# The Application of EU State Aid Rules in Hungary: an overview of individual Commission decisions (2004 – 2012)

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## INTRODUCTION

The developments of the decade since Hungary's accession to the European Union enable us to take stock and reflect, first in the literature, on the operation of the EU state aid regime in Hungary. It is hoped that our observations will be found useful by both the Hungarian and the international audience.

This work does not touch upon the historical developments of the accession process and the interim procedures created in the Treaty of Accession. Although most aid is provided through state aid schemes and not through individual aid decision, this is avoided for two reasons. First, the high number of these schemes prevents their analysis in the confines of the present Chapter. Second, in contrast to the monitoring of individual aid within the national system, there is only very limited information available on the application of these schemes. As an exception, we will, however, look at the aid schemes concerning aid granted during the current financial and economic crisis because their application led to some interesting state aid cases in Hungary during this period.

The analysis of sectoral decisions, like agriculture and transport, also falls outside the scope of this Chapter.[2] The sensitive issue of state aid for the sale of agricultural land, which was the subject of Case C-121/10 before the EU Court, will be left out as well.[3]

In the state aid register of the Commission, 256 Hungarian cases are included.[4] We will focus only on the most important individual decisions of the Commission. It is not only the number of Hungarian state aid cases which is comparatively high. When measured as a percentage of the Hungarian GDP, the volume of the registered state aid cases from Hungary according to the 2011 State Aid Scoreboard amounted to nearly 2.3 per cent of the GDP followed by Malta with 1.4 per cent.[5] The Scoreboard also puts Hungary as the first in the total provision of non-crisis aid to industry and the services economy among the 27 Member States.[6] This phenomenon is not new. Already in 2004, Hungary was amongst the three biggest grantors of state aid among the 10 new Member States.[7] According to information given by the State Aid Monitoring Office (SAMO) in the Ministry of National Development, this figure contained all the existing aid that had been approved under the Treaty of Accession and the aid given to public transport companies under contracts for the provision of services of general economic interest (mainly to the Hungarian State Railways' passenger transport company (MÁV-Start Zrt.). and to the Budapest Transport Corporation (formerly BKV Zrt.,

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[2] For example: NN 73/2008- Sharing of loans between MÁV Zrt and MÁV-TRAKCIÓ Zrt. OJ C 109/5, 13.5.2009 was decided under the Community guidelines on State aid to railway undertakings, OJ C 184, 22.07. 2008.p. 13, SA 33053 (2011/N) Development tax benefit to Pannonia Ethanol Zrt., OJ C 88/4, 24.3.2012. was decided under the Community guidelines for State aid in the agricultural and forestry sector 2007-2013.

[3] C-118/10. Commission v Council, Judgement of the Court (Grand Chamber) of 4 December 2013, not yet reported

[4] downloaded on 20.07.2012.

[5] Report from the Commision. State Aid Scoreboard. Report on state aid granted by the EU Member States-Autumn 2011 Update, Brussels, 1.12.2011 COM (2011) 848 final, p. 4.

[6] p.61 of the Report

[7] IP/04/1365, 16/11/2004

now BKK Zrt.)). Without these sums, the amount of new aid granted by Hungary becomes considerably lower.[8]

This study first provides a brief historical background to state aid control, and sets out the current institutional and procedural issues in Hungary. Next, individual Commission decisions will follow. Decisions are not analysed in a chronological order, but alongside reoccurring problems in the interpretation and application of State aid law. After discussing the case-law on large inverstment projects, the distinction between existing aid applicable after accession and new aid will be dealt with. It was repeatedly a difficult issue how to apply the market investor test, that is why we summarise the case-law on it in an indepenedent subchapter. Lastly, aid given in the financial sector will close this chapter. At the end of each subchapter interim conclusions will guide the reader.

## A BRIEF HISTORY OF STATE AID CONTROL IN HUNGARY

From 1994, under Article 62 of the Europe Agreement[9] state aid provided by Hungary was incompatible with the functioning of the Agreement monitoring of which was entrusted upon the Association Council. In its Decision 30/1998, the Hungarian Constitutional Court declared that in the implementation of Article 62 Hungarian authorities and courts are not bound directly by the rules of the EC Treaty.[10] In 1999, a Government Decree created the prior notification obligation for providers of state aid and established the State Aid Monitoring Office within the Ministry of Finance following the legally imposed obligation of the Minister of Finance to ensure that state aid is granted in accordance with Community law.[11] In the period between 1999 and 2001, local authorities were not covered by the prior notification decree and SAMO did not have power to initiate the suspension or recovery of non-notified aid. From 2002 until accession, the Act on Public Finances[12] contained a general prohibition on granting state aid in Hungary. A Government Decree set out the detailed substantive and procedural rules and provided the legal basis for the suspension and recovery of illegal aid by SAMO.[13] National law now mainly contains procedural rules[14] and in 2004 substantive state aid rules were abolished from national legislation giving way to the relevant EU provisions (Article 107 TFEU, ex Article 87 TEC) subject to the derogations granted in the Treaty of Accession. The institutional framework provided by SAMO remained unchanged because it had managed to concentrate genuine expertise in the application of state aid law and its system of compulsory notification had functioned efficiently.[15] In the following, we briefly examine the main elements of the national legislation in force.

[8] part of the aid is price supplement, provided to the company as a compensation for the difference between the prices paid by special consumer groups and genuine costs of the company.

[9] Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and Hungary, of the other part OJ L 347,31.12.1993, p. 2-266.

[10] Decision 30/1998. (VI.25.) of the Constitutional Court. For a detailed account of the decision see the Chapter by T. Toth in this volume.

[11] Government Decree No 76/1999. (V.26.) on the prior notification obligation of state aid provided to undertakings and its examination on the compatibility with the Europe Agreement

[12] Act XXXVIII of 1992

[13] Government Decree No 163/2001. (IX. 14.) on the unification of exemption from the prohibition of state aid granted to undertakings. The decree 'was considered as a kind of State Aid Code' in Hungary, State Aid Control in Hungary by Eszter Hargita and Zsuzsanna Remetei Filep. 2004 European State Aid Law Quarterly 585 2004., p. 585.

[14] The first regulation after accession was Governmental Decree No 85/2004. (IV.19) on the procedure regarding state aid within the meaning of Article 87 (1) of the Treaty on establishing the European Community and the regional aid map.

[15] State Aid Control in Hungary by Eszter Hargita and Zsuzsanna Remetei Filep. 2004 European State Aid Law Quarterly 585 2004., p. 586.

INSTITUTIONAL AND PROCEDURAL ISSUES

After several reorganisations of government departments since 2004, SAMO is now part of the Ministry of National Development and operates as a department of the Office of the Secretary of State for the Review of High Priority State Contracts and State Aid. Although SAMO is part of the Ministry, it is granted special status by legislation. The binding opinions of the Office are signed by the Head of the SAMO and not by the Minister. Before delivering its opinion, the Office is not obliged to consult with any other department within the Ministry or with any other body within government. Nonetheless, consultation is a widespread practice.

In connection with the EU state aid regime, SAMO's role is twofold. When it instructs parties on EU state aid matters SAMO acts as the agent of the Commission in Hungary. On the European level, as the current Director-General of the Office Zsuzsanna Remetei-Filep puts it, its role is "to defend the official position of the Hungarian government and Hungarian national interest."

SAMO has a staff of around 15 officials. A separate unit was created within the Ministry of Rural Development to cover sectoral cases. Its tasks and procedures are regulated in a separate Government Decree.[16]

The procedure relating to the application of EU state aid rules by SAMO was first regulated in 2004 in a Government Decree.[17] After several amendments, a new Decree was enacted reflecting the modification of the relevant EU rules. Government Decree 37/2011 contains procedural rules relating to the prior notification of state aid, sets out cooperation rules between SAMO and grantors of state aid, defines the Hungarian regional aid map, and prescribes the obligatory elements of state aid measures[18]. The rules on the compensation for services of general economic interest and the temporary rules applicable in the current financial and economic crisis is are also found in the Decree.

The relevant procedural rules oblige all aid grantors to notify any draft state aid measure to the Minister of National Development before the proposed measure is discussed by the representative body of the grantor or before it is submitted for public consultation. The *Vademecum* issued by SAMO on state aid rules mentions the late notification of draft aid measures as a common problem.[19] In most instances, draft aid measures are not notified to SAMO until after consultations within the administration, i.e. among several ministries, have already commenced. Often, SAMO may only be notified at an even later stage, directly before the final approval of the aid measure.[20] The decree contains a national stand-still clause similar to the one applied in EU law. On draft measures, the Minister will form a preliminary opinion. The opinion will be called a statement if the draft measure is compatible with EU law under the *de minimis* rules or under the EU block exemption regulations. SAMO will submit to the EU Commission the summary information on the implementation of aid measures in

[16] Government Decree No 4/2009 (I.10.) on the procedure of notification of agricultural and rural development state aid to the European Commission. The Department of the Ministry is called Vidékfejlesztési Minisztérium Agrárszabályozási Főosztály

[17] Government Decree No 85/2004. (IV.19.) on the procedures relating to State aid measures under Article 87 (1) of the EC Treaty and the regional aid map. Official Gazette (Magyar Közlöny) 2004/49. p.4348.

[18] Government Decree No 37/2011. (III.22.) on the procedures relating to State aid measures and the regional aid map. Official Gazette (Magyar Közlöny) 2011/30.

[19] Vademecum on State aid rules: Procedural rules. Budapest, 2009. State Aid Monitoring Office. Útmutató az állami támogatásokhoz kapcsolódó versenyszabályokról: Eljárási szabályok. Budapest, 2009. Támogatásokat Vizsgáló Iroda, http://www.atj.versenyjog.com/files/issues/2009/4/ATJ_4.pdf. (downloaded on 10 August 2012) p.19.

[20] Notification and cooperation between the Member States and the Commission takes place in electronic format, using the so called SANI electronic system.

cases of where the block exemption regulations apply. Aid schemes that fall under the scope of the *de minimis* rules are registered by SAMO and it is also responsible for reminding grantors that the beneficiary should be informed about the character of the aid and that the administrative obligations concerning the provision of data on the use of aid must be complied with. In cases where the aid measure is exempted under the group exemption regulations it is a common problem that the grantor often fails to comply with its obligation to complete and submit the appropriate State aid notification software (SANI) forms. [21]

If the draft aid measure does not fall under a block exemption regulation or *de minimis* rules, the opinion of the Minister will be called a preliminary opinion. Draft measures eligible for official Commission notification will be notified by the Minister. The Decree explicitly refers to the EU rules which hold that notifiable state aid cannot be implemented before its approval by the Commission. The Minister may also propose amendments to the body planning to grant the aid. If SAMO finds that the provisions of an aid measure do not comply with the EU rules, the notification cannot be submitted to the Commission unless the Government definitely instructs SAMO to forward the aid measure to the Commission. According to the available information, such an event has not taken place in the practice of state aid control in Hungary.[22] Under Act CXCV of 2011 on the Treasury, state aid may only be paid out from the Treasury's accounts if a positive SAMO opinion has been obtained.[23] For producing that, under the general procedural rules SAMO has 30 days.

SAMO actively engages in giving guidance and assistance to aid grantors as early as the preparation of the rules of their aid plan and later in the course of the notification process. Since the opinions of SAMO are based on EU law, it places much emphasis on drawing the attention of grantors to the risks associated with granting state aid under the EU legal framework. In its preliminary opinion, SAMO may recommend the modification of the measure in question in order to ensure its compatibility with the EU rules. In such an event, SAMO may rely on its powers which are available to demand additional information from grantors in order to obtain a more detailed picture of the planned measure. SAMO opinions are not made public.

The responsibility for notification falls on the state aid grantor. SAMO will keep the aid grantor informed of any additional questions raised in the process and it will forward the decision of the Commission concerning the notified aid plan. The Commission decision will also be notified by the Minister of National Development to the bodies concerned.

In addition to basic state aid control, SAMO is also responsible for the control of so-called structural grant sub-schemes. This is when the EU co-finances domestic state aid schemes from the EU Structural Funds and the conformity with state aid rules of the limb financed by the Member State concerned has to be checked *a priori*. In such circumstances, the calls for application of an Operational Programme under the National Development Plan are scrutinised beforehand by SAMO. Fulfilling this task represents a considerable proportion of the workload of SAMO[24].

In Commission procedures initiated against Hungary under EU state aid rules the position of the Hungarian government will be represented by SAMO officials. In high priority cases, the legal position represented by SAMO will be approved *ex ante* by an official of the

[21] p. 19

[22] footnote 16 of Eszter Hargita: A magyar állami támogatási ellenőrzési rendszer kialakítása és működése, 23. oldal in : Az állami támogatási politika jelene és jövője. Állami Támogatások Joga 10 (2011/2) 13-28. Összefoglalta: Staviczky Péter. Vademecum p.28.

[23] Act CXCV of 2011 on the Treasury. Section 50 (6): If aid from the budget is partly or fully based on a directly applicable legal norm of the EU, the aid can be provided if the applicant of the aid claim fulfills the provisions of the norm. Additional conditions can be attached to the provision only if the EU legal act permits it.

[24] see the graph bellow

national administration. Such an approval may come from the State Secretary of the Ministry of National Development, from the Minister or from the Head of Government.

SAMO has further duties in administering the system which includes the compiling of data for the annual report on state aid and for the State Aid Scoreboard published by the Commission. SAMO also formulates the Hungarian position in connection with measures proposed by the Commission in amendments regarded as appropriate to existing schemes and it plays a leading role in representing the national position in the processes for adopting new state aid legislation in the EU. SAMO is under obligation to keep aid grantors informed about the decisions concerning the recovery or the suspension of aid schemes or of individual aid assessed by Commission. SAMO monitors whether all necessary steps have been taken in the execution of such decisions. SAMO regularly publishes discussion papers on state aid issues in the State Aid Law Journal. The journal is the primary Hungarian language source of State aid law.

