

V

(Ogłoszenia)

POSTĘPOWANIA ZWIĄZANE Z REALIZACJĄ POLITYKI KONKURENCJI

KOMISJA EUROPEJSKA

POMOC PAŃSTWA – AUSTRIA

Pomoc państwa SA.32554 (09/C) & SA.32172 (11/NN) – Hypo Group Alpe Adria

Zaproszenie do zgłaszania uwag zgodnie z art. 108 ust. 2 TFUE

(Tekst mający znaczenie dla EOG)

(2012/C 31/09)

Pismem z dnia 19 lipca 2011 r., zamieszczonym w autentycznej wersji językowej na stronach następujących po niniejszym streszczeniu, Komisja powiadomiła Austrię o swojej decyzji w sprawie rozszerzenia postępowania określonego w art. 108 ust. 2 TFUE.

Zainteresowane strony mogą zgłaszać uwagi na temat środków pomocy, w odniesieniu do których Komisja rozszerza postępowanie, w terminie jednego miesiąca od daty publikacji niniejszego streszczenia i następującego po nim pisma. Uwagi należy kierować do Kancelarii ds. Pomocy Państwa w Dyrekcji Generalnej ds. Konkurencji Komisji Europejskiej na następujący adres lub numer faksu:

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Uwagi te zostaną przekazane władzom austriackim. Zainteresowane strony zgłaszające uwagi mogą wystąpić z odpowiednio uzasadnionym pismem wnioskiem o objęcie ich tożsamości klauzulą poufności.

TEKST STRESZCZENIA

I. PROCEDURA

1. W dniu 12 maja 2009 r. (sprawa C 16/09) Komisja wyraziła wątpliwości co do zgodności pomocy restrukturyzacyjnej otrzymanej przez Hypo Group Alpe Adria (HGAA) z przepisami art. 107 ust. 3 lit. b) TFUE.
2. W dniu 29 grudnia 2010 r. Austria zgłosiła pomoc dodatkową, która została przyznana HGAA, aby umożliwić temu bankowi utrzymanie minimalnych ustawowych wymogów kapitałowych.

II. STAN FAKTYCZNY

3. Kontrola aktywów banku wykazała na koniec 2010 r. potrzebę dodatkowych odpisów aktualizujących wartość.

W celu zapewnienia zgodności z ustawowymi wymogami kapitałowymi w dniu 31 grudnia 2010 r. Austria przyznała na rzecz banku HGAA gwarancję na aktywa (*Bürgschaft*) wynoszącą maksymalnie 200 mln EUR, wygasającą w dniu 30 czerwca 2013 r. Opłata za gwarancję ustaje w momencie wygaśnięcia gwarancji, jednak opłata za wykorzystane kwoty ustaje w sierpniu 2013 r., niezależnie od faktu, czy kwota ta została spłacona, czy też pozostaje niespłacona. Gwarancja ta stanowi ochronę pierwszej straty dla określonego pakietu aktywów.

III. OCENA

4. Środek ten można uznać za tymczasowo zgodny z rynkiem wewnętrznym, do momentu podjęcia przez Komisję decyzji w sprawie planu restrukturyzacji HGAA na podstawie art. 107 ust. 3 lit. b) TFUE. Środek ten jest bowiem

niezbędny, aby zapobiec ryzyku niewypłacalności banku o znaczeniu systemowym. Opłata za wykorzystane kwoty ustaje w dniu 31 sierpnia 2013 r., nawet w przypadku niespłacenia powyższych kwot w tym terminie. Komisja ma wątpliwości, czy takie ustalenia są stosowne i czy opłata ta nie powinna ustać dopiero w momencie spłacenia wykorzystanych kwot. Komisja dokona zatem ponownej oceny tej kwestii w momencie oceny planu restrukturyzacyjnego.

5. Ponadto Komisja postanowiła rozszerzyć postępowanie określone w art. 108 ust. 2 TFUE w odniesieniu do powyższego środka pomocy na rzecz HGAA. Komisja ma nadal wątpliwości, potwierdzone faktem konieczności przyznania dodatkowego środka pomocy, czy przedłożony plan restrukturyzacji będzie w stanie przywrócić długoterminową rentowność HGAA, czy dostatecznie ograniczono zakłócenia konkurencji oraz czy uzyskano odpowiedni podział obciążeń.

