



Brussels, 17.3.2017
C(2017)1695 final

<p>In the published version of this decision, some information has been omitted, pursuant to articles 24 and 25 of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty, concerning non-disclosure of information covered by professional secrecy. The omissions are shown thus [...].</p>		<p>PUBLIC VERSION</p> <p>This document is made available for information purposes only.</p>
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**Subject: State Aid SA.32745 (2017/NN-2) – Austria
Sale of parts of Kommunalkredit Austria AG**

Sir,

1. PROCEDURE

- (1) The European Commission, by Decision of 31 March 2011¹ ("Restructuring Decision"), approved State aid for the restructuring of Kommunalkredit Austria AG ("KA") including the then envisaged sale of this nationalised bank² by end 2012. When the sale failed, the Austrian authorities decided for an orderly liquidation of KA and notified the respective amendment of the restructuring plan and contingent capital and liquidity support for the orderly liquidation, which the Commission by Decision of 19 July 2013 ("the 2013 Decision")³, the

¹ OJ C239, 17 August 2011, p.2.

² More precisely, the sale concerned the "good bank" KA which was created in 2009 when the operations of the original Kommunalkredit Austria AG were split into "strategic" activities that were transferred to a new KA and "non-strategic" activities that remained in the existing bank which was renamed KA Finanz AG ("KF", for details see recitals 7-16 of the Restructuring Decision).

³ OJ C69, 7 March 2014, p.29.

Seiner Exzellenz Herrn Sebastian KURZ
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Commission found compatible with the internal market pursuant to Article 107(3) (b) of the Treaty on the Functioning of the European Union ("TFEU").

- (2) The 2013 Decision also approved a sale option for parts of KA, based on Austria's commitment⁴ that this would not cover more than 50% of KA's total assets at the time of the 2013 Decision and comply with State aid requirements, including an open, non-discriminatory and transparent tender process.
- (3) The Finanzmarktbeteiligung Aktiengesellschaft des Bundes ("FIMBAG")⁵, holding the shares in KA as trustee for Austria, was assigned with the implementation and monitoring of the partial privatisation and launched the tender procedure by publishing the sale announcement on 14 August 2014.
- (4) On 16 March 2015, Austria informed the Commission that it had decided for the consortium "Pi"⁶ as the winning bidder and that the respective purchase agreement was signed on 13 March 2015.⁷
- (5) On 16 September 2015, Sirius Beteiligungsgesellschaft mbH ("Sirius" or the "complainant"), a special purpose entity (Zweckgesellschaft) that was formed by members of the consortium "Epsilon" which had also participated in the bidding procedure but eventually was not chosen, lodged a complaint with the Commission. The complainant claims that Austria granted unlawful State aid to the winning bidder Pi because Pi was selected despite the allegedly lower price offered by Pi. The difference to the allegedly higher price offered by the complainant was, in the view of the complainant, a benefit granted to Pi and, therefore, State aid in the meaning of Article 107(1) TFEU in favour of Pi.
- (6) On 6 October 2015, the Commission forwarded the complaint to Austria for comments to which Austria replied by letter dated 21 October 2015.
- (7) On the basis of an initial examination and review of documents and information made available, the Commission sent a first preliminary assessment letter to the complainant on 6 November 2015. The letter asked for further information regarding Sirius' status as an interested party in the meaning Article 1(h) of Council Regulation (EU) 2015/1589 laying down detailed rules for the application of Article 108 of the TFEU⁸ ("Procedural Regulation) and stated that the measure objected to, did not appear *prima facie* to constitute State aid under Article 107(1) TFEU. With that letter it also transmitted Austria's comments.
- (8) The complainant rejected that provisional conclusion by letter dated 11 December 2015 which was transmitted to Austria on 23 December 2015 with a

⁴ Commitment No. 8 of the list of commitments annexed to the 2013 Decision.

⁵ FIMBAG was founded in 2008 as a subsidiary of the then Österreichische Industrieholding AG (since 2015: Österreichische Bundes- und Industriebeteiligungen GmbH, and acted as trustee for the Republic of Austria during the financial crisis. It has been dissolved in the meantime (with remaining tasks transferred to the Bundesministerium für Finanzen and the Federal winding-down management company ABBAG (Abbaumanagementgesellschaft des Bundes) and stopped its activities on 30 June 2016.

⁶ The consortium Pi comprised Interritus Limited and Trinity Investments Limited.

⁷ The special purpose entity of the consortium Pi, the Gesona Beteiligungsverwaltungs GmbH ("Gesona"), signed the agreement for Pi.

