COMMISSION

COMMISSION DECISION

of 21 October 2008

on measure C 35/04 implemented by Hungary for Postabank and Takarékpénztár Rt./Erste Bank Hungary Nyrt.

(notified under document number C(2008) 6023)

(Only the Hungarian text is authentic)

(Text with EEA relevance)

(2009/174/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

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

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

Having called on interested parties to submit their comments pursuant to the provisions cited above,

Whereas:

I. PROCEDURE

(1) By letter dated 23 September 2003, registered on 22 October 2003, the Commission was notified of State measures in favour of Postabank és Takarékpénztár Rt., now Erste Bank Hungary Nyrt., ('Postabank' or the 'Bank'). By e-mail dated 23 January 2004, registered on 26 January 2004, the Hungarian authorities notified a series of additional measures adopted for Postabank. All measures were notified under the interim mechanism procedure, provided for in Annex IV.3 of the Act of Accession, which forms part of the Accession Treaty to the European Union (Accession Treaty).

(2) On 30 April 2004, the Hungarian authorities submitted, as a supplement to the notification, an irrevocable unilateral declaration by Postabank's buyer, Erste Bank. The declaration, which was signed on 29 April 2004, provides for an overall cap on the payments payable by Hungary, as laid down in the share purchase agreement, to Postabank's buyer in respect of threatened or unknown litigation claims and also narrows the scope of the definition of risk in connection with unknown claims.

(3) By a decision dated 20 October 2004, the Commission declared that most of the notified measures did not qualify as applicable after accession and it initiated the procedure in respect of one measure, which was the indemnity undertaking for unknown claims, given that there were serious doubts regarding its compatibility with the common market. The Commission Decision to initiate the procedure was published in the *Official Journal of the European Union* [1]. The Commission invited interested parties to submit their comments.

(4) On 25 November 2004 the Hungarian authorities submitted their observations on the decision initiating the procedure and on 15 April 2005 Erste Bank also submitted its comments. The Commission received comments from interested parties and forwarded them to Hungary, which was given the opportunity to react. Hungary's comments were received by letter dated 23 May 2005. In June, July and October 2005 and February, March, June, July and September 2008 the Commission also received various letters from the Hungarian authorities and Erste Bank in which they provided further explanations in support of the arguments set out in their submissions.

II. BACKGROUND

(5) Postabank, which was established in 1988, used to operate as a retail-oriented bank providing a full range of banking services. By the end of 2002, Postabank was the seventh largest commercial bank in Hungary with a market share of about 3,7 % in terms of total assets.

(6) As Postabank was lacking sufficient capital, over a period of time the Hungarian authorities implemented a number of financial and regulatory measures with a view to restoring its capital adequacy ratio. In 1998 Postabank faced the risk of collapse and the Hungarian Government had to step in and save the Bank through a huge recapitalisation of HUF 152 billion [2], thus becoming a 99,9 % shareholder in the Bank. This bailout of Postabank was intended to prepare it for restructuring with a view to its privatisation within a short time.

[1] OJ C 68, 19.3.2005.
[2] Exchange rate on 25 August 2008: EUR 1 = HUF 235,2.

(7) In 2000 the first attempt to privatise Postabank failed. It was eventually privatised following an open tender procedure in October 2003, when the State-owned majority stake in it was sold to the Erste Bank der österreichischen Sparkassen, whose bid — at HUF 101,3 billion — was the highest submitted. On the basis of the notification and submissions by the Hungarian authorities, it is the Commission's understanding that Postabank was sold to the highest bidder following an open, non-discriminatory and unconditional two-round tender procedure. On 1 September 2004 Postabank was merged with Erste Bank Hungary.

III. THE MEASURE (THE INDEMNITY UNDERTAKING FOR UNKNOWN CLAIMS)

(8) In the tender procedure the Hungarian Government offered all bidders the same contractual terms, including an undertaking to provide indemnity in the event of litigation that would cover payment liabilities arising from threatened and unknown litigation claims in respect of Postabank arising up to five years after the conclusion of the sale and purchase agreement ([1]). The Hungarian authorities explained that it became clear during the privatisation process that bidders had to be given an undertaking providing for indemnities for unknown claims, since no bidder would submit a bid unless such an undertaking were given; the indemnity undertaking was therefore indispensable for the privatisation to take place.

