

# Commission Decisions on Hypo Group Alpe Adria in the Light of Burden-Sharing

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*Since May 2009 the European Commission has assessed several State aid measures in favour of Hypo Group Alpe Adria, a banking group, which has extraordinarily attracted media attention in Austria and Germany at least since the emergency nationalisation of the bank in December 2009. Finally, State aid was authorised by Commission Decision of 3 September 2013. This case note aims to give an overview of this State aid case and its complex surrounding circumstances. Moreover, this case note critically evaluates the approval, in particular in the light of the requirement of “burden-sharing”, which in the field of State aid to ailing financial institutions means the mandatory contribution of shareholders and subordinated creditors of the affected financial institute in order to rescue and restructure it. Finally, this case note will show that the European Commission’s burden-sharing approach in the present case meets several limits.*

## I. European Legal Framework Conditions

Pursuant to Article 107(3)(b) TFEU State aids may be deemed as being compatible with the internal market if granted to “remedy a serious disturbance in the economy of a Member State”.<sup>1</sup> From 2008 to date, the European Commission (hereinafter referred to as the “Commission”) has issued seven communications (hereinafter referred to as “Crisis Communications”) on this primary-law basis, which are intended to serve as a guidance for the financial sector during the financial crisis. Those are the 2008 Banking Communication,<sup>2</sup> the Recapitalisation Communication,<sup>3</sup> the Impaired Asset Communication,<sup>4</sup> the Restructuring

Communication,<sup>5</sup> the First<sup>6</sup> and the Second<sup>7</sup> Prolongation Communication and the 2013 Banking Communication.<sup>8</sup> The Crisis Communications define the criteria that must be met by State aid measures in favour of financial institutions to ensure that such aid is found as being compatible with the internal market. The objective of the Commission’s Crisis Communications is to ensure financial stability despite the financial crisis, while minimising distortions of competition between banks and across Member States.<sup>9</sup> In doing so the Commission does not restrict itself to its role as a guardian of competition in the proper sense of the word but tries to contribute to the restructuring process that takes place in the fi-

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1 Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, OJ 2008 C115/1.

2 Communication of the Commission on the application of State aid rules to measures taken in relation to financial institutions in the context of the current global financial crisis, OJ 2008 C 270/8.

3 Communication of the Commission on 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 2009 C 10/2.

4 Communication from the Commission on the treatment of impaired assets in the Community banking sector, OJ 2009 C 72/1.

5 Communication from the Commission 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 2009 C 195/9.

6 Communication from the Commission on the application, from 1 January 2011, of State aid rules to support measures in favour of banks in the context of the financial crisis, OJ 2010 C 329/7.

7 Communication from the Commission on the application, from 1 January 2012, of State aid rules to support measures in favour of banks in the context of the financial crisis, OJ 2011 C 356/7.

8 Communication from the Commission on the application, from 1 August 2013, of State aid rules to the support measures in favour of banks in the context of the financial crisis, OJ 2013 C 216/1.

9 Cf. 2013 Banking Communication (fn. 8) points 1 et seq.

financial sector due to the financial crisis by defining requirements and/or conditions for the beneficiary's future business operations in decisions on compatibility.<sup>10</sup>

The Commission's decisions concerning the banking sector are based on the same objectives. Three chronologically overlapping stages can be defined: the rescue stage, in which the rescue of banks had priority; the stage in which an exit from the support measures was attempted (ultimately, the exit was postponed indefinitely<sup>11</sup>); and the ongoing restructuring stage aimed at restoring long-term viability or, where the institution cannot credibly return to long-term viability, orderly liquidation.<sup>12</sup>

In order to limit distortions of competition and avoid moral hazard in the banking business, the Commission required, both in the rescue stage and in the restructuring stage, "burden-sharing" as a prerequisite for approval. It requires a mandatory contribution of shareholders and subordinated creditors of the ailing bank in order to rescue and restructure it.<sup>13</sup> Burden-sharing is to be achieved by a dilution of shares and in any case by not allowing remuneration for available own funds, above all because the State aid funds are not to be used for dividend payments or interest or coupon payments for hybrid capital instruments, to the extent legally possible.<sup>14</sup> Early repayment of capital at nominal value on the basis of call options should not be made either.<sup>15</sup> That means that burden-sharing affects providers of equity and subordinated creditors. The 2013 Banking Communication, also referring to the issue of moral hazard in banking, imposed stricter burden-sharing requirements, above all by demanding a conversion of subordinated debt instruments into equity or a write-down of the principal. Non-subordinated creditors are still not required to make a mandatory contribution.<sup>16</sup>

## II. State Aid in Favour of HGAA

### 1. Information on Hypo Group Alpe Adria

Hypo Group Alpe Adria (in accordance with the Commission's diction hereinafter referred to as "HGAA") is a banking group with headquarters in Klagenfurt, Austria. As at 31 December 2008, HGAA maintained 384 branches in twelve countries (Austria, Slovenia,