⁸ OJ L248 of 24.9.2015, p. 9.

request for comments on the various points the complainant raised regarding the bidding procedure. Austria sent its comments on 22 January 2016. On the basis of a further re-examination of the complainant's and Austria's submissions, the Commission replied to the complainant on 24 February 2016 transmitting Austria's comments and setting out its reasons for the preliminary assessment that the measure did not appear to constitute State aid.

- (9) The complainant submitted another letter on 24 March 2016 contesting Austria's comments and the Commission's preliminary conclusions. When the Commission asked the legal representative of the complainant by e-mail of 27 April 2016 whether the letter contained confidential information or could be transmitted to Austria without deletions, it did not receive any reaction. There was also no reply to repeated e-mails sent on 18 May 2016 and on 22 June 2016, when the Commission announced the transmission to Austria in case of no response within the next 14 days. On 19 July 2016 the complainant's letter of March was finally sent to Austria for comments, which Austria submitted by letter dated 2 August 2016.
- (10) Following the analysis of Austria's response, the Commission services decided to reply one more time to the complainant (despite the latter's silence) on 19 December 2016. On 19 January 2017 the complainant submitted its response asking for an immediate initiation of an investigation procedure as to the alleged State aid.

2. DESCRIPTION OF THE ALLEGED STATE AID MEASURE

- (11) As mentioned in recital (2), the 2013 Decision approved the option to sell parts of KA provided that such a sale would not cover more than 50% of KA's total assets and comply with State aid requirements, including an open, non-discriminatory and transparent tender process.
- (12) By letter dated 12 June 2014 Austria submitted information about the planning of the sale process including an indicative timetable for the bidding procedure. Austria also informed the Commission that it considered to sell parts of KA comprising roughly EUR 4 billion (or roughly 35% of KA's total assets), as allowed by the 2013 Decision. This plan, together with an updated description of the bidding procedure, was further detailed by letter of 25 November 2014. Austria explained that it had decided for a carve-out to found a new company (Spaltung zur Neugründung), "KA New", to which the respective parts of KA would be transferred. Those parts finally corresponded to EUR 4.3 billion (or 38%) of KA's balance sheet total at the time of the 2013 Decision. The sales object was consequently Austria's/FIMBAG's shareholding of 99.78% in KA New.⁹
- (13) Austria also explained that a sale would be advantageous for the seller only if it improved its economic situation compared to a scenario of a winding down of the portfolio. Therefore, the proceeds from the sale of the carve-out had to be higher than the present cash values of the carve-out in wind-down. On that basis Austria

⁹ The Austrian association of municipalities (Österreichischer Gemeindebund) would still hold the remaining 0.22%.

subsequently calculated for internal purposes a (strictly confidential) minimum price for the shareholding in KA New of EUR [...] million.

- (14) The Commission was informed subsequently about principal steps, directly by the Austrian government and by the Monitoring Trustee mandated following respective commitments in the Restructuring Decision and the 2013 Decision, and received the relevant documents such as the Process Letters, FIMBAG's Transaction Report and the Monitoring Trustee's report on the sales process.
- (15) According to those documents, and as indicated in recital (3) above, FIMBAG launched the tender procedure by publishing the sale announcement on 14 August 2014 in German and Austrian and on 15 August 2014 in English language newspapers. In parallel to those announcements, potentially interested investors were also pro-actively contacted by the auditing company advising FIMBAG and assigned by it to accompany the process. In total there were over 50 contacts with potential investors, either on the latter's or the advisors' initiative. Deadline for the expression of interest was 10 September 2014. Subsequently, the first Process Letter dated 17 September 2014 ("Process Letter I") was sent to 9 potential bidders that complied with the criteria for entering into the first phase (out of 13 that had expressed interest in writing). Process Letter I informed about the first phase of the procedure ending with the submission of indicative offers by 8 October 2014. The Letter asked for "a non-binding indication of the cash consideration in Euro the bidder is prepared to pay", i.e. an indicative offer in form of a cash purchase price, for the shareholding in question and stated: "An offer based on a formula will be disregarded and, if a range is submitted, the lower end of the range will be assumed to be the Indicative Purchase Price." Five bidders submitted an indicative offer, one of which offered too low a price.
- (16) The second Process Letter dated 15 October 2014 ("Process Letter II"), initiated the second phase of the process and was sent to four bidders that had submitted indicative offers and were shortlisted, among them Epsilon and Pi. Process Letter II informed about the indicative period for access to the data room and the deadline for submitting binding offers (26 November 2014), i.e. the cash consideration bidders were prepared to pay for the shares as a result of the evaluation of KA New. Binding offers had to be "unconditional and fully-financed". Process Letter II repeated that "an offer based on a formula will be disregarded and, if a range is submitted, the lower end of the range will be assumed to be the Binding Purchase Price." The virtual data room was opened for due diligence on 20 October 2014. On 11 November 2014, the deadline for the second phase was prolonged and communicated to all bidders (binding offers had then to be submitted by 10 December 2014, and data room access was granted until then). This was confirmed by an additional information letter of 8 December 2014 supplementing Process Letter II.
- (17) Four binding offers were submitted by 10 December 2014. On that basis, FIMBAG entered into parallel negotiations with the remaining bidders on their proposals regarding the share purchase agreement ("SPA") and, on that basis, finalised the SPA. The remaining bidders had moreover, as already stated in Process Letter II, the option to increase their binding offer in a final offer.