(9) On 29 April 2004, Erste Bank made a unilateral irrevocable declaration in which it narrowed the scope of the indemnity undertaking for unknown claims by defining the categories of risk, as well as reducing the overall cap from its previously unlimited size to HUF 200 billion. The unilateral declaration by Erste Bank also provides for an overall cap of HUF 350 billion in respect of the indemnity for threatened litigation claims, which the Commission declared to be a measure not applicable after accession ([2]).

(10) According to the share purchase agreement as modified by Erste Bank's unilateral declaration, the terms and conditions of the indemnities for unknown litigation claims regarding risk allocation between the seller and the buyer are as follows: The seller would make payment in respect of:

— 90 % of the first HUF 10 billion of the total bank liabilities concerned,

— 100 % of the excess over HUF 10 billion, not exceeding a total amount of HUF 200 billion.

The obligations of the seller in respect of the indemnity undertaking for unknown claims lapse five years after the conclusion of the share purchase agreement in relation to third-party claims in respect of which: (i) no court or arbitration proceedings have been initiated; or (ii) no bank liability established with the seller's written approval has arisen.

IV. LEGAL FRAMEWORK

(11) Annex IV.3 of the Act of Accession sets out what is known as the interim mechanism procedure. This provides a legal framework for the assessment of aid schemes and individual aid measures put into effect in a new Member State before the date of accession and still applicable after accession.

(12) Annex IV.3(1) states that the following aid schemes and individual aid put into effect in a new Member State before the date of accession and still applicable after that date are to be regarded on accession as existing aid: (a) aid put into effect before 10 December 1994; (ii) aid examined by the Commission and included in the list annexed to the Accession Treaty; and (iii) aid approved by the Commission under the interim mechanism procedure. Any measures still applicable after the date of accession that constitute State aid and do not fall within one of these three categories are deemed to be new aid on accession; the Commission therefore has full powers to prohibit the application of these measures and to order recovery of any sums unlawfully paid after accession. This application of State aid rules to the future effects of measures still applicable after accession does not entail any retroactive application of the EC State aid rules and is in any event mandated by the Act of Accession.

([1]) That is, up until 16 December 2008.

([2]) On this basis, in relation to threatened litigation claims, the State as seller would make payment in respect of:

— 50 % of the first HUF 4 billion of the relevant bank liabilities in total;

— 100 % of the excess over HUF 4 billion, not exceeding a total amount of HUF 350 billion.

The obligations of the seller in respect of indemnities for threatened litigation claims lapse five years after completion of the share purchase agreement in relation to third party claims in respect of which no court or arbitration proceedings have been initiated. The indemnity undertaking for threatened litigation claims is confined to three clearly defined items. The Commission declared the measure not applicable after accession (see the decision initiating the procedure, OJ C 68, 19.3.2005).

(13) The Commission considers 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. However, the Commission's power of review under the interim mechanism is inapplicable as regards aid measures definitively and unconditionally granted for a given amount before accession. 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.

(14) As stated in the decision initiating the procedure, with respect to guarantees and the indemnity undertaking 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.

V. DECISION TO INITIATE THE FORMAL INVESTIGATION PROCEDURE

(15) On the basis of the notification by the Hungarian authorities, the Commission assessed the measures under the EC State aid rules and concluded that the majority of them fell outside the scope of the interim mechanism. This was because these measures did not entail any further financial exposure of Hungary after the date of accession and did therefore not count as applicable after accession ([1]).

([1]) The following measures in favour of Postabank és Takarékpénztár Rt./Erste Bank Hungary Nyrt. were considered not applicable after accession: 'Subordinated bonds, April 1995', 'Capital increase, September 1995', 'Subordinated bonds, March 1996', 'Subordinated bonds, July 1996', 'Exemption from mandatory reserve requirement, March 1997', 'Direct surety by the State, April 1997', 'Asset swap, September 1997', 'Capital increase, June 1997', 'Subordinated bonds, December 1997', 'Capital increase, May 1998', 'Capital restructuring, December 1998', 'Portfolio cleaning, December 1998', 'Exemption from legal lending limits and investment limits, April 1999', 'Waiver of Postabank's Consolidation Agreement liabilities, November 2001', 'Exemption from open currency position limit, October 2001', 'Exclusivity to open accounts for students for the disbursement of Student loans, September 2001' and 'Indemnity for threatened litigation claims, October 2003'.

