IV

*(Acts adopted before 1 December 2009 under the EC Treaty, the EU Treaty and the Euratom Treaty)*

# COMMISSION DECISION

## of 28 August 2009

## on State aid C 6/09 (ex N 663/08) — Austria Austrian Airlines — Restructuring Plan

*(notified under document C(2009) 6686)*

**(Only the German text is authentic)**

**(Text with EEA relevance)**

(2010/137/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community, and in particular the first subparagraph of Article 88(2) thereof,

Having regard to the Agreement on the European Economic Area, and in particular Article 62(1)(a) thereof,

Having called on interested parties to submit their comments pursuant to the above Articles [1], and having regard to those comments,

Whereas:

### 1. PROCEEDINGS

(1) By letter of 11 February 2009, the Commission informed the Republic of Austria of its decision to initiate proceedings under Article 88(2) of the EC Treaty with regard to the sale of the Austrian State's shares in the Austrian Airlines Group.

(2) On 11 March 2009, Austria transmitted its comments on the opening of the proceedings to the Commission.

(3) The Commission's decision to initiate proceedings was published in the *Official Journal of the European Union* [2]. The Commission invited interested parties to submit their comments on the measures in question within one month of the date of publication.

(4) The Commission received comments from interested parties. It transmitted the comments to Austria by electronic mail on 15 April 2009. Austria was given the opportunity to respond to those comments. The Commission received Austria's observations by electronic mail on 8 May 2009.

(5) At Austria's request, meetings took place on 7 May 2009 and 18 May 2009. Those meetings were followed by the dispatch of additional information, as requested by the Commission, on 22 May 2009 and 18 June 2009.

### 2. DESCRIPTION OF THE FACTS

#### 2.1. Background to the investigation

(6) The Austrian Airlines Group (hereinafter Austrian Airlines) is made up of three companies: Austrian Airlines Österreichische Luftverkehrs AG, a network carrier airline founded in 1957; Tiroler Luftfahrt GesmbH (Tyrolean Airways — hereinafter 'Tyrolean'), a regional subsidiary established in 1978; and Lauda Air Luftfahrt GmbH (hereinafter Lauda Air), a charter division founded in 1979. Austrian Airlines is headquartered in Vienna and operates from hubs in Vienna International Airport and Innsbruck Airport. Austrian Airlines is a member of the Star Alliance.

(7) The Austrian State holds 41,56 % of Austrian Airlines shares through a State holding company, Österreichische Industrieholding AG (hereinafter ÖIAG). ÖIAG is the largest shareholder.

(8) Given the difficult — and deteriorating — financial situation in which the Austrian Airlines Group has found itself over the last few years (see Commission Decision of 19 January 2009 on State aid NN 72/08, Austrian Airlines — Rescue aid [3]), the Austrian Government issued a privatisation mandate on 12 August 2008, authorising ÖIAG to dispose of all of its shares in Austrian Airlines. On 29 October 2008, this mandate was extended until 31 December 2008.

[1] OJ C 57, 11.3.2009, p. 8.
[2] See footnote 1.
[3] Not yet published in the Official Journal.

(9) ÖIAG published announcements in the Austrian and international press ([4]) on 13 August 2008 inviting potential investors to express their interest in acquiring ÖIAG's shareholding in Austrian Airlines. Bidders had until 24 August 2008 to express their interest. A total of 12 investors did so.

(10) On 28 August 2008, the potential investors were notified that an acquisition concept should be submitted by 12 September 2008. The acquisition concept had to include information on the bidder, a strategic concept for the future of Austrian Airlines, a proposal for the transaction structure, information on the planned financing and certain additional information relating to the subject matter of the contract (warranties, guarantees). Only three acquisition concepts ([5]) were submitted.

(11) On 16 September 2008, the three remaining bidders were invited to submit their final offers without a purchase price by 21 October 2008 and their final offers with the purchase price by 24 October 2008.

(12) On 21 October 2008, Deutsche Lufthansa AG (hereinafter Lufthansa) was the only bidder to submit an offer, including a contract and strategic concept, without a price as had been requested. On 24 October 2008, Lufthansa submitted a binding offer indicating the price it was prepared to pay for ÖIAG's shareholding in Austrian Airlines.

(13) On 24 October 2008, S7 also submitted an offer […] (*). Air France/KLM made no offer ([6]).

(14) The transaction was approved by Lufthansa's Supervisory Board on 3 December 2008 and by ÖIAG's Supervisory Board on 5 December 2008.

(15) Thus, at the end of the privatisation process, Lufthansa, as the selected bidder, made an offer for ÖIAG's shareholding in Austrian Airlines which was accepted by ÖIAG's Supervisory Board.

(16) The transaction concluded between ÖIAG and Lufthansa stipulates that:

— Lufthansa is to pay ÖIAG a purchase price of EUR 366 268,75,

— ÖIAG is to receive a debtor warrant ([7]) which may lead to entitlement to an additional payment of up to EUR 162 million,

— through a special purpose vehicle, ÖIAG is to pay an amount of EUR 500 million, which Lufthansa is to use for a capital increase in Austrian Airlines.

(17) When notifying the measure for reasons of legal certainty on 21 December 2008, the Republic of Austria expressed the opinion that the sales transaction does not involve State aid because the price to be paid for Austrian Airlines is the market price for the company.

(18) In any case, the price to be paid by Lufthansa for the State's participation in Austrian Airlines does not constitute State aid because any alternative scenario would have resulted in higher costs for ÖIAG.

(19) Additionally, and without prejudice to the above arguments, the Austrian authorities stated that, in the event of the Commission not accepting that the measures in question did not amount to State aid, they would also submit a restructuring plan for Austrian Airlines, so that the aid would be compatible under Article 87(3)(c) of the EC Treaty.

(20) With regard to rescue aid, the Republic of Austria notified the Commission on 19 December 2008 of its decision to grant rescue aid to the Austrian Airlines Group in the form of a 100 % guarantee, in order to enable the company to receive loan financing amounting to EUR 200 million. The rescue aid was approved on 19 January 2009.

(21) In accordance with the rescue aid decision, the rescue aid (in the form of a State guarantee for a framework credit agreement) will be brought to an end when the Commission reaches a definitive State aid position (final decision) on the sale process/restructuring plan submitted by the Austrian authorities ([8]).

### 2.2. **Measures under investigation**

(22) The decision to open the formal investigation (hereinafter the decision to initiate proceedings) raised the following questions:

— whether the sales price achieved for the Austrian State's shareholding in Austrian Airlines is the market price,

([4]) *Amtsblatt zur Wiener Zeitung* and *Financial Times* (European edition).
([5]) From Air France/KLM, Deutsche Lufthansa and S7 (a Russian airline).
(*) Confidential information.
([6]) For Air France/KLM's position on the privatisation process, see Section 4.4 below.
([7]) Three years after the closing date or, at the latest, after the financial reports have been submitted for the period ending on 31 December 2011, ÖIAG will receive an additional payment of up to EUR 162 million, calculated on the basis of the following formula, […].
([8]) See recital 71 of the Commission Decision of 19 January 2009 on State aid NN 72/08, Austria — Austrian Airlines — Rescue aid.

— whether ÖIAG acted as a market economy investor in accepting a negative price ([9]), as any alternative scenario would have resulted in higher costs, and

— whether, if State aid is involved, this aid is restructuring aid compatible with the common market.

2.2.1. *The market price of ÖIAG's shareholding in Austrian Airlines*

(23) The Commission expressed doubts as to whether the price to be paid by Lufthansa for the shares it is buying reflects the market price, given the conditions attached to the sale. The privatisation mandate given to ÖIAG stated that:

'ÖIAG is authorised to privatise Austrian Airlines AG, ensuring an Austrian core shareholder structure of 25 % plus one share. The aim is to:

1. retain the trade mark "Austrian";

2. keep the headquarters in Austria;

3. retain a transport network appropriate for the location and pay due regard to Austria as a centre for business and employment;

4. preserve as many secure jobs as possible at Austrian Airlines and Vienna airport; and

5. establish a committee to protect Austria's interests as a location'.

(24) The price to be paid to the Austrian State will be supplemented by an 'earn out' clause allowing the Austrian State to be paid from possible future profits. The Commission wanted to gain a better understanding of this mechanism and its value.

(25) When opening the investigation, the Commission expressed doubts as to whether the sale of Austrian Airlines took place under appropriate conditions. The Commission also indicated that it could not definitively determine whether the conditions attached to the sale were such as to have an influence on the price paid.

(26) In relation to the price paid by Lufthansa, the Commission stated that it was unable to establish definitively whether the warrant for the sum of EUR 162 million could adequately compensate the Austrian State for the lower price per share it is willing to accept when concluding the sale or whether, by accepting a price per share that is considerably lower than the price to be paid to the other shareholders, the State is not in fact granting State aid to Lufthansa and thereby to Austrian Airlines.

(27) With respect to the negative price to be paid by Lufthansa, and as set out in the complaint made by Air France/KLM, it is not clear whether all bidders were afforded the same opportunity to make bids on the same terms. Nor was it clear that all bidders were given enough time and information to be able to value the assets for sale. The Commission also noted that the price to be paid by Lufthansa for the shares it will buy from the State is different from (i.e. lower than) the price to be paid to the floating shareholders.

2.2.2. *ÖIAG acted as a market economy investor, as any other scenario would have resulted in higher costs*

(28) The Austrian authorities submitted that, if ÖIAG had not sold its shareholding, it would have been faced with one of three possible scenarios, all resulting in higher costs.

— Liquidation of Austrian Airlines: ÖIAG would bear the costs (estimated at up to EUR […]) arising from a controlled liquidation of Austrian Airlines.

— Insolvency of Austrian Airlines: ÖIAG does not support Austrian Airlines, resulting in the insolvency of the company. Direct and indirect costs in excess of the net-costs of the privatisation would then arise for ÖIAG.

— Restructuring of Austrian Airlines on a stand-alone basis: ÖIAG finances the restructuring of Austrian Airlines to allow it to operate on a stand-alone basis.

(29) In opening the investigation, the Commission expressed doubts as to whether the option chosen by the State was the action of a market economy investor. It did not have enough information at its disposal, either regarding the liquidation costs that would have had to be borne in the event of a winding-up of the company or regarding the costs and losses that ÖIAG would have incurred in the event of insolvency. Nor did it have sufficient information to be able to evaluate the stand-alone option.

(30) The Commission pointed out that, in general, it does not accept that a shareholder is automatically obliged to meet costs arising from the insolvency or liquidation of a company. The considerations concerning the social and economic consequences of a failure by ÖIAG to support Austrian Airlines appeared to result from the fact that ÖIAG is a State holding company. In addition, the Commission noted that the reasoning of the Austrian authorities is also dependent on the price paid by the selected bidder having been the highest possible price.

([9]) Negative prices are indicated in brackets in the following.

2.2.3. *The restructuring plan submitted for Austrian Airlines*

(31) Having concluded that it could not exclude the existence of State aid, the Commission was obliged to examine the restructuring plan in the light of the applicable legislation, namely the Community Guidelines on State aid for rescuing and restructuring firms in difficulty ([10]) (hereinafter the 2004 Guidelines) and the Commission Notice on the application of Articles 92 and 93 of the EC Treaty and Article 61 of the EEA Agreement to State aids in the aviation sector ([11]) (hereinafter the 1994 Aviation Guidelines).

(32) These guidelines set out a number of conditions under which restructuring aid can be granted. In opening the proceedings, the Commission expressed doubts as to whether the conditions relating to the eligibility of the firm, the restoration of long-term viability, the aid amount, the compensatory measures and the level of own contribution have been complied with.

## 3. COMMENTS FROM AUSTRIA

(33) The Austrian authorities began their observations by providing background information on and a description of the privatisation process. In accordance with Community law, the privatisation process was open and fully publicised, and all bidders were treated equally throughout all phases of the process. Although the privatisation process was conducted to a tight schedule, the Austrian authorities are of the opinion that all bidders had sufficient time to obtain all necessary information and were in a position to prepare a final offer based on that information.

### 3.1. Conditions imposed on the privatisation

(34) In relation to the conditions imposed by the privatisation mandate, the Austrian authorities made a distinction between 'best effort aims', i.e.

(i) retaining a transport network appropriate for Austria; and

(ii) preserving as many jobs as possible;

and 'binding aims', i.e.

(iii) retaining the trade mark 'Austrian';

(iv) keeping the headquarters in Austria;

(v) creating a committee to protect Austria's interests; and

(vi) ensuring an Austrian core shareholder structure of 25 % plus one share.

(35) The Austrian authorities further state that at no time did any of the bidders contest whether these aims could be implemented or argue that they would constitute 'conditions' that would affect the purchase price.

(36) In its decision to open the formal investigation, the Commission, in line with past decisions ([12]), stated that, with regard to (i) 'retaining a transport network appropriate for Austria' and (iii) 'retaining the trade mark "Austrian" ', it could be concluded that these conditions did not have any negative impact on the purchase price.

3.1.1. *Preservation of as many jobs as possible*

(37) The Austrian authorities submit that this condition should not raise any concerns. The contractual documentation submitted by ÖIAG to the bidders did not contain any obligations in this respect. They pointed out that, in previous decisions, the Commission has stated that non-discriminatory conditions requesting buyers to preserve jobs are admissible ([13]). Any impact on the purchase price is ruled out, as this is only a non-discriminatory 'best efforts' clause and is not legally binding ([14]).

3.1.2. *Keeping the headquarters in Austria*

(38) One aim stipulated in the privatisation mandate was to keep the headquarters of Austrian Airlines in Austria. The Austrian authorities argue that, in order to obtain an operating licence, the registered office must be located in the Member State in which the licence was issued ([15]). If the headquarters or the registered office of Austrian Airlines is relocated outside Austria, this would result in the loss of the operating licence. Consequently, under Community law (Regulation (EC) No 1008/2008) and Austrian law (the Aviation Act), Austrian Airlines would no longer be able to continue its aviation operation ([16]).

([10]) OJ C 244, 1.10.2004, p. 2.
([11]) OJ C 350, 10.12.1994, p. 5.
([12]) Commission Decision of 17 September 2008 on State aid N 321/08, N 322/08 and N 323/08, Greece — Sale of certain assets of Olympic Airlines/Olympic Airways Services, not yet published in the Official Journal, recitals 59, 184 and 185; and Commission Decision of 12 November 2008 on State aid N 510/08, Italy — Alitalia, OJ C 46, 25.2.2009, p. 6, recitals 29, 123 and 124.
([13]) Commission Decision 2000/628/EC of 11 April 2000 on the aid granted by Italy to Centrale del Latte di Roma, OJ L 265, 19.10.2000, p. 15, recital 91; and Commission Decision 2001/798/EC of 13 December 2000 on the State aid implemented by Germany for SKET Walzwerktechnik GmbH (aid C 70/97 (ex NN 123/97)), OJ L 301, 17.11.2001, p. 37.
([14]) Commission Decision 2008/767/EC of 2 April 2008 on the State aid C 41/07 (ex NN 49/07) which Romania has implemented for Tractorul, OJ L 263, 2.10.2008, p. 5, recital 44.
([15]) Article 4(a) in conjunction with Article 3(2) of Regulation (EC) No 1008/2008 of the European Parliament and of the Council of 24 September 2008 on common rules for the operation of air services in the Community (Recast), OJ L 293, 31.10.2008, p. 3.
([16]) Commission Decision of 12 November 2008 on State aid N 510/08, Italy — Alitalia, OJ C 46, 25.2.2009, p. 6, recital 125.

(39) Bilateral aviation agreements also require the headquarters to remain in Austria: the validity of the agreements is linked to a valid operating licence. To continue the business operation of Austrian Airlines, it is therefore necessary to retain its headquarters in Austria.

(40) The Austrian authorities state that, in the case of previous mergers in the aviation sector (SWISS/Sabena and Air France/KLM), comparable models were chosen to obtain an operating licence. The model is therefore a structure known and accepted in the sector. Given the legal framework, none of the bidders for Austrian Airlines questioned that the headquarters should remain in Austria and this fact was therefore taken into account accordingly in the acquisition concepts and had no influence on the purchase price.

3.1.3. *Ensuring an Austrian core shareholder structure of 25 % plus one share*

(41) The Austrian authorities point out that this condition was based on the requirements of bilateral aviation agreements as provided for by Austrian law.

(42) Retaining take-off, landing and route rights under bilateral aviation agreements is, in many cases, linked to the exercise of substantial ownership rights and effective control by persons of a certain nationality. For an Austrian-registered airline, substantial ownership means that Austrian citizens or Austrian undertakings must own the majority of the airline for the bilateral aviation agreements to remain applicable. If Austrian majority ownership no longer exists, the third country may revoke the take-off, landing and route rights.