To inform Hungarian grantors of their rights and duties under EU state aid law and to offer a commentary on Hungarian procedural rules, SAMO in 2009 prepared a detailed guidance document called the *Vademecum* on State Aid Rules.[25] Primarily, the *Vademecum* draws the attention of grantors to the typical errors in the interpretation and application of state aid rules. This is an important element of SAMO's compliance strategy in which particular emphasis is placed on helping grantors design EU compliance state aid measures. SAMO organises regular training for officials in central and local administration.[26] Individual training sessions often address special topics or developments in the application of state aid law as requested by the civil servants working in the field.

Currently, SAMO has 13 staff members which is going to be increased to 16 because of the heavy workload. Nine of the current positions are financed from EU Structural Funds. The case handlers working in those positions deal mainly with EU co-financed aid issues. More than half of the staff is a law graduate, the others are economists. SAMO operates as a unitary agency and it is not structured in units or departments. Except for simple cases, teams of two or three officials work together on the same dossier. Each case handler has a designated field of expertise (e.g. regional aid, training aid, employment aid), but all staff members are regularly called to work on cases from other areas.

In administering cases, SAMO relies on the central electronic registry of the Hungarian Government. Currently, there is no electronic state aid registry of the opinions issued by SAMO. This is clearly detrimental to the transparency of SAMO's operation and the public is unable to access information regarding the number of cases closed as ‘not aid’ or exempted under the group exemption regulations.

The most pressing challenges faced by the Office were identified by the Chief Advisor of SAMO as the following.

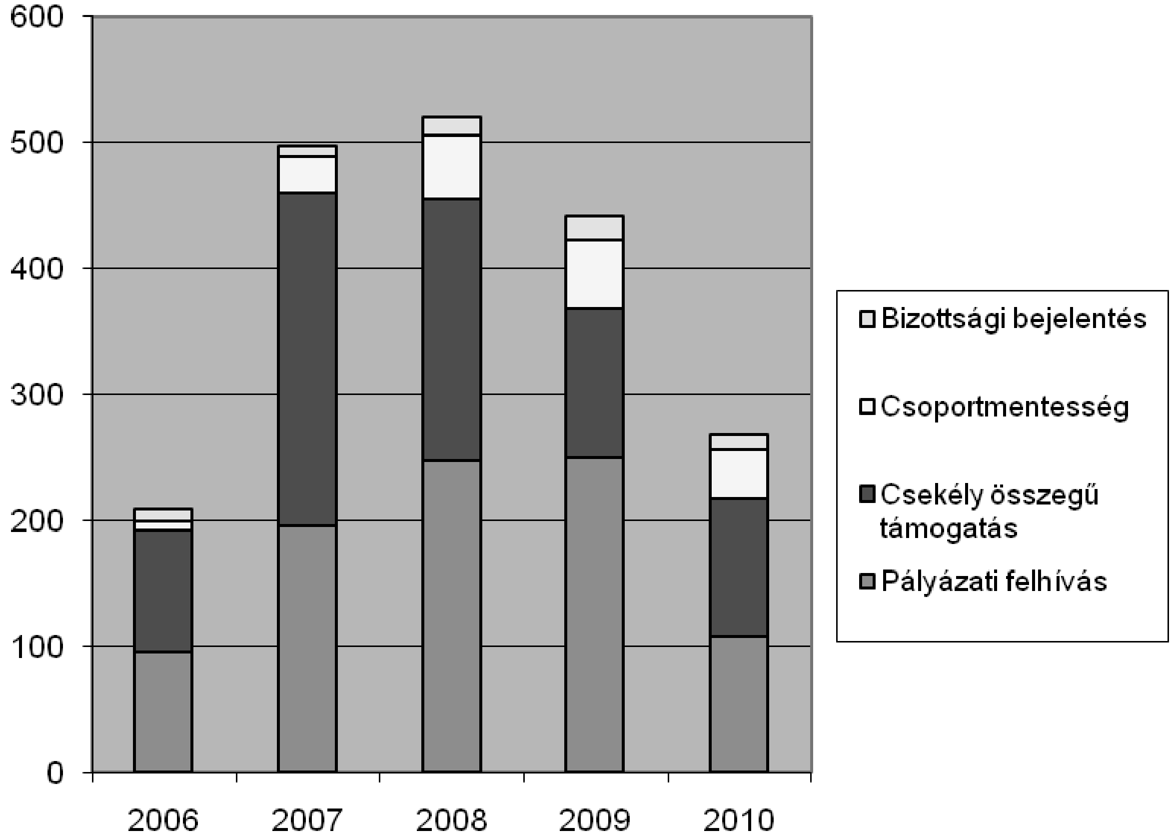
*The main challenges for us... is the lack of knowledge concerning State aid rules, especially in case of indirect forms of aids. In borderline cases when it is not clear whether it is a State aid measure or not, it is difficult to advise the potential aid grantor to notify or not to do that....If there is a change in the State aid rules..., it is not always easy to convince the aid grantors that it is their interest to modify the legislation as soon as possible. And of course, in the eyes*

[25] Vademecum on State Aid Rules: Procedural rules. Budapest, 2009. State Aid Monitoring Office. Útmutató az állami támogatásokhoz kapcsolódó versenyszabályokról: Eljárási szabályok. Budapest, 2009. Támogatásokat Vizsgáló Iroda

[26] According to information from the SAMO on average they organise 10-12 trainings per year.

*of the potential aid grantors/beneficiaries, we are the bad guys who are not always able to give direct answers whether a measure is containing aid or not...*[27]

The workload of SAMO is clearly indicated in the next graph concerning the number of cases investigated between 2006 and 2010.[28]




The chart indicates that the scrutiny of calls for application under the group exemption regulation takes up a considerably large portion of the workload of SAMO.[29]

Regarding the effectiveness of SAMO, it must be noted that so far the Commission initiated five *ex post* investigations of group exempted state aid in Hungary.[30] In each case, the investigations were closed without formulating doubts regarding the lawfulness of the aid exempted under EU law by SAMO. The Commission has not conducted on-site monitoring of state aid control in Hungary.

[27] Eszter Hargita: A magyar állami támogatási ellenőrzési rendszer kialakítása és működése in: Az állami támogatási politika jelene és jövője. Állami Támogatások Joga 10 (2011/2) 55-60, 60.

[28] Number of investigations based on calls for application (pályázati felhívás), *de minimis* aid (csekély összegű támogatás), group exempted aid (csoportmentesség) and notification to the Commission (bizottsági bejelentés). Source: Az állami támogatási politika jelene és jövője. Állami Támogatások Joga 10 (2011/2) 13-28. Összefoglalta: Staviczky Péter. Hargita Eszter: A magyar állami támogatási ellenőrzési rendszer kialakítása és működése, 23. oldal.

[29] The National Development Agency and local governments are the most important grantors of group exempted state aid.

[30] It has monitored aid for example in the field of regional aid, R & D aid, aid to culture. The practice of the Commission is that it asks SAMO for the entire list of beneficiaries and picks up 3-4 cases to investigate thoroughly.

In the control of state aid provision, SAMO fulfils a crucial role as the specialist knowledge required in state aid administration is absent within the central or local public administration. Clients are usually advised by the 'big four' consultancy firms or by the few law firms specialised in EU state aid law. The quality of notifications submitted to the Commission largely depends on the experience and special knowledge of the consultants aid beneficiaries are able to hire.

In 2003, after the amendment of the Act on Public Finances it became obligatory to publish the name of the beneficiary, the amount of state aid, the subject of the contract and the location of the investment in the Official Journal of Hungary (*Magyar Közlöny*) or on the internet page of the grantor not later than 60 days after the decision granting the aid was made. The relevant information must be kept for at least 5 years after publication. The new Act on Freedom of Information formulates this obligation as follows.

*The name of the beneficiary, the objective of the funding, its amount, and data concerning the place of implementation of the funded programme regarding non-normative, specific, operational and development funding granted from the budget of the body undertaking public duties shall be published on the 60th day following decision and shall be safeguarded for 5 years after publication.*[31]

A new super-agency created by the act, called Hungarian Authority for Data Protection and Freedom of Information, is responsible for monitoring the application and the enforcement of this provision.

It should be noted that information about the acivities of SAMO is rather limited. Its web page does not contain substantial information about its activities. Unlike independent public bodies, SAMO has no obligation to publish an annual report as it is part of the Ministry of National Development.

Finally some interim conclusions are drawn. As regards the legal framework regulation of this topic at the level of Government Decree is approriate. Given that SAMO is part of the public administration, its rights and duties are regulated by the Government. Under a different approach its tasks could have been allocated to an independent agency, for example the Hungarian Competition Authority that is a state administrative authority, independent of the Government. The advantage of being part of the central administration is that SAMO can react promptly and also informally to draft aid. It directly receives from and provides information to the Meetings of the Government and its preparatory assembly, the Meeting of the Ministers of State on state aid issues. Regulation of the Governmental Decree on the 30 days time-limit to close its procedure is superflous as state aid grantors usually need urgent advice on state aid issues. As regards the role of SAMO in the application of state aid law every source has confirmed that the notification of draft aid does not happen early enough. Late notification puts SAMO at a disadvantage and puts pressure on it for quick approval.
According to the information available, SAMO has good relations within the public administration, with other Ministries, public bodies, and with the local administrations too. Among the public bodies, the National Development Agency and the Hungarian Development Bank take an active role in the allocation of state and EU resources. The National Development Agency bears responsability for allocation of resources in EU co-financed projects under the national development plan (called New Széchenyi Plan). Relationship with the Hungarian Development Bank (MFB) is very important as it a 100% state-owned public

[31] Annex I of Act CXII of 2011. The new Act CXCV of 2011 on Public Finances with its Section 112 modified the original text of the 2011 Act on Freedom of Information.

undertaking. Through MFB the State implements its strategic decision in the economy. Relations with the local administration becomes more important with regard to regional aid covered by state aid schemes. Contacts with the Hungarian Central Bank are also frequent.
Informal contact with SAMO via e-mails or telephone calls is an usual business.
The role of SAMO in forming a preliminary opinion is rather reactive. Once professional/political decision within the public administration is taken about granting the aid, SAMO scrutinises the plan. By using its advisory role SAMO influences the decision-makers to a certain extent, but does not get involved in political decisions. In case the Commission has opened proceeding against Hungary, it represents the official position already taken by political decision-makers (depending on the importance of the case, decisions are taken on different ministerial or governmental levels).
The activity and professional experience of SAMO was recognised by the Commission, for example in the press release related to the Hankook case.

INDIVIDUAL COMMISSION DECISIONS ON AID GRANTED IN HUNGARY

This section of the Chapter examines the relevant Commission decisions in the following structure. First, we discuss the cases on large, economically significant investment projects. They all involve the application of the Commission's Multi-sectoral framework on regional aid for large investment projects (Multi-sectoral Framework)[32] and they are evaluated separately by the Commission from the rest of regional aid cases. The Member States are obliged to notify these measures under the Framework, and the assessment of the relevant aid measures, instead of focusing on the vague general concepts, follows the rather technical pathway of identifying relevant markets and market shares of the undertakings involved. Secondly, distinction between existing aid applicable after accession and new aid will be made, as it was crucial after 1 May, 2004, whether incompatible aid should be abolished or altered *pro futuro*, or it can be recovered from the beneficiary *ex ante*. The third subchapter will cover decisions where the market investor test was applied by the Commission. Finally, the application of state aid rules during the economic and financial crisis will be touched upon.

**Large investment projects**

Incoming foreign investment is administered in Hungary through the Hungarian Investment and Trade Agency.[33] In case it manages to secure subsidy from the Hungarian Government SAMO will get involved in the negotiation process to ensure that the subsidy providers, for example the Ministry for National Economy or the National Development Agency, observe EU state aid rules. Before the final decision is taken by the Government, SAMO presents its opinion on the compatibility of the subsidy with state aid law. Subsidies falling under the scope of the EU state aid regime need to be notified to the EU Commission for approval that they do not jeopardize the operation of EU single market.

*The 2006 decision on the aid to Hankook Tire*

[32] OJ C 70, 19.3.2002., p.8-20.
[33] Nemzeti Külgazdasági Hivatal

The Commission decision[34] authorized state aid of 92.6 million euros in the form of direct grants and a tax relief[35] to Hankook Tire Hungary, the fully owned subsidiary of Korean based Hankook Tire Corporation to build a new tyre production plant in Dunaújváros. The area qualifies as an assisted area by virtue of Article 107(3)a TFEU with an applicable aid intensity ceiling of 50 per cent. It was expected that the investment will create 1500 new direct jobs as well as up to 750 additional indirect jobs.

The Commission's decision to allow regional aid to large investment projects falling under point 24 of the Multi-sectoral Framework depends on the market power of the beneficiary before and after the investment and on the capacities created by the investment. To carry out the relevant tests, the Commission first has to provide appropriate product and geographic market definitions. In this case, the Commission instead of defining the product market as such decided to look at the data concerning the markets for original equipment and replacement tyres separately and taken together. The Commission also avoided defining the relevant geographical market but went on to examine compliance with point 24(a) of the Multi-sectoral Framework on the relevant product market at EEA-level. This, in principle, should give the smallest possible geographical market and thus the worst case scenario in case the aid. The Commission. thereafter, verified compliance with point 24(a) on the relevant product market at the worldwide level to make sure that its analysis covers all possible demarcations of the geographical market.