(16) However, on 20 October 2004 the Commission initiated a formal investigation procedure in respect of one of the notified measures: the indemnity undertaking for unknown claims. In that decision, the Commission stated that this indemnity undertaking is applicable after accession. The Commission took the view that the measure could constitute State aid and had serious doubts about its compatibility with the common market.

VI. COMMENTS RECEIVED AFTER THE INITIATION OF THE FORMAL INVESTIGATION PROCEDURE

1. Comments by Hungary

(17) The Hungarian authorities take the view that the indemnity undertaking for unknown claims constitutes a measure (rather than aid) that is not applicable after accession. They claim that the measure meets the three conditions to be regarded as no longer applicable after accession within the meaning of paragraph 52 of the Commission decision initiating the procedure.

(18) They consider that the measure cannot constitute State aid, since it is what its name says: an indemnity undertaking, i.e. a conventional commercial term in a sale and purchase agreement concluded under an open and competitive procedure. The market price paid for Postabank precludes aid.

(19) They also argue that the Commission did not take into account the fact that Postabank was sold following an open, non-discriminatory and unconditional tender procedure.

(20) They further state that the restructuring of Postabank and its privatisation are two entirely separate events and not one indivisible 'package' as stated in the Commission's analysis, which assesses the pre-privatisation measures after the event. The privatisation of Postabank was not part of the restructuring process, as the Bank had returned to viability by that time. Therefore, the measure is not part of a chain of interventions and the need for it arose only in the course of the privatisation process. The assessment of the restructuring and the privatisation as a single package is also beyond the jurisdiction of the Commission, since, as the Commission itself acknowledges in the decision to initiate the formal investigation procedure, most of the elements of this 'package' are not applicable after accession, which means that they are not examinable by the Commission.

(21) The Hungarian authorities further state that the measure does not in itself distort competition as the market price was paid in the course of the privatisation, which included the value to Erste Bank of the indemnity undertaking. It was the measure that enabled the privatisation of Postabank to go ahead.

(22) The Hungarian authorities explained that the need for the measure became clear during the privatisation process, as no bidder was willing to buy Postabank without the possibility of indemnification. Therefore it became an indispensable condition for the privatisation to take place. The Hungarian authorities argue that potential buyers, in valuing the business, were not in a position to fully assess the risk of litigation resulting from Postabank's troubled past, this being a typical asymmetric information problem. The State as seller conducted an extensive litigation risk assessment before the privatisation. No new claims were identified and it was strongly felt that any such claim would have come to light prior to the privatisation process as the Bank had been subject to various audits and inspections since 1998.

(23) With regard to all litigation claims, at the time of the sale purchase agreement there was a certain risk-sharing between the Hungarian State as seller and Erste Bank as buyer, whereby the buyer took over all potential liabilities in respect of pending litigation, while threatened and unknown litigation claims were partially undertaken to a limited extent (for unknown claims 10 % of the first HUF 10 billion and for threatened claims 50 % of the first HUF 4 billion of the relevant bank liabilities in total). By offering the risk-sharing mechanism the State intended to send an encouraging signal to bidders that the seller was confident that the State would not suffer financial loss as a result of that arrangement and thereby to strengthen bidders' willingness to attribute a premium value to the Bank.

(24) The privatisation advisor of the State estimated the potential liability arising from the unknown claims to amount to zero in the best-case scenario and HUF 5 billion in the worst-case scenario. The total estimated theoretical exposure to all litigation (threatened and unknown) in the worst-case scenario was significantly lower than the difference between the sales price of HUF 101 billion and the proceeds originally envisaged by the State before the privatisation. This amount was also significantly lower than the difference between the sales price and the highest indicative bid received [1]. Therefore, the Hungarian authorities believe that by giving the indemnity undertaking the State was able to generate an additional premium on the sale and that the State acted wholly in line with the market economy investor principle.

(25) The Hungarian authorities furthermore state that a rescue and restructuring analysis is unnecessary since the measure does not constitute State aid.