* Confidential information.

Access to the data room was again granted from 19 December 2014 until 5 February 2015. The final SPA and conditions were submitted by a third Process Letter dated 22 January 2015 ("Process Letter III") to all four remaining bidders; Process Letter III invited bidders to submit "an unconditional, fully-financed Final Offer" by 5 February 2015. Three such offers were received.

- (18) Process Letter III contained final conditions and precise information requests relating to, for instance, transaction security such as regulatory approvals potentially needed to complete the transaction and bank guarantees. It re-stated that "a Final Offer based on a formula or dependent on conditions will be disregarded and, if a range is submitted, the lower end of the range will be assumed to be the Final Purchase Price". It clarified, however, that unconditional deferred payments of up to 30% of the final purchase price for a maximum of two years were permitted provided that the payments are fully guaranteed (by a bank guarantee) and that at least 70% had to be paid at closing. In addition, it allowed for partial retention of the purchase price, to secure the warranty claims of the final bidders (Haftrücklass), provided that this retention only covered warranty claims of the purchaser. Moreover, only 30% of such retention would be accounted for, only up to 15% of the final purchase price and with a maximum duration of such retention of 24 months from closing.
- (19) FIMBAG, on the basis of the final offers, recommended bidder Pi since its final offer complied with the required criteria as detailed in the Process Letters and it offered the highest price (EUR [100-150] million) which was also higher than the calculated minimum price for the 99.78% shareholding in KA New. According to the Austrian authorities, one other final offer did not comply with the requirements regarding transaction security, and Epsilon's *last and final offer* ("LAFO") as well as its *alternative last and final offer* ("alternative LAFO") were both significantly below the minimum price. The Austrian government (the Federal Finance Minister) agreed with FIMBAG's proposal, and the signing of the SPA with Gesona, the special purpose entity of Pi, took place on 13 March 2015.
- (20) As a consequence, 99.78% of KA New's shares were sold (following the carve-out of the partial portfolio of KA and its transfer to KA New). Since the sale concerned a portfolio of KA that accounted for significantly less than 50% of its total assets at the time of the 2013 Decision, it complied with the respective commitment attached to the 2013 Decision. The remaining parts of KA were transferred to the existing bad bank, KA Finanz, to be orderly liquidated.

3. THE POSITION OF THE COMPLAINANT

- (21) As described in recital (5), the complainant, Sirius, is a special purpose entity that was formed by members of the consortium "Epsilon" towards the end of the bidding procedure.¹⁰ Shareholders of Sirius are Strabag SE ("Strabag", holding 42.50% of Sirius' shares), Haselsteiner-Familien-Privatstiftung ("Haselsteiner", holding 41.60%), Cudos Capital AG&Co KG ("Cudos", holding 9.90%), grosso

¹⁰ According to the information submitted with the complaint of 16 September 2015, the special purpose entity was only founded after the binding offer which had been submitted by the consortium members under the then existing structure, i.e. Cudos with 99% (and sub-members Haselsteiner and grosso) as well as Paierl and Österreichischer Gemeindebund each with 0.5%.

holding Gesellschaft mbH ("grosso", holding 5.00%) as well as pcb Paierl Consulting Beiteiligungs GmbH ("Paierl") and Österreichischer Gemeindebund with each holding 0.50%.¹¹