Italy, Germany, Hungary, Bulgaria, Croatia, Serbia, Bosnia and Herzegovina, Montenegro, Ukraine, the former Yugoslav Republic of Macedonia) and engaged in banking business (retail, corporate, public), leasing business (retail, corporate; real estate, motor vehicles, movable property) and investments, with a balance sheet total of € 43.34 billion and risk-weighted assets in the amount of € 32.83 billion.<sup>17</sup>

In 2008 Bayerische Landesbank Anstalt des öffentlichen Rechts (hereinafter referred to as "BayernLB") held 67.08%, Grazer Wechselseitige Versicherung AG (indirectly via a holding company) held 20.48%, Land Carinthia (indirectly via a holding company) held 12.42% and Hypo Alpe Adria Mitarbeiter Privatstiftung held 0.02% of the shares of Hypo-Alpe-Adria Bank International AG, the group's parent company. BayernLB is a German regional bank with headquarters in Munich, which is present in important financial centres all over the world. Sparkassenverband Bayern and the Free State of Bavaria (indirectly via a holding company) hold interests in BayernLB. In 2008 BayernLB recognised a consolidated balance sheet total of € 422 billion and recorded a loss of € 5 billion although it had generated a profit of € 92 million the year before.<sup>18</sup>

In 2007 BayernLB acquired a majority interest in HGAA by purchasing 50% plus one share in the group's parent company, Hypo-Alpe-Adria Bank International AG. Signing took place in May 2007, clos-

10 Critically *Jaeger*, Hypo-Desaster: Rettet uns die Kommission vor den Rettern – und darf sie das?, *ecolx* 2014, p. 290 with further references.

11 Concerning the prolongation of the Crisis Communications see *Pesaresi/Mamdani*, Latest Developments in the Rules on State Aid for the Rescue and Restructuring of Financial Institutions in Difficulty, *EStAL* 4/2012, pp. 767 et seq.

12 Cf. *Lienemeyer*, Anwendung von Artikel 107 Abs 3 lit. B AEUV auf Finanzinstitute in der Finanzkrise, in: Birnstiel/Bungenberg/Heinrich (eds.), *Europäisches Beihilfenrecht*, 2013, recital 1180.

13 Cf. Impaired Asset Communication (fn. 4), points 21 et seq.; Restructuring Communication (fn. 5), points 22 et seq.

14 Cf. Restructuring Communication (fn. 5), points 22 et seq.; Cf. *Lienemeyer* in: Birnstiel/Bungenberg/Heinrich (fn. 12) recital 1247.

15 Cf. *Lienemeyer* in: Birnstiel/Bungenberg/Heinrich (fn. 12) recital 1249.

16 Cf. 2013 Banking Communication (fn. 8), points 40 et seq.

17 Commission Decision of 3 September 2013 concerning Restructuring aid for Hypo Group Alpe Adria, SA.32554, recitals 14 et seq. and 45 et seq.

18 Commission Decision of 15 May 2009 concerning State aid for BayernLB, Germany, and Hypo Group Alpe Adria, Austria, N 254/2009, OJ 2009 C 134/31, recitals 6 et seq.

ing in October 2007. The purchase price of the transaction was € 1.625 billion.<sup>19</sup> According to its own statement, BayernLB pursued above all the strategic goal of actively exploiting growth opportunities in Austria, Central and South East Europe.<sup>20</sup> On the occasion of the transaction, the then chairman of HGAA's executive board announced that the majority investment of BayernLB would provide a unique opportunity to maintain and even further expand HGAA's excellent market position in the said markets and that this opportunity would be taken.<sup>21</sup>

In practice, they were not able to implement the project, but rather the contrary happened: HGAA faced more and more financial difficulties. Between 2007 and 2009 BayernLB granted HGAA liquidity in the form of loans in the amount of € 4.3 billion subject to various approval rights, which were granted under the so-called *Master Loan Agreement*, in particular in the case of restructuring measures at HGAA. In order to protect the Austrian economy<sup>22</sup> HGAA was nationalised on 23 December 2009, by the Republic of Austria acquiring all shares in the group's parent company, Hypo-Alpe-Adria Bank International AG, for the symbolic price of € 1,- per old shareholder. In this connection, the old shareholders had to commit themselves to inject capital into the bank. BayernLB also agreed to leave liquidity in HGAA. Therefore, additional rights of BayernLB, in particular with respect to all material changes within HGAA, were agreed.<sup>23</sup>

Regarding the 2009 rescue operation the Commission concluded in its Decision of 25 July 2012 in case

SA.28487 concerning Restructuring aid to BayernLB that the guarantee by the Republic of Austria on the above mentioned liquidity constituted State aid in favour of BayernLB. The Republic of Austria brought an action for annulment<sup>24</sup> against that decision, insisting that the measure does not constitute State aid in favour of BayernLB (Case T-427/12, which is still pending before CFI).<sup>25</sup>

Since December 2012, referring to the Austrian Act on Equity Substitution [*Eigenkapitalersatz-Gesetz – EKEG*],<sup>26</sup> HGAA has refused to pay back the outstanding loans of € 2.3 billion to BayernLB, claiming that those loans had been granted by BayernLB as the then majority shareholder in the crisis and would thus substitute equity, which is why they did not have to be paid back for the time being in the crisis within the meaning of *EKEG*. At the same time HGAA has demanded repayment of the amount of € 2 billion that was already paid back under the loan.<sup>27</sup> BayernLB is in turn of the opinion that it had been misled by the then sellers with regard to HGAA's equity when it acquired the majority interest in HGAA in 2007. On the other hand, the Republic of Austria accuses BayernLB of not having been given all relevant information on the financial position of HGAA in the course of HGAA's emergency nationalisation in December 2009 and that it had therefore been misled.<sup>28</sup> Against this background several legal disputes have arisen that are still pending before German and Austrian courts.