(26) In the decision initiating the procedure the Commission considered that the Strategic Cooperation Agreement between Postabank and Magyar Posta (Hungarian Post) signed in December 2002 reinforces the competitive position of Postabank on the Hungarian market and confers an advantage on it by granting it exclusivity for the postal sale of jointly developed new products. The Hungarian authorities claim that the Commission misinterprets the relationship between Magyar Posta and Postabank. They state that the Strategic Cooperation Agreement is a wholly commercial agreement and does not grant either party any form of general exclusivity.

(27) If the measure were to qualify as State aid, Hungary does not agree with the doubts expressed by the Commission (see paragraphs 135-138 of the decision to initiate the formal investigation procedure) in respect of the application of Article 45(2) of the Europe Agreement in the present case to justify the measures granted for Postabank. They argue that the Commission should take into account the fact that Hungary was not yet a member of the EU when the measures under assessment took place. They claim that the Hungarian Government could not have allowed Postabank to fail in 1998 at a time when it was experiencing its greatest difficulties and the Hungarian market was not stable. The failure of Postabank, given its size, could have led to a major financial crisis.

[1] In the first round of the tender procedure bidders were asked for their price proposals and had to itemise separately any undertaking they were expecting from the State in connection with the Bank's obligations in respect of pending and threatened litigation. As described by the Hungarian authorities, 'Each bidder had also separately to indicate the level of comfort it would want in respect of liabilities arising from pre-privatisation events and activities over which it could have had no control. Then the share purchase agreement was issued to the bidders in the second round, on the basis of the suggestions made by the bidders in their indicative bids concerning the handling of the pending and threatened litigation and any other indemnity claim.'

2. **Comments by Erste Bank**

(28) Erste Bank submitted arguments similar to those put forward by the Hungarian authorities. Erste Bank disagrees with the conclusions of the Commission that the measure constitutes aid incompatible with the common market.

(29) Erste Bank also contests the contention that the measure is applicable after accession. It claims that the measure is limited in scope, amount and duration. All the potential claims were clearly defined before accession; therefore, no new aid could arise as a result of it after accession.

(30) It further argues that the measure does not confer a commercial advantage or distort competition, because it is simply a standard market term in a share purchase agreement for dealing with particular risks and it was agreed on under a competitive procedure, which ensures that the market price was paid for the indemnity undertaking and that, therefore, there was no element of aid. On the basis of case-law in relation to privatisations conducted under open, non-discriminatory, competitive and transparent procedures, Erste Bank argued that it had legitimate expectations that the sale of Postabank did not involve any State aid being conferred on it.

(31) In addition, in contrast to a guarantee, which can be a legal obligation in its own right, the measure is, by its nature, an indemnity undertaking, which cannot be viewed as a stand-alone measure, since it is always inextricably linked to a specific sale agreement. The indemnity undertaking serves to protect the value of the assets transferred at the time of the sale against risks arising in respect of the period prior to the sale.

(32) Erste Bank also argues that the measure should be assessed in isolation from past measures and that the private investor test analysis carried out by the Commission should not lump together the pre-accession restructuring measures for Postabank and its privatisation. The measure is not a restructuring measure, but an indemnity undertaking inextricably linked to the share purchase agreement, which is separate from the restructuring process. Postabank was viable at the time of its privatisation. Second, the Commission has no jurisdiction to examine previous restructuring measures that are not applicable after accession. The Commission's approach of lumping together measures not applicable after accession and the indemnity undertaking for unknown claims treats the 1998-2002 measures as aid, although it has no jurisdiction to examine them.

(33) Erste Bank also states, as a subsidiary argument, that the Commission's private investor test analysis is, in any event, incomplete as it does not examine the costs of liquidation or the relevant Hungarian banking rules preventing liquidations from taking place.

(34) Erste Bank considers that, since the measure does not constitute aid and is not applicable after accession, there is no need for a compatibility assessment. It also claims that the compatibility assessment is based on the mistaken assumption that the measure is a restructuring measure rather than an element in the privatisation.

(35) Erste Bank further argues that the measure does not distort competition or confer a commercial advantage, since it came about in the context of a competitive procedure under which Postabank was sold at a market price. In any event, according to the case-law, the benefit of any advantage would remain with the seller and would not be passed on to the buyer. Therefore, there was no selective commercial advantage in favour of Erste Bank (in respect of the indemnity undertaking for unknown claims or otherwise) as the State would have been prepared to sell Postabank to whichever company had offered the highest price.