TEKST PISMA

„The Commission wishes to inform Austria that, having examined the information supplied by the Austrian authorities on the aid measure in the form of an asset guarantee to the benefit of Hypo Group Alpe Adria (“HGAA” or “the bank”), it has decided to temporarily find that aid measure compatible with the internal market until it has concluded its examination of the restructuring plan of the bank and that it has decided to extend the proceedings laid down in Article 108(2) of the Treaty on the Functioning of the European Union⁽¹⁾ (TFEU) which were instigated by decision C(2009) 3811 final on 12 May 2009 and extended on 23 December 2009 and on 22 June 2010.

1. PROCEDURE

1. In December 2008, Hypo Group Alpe Adria (HGAA), which was BayernLB's subsidiary at the time, received EUR 700 million of capital from BayernLB following large write-downs and losses. In addition, HGAA received EUR 900 million in Tier 1 *Partizipationskapital*⁽²⁾ from the Republic of Austria on the basis of the Austrian bank support scheme⁽³⁾.
2. On 29 April 2009, Germany notified a restructuring plan for BayernLB, including HGAA, to the Commission. Austria provided a viability plan for HGAA at the same date.
3. In its decision of 12 May 2009 in case N 254/09⁽⁴⁾ (“the opening decision”) the Commission initiated a formal investigation procedure, raising doubts about the compatibility

⁽¹⁾ With effect from 1 December 2009, Articles 87 and 88 of the EC Treaty have become Articles 107 and 108, respectively, of the TFEU. The two sets of provisions are, in substance, identical. For the purposes of this Decision, references to Articles 107 and 108 of the TFEU should be understood as references to Articles 87 and 88, respectively, of the EC Treaty where appropriate.

⁽²⁾ Tier 1 capital with no voting rights.

⁽³⁾ Commission Decision of 9 December 2008 in case N 557/08 (OJ C 3, 8.1.2009, p. 2), *Maßnahmen nach dem Finanzmarktstabilitäts- und dem Interbankmarktstärkungsgesetz für Kreditinstitute und Versicherungsunternehmen in Österreich*, last prolonged by Commission Decision of 16 December 2010 in case SA.32018 (10/N) (OJ C 20, 21.1.2011, p. 3).

⁽⁴⁾ OJ C 134, 13.6.2009, p. 31.

of the restructuring aid to BayernLB with the internal market, and in particular whether the restructuring plan was apt to restore the viability of BayernLB. In the same decision, the Commission questioned whether HGAA was fundamentally sound and expressed doubts regarding the compatibility of the aid granted to HGAA by Austria with the internal market.

4. Austria notified additional aid measures for HGAA on 18 December 2009, including a temporary asset guarantee which has since expired, a capital injection and a provision of liquidity. In its decision of 23 December 2009 in cases C 16/09 and N 698/09⁽⁵⁾ (“the rescue decision”) the Commission extended the investigation procedure in relation to those measures, which it at the same time found temporarily compatible with the internal market on the basis of Article 107(3)(b) TFEU for a period of up to six months. Austria purchased the existing shares from the previous owners for a symbolic euro and became therefore on 30 December 2009 the sole owner of the bank.
5. On 16 April 2010 Austria submitted a restructuring plan for HGAA.
6. In view of the ongoing assessment of the restructuring plan by the Commission Austria asked for a prolongation of the temporary approval of the measures for HGAA by letter dated 15 June 2010. The Commission decided on 22 June 2010 in case C 16/09⁽⁶⁾ to prolong the validity of the measures until it had concluded on the restructuring plan (“the prolongation decision”).
7. The Commission sent a list of questions regarding the submitted restructuring plan to Austria on 11 June 2010, to which Austria responded on 20 September 2010.
8. On 29 December 2010, Austria notified an additional measure in favour of HGAA in the form of an asset guarantee amounting to EUR 200 million. As the measure has already been granted, it is considered as non-notified. In view of the separation of the procedures relating to BayernLB and HGAA, the Commission informed Austria and Germany on 7 February 2011 that the case of HGAA would be split procedurally from the C 16/09 case and would thereafter be referred to as SA.32554 (09/C) “Restructuring Aid for Hypo Group Alpe Adria”. A meeting with the Austrian authorities took place on 24 January 2011. On 18 March, 15 April, and 3 May 2011, Austria submitted further information.
9. On 21 April 2011, Austria submitted a new restructuring plan for HGAA.
10. On 24 May 2011, the Commission found the EUR 200 million asset guarantee in favour of HGAA temporarily compatible with the internal market (decision SA.32172 (11/NN)), while extending the formal investigation procedure.

