

COMMISSION DECISION

of 27 October 2010

on State aid C 14/09 (ex NN 17/09) granted by Hungary to Péti Nitrogénművek Zrt.

(notified under document C(2010) 7274)

(Only the Hungarian text is authentic)

(Text with EEA relevance)

(2011/269/EU)

THE EUROPEAN COMMISSION,

(2) Hungary submitted its comments to the Commission's opening decision on 3 and 17 August 2009.

Having regard to the Treaty on the Functioning of the European Union, and in particular the first subparagraph of Article 108(2) thereof,

(3) The opening decision was published in the *Official Journal of the European Union* on 17 July 2009 ⁽³⁾. Comments were received from four interested parties: from Nitrogénművek, the beneficiary of the measures allegedly constituting State aid, on 18 August 2009; from two interested parties requesting that their identity not be disclosed, on 17 and 18 August 2009; and from ZAK S.A. on 19 August 2009.

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

Having regard to the decision by which the Commission decided to initiate the procedure laid down in Article 108(2) TFEU ⁽¹⁾ in respect of State aid C 14/09 (ex NN 17/09) ⁽²⁾,

(4) The Commission transmitted the comments to Hungary by letter of 21 September 2009. Hungary replied to the third-party comments by letter of 20 October 2009.

Having called on interested parties in accordance with the aforementioned provisions to submit their comments pursuant to those provisions, and having regard to their comments,

(5) The Commission requested further information from the Hungarian authorities on 3 November 2009, to which Hungary replied by letter of 4 December 2009. A further informal exchange of information took place by e-mail in June 2010 between the Commission services and the Hungarian authorities.

Whereas:

II. THE BENEFICIARY

I. PROCEDURE

(1) At the end of 2008 the Commission learnt from the media about planned measures by Hungary in favour of Péti Nitrogénművek Zrt. (hereinafter 'Nitrogénművek'). After several exchanges of information, on 29 April 2009 the Commission opened the formal investigation procedure on measures allegedly constituting State aid.

(6) Nitrogénművek is a producer of synthetic fertilisers. Its head office is located in Pétfürdő, Veszprém county, Hungary, which is an assisted area pursuant to Article 107(3)(a) TFEU. The company is Hungary's main fertiliser producer and the main supplier of the Hungarian market.

⁽¹⁾ On 1 December 2009, Articles 87 and 88 of the EC Treaty were replaced by Articles 107 and 108, respectively, of the Treaty on the Functioning of the European Union (TFEU). Article 87 of the EC Treaty is, in substance, identical to Article 107 TFEU, as is Article 88 of the EC Treaty to Article 108 TFEU. For the purposes of this Decision, references to Articles 107 and 108 TFEU should be understood as references to Articles 87 and 88, respectively, of the EC Treaty, where necessary.

⁽²⁾ Commission Decision C(2009) 3000 final of 29 April 2009 (OJ C 165, 17.7.2009, p. 12).

(7) In 2008 Nitrogénművek had a turnover of HUF 64,8 billion (approx. EUR 232 million), 74 % of which was realised in Hungary and 26 % exported (mainly to EU markets). In 2008 it employed 508 staff. The company's registered capital amounts to HUF 528 million (approx. EUR 1,92 million). In 2008 equity totalled HUF 11 billion (approx. EUR 40 million).

⁽³⁾ See footnote 2.

Table 1

Nitrogénművek's key financial data

	2007 HUF billion	2007 EUR million	2008 HUF billion	2008 EUR million
Turnover	48,211	175	64,836	232
Operating result	2,435	8,9	16,335	59,4
Net result profit/loss (-)	- 3,303	- 12	7,296	26,5

Source: Data from the company's 2008 financial statements.

- (8) On 18 October 2008, Nitrogénművek stopped its production activity.

III. DESCRIPTION OF THE MEASURE

- (9) On 18 December 2008, the Hungarian Government announced⁽⁴⁾ that, in order to ensure the continuation of fertiliser production in Hungary and for the sake of employment preservation, the State would 'rescue' Nitrogénművek by providing funds to resume production and cover operating costs.
- (10) On 20 December 2008, the Government approved⁽⁵⁾ two separate state guarantees to back two loans to be granted by the 100 % state-owned Hungarian Development Bank (Magyar Fejlesztési Bank Zrt., 'MFB'). Both guarantees were granted against an upfront, one-off premium of 2 % of the guaranteed amount.
- (11) With the backing of these state guarantees, on 26 January 2009 MFB and Nitrogénművek concluded two loan agreements.
- (a) Loan A: investment loan⁽⁶⁾ of EUR 52 million with a maturity of 6 years. The interest rate is 6-month EURIBOR + 1,7 %. The 100 % government guarantee has an up-front one-off premium of 2 % of the loan amount. Collaterals for MFB: 100 % state guarantee, second-rank (i.e. ranking immediately after loan B, below) pledge on assets⁽⁷⁾. No specific collaterals for the State were specified. The principal is to be reimbursed in 12 six-monthly instalments starting from 15 June 2009. Interest payment is due every 6 months.
- (b) Loan B: current facilities loan HUF 10 billion (approx. EUR 36 million) loan granted for 4 years, with an interest rate of 3-month BUBOR⁽⁸⁾ + 2,5 %. The loan is backed by an 80 % government guarantee, with an upfront one-off premium of 2 % (of the amount covered by the 80 % guarantee). Collaterals for MFB: 80 % state guarantee, first-rank pledge on assets. No specific collaterals for the State were specified. In accordance with the Government Decision, MFB had the right to appoint two members of Nitrogénművek's executive board. The principal is to be repaid at the end of the maturity. Interest payment is due every 3 months.