- (22) Sirius claims that it is an interested party in the meaning Article 1(h) of *Council Regulation (EU) 2015/1589 laying down detailed rules for the application of Article 108 of the TFEU* ("Procedural Regulation")¹² since it participated in the bidding procedure as qualified bidder.
- (23) The complaint alleges that, contrary to Austria's assessment, the complainant had offered the highest price, namely EUR [150-200] million, by its alternative LAFO. Therefore, Austria (via FIMBAG) allegedly did not apply the private vendor test, as it disregarded the difference between the allegedly higher price of EUR [150-200] million and EUR [100-150] million offered by the winning bidder, Pi. According to the complainant, that difference has to be considered as State aid in favour of the winning consortium, Pi and its special purpose entity Gesona. The complainant requests the Commission to declare the alleged State aid measure in question to be incompatible with the Internal Market. Consequently, according to the complainant, that State measure should either not be implemented or, if already implemented, reversed.
- (24) In that context, the complainant states that Austria had disregarded several price elements of the complainant's final offer, in particular its alternative LAFO. Notably, Austria had evaluated the price offered in the complainant's alternative LAFO to be only EUR [50-100] million. As described in recital (23), the complainant itself valued the alternative LAFO at EUR [150-200] million. In a study of 8 July 2015, an external expert commissioned by the complainant calculated the value of the alternative LAFO within a range between EUR [100-150] and [100-150] million. This valuation was based on a Monte Carlo simulation to estimate the probability of occurrence of LAFO's variable (performance-related) parameters. According to the complainant, even if this valuation is taken into account, its offer was still higher¹³ and the difference "of at least several million" between the price it offered and the price offered by the winning bidder, Pi, has to be considered as State aid in favour of Pi.
- (25) The complainant also alleges that, overall, the bidding process, in particular the transparency requirement, was flawed. In that context, the complainant refers to the allegedly bad quality of the data room, short deadlines and changing criteria in subsequent Process Letters, for example the allegedly late refusal of prices based on formulas and conditions, the requirement of a payment of 70% of the final purchase price at closing and the definition of allowed price elements as part of the deferred payment structures.
- (26) In addition, the complainant informed the Commission that the sales process was subject of legal proceedings that the complainant, together with other members of the consortium Epsilon (Cudos, Stabag and Paierl), initiated against FIMBAG in

¹¹ Information submitted with the complaint of 16 September 2015.

¹² OJ L248 of 24.9.2015, p. 9.

¹³ One price element of the complainant's offer that the complainant in submissions subsequent to the complaint specifically detailed as disregarded by Austria, was the complainant's offered amount (EUR [10-50] million) for the proportionate loss carry-forward.

a national court (Handelsgericht Wien) on 14 July 2015, i.e. before submitting the complaint to the Commission.

4. THE POSITION OF AUSTRIA

- (27) Austria rejects the complainant's claims and states that the sales procedure was open, transparent and non-discriminatory, and, therefore, in full compliance with State aid rules, notably the Restructuring Decision and the 2013 Decision. Regarding the individual steps of the sales process as detailed in recitals (12) to (18), Austria referred to the information letters it had already sent to the Commission before, during and shortly after the sales procedure.
- (28) According to Austria, the complainant Sirius was only part of the consortium Epsilon which broke apart during the bidding procedure. In the beginning, Epsilon, in its original formation, complied with the requirements of Process Letter I and made an indicative price offer of EUR [100-150] million without conditions or deferred payments.¹⁴ However, when one significant member of Epsilon, the Hypo NOE Gruppe Bank AG ("Hypo NOE") had left, Epsilon tried, according to Austria, to change the criteria for submitting offers, in particular regarding the admissibility of conditional and deferred price elements, in its favour.¹⁵ Thus, Epsilon, without Hypo NOE, already submitted a binding offer that comprised a fixed purchase price part amounting to only 54% of the offer and a part that was conditional and, therefore, not relevant to the valuation (amounting to 46%), although Process Letter II clearly required an unconditional binding offer.¹⁶
- (29) Following Process Letter III, Epsilon submitted two final offers, LAFO and alternative LAFO. According to Austria, even the higher alternative LAFO, which is the focus of the complaint, was nowhere near the alleged EUR [150-200] million. According to Austria, the alternative LAFO offered a final purchase price of only EUR [50-100] million (Kaufpreisteil 1). The remaining part of the price offered in the alternative LAFO (Kaufpreisteil 2) had the following four conditional elements, with a total of EUR [50-100] million:
- (i) Up to EUR [10-50] million depending on profits over the next five years ([...] % of the first EUR 50 million, by which KA's profits would exceed the profits expected by the bidder);
 - (ii) Up to EUR [10-50] million depending on the ability to offset losses carried forward over the next five years ([60-70] % of the tax savings from the used loss carry-forward);
 - (iii) Up to EUR [5-10] million if no need for additional risk provisions over the next five years (amount from dissolved extra risk provisions as planned by bidder) and

¹⁴ Austria's letter dated 21 October 2015.

¹⁵ Austria's letter dated 21 October 2015.

¹⁶ Ibid.