(43) Section 9(2) of the ÖIAG Act states that ÖIAG must retain such influence within the framework of the management of its shareholding to allow it, either on the basis of holding a stake of 25 % plus one share in the voting share capital or on the basis of rights or contracts with third parties, to participate in decisions taken by the General Assembly, which, under the Stock Corporation Act, require at least a three-quarters majority.

(44) On the basis of the privatisation mandate, ÖIAG was faced with a choice between reducing its shareholding in Austrian Airlines to 25 % plus one share and accepting a transaction structure from bidders which would guarantee an Austrian core shareholder structure of 25 % plus one share. Accordingly, at the meetings that took place with the bidders, they were invited to propose such transaction structures. None of the bidders raised fundamental objections to the structure.

(45) Austria is of the opinion that the takeover of Austrian Airlines by non-Austrians would result in the cancellation of certain bilateral agreements and therefore in the loss of take-off and landing rights and flight rights for routes operated by Austrian Airlines under those international agreements. Austrian Airlines' business model, which is based on transport routes to non-Community countries in Central and Eastern Europe, as well as countries in the Middle East and Central Asia, means that such bilateral agreements are of essential economic importance.

(46) However, as the privatisation mandate provided for the divestiture of all of ÖIAG's shares, it was only on the basis of the transaction structure proposed by all bidders (an Austrian registered private foundation) that ÖIAG was able to sell its shares in Austrian Airlines while retaining, for the airline, the valuable traffic rights in question and carrying out a complete privatisation. The Austrian authorities are of the opinion that requiring an Austrian core shareholder structure was essential in order to retain key rights and had no impact on the price achieved. The solution put in place to address this issue is similarly cost neutral.

3.1.4. *Creating a committee to protect Austria's interests*

(47) The Austrian authorities submit that this type of committee, which is not involved in the decision-making processes of Austrian Airlines, is commonly found in the industry and has never yet been objected to by the Commission in comparable cases [17]. There can be no influence on the purchase price, as the body in question has only an advisory character and has no de jure or de facto influence on the company. In particular, the body has no veto or codetermination rights. Furthermore, the requirement for such a committee to be set up was not raised as problematic by any of the bidders in the privatisation process.

### 3.2. **The purchase price corresponds to the market price**

(48) In Austria's opinion, the purchase price is the result of a privatisation process carried out in accordance with the requirements set out in the Commission's XXIIIrd Competition Report [18] and the 1994 Guidelines. The shares held by ÖIAG in Austrian Airlines were sold to the highest bidder at the end of a competitive tendering procedure.

(49) The Austrian authorities submit that, in the current economic situation, only a negative purchase price could be achieved.

[17] Within the framework of the foundation established in the course of the Swissair/Sabena merger (Commission Decision 95/404/EC), an administrative council was set up which was given operative powers.

[18] See points 402 and 403 of the *XXIIIrd Report on Competition Policy 1993* (ISBN 92-826-8374-5).

(50) In addition to the shares to be bought from the State, Lufthansa wishes to buy the free float to take control of the whole undertaking. The price of the free float in such a takeover offer is legally determined under the Austrian Takeover Act.

(51) In the opinion of the Austrian authorities, the valuation of the State's shareholding must be seen in the light of the total purchase price of the transaction, which is made up of the purchase price achieved by ÖIAG in the bidding process and the costs of the takeover of the free float in accordance with the law. The Austrian Takeover Act stipulates that the takeover price must correspond to at least the average stock market price for the stock concerned, weighted according to the respective trading volumes, over the six months preceding the day on which the intention to submit an offer was publicly announced ([19]). The takeover price offered by Lufthansa to the free-float shareholders is EUR 4,49 and is thus in line with the requirements of the Austrian Takeover Act.

(52) In the opinion of the Austrian authorities, the takeover price in the takeover offer is distorted. It does not reflect the true economic value of Austrian Airlines but results from the provisions of the Takeover Act ([20]). This is apparent from the price development of Austrian Airlines shares since the beginning of 2008. Before the privatisation mandate was issued on 12 August 2008, the share price was below EUR 3,00, and it was not until the beginning of September that the price rose above EUR 7,00. The share price of Austrian Airlines then fell sharply again, and, for weeks now, has been well below Lufthansa's takeover price of EUR 4,49 per share. These large fluctuations in Austrian Airlines' share price are the result of speculation, and there is no correlation whatsoever with the actual value of the company.

(53) Another reason why Lufthansa had to make an attractive offer to the floating shareholders was that Lufthansa is aiming to obtain full control of Austrian Airlines. Lufthansa intends to acquire 90 % of Austrian Airlines, as reaching this threshold will enable a 'squeeze out' and hence a takeover of 100 % of the business shares. It would be easier for Lufthansa to implement its plans as sole shareholder, as the decision-making process would be easier. Furthermore, Lufthansa would retain all the benefits of its planned investments.

([19]) Section 26(1) of the Austrian Takeover Act.

([20]) An exemption from the compulsory offer would not have been acceptable, as this would only have meant that there was no need to submit a compulsory offer at that time, but that such an offer would have had to be submitted for the takeover of at least 90 % of Austrian Airlines at a later point in time. A reduction of the takeover price would have made the takeover of Austrian Airlines by Lufthansa more difficult, as the reduced takeover price would have been much lower than the stock-market price, and shareholders' acceptance of the takeover offer would have been lower.

(54) The Austrian authorities point out that selling at a negative purchase price is permissible under Community law. The Commission has confirmed in several decisions ([21]) that a 'symbolic' or 'negative' purchase price that is the result of a privatisation process complying with the requirements of the XXIIIrd Competition Report or is based on a value appraisal is not deemed to be State aid.

(55) In the opinion of the Austrian authorities, the price offered by Lufthansa is the maximum achievable market price. It should also be remembered that both Lufthansa and Austrian Airlines are members of the Star Alliance. Bidders that are not part of the Star Alliance (Air France/KLM and S7) would therefore have had to factor the additional cost of changing alliance into their offer. The Austrian authorities submit that these costs could amount to EUR […].

(56) The Austrian authorities go on to state that the offer submitted by S7 (although not binding) foresaw a […] price. They stress that, based on past Commission decisions ([22]), a competitor's offer constitutes a good benchmark for calculating the market value of a company.

(57) In relation to the debtor warrant, the authorities explain that the maximum disbursement amount under the warrant is EUR 164,1 million, made up of […] ([23]).

### 3.3. **ÖIAG acted as market economy investor**

(58) In the opinion of the Austrian authorities, ÖIAG's decision to sell Austrian Airlines for a negative purchase price would also have been taken by a private investor ([24]) guided by the prospects of longer term profitability, as the negative purchase price was significantly less costly than the alternative scenarios. The insolvency of Austrian Airlines would have led to

([21]) Commission Decision 2002/631/EC of 7 May 2002 on aid allegedly granted by Germany to RAG AG in connection with the privatisation of Saarbergwerke AG, OJ L 203, 1.8.2002, p. 52, recital 60; Commission Decision 2002/200/EC of 3 July 2001 on State aid which Spain has implemented and is planning to implement for the restructuring of Babcock Wilcox España SA, OJ L 67, 9.3.2002, p. 50, recital 61.

([22]) Commission Decision 2008/366/EC of 30 January 2008 on State aid C 35/06 (ex NN 37/06) implemented by Sweden for Konsum Jämtland Ekonomisk Förening, OJ L 126, 14.5.2008, p. 3, recitals 50 and 58.

([23]) […].

([24]) See the ECJ's judgment of 21 March 1991 in Case C-305/89 *Italy* v *Commission* (ALFA Romeo) [1991] ECR I-1603 and the ECJ's judgment of 14 September 1994 in joined Cases C-278/92, C-279/92 and C-280/92 *Spain* v *Commission* (Hytasa) [1994] ECR I-4103.

significant losses in the value of other holdings of the Republic of Austria. Furthermore, ÖIAG would have had to bear the costs of a social plan. The other conceivable alternative scenarios, i.e. a controlled winding-up of Austrian Airlines or continuation on a stand-alone basis, would also have led to costs higher than the negative purchase price.

3.3.1. *Costs relating to the insolvency of Austrian Airlines*

(59) In the opinion of the Austrian authorities, the costs incurred by ÖIAG as a result of the insolvency of Austrian Airlines would have been considerably higher than the negative purchase price. The insolvency of Austrian Airlines could have provoked a massive drop in the value of other State holdings. The Austrian authorities cite an analysis conducted by Merrill Lynch, according to which the insolvency of Austrian Airlines could have resulted in the deterioration of the ratings of other State-owned 'sister companies', leading to higher refinancing costs and share price losses. The 'sister companies' would be affected by an expected downgrading of their ratings regardless of the fact that ÖIAG has only a minority shareholding in Austrian Airlines ([25]).

(60) Such share price losses do not stem from legal or voluntarily assumed obligations but are direct consequences of the insolvency of Austrian Airlines. The Austrian authorities are therefore of the opinion that a private investor would also provide a subsidiary with capital if the share price losses to be expected exceed the costs incurred by avoiding the insolvency of that subsidiary.

(61) According to the analysis conducted by Merrill Lynch, such losses in value could amount to approximately EUR […] for ÖIAG's holdings (OMV AG, Post AG, Telekom Austria AG) alone. […] In view of the above, it is likely that the overall share price losses for the beneficial owner, namely the Republic of Austria (EUR […]), would greatly exceed the negative purchase price.

(62) The Austrian authorities argue that rating agencies stress the fact that subsidiaries' credit ratings benefit from the ownership support of their private parent company. The example they provide is the fact that Hypovereinsbank's rating was increased by three notches to reflect its 100 % ownership by UniCredit. In addition, they provide further examples of cases in which a rating downgrade of the parent company has led to a corresponding downgrade for its subsidiaries (see table below).

*Table 1*

**Examples of rating downgrades for subsidiaries following a rating downgrade of a parent company**

| Parent company | Subsidiary | Date | Rating downgrade (Standard & Poor's) | |
|---|---|---|---|---|
| | | | Parent company | Subsidiary |
| Postbank | BHW Bausparkasse | 22 June 2007 | from A to A– | from A– to BBB+ |
| Post | Postbank | 22 June 2007 | from A to A– | from A to A– |
| UniCredit | Bank Austria | 18 March 2009 | from A+ to A | from A+ to A |
| UniCredit | Hypovereinsbank | 18 March 2009 | from A+ to A | from A+ to A |

(63) […]

(64) As ÖIAG and its holding companies — Telekom Austria AG, Österreichische Post AG and OMV AG — are widely known in Austria, any impact on industrial peace and brand image would be far-reaching. A private investor finding itself in ÖIAG's position would therefore assume the costs of a social plan in the event of Austrian Airlines becoming insolvent, even if it were under no legal obligation to do so.

([25]) The analysis conducted by Merrill Lynch allocates losses in value to ÖIAG and the Republic of Austria only to the extent of their respective shareholdings.

(65) In the opinion of the Austrian authorities, the cost of a hypothetical social plan corresponds to the amount that would arise under this heading in the event of liquidation. On the whole, the employees would therefore not be worse off than in the event of an orderly liquidation with a social plan.

(66) The Austrian authorities estimate these voluntary social costs as EUR […] for the Austrian Airlines Group (Austrian Airlines EUR […] and Tyrolean EUR […]) after deduction of the payments made by the Austrian Insolvency Remuneration Fund (see table below).

*Table 2*

**Employee-related liabilities to be assumed by ÖIAG in the event of insolvency of the Austrian Airlines Group**

*(in EUR million)*

| Employee-related liabilities in the event of insolvency of the Austrian Airlines Group | Austrian Airlines AG | Tyrolean | Austrian Airlines Group |
|---|---|---|---|
| Severance payments in accordance with legal obligations and collective bargaining agreements | […] | […] | […] |
| Pensions | […] | […] | […] |
| Accrual of annual leave | […] | […] | […] |
| Other employee-related costs | […] | […] | […] |
| Social plan | […] | […] | […] |
| Pension claims | […] | […] | […] |
| Total employee-related liabilities | […] | […] | […] |
| Payments by the Austrian Insolvency Remuneration Fund | […] | […] | […] |
| Total liabilities to be assumed by ÖIAG | […] | […] | […] |

3.3.2. *Costs of an orderly winding-up of Austrian Airlines*

(67) In this regard, the Austrian authorities estimate the total liquidation costs to be in the region of EUR […], of which some EUR […] (estimate based on the average employee-related liabilities) relate to the social plan for former employees. Other costs would result from the dissolution of agreements, of which […]. Agreements relating […] would also have to be brought to a premature end.

3.3.3. *Cost to be borne by ÖIAG for restructuring on a stand-alone basis*

(68) If Austrian Airlines were to find itself having to operate on a stand-alone basis, the Austrian Government estimates that the company would have to expect […] operating result in 2009, primarily because of a sharp drop in demand as a result of the economic crisis.

(69) The company's immediate problem would be the unavailability of liquidity. In addition to minimum liquidity reserves of EUR […] to manage […], Austrian Airlines would also require additional liquidity for restructuring measures, as well as for […]. It should be noted in this respect that at the end of 2008 the liquidity holdings of Austrian Airlines were only in the […] range.

(70) The stand-alone concept is based on a […], where only two to three destinations would be retained. As a result, […]. This would result in one-off write-downs of EUR […]. Furthermore, the workforce would be reduced by […] full-time positions. The one-off social plan costs are estimated at EUR […].

(71) The result is a loss of sales revenue of approximately EUR […] in 2009, which would have a negative impact on cash flow. In the opinion of the Austrian authorities, the stand-alone concept would result in a liquidity shortfall of EUR […] over the period 2009-11 ([26]).

3.3.4. *Conclusion*

(72) For the Austrian authorities, the sale of the shareholding in Austrian Airlines for a negative purchase price was the most cost-effective alternative. Since Austria opted for the most cost-effective alternative, it acted as a private market economy investor.

### 3.4. **The restructuring plan for Austrian Airlines**

3.4.1. *Austrian Airlines is a company in difficulty*

(73) The Austrian authorities are of the opinion that Austrian Airlines is a company in difficulty within the meaning of the 2004 Guidelines, as Austrian Airlines would have become insolvent at the end of December 2008 if no rescue aid had been granted. The rescue aid guaranteed the viability of Austrian Airlines for the next six months. However, in order to guarantee long-term viability and a sustainable reorganisation of the enterprise, restructuring of the company is absolutely vital. If the restructuring plan is not approved, Austrian Airlines faces a direct threat of insolvency.

([26]) This is made up of […].

(74) The Austrian authorities go on to state that Austrian Airlines is an independent undertaking whose difficulties arise from the company itself and the special situation of the aviation sector. The Government's decisions regarding the grant and the agreements signed between ÖIAG and Lufthansa stipulate that Austrian Airlines and not Lufthansa is the beneficiary of the grant. Consequently, the grant is made to Austrian Airlines. Under State aid law, Lufthansa is not the beneficiary of the State aid in the event of a takeover of Austrian Airlines.

(75) They further state that Austrian Airlines will not be part of the Lufthansa Group until the sale has been closed, so point 13 of the 2004 Guidelines does not apply. The question of whether Lufthansa could have financially rehabilitated Austrian Airlines using its own capital is therefore moot. Nor can any group relationship be said to exist between Lufthansa and Austrian Airlines on the basis, for example, of existing cooperation within the Star Alliance. The Star Alliance is a platform for cooperation between 24 airlines and does not constitute a group relationship.

(76) In the opinion of the Austrian authorities, the transaction would not result in an appreciable impairment of competition. This is apparent primarily from the fact that Lufthansa and Austrian Airlines already cooperate to a significant extent. In addition to their cooperation within the Star Alliance, they operate a joint venture for traffic between Germany and Austria which seeks to optimise these routes and also includes the sharing of costs and profits.

3.4.2. *Cost savings and synergies resulting from the restructuring plan*

(77) Although Lufthansa and Austrian Airlines already cooperate within the Star Alliance and operate a joint venture, the Austrian authorities feel that further cost reductions and sales revenue growth could be achieved. This is based on the fact that equity participation leads to significantly greater integration between enterprises in the aviation sector, both economically and under corporate law, resulting in substantially higher cost savings than in the case of partnerships without equity participation, which are limited to coordinating certain aspects of the business or to joint-venture activities. The authorities refer to expert studies that estimate cost savings to be about 1,9 % for purely coordinating partnerships, while joint operational activities result in savings of about 5,6 % of overall costs. However, cooperation that is underpinned by equity participation results in cost savings of approximately 11,4 % ([27]).