Table 2

Summary of the state measures in favour of Nitrogénművek

	Aim	Loan amount	Interest	Guarantee	2 % upfront guarantee fee, annualised (*)	Main collaterals to the bank
Loan A	Investments	EUR 52 million	EURIBOR + 1,7 %	100 %	0,41 %	Second-rank asset pledge

⁽⁴⁾ See the statement by the Government's spokesperson: http://www.kormanysozovo.hu/news/show/news_1122?lang=hu.

(Last consulted on 17 September 2010.)

⁽⁵⁾ Government Decision 1086/2008. (XII. 20), published in Official Gazette [Magyar Közlöny] No 184/2008. This Government Decision was amended slightly on 23 January 2009 by Government Decision 1007/2009. (I. 23.), published in Official Gazette No 9/2009.

⁽⁶⁾ This investment loan related to financing of an investment project carried out between 2003 and 2008.

⁽⁷⁾ See recital 38.

⁽⁸⁾ BUBOR is the Budapest Interbank Offered Rate.

	Aim	Loan amount	Interest	Guarantee	2 % upfront guarantee fee, annualised (*)	Main collaterals to the bank
Loan B	Current facility	HUF 10 billion	BUBOR + 2,5 %	80 %	0,46 %	First-rank asset pledge

(*) As calculated by the Hungarian authorities, taking into account the maturity and differentiated EUR or HUF discount rates. In the case of loan B, the annualised guarantee fee has also been adjusted for 100 % of the loan amount (the annualised guarantee fee for the 80 % part would be 0,58 %).

- (12) Nitrogénművek restarted production on 26 February 2009.

IV. GROUNDS FOR INITIATING THE PROCEDURE

- (13) In the opening decision of 29 April 2009, the Commission asked whether Nitrogénművek was a firm in difficulty according to the Community guidelines on State aid for rescuing and restructuring firms in difficulty⁽⁹⁾ (hereinafter 'Rescue and restructuring guidelines') and, if so, whether it could have obtained financing on the market on the same terms as those offered by the Hungarian authorities. The Commission took the preliminary view that the following measures granted to the company could constitute incompatible State aid as they appeared to have been granted below market rate:

- (a) the 100 % state guarantee on the EUR 52 million investment loan;
- (b) the EUR 52 million investment loan itself, in case it is an existing loan which was granted prior to the state guarantee (On the basis of the information available at the time of the opening, it was not clear whether the investment loan was an existing or a new loan.);
- (c) the 80 % state guarantee on the HUF 10 billion current facilities loan;
- (d) the 20 % non-guaranteed part of the current facilities loan.

- (14) The Commission also considered that the 100 % state guarantee backing the investment loan might constitute aid in favour of MFB, insofar as it guarantees an existing loan.

V. COMMENTS FROM HUNGARY

- (15) In general, Hungary argues that the measures could not be classified as State aid because they were market-

conform and thus provided no advantage to the beneficiary. Hungary does not dispute the other cumulative criteria of State aid, i.e. transfer of state resources, selectivity, distortion of competition and effect on trade.

- (16) In particular, Hungary contests that Nitrogénművek could be defined as a firm in difficulty in the sense of the Rescue and restructuring guidelines. The Hungarian authorities claim that the company was profitable and had a stable business outlook in 2008. Hungary holds that the company's creditworthiness could be considered 'satisfactory' at the time of the granting of the measures, which corresponds to 'BB' according to the rating categories laid down in the Communication from the Commission on the revision of the method for setting the reference and discount rates⁽¹⁰⁾ (hereinafter 'Reference rate communication').

- (17) With regard to the shutdown of the company's production in autumn 2008, the Hungarian authorities explain that in general the fertiliser industry is characterised by high seasonality. Moreover, due to the evolving financial and economic crisis, demand diminished. The company decided to stop its production in the view of high gas prices (which represent a major cost element in fertiliser production and were expected to fall) and the substantial accumulated inventories. Hungary also notes that such a stoppage was not a rare phenomenon on the European market; several manufacturing sites shut down or limited production in the same period.