(36) Erste Bank states that the Commission does not identify the legal grounds for its applicability test and that in order to show that the Commission has the jurisdiction to examine the measure under Article 88(2), it would have to be shown that the undertaking constituted new aid within the meaning of Annex IV(3) of the Act of Accession. It also states that Hungary was not a member of the EU at the time the measures were created and therefore not directly subject to Article 87(1) EC. The Commission cannot apply State aid rules to situations definitively fixed before accession, such as the Postabank share purchase agreement, which is a legally binding act, as this would contravene the principle of non-retroactivity. At the time of privatisation neither Hungary nor Erste Bank was aware of the requirement that risks have to be precisely defined in order for indemnity undertakings not to be considered applicable after accession.

VII. **ASSESSMENT**

1. **Applicability after accession**

(37) As explained above as well as in the decision initiating the procedure, the Commission's assessment first examines whether the measure on which the formal investigation procedure was initiated, i.e. the indemnity undertaking for unknown claims, is applicable after accession according to the criteria set out in paragraph 14. 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.

(38) The irrevocable unilateral declaration signed on 29 April 2004 by Postabank's buyer, Erste Bank, provides for an overall cap of HUF 200 billion and a narrower definition of risk in respect of Hungary's liability towards the buyer, as laid down in the share purchase agreement.

(39) However, despite this setting of an overall cap and narrowing of the scope of the measure, the Commission notes that the indemnity undertaken by the Hungarian Government in order to facilitate the sale of Postabank was not precisely defined and did not involve an exhaustive and binding list finalised by the date of accession. On the contrary, the measure covers indemnities with a wide scope, is not precisely defined and is capped at a high level, which moreover was introduced at a later date. Therefore, the undertaking provides the potential for an undetermined number of further claims beyond what had been clearly defined by the time of accession, which is contrary to what the Hungarian authorities and Erste Bank maintain.

(40) The Commission considers that a mere cap without listing (itemising) the specific events which might trigger the undertaking does not tie the payment of the indemnity after accession to specific events definitively and unconditionally identified prior to accession. It is true that the financial exposure of the State has been limited in theory, but the facts that would trigger the potential payments by the State have not been clearly identified, as is clear from the very name of the undertaking, i.e. that it is for unknown claims. The limitation is thus only apparent, as the scope and the concrete amounts which might have to be paid after accession may vary on the basis of criteria explained only in general terms.

(41) The measure at issue therefore qualifies as applicable after accession, with two exceptions. Following the clarifications provided by the authorities, the Commission has concluded that there are two items which fulfil the criteria not to qualify as applicable after accession.

(42) These two items relate to the potential claims of Arthur Andersen Audit Könyvszakértő Korlátolt Felelősségű Társaság and/or Prudentia Könyvvizsgáló és Gazdasági Tanácsadó Korlátolt Felelősségű Társaság (or their assignees or legal successors) against Postabank or any material subsidiary relating to the preparation of an audit of Postabank or any material subsidiary in the period prior to the year 2000, with a total financial limit of HUF 200 billion (included in 'Risk definition O' in Erste Bank's Unilateral Declaration of 29 April 2004).

(43) The Commission notes that these two companies have already indicated to Erste Bank that they would file a claim for damages against Erste Bank subject to the outcome of ongoing legal action brought by the Hungarian State against Postabank's auditors in connection with their role as the Bank's auditors. At this stage, these claims constitute threatened claims. In addition, Arthur Andersen has sought payment from Erste Bank for its legal costs incurred in connection with the Hungarian State's lawsuit.

(44) The State's indemnity undertaking covering these two threatened claims fulfils all three criteria set out above and can therefore not be considered applicable after accession.

(45) Erste Bank states that the Commission does not identify the legal grounds for its applicability test and that in order to show that the Commission has the jurisdiction to examine the measure under Article 88(2), it would have to be shown that the undertaking constituted new aid within the meaning of Annex IV(3) of the Act of Accession. It also states that Hungary was not a member of the EU at the time the measures were created and therefore not directly subject to Article 87(1) EC.