(78) The takeover of Austrian Airlines by Lufthansa would also yield cost savings through […]. Other substantial cost savings would result from savings potential […].

([27]) *Source: Airlines Business* 11/1999, p. 83.

(79) Achievable cost synergies in addition to the existing cooperation are estimated by Lufthansa to be approximately EUR […] a year. There would also be revenue synergies of approximately EUR […] a year, resulting in particular from […]. Overall, the additional synergies would come to about EUR […] a year.

3.4.3. *The aid amount is reasonable*

(80) In the opinion of the Austrian authorities, the sum of EUR 500 million represents the minimum amount needed to restore the long-term profitability of Austrian Airlines. Without the grant, which will be used to reduce Austrian Airlines' liabilities, […].

3.4.4. *Compensatory measures*

(81) In the opinion of the Austrian authorities, there is no need for compensatory measures within the meaning of the Rescue and Restructuring Guidelines. In this regard, the Austrian authorities refer to point 38(3) of the 1994 Guidelines, according to which a restructuring programme must include the reduction of capacity if the restoration of financial viability and/or the market situation so require. Given that the 1994 Guidelines are a *lex specialis* for the aviation sector, they should take precedence over the requirements of the 2004 Guidelines. In the case at hand, the Austrian authorities argue that neither the restoration of financial viability nor the market situation require compensatory measures beyond the steps already planned within the scope of the restructuring.

(82) In any event, the capacity reductions introduced as part of the 'Go4Profit' programme, initiated in 2006, already constitute a significant compensatory measure. Furthermore, the restructuring plan provides for other measures that constitute substantial compensatory measures, as set out in the opening of the proceedings. The Austrian authorities are of the opinion that the compensatory measures already implemented by Austrian Airlines, as well as those planned for the future, constitute a compensatory package that is at the upper end of what the Commission has required in other restructuring cases in the past. This is all the more applicable given that Austrian Airlines is a mid-size airline and, in accordance with point 40 of the 2004 Guidelines, the compensatory measures must be proportionate to the size of the enterprise.

3.4.5. *Own contribution*

(83) In this regard, the Austrian authorities point out that the restructuring costs of Austrian Airlines (without the rescue aid of EUR 200 million, which must be repaid after the takeover has been completed) amount to approximately EUR […]. They are summarised in the table below.

*Table 3*

**Restructuring costs of Austrian Airlines according to the Austrian authorities**

| Measure | Restructuring costs (EUR million) | Own contribution (EUR million) | Contribution of the Republic of Austria |
|---|---|---|---|
| (a) Financial restructuring | […] | […] | […] |
| (b) Austrian Airlines' 'Go4Profit' programme | […] | […] | […] |
| (c) Costs necessary to achieve synergies | […] | […] | […] |
| (d) Consultancy and transaction costs | […] | […] | […] |
| (e) Higher refinancing costs due to the financial crisis | […] | […] | […] |
| Total amount | […] | […] (Level of own contribution: 55,5 %) | […] |

(84) Austrian Airlines' level of debt (EUR […] in 2008) is significantly higher than that of Lufthansa […]. The costs have been estimated at EUR […].

(85) There will be additional costs of EUR […] for restructuring measures in order to achieve the annual synergy effects envisaged in the restructuring plan. It is argued that the costs of the 'Go4Profit' programme, amounting to EUR […], for the restructuring measures already undertaken by Austrian Airlines should also be counted, as this is a still ongoing process.

(86) To these sums must be added transaction costs of EUR […] and higher refinancing costs of EUR […] as a result of the financial crisis.

## 4. COMMENTS FROM THIRD PARTIES

### 4.1. Austrian Airlines

(87) Austrian Airlines' comments were submitted by letter of 13 April 2009 and were fully in line with those of the Austrian authorities.

(88) As regards the voluntary payment of social costs in the event of insolvency, Austrian Airlines emphasises that such payments by the controlling shareholder may be imperative for image reasons and in order to prevent social and industrial unrest within 'sister companies'. Austrian Airlines also explains that a specific form of social partnership (*Sozialpartnerschaft*) between employers and employees' representatives is typical in Austria. This social partnership obliges an employer to pay for social plans and provide for further voluntary compensation of social costs even where it is not legally bound to do so. Furthermore, Austrian Airlines argues that the estimated cost of the social plan, EUR […] for 7 914 employees, is below comparable costs. For Austria Tabak, the cost was EUR […] per employee in 2005 and as much as EUR […] per employee in 2009. Austrian Airlines also gives examples of social plan costs assumed voluntarily in cases of closure/liquidation of subsidiaries and/or production units in Austria.

*Table 4*

**Examples of social plan costs assumed voluntarily in cases of closure/liquidation of subsidiaries and/or production units in Austria**

| Company | Year | Employees | Compensated social cost | |
|---|---|---|---|---|
| Eurostar Automobilwerk GmbH und Co. KG | from 1995 | 150 | Social plan | […] |
| Semperit Reifen GmbH | 1997-2002 | 1 000 | Employment foundation and social plan | […] |
| Philips, closure of the factory in Lebring | 1999-2000 | 200-300 | Social plan | […] |
| Elektra Bregenz | 2003 | 234 | Severance payments and social plan | […] |
| Legrand Austria | 2003-04 | 150 | Social plan | […] |
| Verbund, closure of the Voitsberg IV power station | 2004 | 220 | Employment foundation and additional severance payments | […] |
| Phelps Dodge Magnet Wire Austria | 2004-05 | 55 | Social plan | […] |
| Austria Tabak | 2005 | 220 | Severance payments and employment foundation | […] |
| Austria Tabak | 2009 | 269 | Severance payments and employment foundation | […] |
| Thonet-Vienna, closure of the factory in Friedberg | 2006 | 25 | Additional severance payments | […] |
| AT & S | 2007 | 35 | Social plan | […] |

(89) As private holding companies voluntarily assume a certain level of social costs when they close business divisions or production units, Austrian Airlines is of the opinion that the level of social costs ÖIAG would have to assume voluntarily in the event of insolvency is equal to those arising in the event of structured liquidation.

*Table 5*

**Average social cost estimates of Austrian Airlines AG (without Tyrolean)**

*(in EUR million)*

| | Social cost | |
|---|---|---|
| | Minimum amount | Maximum amount |
| Severance payments | […] | […] |
| Accrual of annual leave | […] | […] |
| Pension scheme | […] | […] |
| Social plan | […] | […] |
| Total | […] | […] |

(90) Austrian Airlines explains that the severance payments (EUR […]) relate to the obligations laid down by law or by collective agreements as at 30 June 2009, including a EUR […] estimate for employees outside Austria. The large difference between the minimum (EUR […]) and maximum amount (EUR […]) of social costs compensated within the pension scheme is due to […]. The lower estimate of EUR […] for pension costs is based on the assumption that […] is to be financed. The upper estimate of EUR […] covers the (not unlikely) scenario of employees exercising […].

(91) Although Austrian Airlines acknowledges that the estimated social costs are at the […] end of the usual social compensation in Austria, they submit that there are factors to justify this amount. Firstly, the length of time served by Austrian Airlines' staff is high, averaging […] years for pilots and […] years for commercial and technical staff and flight attendants. Secondly, any remuneration under a social plan for this company would be influenced by the […] average salary of pilots and other staff compared with workers in other sectors. The average monthly salary of Austrian Airlines' cockpit crew (2009 level) is EUR […], while the monthly salary of commercial and technical staff and flight attendants is between EUR […] and EUR […]. Furthermore, Austrian Airlines considers itself to be one of Austria's key companies, and its insolvency would attract a lot of media attention.

(92) In the liquidation scenario, Austrian Airlines would expect liquidation costs of between EUR […] and EUR […].

*Table 6*

**Liquidation scenario for Austrian Airlines**

*(in EUR million)*

| | Costs | |
|---|---|---|
| | Lower value | Upper value |
| Sale of aircraft | […] | […] |
| Repayment of aircraft financing | […] | […] |
| Social costs | […] | […] |
| Termination of long-term contracts | […] | […] |
| Remaining costs and proceeds (netted) | […] | […] |
| Total cost | […] | […] |

### 4.2. **Lufthansa**

(93) Lufthansa began its observations of 9 April 2009 by stating that the economic parameters of the transaction have changed significantly since it made its bid to acquire Austrian Airlines in October 2008. These changes reflect Austrian Airlines' structural problems, as well as the changes in the economic environment, which has dramatically deteriorated since then. The sub-prime crisis has developed into the worst financial crisis for decades, leading to a severe real-economy recession.

(94) Lufthansa expects the European markets to remain in recession in 2009, possibly 2010 and maybe even longer, with a corresponding effect on the business and planned restructuring of Austrian Airlines. Having said this, Lufthansa is of the opinion that the planned restructuring can restore the long-term viability of Austrian Airlines, with break-even depending in particular on the length and depth of the recession. As things stand, it is apparent that Austrian Airlines will continue to sustain […].

(95) As regards the price to be paid, Lufthansa states that the conditions set in the privatisation mandate had no impact on the price it was willing to pay for Austrian Airlines. Furthermore, these conditions did not deter bidders from participating in the tender process when compared with a private auction.

(96) Lufthansa also argues that the difference between the price offered to the floating shareholders and the price to be paid to ÖIAG does not involve State aid. The price to be paid to ÖIAG is made up of a fixed price of EUR 366 268,75 and a debtor warrant (*Besserungsschein*) whose value depends on the operational performance of Austrian Airlines and the price development of Lufthansa shares. The maximum payment under the debtor warrant is EUR 4,48 per share. The price to be paid to the floating shareholders is determined by Section 26 of the Austrian Takeover Act and is EUR 4,49 per outstanding share.

(97) Lufthansa stated that it would make no economic sense to oblige the highest bidder to offer a price corresponding to the share price. If the State had chosen to offer all of its shares on the stock exchange, the share price would have plummeted. The minimum takeover bid price is based on an average of historical share prices (see above). It therefore does not necessarily reflect the real value of the shares, either at the time of the takeover bid itself or at the time of privatisation.

(98) Accordingly, the maximum price per share paid to ÖIAG (fixed price plus the minimum amount under the debtor warrant) corresponds to the price per share paid to the other shareholders under the takeover bid. Although ÖIAG may be receiving a lower price per share than other shareholders for its stake in Austrian Airlines, this does not amount to State aid, as the price paid to ÖIAG corresponds to the market value. Lufthansa states that it was the only undertaking in the sales process to submit a valid final bid. By definition, Lufthansa is therefore the highest bidder. The result of an open tender sales process must be assumed to be the market price.

(99) As regards the restructuring plan, Lufthansa argues that the 1994 Aviation Guidelines and the 2004 Guidelines should be applied in parallel. When calculating the business plan, the deterioration in the economy and the aviation markets was taken into account as far as could be predicted. […] However, Austrian Airlines' long-term viability can be restored only if the revised restructuring plan — and further cost-cutting measures yet to be negotiated — can be implemented as envisaged and thereby bring about the necessary cost reductions.

(100) Lufthansa submits that the restructuring aid amount (EUR 500 million) is the absolute minimum required to re-establish the long-term viability of Austrian Airlines. Further deterioration in the Austrian and global aviation markets has […].

(101) Regarding compensatory measures, Lufthansa stresses the fact that Austrian Airlines has already significantly reduced its capacity over the last few years. […].

(102) Regarding the requirement for a significant own contribution, as set out in point 43 et seq. of the 2004 Guidelines, Lufthansa notes that this is not reflected in the 1994 Aviation Guidelines. Lufthansa therefore doubts that this criterion is a legal requirement for restructuring in the aviation sector. In any event, Lufthansa submits that Austrian Airlines and Lufthansa will bear a considerable share of the overall restructuring costs, amounting to some EUR […] or approximately 68 % of the total restructuring costs of EUR […].

### 4.3. **Ryanair**

(103) Ryanair operates 11 routes between 4 Austrian airports (Salzburg, Linz, Graz and Klagenfurt) and destinations in other EU countries, including Germany. Ryanair states that it is therefore a competitor of both Austrian Airlines and Lufthansa.

(104) Ryanair began its observations of 9 April 2009 by stating that, in its opinion, the initiation of formal investigation proceedings was justified, but the Commission's call for comments provided insufficient data. The non-publication of information considered confidential by the Austrian authorities constituted a procedural flaw.

(105) On the substance of the case, Ryanair is of the opinion that the Austrian authorities have not demonstrated that, from the point of view of a market economy investor, the sale of Austrian Airlines, combined with a cash injection of EUR 500 million, is preferable to its liquidation. In Ryanair's opinion, a market economy investor would have preferred the voluntary winding-up or judicial liquidation of Austrian Airlines, or a straight share deal with no preconditions regarding a massive cash injection, to the solution chosen by the Austrian Government. This is demonstrated by the fact that Austrian Airlines' private shareholders were not prepared to subscribe (in proportion to their shareholding) to the capital increase.

(106) As regards the reasons put forward by the Austrian authorities for not opting for liquidation, in so far as these relate to concerns about the reputation and image of the State-owned holding ÖIAG, Ryanair doubts whether such reasoning could be the primary, or indeed the only, motivation for major business decisions by such an investor.

(107) Ryanair also calls into question whether the price offered by Lufthansa is the market price. In the opinion of Ryanair, the process that led to the selection of Lufthansa as the buyer was not competitive, the deadline for the submission of bids was extremely short (from 13 to 24 August 2008) and Lufthansa, which had prior knowledge of Austrian Airlines' operations through its participation in the Star Alliance and in joint ventures, had an advantage over other possible buyers. By imposing conditions on the sale, the Austrian authorities confused their role as the State and their role as an economic operator.

(108) Even if some of those conditions could be considered 'soft' conditions, they would still not have been imposed by a market economy investor, as they entail a cost. Potential bidders would take them seriously and either be discouraged from bidding or lower their price below the market price to factor in the cost of compliance.

(109) Ryanair submits that its expansion in Austria has been hindered by Austrian Airlines' loss-making presence in the market and its ability to sustain below-cost prices over a long period of time. State aid to Austrian Airlines would deprive Ryanair of opportunities for expansion and shift the burden of structural adjustment away from Austrian Airlines to competitive market operators such as Ryanair. Once Austrian Airlines has been integrated into the Lufthansa network, it will start feeding traffic into Lufthansa's Frankfurt and Munich hubs, creating a risk of foreclosure, at least on the routes between Austria and Germany.

### 4.4. **Air France/KLM**

(110) Air France/KLM began its observations of 14 April 2009 by regretting that the Commission had not carried out a more detailed evaluation of the structure of the sales process. Air France/KLM points out that, at the start of the process in August 2008, it was a question of privatisation without Austrian Airlines needing to be restructured.

(111) […]

(112) Air France/KLM is of the opinion that the restructuring proposed by Lufthansa is not a real plan and therefore cannot justify the granting of State aid. In addition, the ability of the Lufthansa Group to implement these same restructuring measures using its own resources needs to be considered.

(113) Air France/KLM states that the tender process as implemented did not meet the requirements of the 1994 Aviation Guidelines. It states that the privatisation process initiated on 13 August 2008 was not conducted in a transparent and non-discriminatory manner.

(114) Air France/KLM participated in the privatisation process and […].

(115) The tender required bidders to make all shareholders an equivalent offer of the price they were prepared to pay as a cash consideration to all shareholders per Austrian Airlines share and redeem the shares at an amount in accordance with the Austrian legislation on the subject.

(116) […]

By not submitting an unconditional offer as required, Lufthansa has not complied with the conditions imposed at the start of the process, and acceptance of this offer by ÖIAG should be interpreted as evidence that the process was flawed.

(117) […]

(118) In relation to the conditions imposed in the privatisation mandate, Air France/KLM states, with regard to the 'Austrian core shareholder' condition, that, although similar structures had been required in the past, the regulatory landscape has changed since then. Air France/KLM points out that the Council entrusted the Commission with a mandate to negotiate with all third countries to bring all bilateral air agreements signed with these countries into line with Community law. While Air France/KLM recognises that the particular case of Austrian Airlines deserves to be examined more closely, it encouraged the Commission to deal with this issue flexibly, as some of these negotiations with third countries were ongoing.

(119) Nor is Air France/KLM convinced by the argument that the Austrian State acted as a market economy investor. It argues that by accepting a sales price resulting from a flawed process, it has failed to sell its stake in Austrian Airlines under the best possible conditions.

(120) Air France/KLM explains that, after learning of the Austrian Government's decision to grant financial assistance amounting to EUR 500 million, it informed ÖIAG that […].

(121) Air France/KLM questions whether the Commission should also examine whether Austrian Airlines is not already part of the Lufthansa Group, notwithstanding the conditions attached to the acquisition.