⁽⁵⁾ OJ C 85, 31.3.2010, p. 21.

⁽⁶⁾ OJ C 266, 1.10.2010, p. 5.

11. Subsequently, the Austrian authorities pointed out to the Commission that one element of the decision of 24 May 2011 did not reflect the final agreement on the guarantee between Austria and the bank.
12. It is necessary to deal with that discrepancy. The present decision thus replaces and annuls the decision of 24 May 2011 (SA.32172 (C(2011) 3648 final)).
13. Given the urgency of the measures, Austria has exceptionally agreed that this decision is adopted in the English language.

2. DESCRIPTION

2.1. The beneficiary and the temporarily authorised aid measures

14. The seat and headquarter of HGAA is in Carinthia (Austria) from where the bank and the leasing business is controlled. For a detailed description of the beneficiary and the authorised aid measures so far, reference is made to the opening decision and the rescue decision.

2.2. The additional aid measure

15. In order to gain a deeper insight into its own portfolios, the bank conducted the so-called "Review Rush" in the second half of 2010. The results of that exercise showed an additional need for write-downs which would have reduced the available excess capital of the bank to a degree where it was possible that the bank would not meet regulatory capital requirements at the end of 2010.
16. To avoid regulatory capital ratios being breached, Austria granted to HGAA an asset guarantee with similar features to those of a capital injection (*Bürgschaft*) amounting to EUR 200 million (including outstanding interest payments) from 31 December 2010 until 30 June 2013 ("the guaranteed amount"). The guaranteed amount will constitute a first-loss protection against the need for write-downs for specified parts of outstanding assets with a nominal value of EUR 200 million in a larger asset pool with a nominal value of [...] (*) and a book value as of 31 December 2010 of [...], which are listed in a so-called Annex 1 ("Annex 1 assets").
17. The effect of the asset guarantee is to reduce the provisioning or write-down needs of the bank and to protect its capital base. The measure differs from standard impaired asset measures because the specific construction of the guarantee is such that it will only influence [...]. By contrast, the granting of the measure does not affect the bank's risk weighted assets (RWA) as such. The guarantee is therefore given for (book) losses which have already occurred. That first-loss protection also distinguishes the measure from a standard impaired asset measure.
18. The guarantee will be triggered for individual assets if HGAA cannot manifestly recuperate the guaranteed value

from a guaranteed asset (for instance through court proceedings) — including from available collateral or any other party. However, while the guarantee can be triggered earlier, any actual payments due under the guarantee will be made as of 1 September 2013 at the earliest and until 31 January 2015 at the latest.

19. The remuneration of the guarantee is as follows: (i) from the moment when the guarantee is granted, HGAA shall pay a 10 % p.a. remuneration on the part of the assets guaranteed by Austria (7) and (ii) for amounts called upon HGAA shall pay from the moment the guarantee is triggered and until two months after the guarantee expires (31 August 2013) instead of the remuneration set out in (i) 10 % p.a. on the amount called upon as calculated at the end of each month. The payment in case of (ii) which will be paid before any payments are made on [...] instruments — depends on the bank recording a profit and no payment is due for any year in which no profits are shown. The remuneration is non-cumulative.

2.3. The restructuring plan

20. Austria submitted a new restructuring plan on 21 April 2011, which defines as the core of the bank the preservation of the South-Eastern European (SEE) network bank together with a central controlling unit in the Austrian holding. The SEE network consists of [...]. Leasing is to be significantly curtailed and kept under the governance of the locally active SEE banks. The plan acknowledges the need for a structured know-how transfer and an amplification of the local funding base for the different banks in the network. The new plan provides for a reprivatisation of the bank in [...].
21. The banking activities in Austria (Hypo Alpe-Adria-Bank AG, "HBA") are planned to be sold at the latest by the end of [...]. Due to the existing funding gap, the divestiture of the Italian bank is now planned for [...], instead of an originally envisaged earlier sale.
22. Those business activities considered to be outside the scope of the new bank's core business activities are to be wound down or sold by the end of [...].
23. The overall earnings figures for 2010 show a result before taxes of minus EUR 798 million, which is worse than projected earlier. The individual components show that — when compared with the previous projections submitted to the Commission — the total earnings were about [...] below those projected and the total operating costs about [...] higher than projected. The risk provisions were about [...] higher than initially projected. According to the bank, the differences can be explained by various one-off effects, higher than foreseen write-downs in leasing and the rigorous evaluation of the existing portfolio against possible credit risks.