(46) First, the Republic of Hungary (like all the other candidate countries at that time) were already bound — prior to accession — by the Europe Agreements, which, *inter alia*, declared any public aid which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods in so far as they may affect trade between the Community and the then candidate country incompatible with the proper functioning of the Agreement itself [1]. Subsequently, Annex IV.3 of the Accession Treaty defined three categories of measures as existing aid: (i) those put into effect before 10 December 1994; (ii) those examined by the Commission and included in the list annexed to the Treaty of Accession; and (iii) those approved under the interim mechanism. The Treaty makes it clear that all measures still applicable after the date of accession that constitute State aid and do not fulfil the conditions of existing aid would be considered new aid upon accession.

(47) It is therefore clear — on the basis of this primary EU legislation — that the Commission has full powers to review aid measures put into effect before and applicable after accession that did not qualify as existing aid after accession. The Commission can consider such measures to be 'new aid' as of 1 May 2004 and can thus prohibit the application of the aid after that date, as well as order recovery of any sums unlawfully paid after accession, if it considers that this aid is incompatible with the common market. This application of State aid rules to the future effects of measures applicable after accession and not fulfilling the criteria of existing aid, as defined by the Treaty of Accession, does therefore not entail any retroactive effect of the EC State aid rules.

2. **Existence of State aid**

(48) Pursuant to Article 87(1) of the EC Treaty, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods is, in so far as it affects trade between Member States, incompatible with the common market.

State resources

(49) In the framework of Postabank's privatisation the Hungarian Government (through ÁPV [2]) provided the buyer with an indemnity undertaking covering payment liabilities that might arise from unknown litigation claims in respect of Postabank up to five years after the conclusion of the share purchase agreement. In other words, in this way the Hungarian Government committed public money in order to make the sale of Postabank possible. It is thus clear that the measure involves State resources.

Economic advantage

(50) As stated above, the Hungarian authorities and Erste Bank argue in their comments on the decision initiating the procedure that the measure is not capable of constituting State aid given that it is a typical commercial term in a sale and purchase agreement concluded pursuant to an open and competitive procedure and that the market price paid for Postabank precludes aid. They argue that the Commission should apply the market economy investor principle and not consider the measure under assessment to be aid since a market price, taking into account the value of the measure to Erste Bank, had been paid. They also claim that the market economy investor test analysis carried out by the Commission should not lump together Postabank's pre-accession restructuring measures and its privatisation, as the measure is not a restructuring measure but an integral part of the share purchase agreement.

(51) As stated in the decision initiating the procedure, aid measures that are not applicable after accession cannot be examined by the Commission under the procedures laid down in Article 88 EC. The Commission's power of review under the interim mechanism is inapplicable as regards aid measures definitively and unconditionally granted for a given amount before accession. With the exception of the indemnity undertaking for unknown claims the Commission found the notified restructuring measures for Postabank not to be applicable after accession [3]. They are therefore not subject to this analysis.

[1] See Europe Agreement, Chapter II, Article 62(1)(iii).

[2] Állami Privatizációs és Vagyonkezelő Rt (Hungarian State Privatisation and Holding Company), whose current legal successor is Magyar Nemzeti Vagyonkezelő Rt. (Hungarian National Holding Company).

[3] See decision initiating the procedure in OJ C 68, 19.3.2005.

(52) Therefore, when assessing the only measure applicable after accession (the indemnity undertaking for unknown claims given in 2003), the Commission has to examine whether the Hungarian State's action at the time was in line with that of a market economy investor in respect of the decision giving the undertaking at the time of privatisation. Consequently, the measure is being assessed by the Commission in isolation from previous measures.

(53) The assessment of the sale of Postabank can be separated from the previous measures also because restructuring had already been completed before privatisation. The Commission notes that the Hungarian State Audit Office issued a report in April 2003, recognising that the restructuring of Postabank had been successfully completed and that the Bank was operating soundly. Postabank was viable at the time of its privatisation.

(54) This separation of the measures under assessment is not at odds with the case-law in BP Chemicals ([1]), since that case included three capital injections granted as part of a single continuing restructuring process 'the common purpose of which was to finance the restructuring measures necessary and to restore EniChem's capital base which had been eroded by losses.' In the assessment of whether the three measures had to be examined as a whole or the last measure had to be assessed separately, the Court of Justice considered the decisive factors to be the timing of the measures, their purpose and the situation of the firm at the time when each decision to make an injection was made. In that case, without the last measure, liquidation would have been inevitable. In contrast, in the present case the indemnity undertakings for unknown claims was connected with the sale of Postabank and formed an integral part of the share purchase agreement at a time when the Bank had been successfully restructured and its liquidation was no longer an issue.

