges that, like guarantees, loans to institutions that find themselves in situations brought about by the crisis may be appropriate for helping to remedy any sudden and unexpected liquidity requirement, should investors refuse to provide refinancing because of their increased aversion to risk.[39]

(112) Since the loans and the assumption of liability are similar in terms of objective and design, loans under the FinStaG can also, in principle, be regarded as being compatible.

(113) The Commission here takes account of the fact that, in the case of loans, the corresponding Euribor interest rate applies in addition to the statutory guarantee

[39] Commission Decision of 5 December 2007 in Case NN 70/2007 *Northern Rock* (OJ C 43, 16.2.2008, p. 1).

remuneration. The bank also has to pay a risk fee that, as noted above, is fixed according to the institution's respective CDS spread. And so, a remuneration method has been selected which ensures that the State is paid, both for its provision of liquidity and for the risks it assumes, an amount such that undue distortions of competition are avoided. It can, therefore, be regarded as proportionate.

(114) The necessary restructuring plan for an institution that does not repay on time the amount of liquidity provided, together with remuneration, is a further element that helps keep application of this measure to a minimum.

DECISION

The Commission concludes that the measure constitutes state aid within the meaning of Article 87(1) of the EC Treaty.

Since the measure satisfies the above-mentioned conditions for aid under Article 87(3)(b) of the EC Treaty, it is compatible with the common market, with the result that the Commission has no objections to it.

The Commission would recall that, according to the assurance given by Austria, the measure is restricted to six months and any extension must be notified to the Commission.

If the decision contains confidential information which should not be disclosed, please provide the Commission within fifteen working days of the date of receipt of this letter a reasoned request for confidential treatment. Otherwise, the Commission will assume that you agree to disclosure of the data and publication of the full text of this letter in its binding language version on the following website:
http://ec.europa.eu/community_law/state_aids/index.htm
The request should be sent by registered letter or fax to:

European Commission
Directorate-General for Competition
State Aid Registry
Rue de la Loi/Wetstraat, 200
1049 BRUSSELS, BELGIUM
Fax No: (32-2) 296 12 42

For the Commission

Neelie KROES
Member of the Commission