- (iv) Up to EUR [0-5] million depending on the extension of a contract with a third party over the next five years (EUR [0-5] million for each additional year).¹⁷
- (30) According to Austria, the fact that the additional price elements were conditional was contrary to the requirements set in the Process Letters. In addition, those four elements were based on unrealistic assumptions such as too optimistic profits and would have been paid over a period of five years, contrary to the two year limit for the deferred payments set in Process Letter III.¹⁸
- (31) Austria argues that, as a consequence, the conditional price elements of Kaufpreisteil 2 could not be taken into account. Austria adds that, even if those conditional price elements were taken into account under realistic assumptions, Epsilon's offer would have still been below the best and winning offer of Pi.
- (32) In that context, Austria also refers to the Sirius' expert study of 8 July 2015 as described in recital (24). Austria rejects this valuation in principle because it is based on the assumption of the best-case performance scenario which is, in view of its at least uncertain likelihood, too risky for the seller, a risk which Austria, as any other economically rational seller, wanted to avoid by rejecting conditional price elements.¹⁹ Moreover, Austria submits that sub-elements of the valuation, for instance, the second sub-element concerning the loss carry-forward mentioned by the complainant, were based on unrealistic assumptions or inconsistent with the actual offer. According to Austria, Epsilon's valuation of the tax saving of the loss carry-forward could only be achieved if KA's loss-carry forward could be completely consumed over five years which, however, assumes an unrealistic future profit (three times higher than assumed by the management case for the five years). In reaction to this criticism by Austria, Sirius later submitted that it meant the nominal amount of the loss carry-forward and not the achieved tax saving. However, this explanation is not consistent with the wording of the Sirius' offer and would result in a significantly lower tax saving than the respective amount of this sub-element of the alternative LAFO²⁰. In any case, these conditional price elements could not be taken into account.
- (33) However, in coherence with Process Letter III, Austria finally evaluated Epsilon's offer as representing a slightly higher amount, namely EUR [50-100] million. In doing so it recognised Kaufpreisteil 1 of EUR [50-100] million plus EUR [0-5] million as retention to secure for the final bidders warranty claims (Haftrücklass, as described in recital (18)) plus EUR [...] million for the estimated half-year profit for 2015²¹.
- (34) According to Austria, the process was fully transparent and non-discriminatory since all bidders had the same information. The Process Letters contained all relevant details for each phase, and the fact that some criteria were refined during the process is normal standard for such a complex procedure. The decisiveness of the highest, unconditional price offer was communicated from the beginning, and

¹⁷ FIMBAG's Transaction Report of 29 April 2015, p.47.

¹⁸ Austria's letters dated 21 October 2015 and 22 January 2016.

¹⁹ Austria's letter dated 22 January 2016.

²⁰ Austria's letter dated 22 January 2016.

²¹ This estimate refers to the profit from 1 January 2015 until the expected closing date. The amount of EUR [...] million was added to the valuation of all final offers described in recital (19).

it was Epsilon, respectively Sirius, that deviated from this approach and pursued an "earn-out concept".²²

(35) [Opinion of Austria on the national court procedure].

5. ASSESSMENT OF THE EXISTENCE OF STATE AID

Legal standing

(36) As mentioned in recital (22), the complainant Sirius claims that it is an interested party in the meaning Article 1(h) of the Procedural Regulation since it participated in the bidding procedure concerning the sale of parts of KA and, in that capacity, is a competitor of the beneficiary of the alleged State aid, namely the consortium Pi that was selected by Austria as the winning bidder although it offered an allegedly lower price than Sirius.

(37) In order to be an interested party within the meaning of Article 1(h) of the Procedural Regulation, the complainant must show that its "interests might be affected by the granting of aid"²³. The concept of an interested party is not limited to beneficiaries of the alleged aid, competing undertakings and trade associations, nor is there a need for a direct competitive relationship, as interpreted by the Court of Justice in *Kronoply*.²⁴ However, it is for the complainant to show that its interests might be adversely affected by the alleged granting of aid to consortium Pi, notably (i) to establish, to the requisite legal standard, that the aid is likely to have a specific effect on its situation²⁵ and (ii) to show a legitimate interest that the aid measures at issue is implemented or not implemented or, if it had already been implemented, that it is maintained or not maintained.²⁶

(38) The Commission has, therefore, repeatedly asked the complainant to describe such possible effects on its situation or such legitimate interest in the (non-) implementation of the alleged aid to Pi. However, the complainant refused to give any information in this respect and just repeated that Sirius as a competing bidder of Pi in the tender procedure is "without any doubt" such an interested party in accordance with the Commission Decision in the case *Bank Burgenland*²⁷ and since, in the subsequent court procedures, neither the Court of First Instance nor the Court of Justice had objected to that interpretation.²⁸

(39) Whether a competing participant in a bidding process may qualify as an interested party in the context of legal proceedings that concern potential infringements of rules relating to procurement procedures, is not a question relevant for the notion of an "interested party" under State aid rules. In the present proceedings, without submitting any factual information on its activities and explanations as to possible effects of the alleged aid on its economic

²² Austria's letter dated 2 August 2016; "earn-out" in the context of acquisitions refers to a pricing structure where part of the purchase price must be "earned" based on the performance of the business following the acquisition.