- (18) With regard to the interest paid and the guarantee fee, Hungary maintains that those are market-conform: (i) in the case of loan B they do not qualify as aid in view of the Reference rate communication; and (ii) in the case of loan A the interest rate is below that which would be deemed market-conform under the Reference rate communication, but given the high-value collaterals, it can nevertheless be considered as market-conform. Hungary also holds that there were several loan and credit line contracts concluded between the company and private banks in the first half of 2008 on similar conditions, which – it argues – would show that the premiums and terms of loans A and B did not provide the company with any advantage compared to market financing.

⁽⁹⁾ OJ C 244, 1.10.2004, p. 2.

⁽¹⁰⁾ OJ C 14, 19.1.2008, p. 6.

VI. COMMENTS FROM INTERESTED PARTIES

- (19) The Commission received comments to the opening decision from three competitors⁽¹¹⁾. All parties supported the Commission's investigation and argued that the loans did constitute State aid.
- (20) The beneficiary also commented, contesting that the measures would entail illegal State aid. Its arguments overlapped to a large extent with those submitted by the Hungarian authorities.

VII. HUNGARY'S COMMENTS ON THE OBSERVATIONS OF INTERESTED PARTIES

- (21) In its reply to the comments of interested parties, Hungary dismisses the third parties' comments and reiterates its arguments that Nitrogénművek did not benefit from State aid.

VIII. EXISTENCE OF STATE AID WITHIN THE MEANING OF ARTICLE 107(1) TFEU

- (22) In order to ascertain whether a measure constitutes State aid, the Commission has to assess whether the contested measure fulfils the conditions of Article 107(1) TFEU. This Article states that: 'Save as otherwise provided in the Treaties, any aid granted by a Member State or through state resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market'.
- (23) In the light of this provision, the Commission will assess hereunder whether the contested measures in favour of Nitrogénművek constitute State aid.

VIII.1. The loans from MFB are imputable to the State

- (24) The rules governing MFB's functioning have changed since the granting of the measures. The present assessment refers to the legal situation at the time of the conclusion of the loan agreements under scrutiny.
- (25) MFB is a State-owned specialised financial institution, which was set up and whose functioning was, at the time of the granting of the measures, governed by a (special purpose) legal act (hereinafter 'the MFB Act')⁽¹²⁾. Under the Act, the bank pursues certain public policy objectives; in particular, its core function

is to promote economic development and to contribute effectively to the implementation of the State's economic and development policy. Part of the prudential rules pertaining to commercial banks is not applied to MFB, as it is subject to special prudential rules under the MFB Act.

- (26) MFB's share capital, amounting to HUF 60 billion, is 100 % owned by the Hungarian State, its shares are not subject to trading as stipulated by the MFB Act. Some of MFB's liabilities are covered by the State's Central Budget; the budgetary law stipulates MFB's maximum lending and the amounts it is allowed to guarantee. Moreover, any dividends paid out flow into the Central Budget. Consequently, the Commission finds that measures granted by MFB involve state resources.
- (27) The State's ownership rights in MFB are exercised by the competent minister. MFB reports annually to the competent minister about its operations; the 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 revoked by the competent minister.
- (28) Although public control of an institution does not automatically render all the latter's actions imputable to the State⁽¹³⁾, in the case at hand the necessary conditions laid down by the ECJ obtain⁽¹⁴⁾, 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.
- (29) On the basis of the foregoing, the Commission considers that the MFB's actions are imputable to the State.

VIII.2. The measures should be assessed as straightforward state loans

- (30) As the loans themselves are directly imputable to the State, the additional state guarantees do not increase the financial burden borne by the State or the

⁽¹¹⁾ See recital 3.

⁽¹²⁾ Act XX of 2001 on the Magyar Fejlesztési Bank Részvénytársaság [Hungarian Development Bank Ltd]. The MFB Act was amended by Act LII of 2010.

⁽¹³⁾ Judgment in Case C-345/02 *Pearle BV*.

⁽¹⁴⁾ Judgment in Case C-482/99 *France v Commission*, paragraphs 52-57.

advantage to Nitrogénművek. It therefore appears appropriate to subsume the loans and the guarantees at issue under two measures to be assessed as straightforward loans from the State (for which the cost to Nitrogénművek will be the interest on the loan plus the premium for the guarantee).

- (31) Consequently, the State aid assessment will be made in the light of the Reference rate communication which applies to loans.

