

Client Briefing

17 October 2008

Austrian Bank Stability Update State Aid

Background

On 13 October 2008 the Austrian government announced coordinated stability measures for the financial markets following the joint declaration on the concerted European action plan of the euro area countries last Sunday. The stability measures approved on Monday by the Austrian cabinet (*Ministerrat*) aim at protecting banks and insurance companies swiftly and decisively from the possibly serious effects of the international financial crisis.

A draft bill on the stability measures has been published. The proposed legislative measures, inter alia, include the implementation of the Inter-Bank Market Enhancement Act (*Interbankmarktstärkungsgesetz – IBSG*), the Financial Market Stabilization Act (*Finanzmarktstabilitätsgesetz – FinStaG*) and certain amendments to the Banking Act (*Bankwesengesetz – BWG*) and the Stock Exchange Act (*Börsegesetz – BörseG*). The bill is expected to be approved by parliament on 20 October 2008 (and 21 October 2008 respectively) in extraordinary sessions. Austria will earmark up to EUR 100 billion in support of the banking system. EUR 15 billion are to be used for recapitalization measures, EUR 85 billion shall be made available for state guarantees.

Separately, on 13 October 2008, the European Commission issued guidance to Member States on the State Aid implications of recent bank stability measures taken by governments. A link to the text of the Commission release can be found at the

1/3

end of this newsletter. We have briefly highlighted state aid issues which may arise in the context of the Austrian government's stability measures. This reflects developments as at 16 October 2008.

State Aid

The stability measures also have to be assessed in the light of the guidelines on State aids for rescuing and restructuring firms in difficulty and on the basis of the recent Commission communication 'The application of State aid rules to measures taken in relation to financial institutions in the context of the current global financial crisis' as well as EC Commission's decisions on national support schemes (e.g. Bradford & Bingley, Hypo Real, Denmark, UK, Ireland).

The clearing house pursuant to the IBSG and the proposed state guarantees in connection therewith correspond, in essence, to EU law, as this scheme is open on a non-discriminatory basis, as remuneration and interests the clearing house receives correspond to market conditions and as an adequate remuneration has to be paid for the guarantee.

The FinStaG provides for several recapitalization measures such as guarantees, granting of loans and the acquisition of shares (under certain conditions even nationalisation is possible). Those measures could raise issues with EU State aid law which lays down certain criteria underlined by the EU Commission just recently. First, there is no distinction between fundamentally sound financial institutions that are affected by the current liquidity crises and banks suffering from endogenous problems. Second, there is no restriction to measures strictly necessary, as the law does not explicitly prevent instruments from exceeding that limit. Third, there are no appropriate safeguards provided for against abuse of the scheme, including restrictions on commercial conduct and limits to balance-sheet growth. Forth, the Commission requests restructuring plans of companies benefitting from support measures. Those plans are assessed by the Commission.

One could argue that, albeit not expressly stated, such criteria are implied in the legislation. Nevertheless, due to the fact that the new law provides for specific exemptions from the general state aid prohibition (and therefore needs to be construed in a strict way) such implied restrictions might not suffice. It could therefore well be that the law will still be amended accordingly in the near future or at least a directive to that end will be issued by the Austrian Ministry of Finance.

Furthermore, the individual measures based on the new legislation have to fulfil the conditions for such exemptions as outlined by the EC-Commission as well.

Useful links

Austrian Federal Government

<http://www.austria.gv.at>

The Austrian National Bank

<http://www.oenb.at>

Austrian Parliament

<http://www.parlinkom.gv.at>

The Austrian Financial Market Authority

<http://www.fma.gv.at>

Commission on the State Aid implications of recent bank stability measures taken by governments

http://ec.europa.eu/comm/competition/state_aid/legislation/horizontal.html

Contact

If you would like to know more about the subjects covered in this publication or our services, please contact:

Raoul Hoffer: +43 (1) 534 80 220, hoffer@bindergroesswang.at

The information provided in this newsletter is general in nature and does not constitute legal advice. Binder Grösswang Rechtsanwälte OG cannot assume any liability in respect thereof. Before entering in commercial transactions, professional legal advice should be sought.