The treatment of the aid in this case shows that the Commission prefers to investigate possible aid scenarios instead of defining precise product and geographical markets. The highest market share found using this approach was around 10 per cent which is far below the 25 per cent regulated in the Multi-sectoral Framework. The capacity created by the project was established as less than 5 per cent of the size of relevant product market at EEA-level. The aid also met the other condition in the Multi-sectoral Framework that the aid beneficiary had to contribute at least 25 per cent level to the financing of the investment. The aid scheme was put into effect after the approval of the Commission with the obligation that the company maintains its investment for a minimum of five years. The Net Grant Equivalent of the aid was lower than the maximum aid intensity regulated under the Multi-sectoral Framework.

The relevant press release of the Commission was not hesitant to praise the performance of SAMO in the procedure. It stated that

*The Commission has been able to clear the aid after an investigation lasting less than five months thanks to the high quality of the notification and excellent cooperation with the Hungarian authorities.*[36]

Soon after the opening of the new plant and the start of production new emerged alleging unfair dismissals of trade union activists who had complained that certain employment protection rules were not followed and wages were incorrectly calculated. The Hungarian Employment Office conducted investigations at the premises of the company and imposed fines for the breach of employment protection rules. The officials of the Government were quick to confirm that the implementation of the subsidy package is (also) conditional on

[34] Authorisation for State aid pursuant to Articles 87 and 88 of the EC Treaty. Cases where the Commission raises no objections. State aid N 34/2006- Aid to Hankook- MSF 2002 (Hungary). OJ C 232., 27.9.2006., p. 2., IP /06/828, Brussels, 23 June 2006.

[35] Firstly, the Ministry of Economy and Transport gave a grant based on the Earmarked scheme for investment promotion. Secondly, the Ministry of Employment and Labour gave a subsidy based on a Scheme for job creation and job maintenance. Thirdly, the Ministry of Finance allowed a tax allowance based on a scheme for Development Tax benefit.

[36] IP/06/828, Brussels, 23 June 2006

Hankook Tire Hungary observing Hungarian law.[37] As a consequence of the irregularities, the Ministry of Social Affairs and Labour withdrew the 143 million HUF training aid from the company.[38]

*The 2007 decision on the aid to Mátrai Erőmű*[39]

The proposed aid was intended to subsidise the construction of a new increased capacity unit at *Mátrai Erőmű* for the production of electricity based using domestically mined lignite. The new unit was supposed to replace the old units at its existing electricity generation plant which had a low efficiency and damaging CO2 emissions. The investment project promised the creation of 80 new jobs and the continuation of 200 existing jobs which were threatened by the impending closure of the existing units. Since the aid amount exceeded the notification threshold of the Multi-sectoral Framework, compliance of the proposed aid with the Framework had to be assessed.

In its decision, the Commission found that the investment aid to be paid out until 2020, worth 47 million EUR in the form of a tax relief, was in line with the legal framework on regional aid for large investment projects. Aid intensity was compatible with the regional aid ceiling and the beneficiary's market shares did not exceed the threshold of 25 per cent of the total market. The capacity increase created by the project was also found to be less than 5 per cent of the size of relevant product market and the own contribution of *Mátrai Erőmű* to the investment was over 25 per cent of the eligible costs.

The project and the decision of the European Commission was heavily criticised by environmental groups, especially the World Wide Fund for Nature (WWF).[40] According to their opinion, lignite-based electricity production is unsustainable and it is one of the most polluting method to produce electricity. In 2010, the expansion project was cancelled by the owners of *Mátrai Erőmű*.[41] The owners took into account the rate of return of the project, the increasing strictness of environmental standards in EU law and the requirements of EU climate change policy.

*The 2008 decision on aid to IBIDEN*

IBIDEN Hungary Gyártó Kft., the Hungarian subsidiary of IBIDEN Co. Ltd., which has its headquarters in Japan, produces ceramic substrates for Diesel Particulate Filters (DPFs) in Dunavarsány.[42] The company was granted 9.56 million EUR in subsidy by the Hungarian Government for setting up a new manufacturing plant in Hungary. The Commission's

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[37] http://index.hu/gazdasag/magyar/hnkk070718/, http://index.hu/gazdasag/magyar/0924kokaj/ http://index.hu/gazdasag/magyar/hnk070921/ (downloaded on 03.07.2012.)

[38] http://index.hu/gazdasag/magyar/hnk071127/ (downloaded 04.07.2012.)

[39] N 907/06 Aid to Mátrai Erőmű Zrt, OJ C 227/3., 27.9.2007.,. IP/07/1085, Brussels, 12 July 2007,

[40] http://vallalkozoi.negyed.hu/uzletinegyed/hirek/20081002-tilatakozik.a-wwf-a-matrai-eromu-bovitese-ellen.html (downloaded 04.07.2012), http://wwf.hu/archivum/2008ev/1/milliardokat-fustol-el-az-allam http://wwf.hu/archivum/2008ev/a-wwf-ellenzi-aligniteromu-boviteset (downloaded on 04.07.2012)

[41] http://vallalkozoi.negyed.hu/vnegyed/20101028-energiaipar-nem-epitik-meg-a-matrai-eromu-uj-blokkjat.html (downloaded 04.07.2012.)

[42] DPFs, which are used for treating soot and other insoluble particulate matter in exhaust emissions, are one key part of the exhaust gas treatment system of diesel passenger cars and light duty trucks. The other key part is Diesel Oxidation Catalysts (DOC), which treat gases (i.e. Carbon Oxides and Hydrocarbons) and to a certain extent the soluble organic fraction (SOF) of particulate matter.

decision found the proposed aid incompatible with EU law.[43] It established that the relevant product market covers only substrates for DPFs to be fitted in the exhaust systems of diesel passenger cars and light duty trucks. The Commission also established that the market share of IBIDEN in the DPF market in Europe substantially exceeds the 25 per cent threshold established in the Multi-sectoral Framework both before and after the investment. The high market share established for IBIDEN can be regarded as adequately reflecting the position of the company in the global DPF market. It is one of the two major filter substrate manufacturers in the world. The aid would have strengthened even more IBIDEN's leading position in this market. The Commission also took into account that IBIDEN had already received aid worth 29.73 million EUR in the form of a direct grant and a corporate income tax allowance on the basis of existing regional aid schemes and the proposed aid was intended to supplement that aid. As the new aid had not been paid out, there was no need to decide on its recovery. Wishlade noted that procedures under the Multi-sectoral Framework are quite rare in EU state aid practice.[44] Since its introduction in 2002, until July 2007 a total of only 14 aid proposals were notified. Of these, in only one instance did the Commission open the investigative procedure, in the case of IBIDEN Hungary.[45]

*The 2009 decision on the aid to Mercedes-Benz*

The Commission decision[46] authorised until 2017 a 111.5 million EUR aid to Mercedes-Benz Hungary, owned by Daimler AG, for the construction of a new can manufacturing plant for the production of two new passenger car models in the Dél-Alföld Region in Hungary, a disadvantaged area eligible for aid under Article 107(3)(a) TFEU. The aid was granted in the form of a cash grant and a corporate tax allowance.[47] The company received further financial support for constructing railway access to the public railway network which amounted to around 0.8 million EUR.
The compensation mechanism included in the subsidy scheme covering significant exchange rate fluctuations affecting the Hungarian currency was a new element in financing an investment project in Hungary. It was added to the notified aid package for the purpose of compensating Mercedes-Benz Hungary for possible significant adverse effects of HUF/EUR exchange rate fluctuations in the economic environment after the 2008 crisis. Most of the eligible investments costs of Mercedes-Benz Hungary will incur in EUR, therefore, state aid must be received in EUR expressed as a percentage of the present value of the eligible costs incurred in EUR. Working with EUR/HUF exchange rates is, however, unavoidable as according to the Hungarian legislation the aid amount and aid intensity must be calculated and paid in HUF. This entails determining state aid in HUF *a priori* on the basis of the eligible costs calculated at a 'fixed' exchange rate applicable at the time of the application for the aid. The mechanism provides compensation for a possible decrease in the aid amount in EUR

[43] IP/08/670, Brussels, 30 April 2008, Commission decision 2008/830/EC of 30 April 2008 on State aid C 21/07 (ex N 578/06) which Hungary is planning to implement in favour of IBIDEN Hungary Gyártó Kft. OJ L 295/34., 4.11.2008.
[44] Fiona G. Wishlade: The Control of Regional Aid to Large Investment Projects. Workable Compromise Or Arbitrary Constraint? 2008 European State Aid Law Quarterly 495 2008
[45] p.502.
[46] Authorisation of State aid pursuant to Article 87 and 88 of the EC Treaty. Cases where the Commission raises no objections. HL C 28/2., 4.2.2010.
IP/09/1147, 16/07/2009
[47] As to the legal form of the aid, it is granted on four legal basis. The Ministry of Economy and Transport granted on the basis of a Hungarian aid scheme which is exempted under the Block Exemption Regulation for regional aid. The Ministry of Finance granted the tax allowance under Government Decree No 206/2006 on Development Tax Benefit. Incentive Agreement of October 2008 between the company and the Ministry for National Development and Economy on providing a cash grant.

terms in a situation when the planned investment volume in EUR is achieved. These eligible cost amounts are cumulated over the lifetime of the project and their final sum is determined after completion of the investment. Any increase in the eligible costs in EUR terms will not be compensated.[48]

...

*„ (57) The compensation mechanism ensures that the aid intensity remains the same as in a situation when both the eligible costs and the aid amount are fixed in EUR terms. ...Any increase in the eligible costs in EUR terms will not be compensated. It is also ensured that there is a "negative compensation" (i.e. a decrease in the aid amount in HUF) if eligible costs in HUF are lower than planned. Thus the mechanism applies in both ways ("positive" and "negative" compensation) to ensure that no one sided advantage occurs.'*[49]

The Commission considered that the mechanism does not involve any additional advantage for Mercedes-Benz Hungary and thus it does not constitute state aid.

Regarding the aid allocated for the railway infrastructure development element of the project, which infrastructure will remain in state ownership, the Hungarian Government put forward arguments against the selective nature of the measure. It claimed that market prices will be paid by either Daimler AG or a third party operator for the use of the railway tracks to the owner, and in case of a third party operator, Daimler AG would pay market prices for the services supplied. Furthermore, with respect to the granting of the future concession for the operation of the planned railway transport service the Hungarian authorities confirmed that the concession will be granted in accordance with the relevant principles of EU law, in particular the principles of equal treatment and transparency and access to the railway infrastructure will be charged at a rate compliant with the relevant EU legislation. The Commission classified the aid for the railway infrastructure as selective, because the new railway link, although it is open to all potential users, served only the company. This way Mercedes-Benz Hungary was relieved from costs which otherwise would be incurred by economic operators and, therefore, benefited from an economic advantage over its competitors. It was also held that the aid was likely to affect trade between Member States and it was also likely that competition would be distorted or threatened to be distorted in the single market. The Commission's conclusions are consistent with the considerable case law on aid for infrastructure development of infrastructure which has consistently held that aid for the construction of infrastructure which serves one company only will be found incompatible with EU state aid rules.

Although the scheme was found to constitute state aid within the meaning of the Treaty, the measures were open to be exempted in line with the requirements of the Regional Aid Guidelines 2007-2013 concerning large investment projects[50]. The project was expected to create 2500 direct jobs and an additional 10.000 to 14.000 indirect jobs. In its examination of the market share and the capacity thresholds, the Commission found that the capacity increase generated by the project will remain below 5 per cent of the apparent consumption of the product concerned in the EEA and the company's market share will stand bellow the 25 per cent threshold in each of the market segments concerned (small family cars, compact multi-purpose vehicles and the total passenger car market).

[48] para (36) It is also ensured that there is a "negative compensation" (i.e. a decrease in the aid amount in HUF) if eligible costs in HUF are lower than planned (be it because of a stronger HUF or lower than planned eligible costs in EUR). This "negative compensation" applies for any decrease in eligible costs, i.e. it is not linked to a [5-20] % or larger decrease."

[49] Authorisation of State aid pursuant to Article 87 and 88 of the EC Treaty. Cases where the Commission raises no objections. State aid N 671/2008- Hungary- LIP-Aid to Mercedes-Benz Manufacturing Hungary Kft. HL C 28/2., 4.2.2010.

[50] Guidelines on regional State aid for 2014-2020., HL C 209., 2013.07.23.

In a separate case, the Commission examined *ex officio* the acquisition of land in 2008 by Mercedes Benz Hungary for the construction of its new plant in the Dél-Alföld Region.[51] Since part of the land was in state ownership, the Commission suspected that its sale constituted state aid in the meaning of the Communication concerning aid elements in land sales by public authorities.[52] After a thorough investigation, the Commission came to the conclusion that even if the conditions of the Communication were not met, the market economy investor principle applied as the state owned plots of land were sold at market value. Their price was freely negotiated between the parties.