According to the Commission, HGAA's financial difficulties were due to the following causes: HGAA

19 BayernLB, „BayernLB ist Mehrheitseigentümer der Hypo Group Alpe Adria – Closing vollzogen“, 9 October 2007, available on the Internet at: <[http://www.bayernlb.de/internet/media/de/internet\\_4/de\\_1/downloads\\_5/0100\\_corporatecenter\\_8/1320presse\\_3/pressemeldungen\\_2/pressemeldungen\\_deutsch/2007\\_19/10oktober\\_9/09102007\\_Presseinfo\\_Closing.pdf](http://www.bayernlb.de/internet/media/de/internet_4/de_1/downloads_5/0100_corporatecenter_8/1320presse_3/pressemeldungen_2/pressemeldungen_deutsch/2007_19/10oktober_9/09102007_Presseinfo_Closing.pdf)> (last accessed on 20 May 2014).

20 BayernLB, „BayernLB beteiligt sich mehrheitlich an der Hypo Alpe-Adria-Bank International AG“, 22 May 2007, available on the Internet at: <[http://www.bayernlb.de/internet/media/de/internet\\_4/de\\_1/downloads\\_5/0100\\_corporatecenter\\_8/1320presse\\_3/pressemeldungen\\_2/pressemeldungen\\_deutsch/2007\\_19/05mai\\_12/220507\\_HypoGroupfinal.pdf](http://www.bayernlb.de/internet/media/de/internet_4/de_1/downloads_5/0100_corporatecenter_8/1320presse_3/pressemeldungen_2/pressemeldungen_deutsch/2007_19/05mai_12/220507_HypoGroupfinal.pdf)> (last accessed on 20 May 2014).

21 BayernLB (fn. 19).

22 See § 1 Austrian Financial Markets Stabilisation Act [Finanzmarktstabilitätsgesetz – FinStaG], Austrian Federal Law Gazette I 136/2008.

23 Renate Graber, „Hypo Banker ringen um Sanktus der Bayern“, 30 August 2013, available on the Internet at <<http://derstandard.at/>

1376535009235/Hypo-Alpe-Adria-drohen-bis-35-Milliarden-Verlust> (last accessed on 20 May 2014).

24 OJ 2012 C 373/10.

25 Commission Decision of 3 September 2013 (fn. 17) recital 88.

26 Austrian Federal Law Gazette I 92/2003.

27 Austrian Federal Ministry of Finance, „Fragen und Antworten zur Hypo Alpe Adria“, 2014, available on the Internet at: <[https://www.bmf.gv.at/top-themen/Antworten\\_Hypo.html](https://www.bmf.gv.at/top-themen/Antworten_Hypo.html)> (last accessed on 20 May 2014); concerning the current status of the proceedings of the ongoing trial at the Landesgericht München cf. Christian Höller, „Streit um Hypo Österreich feiert Punktesieg gegen Bayern“, 8 May 2014, available on the Internet at <[http://diepresse.com/home/wirtschaft/economist/3802904/Streit-um-Hypo-Oesterreich-feiert-Punktesieg-gegen-Bayern?\\_vl\\_backlink=/home/politik/innenpolitik/1557859/index.do&direct=1557859](http://diepresse.com/home/wirtschaft/economist/3802904/Streit-um-Hypo-Oesterreich-feiert-Punktesieg-gegen-Bayern?_vl_backlink=/home/politik/innenpolitik/1557859/index.do&direct=1557859)> (last accessed on 20 May 2014).

28 Günter Fritz, „BayernLB will noch mal in die Verlängerung“, 21 October 2013, available on the Internet at <<http://wirtschaftsblatt.at/home/nachrichten/oesterreich/1466846/Bayern-LB-will-noch-mal-in-die-Verlaengerung>> (last accessed on 20 May 2014).