²³ Article 1(h) of the Procedural Regulation.

²⁴ Case C-83/09 P *Commission v Kronoply and Kronotex*, EU:C:2011:341, paragraph 64.

²⁵ *Ibid.*, recital 65.

²⁶ *Ibid.*, recitals 66.

²⁷ Commission Decision of 20 December 2006, recital 59, OJ C28; 8 February 2007, p.8.

²⁸ Joined cases T-268/08 and T-281/08 *Land Burgenland v Commission*, EU:T:2012:90; Joined Cases C-214/12 P, C-215/12 P and C-223/12 P *Land Burgenland v Commission*, EU:C:2013:682.

situation, such a participant does not, in the Commission's view, automatically qualify as an interested party in the meaning of Article 1(h) of the Procedural Regulation. The Regulation belongs to State aid rules and therefore concerns distortive effects of State aid on competition. This includes potentially adverse effects on competitors as well as on the economic situation of other market participants. According to established case law, it is not necessary to demonstrate real effects but the complainant should, as described in recital (37), explain to the requisite legal standard that the aid can have a specific effect on its situation. However, the complainant refused to explain any such potential effects.

- (40) In the case *Bank Burgenland*, the activities of the two final bidders - GRAWE group and a bidding consortium - and potential adverse effects of the aid measure were not issues in question. First, both GRAWE and the consortium, respectively one member thereof, were clearly active on the banking market and had banking licenses.²⁹ In that regard, the Commission in its Decision of 20 December 2006 stated that the aid measure in question was liable to affect trade and distort competition in the banking sector.³⁰
- (41) The complainant, however, remained silent on the question of whether Sirius, as a special purpose entity that was founded for the purpose of the bidding process had, has or plans to have any activities apart from that special purpose. The complainant only gave the short and general statement that Sirius and the winning bidder Pi were actual and potential competitors on the same market, namely participation companies ("Unternehmensbeteiligungsgesellschaften"). Whether this refers again to the bidding procedure in question or also to other activities, remained unclear. The complainant also did not submit any such information regarding the shareholders of Sirius.
- (42) Thus, it has not been established that Sirius or its shareholders are competitors of Pi on the same market(s) or have other economic relationships, for instance, in upstream or downstream markets. Since no other information has been provided about Sirius and its members, its activities and related interests, it has not been established that Sirius qualifies as an interested party regarding the alleged incompatible State aid to Pi.
- (43) In view of the above, the Commission considers that the complainant is not an interested party in the meaning of Article 1(h) of the Procedural Regulation. In any event and as explained in the following section, the Commission considers that no State aid was granted to Pi in the context of the sales process in question.

Assessment of the existence of State aid

- (44) By virtue of 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 the Member States, be incompatible with the internal market.

²⁹ Commission Decision of 20 December 2006, recitals 17 and 18; OJ C28, 8 February 2007, p.8.

³⁰ *Ibid.*, recital 77.

- (45) A privatisation, i.e. the sale of a State-owned company or parts thereof implies a transfer of the relevant State-owned companies and/or assets to the eventual buyer(s). Consequently, it is a measure involving State resources and it is imputable to the State.
- (46) However, the criteria laid down in Article 107(1) TFEU are cumulative, and all of them must be satisfied in order to determine whether the alleged measure constitutes State aid within the meaning of Article 107(1) TFEU. If any of those criteria are not fulfilled, there is no State aid and no need to examine the other criteria. In the context of the (partial) privatisation in question, it is therefore sufficient to assess the criterion of whether the sale favoured certain undertakings by conferring an economic advantage.
- (47) Economic transactions do not confer an advantage on either of the parties involved, and therefore do not constitute aid, if they are carried out in line with normal market conditions.³¹ In other words, a transaction does not confer any advantage if the Member State's behaviour is consistent with that of a private, market economy operator or, more specifically in this context, market economy vendor ("private vendor test"). Where a sale is carried out by an open, transparent and unconditional tender procedure and where the asset or shareholding is sold to the bidder who made the highest binding and credible offer, market conditions can be presumed and, consequently, there is no advantage.³²
- (48) The Commission considers that the shareholding in (the respective part) of KA was indeed sold through an open, transparent, non-discriminatory and unconditional tender procedure to the bidder submitting the highest binding and credible offer.