(122) In relation to the restructuring plan, Air France/KLM calls into question whether this financial aid should be described as restructuring aid at all. Air France/KLM does not doubt the financial difficulties encountered by Austrian Airlines but insists that the measures are too weak to restructure the company. The measures proposed by Lufthansa are measures of the type undertaken in the context of an acquisition, and have been artificially relabelled as a 'restructuring plan'. These measures do not amount to a plan ([…]) and, in any case, do not justify the granting of State aid. Furthermore, there is no evidence that Lufthansa would not be able to implement the same restructuring measures with its own resources.

(123) Air France/KLM wishes to emphasise that, in the current economic climate, the whole aviation sector is facing tremendous pressure, and the Commission must therefore assess the compatibility of the aid proposed by Austria particularly carefully in order to ensure that this aid does not distort competition.

### 4.5. **NIKI**

(124) NIKI began its observations of 31 March 2009 by stating its opinion that ÖIAG did not act as a market economy investor when it accepted a negative price for its shareholding in Austrian Airlines. Furthermore, it argues that the sale price does not reflect the market price of Austrian Airlines. It is of the opinion that the sale was linked to conditions, such as, for example, negative purchase price and codetermination by the seller in the acquired undertaking, which would, in any event, have been unacceptable to a market economy investor.

(125) In relation to the negative sales price, NIKI argues that Lufthansa has actually paid a positive price of EUR 366 269 and a warrant worth EUR 162 million to ÖIAG and that the subsidy of EUR 500 million amounts to a condition set by Lufthansa and not a negative sales price.

(126) NIKI is of the opinion that, if a negative price were paid for ÖIAG's shareholding (41,56 %), such a price would give a total equity value (100 %) of EUR 1,2 billion. However, it is impossible to see how such a negative sales price could be derived from Austrian Airlines' financial reports. NIKI also explains that the share price of the free float noted on the stock exchange reflects a positive company value (a lowest share price of EUR 2,22 in July 2008 and a 6-month average price of EUR 4,49).

(127) As regards the alternative scenarios, NIKI is critical of ÖIAG's claim that it is acting as if it were the sole shareholder of Austrian Airlines. NIKI explains that structured liquidation would be possible only with a 75 % majority. However, ÖIAG holds only 41,56 % of Austrian Airlines. NIKI also argues that Austrian Airlines would continue to operate even if it were insolvent. It considers that social plans are voluntary payments which have to be discussed with employees' representatives. NIKI estimates that, in the event of liquidation, the social plan would cost EUR 5 million. It also states that, in relation to the estimated social cost, Austria is confusing its role as a shareholder with its role as the State.

(128) NIKI also fails to see how the insolvency of Austrian Airlines could have an effect on the share prices and ratings of Telekom Austria AG, OMV AG, and Österreichische Post AG. It is of the opinion that the public does not see these undertakings as a group. These undertakings operate in different sectors, so the insolvency of Austrian Airlines could not have a negative influence on them.

(129) NIKI raises the issue of whether a solution similar to that chosen for Alitalia, resulting in the privatisation of a smaller, healthier Austrian Airlines, would not result in a positive outcome for ÖIAG and have a better effect on competition.

(130) In relation to the privatisation, NIKI is of the opinion that the conditions relating to establishing a committee to protect Austria's interests and maintaining an Austrian core shareholder structure and Lufthansa's condition of receiving a capital increase of EUR 500 million for Austrian Airlines all had a negative impact on the price. It is of the opinion that the State should not intervene in the management of an undertaking.

(131) NIKI argues that the selective advantage granted to Austrian Airlines and Lufthansa will distort competition and trade between Member States. It considers that Lufthansa is not a beneficiary eligible for State aid, because it has enough own resources. Furthermore, it is of the opinion that the restructuring plan does not comply with the requirements of the 2004 Guidelines. It also criticises the fact that there are no compensatory measures to offset the distortive effect of the aid on the common market. It considers the reduction in long-haul connections not to be sufficient compensation.

(132) In addition, NIKI is not convinced that Austrian Airlines has not received State aid in the past (in the last 10 years) or that the 'one time, last time' principle will be respected. It provides a list of measures which, in its opinion, may involve State aid: (a) exclusive and free grant of air traffic rights, (b) slot coordination of all slots in Austria is done by a company partially owned by Austrian Airlines, (c) lower rent for premises at Vienna Airport, (d) risks associated with the sale of real estate assumed by the public authorities, (e) toleration of Austrian Airlines' tax vehicles in Guernsey, Channel Islands, (f) capital increase of EUR 146 million by the public shareholder in December 2006 and (g) rescue aid of EUR 200 million.

(133) Furthermore, it explains that Austrian Airlines has introduced short-time work and that the difference between the normal working hours and the reduced working hours will be paid by the State. It is also critical of the fact that, under Austrian labour law, Austrian Airlines will not be able to make staff that have accepted such reduced working hours redundant.

### 4.6. **Air Berlin**

(134) Air Berlin's comments of 8 April 2009 were fully in line with those of NIKI.

### 4.7. **Robin Hood Aviation**

(135) In its comments of 8 April 2009, Robin Hood Aviation expresses the opinion that the negative price constitutes State aid and that this State aid will have a negative impact on competition. Furthermore, it will strengthen the dominant position of Austrian Airlines and Lufthansa in the common market, which is why such State aid should be declared incompatible with the common market. Robin Hood Aviation claims that, contrary to the restructuring plan submitted by the Austrian authorities, Austrian Airlines is currently increasing its capacity. In 2009, Austrian Airlines took over additional routes from Lufthansa, such as Graz-Stuttgart, which is also operated by Robin Hood Aviation. According to Robin Hood Aviation, Austrian Airlines offers very low and competitive prices on its routes which are possible only with the envisaged State aid.

### 4.8. **WKO — Die Luftfahrt**

(136) In its comments of 8 April 2009, WKO — Die Luftfahrt stressed Austrian Airlines' importance for Austria's economic standing and its contribution to safeguarding some 18 000 jobs at Vienna International Airport. It emphasises how important a functioning network is for tourism and the domestic economy.

### 4.9. **Wien — konkret**

(137) In its observations of 21 March 2009, Wien — konkret Medien GmbH (hereinafter Wien — konkret) claims to have submitted a binding bid of EUR 10 for Austrian Airlines on 11 November 2008 and states that this is higher than Lufthansa's bid. On 30 January 2009, this bid was increased to EUR 11. Wien — konkret did not participate in the tendering procedure.

(138) Wien — konkret is also of the opinion that ÖIAG did not act as a prudent private investor. It claims that what it sees as the three alternative scenarios for ÖIAG — (a) to sell the shares on the stock exchange at a share price of EUR 3,90, leading to a revenue of EUR 142 million, (b) Wien — konkret's bid of EUR 10 and (c) insolvency, costing EUR 0 — would be less costly. It also claims that the conditions in the privatisation mandate (Austrian core shareholder structure) have not been complied with, as Lufthansa is a German company.

(139) Wien — konkret maintains that the negative price will have a negative impact on competition and that it will enable Austrian Airlines to offer very competitive prices on the market. Furthermore, it emphasises that Austrian Airlines has not taken any restructuring measures, such as capacity reduction, staff cuts or reducing personnel costs. It is also of the opinion that granting State aid to the aviation sector has a negative impact on the environment (e.g. $CO_2$ emissions, noise).

### 4.10. **Observations received from private individuals**

(140) The comments submitted by 32 private individuals, dated between 11 February 2009 and 10 April 2009, were largely in line with those of Wien — konkret.

## 5. **COMMENTS FROM AUSTRIA ON THIRD-PARTY COMMENTS**

(141) The Austrian authorities began their observations by stating that the privatisation process had been open, transparent and unconditional. Although the length of the process was short as a result of the limited validity of the privatisation mandate, it was not unusually short compared with similar processes.

(142) The Austrian authorities stated that there had been no unequal treatment of the bidders participating in the process. The process conditions were the same for all participants. In their opinion, the reason why only one binding offer was submitted had more to do with the dramatic deterioration of the economic situation in the European aviation sector during the privatisation process, the fact that Air France/KLM and British Airways were involved in other transactions and, for bidders other than Lufthansa, the high cost of switching to another alliance.

### 5.1. **The appropriateness of the process**

(143) The Austrian authorities find it surprising that Air France/KLM did not know that it was permissible to submit an offer with a negative purchase price. Under the process conditions, submission of an offer with a negative purchase price was possible at all times. If Air France/KLM was truly unsure whether it was permissible to submit an offer with a negative purchase price, it had many opportunities to clarify this issue, either through the investment banks or by submitting a direct inquiry to ÖIAG. However, this did not happen.

(144) The Austrian authorities confirm that Air France/KLM had the opportunity to submit an offer with a negative purchase price, as did the two other bidders remaining in the second round of the privatisation process.

(145) The Austrian authorities go on to say that, shortly after the expiry of the deadline for submission of offers, ÖIAG […].

(146) […]

(147) […]

(148) The Austrian authorities dispute Air France/KLM's statement that ÖIAG should first have provided Austrian Airlines with a EUR 500 million grant and only then been allowed to privatise the company. Furthermore, a grant provided before privatisation would also have had to be examined under State aid law.

### 5.2. **Negative Purchase Price**

(149) The Austrian authorities dispute the argument put forward in NIKI's submission to the effect that the price was not a negative purchase price but a condition. When evaluating a share purchase, bidders base their decision on the sum of all payments necessary for the purchase. Lufthansa did not make its decision dependent on a non-monetary condition but simply offered a negative purchase price.

### 5.3. **Negative Market Value**

(150) In relation to the allegation made in NIKI's complaint that there was a positive (economic) equity value, referring to the accounting equity value shown in Austrian Airlines' consolidated balance sheet as at 31 December 2008, the Austrian authorities consider this to be irrelevant, as the figures established on the basis of the International Financial Reporting Standards and their explanatory guidelines are being compared with the company's market value as a 'going concern'.

(151) The Austrian authorities refer to a calculation performed by NIKI, showing that, after receiving the EUR 500 million grant, Austrian Airlines could operate for […] years without implementing any restructuring measures, in spite of an annual negative cash flow of EUR […], and point out that this is inconsistent with the economic reality, as Austrian Airlines must at all times be able to satisfy all payment obligations due. NIKI's allegation that the value of Austrian Airlines is not negative is therefore incorrect.

### 5.4. **Alternative scenarios**

(152) NIKI argued that Austrian Airlines would continue to operate even if it were insolvent. The Austrian authorities dispute this, arguing that it is precluded by law. Under Section 109 in conjunction with Section 106 of the Austrian Aviation Act, an air carrier's operating licence must be revoked in the event of insolvency. The continued operation of an airline by an assets administrator would be inconceivable without an operating licence.

(153) NIKI also claimed that the value of Austrian Airlines' assets is sufficient to cover its liabilities in the event of liquidation, which means that ÖIAG would not incur any liquidation costs. The Austrian authorities state that this allegation is based on the assumption that the value of Austrian Airlines' assets exceeds the value of its liabilities by EUR […]. This assumption clearly relates to the equity value shown in the consolidated balance sheet as at 31 December 2008. However, the Austrian authorities are of the opinion that this value cannot be used to draw conclusions about the liquidation costs.

(154) NIKI also argued that, as a 'minority shareholder', ÖIAG would not bear the costs of liquidation or insolvency alone. According to the Austrian authorities, this is incorrect. ÖIAG is Austrian Airlines' controlling and largest shareholder, and it alone is affected by the economic risks to its other investments, which would be associated with a winding-up without social plans. Small shareholders and institutional investors that are not 'visible' to the outside world are not exposed to risks of this nature. ÖIAG would therefore have to bear the costs of the social plans alone.

### 5.5. **The restructuring plan**

(155) The Austrian authorities dispute the assertions made by NIKI and Air France/KLM that Lufthansa might be a beneficiary of the capital injection of EUR 500 million. They state that this is inconsistent with the facts of the case. The Austrian authorities argue that the view that Lufthansa will profit from the capital increase of its future subsidiary after the transaction has been completed, and so become a beneficiary of the (putative) restructuring aid itself, is untenable. In the opinion of the Austrian authorities, Air France/KLM's interpretation in this regard is therefore incorrect.

(156) The Austrian authorities dispute the allegation made by certain third parties that the restructuring does not provide for any structural measures and therefore shifts structural adjustments to competitors. Adjustments in the form of capacity reductions to take into account the foreseeable trend in demand are the core of the restructuring plan. In the summer of 2008, Austrian Airlines already reduced its fleet from 105 aircraft to 98 and reduced its long-haul capacity by […]. There is no basis for supposing that Austrian Airlines was pursuing an expansionary strategy on short- and medium-haul routes.

(157) The Austrian authorities also dispute NIKI's assertion that Austrian Airlines has already received State aid in a variety of ways in the past. The alleged aid is not the subject of the investigation as stated in the Commission's decision to initiate proceedings. Statements referring to this are therefore inadmissible and irrelevant. In any event, the Austrian authorities decisively reject in this respect the allegation that Austrian Airlines has already received State aid in the past. The measures referred to do not satisfy the definition of aid within the meaning of Article 87(1) of the EC Treaty. Some of these measures were taken before Austria's accession to the EEA and the EU. Others are not State measures, as, for example, the majority of Vienna Airport is privately owned.

(158) In relation to the capital increase undertaken in 2006, the Austrian authorities point out that private investors subscribed on the same terms as ÖIAG. The capital increase was oversubscribed, and the placement to private investors could have been even larger. In order to avoid diluting ÖIAG's shareholding, its share of the capital increase was exactly equal to its shareholding in Austrian Airlines. This does not constitute aid. As regards the statement that Austrian Airlines has introduced short-time work and that the difference between the normal working hours and the reduced working hours is paid by the State, this is a generally applicable measure. Equally, any protection afforded under Austrian labour law to staff working reduced hours would be generally applicable.

(159) The Austrian authorities disagree with NIKI's allegations that granting air traffic rights to Austrian Airlines amounts to State aid. Traffic rights result initially from bilateral air service agreements. Contracting States grant airlines the right to use corresponding traffic rights under bilateral air service agreements. This does not therefore involve any costs to the contracting State. In addition, there is no market for the use of traffic rights. Traffic rights may not be sold or auctioned.

### 5.6. **Replies to other matters raised in the third-party observations**

(160) The fact that Austrian Airlines holds an interest in SCA Schedule Coordination Austria GmbH (hereinafter SCA GmbH) was also raised in third-party observations as being problematic. The Austrian authorities state that SCA GmbH is Vienna airport's schedules facilitator or airport coordinator within the meaning of Regulation (EC) No 793/2004 of the European Parliament and of the Council of 21 April 2004 amending Council Regulation (EEC) No 95/93 on common rules for the allocation of slots at Community airports ([28]). The activities of SCA GmbH are determined by Regulation (EC) No 793/2004 to such an extent that a single shareholder can exercise no influence whatsoever over slot allocation.

(161) Robin Hood Aviation alleged that the rescue aid was used to finance displacement competition on the Graz-Stuttgart route. The Austrian authorities dispute this.

(162) The Austrian authorities also dispute Ryanair's assertion that Austrian Airlines would, in future, offer flights below cost in competition with low-cost airlines, arguing that these allegations are unsubstantiated. Moreover, the Austrian authorities are of the opinion that these concerns would essentially be examined by the Commission in merger control proceedings.

(163) By letter of 22 May 2009, the Austrian authorities sent the Commission additional information on a number of points.

([28]) OJ L 138, 30.4.2004, p. 50.

(164) In relation to the fact that ÖIAG is considered to be the controlling shareholder of Austrian Airlines, the Austrian authorities point out that ÖIAG holds 41,56 % of the shares in Austrian Airlines directly and has formed a syndicate with other institutional shareholders which holds a further 7,05 % of the shares. The syndicate agreement entails aligned voting in Austrian Airlines' shareholder meetings. A further 3,45 % of the shares in Austrian Airlines (which do not bear voting rights) are held by Austrian Airlines, while the remaining 47,94 % are held by floating shareholders.

(165) ÖIAG and the syndicate members together hold 48,61 % of the shares in Austrian Airlines and have 50,34 % of the voting rights, since the shares held by Austrian Airlines do not bear voting rights.

(166) The authorities also clarified that floating shareholders are not bound to participate in a sale at a negative purchase price, as Austrian insolvency law does not require shareholders to contribute to the costs of insolvency. Their loss is limited to the loss of their capital contributions or the price at which they purchased the shares. The floating shareholders would therefore not have to bear any costs in the event of the insolvency or liquidation of Austrian Airlines, and would not be bound to take the alternative scenarios into consideration.