pursued an aggressive growth strategy based on cheap (because guaranteed by Land Carinthia) funding. For example, HGAA bet massively on a rapid growth in the SEE markets. As a result, the balance sheet total of HGAA increased from € 9.8 billion as at 31 December 2002 to € 43.3 billion as at 31 December 2008. This was made possible by low financing costs due to State guarantees by Land Carinthia, the total of which increased from € 4.9 billion as at 31 December 2002 to € 20.7 billion as at 31 December 2009. That business model of HGAA generated short-term profits from 2002 to 2006 (except in 2004). Due to systematic misjudgments high-risk projects in the real estate and the tourism segment were funded and the bank's portfolio became increasingly plagued by a significant portion of non-performing loans. In many cases underlying collateral proved difficult or impossible to sell, necessitating large write-downs. With the subsequent appreciation of the Swiss Franc currency risks also materialised. In addition, the lack of adequate internal control mechanisms rendered the bank's bodies and officers vulnerable to conduct that is punishable under criminal law, which led to several criminal cases.<sup>29</sup> The Austrian Federal Ministry of Finance does not contradict the opinion that BayernLB continued to push HGAA's expansion strategy in the Balkans and exposed itself to more risks after its investment.<sup>30</sup>

## 2. State Aid Granted in favour of HGAA so Far

In December 2008 HGAA received € 900 million in Tier-1 *Partizipationskapital* and liquidity guarantees in the amount of € 1.35 billion for bond issues as State aid from the Republic of Austria under the Austrian Banks Rescue Package.<sup>31</sup> At that time HGAA had been considered "not distressed" by the Austrian Central Bank (hereinafter referred to as "OeNB") as expert, which, at the end of 2008, had audited HGAA at the request of the Austrian Federal Ministry of Finance to obtain a rating. Therefore, HGAA paid lower remuneration on the *Partizipationskapital* than would have been the case had it been considered a "distressed" bank. These State aid measures were subject to the condition that the bank's shareholders provide capital, too. Therefore, in December 2008 HGAA received a capital injection of € 700 million from its then majority shareholder, BayernLB,

which, in turn, had received State aid from the Free State of Bavaria in the same month.<sup>32</sup> According to a later OeNB statement, HGAA's rating of "not distressed" had, in particular, been granted due to the said capital injection by BayernLB and the ensuing fulfilment of the statutory minimum solvency ratio.<sup>33</sup>

By its decision of 12 May 2009<sup>34</sup> the Commission opened the formal investigation procedure concerning BayernLB and HGAA pursuant to Article 16 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 (hereinafter referred to as "State Aid Procedure Regulation").<sup>35</sup> For the Commission doubted that the State aid granted by the Free State of Bavaria in favour of BayernLB was compatible with the internal market. The Commission also questioned whether HGAA was a fundamentally sound bank. After all, in April 2009 the Republic of Austria had submitted a plan to the Commission to restore HGAA's viability. If HGAA had not been rated as a fundamentally sound bank, the Republic of Austria would have had to present a restructuring plan for HGAA.<sup>36</sup> Moreover, the Commission criticised the inadequate burden-sharing with respect to the aid measures in favour of HGAA due to the facts that the capital injection of BayernLB had actually only been possible because of the aid measures of the Free State of Bavaria, that the shareholders had provided no additional funds and that there was no commitment of the hybrid capital holders to join loss-sharing agreements, if necessary.<sup>37</sup>

29 Commission Decision of 3 September 2013 (fn. 17) recitals 45 et seq.

30 Austrian Federal Ministry of Finance (fn. 27).

31 That scheme had been approved by Commission Decision of 9 December 2008 concerning *Maßnahmen nach dem Finanzmarktstabilitäts- und dem Interbankmarktstärkungsgesetz für Kreditinstitute und Versicherungsunternehmen in Österreich*, N 557/2008, OJ 2009 C 3/1.

32 Commission Decision of 3 September 2013 (fn. 17) recitals 27 and 133.

33 OeNB, "Eckpunkte der Aufsichtstätigkeit in Bezug auf die Hypo Alpe Adria (HAA)", 2014, available on the Internet at: <<http://www.oenb.at/Finanzmarktstabilitaet/eckpunkte-der-aufsichtstaetigkeit-in-bezug-auf-die-hypo-alpe-adria.html>> (last accessed on 20 May 2014).

34 Commission Decision of 12 May 2009 (fn. 18).

35 OJ 2009 L 83/1.

36 Commission Decision of 9 December 2008 (fn. 31) recital 34.

37 Commission Decision of 12 May 2009 (fn. 18) recitals 85 and 102.

In the course of the emergency nationalisation of HGAA, the Republic of Austria notified several State aid measures in favour of HGAA, which were temporarily authorised by the Commission on the basis of Article 107(3)(b) TFEU in its decision of 23 December 2009,<sup>38</sup> i.e. until submission of a credible restructuring plan for HGAA. In the same decision the Commission extended the formal investigation procedure. Emergency nationalisation itself constituted no State aid, but in the course of emergency nationalisation HGAA received as State aid from the Republic of Austria a temporary asset guarantee of € 100 million which was replaced by a capital injection in an amount of € 450 million in June 2010, again under the Austrian Banks Rescue Package but in that case under the conditions for “distressed” banks. With respect to burden-sharing the Commission demanded a stronger involvement of the old shareholders than before.<sup>39</sup> The December 2009 Rescue Decision also established that the Republic of Austria, referring to OeNB’s confirmation letter dated 7 December 2009, considered HGAA a bank of systemic importance to the financial market in Austria and that, without the aid measures, the supervisory authority might close the bank.<sup>40</sup>