*The investigation into the aid to Audi Hungaria*[53]

The procedure to authorise the aid proposed to be granted to the car manufacturer Audi Hungaria was initiated in 2009[54] when Hungary notified the Commission of its intention to grant a subsidy to finance the installation of new high-tech engine production lines for new generation engines and engine components for a wide range of passenger car models. Hungary plans to finance 14.9 billion HUF of the 153.4 billion HUF project in the form of a direct grant and a tax allowance. The Commission's preliminary investigation revealed that in some markets of passenger cars the 25 per cent market share threshold will be exceeded. The Commission expressed doubts concerning whether certain groups of passenger cars as opposed to individual passenger car segments should be considered as the relevant product market. In its comments on the opening decision the Commission, Hungary informed the Commission on recent changes to the scope of the investment project. It argued that owing to these changes the threshold will not be exceed in any of the individual passenger car segments concerned, provided that the Commission calculated the market share on the basis of the global market data of the Volkswagen-Porsche Group. In this regard, it must be remembered that under the Regional Aid Guidelines the markets should normally be defined at the EEA level. Following these developments, in 2010 the Commission extended the initial opening decision asking for comments from the interested parties.[55] In response, Hungary has withdrawn its notification in 2012 and the case was closed by the Commission.[56]

**The distinction between existing aid and aid applicable after accession**

*The decision concerning the aid granted through Power Purchase Agreements*

In the 90s, Hungarian economic and energy policy sought to secure the modernization of infrastructure in the electricity sector by attracting foreign investors that were willing to make the required substantial investment. To this end, Hungary offered entering into long-term power purchase agreements (so called PPAs) in the electricity market under which the state owned electricity distributing monopoly, the *Magyar Villamos Művek Zrt.* (MVM) undertook, as single buyer, the obligation to buy a fixed quantity of electricity at a fixed price for a

[51] Authorisation of State aid pursuant to Article 87 and 88 of the EC Treaty. Cases where the Commission raises no objections. HL C 313/3, 26.10.2011. State aid No SA 27308 (2011/NN) Republic of Hungary Land acquisition by Mercedes Benz Hungary
[52] OJ 1997, C 209, p.3.
[53] State aid C 31/09 (ex 113/09) Aid to Audi Hungaria Motor Kft. Invitatiton to submit comments pursuant to Article 88 (2) of the EC Treaty OJ C 64/15., 16.3.2010.
[54] IP/09/1631, Brussels, 29 October 2009
[55] OJ C 243/4, 10.9.2010. State aid C 31/09- Hungary- LIP- Aid to Audi Hungaria Motor Kft. Invitation to submit comments pursuant to Article 108 (2) of the Treaty on the Functioning of the European Union
[56] OJ C 56/19., 26.2.2013., State aid SA.27913 (C 31/09 (ex N 113/19)-Large Investment Project- Hungary- Aid to Audi Hungaria Motor Kft.

certain period to supply to the retail market. These long-term PPAs guaranteed a predictable return on investment and the privatised power plants in Hungary entered into long-term PPAs with MVM.[57]

In 2005, under EU state aid law the Commission initiated a procedure against the Hungarian PPA regime, which decision was challenged by *Budapesti Erőmű*, one of the economic operators affected. [58] In 2008, the Commission decided that the PPAs constituted state aid incompatible with the common market and that the aid had to be recovered from the beneficiaries.[59] According to the Commission, the long-term agreements shielded the companies involved from commercial risk and thus put them in a more advantageous position on the market than that enjoyed by other market participants. Hungary was given a six month period to dismantle the PPA system from the date of the notification of the Commission's decision. It was also requested to recover the aid within ten months following same date.[60]
The challenge by *Budapesti Erőmű* was dismissed by the General Court.[61] The Court examined two questions. The first was about the nature of the aid, whether it was an existing or a new aid, the second concerned the compatibility of the aid with the common market. Regarding the first question, the Court had to determine whether the PPAs concluded before Hungary's accession constituted existing aid. In such an event, while the Commission is entitled to declare that the aid is contrary to the common market, it cannot ask the Member State concerned to recover that aid and the Commission's decision has only *ex nunc* effect. In the Hungarian case, the Court referred to Annex IV of the Accession Treaty which defines existing aid as follows: (1) aid measures put into effect before 10 December 1994, (2) aid measures listed in the Appendix to Annex IV to the Act of Accession, and (3) aid measures which prior to the date of accession were assessed by the state aid monitoring authority of the new Member State and found to be compatible with the *acquis*, and to which the Commission did not raise an objection on the ground of serious doubts as to the compatibility of the measure with the common market, pursuant to the interim procedure.

The judgment declared that the PPA regime was new aid as it did not fall into either categories under the legal framework provided by Annex IV. It was clear from its wording that in the particular circumstances of EU enlargement a measure which was not regarded as state aid when it was introduced can subsequently become state aid under EU law. Annex IV also indicates that in such cases the aid must be regarded as new aid. This was confirmed by the Court when holding that ‘Any other conclusion would have the effect of rendering meaningless the desired objective of the authors of the Treaty [on accession].’[62] With this reasoning, the General Court rejected to decide the case on the basis of the first sentence of Article 1(b)(v) of Regulation 659/1999 according to which existing aid is ‘aid which deemed to be an existing aid because it can be established that at the time it was put into effect it did not constitute an aid, and subsequently become an aid due to the evolution of the common market and without having been altered by the Member State.’ On the same grounds, the

[57] The Hungarian Competition Office had criticised long term power purchase agreements in its 1999 Study on the liberalisation of the energy sector. (A Gazdasági Versenyhivatal versenypolitikai álláspontja a villamosenergia szektor piacnyitásának fő kérdéseivel kapcsolatban. 1999. július., 20. oldal.) Downloaded: www.gvh.hu/domain2/files/modules/module25/pdf/hu, on 19 June 2012.
[58] in case T-80/06
[59] Commission Decision of 4 June 2008 on the State aid C 41/05 awarded by Hungary through Power Purchase Agreements (2009/609/EC) OJ L 225., 2009.8.27., pp.53-103.
[60] A summary of the decision and comments can be found in the journal of Közgazdasági Szemle (Economic Review) Issue LVIII, July-August 2011 by Éva Sztankó on pp.653-665.) in Hungarian. Sztankó Éva: Miért összeegyeztethetetlenek a magyar hosszú távú villamosenergia-vásálási megállapodások a közösségi vívmányokkal? Közgazdasági Szemle, LVIII.évf., 2011. július-augusztus (653-665.o.)
[61] Joined cases T-80/06 and T-182/09 Budapesti Erőmű Zrt v European Commission (Judgement of the General Court of the European Union, 13 February 2012), not yet reported
[62] para 54 of the judgement

Court also rejected the argument that the Commission's interpretation is inconsistent with earlier case law.

*The 2008 decision on the aid to Postabank/Erste Bank*

The second case in which the Commission established that Hungary had granted state aid in breach of EU law was the Postabank/ Erste Bank case.[63] The measure was notified by Hungary in September 2003[64] and concerned the indemnity undertaken by Hungary in 2003 in the sale of Postabank. Postabank, the seventh largest commercial bank in Hungary in 2002, was saved from collapse in 1998 by government recapitalisation which made the state the sole shareholder. The bailout was intended to prepare the bank for restructuring with a view to its eventual privatisation. After the first failure to sell Postabank, Erste Bank won the second open, transparent and non-discriminatory privatisation tender in 2003. In the tender procedure, the state offered all bidders the indemnity undertaking in question in the event of litigation concerning liabilities arising from litigation claims arising up to five years after the conclusion of the sale and purchase agreement. In a unilateral declaration, which was signed on 29 April 2004, Erste Bank established an overall cap on the payments payable by the Hungarian state, as laid down in the share purchase agreement, to Postabank's buyer in respect of threatened or unknown litigation claims and also narrowed the scope of the definition of risk in connection with unknown claims.

As in the case of the electricity PPAs, the first question to be considered was whether the indemnity claim, as taken in 2003 and modified in 2004, can be qualified as a measure applicable after the date of Hungary's accession to the EU. The Commission considered that for a measure to qualify as applicable after accession it must be shown that it is liable to produce an additional benefit that was not known or not precisely known at the time when the aid was granted. In this respect, the relevant factor is the legally binding act by which the competent national authorities granted the aid. Individual measures are considered applicable after accession if the precise economic exposure of the state is not known on the date the aid is granted and still unknown on the date of accession. As stated in the decision initiating the procedure, with respect the indemnity undertaking and to further potential guarantees the following conditions have to be met in order for a measure to be considered no longer applicable after accession:

(a) the risks are precisely defined and included in an exhaustive list closed by the date of accession;

(b) there is an overall cap on the amounts payable;

(c) the litigation relates to events that had already occurred by the date of the indemnity undertaking and not to any future events.

In the procedure Hungary argued that the measure was no longer applicable after accession. In any event, the indemnity was a conventional commercial term in a sale and purchase agreement concluded under an open and competitive procedure in which a market price was paid for Postabank. They further stated that the measure did not in itself distort competition as the market price, which included the value of the indemnity undertaking, was paid in the course of a privatisation transaction and without the indemnity undertaking the privatisation of Postabank would not have succeeded.

[63] Commission Decision of 21 October 2008 on measure C 35/04 implemented by Hungary for Postabank and Takarékpénztár Rt./Erste Bank Hungary Nyrt. (2001/174/EC), OJ 2009 L 62, 6.3.2009., pp. 14-27.

[64] State Aid C 35/04 (ex HU 11/2003) (interim mechanism procedure) Postabank és Takarékpénztár Rt/Erste Bank Hungary Rt. Invitation to submit comments pursuant to Article 88 (2) of the EC Treaty, OJ C 68, 19.3.2005, p. 12-26.

The Commission, relying on the relevant provisions of the Treaty of Accession concerning the qualification of aid as new aid after the date of accession, held that the question of aid being 'applicable after accession' is distinct from the question of whether a measure qualifies as aid (at any given relevant time) and its assessment is subject to distinct criteria. It found that the indemnity undertaken by the Hungarian Government in 2003 in order to facilitate the sale of Postabank was not defined precisely and it did not include an exhaustive and binding list of obligations finalised by the date of accession. The Commission considered that introducing a simple cap without listing (itemising) the specific events which might trigger the indemnity does not restrain the payment of the indemnity with sufficient rigour.

*The 2009 decision on tax deduction for intra-group interest*

As of January 2003, Hungary introduced new, favourable provisions for the taxation of net interest income between affiliated companies belonging to the same group. The measure was not notified to the Commission, and by a letter in November 2004 the Commission requested information regarding the taxation scheme from the Hungarian authorities. More than two years later, the Commission informed Hungary that it had decided to initiate a formal procedure in the matter.[65] By a letter dated June 2009, the Hungarian authorities informed the Commission of their intention to abolish the scheme from 1 January 2010. As a result, in its 2009 decision the Commission terminated its procedure. [66]

Originally, the Commission qualified the measure as new aid in its decision opening the formal procedure. The scheme allowed companies to claim as taxable income or expenses only 50 per cent of the balance of interest received from or paid to affiliated companies in the context of intra-group relations. This could mean that when a company based in Hungary has a positive balance of interest with its affiliated companies, only half of the interest is taxed. Also, when the affiliated company paying a net interest is based in Hungary, it is able to deduct only half of the amount from its taxable income. However, when the interest-paying affiliated company is located abroad, it is not subject to Hungarian tax rules. Therefore, it is able to deduct the whole balance of interest paid from its taxable income. The Commission also questioned that the scheme would constitute a general tax measure.[67] Furthermore, it declared that the measure could not be considered as existing aid as it did not fulfil any of the conditions set out in the Treaty of Accession.[68] It argued that 'in case in its final decision the Commission confirms that the measure constitutes incompatible State aid, it would imply that the aid had been illegally granted since 1 January 2003. Recovery would therefore be requested as from the date of accession of Hungary to the EU.'[69]

In reaching its conclusion that the measure in question does not qualify as existing aid, the Commission found that in the circumstances of the case the legal provisions of the Treaty of Accession were inapplicable and it proceeded following the rules set forth in Article 1(b)(ii)-(v) of the procedural regulation (Council Regulation 659/1999)[70] which defines what constitutes existing aid. In this regard, it held that neither of the exceptions listed in Article 1

[65] IP/07/375, Brussels, 21 March 2007.
[66] Commission Decision 2010/95/EC of 28 October 2009 on State aid C 10/07 (ex NN 13/07) implemented by Hungary for tax deductions for intra-group interest. OJ L 42., 17 February 2010., p. 3.
[67] IP/07/375, Brussels, 21 March 2007.
[68] para 26 of the decision to initiate the formal procedure. OJ 2007/C 142/12., 27.6.2007., State aid No. C 10/07 (ex NN 13/07) Tax deductions for intra-group interest. Invitation to submit comments pursuant to Article 88 (2) of the EC Treaty.
[69] para 32 of the decision to initiate the formal procedure
[70] Council Regulation 659/1999 of 22 march 1999 laying down detailed rules for the application of Article 93 of the EC Treaty, OJ L 83, 27.3.1999., p. 1.

would apply. Points (ii) and (iii) could not be applied because the measure had not been notified. Article 1(b)(v) was also found inapplicable as the measure in question could not be considered as becoming an aid due to the evolution of the market.[71]

The Commission continued its decision by drawing parallels with the earlier decided cases concerning the Belgian Coordination Centres (BCC) scheme. In 1984 and 1978, two Commission decisions of 1984 and 1987 ruled that a similar Belgian scheme dealing with intra-group taxation, which was applicable exclusively to multinational companies, was not aid. In the procedure, Hungary pointed out that SAMO had examined the measure prior to its adoption in the summer of 2002 and it decided not to notify the scheme to the Commission on the basis of the said jurisprudence concerning the BCC scheme. At the time it was put into effect, it was not self-evident that the measure in question constituted state aid.[72] The Commission explicitly considered this point.

*Despite the fact that the measure did constitute State aid at the time it was implemented, the Commission considers that due to the very specific circumstances of the case at hand, in particular the pre-accession context and the previous Commission decisions in 1984 and 1987 on the Belgian scheme, the Hungarian State Aid Monitoring Office had no reason to consider that the measure constituted aid in the sense of Article 87, paragraph 1, of the Treaty, especially since the measure was adopted before the Commission reconsidered its position on the Belgian scheme. It is therefore considered that there is a body of exceptional circumstances suggesting that the Hungarian authorities may have been misled in thinking that the measure did not constitute State aid in a pre-accession context. In such circumstances, at the time the measure was adopted, Hungary had valid reasons not to submit the measure to the Commission as provided for under the interim mechanism procedure.*[73]

The Commission's decision, which found that the measure was state aid in the meaning of the Treaty, is legally questionable. It declined to follow the provisions of the Act of Accession or of the Procedural Regulation and decided, without identifying a legal basis, referring to the very specific circumstances of the case, that the aid in question qualifies as existing aid. This was a clear signal from the Commission that similar aid measures are prohibited, although their recovery may not be ordered as it happened in the Hungarian case. The Commission could have interpreted Article 1(b)(v) of the Procedural Regulation, and the Treaty of Accession as well, in a manner that the evolution of the market would also involve evolution of the interpretation of state aid law. These solutions were rejected clearly in order to avoid creating 'precedent' for similar cases.