(*) Confidential information.

(7) HGAA has the right to cancel any outstanding guaranteed amount which it does not intend to use anymore.

3. ASSESSMENT

3.1. Existence of aid

24. According to Article 107(1) TFEU, 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 internal market.
25. The Commission notes that the asset guarantee is granted from State resources within the meaning of Article 107(1) TFEU. Given that HGAA is an undertaking active in the financial sector, which is open to intense international competition, the Commission considers that any advantage from State resources to HGAA would have the potential to affect intra-Union trade and to distort competition. Austria does not dispute that the measure constitutes State aid.

3.2. Compatibility of the aid

3.2.1. Application of Article 107(3)(b) TFEU

26. Article 107(3)(b) TFEU provides for the possibility that State aid can be regarded as compatible with the internal market where it is granted "to remedy a serious disturbance in the economy of a Member State".
27. Whilst there has been a stabilisation process in financial markets the Commission considers that the requirements for State aid to be approved pursuant to Article 107(3)(b) TFEU are still fulfilled in view of the persistently precarious situation in financial markets and the risk of wider negative spill-over effects.
28. The Austrian Central Bank has already at an earlier occasion confirmed that HGAA is a bank with systemic importance for the financial market in Austria. Without the measure, HGAA risked closure by the supervisory authorities. For those reasons the Commission accepts that the guarantee can be assessed under Article 107(3)(b) TFEU.

3.2.2. Compatibility of the measure

29. The Commission must assess the continuation of all emergency aid measures as restructuring aid, on the basis of the submitted restructuring plan⁽⁸⁾.
30. As regards the compatibility of the asset guarantee, the Commission notes that the measure serves the purpose of preventing HGAA from having to provision or write down assets, which would have been necessary without the guarantee. In fact, it avoids the capital base from being reduced or allows the capital base to be increased, as the case may be. However, unlike a typical impaired asset measure, it does not have an effect on the risk weighted assets of the bank due to the technical construction of the

guarantee which aims at reducing only the loan loss provisions of the bank. In addition, the asset guarantee covers the first loss and is thus also in that way different from a standard impaired asset measure. Also, any amount drawn needs to be repaid to the State. On that basis, as it is constructed, the effect of the measure is to protect the capital base of HGAA and is therefore similar to a capital injection into HGAA and needs to be assessed as such. For all those reasons, the Commission finds that the measure resembles a capital injection.

31. HGAA has received an asset guarantee amounting to EUR 200 million which will be remunerated with a 10 % fee p.a. on the total amount granted and not called (minus cancellations) from 30 December 2010 until 30 June 2013. For the amounts called upon, that remuneration will be replaced by a 10 % fee p.a. which will be paid from the moment the amounts are called upon until 31 August 2013 (i.e., two months after the guarantee expires). The latter remuneration is linked to the bank making profits and is not cumulative. The Commission notes that both the remuneration structure and level are similar to the remuneration typically required for a capital injection for a distressed bank under the Recapitalisation Communication. The level of remuneration is also in line with point 29 of the Austrian emergency bank support scheme⁽⁹⁾ on emergency aid measures to distressed banks. However, the remuneration for amounts called upon stops on 31 August 2013. The length of payment of the remuneration therefore does not seem to be in line with the Recapitalisation Communication and what the Austrian emergency bank support scheme would require for a recapitalisation. The Commission thus has doubts whether the remuneration structure is adequate and whether the remuneration would not need to continue until repayment of the amounts called upon and will reassess that point when assessing the restructuring plan.
32. Austria has previously granted aid to HGAA under the Austrian emergency bank support scheme and has in addition injected capital into HGAA in a rescue operation. Therefore, the present measure acts as a further recapitalisation for a distressed bank, for which an individual notification is required.
33. Austria has already supplied a restructuring plan which is currently being assessed by the Commission. Moreover, the outcome of the Review Rush report confirms the need for additional capital. The supervisory authorities have confirmed that the aid is necessary in order to prevent the threat of insolvency of a systemically relevant bank.
34. The survival of HGAA requires that those measures are granted before a final decision about the restructuring can be taken and thus an urgent Commission Decision. Based on the information provided, the measure seems limited to the minimum necessary to ensure regulatory compliance of HGAA and an adequate capital buffer. A temporary approval of the measure pursuant to Article 107(3)(b) TFEU is therefore possible.

