EUROPEAN COMMISSION

Brussels, 17.6.2009
C (2009) 4691 final corr.

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 […].

PUBLIC VERSION

WORKING LANGUAGE

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Subject: State aid N 214/2009 – Austria
Aid measures provided to Hypo Tirol Bank AG

Sir,

1. PROCEDURE

(1) Austria informed the Commission of the measure covered by this decision by letter dated 25 February 2009, registered with the Commission on 7 April 2009. Complementary information, necessary for the Commission's assessment of the compatibility of the aid, was submitted by Austria, dated 12 May 2009, 18 May 2009, 20 May 2009, 28 May 2009, 8 June 2009 and 10 June 2009.

2. BACKGROUND AND BENEFICIARY

(2) Hypo Tirol Bank Aktiengesellschaft (in the following "Hypo Tirol") is a credit-institution in the form of a joint stock company. The Austrian federal state (Land) Tirol is, indirectly via the Landes-Hypothekenbank Tirol Anteilsverwaltung, sole owner of the bank.

(3) Hypo Tirol is active in universal banking, insurance broking, in private banking and in the leasing business. Hypo Tirol is active in Tirol, in Italy (focussing on the region of Südtirol), and, as a niche bank, in Zurich, Munich and Vienna.

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(4) In 2008 Hypo Tirol employed in average 786 employees and its balance sheet amounted to approx. EUR 13 billion, with earnings before tax of approx. EUR 16.6 million. While Hypo Tirol is not amongst Austria's largest banks, it is positioned among the important Austrian banks and is, when measured by balance sheet size, the biggest bank in Western Austria.

(5) Due to the financial crisis Hypo Tirol was confronted with losses and downgrades in its credit business, forcing it to reinforce its capital position. Hypo Tirol incurred losses […][*] which affected its financial results in a manner that excluded the possibility of an allocation to reserves. As per 13 December 2008 the tier 1 capital ratio amounted to […] which is low compared to similar banks. In order to ensure a sustainable tier 1 capital ratio of above 7% comparable to its peers and […] whilst at the same time preserving its rating and possibilities for refinancing the aid measure described below was notified.

3. THE FINANCIAL SUPPORT MEASURE

(6) Hypo Tirol issues tier 1 hybrid capital (*Partizipationskapital*) in the amount of up to EUR 100 million, corresponding to 1.6% of the risk-weighted assets (RWA). This capital does not confer voting rights and is not cumulative in its payments to the subscribers.

(7) The capital will be issued via financial instruments and will be subscribed by private investors. The financial instruments have a dividend of 5% payable annually provided the bank shows a profit. As from 16 May 2014 the dividend amounts to EURIBOR (12 months) plus 200 basis points payable annually provided the bank shows a profit.

(8) Land Tirol issues a State guarantee for the principal capital amount subscribed by the investors for a period of ten years, which is called in the case of a bankruptcy of Hypo Tirol.

(9) For this guarantee, Hypo Tirol is paying to Land Tirol a progressively increasing guarantee fee, starting with 3.9% in the first three years, and rising to 6.6% in year number ten (see table).

Year	1-3	4	5	6	7	8	9	10
% Guarantee	3,9	4,2	4,5	4,8	5,1	5,6	6,1	6,6

[*] Confidential information

(10) For the bank, therefore, the total cost of the capital injection amounts to 8.9% in year one, and rises progressively to 9.5% in year five. Thereafter, the total remuneration is comprised of an increasing guarantee fee and a dividend of 12 months Euribor plus 200 basis points.

(11) The financial instruments do not have a fixed maturity. After ten years, i.e. after the expiry of the guarantee, the private investors have a put option towards the Land Tirol, i.e. they can sell the financial instruments to the Land Tirol. Likewise, Land Tirol has a purchase option. It is envisaged that Tirol makes use of the purchase option and that the capital is subsequently redeemed by the bank. In case this does not happen and if Land Tirol were to remain the owner of the capital, Hypo Tirol commits itself to pay a dividend of Euribor (12 months) plus 860 basis points in year 11. In the 12^{th} year the dividend payable to Land Tirol increases by additional 100 basis points to Euribor (12 months) plus 960 basis points. From year 13 onwards the dividend amounts to Euribor (12 months) plus 1000 basis points.