[71] Under Article 1 (b) 'existing aid' shall mean:
(i):... aid schemes and individual aid which were put into effect before, and are still applicable after, the entry into force of the Treaty;
(ii) authorised aid, that is to say, aid schemes and individual aid which have been authorised by the Commission or by the Council;
(iii) aid which is deemed to have been authorised pursuant to Article 4(6) of this Regulation or prior to this Regulation but in accordance with this procedure;
(iv) aid which is deemed to be existing aid pursuant to Article 15;
(v) aid which is deemed to be an existing aid because it can be established that at the time it was put into effect it did not constitute an aid, and subsequently became an aid due to the evolution of the common market and without having been altered by the Member State. Where certain measures become aid following the liberalisation of an activity by Community law, such measures shall not be considered as existing aid after the date fixed for liberalisation;
[72] para 147-149.
[73] para. 151.

## The application of the market economy investor test in Hungarian state aid cases

*The PPA scheme*

In the Power Purchase Agreements case before the General Court, the compatibility of the aid scheme with the common market was examined under the market investor test. The question was whether *Budapesti Erőmű* could have negotiated equally favourable contractual terms if the other party to the contract had been a buyer acting on a commercial basis instead of MVM. The General Court found that the conditions generated under the PPA scheme does not correspond to the conditions of the European wholesale market in the energy sector. On that market, the amount of energy sold and the expected sale price depend on the amount of energy sought which constantly fluctuates. Thus, by having undertaken the obligation to buy fixed quantities of electricity irrespective of actual demand for that product at any given time, MVM run a serious risk of being contractually bound to buy excessive quantities of electricity and suffering losses on resale as a result. A private operator in a comparable situation on the market would not have taken such a risk.[74] Therefore, as suggested by the Commission, the PPA regime enabled economic operators in the Hungarian electricity market to enjoy economic advantages which they would not have been able to obtain in a competitive market.

The Court also rejected the applicant's argument that the return on investment enjoyed by market operators should be regarded as consideration for the guarantee given by the PPA regime in relation to the sale of electricity and, therefore, it should qualify as a benefit enjoyed by MVM when the test of a private operator in a market economy is applied. MVM's commercial objective was to supply the regulated segment of the Hungarian electricity retail market at the lowest prices. It must be noted, as the Commission did, that in a normal transaction between a generator and a buyer of electricity the commercial risks linked to the operation of a power plant are generally borne by the operator of that plant. It was not established that MVM had an interest in bearing the risk associated with power generation assets and that the relevant risks at any given time would have to be transferred to MVM. Furthermore, while the PPA regime could be regarded as serving legitimate energy policy objectives, such as attracting investment in the Hungarian electricity market, this circumstance does not preclude the PPA regime from conferring an advantage on investors. The policy rationale underpinning an aid measure are immaterial for the purposes of determining whether the measure concerned constitutes aid in the meaning of the Treaties.[75]

The argument that the PPA regime should be conceived as compensation for the provision of a service of general economic interest was also treated unfavourably in the judgment because there was no evidence confirming that a service of economic general interest defined accurately in advance was entrusted on the applicant.

The General Court approved the methodology used by the Commission to ensure the recovery of the incompatible aid. The Commission stated in its decision that the amount of state aid depended on the price and amount of electricity which could have been produced and sold on the Hungarian wholesale market between 1 May 2004 and the date of the termination of the PPA regime. On this ground, the Commission required Hungary to calculate the exact amount to be recovered on the basis of a simulation of the wholesale electricity market as it would have stood without the long-term PPAs being in force.

The Commission's decision was openly criticized by Leigh Hancher.[76] She argued that given that the Commission limited its assessment to the period after 1 May 2004 it failed to consider

[74] para 71, 79.
[75] para 83.
[76] Leigh Hancher: Long –term Contracts and State Aid- A new Application of the EU State Aid Regime or a Special Case? 2010 European State Aid Law Quarterly 285 2010.

whether the business case for the PPA regime might have been different in the mid-1990s and whether at that time the regime indeed met the commercial objectives of MVM. She claimed that 'surprisingly, even taking 2004 as the starting point, the Commission failed to consider the disadvantages for buyers relying on spot markets and short term contracts- that is exposure to volatility and liquidity risk'[77] and that '...its approach in the PPA cases certainly represents a departure from the established jurisprudence as summarised and confirmed once more by the Court in West LB[78] - that the application of the MEIT [market economy investor] test should be made at the time when the investment was made, and not with the benefit of hindsight.'[79]

Up until 2012, no aid was recovered from *Budapesti Erőmű* and in the meantime the Commission authorised some of the aid addressing the so-called sunk costs of the company[80]. In case T-352/08, *Pannon Hőerőmű* applied for the annulment of the Commission decision, but later withdrew its application as *Alpiq Csepel Erőmű* did.[81] Two other PPA related proceedings are still pending before the General Court. The Commission's decision was also challenged in an action for annulment by *Dunamenti Erőmű* in case T-179/09, and in T-468/08 *AES-Tisza Erőmű* that are in progress since April 2009.[82]

*The 2010 decision on compensation for stranded costs in the Hungarian electricity market*

At the end of 2009, the Hungarian authorities notified the Commission of a scheme compensating stranded costs in the Hungarian electricity market. In 2010, the Commission authorised the aid scheme holding that the compensation of economic operators in the power generation market for certain costs resulting from the termination of the long term PPA regime does not exceed what is necessary to recoup the shortfall in investment costs repayment over the lifetime of the relevant assets, including a reasonable profit margin.[83] The Commission was satisfied that the compensation scheme was in line with its Communication relating to the methodology for analysing state aid linked to stranded costs.[84] The three beneficiaries of the scheme are *Budapesti Erőmű*, *Dunamenti Erőmű* and *Pannon Hőerőmű.* The compensation is deducted from the amounts of aid to be recovered from these undertakings under the Commission decision on the PPA regime.

The Commission's approach is in line with its general policy in the EU electricity market which recognized as early as 2001 that economic operators will not be able to recover some of their investments made before the opening up of electricity markets after liberalization. In its Communication on stranded costs it accepted that Member States may grant aid in order to finance losses caused by investments or contracts that were made economically unviable by liberalization. In the Hungarian case, the Commission found that the costs taken into account by Hungary for the calculation of the compensation were eligible for aid, in particular, because they concerned investments in assets that became non-

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[77] Leigh Hancher p.292

[78] Joined cases T-228/99 and T-233/99 Westdeutsche Landesbank Girozentrale (West LB) and Land Nordrhein-Westfalen v Commission 2003 ECR II-435.

[79] Leigh Hancher p. 294

[80] State aid N 691/2009- Hungarian stranded costs compensation scheme. Brussels, 27.04.2010 C (2010) 2532 final, OJ 2010 C 213., 2010.8.6., Authorisation for State aid pursuant to Articles 107 and 108 TFEU. Cases where the Commission raises no objections

[81] T-370/08 Alpiq Csepel v Commission, not yet reported

[82] OJ C 167/16., 18.7.2009.

[83] State aid N 691/2009- Hungarian stranded costs compensation scheme. Brussels, 27.04.2010 C (2010) 2532 final, OJ 2010 C 213., 2010.8.6., Authorisation for State aid pursuant to Articles 107 and 108 TFEU. Cases where the Commission raises no objections

[84] adopted by the Commission on 26.07.2001. Commission letter SG (2001) D/290869 of 6.8.2001.

economical as a result of the liberalization of the Hungarian electricity market. It also accepted that the revenues generated by the relevant investments and the aid previously received have all been deducted from the cost amount taken into account for the calculation of the compensation, and as a result there was no risk of over-compensation.[85]

The Commission made it clear that the notified scheme and the execution of the recovery requirement contained in the PPA decision must be carried out simultaneously. This means that the economic operators affected instead of receiving payments from the Hungarian state will be liberated from part of their obligation to repay the amount indicated in the PPA decision. Until 2012, no aid was recovered as the aid approved by the Commission was higher than the aid found incompatible with the Treaties.

*The implementation of the PPA and the stranded costs decisions*

In 2007, the Government issued a decision concerning the termination or modification of the PPA regime. MVM terminated its long-terms contracts with *Paksi Erőmű*, *Pécsi Erőmű* and *Mátrai Erőmű* in 2007 and began negotiations with the two largest market participants, *Dunamenti Erőmű* and *Tiszai Erőmű*. To prepare for all eventuality, Act LXX of 2008 stated that in case the issues regarding individual PPAs cannot be settled in negotiations between the parties as required by Article 3, the contract concerned will be terminated by virtue of the power of that act. This took place in regards the PPA concluded with *Budapesti Erőmű*. In order to dissolve any doubts regarding the constitutionality of the act, the explanations attached to the act contain a detailed reference to the case law of the Hungarian Constitutional Court on the limitations of the right to freedom of contract.

The Hungarian Energy Office was made responsible for calculating the stranded costs of the electricity producers affected and the recoverable state aid under Act LXX of 2008. The obligation to recover the incompatible state aid is contained in Article 4 of the Act which also refers to the methodology approved by the European Commission. The 2008 Act already made it possible to deduct the stranded costs of the electricity producers concerned from the aid to be recovered, even though the final decision of the Commission was taken only on 27 April 2010. 10 days after the Commission's decision, the Hungarian Energy Office calculated and published the final amounts which had to be recovered to the State Treasury. The companies, as regulated by the 2008 Act, were given 60 days to pay the amount calculated by the Office, otherwise the Office under statutory obligation would inform the National Tax and Customs Authority to enforce the payment under tax law. Until the publication of this Chapter, none of the companies involved were put under an obligation by the Energy Office to repay the state aid. The starting point of the 60 day deadline was determined, as stipulated by the Act, in a decision of the Minister of Finance identifying the exact date on which the European Commission issued its stranded cost decision.[86] A separate government decree (Decree No 149/2010) contained detailed rules on the methodology of calculating the amount of the incompatible state aid under the PPA regime and the stranded costs found compatible with EU law.

Parallel to the procedures under EU state aid law, several of the companies affected initiated proceedings against the Hungarian State at the International Centre for Settlement of Investment Disputes (ICSID) alleging the violation of the 1994 Energy Charter Treaty. The

[85] The summary of the decision was taken from the Commission’s press release (IP/10/470, Brussels, 27 April 2010) The legal basis in Hungarian law is Act LXX of 2008 on certain aspects of the electricity market and Government Decree 149/2010 (IV.29.) on the calculation of state aid to be recovered on the basis of Act LXX of 2008 of the Parliament and on the stranded costs of power plants. The overall budget of the aid scheme is 178 954 million HUF and runs from 1 February 2010 to 31 December 2024.

[86] 2/2010 (IV.30) Decision of the Minister of Finance

case of *AES-Tisza* Erőmű was closed with the award that the respondent did not breach the Energy Charter Treaty.[87]

*The Postabank case*

In the case concerning the sale of Postabank, the existence of an advantage was assessed by the Commission with reference to the nature of the measure both in isolation from previous measures taken by the state and in connection with those measures. The results of both exercises were identical and they confirmed that the indemnity undertaking by the Hungarian state provided an advantage for the buyer of Postabank. The Commission's assessment had to take into account the circumstances at the time when the privatization decision was made. The Commission did not question the way Postabank was privatised and it acknowledged that it was sold to the highest bidder in an open and competitive tender procedure. However, this fact was not sufficient to exclude that the buyer was provided an advantage from the state.

The Commission argued, among others, that

*First, at the time of the conclusion of the share purchase agreement, the indemnity undertaking for unknown claims was not capped. When the Hungarian Government sold Postabank, it committed public money under the measure to the buyer of Postabank to an unlimited extent. The Commission, therefore, considers that... a prudent private seller in the present case would not have given a commitment of an unlimited size to cover payment obligations arising from unknown claims up to five years after the conclusion of the share purchase agreement, even if the provision of the indemnity undertaking resulted in a higher sales price than the price the seller would have obtained by selling Postabank without this undertaking. The Commission considers that a market economy seller selling Postabank would have at least included a ceiling in the sale contract limiting the potential payment to the purchaser under the indemnity. A market economy seller would not have accepted running the risk of having to pay an unlimited amount, even in the knowledge that the likelihood of such a high payment was very low. Therefore, the fact that at the time of the privatisation no ceiling was put on the indemnity shows that the State did not behave in the same way as a market economy operator.*[88]

The Commission's conclusion was not altered by the fact that the bidders considered the measure to be an indispensable condition of the privatisation deal. It is likely that without the indemnity undertaking for unknown litigation claims the privatization of Postabank would have been unsuccessful. However, the Hungarian state should have considered introducing a less generous indemnity undertaking covering only the value of the business instead of an unlimited future amount.  Limiting the indemnity undertaking would have been a reasonable decision in a competitive market and it would have been in line with the market economy investor principle.

The measure was also examined under the Rescue and Restructuring Guidelines.[89] Since indemnity was given in a time when Postabank was no longer an undertaking in difficulty, the Guidelines were unable to support the measure and ultimately, the Commission ordered its termination with retroactive effect from 30 April 2004. However, no recovery was necessary as no payments had actually been made to Erste Bank under the indemnity undertaking.

[87] ICSID Case no. ARB/07/22.