VIII.3. Advantage: Market conformity of the measures

VIII.3.1. Financial health of the company at time of granting of the measures

- (32) Hungary maintains that Nitrogénművek did not qualify as a company in difficulty within the meaning of the Rescue and restructuring guidelines at the time of the granting of the measures. As regards the stoppage of the company's production in October 2008, the Hungarian authorities claimed that this was a strategic and seasonal decision and that several other market players stopped production in autumn 2008. Hungary claims that the company should rightly be considered as BB-rated at the time.
- (33) The Commission notes that despite the company's apparent liquidity problems, and as the evidence submitted by Hungary suggests, the company's total equity exceeded its registered capital, it did not fulfil the criteria under domestic law for being the subject of collective insolvency proceedings, and it had positive operating as well as net results for the entire year 2008. Therefore, points 9-11 of the Rescue and restructuring guidelines do not seem to be fulfilled.
- (34) It is clear, however, from the investigation, notably from the company's 2008 financial statements, that Nitrogénművek needed the public money to resume operations. Indeed, the 2008 financial statements emphasised that: 'In the second half of [2008] the financial and economic crisis reached the company. Its customers experienced financial difficulties and hence marketing of Nitrogénművek's products fell to a minimal level. On 18 October 2008 the company stopped production for financial and economic reasons. In order to relaunch production, the owner of the company initiated talks with the Government. As a result, the Government issued the guarantee with the aim of secure Hungarian fertiliser supply.'⁽¹⁵⁾ The financial accounts also suggest that the current facilities

loan was necessary to restart operations and that part of the amount was used to pay supplier credits due on 31 December 2008⁽¹⁶⁾.

- (35) The Commission considers that a company which, having stopped its production, is unable to resume operations without public help – regardless of the reasons which led to its stoppage – cannot be regarded as a healthy and viable company. It is clear from the financial accounts that the company had a serious liquidity shortage and that the State's intervention was essential in raising funds.
- (36) As regards the creditworthiness of the company, the Commission doubts that the alleged BB rating reflects the real financial situation of Nitrogénművek at the time of the granting of the measures. Firstly, the Commission notes that Hungary did not provide a credit assessment by an independent rating agency or financial institution. The alleged BB rating is attributed to MFB which, for the purposes of the measures at issue, acted as an instrument of the State (indeed in line with the express decision of the Government) and not as an independent financial institution seeking to make sound commercial assessment. This is in itself liable to call into question the value of the 'rating'. Secondly, Hungary provides no information whatsoever on the methodology and underlying information used by MFB to establish the financial health of the company. Thirdly, in the light of the fact that Nitrogénművek was, at the time of the granting of the measure, a company with no production activity and apparently in urgent need of financing in the absence of which it would be unable to resume production (see in detail recitals 34 and 35 above), it is not credible that its financial situation could be considered as 'satisfactory'. Against this specific background, and regardless of the past performance of the company, the Commission is of the view that in the present case the alleged BB rating cannot be applied for the State aid assessment of the measures under the Reference rate communication.
- (37) In conclusion, the Commission is of the opinion that the company cannot be regarded as a company with sound financial strength. It is clear from the submissions that it suffered severe liquidity problems and was unable to resume operations (see recitals 34 and 35 above). Thus it can be considered to be in bad financial shape, which corresponds to the lowest category of the Reference rate communication (CCC category).

VIII.3.2. Collaterals

- (38) The assets offered as collaterals include land, buildings and machines on several different production plants⁽¹⁷⁾ of Nitrogénművek.

⁽¹⁶⁾ Page 51 of the 2008 financial statement.

⁽¹⁷⁾ More specifically the assets include the following plants: carbamide production, ammonia production, acid production; granulating, neutralising and packaging plants.

⁽¹⁵⁾ Page 3 of the 2008 financial statement.

(39) As regards the value of the pledged asset, Hungary submitted an evaluation report by the firm [...] (*), prepared in mid-2008. According to this evaluation, the pledged assets had a market value of approx. EUR [...] million and an orderly liquidation value of approx. EUR [...] million. MFB calculated the risk-weighted liquidation value of the assets as approx. EUR [...] million.

(40) Given that the total combined value of the two loans under scrutiny is EUR 88 million (i.e. collaterals have a value of [over 70] % of the loans according to the most prudent estimate), the Commission considers that the transactions are highly collateralised. Even if the pledges for loan A are in second rank, any claims resulting from this transaction can be satisfied after those from loan B.

(41) The fact that the collateral is pledged to MFB and not to the State directly is not material. According to Hungarian law⁽¹⁸⁾, if a guarantor has to satisfy claims from a guarantee, all the rights pertaining to the underlying loan are transferred to him. Thus, if Nitrogénművek fails to repay the loans and MFB calls the guarantee, the State can satisfy its claims from the pledges under the loan agreement.

(42) Moreover, with regard to loan B, the State had the right to appoint two members to the company's executive board, having a veto right on any decision to pay out dividends, to grant further pledges to third parties or to take out further loans exceeding HUF 100 million.

(43) In the light of these elements, the Commission considers that both transactions, loan A and loan B, were highly collateralised for the purposes of the Reference rate communication.

VIII.3.3. Comparable market rates

(44) In its submission Hungary presented several allegedly 'comparable' loans concluded between private banks and Nitrogénművek, with the aim of demonstrating that the financial charges under the public measures were market-conform.

(45) However, these examples are not comparable and thus irrelevant for the sake of the current assessment. Firstly, they mostly concern lower amounts and current account

credit lines⁽¹⁹⁾. Secondly, the rates charged by the banks are higher than those under assessment⁽²⁰⁾. Finally and most importantly, all of them were granted before the crisis, mainly in the first half of 2008. The commercial conditions in that period are not comparable with the period December 2008-January 2009, the peak of the financial crisis.