4. AUSTRIA'S POSITION

(12) Austria considers the bank to be fundamentally sound and has provided evidence to that effect.

(13) Austria explained that it was necessary for Hypo Tirol to reinforce its capital position through a measure that would qualify as tier 1 capital under the applicable solvency regulations.

(14) Austria considers that the measure constitutes state aid within the meaning of Article 87(1) EC. Austria believes that the aid is compatible with the common market under Article 87(3)(b) of the EC Treaty in the context of the current crisis.

(15) Austria considers that the measure is not a recapitalisation stricto sensu, as the aid is restricted to guaranteeing the nominal value of the capital provided by private investors, but accepts the application of the Recapitalisation Communication[1]. The measure is not envisaged under the scope of the Austrian scheme N 557/2008.

(16) Austria has provided a letter from the Austrian Financial Supervisory Authority which considers Hypo Tirol due to its size and strong regional position an important element in the Austrian banking sector.

(17) Austria commits to submit a viability plan for the bank after six months. However, if the bank is no longer fundamentally sound, Austria commits to submit a restructuring plan.

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1 Communication from the Commission – "The recapitalisation of financial institutions in the current financial crisis, limitation of aid to the minimum necessary and safeguards against undue distortions of competition", OJ C 10, 15/01/2009, p. 2

(18) Austria, along with Hypo Tirol, has provided the following behavioural commitments:

– For a period of two years, i.e. for the years 2009 and 2010, the bank will not release reserves for purposes of paying the coupon unless obliged to by operation of law.

– A dividend restriction of 22.5% is accepted for helping the bank to maintain its capital ratio and provide an exit incentive.

– The bank commits to continue lending to the economy at normal market conditions and will refrain from aggressive advertising. In years where the full remuneration for the capital is not paid, no bonus payments to the management board of the bank will be paid.

5. ASSESSMENT

5.1. Existence of State Aid

(19) As set out in Article 87(1) of the EC Treaty, 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.

(20) While the chosen aid instrument is a recapitalisation with a guarantee for private investors, the Commission considers the measure as an aid for the bank. While the capital comes from private investors, the guarantee involves state resources.

(21) Given that Hypo Tirol is active in the financial sector, which is open to intense international competition, and as Hypo Tirol is active in neighbouring countries, i.e. Italy, Switzerland and Germany, any advantage from state resources would have the potential to affect intra-Community trade and to distort competition.

(22) The notified measure allows Hypo Tirol to get financing in a situation where it is unable to find funding at similar conditions on the market. This gives an economic advantage to Hypo Tirol and strengthens its position compared to that of its competitors in Austria and other Member States that are not benefitting from the same support. The measure must therefore be regarded as liable to distort competition and affect trade between Member States. The advantage is provided through State resources and is selective since it only benefits one bank.

(23) The Commission concludes therefore that the measure is State aid pursuant to Article 87 (1) of the EC Treaty to Hypo Tirol.

(24) As regards the question if the private investors profit from the aid measure the Commission notes first that the private investors wanting to get exposure to Austrian (or Tirol) related debt instruments, have the alternative of buying a 10 year government – or Land Tirol - bond. Currently, the bond yield for Austrian debt amounts to about 4.4%, which is slightly lower than the 5% coupon envisaged by the current measure. However, given the risks involved for the private investors, i.e. prohibition to release reserves for paying out the coupon and the guarantee on

the principal capital only in case of the bank's insolvency, the Commission is of the opinion that the measure does not constitute aid to the investors.

5.2. Legal basis for assessment

5.2.1. Individual measure outside the scheme N 557/2008

(25) The Austrian aid scheme N 557/2008 provides for guarantees for the issuing of bonds and as well as for guarantees on assets.

(26) The measure notified does not fall under either of these measures as provided for in the Austrian scheme but constitutes a guarantee on capital provided by private investors. The Commission therefore considers that the notified aid falls outside the scheme. The compatibility of the aid which is considered to be an ad hoc intervention must therefore be assessed independently of the scheme.