[88] Para. 57

[89] Community Guidelines on State aid for rescuing and restructuring firms in difficulty, OJ C 288, 9. 10. 1999., p. 2.

In principle, the Commission could have asked for a charge to be levied for the indemnity undertaking for the purpose of offsetting the advantage offered by the measure. However, the Commission accepted the argument that levying such a charge could contravene the principle of legal certainty having regard to the specific circumstances in which the guarantee was given. Its enforcement and its value depended almost entirely on unforeseen events and circumstances. Moreover, despite the objective character of the relevant provisions of the Treaty of Accession, the Commission's guidelines on the concept of applicability after accession with regard to guarantees and indemnity undertakings from the state were only gradually clarified over time. On the basis of the Treaty of Accession alone, it was unclear what criteria the Commission would apply in the assessment of applicability after accession in the case of measures the application of which depends on future events. The applicable criteria were communicated to the candidate countries in the form of guidance letters. In the letter received by the Mission of the Republic of Hungary to the EU, the Commission clarified its understanding of the concept of 'applicable after accession' in respect of individual aid measures only. It did not explicitly address the assessment of indemnity undertakings, nor did it explicitly require itemisation as a criterion for the indemnity undertaking not to be considered applicable after accession, namely that the risks should be precisely defined and included in an exhaustive list closed by the date of accession.

The further formal guidance on this matter followed only after the 20 October 2003 purchase of Postabank subject to the said indemnity undertaking by the Hungarian state. The Commission's formal decisions of 28 January 2004 on Česká Spořitelna and of 16 December 2003 on Komerční Banka[90] stated that the Commission considers individual aid measures to be applicable after accession if the precise economic exposure of the state is not known on the date the aid is granted. In neither of these cases was any mention made of any itemisation requirement. The specific itemisation requirement in the Postabank case was only brought to Hungary's attention by the Commission in a letter dated 19 March 2004 addressing specifically the post-accession applicability of the indemnity undertaking. Therefore, the Commission found unreasonable to require recovery in respect of aid that was granted at a time when the Commission's guidelines on the post-accession applicability criteria for indemnity undertakings had not been fully clarified and may have given the misleading impression of the Commission's approach being complete.[91] In these circumstances, it remains questionable whether the Commission's treatment of Hungary's conduct in the Postabank case was legally sound altogether. Neither Hungary, nor Erste Bank sought the annulment of the Commission decision.

*The 2010 decision on the aid to MOL*

In November 2007, the Commission received a complaint regarding an alleged state aid measure in favour of the Hungarian national oil and gas company MOL. This happened in a period when MOL was under attack in a hostile takeover. The measure in question is an agreement dating back to 2005 between MOL and the Hungarian government according to which MOL's mining royalty payments on extracted hydrocarbons remain fixed for the majority of its hydrocarbon mining fields until 2020. For all other operators, the mining fee was increased considerably by an amendment of the Hungarian Mining Act in early 2008. The extension agreement was subject to the payment of considerable mining fees, because the extraction of the fields concerned was delayed. In the Commission's view, the combined effect of the prolongation agreement and the subsequent modification of the Mining Act

[90] CZ 14/03 and CZ 15/03
[91] para 107 of the decision

exempted MOL from taxes which were payable by its competitors and thus MOL enjoyed an unfair competitive advantage in the market.[92]

The Commission argued that

*In the framework of the authorisation regime, the extension agreement is clearly selective. Indeed, as the Hungarian authorities themselves confirm, the parties, when negotiating the terms of this agreement, have a certain margin of manoeuvre to stipulate the different payment components and, more importantly, may even decide not to conclude the agreement at all. Thus, the Hungarian authorities had the discretion to conclude such an agreement with MOL (or with any other market participant).*[93]

The Hungarian state was unable to justify such a discriminatory treatment through the logic and nature of the Hungarian mining regulatory system. Mining fees are imposed on economic operators to secure revenues for the State from mining activities on the extracted value. In contrast, the payments made under the prolongation agreement incurred as an extra charge in exchange for concluding the prolongation agreement. The special arrangements enjoyed by MOL led to the situation that while MOL, having failed to commence production on time, was guaranteed to benefit from lower mining fees until 2020 in all of its fields under authorisation, its competitors, which are equally subject to the authorisation regime and which started production on time and, therefore, were not interested in obtaining a prolongation of their rights, were required to pay higher statutory fees.[94]

The Commission did not accept Hungary's view that the fees paid by MOL for the prolongation agreement should be deducted from the amount of state aid received by the company calculated as the difference of the fee payable under the prolongation agreement and the fee chargeable under the modified Mining Act. The Commission argued that the fees were paid in exchange for concluding the prolongation agreement and not for the right of having lower fees than those imposed on MOL's competitors. The Commission made reference to the case law of the EU Court according to which aid cannot be offset by a specific and distinct charge imposed on the same company without a link to the measure constituting aid. This principle was confirmed by the EU Court of Justice in 2011 in its judgment *France Télécom*[95] where it held that a measure cannot be saved from categorisation as aid where the aid beneficiary is subject to a specific charge which is different from and unconnected with the aid in question.

The Commission's decision declared the whole measure incompatible with the internal market and ordered its recovery. In 2010, MOL repaid the aid,[96] but the decision was challenged before the General Court.[97] In 2013, the General Court upheld the pleas presented by MOL and annulled the decision[98]. The Court considered that, where a Member State concludes with an economic operator an agreement which does not involve a State aid element, the fact that, subsequently, conditions external to such an agreement change in such a way that the operator is in an advantageous position vis-à-vis other operators that have not concluded a similar agreement is not a sufficient basis on which to conclude that, together, the agreement and the subsequent modification of the conditions external to that agreement can

[92] IP/09/39, Brussels, 13.01.2009. Commission Decision 2011/88/EU of 9 June 2010 on state aid C 1/09 (ex NN 69/08) granted by Hungary to MOL Nyrt, OJ L 34/55., 9.2.2011.
[93] para. 66.
[94] para 67 of the decision.
[95] C-81/10 P France Télécom v Commission, not yet reported
[96] Gyürkés Anita: Az Európai Bizottság határozata a MOL nyrt-nek nyújtott állami támogatás ügyében. Állami Támogatások Joga 8 (2010/4) 47-60.
[97] T-499/10 MOL v Commission, not yet reported
[98] T-499/10. MOL v Commission, Judgement of the General Court, 12 November 2013, not yet reported

be regarded as constituing State aid.[99] In other words, the valid agreement concluded between MOL and the State cannot be considered selective because Mol was the only mining company concluding such a contract and later modification of Hungarian law has raised the mining fee for the rest of the operators. The Court went on to examine whether the terms of the agreement (for example duration and fee rate) were proposed selectively by the State to one or more operators rather than on the basis of objective criteria laid down by law.[100] The Court came to the conclusion that no evidence of unjustified preferential treatment of the applicant is apparent from the decision. [101] The judgement of the General Court was appealed by the Commission.[102]

*The 2012 decision on the aid to Malév*

In 2012, the European Commission found that the financing granted to the Hungarian flag carrier Malév Hungarian Airlines between 2007 and 2010 in the context of its privatisation and renationalisation constitutes incompatible state aid as Malév would not have been able to obtain similar financing from the market on the terms conceded by the Hungarian authorities.[103] Hungary was obliged to implement the Commission's decision within four months following its date of notification. After several unsuccessful attempts at privatisation, in 2007 Hungary concluded a sales agreement with AirBridge Zrt concerning the majority ownership of Malév. Following press reports and information by a complainant about Hungary's intention to re-nationalise the company, the Commission opened in December 2010 an in-depth investigation scrutinising the following measures:

a) the takeover in December 2007 of a 76 million EU loan granted to Malév in 2003;
b) a *de facto* cash facility in the context of the abortive sale of Malév's Ground Handling subsidiary amounting to 4.3 billion HUF;
c) a tax and social security debt deferral in the amount of 13.8 billion HUF;
d) two capital increases of 25.4 billion HUF in February 2010 and 5.7 billion HUF in September 2010;
e) shareholder loans granted between May and September 2010 totalling 14.9 billion HUF;
f) the conversion of part of these shareholder loans together with the interest owed into shares of Malév in September 2010.

During the procedure, the Hungarian Government tried to defend these measures under the market economy investor and market economy creditor principles. In relation to the measures accompanying the sale of Malév to Airbridge, Hungary claimed that these measures are market conform because they are supported by the collateral put in place to secure the taking over of the loan by the state asset management company, *Magyar Vagyonkezelő Kft*. As to the abortive sale of Malév Ground Handling, they argued that no advantage was conferred on Malév as the late reimbursement of the sale price was correctly collateralised and that due interest was charged on the sale price. With regard to the tax deferrals, the argument was that such arrangements constitute general measures under state aid law. In relation to the shareholder loans and their subsequent transformation into shares in Malév, Hungary suggested no advantage was conferred on Malév as the loans were fully secured against assets, market conform interest rates were applied and in the transformation process all interests due were fully taken into account. Hungary did not dispute the findings of the

[99] para 64 of the judgement
[100] para 66.
[101] para 79.
[102] C-15/14. P., Commission v MOL
[103] IP/10/1753, 21/12/2010, Commission Decision of n SA. 30584 (C 38/2010, ex NN 69/2010) on the state aid implemented by Hungary in favour of Malév Hungarian Airlines Zrt., Brussels, 2012.01.09., not yet published

Commission relating to the use of state resources and imputability, effect on trade and distortion of competition. In case of the tax deferral, although the selectivity of the measure was disputed, the Commission rejected the arguments on the ground that the deferral arrangement was a discretionary solution and could have been refused by the parties involved.

The main issue in the debate between the Commission and Hungary was whether the abovementioned measures conferred advantage on Malév. The European Commission first assessed the totality of the measures and then made an assessment of each measure individually. The individual measures were not considered as autonomous as they constituted elements of a single process. As to the application of the market economy investor and creditor test, the Hungarian authorities themselves admitted that there was no private investor which would have been willing to take over the airline at the relevant time. The Commission assumed that in similar circumstances no private investor would have acted like the Hungarian government. In light of Malév's critical financial results over a long time period, also supported by the claim from the Hungarian authorities claim that the airline had been in permanent difficulty at least since 2006, it was likely that Malév could only have produced a return acceptable to a private investor if the company had undergone drastic restructuring. Neither Hungary, nor Malév ever demonstrated that any of the measures introduced were part of such a restructuring plan.[104] The Commission's investigation concluded that Malév, given its consistently difficult financial situation, would have been unable to secure the required financing on the market on the terms conceded by Hungary, or in fact in any other terms.

Under EU law, a company in difficulty may receive state aid subject to the strict conditions set in the 2004 EU Rescue and Restructuring Guidelines.[105] This was not the case here, because Malév could not demonstrate how its operation would become viable again under its existing business model. Malév's business plan contained no evidence that a private source would be drawn in to finance the cost of restructuring and the plan contained no compensatory measures to minimise the competition distortions brought about by the significant state support. The position of Malév was worsened by the aid received in the years preceding the introduction of the investigated measures.

At the end of January 2012, the Government declared Malév as a major economic operator of preferential status for strategic considerations.[106] This was based on the controversial modification of the Act on Bankruptcy and Liquidation Proceedings which enabled the application of special rules in the liquidation of companies deemed strategically important by the Hungarian government.[107] Under the act, economic operators classified in a decree as major economic operators of preferential status for strategic considerations[108] to whom the following criteria apply:

[104] points 68 and 69 of the Decision.

[105] C 244, 01.10.2004., p.2-17.

[106] Government Decree No 4/2012. (I.30.) on the definition of Major Economic Operator of Preferential Status for Strategic Considerations

[107] Act of XLIX of 1991 on Bankruptcy Proceedings and Liquidation Proceedings. Chapter IV on Special Provisions Pertaining to Major Economic Operators of Preferential Status for Strategic Considerations. Government Decree of 359/2011. (XII.30.) on the procedure to declare a company as major economic operator of preferential status for strategic considerations.

[108] A major economic operator of preferential status for strategic considerations' shall mean any economic operator:

a.) that operates in fields that may be construed to be of national importance for reasons of national security, defense, law enforcement, military, energy safety, energy supply, industrial safety, disaster relief and emergency response, nature preservation, environmental protection, public health, public utility, infrastructure development, cultural heritage, public information, communications, transport, transportation safety, research and development and public health considerations, or as related to basic public functions or to ensuring basic food supplies to the general public, as well as for reasons of

a) settlement of the debts of such operators, composition with creditors or reorganization is in the interest of the national economy or is of particular common interest, or
b) the winding up of such operators without succession-where the lack of funding and insolvency cannot presumably be resolved- in a simplified, transparent and standardized procedure is given priority due to economic considerations.

On 3 February 2012, Malév ceased its activities[109] and on 14 February 2012 it went into liquidation. Shortly after, under the new provisions a state liquidator was appointed by the Government.[110]

As an interim conclusion, we would like to highlight the following:

The obligation to notify draft aid was no always complied with by the State. With regard to the large investment projects (Mercedes-Benz, Audi, Opel, Hankook, Mátrai Erőmű, IBIDEN) the draft aid was notified to the Commission under the Multisectoral Framework on regional aid for large investment projects. In other cases under investigation, the Commission has opened most of the proceeding against Hungary ex officio, because the measure was not notified. A complaint was received by the Commission in two cases, namely MOL and MALÉV. Given the fact, that both companies are present on competitive markets, it was not surprising that competitors whistleblowed the Hungarian State in Brussels. With regard to the aid to MALÉV, Hungarian authorities may have thought that notification was undesirable given the high chance of rejection. Borderline cases (PPAs, tax deduction for intra-group interest) where the exact meaning of the EU law was missing, were not notified either. Hungary failed to notifiy aid to financial institutions too as we will see at the end of the following chapter.