Openness

- (49) According to the available information, the invitation to submit an expression of interest did not contain any limitation as to the parties that could submit offers (see also recital (59)). From the beginning it was clear that the offered price was the sole award criterion. Furthermore, the invitation to submit an expression of interest was announced by publications in the national and international press and by directly approaching potentially interested investors. The deadlines, in particular for submitting indicative, binding and final offers, as communicated in the Process Letters gave enough time and were, therefore, not eliminatory.
- (50) In view of the above, the Commission considers that the sales process was open.

Transparency

- (51) According to the Commission's information, clear guidance was given for each phase of the sales process by means of the Process Letters I, II and III of 17 September 2014, 15 October 2014 and 22 January 2015, by access to more than 2500 documents and the answering of roughly 300 questions during the process. This information was sufficient for the bidder to carry out a proper valuation. The

³¹ Case C-39/94 SFEI and Others v La Poste and Others, EU:C:1996:285, paragraph 60.

³² Joined cases T-268/08 and T-281/08 Land Burgenland v Commission, EU:T:2012:90, paragraphs 70 and 87; joined Cases C-214/12 P, C-215/12 P and C-223/12 P Land Burgenland and others v Commission, EU:C:2013:682, paragraphs 94.

same applies to the deadlines set by the Process Letters. During the sales process bidders had almost five months to value the sale's object on the basis of progressively detailed information.

- (52) Initially, the interested investors had, on the basis of publicly available information, nearly a month to decide whether to submit an expression of interest by 10 September 2014. Subsequently, interested investors had three weeks to evaluate the information contained in Process Letter I to decide whether to submit an indicative offer by 8 October 2014. Following that step, Process Letter II gave not only very detailed information on the further procedure including the due diligence process with the access to the virtual data room from 20 October 2014 and guidance as to the submission of the binding purchase price, but, on the basis of an indicative time table, almost six weeks to submit binding offers. Finally, this deadline for submitting binding offers as well as access to the data room was extended so that bidders had nearly two months – until 10 December 2014 – for this central due diligence and valuation phase. On that basis, FIMBAG finalised the share purchase agreement and final conditions in Process Letter III to all bidders and set the 5 February 2015 as deadline for submitting last and final offers.
- (53) Contrary to what the complainant claims, it was clear from the beginning that conditional price offers would not be accepted. Thus, for the indicative offer Process Letter I already required a "non-binding cash consideration (Barkaufpreis) in Euro the bidder is prepared to pay" and stated that "an offer based on a formula will be disregarded and, if a range is submitted, the lower end of the range will be assumed to be the Indicative Purchase Price". Subsequently, the consortium Epsilon, then still with the bank Hypo Noe as member, submitted an indicative offer of EUR [100-150] million to be financed by internal resources and did not mention any conditions (it was only said that the underlying assumptions needed to be checked in due diligence). Process Letter II invited the shortlisted bidders, including Epsilon, "to submit an unconditional, fully financed Binding Offer" and repeated that offers based on a formula would be disregarded and, in case of a range, that the lower end would be assumed.
- (54) The consortium Epsilon, then with a different structure, submitted a binding offer below the minimum price which moreover, according to Austria, only included a fixed price amounting to 54% of the offer. However, as described in recital (17), the remaining bidders could still increase their offers in a final round. To that end Process Letter III repeated that a price offer based on formulas or conditional offers would not be taken into account. Consequently, there was no question that conditional price elements would also not be accepted regarding the final offers to be submitted by 5 February 2015.
- (55) The Commission therefore concludes that the sales process through all phases was fully transparent. The fact that Process Letter III clarified that unconditional deferred payments of up to 30% of the final purchase price for a maximum of two years were permitted, does not change this assessment. First, it was an option, not a restriction. Secondly, if that option was chosen, the proportion of those payments and the deferral period were limited. Moreover, the seller did not bear any risk since the deferred part of the payments had to be fully guaranteed by a bank guarantee. The same applies to the – very limited - possibility for retention to secure for the final bidders warranty claims (Haftrücklass) as described in recital (18). Such retention is, first, not unusual in the context of

sales of companies or company parts. Secondly, it is an option from which also the complainant benefitted since it increased the set value of its final offer by EUR [0-5] million as described in recital (33). The Commission has consequently no indication that the transparency requirement was not complied with.

- (56) In view of the above, the Commission considers that the sales process was transparent.

No discrimination

- (57) The Commission, based on the available documents, has also not seen any evidence that the sales process was discriminatory at any stage. All bidders received the same information at the same time. This included all relevant information about the sales object, the bidding rules and procedures, deadlines for submission of offers, and information on the sales object as well as the access to documents and the data room. All bidders that had submitted binding offers were given the opportunity to improve their bids and could make, before the SPA was finalised, mark-up proposals and enter subsequently in parallel negotiations. To the Commission's knowledge, no bidder was offered exclusivity at any stage of the process.