(167) Furthermore, floating shareholders do not have to accept a negative purchase price. On the contrary, in transactions involving a change of control of the company, the Austrian Takeover Act stipulates that the takeover price must equal the six-month volume-weighted average stock price, which need bear no relationship to the economic value of their stake. The stock price may be driven — as in the case of Austrian Airlines — by market expectations of a takeover and rarely reflects the fundamental value of the company.

(168) Similarly, the floating shareholders do not have to share in liquidation and insolvency costs and do not have to contribute to a negative purchase price. This 'free-rider phenomenon' is the result of the protection afforded to floating shareholders under Austrian corporate and insolvency law and within the legal framework for takeovers under European law.

(169) The Austrian authorities state that the payment of a negative purchase price to ÖIAG is a direct consequence of the negative equity value of Austrian Airlines and, in particular, of the legal requirement for the bidder to buy out the floating shareholders at a price that does not reflect the economic value of the airline in order to obtain 100 % ownership.

(170) In the opinion of the Austrian authorities, ÖIAG acted as a rational private market economy investor by assuming the entire negative purchase price associated with 100 % of Austrian Airlines' negative equity value and the legally required positive offer price to the floating shareholders in order to fully privatise Austrian Airlines.

(171) The Austrian authorities also state that the floating shareholders did not receive State aid in the course of the privatisation process, as, firstly, the takeover bid does not involve public funds but is paid by the successful bidder, namely Lufthansa, and secondly, the price to be paid to the floating shareholders is not set by the State but determined on the basis of the compulsory rules for calculating a takeover price where a change of control is involved, as laid down in the Austrian Takeover Act.

(172) The Austrian authorities clarified that Austrian law does not require shareholders to assume social costs in the event of insolvency. They pointed out that the Austrian Insolvency Remuneration Fund established pursuant to the Insolvency Remuneration Guarantee Act covers the following costs:

— severance payments required by law up to an amount of EUR 6 030 per month,

— salary up to an amount of EUR 8 040 per month,

— pension claims, limited to 24 monthly payments, calculated from the vesting amount (*Unverfallbarkeitsbetrag*) and capped at EUR 6 000 per month,

— annual leave payments, and

— termination payments.

(173) The fund does not cover severance payments or monthly salaries exceeding those thresholds. Furthermore, claims arising from collective bargaining agreements or social plans are not covered by the fund.

(174) […] In this regard, they provided a further estimate of the social costs by Ernst & Young, dated 12 March 2009. This new estimate shows the social costs for (1) the Austrian Airlines Group and (2) Austrian Airlines AG and Tyrolean Airways. […].

(175) The Austrian authorities also provided further information on whether a holding company in a similar situation to ÖIAG would take account of share price losses triggered by rating downgrades and comparable losses.

(180) Moore Stephens carried out its study in Vienna between 23 March 2009 and 16 April 2009. In carrying out this study, it had the support of the Austrian authorities and had access to all necessary documents, including access to the data room.

## 6. PRESENCE OF AID

### 6.1. Legal basis for appraisal of aid

(176) Under 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'.

(177) The concept of State aid applies to any advantage granted directly or indirectly, financed from State resources or granted by the State itself or by an intermediary body acting by virtue of powers conferred on it by the State.

(178) The criteria laid down in Article 87(1) of the EC Treaty are cumulative. Therefore, in order to determine whether the notified measures constitute State aid within the meaning of Article 87(1) of the EC Treaty, it is necessary to verify whether all of the following criteria have been met. The financial support:

— is granted by the State or through State resources,

— favours certain undertakings or the production of certain goods,

— distorts or threatens to distort competition, and

— affects trade between Member States.

(179) The Commission has carried out a close and in-depth analysis of the comments received in the course of the opening of the proceedings and the observations made by Austria. The Commission has also engaged an expert (Moore Stephens) to carry out a study of the financial data and assumptions underpinning the sales transaction.

(181) In the present case, the Austrian authorities have argued that the notified measure does not constitute State aid because the price, which was the result of an open, transparent and non-discriminatory sales process, is the market price. In the alternative, they have argued that the notified measure does not constitute State aid because ÖIAG acted as a market economy investor would have done in a similar situation, in so far as the alternative scenarios facing ÖIAG were all more expensive and ÖIAG chose the least expensive option.

(182) In order to make sure that the sale did not involve State aid, the Commission must assess whether Austrian Airlines was sold at the market price. In this regard, the Commission has developed certain principles in relation to the privatisation of State-owned companies, which have been built up over the years from past decisions made on the basis of the examination of individual cases ([29]). Depending on the circumstances, State aid could be granted either to the buyer or to the entity being privatised.

#### 6.1.1. *Evaluation of the sales price of Austrian Airlines*

(183) In the present case, the Commission notes that Austria gave ÖIAG a privatisation mandate which, while requiring ÖIAG to conduct a transparent and non-discriminatory sales process, also imposed a number of conditions. Therefore, prima facie, the presumption that the transaction involves State aid cannot be ruled out.

(184) In this regard, the Commission notes that, by imposing certain conditions on the buyer, the State, as vendor, would potentially lower the sales price and thus forego additional revenue. Furthermore, conditions can deter potentially interested investors from submitting a bid in the first place, so that the competitive environment of the sales process is disturbed, and even the highest of the offers eventually submitted does not necessarily represent the actual market value.

([29]) See points 402 and 403 of the *XXIIIrd Report on Competition Policy 1993* (ISBN 92-826-8374-5).

(185) By imposing such conditions and thus accepting that it will not receive the best price for its shares or assets, the State is not acting as a market economy operator, who would try to obtain the highest possible price. Instead, the State is choosing to sell the undertaking at a price below the market value. The Commission is of the opinion that a market economy operator would not have an economic interest in attaching comparable conditions but would sell the company to the highest bidder, who would then be free to determine the future of the acquired company or assets.

(186) In such circumstances, it should be determined whether an undertaking has obtained an economic advantage from the transaction, for which purpose the third subparagraph of point 43 of the 1994 Aviation Guidelines stipulates that the company 'must be valued by an independent expert who must indicate, under normal circumstances, a going-concern value for the company […]'.

(187) In its 'Stardust Marine' judgment, the Court declared that 'in order to examine whether or not the State has adopted the conduct of a prudent investor operating in a market economy, it is necessary to place oneself in the context of the period during which the financial support measures were taken in order to assess the economic rationality of the State's conduct, and thus to refrain from any assessment based on a later situation' ([30]). In the present case, the decisive point in time is the day (5 December 2008) on which the sale to Lufthansa of ÖIAG's 41,56 % shareholding in Austrian Airlines was contractually agreed.

Going-concern value of Austrian Airlines

(188) As previously mentioned, Austria submitted an evaluation of Austrian Airlines' equity value on a stand-alone basis as at 5 December 2008, which was prepared by Deloitte based on a going-concern assumption and using the discounted cash flow method (hereinafter DCF). On the basis of this evaluation, including the business plan data, the Commission, assisted by its independent expert, was able to review whether the price paid by Lufthansa corresponds to the market price.

(189) Deloitte produced its DCF valuation in accordance with Austrian professional valuation standards, using the business plan drawn up by the management of Austrian Airlines, adjusted to reflect the change in economic climate and the cost savings the management had agreed to. The business plan available on 5 December 2008 had been drawn up on a stand-alone basis and does not take account of any potential synergies which might be achieved with a strategic partner. The business plan includes optimisation measures (such as […]) totalling EUR […]. Furthermore, it is assumed that […].

(190) In order to determine the impact of these measures on the cash flow of Austrian Airlines, Deloitte used the following three net present value (hereinafter NPV) phases in its evaluation:

— Phase I (12/2008-12/2012), based on the management business plan as adjusted by Deloitte,

— Phase II (2013 to 2021), which incorporated the […] to reflect this and assumes a growth rate of […] % per year, and

— Phase III (2022 onwards), which is the terminal value and is based on the assumption that the business has reached its steady long-term growth rate of […] % per year.

(191) The Commission notes that, in this specific case, the assumptions underpinning the baseline scenario are justified, particularly with regard to the […]. Furthermore, the average age of Austrian Airlines' fleet is approximately […] years, which is […] compared with that of its competitors. The mix of aircraft types and ages in Austrian Airlines' fleet is partly the result of its acquisition of two competitors (Lauda and Tyrolean). Furthermore, the fleet is very diverse in comparison with competitors of a similar size. The Commission notes that, on the basis of these two factors, […] should be taken into account in the baseline scenario, even if the company is in financial difficulties and given the importance of savings in restoring profitability in the industry.

(192) The following table summarises the results of the equity value calculation. This calculation is based on the business scenario submitted by Austria, which assumes, among other things, that the weighted average cost of capital (hereinafter WACC) is […] % in phases I and II and […] % ([31]) in phase III.

([30]) Judgment of the Court of Justice of 16 May 2002 in Case C-482/99 *France* v *Commission* (Stardust Marine) [2002] ECR I-4397, paragraph 71.

([31]) The discounting factor for the calculation of the terminal value (hereinafter TV) is calculated as the difference between the applied WACC and the estimated stable long-term growth rate (in this case […]).

*Table 7*

**Calculation of the value of Austrian Airlines — baseline scenario**

*(in EUR million (*))*

| | Phase I | | | | | Phase II | Phase III |
|---|---|---|---|---|---|---|---|
| | Dec 2008 Ist | 2009 Budget | 2010 Budget | 2011 Budget | 2012 Budget | 2013-21 Budget (***) | 2022 onwards Terminal value |
| Revenue | […] | […] | […] | […] | […] | […] | […] |
| EBITDA | […] | […] | […] | […] | […] | […] | […] |
| Depreciation | […] | […] | […] | […] | […] | […] | […] |
| EBIT | […] | […] | […] | […] | […] | […] | […] |
| Adjusted tax | […] | […] | […] | […] | […] | […] | […] |
| Net Operating Profit Less Adjusted Tax | […] | […] | […] | […] | […] | […] | […] |
| + Depreciation | […] | […] | […] | […] | […] | […] | […] |
| +/– Change in capital expenses | […] | […] | […] | […] | […] | […] | […] |
| +/– Change in working capital | […] | […] | […] | […] | […] | […] | […] |
| Free Cash Flow (FCF) | […] | […] | […] | […] | […] | […] | […] |
| WACC | […] | […] | […] | […] | […] | […] | […] (**) |
| NPV Phase I + II + III | […] | […] | […] | […] | […] | […] | […] |
| Total NPV | […] | | | | | | |
| NPV loss carried forward | […] | | | | | | |
| Non-operating assets | […] | | | | | | |
| Entity value | […] | | | | | | |
| Net debt | […] | | | | | | |
| Equity value | […] | | | | | | |

*Source*: Deloitte valuation report dated 19 March 2009
(*) Variation due to rounding
(**) Discount factor (see footnote 31)
(***) Aggregated figures (see footnote 32)

(193) The accumulated NPV of the free cash flows for phases I, II ([32]) and III, the value of the loss carried forward and the market value of non-operating assets result in an entity value for Austrian Airlines amounting to EUR […]. The market value of liabilities as at 5 December 2008, which amounts to EUR […], must be deducted from the entity value in order to arrive at the negative equity value of EUR […].

([32])

| Phase II | 2013 budget | 2014 budge | 2015 budget | 2016 budget | 2017 budget | 2018 budget | 2019 budget | 2020 budget | 2021 budget | Total |
|---|---|---|---|---|---|---|---|---|---|---|
| FCF | […] | […] | […] | […] | […] | […] | […] | […] | […] | […] |
| WACC | […] | […] | […] | […] | […] | […] | […] | […] | […] | |
| NPV | […] | […] | […] | […] | […] | […] | […] | […] | […] | […] |

(194) The Commission notes that the WACC used as a discount rate for calculating the NPV of the free cash flows assumed a debt risk premium of […] basis points for Austrian Airlines' debts. This resulted from the risk premium applied by the banks for the rescue loan granted at the beginning of 2009. The Commission notes that, in December 2009, a credit default swap ([33]) by Lufthansa required a risk premium of […] basis points. Therefore, a risk premium of […] basis points appears to be rather low and does not fully reflect the risk situation of Austrian Airlines.

(195) The Commission's expert has therefore reviewed Deloitte's calculation using a WACC of […] % and […] %. The Commission notes that the WACC used — in order to reflect the risk premium which might be required by Austrian Airlines' shareholders and creditors — significantly increases the negative equity value of Austrian Airlines (see table below).

*Table 8*

**Sensitivity analysis of the WACC on the equity value of Austrian Airlines**

*(in EUR million)*

| WACC | Equity Value | Difference in the equity value |
|---|---|---|
| […] % in Phase I and II and […] % in Phase III | […] | […] |
| […] % | […] | […] |
| […] % | […] | […] |

(196) In addition, the Commission's expert evaluated a combination of worst- and best-case combinations of events and their impact on the equity value of Austrian Airlines. The expert carried out an evaluation based on Austrian Airlines' business plan and Deloitte's evaluation model and has identified best- and worst-case scenarios by applying a debt risk premium he believes the market would apply. The results of these sensitivity analyses are summarised in the table below.

*Table 9*

**Sensitivity analysis of the equity value of Austrian Airlines**

*(in EUR million)*

| | Entity value (1) | Net debt (2) | Equity value (1) – (2) | Difference in the equity value | Difference in the equity value (%) |
|---|---|---|---|---|---|
| 'Best-case' ('optimistic') Scenario | […] | […] | […] | […] | […] |
| Baseline scenario (Deloitte) | […] | […] | […] | […] | […] |
| 'Worst-case' scenario | […] | […] | […] | […] | […] |

(197) In the best-case (most optimistic) scenario, the Commission's expert assumes that the restructuring plan is more successful than assumed by the management and that the personnel costs can be maintained at a constant level of […] % of revenues for the period from 2009 to 2012. The WACC amounts to […] %. These assumptions lead to an equity value of EUR […] million, which is EUR […] million or […] % more positive than in the baseline scenario calculated by Deloitte.

([33]) A credit default swap is a derivative credit instrument which requires the buyer of this swap to make a series of payments to the seller and — in exchange — the buyer receives a payoff if a bond or loan goes into default (is not serviced).

(198) In the worst-case scenario, the Commission's expert assumes lower sales growth, which is in line with GDP estimates for Austrian Airlines' target markets (i.e. a growth rate of […] % instead of […] % in 2011 and […] % instead of […] % in 2012), and assumes that the management will only be able to maintain material and personnel costs at a constant percentage of revenues from 2011 to 2012 rather than introducing cost cutting measures. This leads to an equity value of EUR […] million, which is EUR […] million or […] % more negative than in the baseline scenario.

(199) On this basis, the Commission can conclude that, at the time of the sale, Austrian Airlines' equity value, calculated on a going-concern assumption (going-concern value), was between EUR […] million and EUR […] million, with a mid-range value of EUR […] million.

Share of the equity value that the buyer should pay

(200) The Commission notes that this equity value corresponds to 100 % of the shares in Austrian Airlines. ÖIAG holds only 41,56 % of those shares. However, under Section 22(2) of the Austrian Takeover Act, a direct controlling interest is a direct interest held in a company which gives the holder more than 30 % of the shares with permanent voting rights. Thus, in the present case, ÖIAG can be regarded as the controlling shareholder. There is no other shareholder who could also be considered a controlling shareholder or even a blocking minority shareholder (25 % plus one share).

(201) The Commission notes that a control premium is usually imposed to reflect the increase in value as a result of the benefit of control where the initial indication of value does not reflect this capacity. This is confirmed in the present case by the fact that, by obtaining a controlling interest in Austrian Airlines, Lufthansa assumes full responsibility for restructuring the undertaking, and the benefit of control does not constitute a benefit for the purchaser but rather a burden. The Commission also agrees with the Austrian authorities that a percentage of 58,44 % is a negative control premium which has to be assumed by ÖIAG as the controlling shareholder when selling its shareholding. This explains why Lufthansa will pay a more negative price than 41,56 % of the going-concern price.

(202) In addition, a 'blockage discount' must also be assumed for ÖIAG's shareholding. This discount may be imposed to reflect the negative effect on share price when a large block of shares is offered for sale all at once and the market is flooded with sell orders and demand is insufficient to take up supply. In the present case, ÖIAG's stake in Austrian Airlines corresponds to 36 626 875 shares out of a total of 88 134 724. It must also be taken into account that only 47,94 % of Austrian Airlines' share capital is traded on the stock exchange. It is therefore logical that ÖIAG would accept a lower price in order to be able to sell its shares *en bloc*.

(203) On this basis, the Commission can conclude that the price for ÖIAG's 41,56 % shareholding corresponds to 100 % of the equity value.