Negative decisions have always been implemented timely and entirely in Hungary. The implementation of a Commission decision has caused the liquidation of MALÉV, the national flag-carrier airline company. The execution of the Commission's decision has been and is still very complex in the case of compensation of aid with regard to PPAs and stranded costs, requiring special knowledge and dedicated legislation. Thus, an Act of Parliament and a Governmental decree set out the rules for the calculation of the exact amount of state aid and the responsibilities of the Hungarian Energy Office. The State has abolished the law on tax deduction for intra-group interest before the Commission closed its proceeding, which ended with a decision on the incompatibility of the law with the internal market. Even MOL has repaid the illegal aid nothwithstanding its application for the annullment of the decision at the General Court. No particular problems have emerged concerning the ex post monitoring activity[111] of the Commission either. No infringement proceedings have been brought against Hungary in the field of state aid either.

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national and international trade and employment, or for reasons of supplying district heat and other public utility services to the general public,

b.) that is involved in the implementation of projects given priority for national economy considerations,

c.) that is involved in discharging public functions conferred by law nation-wide,

d.) that received large amounts of State aid for restructuring, credit guarantees, surety facilities or export credit insurance, or that is engaged in the pursuit of concession-bound activities, and therefore engaged under contract with the State or specific public bodies (including the State-owned economic operators established for carrying out the aforesaid funkctions) in connection with the above, or

e.) that is engaged in the pursuit of activities considered to carry strategic importance for national economy purposes, other than those under Paragraphs a)-d).

[109] see also Government Decree No 5/2012. (I.31.)

[110] Government Decree No 358/2011. (XII.30.) on the appointment if the State liquidator in Bankruptcy and Liquidation Proceedings concerning Major Economic Operators of Preferential Status for Economic Considerations.

[111] mainly individual aid granted under group exempted aid schemes-

It is noteworthy that there are two interesting reoccurring issues discussed in the Hungarian cases. One is the definition of existing aid and aid applicable after accession within the meaning of the Accession Treaty. The other one is evolving case-law.

Concerning the question of existing aid, in the PPAs, Postabank, and tax reduction cases, the Commission had to decide whether the aid is existing or new. Indeed, it was crucial for the companies to show that aid is an exising one. With respect to existing aid, the Commission's negative decision has only *ex nunc* effect, therefore already granted aid shall not be recovered. During earlier accessions, the EU followed a different concept. With regard to accessions before 2004, all aid granted before accession was considered as old or existing. The opposite approach was followed in 2004, namely all aid which is not enlisted as existing, is considered as new. This change was motivated by the fact that the Commission had fears that the candidate countries arrive into the Union with too much incompatible aid.[112] The General Court has ruled that the only relevant legal framework in this instance is the Treaty of Accession. As to the question of aid applicable after Accession, the Postabank case is among the first to set out the rules with regard to aid measures in the form of guarantees.

The Treaty of Accession defines its applicability to any measure still applicable after the date of accession that constitute State aid and do not fall within the category of existing aid. These measures are deemed to be new aid on accession and the Commission has full powers to prohibit their application and to order recovery of any sums unlawfully paid after accession.

According to the Commission, the question of aid being 'applicable after accession' is a distinct question from the question of whether a measure qualifies as aid (at any given relevant time) and is subject to distinct criteria.

The Commission has clarified its position with regard to guarantees applicable after accession a few days before the Treaty of Accession came into force, when Postabank has already been sold to Erste Bank. In the period between the signature of the Accession Treaty and its coming into force, the so-called interim procedure applied. As SAMO could have not used that procedure within the limited time-frame, the Commission created a situation whereby legal certainty deemed to be violated. For this reason, the Commission failed to charge a levy for the indemnity undertaking in order to offset the advantage of the measure.

Almost the same problem occurred one year later in the proceeding concerning tax deduction for intra-group interest. The proceeding was closed more than five years after the first information request was sent to Hungary. The measure was qualified as new aid under the Treaty of Accession in the decision to initiate formal proceedings in 2007, but the opposite view was taken two and a half years later. In the final decision the Commission defined the measure as existing, but not under the meaning of the Accession Treaty or the meaning of the procedural regulation. The measure was definied as existing aid without legal basis after reference was made to the exceptional circumstances of the case. SAMO did not apply the interim procedure because, after examination, it found no compatibility problems.

In this way the Commission could send a signal to the Member States that similar aid measures are prohibited, but did not have to order recovery of the incompatible aid from the Hungarian beneficiaries. Another advantage of this solution was that the Commission avoided to make a „precedent" for later cases.

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[112] Eszter Hargita: Állami támogatások Magyarországon az uniós versenypolitika tükrében Ph.D tanulmány 2003, TVI információs füzetek 23., 2005 június, 112-113. oldal

The relatively high number of cases where the Commission has applied the private investor test or its variations is a common feature. Cases in PPAs, Postabank, Mercedes-Benz land acquisition, MALÉV, FHB Bank have been decided under this „economic" test where outcomes are more or less difficult to predict. It has been more predictable in the case of MALÉV, where considerable case-law already existed for the sector, and less predictable for exemple in case of the long-term power purchase agreements.

Although the examination of the social effects of state aid decisions is not the subject of this article, we can note that decisions on grants have been increasingly followed by the press. Most of the cases has triggered a social/environmental/economic debate in society about the role of the State in a market economy. In the Hankook case, the press reported and heavily criticised the behaviour of the company towards its employees and trade union activists. The large amount of state aid was compared with the positive effects of the new plant on employment and on the economy. Probably under the pressure of public opinion, officials of the Government have reiterated that implementation of the contract with the company is (also) conditional on the observance of Hungarian law. Withdrawal of aid already contracted has never happened, to the best of my knowledge, as Hungary is very keen on attracting foreign investments. In case of Mátrai Erőmű environmental groups were active in drawing public attention to the environmental effects of the decision and an open debate has started on the environmental effects of investment aid to Hankook. As a result of the liquidation of MALÉV, a couple of thousand workers have lost their jobs. Economic and social implications of the closure of the Hungarian flag carrier are considarable.

**The application of the EU temporary rules established in response to the post-2008 financial and economic crisis**

In 2008-2009, the Commission adopted a Temporary State Aid Framework to enable Member States to deal with the problems of the financial and economic crisis affecting the financial system and to support access to finance for real economy firms.[113] The Temporary Framework, which was to operate until 2010, was extended through 2011 and finally expired in December 2011. It was based on Article 87(3)(b) of the EC Treaty (currently 107(3)(b) TFEU) which permits aid to remedy a serious disturbance in the economy of a Member State. In February 2009, the Commission gave its authorisation to the Hungarian temporary scheme to grant aid of up to 500.000 EUR and to offer reduced-interest loans covering undertakings which started to face financial difficulties after 1 July 2008.[114]

*The 2010 decision on the aid to Péti Nitrogénművek*

In January 2009, the Hungarian Development Bank (*Magyar Fejlesztési Bank*, MFB) granted loans amounting to approximately 88 million EUR to *Péti Nitrogénművek*, a synthetic fertiliser producer, which in October 2008 stopped its production activity. The loan was supplemented by guarantees from the Hungarian government. The scheme was announced in December 2008 and it aimed to rescue the main supplier of the Hungarian market by providing funds to resume production and cover operation costs. According to the government, the aid would ensure the continuation of fertiliser production in Hungary and

[113] Communication of the Commission: Temporary Union Framework for State aid measures to support access to finance in the current financial and economic crisis. OJ C 6, 11.1.2011,p.5
[114] OJ C 73/2., 27.3.2009., IP/09/325 (26/02/2009)

secure the employment of the company's workforce. The measures were not notified, but soon after their introduction, the Commission opened its formal investigation procedure.[115]

For the Commission, it was unclear whether the company was in genuine difficulty in the meaning of the Rescue and Restructuring Guidelines.[116] In such case, the Temporary Framework can be applied. In its decision, the Commission noted that despite the company's apparent liquidity problems, and as the evidence submitted by Hungary suggested, the company's total equity exceeded its registered capital, that it did not fulfil the criteria under domestic law for being the subject of collective insolvency proceedings, and that it had positive operating as well as net results for the entire 2008 year. On this basis, it was convinced that the conditions of the Rescue and Restructuring Guidelines were not fulfilled.

The Commission had no difficulties with declaring that the measures constituted state resources and they were imputable to the state. In declaring the financing from the Hungarian Development Bank as involving the use of state resources, the Commission took into account the following circumstances.[117] The Hungarian Development Bank is a state-owned financial institution, the operation of which is governed by statute, and it is entrusted with the special task of financing projects in the public interest, in particular to promote economic development in Hungary and to contribute effectively to the implementation of government economic and development policy. Its operation is subject to the special prudential rules laid down in statute, its share capital is owned by the Hungarian state and its shares are not subject to trading. Its liabilities may be covered by the state budget, and the upper limits of its lending and guaranteeing activities are regulated in law. Any dividends paid out go to the state budget. As to the imputability of the measures to the state, the Commission acknowledged that the ownership rights of the state in the bank are exercised by the competent minister and the bank reports annually to the competent minister about its operations. Its auditor is also appointed by the competent minister. The members and the chairperson of the management and supervisory boards, as well as the Chief Executive Officer, are appointed and dismissed by the competent minister.[118] On this basis, the Commission held with reference to the conditions laid down in *Stardust Marine*[119] that

*Although public control of an institution does not automatically render all the latter's actions imputable to the State, in the case at hand the necessary conditions laid down by the ECJ obtain, suggesting that MFB's behaviour is imputable to the State. MFB pursues public policy objectives, its legal status is governed by separate legislation, it is partially exempted from financial supervisory regulation and there is a high intensity of the supervision exercised by the public authorities over the management. In particular, the context in which the measures have been decided (i.e. a government decision issuing the guarantee explicitly for loans granted by the MFB and stipulating that the MFB can, in exchange, delegate two members to Nitrogénművek's board and preceded by public statements by the Government's spokesperson announcing that the measures would be granted) shows that the Hungarian authorities must be regarded as having been involved in the adoption.*[120]

The Commission also examined whether the measures complied with the Regional Aid Guidelines.[121] As the aid was granted for an investment which had been already

[115] The decision closing the procedure is published as Commission Decision of 27 October 2010 on State aid C 14/09 (ex NN 17/09) granted by Hungary to Péti Nitrogénművek OJ L 118., 6.5.2011., pp.9-18.
[116] OJ C 244, 1.10.2004, p. 2.
[117] para 25 and 26 of the Decision
[118] para 27 of the Decision
[119] C-482/99., French Republic v Commission [2002] ECR I- 4397.
[120] para. 28.
[121] OJ C 54, 4.3.2006, p.13.

completed, and thus there was no incentive effect as required by the Regional Aid Guidelines, the aid was not exempted. The Commission found, however, that part of the aid was partly justified under Article 107(3)(b) TFEU, specifically under the Temporary Framework.[122] The Commission declared that the remuneration paid by the company was too low, and the difference between the remuneration *Péti Nitrogénművek* should have paid according to the Temporary Framework and the remuneration it actually paid must be repaid by the company.[123]

On 22 July 2011, *Nitrogénművek Vegyipari Zrt* brought an action for the annulment of the Commission's Decision alleging the Commission's failure to apply the market transaction principle and that the decision violated the principle of legitimate expectations. It also claimed that Article 107(3)(b) TFEU[124] and Charter of Fundamental Rights of the European Union[125] were violated. Case T-387/11 is still pending before the General Court. The General Court has dismissed all pleas presented by the company in 2013.[126]

*Aid in the financial sector*

The Commission approved several schemes affecting the damaged European financial sector. The Hungarian bank support scheme was accepted in February 2009[127] and it is subject to approval every six months.[128] The resources of the scheme come from the external support package provided jointly by the IMF, the EU and the World Bank in November 2008. The budget of the scheme is altogether 600 billion HUF. The scheme includes a recapitalisation and a guarantee measure. The recapitalisation measure made new capital available to credit institutions in exchange for preferential shares with the purpose of enabling them to strengthen their capital base against potential losses. The guarantee measure covers new debt with a maturity of up to three years for a remuneration aligned on the recommendations of the European Central Bank. The scheme is open to all credit institutions of systemic importance and it is available only to fundamentally sound financial institutions. Eligibility is determined on the basis of an assessment by the Hungarian Central Bank and the Hungarian Financial Supervisory Authority. The Minister for the National Economy is endowed with the power to

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[122]Communication from the Commission –Temporary framework for state aid measures to support access to finance in the current financial and economic crisis (OJ C 16, 22.1.2009, p.1) as amended by the Communication from the Commission amending the Temporary Community Framework for state aid measures to support access to finance in the current financial and economic crises (OJ C 303,15.12.2009, p.6)

[123] With regard to a loan in euros, the subsidised interest rate allowed under the Temporary Framework would have been 5.868 per cent whereas the effective financing cost of the transaction was 4.362 per cent. Concerning a HUF loan, the subsidised interest rate allowed under the Framework would have been 13.40 per cent, but the effective financing cost was 12.44 per cent.

[124] The following may be considered to be compatible with the internal market:
(b) aid to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State.

[125] The applicant contended that the Commission violated its right to good administration. Under Article 41 of the Charter of Fundamental Rights of the European Union every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions, bodies, offices and agencies of the Union.

[126] T-387/11. Nitrogénművek Vegyipari Rt v Commission, not yet reported

[127] N 664/2008- Financial support measures to Hungarian financial industry in form of recapitalisation and guarantee scheme, IP/09/253, OJ C 147/2, 27.6.2009.