VIII.3.4. Benchmark rates under the Reference rate communication

(46) In order to determine whether a loan entails State aid and, if so, how much, the Commission applies a proxy for market interest rates in its Reference rate communication. According to the Reference rate communication, differentiated margins are to be applied on the base rate, depending on the creditor's rating and the available collaterals.

(47) With regard to the relevant date of assessment, given that the final binding 'granting' acts (i.e. the loan agreements) were concluded on 26 January 2009, the reference rate (base rate plus the relevant margin) of that day has to be compared with the corresponding effective remuneration of the financing package.

(48) Concerning the margin to be applied, as set out in detail above, the Commission considers that Nitrogénművek fell into the lowest category of the reference rate 'grid' and that the transactions were highly collateralised. Consequently, a margin of 400 basis points added on the top of the relevant base rate can be considered as a market benchmark rate.

(49) As regards loan A (EUR), its total effective financing cost amounted to 4,362 % on 26 January 2009⁽²¹⁾. By comparison, the relevant benchmark reference rate on that date was 8,99 %⁽²²⁾. The total financing cost of loan A is thus below the benchmark rate, and consequently the measure confers an advantage on the company.

⁽¹⁹⁾ The credit lines by four different private banks were of the following magnitude: EUR [...] million; EUR [...] million, HUF [...] billion and HUF [...] billion.

⁽²⁰⁾ In three cases out of the four credit line contracts presented by Hungary.

⁽²¹⁾ The total financing cost consists of the interest charged by MFB (6-month EURIBOR + 1,7 %) plus the annualised guarantee fee of approx. 0,41 %. On 26 January 2009 the 6-month EURIBOR (http://www.euribor-ebf.eu/assets/modules/rateisblue/processed_files/hist_EURIBOR_2009.xls) amounted to 2,252 %. 2,252 % + 0,41 % + 1,7 % = 4,362 %.

⁽²²⁾ The EUR reference rate on that date was 4,99 %. 4,99 % + 4 % = 8,99 %.
See http://ec.europa.eu/competition/state_aid/legislation/reference_rates.html

(*) Data covered by the obligation of professional secrecy is indicated in the text of the Decision by a [...] sign.

⁽¹⁸⁾ The general rules on guarantees are laid down in Sections 272-276 of the Civil Code (Act IV of 1959).

(50) As regards loan B (HUF), its total effective financing cost amounts to 12,44 %⁽²³⁾. By contrast, the relevant reference rate on that date was 14,01 %⁽²⁴⁾. The total financing cost of loan B is thus below the benchmark rate, and consequently the measure confers an advantage on the company.

VIII.4. Conclusion on the presence of aid

(51) As shown above, the measures are financed by state resources and imputable to the State.

(52) Nitrogénművek obtained financing on better terms than on which it would have raised funds on the markets. The measures thus confer an advantage on the company.

(53) Furthermore, the advantage is selective as the measures are limited to Nitrogénművek.

(54) These selective measures are likely to distort competition, by providing the company with an advantage in relation to competitors, and there is extensive trade between Member States in fertilisers.

(55) Consequently, loans A and B constitute State aid within the meaning of Article 107(1) TFEU.

IX. POSSIBLE AID TO MFB

(56) In the opening decision the Commission raised the possibility that the 100 % guarantee on loan A could be State aid to the benefit of MFB in view of the fact that contradictory information had suggested that the investment loan was an existing one (in which case the later guarantee could be considered aid to the bank inasmuch as it improved its likelihood of repayment). However, the investigation has shown that loan A is a new loan which was signed on 26 January 2009, thus the 100 % guarantee on loan A did not contain State aid to MFB.

X. COMPATIBILITY OF THE AID WITH THE INTERNAL MARKET

X.1. General

(57) Article 107(2) and 107(3) TFEU provide for exemptions to the general rule that State aid is incompatible with the internal market as stated in Article 107(1).

⁽²³⁾ The total financing cost consists of the interest charged by MFB (3-month BUBOR + 2,5 %) plus the annualised guarantee fee of approx. 0,46 %. (Calculated on the basis of 100 % of the loan.) On 26 January 2009 the 3-month BUBOR (http://www.mnb.hu/Root/Dokumentumtar/ENMNB/Monetaris_politika/mnben_jegybanki_eszkozatar/mnben_egynaposjegybankieszkozok/bubor2.xls) amounted to 9,48 %. $9,48 \% + 0,46 \% + 2,5 \% = 12,44 \%$.

⁽²⁴⁾ The HUF reference rate on that date was 10,01 %. $10,01 \% + 4 \% = 14,01 \%$.

See http://ec.europa.eu/competition/state_aid/legislation/reference_rates.html

(58) In the following the Commission will assess the compatibility of the measures under those exceptions. However, it should be noted at the outset that Hungary did not put forward any arguments as regards their compatibility with the internal market.