(204) Furthermore, and without prejudice to the arguments set out and the conclusions reached above, the Commission notes that, without taking into account the control premium and blockage discount, the value for 41,56 % would be between EUR […] and EUR […], with a mid-range value of EUR […].

Price paid by Lufthansa for ÖIAG's shareholding in Austrian Airlines

(205) As previously explained, the price paid by Lufthansa is made up of three elements: (a) EUR 366 268,75 (EUR 0,01 per share), (b) a debtor warrant and (c) ÖIAG's contribution of EUR 500 million.

(206) The Commission's expert carried out a review of the potential payout under the warrant. He noted that the warrant becomes payable following the signing of Austrian Airlines' financial statements for the year ending 2011. Under the terms of the warrant, the maximum possible additional consideration cannot exceed the amount per share paid to minority shareholders under the Austrian Takeover Act unless Lufthansa increases its offer to the minority shareholders. Thus the maximum ÖIAG can receive is EUR 164,1 million.

(207) The warrant is made up of two components: […] ([34]).

(208) […]

(209) The Commission's expert looked into the report prepared by ÖIAG's advisors, Merrill Lynch, which analysed the potential payout under the debtor warrant. Moore Stephens concluded that Merrill Lynch's approach to estimating the payout under the debtor warrant was based on reasonable assumptions and used recognised and established capital market valuation techniques.

(210) Nevertheless, the Commission's expert carried out a sensitivity analysis in order to determine the payout depending on various […]. The results are summarised in the table below.

([34]) See footnote 23.

*Table 10*

**Sensitivity analysis of […]**

| Sensitivity […] | Cumulative […] | Cumulative adjusted consolidated […] | Payout |
|---|---|---|---|
| 0,0 % | […] | […] | […] |
| […] % | […] | […] | […] |
| […] % | […] | […] | […] |
| […] % | […] | […] | […] |

(211) As regards the […], which is calculated on the basis of […], the Commission notes that, due to the deterioration in the European air passenger and cargo market, there is a risk that the […]

(212) Based on the foregoing, it would appear that the […]. In view of the above, the Commission can conclude that the price paid by Lufthansa is in the range between EUR […] million and EUR […] million, depending on the payout under the debtor warrant (see Table 11 below).

*Table 11*

**Summary of the price paid by Lufthansa**

*(in EUR million)*

| Price paid by Lufthansa for ÖIAG's shareholding | Maximum price | Minimum price |
|---|---|---|
| (1) Price for ÖIAG's shareholding | […] | […] |
| (2) Debtor warrant ([…]) | […] | […] |
| (3) ÖIAG grant | […] | […] |
| Total amount (1) + (2) + (3) | […] | […] |

Price paid to minority shareholders

(213) In relation to the fact that Lufthansa will pay a price for the free-float shares that differs from that paid for ÖIAG's stake, the Commission notes that public takeovers of companies quoted on the Austrian stock exchange are governed by the Takeover Act, which is implemented by the Takeover Commission. The Takeover Commission ensures that minority shareholders are protected and that the takeover procedure is carried out in the interests of the target company and the securities markets.

(214) The Takeover Act obliges an acquirer of more than 30 % of the target company's shares to announce a mandatory offer for all of the target company's equities within 20 days of crossing the threshold (Section 22 of the Takeover Act).

(215) Section 26 of the Takeover Act states that the price of a mandatory or voluntary bid to acquire a controlling interest must not be lower than the highest money consideration paid or agreed by the bidder for these equities over the 12 months preceding the announcement of the bid and that this price must be at least the average stock-market price for the equities concerned, weighted according to the respective trading volumes, over the six months preceding the day on which the bid was announced. Lufthansa, as the acquirer of ÖIAG's controlling stake, is therefore obliged to make an offer to all shareholders at the weighted average price. The Commission notes that the bidder has no discretion with regard to the level of this price.

(216) In addition, because of the public tendering procedure for ÖIAG's shares, the transaction attracted media interest, which is why the share price has been influenced by market activity and speculation. The difference in the prices may also be explained by the control discount applicable to minority shareholdings. In contrast to the control premium, the value of minority shareholdings does not reflect the value attached to the controlling interest.

(217) Although the total price paid to ÖIAG is negative and, as explained above, can be derived from a negotiated procedure, the price paid for the free-float shares is set by law, is in fact known to all parties in advance and would amount to approximately EUR 220 million in the present case.

(218) Accordingly, the Commission can conclude that the minority share price is based solely on legal obligations which Lufthansa must meet and that, in the present case, no conclusions regarding the price paid to ÖIAG can therefore be inferred from the price paid to the minority shareholders.

Conclusion

(219) It follows from the above that the price paid by Lufthansa for ÖIAG's stake is between EUR […] and EUR […]. This must be compared with a going-concern value for Austrian Airlines of between EUR […] and EUR […], with a mid-range value of EUR […]. The price paid is therefore not lower than the going-concern value. The Commission notes that, even though the price paid is only 41,56 % of the value of the company, that price is very close to the range identified by the expert. The Commission therefore concludes that the price paid by Lufthansa is within the range of market prices for the shareholding in Austrian Airlines being sold by ÖIAG. Hence, the conditions did not have an impact on the sales price.

(220) This conclusion is confirmed by a qualitative assessment of the above-mentioned conditions. As set out above, the Austrian authorities argued that the conditions imposed on ÖIAG by the privatisation mandate were not such as to have a negative impact or indeed any impact on the price that the purchasers were willing to pay.

(221) With regard to the goal of 'preserving as many secure jobs as possible', the Commission is of the opinion that this requirement is merely a 'best efforts' aim. The Commission notes that this condition was formulated in such a manner that it did not impose any onerous or binding obligations on potential buyers. In view of the above considerations, the Commission concludes that, since this condition did not have an onerous character and this was obvious to all potential buyers from the way in which the tender documents were formulated, it did not lower the purchase price and did not have the potential to deter potential investors from submitting a bid, and therefore did not entail a loss of resources for the State. This conclusion is also supported by the fact that all bids submitted by the bidders were limited and carefully worded, giving bidders the flexibility to ensure that their commercial and profit-motivated ambitions could be achieved ([35]).

([35]) In this regard, see also Commission Decision 2008/767/EC.

(222) Similarly, with regard to 'establishing a committee to protect Austria's interests', the Commission notes that such a committee is purely advisory and has no decision-making powers. Furthermore, none of the […] bidders were deterred by such a condition, as […]. The Commission can therefore conclude that, since this condition did not have an onerous character, it did not lower the purchase price and did not have the potential to deter potential investors from submitting a bid. It did not therefore involve State aid.

(223) With regard to the goal of 'keeping the Company's headquarters in Austria', the Commission notes that all […] bidders expressed their intention of doing so. As this condition is based on the logic of the 'core shareholder' requirement and is merely a refinement thereof, the Commission will deal with the two requirements together.

(224) On the issue of the Austrian core shareholder structure, the Commission notes that this condition applied for all bidders and that all […] bidders were aware of and interested in Austrian Airlines' particular market in certain regions and had an interest in maintaining certain bilateral traffic rights. […] In this context, the Commission notes that the bidders intended to acquire Austrian Airlines as a going concern and not as an asset. Owing to the regulatory and other particularities of the air transport sector, the value of an airline is largely determined by intangible assets, such as slots and air traffic rights. As such, both the seller and the buyer would see maintaining these rights as positive for potentially maintaining the value of the company.

(225) In view of the above considerations, the Commission can conclude that, rather than being onerous, this condition and the condition of keeping the headquarters in Austria were essentially commercial conditions actually designed to maintain bilateral traffic rights with certain third countries and thus rather to maintain the turnover of the company and the value of Austrian Airlines for the potential purchaser than, for example, to dictate the output or investment levels. The Commission is also of the opinion that, while such conditions may give rise to compatibility problems with Community law, their relevance would have been obvious and important to all potential bidders, as maintaining traffic rights is essential. In the context of the current state of development of the international air transport market and of bilateral agreements with third countries, the Commission considers that such conditions are not unusual in this sector.

(226) The Commission further notes that these conditions were not challenged by any potential purchaser but rather that all bidders sought in a variety of similar ways to satisfy them […]. On this basis, the Commission can conclude that neither the requirement to maintain the headquarters in Austria nor the requirement to retain an Austrian core shareholder structure was liable to lower the purchase price or to deter potential investors from submitting a bid, so no loss of State resources was involved.

(227) Although, in the context of a tendering procedure, such conditions are generally regarded as conditions that could result in a potential loss of State resources, the above qualitative assessment confirms that, in this particular case, the conditions had no effect on the price paid, given the very specific nature of the aviation industry, but rather contributed to maintaining the full value of Austrian Airlines.

(228) In the light of the above, the Commission concludes that no aid to Lufthansa is contained in the price it paid for ÖIAG's shareholding in Austrian Airlines.

(229) As the Commission has established that the sale took place at the market price, it is not required to further examine the fairness and transparency of the privatisation process as part of this aid assessment.

6.1.2. *Application of the 'market economy investor' test*

(230) The conclusion that the price paid by Lufthansa for ÖIAG's shares in Austrian Airlines corresponds to the market price does not exclude the possibility that aid has been granted to Austrian Airlines itself. The fact that a market price has been paid for a company might ensure that no new aid is granted to the buyer, but the buyer should not be confused with the company sold at a negative price. The Court has in fact consistently held that, where an undertaking that has benefited from unlawful State aid is bought at the market price, that is to say at the highest price which a private investor acting under normal competitive conditions was ready to pay for that company in the situation it was in, in particular after having enjoyed State aid, the aid element was assessed at the market price and included in the purchase price ([36]).

([36]) Judgment of the Court of Justice of 21 March 1991 in Case C-305/89 *Italy* v *Commission* (ALFA Romeo) [1991] ECR I-1603, paragraph 40; judgment of the Court of Justice of 20 September 2004 in Case C-390/98 *Banks* [2001] ECR I-6117, paragraph 77; and judgment of the Court of Justice of 29 April 2004 in Case C-277/00 *Germany* v *Commission* (SMI) [2004] ECR I-3925, paragraph 80.

(231) Thus, where a company is sold by the State at a negative price, the sale at the market price is not a sufficient criterion for establishing that the State acted as a market economy investor and that no State aid was granted. Such a market economy investor would also compare the negative market price with the cost to him of alternative options, such as, in the present case, insolvency of the company (insolvency scenario). The Austrian authorities have argued that the decision to sell their stake in Austrian Airlines to Lufthansa at a negative price was the least expensive of the various options open to them. The other options were structured liquidation, the stand-alone scenario and the insolvency scenario.

(232) In this respect, the Commission notes that alternative scenarios do not have to be assessed in detail in this Decision, as all of them would lead to higher costs than insolvency.

Insolvency scenario

(233) In the event of insolvency, outstanding debts to secured and unsecured creditors would have to be paid from the proceeds of the sale of unencumbered assets. Under Austrian law, there are no preferential creditors, but the costs of the insolvency practitioner are settled in priority to any unsecured creditors. Furthermore, the claims of employees are not treated as preferential claims and will therefore be settled according to the quota that applies for all creditors. In the insolvency scenario, shareholders would be unlikely to benefit from any return. As a corollary, shareholders would have no liability other than the loss of their shareholdings.

Assumption of all unsatisfied debts by ÖIAG in order to avoid a negative impact on its other shareholdings

(234) In this regard, the Austrian authorities argue that the insolvency of Austrian Airlines would result in the downgrading of the rating of ÖIAG's other shareholdings (OMV AG, Österreichische Post, Telekom Austria, etc.) and of the Austrian State's other shareholdings ([…]). Furthermore, they argue that such a downgrading would also negatively affect the share price of these companies and would result in a massive loss in the shareholdings of ÖIAG and of the Republic of Austria.

(235) In their opinion, the rating downgrade would result from the loss of the support of the parent company. Moreover, they are of the opinion that the support of the parent company is one of the key rating factors. They have provided examples of private undertakings, stating, for example, that the ratings of Bank Austria and Hypovereinsbank have benefitted from the support of their parent company UniCredit.

(236) The Commission first notes that, irrespective of whether a company is wholly privately owned or whether it is publicly owned, its rating depends not only on the support of the parent company but also on other factors. Key rating factors are the production characteristics of the company, the re-investment risk, the operating and capital efficiency and downstream rating factors such as the dependence of its customers, diversification, its financial situation and its liquidity profile in general.

(237) In addition, the examples summarised in Table 1 relate to a downgrading of the rating of a parent company resulting in the downgrading of the rating of its subsidiary. Based on the rating methodology, the rating of a subsidiary cannot be better than that of the parent company. In the present case, ÖIAG does not have a rating.

(238) Furthermore, the ÖIAG Act of 26 April 2000 expressly forbids the consolidation of ÖIAG with its shareholdings and, moreover, its liabilities are covered by a State guarantee. ÖIAG's role appears, by its nature, to be that of an asset management fund rather than that of a diversified group holding. The Commission also notes that a significant number of its shareholdings (OMV AG, Österreichische Post, Telekom Austria) are themselves listed separately on the Vienna stock exchange rather than being unified within a single group structure and that the majority of each of these companies is owned by shareholders other than ÖIAG. Furthermore, the Commission notes that, when the fundamental business data of undertakings such as OMV AG, Österreichische Post or Telekom Austria are examined by analysts, the performance of other undertakings in which ÖIAG has a stake is not taken into consideration ([37]).

(239) In view of the above, the Commission cannot agree with the argument that the insolvency of Austrian Airlines would have an effect on the rating of the other shareholdings and would result in ÖIAG's shares losing value. Similarly, the Commission cannot accept that the insolvency of Austrian Airlines would also affect the rating and value of any other undertaking owned by the Republic of Austria.

Assumption of social costs by ÖIAG

(240) […]

(241) […]

(242) […]

(243) The Austrian authorities and Austrian Airlines have provided the Commission with information on cases in which privately owned companies have voluntarily assumed the cost of social plans when they have closed business divisions or production units in Austria.

(244) On the basis of this information, it would appear that it is common practice in Austria for a parent company or group to assume social costs when it closes down a subsidiary or reduces its production capacity in order to relocate production to another country. The Austrian authorities have argued that the same would hold true if the parent company or group were to allow the subsidiary to become insolvent.

(245) In this regard, the Commission notes that, in the cases presented as examples, the parent company still continues to offer products under the brand name of the liquidated subsidiary in Austria even though its production or parts of its production have been relocated to another country. Against this background, the Commission observes that it would be only reasonable from an economic point of view for the parent company to assume the obligations of a subsidiary towards its employees under the applicable labour law in the event of structured liquidation of the subsidiary if the parent company retains a presence in the market in question. In the present case, however, ÖIAG would, in the hypothetical insolvency scenario, fully disinvest from the aviation market in Austria. Therefore, it does not seem convincing that, in a similar situation to ÖIAG, a private investor (such as a purely financial holding) would assume the social costs for reasons relating to the 'Austrian Airlines' brand image (a brand it would no longer have any interest in).

(246) The Commission also notes that, for the same reasons, the amount of social costs for Austrian Airlines (see Table 2) hypothetically to be assumed by ÖIAG in the event of insolvency cannot be compared with the examples of voluntary assumption of social costs. The Commission further observes that Austrian Airlines' social costs are very high, both in terms of average individual payment and in terms of overall payment amount, when compared with the social costs voluntarily assumed by other companies (see Table 4).

([37]) See, for example, Erste Group Research: http://produkte.erstegroup.com/CorporateClients/de/ResearchCenter/Overview/index.phtml or Raiffeisen Centrobank Equity Research: http://www.rcb.at/_sterreich.aktienoesterreich.0.html

(247) The Austrian authorities argue that there are clearly a number of factors which would influence the costs of such a social plan. The most important factors would be the length of service of the employees and their salary levels. In the present case, the Commission notes that the costs of a social plan in the event of a company's insolvency and in the event of closure of a production unit may be different from the social plan costs in the event of a reduction in production capacity, where the undertaking is still active on the market.

(248) In this regard, the Commission considers that the Austrian authorities have not demonstrated that insolvency would have had a sufficiently negative impact on the brand image of the ÖIAG holding company to oblige it voluntarily to assume social costs of such a magnitude.

(249) With regard to the argument that ÖIAG in effect functions as Austrian Airlines' parent company, the Commission observes that, under Austrian law, in particular the law governing the creation and operation of ÖIAG (Section 11(2) of the ÖIAG Act), ÖIAG and the companies in which it has a stake are prohibited from forming a group. Moreover, for accounting purposes, ÖIAG does not consolidate the results of companies in which it has shareholdings on to its own balance sheet as a private holding would be expected to. This is further confirmed by the fact that (i) ÖIAG and the companies in which it has a stake do not appear to form an economic unit for the purposes of European competition law and (ii) under Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) ([38]), the Commission does not consider ÖIAG to be a group for the purposes of calculating the turnover thresholds.