[128]N 355/09 First prolongation of the Hungarian bank support scheme, OJ C 235/2009, 30.9.2009., p. 2., N 662/2009 Second prolongation of the Hungarian bank support scheme. OJ C 25/13, 2.2.2010., N 224/2010. Third prolongation of the Hungarian bank support scheme OJ C 230, 26.08.2010., p.2-3., SA 31928 (N 536/2010.) Fourth prolongation of the Hungarian bank support scheme OJ C 20/6., 21.1.2011., SA 34077 Extension of the Hungarian bank support scheme-EXME 12/08.03

grant the aid on the proposal of President of the Hungarian Central Bank and the President of the Hungarian Financial Supervisory Authority.[129]

The scheme includes several safeguards to avoid abusive uses of the state support. These include a special veto share reserved for the state which enables objecting to decisions which would lead to a misuse of the funds or which would be detrimental to the stability of the financial system. Hungary also introduced a ban on financial institutions advertising their participation in the bank support scheme. The state was granted special powers to impose limitations on management remuneration while the support measures are in place. Finally, Hungary committed to notifying the restructuring or liquidation plans of companies which either fail under the guarantee scheme or of banks which can no longer be considered as fundamentally sound in the meaning of the bank support scheme.

Before the publication of the scheme, government officials announced that financial institutions receiving support from other states (i.e. foreign-owned banks) will not be eligible to receive aid from Hungarian resources. Given that 81 per cent of the registered financial institutions belong to foreign stakeholders, the implementation of this declaration could have led to open discrimination in the Hungarian financial market.[130] The final version of scheme rendered all banks having their seat in Hungary with a minimum registered capital set out in the scheme eligible.

The guarantee scheme was never used in practice.[131] Recapitalisation occurred only once, in the case of FHB Bank. This will be examined shortly.

The financial institution liquidity support scheme was put into place in March 2009. After its notification to the Commission, it received approval in January 2010.[132] As the bank support scheme, it is also subject to approval every six months.[133] The measure, financed from the rescue package provided jointly by the IMF, the World Bank and the EU, aimed at alleviating the severe liquidity shortage in the Hungarian market by providing liquidity to financial institutions to support lending to the economy. Support was granted in the form of non-subordinated, non-structured loans with a maximum maturity and with an entry window open until 30 June 2010. The Commission confirmed that the scheme was in line with its Banking Communication[134] because the level of remuneration met the requirements of the external support package provided jointly by the IMF, the EU and the World Bank in November 2008. The remuneration covers the cost of funds from the state and the risk premium of the participating financial institutions. The level of remuneration of the loans is consistent with the pricing of the Hungarian guarantee scheme.

Three banks benefited from the scheme since its implementation. OTP Bank (*Országos Takarékpénztár Bank Nyrt*), the market leader in Hungarian retail banking,

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129 The recapitalisation takes the form of preference shares, designed to be classified as Tier 1 capital. The objective of the recapitalisation is to bring the participating banks' Capital Adequacy Ratio to a certain level. The preference shares are non-cumulative, senior to all other categories of shares as regards payout of dividends and bear no voting rights. The Scheme provided that the preference shares were issued at nominal price, i.e. the amount of recapitalisation equals the face value of the shares. The remuneration of the preference shares is a combination of an annual interest plus a step up clause related to the redemption price. The annual return on the preference shares has been calculated in line with the recommendations of the European Central Bank (ECB) of 20 November 2008,

130 data cited by Thyri, Péter and Takács, Zita: Crisis related State aid for the financial Sector in Hungary- the „Bank Stability Act" 2009 European State Aid Law Quarterly 124 2009

131 It was not prolonged after 31 December 2009.

132 NN 68/09, OJ C 47/16., 25.2.2010., IP/10/19, Brussels, 14.01.2010.

133 N 225/2010. Prolongation of the Hungarian liquidity scheme OJ C 217, 11. 08.2010., p. 2., N 535/2010 Second prolongation of the Hungarian liquidity scheme OJ C 32/2011, SA.32994- EXME/11/23.06., SA 34078 Extension of the Hungarian liquidity support scheme- EXME/12/07.03.

134 The application of state aid rules to measures taken in relation to financial institutions in the context of the current global financial crises, 13 October 2008. IP/08/1495

received 1.4 bn EUR (400 billion HUF). In this regard, it announced that at least half of the received amount is going to be distributed on the Hungarian financial market, mostly in form of credit products for SMEs. In return, it was expected that the state will delegate a member to the OTP's Supervisory Board and a member to the Audit Committee of the bank. OTP decided to pay back the aid shortly after its initiation. Repayment was supposedly motivated by the fact that OTP found that the state aid had a negative influence on its reputation. This raises the important question whether the provision of the aid to OTP was altogether necessary.[135] It is also doubtful whether the loan would have achieved its declared aim, namely to use the proceeds from the loans to increase lending to the economy. The loan to OTP seems to have violated three of the criteria of the Banking Communication of the Commission,[136] appropriateness, necessity and proportionality.

Another beneficiary of the scheme was FHB Bank (*Fejlesztési Hitelbank Nyrt*). The bank received a loan which was used for increasing consumer credit and introducing several credit offers supporting SMEs. After the recapitalisation of FHB Bank in a separate support arrangement, the state gained additional shares and its ownership increased to 43.57 per cent in the bank. The state received 10.5 per cent dividend from its dividend shares. Under the terms of the scheme, the supported credit is to be paid back within five years after its initiation.[137]

*MFB Rt/Eximbank* was the third beneficiary of the scheme. It has received a 170 billion HUF (617.7 million EUR) loan with a maturity rate of November 2012. In exchange, the bank committed itself to retain and enlarge its retail loan activity on the Hungarian retail market. It also undertook the obligation to widen its company loan portfolio with 55 billion HUF.

The legal basis for the liquidity support scheme was provided by a modification of the Treasury Act which enabled the government to give loans to commercial banks.[138] The government was convinced that the interest rates applied within the scheme are commensurate with market interest rates, and, therefore, there was no need to notify the Commission under EU state aid loan. It emphasised that the exceptional status of the affected banks, that they have no foreign parent banks, justified the loan agreements, which will place these banks on equal footing with their competitors on the market.[139] The distribution of the loans and the government's approach was criticized by the president of the Hungarian Banking Association (*Bankszövetség*) as discriminative and offering excessive advantages to the beneficiaries.[140] He argued for an even, statutory access to the loan scheme instead of the loans being granted in individual discretionary agreements.

In March 2009, the Commission became aware from press reports of the loans in question and it sent a letter to the Hungarian authorities requesting information on the

[135] On 5 November 2009 about half of the loan was paid back by OTP Bank. The second instalment was paid back on 19 March 2010.

[136] The application of State aid rules to financial institutions in the context of the current global financial crises. OJ C 270, 25.10.2008, p. 8.

[137] Thyri, Peter and Takács, Zita: Crisis related State aid for the financial Sector in Hungary- the „Bank Stability Act", 2009 European State Aid Law Quarterly 124 2009, page 126.

[138] see Article 8/B of Act XXXVIII of 1992 on the Public Finances. The State can provide loans to credit institutions having a seat in Hungary in case of potential danger of the stability of the financial sector. The loan can be conditional upon the obligation to improve financing companies having a seat in Hungary.

[139] the Hungarian liquidity scheme was reported by Péter Metzinger and Mónika Papp: Public Capital and Private Capital in the internal market. Securing a level playing field for public and private enterprises in eds: Gol Carlos Rodriquez Iglesias/Lius Ortiz Blanco: Public capital and private capital in the internal market. Proceedings of the FIDE XXIV Congress Madrid 2010 Vol.3. Servicio de publicaciones de la Facultad de Derecho Universidad Complutense, pp. 275-287. on page 284-285.

[140] The interest of the loan was more favourable to the banks than the interest they were to pay under market conditions taking into account the high country specific risk.

measures. In June 2009, the Hungarian authorities pre-notified the measure. Finally, after another letter from the Commission in September 2009 reiterating its preliminary assessment, the Hungarian authorities formally notified the liquidity scheme on 9 November 2009 under Article 107(3)(b) TFEU. Since the measures had been implemented before the notification, the Commission registered the case as ‘non notified aid’.

The individual assessment by the Commission of the support measures given to FHB produced unfavourable results.[141] FHB received a mid-term loan of approximately 120 billion HUF (400 million EUR) under the liquidity scheme which was followed by an injection of 30 billion HUF (100 million EUR) of capital into the bank on the proposal of the President of the Hungarian Central Bank and the President of the Hungarian Financial Supervisory Authority. The special dividend-preference shares and the single special voting preference share with veto rights issued in this process as required under statute were subscribed by the Hungarian state with premium. The bank also issued 46.153.999 pieces special dividend preference shares, representing no voting rights, with the face value of 100 HUF. The owners of the special dividend preference shares will be entitled for dividend from the profit generated in the respective business year, the extent of which is set at 10.5 per cent reflected to the issue value. None of the newly issued shares can be transformed into ordinary shares, and they will be withdrawn 5 years after they were issued.

On 19 February 2010, FHB paid back the full amount of the recapitalisation. In September 2010, FHB acquired Allianz Commercial Bank Ltd and concluded a long-term strategic agreement with Allianz Hungária Insurance Co. Ltd.

After the start of the initial investigation in April 2009, in 2011 the Commission opened an in-depth investigation.[142] It had doubts whether the recapitalisation of FHB was in line with the Hungarian recapitalisation scheme and the EU Restructuring Guidelines.[143] Under the Temporary Framework, recapitalisation for financially sound banks should not exceed 2 per cent of their assests. In case of FHB, this was not observed as the capital provided was 9 per cent of FHB's assets. The Commission also raised the question of whether the recapitalization arrangement was used to acquire the shares of Allianz Bank. It was also questioned whether FHB, as required by the Hungarian scheme, was financially stable. After the investigation was opened, the Commission asked Hungary to provide a restructuring plan to restore the viability of FHB, which was duly submitted to the Commission later that year. This first restructuring plan was not accepted by the Commission as according to the Restructuring Guidelines the plan should secure the restoration of the long-term viability of a company, the company involved must contribute adequately to its restructuring, and measures delimiting the restraint of competition must be provided. In October 2011, Hungary submitted an updated restructuring plan which promised to FHB's involvement in the mortgage bond market and its exposure to adverse currency movements.

Hungary and the Bank claimed that the bank was sound at the time of recapitalisation and remuneration was not paid, because interest was not paid to shareholders when the State was a shareholder. The Bank has already repaid the capital for the State when the General Meeting has decided to pay out interest for the shares.

141 Commission Decision on the state aid No SA. 29608 (C 37/2010) implemented by Hungary for the recapitalisation of FHB Jelzálogbank Nyrt. Brussels, 22.2.2012.

142 Only the Hungarian version of the decision was available at the time of writing. C 37/2010 (ex NN 64/2010) sz állami támogatás, Magyarország- Az FHB feltőkésítése, Brüsszel, 2011.1.24. C (2011) 335 végleges.

143 as updated with the rules of crises aid

On 21 August 2010 a new law came into effect making it possible retroactively for the State to claim interest for the capital provided, even at the time the State was not a shareholder in the company anymore.[144]
According to an agreement between the State and the Bank on 28 October 2010 the Bank paid HUF 890 million to the State as a remuneration. This meant on average 3,79 -4,08% interest for the capital provided. According to the calculation of the Commission, in case of sound banks, the remuneration should be above 10%. As in the Commission's view FHB Bank was unsound at the time of recapitalisation, a higher remuneration should be paid for the capital provided. The Bank paid additional remuneration for the capital, totalling HUF 2.6 billion. The remuneration paid for the capital provided by the state was also criticised.

In February 2012, the Commission closed the case with a positive decision. It concluded that the measures were in line with its guidance on state support for banks during the crisis because the revised restructuring plan would restore FHB's viability while ensuring that the distortion of competition created by the aid is kept to the minimum.[145] The Commission took into account the fact that FHB had a limited importance in the retail and commercial markets in Hungary and that the bank repaid the capital to the state less than one year after its injection. The remuneration paid to the state was in line with the criteria set in the Hungarian recapitalisation and guarantee scheme which had been authorized by Commission in 2009.

As an interim conclusion we can conclude that aid granted to financial institutions during the crisis has been the most problematic field in state aid law recently. Liquidity support for OTP Bank, FHB Bank and MFB Bank/Eximbank has not been notified, but has been approved later by the Commission under the Temporary Framework. Aid to OTP Bank was not in line with the Banking Communication of the Commission as it was not necessary. The story of FHB is rather surprising. It is noteworthy that the Commission has not accepted the Bank's restructuring plans and after approval in its final decision ruled that distortion of competition was created by the aid, but was kept to the minimum. HUF 2.6 billion was repaid to the Budget for approval of the measure. Aid to financial institutions have passed without much notice in Hungary.

## CONCLUSIONS

Hungarian regulation on state aid has evolved over time, but its basic structure has remained intact. SAMO has a central role in applying and interpreting very complex rules on state aid. Although it is part of the central administration, transparency of its work should be improved. The notification obligation to the Minister responsible has produced positive results, because the centralised system ensures more compliance on behalf of local administration.

Although the obligation to notify draft aid was breached by the Hungarian State in those cases where there was little chance to get authorisation from the EU Commission, Hungary has always respected its obligations stemming from Commission decisions and EU Court judgements. Altogether SAMO has coped well with the challenges of EU membership over the last 10 years.

[144] Act CX of 2010 modifying Act CIV of 2008 on reinforcing the financial stability of the Hungarian financial intermediary system.
[145]Commission Decision on the state aid No SA. 29608 (C 37/2010) implemented by Hungary for the recapitalisation of FHB Jelzálogbank Nyrt. Brussels, 22.2.2012.

Shortly after accession a repeated problem was how to divide new aid from existing aid. Nowadays, after our membership has become more established, no special, country- or region-specific legal issues arise anymore. From an economic point of view, as the Hungarian economy is very dependent on foreign investments, it is crucial for the State to attract as much foreign capital as possible.