5.2.2. Application of Article 87(3)(b) EC

(27) The Commission considers that it may be acceptable to examine the State measure directly under the Treaty rules and in particular under Article 87 (3) (b) EC.

(28) Given the high rating of the bank (Aa1) and the relatively small size of the recapitalisation (1.6% of the risk-weighted assets) the Commission considers in line with the Recapitalisation Communication Hypo Tirol to be a sound bank.

(29) Whilst according to point 9 of the Banking Communication[2], Article 87 (3) (b) EC is in particular applicable as a legal basis for aid granted via a general scheme available in a Member State, *ad hoc* interventions by Member States are, according to point 10, not excluded in circumstances fulfilling the criteria of Article 87 (3) (b) EC.

(30) The notification provides for a state guarantee on tier-1 capital provided by private investors. Thus the measure has de facto the same effect as a capital injection by the State. The Commission therefore concludes to apply the principles as set out in the Recapitalisation Communication.

(31) The Commission notes that Hypo Tirol has a relatively low tier-1 capital ratio compared to other Austrian banks and competitors in other Member States. It accepts therefore that not providing additional capital to Hypo Tirol could lead to a loss of trust in the bank, which might, in the context of the current financial crisis, affect the Austrian financial sector. Given the great uncertainty due to the financial crisis, a lack of confidence in the Austrian financial system would severely affect the whole Austrian economy.

(32) The Commission therefore considers that in the present crisis a failure of Hypo Tirol could entail a serious disturbance of the Austrian economy.

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[2] Communication from the Commission – The application of State aid rules to measures taken in relation to financial institutions in the context of the current global crisis, OJ C 270, 25/10/2008.

(33) The Commission therefore considers the measure on the basis of Article 87 (3) (b) EC as interpreted in the Banking Communication, and, in analogy, in the Recapitalisation Communication.

5.3. Lawfulness of the aid

(34) Austria has notified the aid under Article 87 (3) b EC. The aid is subject to a decision to be taken by the government of the Federal State of Tirol and has not yet been implemented.

5.4. Compatibility of the aid

5.4.1. General considerations

(35) In line with the Banking Communication in order for an aid or aid scheme to be compatible under Article 87(3)(b) of the EC Treaty, it must comply with general criteria for compatibility under Article 87(3) of the EC Treaty, viewed in the light of the general objectives of the Treaty and in particular Articles 3(1)(g) and 4(2), which imply compliance with the following conditions:

a. *Appropriateness*: The aid has to be well targeted in order to be able to effectively achieve the objective of remedying a serious disturbance in the economy. This would not be the case if the measure is not appropriate to remedy the disturbance.

b. *Necessity*: The aid measure must, in its amount and form, be necessary to achieve the objective. That implies that it must be of the minimum amount necessary to reach the objective, and take the form most appropriate to remedy the disturbance. In other words, if a lesser amount of aid or a measure in a less distortive form (e.g. a temporary and limited guarantee instead of a capital injection) were sufficient, the measure in question would not be necessary.

c. *Proportionality*: The positive effects of the measures must be properly balanced against the distortions of competition, in order for the distortions to be limited to the minimum necessary to reach the measures' objectives. This follows from Article 3 (1) g EC and Article 4 (1) and (2) EC, which provide that the Community shall ensure the proper functioning of an internal market with free competition. Therefore, Article 87 (1) EC prohibits all selective public measures 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 must be limited to that necessary to achieve its stated objective.

(36) The Commission will assess the notified aid along these principles as translated in the Banking Communication as well as in the Recapitalisation Communication. The Commission will assess the status of the bank in accordance with Point 40 of the Recapitalisation Communication, when the bank provides a viability or restructuring plan in six months time.

5.4.2. The aid is well-targeted

(37) The purpose of the aid which has the same effect as a capital injection by the state is to ensure a level of capital comparable to its peers and to avoid a destabilisation of the bank, at the same time ensuring the stability of the current bank rating and thus its refinancing conditions. In order to do so, the aid has to remedy the identified cause of Hypo Tirol's problems, i.e. its inability to find sufficient capital on the market under normal conditions. In consequence, the bank will also be able to access liquidity at better terms, which is another important element for stabilising the bank.