⁽⁸⁾ Commission Communication on the return to viability and the assessment of restructuring measures in the financial sector in the current crisis under the State aid rules (OJ C 195, 19.8.2009, p. 9).

⁽⁹⁾ See reference in footnote 3.

35. In relation to burden-sharing the Commission considers that the remuneration level and structure of the new aid measure can be considered appropriate in the current circumstances. It notes first that the proposed remuneration for the guarantee appears to be adequate, given that the remuneration will be paid once the guarantee is granted, and payments will continue once it is drawn and until two months after the guarantee expires. The fact that the remuneration is linked to the bank being profitable and not cumulative can be considered a typical feature also prevalent in Tier 1 capital injections.

36. A particular element contributing to ease burden-sharing concerns is that the previous shareholders already lost their stakes when Austria took over the bank in December 2009. Their elimination reduces the risk that the measure would benefit (former) shareholders without them fully contributing to the rescue of the bank.

3.2.3. *Extension of the formal investigation procedure regarding the restructuring aid*

37. The formal investigation procedure into the restructuring of HGAA and the corresponding aid has to be extended with respect to the new measure. The final compatibility of the aid, and in particular the remuneration structure, will be assessed on the basis of the submitted restructuring plan.

38. The Commission acknowledges that Austria has submitted a revised restructuring plan for HGAA, which contains a number of changes compared to the previously submitted plan. However, the information provided to date regarding the revised restructuring plan does not allay all the doubts raised by the Commission in the opening decision regarding restoration of viability, burden-sharing and limitation of distortions of competition.

39. The Commission notes that additional aid has become necessary, which demonstrates that the previously submitted draft restructuring plan was not sufficient to restore the viability of HGAA. At present, it is not clear whether the revised plan tackles all the weaknesses of the previous plan.

40. The Commission continues to have doubts as regards the business model of the bank. In particular, the Commission needs to investigate further the synergies arising from the market presence of HGAA in all the network countries, and the function and tasks attributed to the holding. In particular it remains unclear to which extent financial products, controlling devices and procedures (e.g. for risk management) can be used and applied to the SEE network in its entirety, given the different level of the development of the local banking markets.

41. Also, the Commission has doubts whether the lower than previously projected results for the year 2010 can be

explained by one-off effects and the allegedly more rigorous examination of the existing portfolio.

42. Furthermore, the Commission continues to see significant structural funding problems for HGAA due to its wholesale funding model. In particular it notes the funding gap for the operating banking and leasing units on a country level.

43. In relation to the new aid measure, the Commission recalls that the measure covers only specified parts on individual assets, which are themselves part of a wider asset pool⁽¹⁰⁾. Therefore the non-covered parts of the assets do not benefit from the guarantee and could still show additional future deterioration which might lead to additional losses for the bank, with a potential impact on the viability of the bank. The Commission will assess that risk within the formal investigation.

44. In addition, the Commission has still doubts as to whether the envisaged divestitures are sufficient to adequately limit the distortions of competition created by the aid. In that respect the Commission notes that, according to point 31 of the Restructuring Communication, such measures must also reflect the amount of aid, which has increased.

4. DECISION

The Commission has decided to temporarily find the EUR 200 million asset guarantee in favour of HGAA compatible with the internal market on the basis of Article 107(3)(b) TFEU until the Commission has taken a final decision on the restructuring aid.

In the light of the considerations above, the Commission has further decided to extend the proceedings as laid down in Article 108(2) TFEU with respect to the above aid measure in favour of HGAA.

Austria is requested to forward a copy of this letter to HGAA immediately.

The Commission wishes to remind Austria that Article 108(3) TFEU has suspensory effect, and would draw your attention to Article 14 of Council Regulation (EC) No 659/1999, which provides that all unlawful aid may be recovered from the recipient.

The Commission warns Austria that it will inform interested parties by publishing this letter and a meaningful summary of it in the *Official Journal of the European Union*. It will also inform interested parties in the EFTA countries which are signatories to the EEA Agreement, by publishing a notice in the EEA Supplement to the *Official Journal of the European Union*, and will inform the EFTA Surveillance Authority by sending a copy of this letter. All such interested parties will be invited to submit their comments within one month of the date of such publication."

⁽¹⁰⁾ See paragraph (17).