(250) Notwithstanding the social and political pressure that would result from a decision to allow Austrian Airlines to become insolvent, the Commission maintains the view, as expressed in the opening of the proceedings, that any decision by ÖIAG to assume costs relating to a social plan voluntarily in the event of the insolvency of Austrian Airlines would appear to result from the fact that ÖIAG is a State holding company, and a private investor operating a holding company would not assume these costs in similar circumstances.

(251) It must therefore be concluded that, in the event of the insolvency of Austrian Airlines, the cost to ÖIAG would be nil.

([38]) OJ L 24, 29.1.2004, p. 1.

6.1.3. *Conclusion*

(252) While concluding that the sales process established the highest possible market price for Austrian Airlines, the Commission also came to the conclusion that the insolvency of the airline would have been a cheaper option for the State. The Commission therefore holds that the amount by which the negative price exceeds the cost of insolvency for the State and ÖIAG must be regarded as State resources granted to Austrian Airlines. Since the cost of insolvency to the shareholder is nil, the amount of State aid is the full amount of the negative price, which lies within a range of EUR […] to EUR […], with a maximum aid amount of EUR […].

(253) The negative sales price is made up of State resources, as it is granted directly by an entity (ÖIAG) which is wholly owned and controlled by the State. It is the result of the privatisation mandate by means of which the Austrian Government authorised ÖIAG to sell all of its shares in Austrian Airlines and is therefore imputable to the State. It is directed at a company (Austrian Airlines) which is in competition with other Community airlines, particularly since the liberalisation of air transport. It affects intra-Community trade, since it concerns a company involved in transport between Member States, and distorts competition.

(254) Accordingly, the negative sales price is to be considered State aid within the meaning of Article 87(1) of the EC Treaty.

## 7. **COMPATIBILITY OF THE AID WITH THE COMMON MARKET**

(255) Having concluded that the negative purchase price constitutes State aid, the Commission must examine its compatibility with the common market.

(256) It is therefore necessary to examine the compatibility of the aid with the common market in the light of Article 87(2) and (3) of the EC Treaty, which provide for exceptions to the general rule of incompatibility set out in Article 87(1).

(257) In the present case, only the exemption provided for in Article 87(3)(c) may apply. Under Article 87(3)(c), State aid can be regarded as admissible if it serves to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest.

(258) In this respect, the applicable Community framework for deciding on compatibility with the common market comprises both the 2004 Guidelines and the 1994 Aviation Guidelines.

7.1. **Compatibility with the common market and possible infringement of internal market rules**

(259) In the opening of the proceedings, the Commission noted that Austria gave ÖIAG a privatisation mandate which imposed a number of conditions. In the course of the proceedings, the Commission established that, in the particular circumstances of this case, these conditions were not such as to have a negative impact or indeed any impact on the price that the purchasers were willing to pay.

(260) However, on the face of it, the conditions of sale requiring the creation of a committee to protect Austria's interests and the maintenance of an Austrian core shareholder structure and the requirement to maintain the headquarters of Austrian Airlines in Austria could give rise to concerns with regard to Articles 43, 49 and 56 of the EC Treaty concerning freedom of establishment, freedom to provide services and the free movement of capital.

(261) This raises the question of the extent to which a potential violation of internal market rules should be taken into consideration by the Commission in determining the compatibility of State aid with the common market ([39]).

(262) In the present case, the Commission has found that the conditions imposed in the privatisation mandate did not in any way exacerbate the distortion resulting from the negative price, as these conditions had no material effect on the price paid. In the present case, the conditions relating to the shareholders and the company's headquarters are linked to bilateral aviation agreements and, in this form, their application does not give rise to discrimination between the potential buyers, as they would all have the same interest in continuing these agreements in order to protect their potential activities. Consequently, the conditions imposed by the privatisation mandate do not impose additional restrictions beyond those already imposed by the bilateral aviation agreements. There is therefore no reason to take any possible infringement of internal market rules into account when assessing the compatibility of the aid.

(263) The Commission must therefore assess whether the restructuring plan complies with the provisions of the applicable guidelines. The basic principle (point 31 of the 2004 Guidelines) is to 'allow the grant of restructuring aid only in circumstances in which it can be demonstrated that it does not run counter to the Community interest. This will only be possible if strict criteria are met, and if it is certain that any distortions of competition will be offset by the benefits flowing from the firm's survival […] and, in principle, there are adequate compensatory measures in favour of competitors'.

(264) The Guidelines then set out a number of conditions under which restructuring aid may be granted.

7.1.1. *Identity and eligibility of the firm*

(265) Point 13 of the 2004 Guidelines provides that 'a firm belonging to or being taken over by a larger business group is not normally eligible for rescue […] except where it can be demonstrated that the firm's difficulties are intrinsic and are not the result of an arbitrary allocation of costs within the group, and that the difficulties are too serious to be dealt with by the group itself'.

(266) In the opening of the proceedings, the Commission noted that certain complainants had argued that, in the context of the takeover of Austrian Airlines by Lufthansa, Austrian Airlines was not eligible for aid.

(267) In this regard, the Commission observes that, although the notified measure envisages that Lufthansa will take over Austrian Airlines, the difficulties in which Austrian Airlines finds itself are not linked to the planned acquisition. Furthermore, the Austrian authorities have indicated that the reduction in Austrian Airlines' debt levels (financial restructuring) is the price that Lufthansa is willing to accept for the acquisition, following a transparent and open bidding procedure, and that without this measure the sale would not take place.

(268) The Commission notes that the Austrian State's decisions regarding the grant and the agreements signed between ÖIAG and Lufthansa stipulate that Austrian Airlines and not Lufthansa is the beneficiary of the grant and that the grant will be received by Austrian Airlines in the form of a capital increase. The primary effect of the grant will be the survival of a restructured Austrian Airlines. The Commission further notes that Austrian Airlines will not be part of the Lufthansa Group until completion of the sale, so the question of whether Lufthansa could have financially rehabilitated Austrian Airlines using its own capital is moot. No group relationship exists between Lufthansa and Austrian Airlines based on their existing cooperation. The Commission can therefore conclude that Austrian Airlines is not part of the Lufthansa Group.

([39]) Under case law, this should be the case where 'those aspects of aid which contravene specific provisions of the Treaty other than Articles 92 and 93 may be so indissolubly linked to the object of the aid that it is impossible to evaluate them separately' (see the judgment of the Court of Justice of 22 March 1977 in Case 74/76 *Ianelli* v *Meroni* [1977] ECR 557 and the judgment of the Court of Justice of 15 June 1993 in Case C-225/91 *Matra* v *Commission* [1993] ECR I-3203, paragraph 41).

(269) The Commission can therefore conclude that Austrian Airlines is the beneficiary of the aid.

(270) The Commission must then determine whether Austrian Airlines is eligible for restructuring under the 2004 Guidelines. The Commission had already arrived at this conclusion in its decision to authorise rescue aid ([40]) and in the decision to open the investigation. During the subsequent investigation, it has not uncovered any elements which would change this view.

(271) In this regard, the Commission can conclude that Austrian Airlines is an undertaking in difficulty within the meaning of the 2004 Guidelines.

7.1.2. *Restoration of long-term viability*

(272) The second condition (as set out in point 35 of the 2004 Guidelines) to be complied with is that the 'restructuring plan, the duration of which must be as short as possible, must restore the long-term viability of the firm within a reasonable timescale and on the basis of realistic assumptions as to future operating conditions'.

(273) The 2004 Guidelines (point 37) go on to stipulate that 'the plan must provide for a turnaround that will enable the company, after completing its restructuring, to cover all its costs including depreciation and financial charges. The expected return on capital must be enough to enable the restructured firm to compete in the marketplace on its own merits'.

(274) In the opening of the proceedings, the Commission raised questions regarding the assumptions underlying the restructuring plan submitted. It also questioned the cost savings and synergies referred to in the plan, given that Austrian Airlines and Lufthansa already enjoy extensive cooperation.

(275) In relation to the fact that Lufthansa and Austrian Airlines already cooperate within the scope of the Star Alliance and in relation to their joint venture, Austria has provided the Commission with information suggesting that integration of enterprises in the aviation sector is significantly greater from an economic point of view in the event of equity participation, resulting in higher cost savings than in partnerships without equity participation. Austria refers to expert studies which estimate cost savings of approximately 1,9 % for purely coordinating partnerships, while joint operational activities result in savings of approximately 5,6 % of overall costs. However, cooperation that is underpinned by equity participation results in cost savings of approximately 11,4 % ([41]).

(276) The Commission notes that the restructuring plan is based on consolidating the benefits accruing from cost reductions and synergies resulting from the integration of the airline into the Lufthansa Group. This provides for fleet reduction, fleet resizing, production optimisation, cost cutting measures and synergy potentials.

(277) […] The Commission notes that Lufthansa's later business plan takes into account, as far as possible, the deterioration in the global aviation market and, in particular, in Austrian Airlines' markets in Central and Eastern Europe. Lufthansa notes that the economic crisis has meant that prospects are significantly bleaker when compared with the plan from October 2008.

(278) Lufthansa states that the five-year (2009-13) financial forecasts show that, in the 'baseline', 'realistic case' and 'pessimistic case' scenarios, the company will […] in the short to medium term […]. It expects […] that Austrian Airlines will be able to cover its depreciation, aircraft leasing costs and interest from […]. […].

(279) Lufthansa notes that some of the underlying measures […]. However, in Lufthansa's opinion, Austrian Airlines' long-term viability can be restored only if the revised restructuring plan — and further cost cutting measures yet to be negotiated — can be implemented as envisaged and thereby bring about the necessary cost reductions.

(280) The business plan is based an average USD/EUR exchange rate of approximately […] and an average crude oil price of […] per barrel for 2009-13. It is further assumed that […].

(281) Flight revenues will […] in 2009. Afterwards, the plan anticipates […] per year, as Austrian Airlines' markets recover and revenue synergies are harvested. […] the company is expected to again reach the flight revenue level of […].

(282) […] As such, load factors are estimated […] in 2008 to 2010, recovering only from […] onwards. Similarly, the average yields per passenger kilometre are expected to […] in 2009.

(283) […] ([42]).

(284) As a result of the coming together of Austrian Airlines and Lufthansa, the plan includes EUR […] of revenue synergies and EUR […] of cost synergies to be achieved from […].

([40]) See footnote 8.

([41]) See footnote 27.

([42]) […]

(285) One third of revenue synergies are expected to come from […], one third from […] and one third from […].

(286) […]

(287) With regard to personnel […] is planned. Austrian Airlines' sales organisation currently comprises […] employees, […] of whom are located in Austria. Lufthansa envisages […]. This means that […]. In addition, the restructuring plan also anticipates an adjustment […], as these capacities will be integrated into the Lufthansa Group. This adjustment would lead to […] ([…]). In addition, smaller modifications are envisaged in other business segments, such as […]. Between the end of 2008 and 2013, these measures will result in a decrease […].

(288) The total exceptional costs of EUR […] million planned for Austrian Airlines for the period 2009-13 include costs […].

*Table 12*

**EBIT before exceptional items 2008-13 assumed by Lufthansa**

*(in EUR million)*

| EBIT before exceptional items | 2008 | 2009 | 2010 | 2011 | 2012 | 2013 |
|---|---|---|---|---|---|---|
| | […] | […] | […] | […] | […] | […] |

(289) The company's EBIT (operational break-even) before exceptional items is calculated to […].

(290) However, Lufthansa points out that Austrian Airlines is burdened with annual interest costs of roughly EUR […] as a result of significant interest-bearing financial liabilities and pension provisions. Net profitability will be achieved […].

(291) The Commission must evaluate whether Austrian Airlines is capable of making a success of its restructuring within the prescribed time limit. […].

(292) On the basis of the revised plan, Austrian Airlines should be able to reduce its costs significantly. This significant reduction in the cost base, together with […], should give the company the necessary flexibility and adaptability to make progress towards achieving its objectives.

(293) In view of the above, the Commission considers that Austrian Airlines should be capable of making a success of its restructuring by 2015. However, in this regard, the Commission does not consider that the date of implementation of the 'Go4Profit' programme should be considered the start date of restructuring. Rather, it appears that the measures undertaken as part of the 'Go4Profit' programme — even though they have led to a decrease in the cost burden for Austrian Airlines — were not sufficient to restructure the company and were conceived as part of a stand-alone solution.

(294) The Commission must also evaluate whether the assumptions on which the restructuring plan is based are appropriate to the circumstances and whether the predictions and forecasts correspond to what is required in the guidelines. The 2004 Guidelines (point 35) stipulate that 'the plan must be submitted in all relevant detail to the Commission and include, in particular, a market survey. The improvement in viability must derive mainly from internal measures contained in the restructuring plan; it may be based on external factors such as variations in prices and demand over which the company has no great influence, but only if the market assumptions made are generally acknowledged'.

(295) In this respect, the Commission is of the opinion that the business plan submitted in April 2009 is realistically negative in its predictions. The assumptions submitted by Lufthansa to the Commission with regard to fuel price, exchange rates, traffic flows and the development of the market are plausible, and the forecasts made in the restructuring plan with regard to progress in terms of Austrian Airlines' overall result therefore appear credible, taking into account the effects of the economic crisis on the air transport sector. The Commission observes that a company is more likely to be viable in the long term under the control of a new, private owner, so in this respect the sale is effectively a key aspect of the restructuring of Austrian Airlines.

(296) In the light of the above-mentioned factors, the Commission considers that Austrian Airlines will be able to restore its long-term viability from 2015 as envisaged in the 2009-15 business plan. Viability will therefore be re-established in a restructuring period of approximately six years, which the Commission considers to be a reasonable length of time.

7.1.3. *Level of own contribution*

(297) In relation to the level of own contribution, the 2004 Guidelines (point 43) provide that 'aid beneficiaries will be expected to make a significant contribution to the restructuring plan from their own resources, including the sale of assets that are not essential to the firm's survival, or from external financing at market conditions. Such contribution is a sign that the markets believe in the feasibility of the return to viability. Such contribution must be real, i.e. actual, excluding all future expected profits such as cash flow, and must be as high as possible'. The guidelines indicate the level of own contribution that would normally be considered appropriate. For a company the size of Austrian Airlines, this contribution should be 50 %. In this regard, the Commission notes that the 2004 Guidelines (point 18) stipulate that they are without prejudice to any specific rules relating to firms in difficulty in the sector concerned, including such specific rules for the air transport sector.

(298) In this regard, the Austrian authorities have argued that the 1994 Aviation Guidelines, which are a *lex specialis* for State aid to air carriers, do not require a set amount of own financial contribution. However, they subsequently expressed the opinion that, in any event, this requirement is satisfied and the level of own financial contribution exceeds 50 % of the required restructuring costs.

(299) The Austrian authorities argue that the total restructuring costs amount to EUR […] and, as the State aid granted by Austria amounts to EUR 500 million, the own financial contribution made by Austrian Airlines and Lufthansa comes to some EUR […] million, or 55,5 % of the total.

(300) The information provided by Lufthansa is slightly different. Lufthansa argues that the total restructuring costs amount to EUR […] million. As the grant from Austria still amounts to EUR 500 million, the own financial contribution made by Austrian Airlines and Lufthansa comes to some EUR […] million, or 67 % of the total.

(301) Both Austria and Lufthansa argue that, as Austrian Airlines' borrowing ratio is higher than that of Lufthansa, Lufthansa will have to pay off debt in order to keep its group-wide equity ratio at the previous level. Austrian Airlines' total net liabilities (without the rescue aid of EUR 200 million, which must be repaid after takeover has been completed) amount to approximately EUR […]. After partial repayment, with the help of the EUR 500 million grant, net liabilities of EUR […] million remain. Austrian Airlines is being taken over by Lufthansa with these liabilities. This corresponds to […]. The difference from Lufthansa's borrowing ratio of […] comes to EUR […]. However, at the present time, it is not clear how and when Austrian Airlines' debts will be paid off.

(302) If this amount is effectively paid to Austrian Airlines by Lufthansa in the form of a capital injection, the Commission can accept that this constitutes an own contribution. However, merely assuming Austrian Airlines' debt burden and its effects on Lufthansa's consolidated accounts would not in itself constitute an own contribution. The Commission notes that, if this element is not counted as a restructuring cost or as an own contribution, the respective amounts come to […].

(303) In relation to Austrian Airlines' cumulative operating losses for the period 2009-13, as set out in Table 12, the total sum of EUR […] has been discounted to a net present value (NPV) based on a discount rate of 9,7 %, giving an amount of EUR […]. The Commission can accept that this amount, which will be contributed in cash by Lufthansa, constitutes an own contribution to the restructuring plan.