X.2. Exemptions under Article 107(2) TFEU

(59) The exemptions in Article 107(2) TFEU do not apply in the present case because this measure does not have a social character, has not been awarded to individual consumers, is not designed to make good damage caused by natural disasters or exceptional occurrences and has not been awarded to the economy of certain areas of the Federal Republic of Germany affected by the division of that country.

X.3. Exemptions under Article 107(3) TFEU

(60) Further exemptions are laid down in Article 107(3) TFEU. In the following, the Commission will first assess the measures' potential compatibility pursuant to Article 107(3)(a), (c) and (d) and in the end pursuant to Article 107(3)(b).

(61) Article 107(3)(a) states that 'aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious under-employment' may be declared compatible with the internal market. Hungary's entire territory was regarded as such an area at the time of accession, and most of its regions are still eligible for such aid⁽²⁵⁾.

(62) The compatibility of State aid to assisted areas is governed by the Commission guidelines on national regional aid for 2007-2013 (hereinafter 'Regional Aid Guidelines')⁽²⁶⁾. The measures, however, do not comply with the Regional Aid Guidelines. As regards the investment loan, it was granted for an investment which had already been completed⁽²⁷⁾, and thus there is no incentive effect as required by the Regional Aid Guidelines. As regards possible operating aid, this aid does not facilitate the development of any activities or economic areas and it is not limited in time, degressive or proportionate to what is necessary to remedy specific economic handicaps⁽²⁸⁾.

⁽²⁵⁾ Regional aid map of Hungary approved by the Commission on 13 September 2006 and published in OJ C 256 of 2006. Almost the entire territory of Hungary is defined as Article 107(3)(a) regions, with the exception of Budapest and Pest county, which are Article 107(3)(c) regions.

⁽²⁶⁾ OJ C 54, 4.3.2006, p. 13.

⁽²⁷⁾ See footnote 6.

⁽²⁸⁾ Section 5 of the Regional Aid Guidelines allows operating aid under strict conditions. Moreover, the measure is ad hoc aid. In this regard, the aforementioned Guidelines state that 'Where, exceptionally, it is envisaged to grant individual ad hoc aid to a single firm, or aid confined to one area of activity, it is the responsibility of the Member State to demonstrate that the project contributes towards a coherent regional development strategy and that, having regard to the nature and size of the project, it will not result in unacceptable distortions of competition.' Hungary did not provide any information to that effect.

- (63) In view of the above, the Commission concludes that the aid is not eligible for the derogation provided for in Article 107(3)(a) TFEU.
- (64) Article 107(3)(c) provides for the authorisation of State aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest. The Commission has developed several guidelines and communications that explain how it will apply the derogation contained in the aforementioned provision.
- (65) With regard to the Rescue and restructuring guidelines, the Commission notes that (irrespective of whether the company was eligible to receive aid under the guidelines) the criteria for compatible aid do not appear to be fulfilled. With regard to rescue aid, the measures are not restricted to the minimum necessary as they are longer than 6 months; it has not been demonstrated that they would be warranted on the grounds of serious social difficulties or would not have any unduly adverse spill-over effects on other Members. With regard to restructuring aid, in the absence of a restructuring plan, the Commission cannot evaluate whether the aid would restore long-term viability, whether it would be kept to a minimum, and that undue distortions of competition would be avoided.
- (66) The Commission thus concludes that the measures are not compatible as rescue or restructuring aid.
- (67) The Commission considers that because of the nature and characteristics of the aid, none of the exemptions enshrined in other guidelines and communications issued pursuant to Article 107(3)(c) is applicable to the present case.
- (68) Article 107(3)(d) TFEU states that aid to promote culture and heritage conservation may be declared compatible with the TFEU where such aid does not affect trading conditions and competition in the EU to an extent that is contrary to the common interest. This obviously does not apply to the current case.
- (71) With regard to remedying a serious disturbance in the economy of a Member State, the Commission adopted a Temporary Community framework for State aid measures to support access to finance in the current financial and economic crisis ⁽²⁹⁾ (hereinafter 'Temporary Framework').
- (72) The Commission considers that on the basis of the financial figures submitted by the Hungarian authorities ⁽³⁰⁾, the company did not show signs of difficulties before the outbreak of the global financial and economic crisis. More specifically, as already set out in recital 33 above, its total equity exceeded its registered capital, it did not fulfil the criteria under domestic law for being the subject of collective insolvency proceedings, and it had positive operating as well as net results with regard to the entire year 2008. The problems leading to the production shutdown arose after the beginning of the crisis. The Commission hence considers that Nitrogénművek did not qualify as a firm in difficulty within the meaning of the Rescue and restructuring guidelines on 1 July 2008. Therefore, it is eligible for aid under the Temporary Framework.
- (73) The measures, however, do not comply with point 4.2 of the Temporary Framework as 'limited compatible amount of aid' because they were not granted in the form of an aid scheme and the aid amount seems to exceed EUR 500 000. Furthermore, even if the guarantees were regarded in isolation, they do not comply with point 4.3 of the Temporary Framework as measures in the form of guarantees, because the guarantee fees ⁽³¹⁾ paid are below the applicable safe harbour premia ⁽³²⁾ under the Temporary Framework. Besides, Hungary did not demonstrate that the wage bill criterion has been complied with. The financial package is not aid for the production of green products (point 4.5), neither is it risk capital (point 4.6).
- (74) As regards the subsidised loan measure under point 4.4 of the Temporary Framework, this applies to loans with unlimited duration contracted before 31 December 2010 ⁽³³⁾. The measures under scrutiny were contracted after the entry into force of the Temporary Framework and before 31 December 2010 and could therefore be eligible.