In April 2010 the Republic of Austria submitted a restructuring plan for HGAA to the Commission. Thereupon the Commission further extended the formal investigation procedure by decision dated 22 June 2010,<sup>41</sup> because, considering the restructuring plan, it still doubted the compatibility of the aid measures as regarded the restoration of the bank’s long-term viability, appropriate burden-sharing

(specifically concerning BayernLB, Grazer Wechselseitige Versicherung AG and Land Carinthia) and measures to minimise distortions of competition caused by the aid. Reiterating OeNB’s confirmation of HGAA’s systemic importance, the Commission prolonged the temporary authorisation of current and previous aid measures until conclusion of its examination of the restructuring plan for HGAA.<sup>42</sup>

In December 2010 the Republic of Austria notified another State aid measure in favour of HGAA in the form of a temporary asset guarantee of € 200 million, which was to ensure compliance with the statutory equity requirements.

In February 2011 the Commission informed the Republic of Austria and the Federal Republic of Germany that the joint State aid case concerning HGAA and BayernLB would be continued separately henceforth.

In April 2011 the Republic of Austria submitted a revised restructuring plan for HGAA.

The asset guarantee was temporarily approved by Commission Decision of 19 July 2011<sup>43</sup> until its final decision on the restructuring plan in order to prevent the bank’s imminent insolvency, with the Commission again making reference to OeNB’s confirmation of HGAA’s systemic importance. With regard to the requirement of appropriate burden-sharing the Commission held that the level of remuneration and the structure of that asset guarantee would be appropriate in the current circumstances and that the loss of shares suffered by the old shareholders in connection with HGAA’s emergency nationalisation in December 2009 would have reduced the risk that the old shareholders benefit from that additional aid measure without fully contributing to the rescue of the bank.<sup>44</sup>

In December 2012 the Republic of Austria notified additional State aid measures in favour of HGAA in the form of a capital injection via subscription for new no-par value shares of € 500 million and a guarantee of € 1 billion for the Tier-2 subordinated bonds issued by the bank. Those additional aid measures were approved temporarily by Commission Decision of 5 December 2012<sup>45</sup> subject to certain commitments of the Republic of Austria. The December 2012 Rescue Decision was also based on the finding that HGAA constituted a bank of systemic importance, which had been confirmed once more by OeNB by its letter dated 3 December 2012.<sup>46</sup> In contrast to its other decisions the Commission did not comment on

38 Commission Decision of 23 December 2009 concerning State aid for BayernLB, Germany, and Hypo Group Alpe Adria, Austria, C 16/09 (ex N 254/09) and N 698/09; OJ 2010 C 85/21.

39 Commission Decision of 23 December 2009 (fn. 38) recital 67.

40 Commission Decision of 23 December 2009 (fn. 38) recitals 45 and 55.

41 Commission Decision of 22 June 2010 concerning State aid for Hypo Group Alpe Adria, C 16/09, OJ 2010 C 266/5.

42 Commission Decision of 22 June 2010 (fn. 41) recital 46.

43 Commission Decision of 19 July 2011 concerning State aid for Hypo Group Alpe Adria, SA.32554 and SA.32172; OJ 2012 C 31/13.

44 Commission Decision of 19 July 2011 (fn. 43) recitals 35 et seq.

45 Commission Decision of 5 December 2012 concerning Restructuring aid for Hypo Group Alpe Adria, SA.32554; OJ 2013 C 59/34.

46 Commission Decision of 5 December 2012 (fn. 45) recitals 19 et seq.

burden-sharing in the December 2012 Rescue Decision.

### 3. September 2013 Approval Decision

In June 2013 the Republic of Austria submitted a restructuring plan, under which HGAA is to be liquidated in an orderly manner and which was amended on 27 August 2013. Subsequently, the most recent decision to date of the Commission in the State aid case concerning HGAA was rendered on 3 September 2013<sup>47</sup> (hereinafter referred to as the “September 2013 Approval Decision”). By that decision the Commission authorised the State aid that had been granted by then as well as additional State aid measures which may be required for the liquidation of HGAA, namely up to € 5.4 billion of potential future capital measures and up to € 3.3 billion of potential future liquidity measures.<sup>48</sup> The systemic importance ascertained by OeNB and the potential closure of the bank by the supervisory authorities without the aid measures are crucial aspects on which the Commission relies, which is hardly surprising given the reasons stated for the preceding decisions.<sup>49</sup>

The Commission concluded that the viability of HGAA could not be restored and that the orderly liquidation strategy for HGAA as proposed by the Republic of Austria was an appropriate means to deal with HGAA.<sup>50</sup> The Republic of Austria undertook to ensure that the restructuring plan would be fully implemented within the relevant deadlines and that the commitments made regarding business policy, profit transfer, own contribution and restrictions on new business would be complied with, which would have to be monitored by an independent monitoring trustee. The restructuring plan provides that the marketable entities of HGAA, namely the Austrian bank and the SEE banks, are to be sold, while the remaining non-viable parts are to be liquidated in an orderly procedure. The reprivatisation deadline for the Austrian bank was 31 December 2013 (and was met by the Republic of Austria<sup>51</sup>), the deadline for the SEE banks is 30 June 2015 (those deadlines refer to signing; the deadlines set for closing were not disclosed in the published text of the decision with regard to non-disclosure of business secrets).<sup>52</sup>