(304) With respect to certain other costs, such as the costs of integration in order to achieve the annual synergy effects (EUR […]), ongoing additional restructuring costs since the sale in December 2008 (EUR […]) and transaction costs (EUR […]), the Commission accepts that these form part of the restructuring costs. They will be borne by Lufthansa.

(305) However, with regard to the costs of the 'Go4Profit' programme, which amount to EUR […], the Commission is unwilling to regard these as eligible costs, as they arose prior to the implementation of the restructuring plan. The situation is similar for the higher refinancing costs of EUR […] resulting from the financial crisis, which were identified by the Austrian authorities as a restructuring cost item for Lufthansa. The Commission notes that Lufthansa has not referred to them and that they constitute normal operating costs.

(306) The table below summarises the assessment of the different restructuring cost items by the Commission.

*Table 13*

**Restructuring costs of Austrian Airlines**

| Measure | Opinion of Austria | Opinion of Lufthansa | Assessment by the Commission |
|---|---|---|---|
| ÖIAG's contribution to reducing net liabilities | EUR 500 million 0 % own contribution | EUR 500 million 0 % own contribution | EUR 500 million 0 % own contribution |
| Reduction of borrowing ratio to the level of Lufthansa | […] | […] | […] |
| Costs of the 'Go4Profit' programme | […] | […] | […] |
| Additional restructuring measures under way since December 2008 | […] | […] | […] |
| Cost of integration with a view to generating the necessary synergies | […] | […] | […] |
| Consultancy/transaction costs | […] | […] | […] |
| Higher refinancing costs due to financial crisis | […] | […] | […] |
| NPV of cumulative operating losses | […] | […] | […] |
| Total overall restructuring costs | […] | […] | […] |
| Level of own contribution | EUR […] (56 %) | EUR […] (67 %) | EUR […] (64 %) EUR […] (52 %) |

(307) Based on the above, the Commission has reached the conclusion that the total overall restructuring costs will amount to approximately EUR […] million (or EUR […] if Lufthansa does not reduce Austrian Airlines' debts by EUR […]), while the level of own contribution (contributed jointly or severally by Austrian Airlines and/or Lufthansa) amounts to EUR […] (or EUR […]). This amounts to 64 % (or 52 %) of the restructuring costs. The Commission can therefore conclude that the requirement to make a sufficient own contribution to the restructuring costs has been met in the present case.

7.1.4. *Aid must be kept to the minimum*

(308) Point 43 of the 2004 Guidelines stipulates that the 'amount and intensity of the aid must be limited to the strict minimum of the restructuring costs necessary to enable restructuring to be undertaken in the light of the existing financial resources of the company, its shareholders or the business group to which it belongs. Such assessment will take account of any rescue aid granted beforehand'. The Commission considers that this condition is fulfilled.

(309) As set out above, the restructuring costs amount to EUR […], while the aid amount is limited to EUR 500 million. Both Austria and Lufthansa have submitted that the grant of EUR 500 million is the minimum amount necessary to restore the long-term profitability of Austrian Airlines. They claim that without the grant, which will be used to reduce Austrian Airlines' liabilities, the takeover of the company by Lufthansa is not economically viable.

(310) In this regard, the Commission notes that the amount of EUR 500 million emerged from a public tender as the minimum negative price that Lufthansa was willing to accept. The Commission also notes that, as the sum in question will be used only to reduce Austrian Airlines' excessive debts, it will not result in excess liquidity for Austrian Airlines.

(311) The Commission finds this amount acceptable and concludes that the aid granted is not excessive in comparison to the corresponding costs. The major part of the restructuring resources will be paid for by Austrian Airlines and/or Lufthansa out of their own resources.

7.1.5. *Compensatory measures*

(312) The 2004 Guidelines (point 38) also provide that 'in order to ensure that the adverse effects on trading conditions are minimised as much as possible, so that the positive effects pursued outweigh the adverse ones, compensatory measures must be taken. Otherwise, the aid will be regarded as "contrary to the common interest" and therefore incompatible with the common market'.

(313) It is further specified (point 39) that 'these measures may comprise divestment of assets, reductions in capacity or market presence and reduction of entry barriers on the markets concerned. When assessing whether the compensatory measures are appropriate the Commission will take account of the market structure and the conditions of competition to ensure that any such measure does not lead to a deterioration in the structure of the market […]'.

(314) As regards the requirement for suitable compensatory measures within the meaning of the 2004 Guidelines and the 1994 Aviation Guidelines, both Austria and Lufthansa have argued that the basis for assessing the measures taken to prevent a distortion of competition is point 38(3) of the 1994 Aviation Guidelines, in accordance with which a restructuring programme must include the reduction of capacity if the restoration of financial viability and/or the market situation so require.

(315) The Austrian authorities and Lufthansa have argued that, as the 1994 Aviation Guidelines are a *lex specialis* with respect to the 2004 Guidelines, they take precedence over them. This, they argue, is based on point 18 of the 2004 Guidelines, according to which the sectoral regulations for firms in difficulties remain unaffected by the 2004 Guidelines. They further argue that neither the restoration of financial viability nor the market situation require compensatory measures that go beyond the steps already planned within the scope of the restructuring.

(316) With respect to this argument, the Commission is of the opinion that, in the present case, the market situation does in fact require an additional capacity reduction. The Commission does not agree with the assertion that the only indicators of overcapacity that it should take into account are insufficient load factors and/or the frequent withdrawal of market participants and a lack of incentives for new market entries. In this connection, the Commission observes that since 2006 Austrian Airlines has undertaken cost-reduction and restructuring measures in the context of the 'Go4Profit' programme and that this programme has not restored the company to profitability. Austrian Airlines has made losses in the past, is currently loss-making and will continue to be so in the medium term, so it should lower its cost base and exit or reduce capacity in unprofitable segments of the markets in which it operates.

(317) Point 40 of the 2004 Guidelines provides that 'the degree of reduction must be established on a case-by-case basis. The Commission will determine the extent of the measures necessary on the basis of the market survey attached to the restructuring plan and, where appropriate on the basis of any other information at the disposal of the Commission including that supplied by interested parties'.

(318) The Austrian authorities have indicated that Austrian Airlines introduced the 'Go4Profit' restructuring programme from 2006, by which it reduced its fleet and discontinued a number of long-haul routes. Long-haul capacity was reduced by some […]. The workforce was reduced by […] posts or some […], while the fleet size fell from […] aircraft.

(319) In this regard, the Commission notes that the 'Go4Profit' programme was started in 2006 and continued in 2007. Therefore, it cannot really be seen as one continuous plan with the measures notified in December 2008 and revised in April 2009. Accordingly, and for the reasons set out in paragraph 293, the Commission will take only capacity reductions implemented since 2008 into consideration as compensatory measures.

(320) During 2008, scheduled capacity was cut by some […], while charter flights were reduced by […], which corresponds to an overall capacity reduction in terms of ASK of […] compared with the previous year.

(321) In the restructuring plan notified in December 2008, Lufthansa envisaged […].

(322) Furthermore, further restructuring measures were taken in early 2009, resulting in further capacity reductions of […] on scheduled routes (both by cutting routes and by thinning out flight connections) and […] on charter routes. This has resulted in an overall capacity reduction in terms of ASK of […] from 2008 to 2009. It should, however, be noted that the restructuring plan is based on the assumption that market developments will reverse in 2010 and capacity increases will follow.

(323) As a compensatory measure, the Austrian authorities have offered a 15 % reduction in the total available seat kilometres (using the total available seat kilometres in the 2007 financial year as the basis for comparison) by Austrian Airlines (including its subsidiaries) from the beginning of 2008 until 31 December 2010. This includes a considerable reduction in its charter operation, with the available seat kilometres being reduced by […] by the end of […] when compared with […].

(324) Furthermore — in line with the Commission's requirements — the increase in available seat kilometres after 2010 will be limited to the average growth rate observed for airlines belonging to the Association of European Airlines. This limitation will remain in force, either until the end of 2015 or until such time as Austrian Airlines achieves EBIT break-even, if this occurs before the end of 2015.

(325) To allow the Commission to monitor compliance with this cap on growth, annual reports are to be submitted to the Commission no later than the end of March of the year following that covered by the report.

(326) The Commission notes that, although the aviation market experienced a sharp downturn at the beginning of 2009, the capacity reductions and cap on growth must be assessed over the entire period for which they apply, taking into account the potential for market recovery from 2010, resulting in a further decrease in the airline's market share. The Commission also notes that, over the period of the planned restructuring, the fleet will be reduced from 98 aircraft in 2008 to […] aircraft in 2011. In this regard, the Commission notes that […].

(327) Furthermore, the Commission is of the opinion that, given the close link between the State aid linked to the Austrian State's sale of its stake in the Austrian Airlines Group and the merger of Lufthansa and Austrian Airlines, the compensatory measures envisaged in connection with the State aid must be assessed in the light of the compensatory measures proposed as part of the ongoing merger control procedure ([43]).

(328) Lufthansa and Austrian Airlines have put forward certain compensatory measures in the context of the merger decision being taken in parallel, such as a further release of slots at various capacity-constrained airports to allow one or more new market players to operate a new or additional competing connection. Accordingly, Lufthansa, Austrian Airlines and their respective subsidiaries undertake to make time slots ([44]) available under a special procedure at Vienna, Stuttgart, Cologne, Munich, Frankfurt and Brussels airports for routes for which the Commission has identified competition concerns ([45]) (hereinafter the identified routes).

(329) The number of slots to be made available should enable a new airline ([46]) to operate the identified routes at the following frequencies:

— Vienna-Stuttgart: up to three (3) connections a day,

— Vienna-Cologne/Bonn: up to three (3) connections a day, but not more than 18 connections a week,

— Vienna-Munich: up to four (4) connections a day,

— Vienna-Frankfurt: up to five (5) connections a day,

— Vienna-Brussels: up to four (4) connections a day, but not more than 24 connections a week.

(330) These compensatory measures will allow the probable, timely entry or expansion of competitors on the routes concerned and will therefore restrict the market position of the merged company.

(331) Given the above, it is the Commission's view that, in the particular circumstances of the present case, the compensatory measures proposed as part of the merger control decision, namely the proposed capacity reduction and the cap on growth after 2010, together constitute sufficient compensatory measures to counteract the market distortions accompanying the restructuring.

7.1.6. *Additional conditions and commitments*

(332) In accordance with point 46 of the 2004 Guidelines and point 40 (second sentence) of the 1994 Aviation Guidelines, the Commission may impose conditions and obligations in addition to the compensatory measures in order to ensure that the aid does not distort competition to an extent contrary to the common interest.

(333) As previously noted, the Commission has observed that the Republic of Austria retains a number of bilateral air transport agreements with certain third countries which do not recognise the Community designation.

(334) The vast majority of bilateral air transport agreements with third countries already contain the Community designation clause, either through bilateral negotiations or by means of a horizontal agreement. In this regard, the Austrian authorities, aware of their obligations under Community law, have undertaken to terminate the agreements or renegotiate them in accordance with the provisions of Regulation (EC) No 847/2004 of the European Parliament and of the Council of 29 April 2004 on the negotiation and implementation of air service agreements between Member States and third countries ([47]).

([43]) Case COMP/M.5440 — Lufthansa/Austrian Airlines.

([44]) i.e. the authorisation issued to an airline to use an airport's infrastructure on a certain day and at a certain time for the purpose of take-off or landing.

([45]) Such concerns exist for the routes between the following cities: Vienna-Stuttgart, Vienna-Cologne, Vienna-Munich, Vienna-Frankfurt and Vienna-Brussels.

([46]) Defined as 'any airline or airlines that are members of the same alliance (with the exception of the two combining parties and all airlines controlled by them) offering new or additional competing air transport services either individually or collectively through code sharing'.

([47]) OJ L 157, 30.4.2004, p. 7.

(335) During the course of the investigative procedure, the Commission was made aware of the fact that Austrian Airlines owns 51 % of the shares in Schedule Coordination Austria GmbH (SCA).

(336) In the opinion of the Commission, this relationship could be problematic, as Regulation (EC) No 793/2004 ([48]) (the 'EU Slot Regulation') provides as follows (Article 4): 'The Member State responsible for a schedules facilitated or coordinated airport shall ensure: (a) that at a schedules facilitated airport, the schedules facilitator acts under this Regulation in an independent, neutral, non-discriminatory and transparent manner; (b) the independence of the coordinator at a coordinated airport by separating the coordinator functionally from any single interested party. The system of financing the coordinator's activities shall be such as to guarantee the coordinator's independent status; (c) that the coordinator acts according to this Regulation in a neutral, non-discriminatory and transparent way'.

(337) The Commission is of the opinion that functional separation means, among other things, that the coordinator should act autonomously from, not be instructed by and not have a duty to report back to the airport managing body, a service provider or any air carrier operating from the airport concerned. The Commission further considers that the system of financing the coordinator's activities should be set up in such a way that the coordinator is financially autonomous from any single party directly affected by or having an interest in its activities. The coordinator should therefore keep separate accounts and budgets and not rely only on the airport managing body, a service provider or a single air carrier to finance its activities.

(338) In this regard, the Commission notes that the Austrian authorities have agreed that Austrian Airlines will initiate a process to reduce its shareholding in SCA to 25 % and that Flughafen Wien AG, which currently holds 40 % of the shares in SCA, will not have a majority stake in SCA after this restructuring process. Austrian Airlines' reduced shareholding in SCA will not qualify as a substantial blocking minority under Austrian corporate law. The reduction must be completed by the end of the 2009 IATA summer season. The Commission observes that, in order to ensure the independence of the slot coordinator, the shares should be held by a third party, which is independent of both Austrian Airlines and Flughafen Wien AG.

7.1.7. *One time, last time*

(339) In opening the proceedings, the Commission noted that Austrian Airlines had received rescue aid authorised by the Commission. It also noted that neither Austrian Airlines nor any other company within the Group had received restructuring aid in the past.

(340) The Commission recalls that, pursuant to the rescue aid decision of 19 January 2009, the rescue aid (granted in the form of a 100 % guarantee for a loan of EUR 200 million) will be brought to an end when the Commission reaches a definitive position (by adopting this Decision) on the sales process/restructuring plan notified by the Austrian authorities ([49]).

(341) Furthermore, the Republic of Austria has undertaken not to grant Austrian Airlines or any part of the Austrian Airlines Group any additional rescue or restructuring aid within ten years of the date on which the rescue aid was granted or the end of the restructuring period,

HAS ADOPTED THIS DECISION:

*Article 1*

Subject to the conditions set out in Article 2, the restructuring aid granted by Austria in favour of Austrian Airlines is deemed compatible with the common market by virtue of Article 87(3)(c) of the EC Treaty, provided that the restructuring plan notified to the Commission is implemented in full.

*Article 2*

1. Austria shall take the necessary measures to ensure that Austrian Airlines reduces its overall capacity in terms of available seat kilometres (ASK) by 15 % of its January 2008 level by the end of 2010. Thereafter, Austrian Airlines' capacity growth shall be capped at the average of the growth rate observed for airlines belonging to the Association of European Airlines. This cap shall remain in force until the end of 2015 or until Austrian Airlines reaches EBIT break-even, whichever comes first.

2. Austria shall take the necessary measures to ensure that Austrian Airlines reduces its shareholding in Schedule Coordination Austria GmbH to 25 % by 30 September 2009 and that neither Flughafen Wien AG nor any other party controlled by Austrian Airlines or Flughafen Wien AG has a majority in Schedule Coordination Austria after the restructuring process.

3. Austria shall take the necessary measures to ensure compliance with the conditions set out in the merger decision in Case COMP/M.5440 — Lufthansa/Austrian Airlines.

([48]) See footnote 28.

([49]) See recital 15.

4. Austria shall terminate bilateral aviation agreements which do not contain the Community designation clause or renegotiate them in accordance with Regulation (EC) No 847/2004. Austria shall inform the Commission of measures taken to ensure the conformity of such agreements with Community law regarding the recognition of the Community designation.

5. Austria shall submit a report to the Commission by 31 December 2009 on the progress and management of the restructuring plan and on the measures taken to reduce Austrian Airlines' shareholding in Schedule Coordination Austrian GmbH. By 31 April 2010, Austria shall also indicate the steps taken to implement Article 2(4). Every year until 2015, Austria shall submit annual reports to the Commission on the implementation of the restructuring plan and the capacity growth rates.

*Article 3*

This Decision is addressed to the Republic of Austria.

Done at Brussels, 28 August 2009.

*For the Commission*
Antonio TAJANI
*Vice-President*