X.4. Compatibility assessment under the Temporary Framework

- (69) Article 107(3)(b) TFEU states that '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' may be declared compatible with the internal market.
- (70) The Commission notes that the aid in question is not designed to promote the execution of an important project of common European interest.

⁽²⁹⁾ 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 crisis (OJ C 303, 15.12.2009, p. 6).

⁽³⁰⁾ See Table 1.

⁽³¹⁾ Guarantee fee A: 0,41 % p.a., guarantee fee B: 0,46 % p.a.

⁽³²⁾ 3,8 % for highly collateralised transactions for CCC. The Commission notes that even for BB+-rated companies, the minimum fee would be 0,8 %.

⁽³³⁾ The reduced interest rates may be applied for interest payments before 31 December 2012; an interest rate at least equal to the rate defined in the Communication on reference rates must apply to loans after that date.

- (75) The Commission notes, however, that the effective remuneration of the transactions is below the minimum interest rate deemed compatible under the Temporary Framework.
- (76) According to the relevant provision, 'the Commission will accept that public or private loans are granted at an interest rate which is at least equal to the central bank overnight rate plus a premium equal to the difference between the average 1-year interbank rate and the average of the central bank overnight rate over the period from 1 January 2007 to 30 June 2008, plus the credit risk premium corresponding to the risk profile of the recipient, as stipulated by the Commission Communication on the revision of the method for setting the reference and discount rates.'
- (77) With regard to the EUR loan (loan A), the difference between the average 1-year interbank rate and the average overnight interbank rate over the period from 1 January 2007 to 30 June 2008 is 64 basis points. Moreover, the European Central Bank overnight rate (EONIA) on 26 January 2009⁽³⁴⁾ was 1,228 %. Given the rating of the beneficiary and the collateralisation of the transaction (see recital 48 above), an additional 400 bps margin has to be applied on this base. Therefore, the subsidised interest rate allowed under the Temporary Framework would be 5,868 %. The effective financing cost of the transaction (4,362 %) is below this rate.
- (78) Concerning the HUF loan (loan B), in case N 78/09⁽³⁵⁾ the Hungarian authorities confirmed that the difference between the average 1-year interbank rate and the average overnight interbank rate over the period from 1 January 2007 to 30 June 2008 is 26 basis points. Moreover, the Hungarian Central Bank's overnight rate on 26 January 2009⁽³⁶⁾ was 9,14 %. Given the rating of the beneficiary and the collateralisation of the transaction, an additional 400 bps margin has to be applied on this base. Therefore, the subsidised interest rate allowed under the Temporary Framework would be 13,40 %. The effective financing cost of the transaction (12,44 %) is below this rate.

X.5. Conclusion on compatibility

- (79) In view of the above, the Commission concludes that loan A and loan B are partly compatible as subsidised loan measures under the Temporary Framework.

⁽³⁴⁾ http://www.euribor.org/html/content/eonia_data.html
http://www.euribor-ebf.eu/assets/modules/rateisblue/processed_files/hist_EONIA_2009.xls.

⁽³⁵⁾ Commission Decision of 24 February 2009 (OJ C 73, 27.3.2009, p. 1).

⁽³⁶⁾ http://www.mnb.hu/engine.aspx?page = mnbhu_statisztikak
http://www.mnb.hu/Root/Dokumentumtar/MNB/Monetaris_politika/mnbhu_eszkoztar/mnbhu_egynaposjegybankieszkozok/HUFONIA.xls.

- (80) Specifically, the Commission considers that the difference between the effective remuneration of the transactions and the subsidised rate is incompatible; whereas the difference between the subsidised rate and the benchmark market rate is compatible on the basis of the Temporary Framework.