As regards burden-sharing, the Commission considers the old shareholders and the hybrid capital holders sufficiently involved: Grazer Wechselseitige

Versicherung AG and Land Carinthia both also had to accept a capital cut. Hypo Alpe Adria Mitarbeiter Privatstiftung gave up its shareholder rights without receiving any consideration. The hybrid capital instruments were bought back below par or they were cancelled and many hybrid capital holders did not receive any dividends or coupon payments in recent years. As regards BayernLB the Commission established that as the former majority shareholder the bank has in total contributed about € 1.5 billion in capital whilst renouncing further ownership rights, even any prospect of further remuneration, it contributed € 4.3 billion in liquidity and faced a significant write-down loss when it sold its shares to the Republic of Austria. In the Commission’s opinion, the fact that BayernLB’s amount of burden-sharing is higher compared to that of the other old shareholders is adequate in view of the controlling position of a majority shareholder. As to the pending lawsuit concerning the loans granted by BayernLB, which from HGAA’s point of view substitute equity and must not be paid back pursuant to *EKEG*, the Commission noted that in its opinion the final outcome of the proceedings would not affect that decision. If BayernLB should lose the case, it would have to bear a still heavier burden. If BayernLB should win the case, this would not, in the opinion of the Commission, change anything regarding the examined burden-sharing.<sup>53</sup>

## I. Criticism

The September 2013 Approval Decision described above and the steps taken so far by the Commission in the State aid case concerning HGAA will be critically evaluated hereinafter, in particular in the light of the approval requirement of burden-sharing:

47 Commission Decision of 3 September 2013 (fn. 17).

48 Commission Decision of 3 September 2013 (fn. 17) recitals 98 and 156.

49 Commission Decision of 3 September 2013 (fn. 17) recitals 101 et seq.

50 Commission Decision of 3 September 2013 (fn. 17) recitals 121 et seq.

51 Austrian Federal Ministry of Finance (fn. 27).

52 Commission Decision of 3 September 2013 (fn. 17) Annex – General commitments.

53 Commission Decision of 3 September 2013 (fn. 17) recitals 122 et seq.

#### 4. The Requirement of Burden-Sharing and its Limits

The Commission examined the State aid granted by the Republic of Austria for its compatibility with the internal market pursuant to Article 107(3)(b) TFEU on the basis of the criteria defined by the Commission in the Crisis Communications, especially in the Restructuring Communication: (i) restoration of the bank's viability (ii) sufficient own contribution by the beneficiary (burden-sharing) and ensuring that the aid is limited to the necessary minimum, as well as (iii) sufficient measures to limit distortion of competition.<sup>54</sup>

In the Restructuring Communication, the following reasons were given for the requirement of burden-sharing: *"The bank and its capital holders should contribute to the restructuring as much as possible with their own resources. This is necessary to ensure that rescued banks bear adequate responsibility for the consequences of their past behaviour and to create appropriate incentives for their future behaviour."*<sup>55</sup> Joaquín Almunia, Vice-President of the Commission and Commissioner for Competition, voiced his opinion on the issue of burden-sharing in a speech on State aid law and banks in February 2011 as follows: *"I believe that institutional shareholders should be held responsible for their mistakes or their reckless risk-taking. I can see no reason why the burden of restructuring Landesbanken should be transferred wholly onto taxpayers; there must be a rational and fair way to share the burden with shareholders."*<sup>56</sup> Thus, the requirement of burden-sharing was designed by the Commission with the intention to provide a measure that has the character of both prevention and sanction. The latter is shown by the fact that not the taxpayers but the owners of the banks, who are (at least indirectly) responsible for the risky business

policy and the resulting financial trouble of the bank, should bear the restructuring costs.<sup>57</sup>

However, in the State aid case concerning HGAA already at this point the first limits of this approach taken by the Commission manifest themselves: as explained above, the Republic of Austria nationalised HGAA in December 2009 in order to protect the Austrian economy, granted HGAA State aid of several billion euros before and after emergency nationalisation and obtained approval from the Commission for additional State aid measures in the amount of several billion euros for the planned orderly liquidation. This means a burden on the national budget of the Republic of Austria and, thus, on the taxpayers. By the old shareholders' relinquishment of their shareholder rights with concurrent acceptance of a massive write-down loss and waiving further remuneration, they were burdened only at first glance. For one must not overlook the fact that, according to the Commission's findings, HGAA is not viable and that viability cannot be restored either,<sup>58</sup> which is why future remuneration payments for available own funds are unrealistic anyhow, and could not have realistically been expected at the time of emergency nationalisation. This means that it must have been clear that the old shareholders would have to write down their investment in any case and that, irrespective of the sale of the shares for the symbolic price of € 1,- each, there were no prospects of future remuneration of own funds. Therefore, the part of the Commission's conclusion according to which the old shareholders had to face a financial burden due to the manner in which they lost their shareholder status<sup>59</sup> seems constructed (the question of whether the other measures taken to the detriment of the old shareholders ensure appropriate burden-sharing will be left open here). Consequently, in the present case the instruments defined in the Crisis Communications, by which the burden is to be shifted from the taxpayers to the shareholders, in particular the ban on remuneration of available own funds, have proved little successful since the time of and due to the emergency nationalisation of HGAA. In other words, the burden-sharing instruments are tailored to banks (owned by private shareholders), which are rescued by means of State aid and then return to viability, but not to cases like the one at hand.