- (58) In view of the above, the Commission considers that the sales process was not discriminatory.

No conditionality

- (59) The sales process including the public announcement and Process Letters did not impose any conditions on potential bidders that are not customary in comparable transactions between private parties and capable of potentially reducing the sales price. Apart from standard requirements such as the bidder's disposal over sufficient financial resources and the non-existence of a priori hindrances for regulatory approvals, no conditions were attached. All investors that met those standard requirements were eligible, and the offered price was the sole award criterion. The narrowing of the bidders' circle following the expression of interests – from nine that received Process Letter I to five that submitted indicative offers, four of which were shortlisted and submitted binding offers to, finally, three that submitted final offers - were based, according to the available information, on the clear criteria communicated in the Process Letters. Those criteria did not contain any non-standard conditions either but only concretised formal requirements such as the description of the bidder, the calculation of the price offer or the financing, in particular if the bidder opted for external financing so that, for instance, bank commitment letters had to be submitted.

- (60) In view of the above, the Commission considers that the sales process was unconditional.

Sale to the highest bidder

- (61) The Commission observes that the shareholding in KA NEW was sold, in compliance with the sole award criterion as communicated to all bidders, to the bidder that offered the highest price, namely the consortium Pi via its special purpose entity Gesona. According to the information made available to the

Commission, Pi fulfilled all requirements of the Process Letters and offered not only the highest fixed price but it was also the only bidder that offered a price above the (confidential) minimum price Austria had calculated for the sale to be rational from an economic viewpoint.

- (62) Sirius, in contrast, offered a fixed, unconditional price significantly below the minimum price and below the price Pi offered. The conditional price elements of Sirius' offer as described in recital (29) could not be taken into account because price elements that were contingent on future events such as the realisation of certain profits or the continuation of contracts with third parties, were to be excluded according to the requirements in the Process Letters that applied equally to all potential bidders. Such requirements ensured the credibility of the submitted offers.
- (63) The exclusion of conditional price offers does not run counter to the private vendor test since also a hypothetical private vendor in a similar situation could have decided to exclude price offers that depend on the materialisation of certain conditions or future developments of the business. The disregard of conditional offers avoids the seller's future exposure to risks. In line with case law, the benchmark for the market economy operator test includes a prudent operator, i.e. a profit-oriented operator who does not want to take excessive risks compared with other participants in the market.³³ Furthermore, according to case law in case of a sale by a public vendor, it can be assumed that the highest offer resulting from an open, transparent and unconditional tender procedure corresponds to the market price provided, inter alia, that *"that offer is binding and credible"*³⁴.
- (64) Even the complainant's expert, on the basis of the Monte Carlo simulation, considers that the value of its last and final alternative offer was below the price submitted (see recital (24)). Austria rejects this simulation because in its view it operates with unrealistic assumptions. Against this background, it is obvious that the exclusion of conditional price elements does not only avoid lengthy debates on the likelihood of future events but also reduces incalculable risks and, therefore, is economically rational, also for a public and a private vendor.
- (65) Austria's alternative consideration that Sirius' offer was significantly below the best price, even if one took into account the conditional elements but on the basis of more realistic assumptions does not change the Commission's assessment since, as explained above, the exclusion of conditional price elements was transparently communicated and in line with the market economy operator test.

Conclusion on the sales procedure

- (66) In light of the above, the Commission considers that the sale in question was carried out by an open, transparent non-discriminatory and unconditional tender procedure and that the shareholding in the carve-out of KA was sold to the bidder that made the highest binding and credible offer. Therefore, the Commission has found that no selective advantage was granted within the meaning of Article

³³ Joint Cases T228/99 and T-233/99, *Westdeutsche Landesbank Girozentrale v Commission*, EU:T:2003:57, paragraph 255.

³⁴ Joined cases T-268/08 and T-281/08 *Land Burgenland v Commission*, EU:T:2012:90, paragraphs 70 and 87.

107(1) TFEU. The measure complained of, therefore, does not amount to State aid pursuant to Article 107(1) TFEU.

6. CONCLUSION

(67) The Commission has accordingly decided that the measure complained of, namely the sale of the shareholding in the carve-out of KA to the consortium Pi, does not constitute State aid in the meaning of Article 107(1) TFEU.

If this letter contains confidential information which should not be disclosed to third parties, please inform the Commission within fifteen working days of the date of receipt. If the Commission does not receive a reasoned request by that deadline, you will be deemed to agree to the disclosure to third parties and to the publication of the full text of the letter in the authentic language on the Internet site:

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Your request should be sent by registered letter or fax to:

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Yours faithfully,
For the Commission

Margrethe VESTAGER
Member of the Commission