XI. RECOVERY

- (81) According to the TFEU and the Court of Justice's established case-law, when it has found aid to be incompatible with the internal market the Commission is competent to decide that the State concerned must abolish or alter it⁽³⁷⁾. The Court has also consistently held that the obligation on a State to abolish aid regarded by the Commission as being incompatible with the internal market is designed to restore the previously existing situation⁽³⁸⁾. In this context, the Court has established that that objective is attained once the beneficiary has repaid the amounts granted by way of unlawful aid, thus forfeiting the advantage which it had enjoyed over its competitors on the market, and the situation prior to the payment of the aid has been restored⁽³⁹⁾.
- (82) Following that case-law, Article 14 of Council Regulation (EC) No 659/1999⁽⁴⁰⁾ laid down that 'where negative decisions are taken in cases of unlawful aid, the Commission shall decide that the Member State concerned shall take all necessary measures to recover the aid from the beneficiary'.
- (83) Thus, given that the measures at hand are to be considered as unlawful and partly incompatible aid, the incompatible part must be recovered in order to restore the situation that existed on the market prior to the granting of the aid. Recovery is, therefore, to be effected from the date when the advantage accrued to the beneficiary, i.e. when the aid was made available to the beneficiary, and is to bear recovery interest until effective recovery.
- (84) In light of section X.5 above, the incompatible aid element of the measures is calculated as the difference between the compatible Temporary Framework subsidised rate and the total effective financing costs (i.e. interest rate plus guarantee premium) at which the financing was provided.
- (85) The exact recovery amount is to be computed by the Hungarian authorities.

⁽³⁷⁾ Judgment in Case C 70/72 *Commission v Germany* [1973] ECR 813, paragraph 13.

⁽³⁸⁾ Judgment in Joined Cases C-278/92, C-279/92 and C-280/92 *Spain v Commission* [1994] ECR I-4103, paragraph 75.

⁽³⁹⁾ Judgment in Case C-75/97 *Belgium v Commission* [1999] ECR I-3671, paragraphs 64-65.

⁽⁴⁰⁾ OJ L 83, 27.3.1999, p. 1.

XII. CONCLUSION

- (86) On the basis of the foregoing, the Commission concludes that loan measures A and B in favour of Nitrogénművek constitute State aid within the meaning of Article 107(1) TFEU.
- (87) In addition, the Commission concludes that loan A and loan B are partly compatible with the internal market as subsidised loan measures under the Temporary Framework. In particular, the difference between the subsidised Temporary Framework rate and the benchmark market rate is compatible. On the other hand, the difference between the effective remuneration of the transactions and the subsidised rate is incompatible with the internal market.
- (88) Given that loan A and loan B are to be considered as unlawful and partly incompatible aid, the incompatible part must be recovered from Nitrogénművek in order to restore the situation that existed on the market prior to the granting of the aid.
- (89) The exact recovery amount is to be computed by the Hungarian authorities. It is calculated as the difference between the compatible Temporary Framework subsidised rate and the total effective financing costs (i.e. interest rate plus guarantee premium) at which the financing was provided.
- (90) The Commission also concludes that the 100 % guarantee on loan A did not constitute State aid within the meaning of Article 107(1) TFEU in favour of MFB,

HAS ADOPTED THIS DECISION:

Article 1

The EUR 52 million investment loan and the HUF 10 billion current facilities loan granted by Hungary to Péti Nitrogénművek Zrt. constitute State aid within the meaning of Article 107(1) TFEU.

Article 2

1. The State aid unlawfully granted by Hungary to Péti Nitrogénművek Zrt. in breach of Article 108(3) TFEU is partly compatible, partly incompatible with the internal market.
2. The unlawful State aid consisting in the difference between the subsidised interest rate under the Temporary Framework and the relevant reference rate is compatible with the internal market.
3. The unlawful State aid consisting in the difference between the effective remuneration of the measures and the subsidised interest rate under the Temporary Framework is incompatible with the internal market.

4. Hungary shall refrain from granting the State aid referred to in paragraph 3 with effect from the date of notification of this decision.

Article 3

1. Hungary shall recover the aid referred to in Article 2(3) from the beneficiary.
2. The sums to be recovered shall bear interest from the date on which they were put at the disposal of the beneficiary until the date on which they are actually recovered.
3. The interest shall be calculated on a compound basis in accordance with Chapter V of Regulation (EC) No 794/2004.

Article 4

1. Recovery of the aid referred to in Article 2(3) shall be immediate and effective.
2. Hungary shall ensure that this Decision is implemented within 4 months of its notification.

Article 5

1. Within 2 months following notification of this Decision, Hungary shall submit the following information to the Commission:
 - (a) the total amount (principal and recovery interest) to be recovered from the beneficiary;
 - (b) a detailed description of the measures already taken and planned to comply with this Decision;
 - (c) supporting documents demonstrating that the beneficiary has been ordered to repay the aid.
2. Hungary shall keep the Commission informed of the progress of the national measures taken to implement this Decision until recovery of the aid referred to in Article 2(3) with interest has been completed. It shall immediately submit, on simple request by the Commission, information on the measures already taken and planned to comply with this Decision. It shall also provide detailed information concerning the amounts of aid and recovery interest already recovered from the beneficiary.

Article 6

This Decision is addressed to the Republic of Hungary.

Done at Brussels, 27 October 2010.

For the Commission
Joaquín ALMUNIA
Vice-President