In the HGAA case, the burden-sharing approach meets its limits also in terms of procedural law: State aid cases are generally between the Commission and

54 Restructuring Communication (fn. 5), point 5; Commission Decision of 3 September 2013 (fn. 17) recital 103.

55 Restructuring Communication (fn. 5), point 22.

56 Speech/11/62, "Landesbanken and the EU competition rules", 9th Handelsblatt annual conference Strategies for Savings Banks and Landesbanken, Berlin, 2 February 2011, pp. 5 et seq.

57 Cf. *Pesaresi/Mamdani* (fn. 11) p. 770.

58 See Commission Decision of 3 September 2013 (fn. 17) recital 105.

59 See Commission Decision of 3 September 2013 (fn. 17) recitals 124, 125, 135.

the Member State concerned.<sup>60</sup> As a result of the separation of the initially joint State aid cases concerning HGAA and BayernLB, for which no detailed reasons were given in the September 2013 Approval Decision either,<sup>61</sup> pursuant to Article 25 of the State Aid Procedure Regulation the September 2013 Approval Decision is addressed to the Republic of Austria, but not to the Federal Republic of Germany. It is therefore no wonder that the Commission assumed a neutral position regarding the issue of how to deal with the loans of € 4.3 billion granted by BayernLB to HGAA from 2007 to 2009 and which HGAA considers equity substitution which, pursuant to *EKEG*, cannot be paid back in times of crisis, by stating in the September 2013 Approval Decision that in its opinion the outcome of the ongoing civil proceedings would not affect its decision.<sup>62</sup> Since the Federal Republic of Germany was not involved in this State aid case, pursuant to Article 25 of the State Aid Procedure Regulation, the September 2013 Approval Decision, including all commitments stated therein, could only be addressed to the Republic of Austria. Irrespective of whether it would be politically desirable that the Commission acts as a “conciliator” between the Republic of Austria and HGAA, on the one part, and the Federal Republic of Germany and BayernLB, on the other part, it deprived itself of (most of) its options in this regard by separating the cases. This might be the reason why the Commission did not examine possible outcomes of the ongoing civil proceedings which, of course, considerably affect burden-sharing.

However, the “exclusion” of the Federal Republic of Germany (and indirectly also the Free State of Bavaria and BayernLB) resulting from the separation of cases does not only concern HGAA’s obligation to pay back the loans, which is in dispute, but also BayernLB’s contractual approval rights in the case of material changes within HGAA: as explained earlier, the Republic of Austria is obliged under the September 2013 Approval Decision to sell HGAA’s marketable entities (which currently are the SEE banks) as soon as possible, for which signing and closing deadlines have been defined. If those deadlines are not met, the entity concerned must refrain from new business from the day following the relevant deadline.<sup>63</sup> If the obligations are not fulfilled, the Republic of Austria will have to face proceedings regarding misuse of aid as defined in Article 16 of the State Aid Procedure Regulation in the worst case. If those approval rights of BayernLB according to the *Master Loan Agreement*

should also concern the sale of HGAA’s SEE banks, which is required under State aid law, it is conceivable that BayernLB will try to impede such sales, which would obviously not be in line with the burden-sharing approach of the Commission.

## 5. Is HGAA a Bank of Systemic Importance and, if so, Why?

When looking at the way in which the Commission has dealt with bank aid during the financial crisis, a paradigm shift can be noticed compared to its decision-making practice before the financial crisis, for the Commission tries to shape the European banking landscape by means of the affected Member State’s commitments which it demands in State aid proceedings concerning the further development of the beneficiary bank’s business policy.<sup>64</sup> The Commission’s main argument for that paradigm shift is that it wants to avoid negative spillover effects that may result from a bank’s insolvency. Therefore, in particular banks which play an important role in the financial system (the Impaired Asset Communication speaks of “banks of systemic importance”<sup>65</sup>) should be given support.<sup>66</sup> Both the European and the Austrian legislator leave the parameters open (either wittingly or unwittingly) according to which a bank is to be classified as relevant to the financial system. As a result, the term of “bank of systemic importance” follows a political definition rather than one that can be verified by law.<sup>67</sup>

In the OeNB’s opinion HGAA was “*without doubt*” of systemic importance in the autumn of 2008.<sup>68</sup> As

60 Cf. *Sinnaeve*, “Rechte der Beteiligten”, in: Heidenhain (ed.), *Handbuch des Europäischen Beihilferechts*, 2003, p. 744 with further references.