(38) The Commission considers that the aid instrument chosen by the Austrian authorities, i.e. the provision of capital by private investors, secured by a state guarantee, is a necessary and appropriate means to address Hypo Tirol's problems. The aid is consequently well targeted.

5.4.3. Limitation of the aid to what is necessary

(39) The measure will help Hypo Tirol to improve its capital ratio, bringing it to a more acceptable level. In addition, it will help Hypo Tirol to fulfil the capital requirements of rating agencies and to maintain its rating level. The Commission notes in that respect that the capital injected is below 2% of the bank's risk-weighted assets, which is an indicator of the bank's soundness according to Annex 1 of the Recapitalisation Communication.

(40) The Commission notes positively the fact that Hypo Tirol raises the capital on the private market. As the measure has *de facto* the same effect as a recapitalisation and is therefore treated as a recapitalisation in terms of pricing, thus being considerably more expensive than a guarantee, the Commission considers it appropriate to authorise the guarantee for a period of 10 years.

(41) The guarantee on the hybrid tier-1 capital, which is to be granted to Hypo Tirol, is limited to the minimum necessary in scope and time, in particular as it only refers to the principal amount of the financial instruments subscribed by the private investors and is limited to 10 years.

(42) The Commission also notes that the guarantee fee itself represents a significant amount of the overall remuneration, which is also increasing over time, which contributes to ensure that the bank does not ask for more capital than necessary. The guarantee fee also helps to ensure that the bank will re-pay the capital as quickly as possible.

(43) The Commission notes also positively the step-up clause in the guarantee fee, which ensures that the bank will have an incentive to redeem the capital and thus the guarantee as quickly as possible. The Commission consequently finds that the measure is limited to the minimum necessary to achieve its purpose.

5.4.4. Proportionality

(44) As regards proportionality, the distortions of competition are minimised by a number of clearly defined and contractually agreed behavioural safeguards.

Adequate safeguards inter alia need to ensure that the State must, despite the current market conditions, obtain an adequate minimum return on its investment[3] in order to limit distortions of competition. This is achieved in this case through an adequately high and rising guarantee fee for the principal guarantee for the private investors, which is rising further from year 11 onwards, in case Land Tirol takes over the capital from the private investors and the bank does not redeem this capital. In this context the Commission takes into account also the Aa1 rating and the comparatively good standing of Hypo Tirol, which indicates that the bank would – in normal times – have been able to raise capital at acceptable conditions.

(45) As regards the bank's soundness, the Commission furthermore notes that the capital is provided by private investors, which indicates that the investors perceive that the bank will be able to pay the 5% coupon on the capital. The Commission considers that a 5% coupon would seem not disproportionate in the current circumstances. The risk for the investors is also increased by the commitment of the bank and Austria not to allow a release of reserves for paying out this coupon. In consequence, private investors taking up the investment seem to consider the bank as likely to be able to make profits in the coming years.

(46) As regards the overall remuneration, the Commission takes account of the bank's good rating which justifies a slightly lower fee compared to the Austrian scheme which is eligible also to banks with a lower rating and which for this reason provides for a slightly higher remuneration.

(47) As regards the duration of the aid, the Commission acknowledges that an envisaged duration of 10 years during which the capital is supposed to stay in the bank is longer than what is foreseen in other banks' recapitalisations. However, also in such cases it is not assured that the aid will actually be reimbursed within a period much shorter than 10 years, despite the exit incentives typically foreseen in other recapitalisations. Therefore, the openly stated need for Hypo Tirol to retain the capital for 10 years is acceptable, provided that the bank has sufficient exit incentives in place, which is the case.

(48) In view of the above, the Commission finds that the State aid is an appropriate means, limited to the minimum necessary and will not entail undue distortions of competition.

(49) For the above reasons, the Commission finds that the State aid in favour of Hypo Tirol is compatible with the common market pursuant to Article 87 (3) b) of the Treaty.

6. DECISION

The Commission finds that the abovementioned state aid is compatible with the common market and has accordingly decided not to raise objections.

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

The Commission will assess the status of the bank in accordance with Point 40 of the Recapitalisation Communication, when the bank provides a viability or restructuring plan in six months time.

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

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Yours faithfully,
For the Commission

Neelie KROES
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