61 See Commission Decision of 3 September 2013 (fn. 17) recital 7.

62 See Commission Decision of 3 September 2013 (fn. 17) recital 127.

63 See Commission Decision of 3 September 2013 (fn. 17) Annex – Reprivatisation of the operational entities.

64 Cf. *Lienemeyer* in: Birnstiel/Bungenberg/Heinrich (fn. 12) recital 1192; *Koenig/Soltész*, *Regulierung durch EU-Beihilfenrecht in der Finanz- und Staatsschuldenkrise*, WM 2013, pp. 145 et seq.

65 Impaired Asset Communication (fn 4), point 12.

66 Cf. 2013 Banking Communication (fn. 8), points 4 et seq.

67 Cf. *Herzog*, *Die österreichischen Staatshilfen*, in: Jaeger/Rumersdorfer (eds.), *Jahrbuch Beihilferecht* 2010, 2010, p. 286 with further references.

68 OeNB (fn. 33).

set forth above, HGAA's systemic importance was for the first time confirmed by OeNB in writing in connection with the State aid proceedings in December 2009 and has since been stated by the Commission in all HGAA decisions as a condition critical to the decision; however, this is merely done by referring to the OeNB decisions but without stating more detailed reasons. In view of the previous Commission practice, according to which systemic importance is attributed to almost every European bank, *Jaeger* has already expressed a critical view with respect to HGAA's systemic importance and the way in which the Commission has dealt with that issue: for if the concept of systemic importance is interpreted (too) broadly the risk of encouraging systematic misconduct will increase as well.<sup>69</sup>

I would affirm that view and add that in the light of the obligation to state reasons as defined in Article 296(2) TFEU, it seems doubtful whether that obligation was fulfilled when HGAA's systemic importance was established. This applies all the more so because the obligation to state reasons is very strict in State aid decisions<sup>70</sup> and HGAA's systemic importance actually was the *conditio sine qua non* for the approval of State aid pursuant to Article 107(3)(b) TFEU.

Moreover, not least because of recent criticism,<sup>71</sup> the OeNB confirmations of HGAA's systemic importance should be questioned as well: irrespective of whether they are really true, the OeNB still owes a more detailed explanation, at least to the public. That would have fostered confidence in the rule of law and its institutions. Assuming that it was possible to pro-

vide credible reasons for an affirmation of HGAA's systemic importance and such reasons were submitted by OeNB to the Commission in the State aid proceedings, their non-disclosure must be criticised.

### III. Conclusion and Outlook

With the September 2013 Approval Decision, the Commission decided on a State aid case that had lasted for more than four years. In doing so, the Commission followed the decision-making practice it has applied since the outburst of the financial and economic crisis: banks that are of relevance to the financial system should be able to receive and be rescued by State aid measures. Thus, all State aid measures in favour of HGAA could finally be approved after several adaptations of the plan. It remains to be seen if the Commission will continue that practice in future cases, in particular in view of the recently adopted Directive 2014/59/EU of the European Parliament and the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council.<sup>72</sup>

On a closer inspection the Commission failed to provide answers to a few questions, in particular as to why HGAA is considered a bank of systemic importance and why, in February 2011, despite the legal and factual interconnections, the Commission separated the State aid cases of HGAA and BayernLB, which had initially been a joint case. It becomes apparent that the Commission relies on the expert opinion of national authorities like the OeNB, if there are no supranational authorities holding opposite views, and that the Commission struggles with multiple-party State aid procedures. The consequences of the separation in the present case indirectly also affect the approval requirement of burden-sharing and the Commission's related options to deal with the tense legal situation between the Republic of Austria and HGAA, on the one part, and the Federal Republic of Germany and BayernLB, on the other.

69 Cf. *Jaeger*, Hypo-Desaster: Milliardenbeihilfe für Kärntner Hypo – Gibt es überhaupt Banken ohne Systemrelevanz?, *ecolex* 2013, pp. 95 et seq.

70 Cf. *Vedder*, Artikel 296 AEUV, in: *Vedder/Heintschel von Heinegg* (eds.), *Europäisches Unionsrecht Handkommentar*, 2012, p. 997, recital 7.

71 Austrian Parliament, "Parlamentskorrespondenz Nr. 310 vom 09.04.2014: Hypo Alpe Adria – Sondersitzung des Finanzausschusses", 9 April 2014, available on the Internet at: <[http://www.parlament.gv.at/PAKT/PR/JAHR\\_2014/PK0310/](http://www.parlament.gv.at/PAKT/PR/JAHR_2014/PK0310/)> (last accessed on 20 May 2014); concerning the position of the OeNB cf. OeNB, "OeNB: Bewertung der Hypo Group Alpe Adria im Dezember 2008 mit 'not distressed' basierte ausschließlich auf Fakten", 17 February 2014, available on the Internet at: <<http://www.oenb.at/Presse/20140217.html>> (last accessed on 20 May 2014).

72 OJ 2014 L 173/190.