(55) When assessing the action of the Hungarian authorities in the light of the market economy investor principle in 2003, it has to be noted that the Commission does not question the way Postabank was privatised and acknowledges that it was sold to the highest bidder under an open competitive tender procedure.

(56) However, this fact is not a sufficient condition to exclude the existence of an advantage in the present case.

([1]) Case T-11/95 BP Chemicals v *Commission* [1998] ECR II-3235; paragraphs 178 and 179.

(57) 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 — even though the Hungarian State conducted a thorough litigation due diligence before the privatisation process started and found that the probability of having to make payments under the indemnity undertaking was very low — 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.

(58) The fact that Erste Bank made a unilateral declaration whereby the State's potential payment liabilities under the indemnity undertaking were limited to HUF 200 billion does not change the Commission's assessment of the behaviour of the Hungarian State. This is because a unilateral declaration by the buyer six months later cannot render the behaviour of the Hungarian State in granting the undertaking compatible with the market economy investor principle.

(59) This conclusion is in no way altered by the fact that bidders, who were not able to fully quantify the litigation risk given the troubled past of Postabank, considered the measure to be an indispensable condition for the privatisation. If the indemnity undertaking for unknown claims had not been given, the Bank would probably have remained in State ownership. In such a situation, if a potential claim under the indemnity undertaking materialised in the future, the State — if acting in line with the market economy investor principle — would have had to cover claims only up to the value of the business and not up to an unlimited amount. Therefore if the State had been acting in line with the market economy investor principle, it would not have pledged unlimited indemnity.

(60) Second, though there was an open and competitive tender with equal treatment of all bidders, it cannot be said that the sale was conducted under market conditions. Since the amount of the indemnity was not limited, the bids could not include a proper price for it. Since it was impossible to put a value on the unlimited indemnity undertaking, the tender procedure could not be said to have involved a 'market price' or, therefore, to have been conducted under market conditions.

(61) Erste Bank argues that the measure does not confer a commercial advantage, since it arose pursuant to a competitive procedure and the market price was paid. In this context, Erste Bank refers to a number of Commission Decisions ([1]). Citing the Banks ([2]) and Systems Microelectronic ([3]) cases, Erste Bank further argues that when a company has been in receipt of an advantage and it is sold at a market price by the State, the benefit of any advantage would remain with the seller and would not be passed on to the buyer.

(62) The Commission notes that the Banks case cited by Erste Bank establishes the general principle that where an open and competitive tender procedure takes place under market conditions, there is normally no aid to the buyer of the company. In the present case, however, under normal market conditions Erste Bank would not have benefited from an unlimited indemnity, since a prudent market economy seller would not have sold Postabank together with an unlimited indemnity undertaking for unknown claims. In conclusion, since a market economy operator selling Postabank would not have pledged unlimited indemnity for unknown claims, Erste Bank received an economic advantage as a result of purchasing Postabank with the indemnity undertaking for unknown claims.

(63) The Commission therefore considers that assessed in isolation, the measure does not meet the market economy seller test.

Assessment of privatisation together with restructuring

(64) In the decision initiating the procedure the Commission viewed the measures relating to restructuring and privatisation together because in 1998 the Hungarian Government had informed the Commission that it had decided to make a capital injection and become 99,9 % owner of Postabank, with a view to restructuring and privatising it, i.e. the Hungarian authorities themselves seemed to link the restructuring with the privatisation. The partly financial and partly regulatory support measures granted as of December 1998 made it possible to keep the bank operational and to facilitate its privatisation.

(65) Therefore, the Commission will carry out a secondary assessment of the undertaking given at the time of privatisation measure that examines it jointly with the earlier restructuring measures; however, since it has already been established that the measure viewed in isolation constitutes aid, it cannot but still constitute aid, if examined in conjunction with the earlier restructuring measures.

(66) If the whole set of measures are jointly taken into account for the market economy investor principle test, the calculation of the costs born by the State includes the measures adopted by the Hungarian authorities to restructure the bank prior to its sale as well as those measures decided on within the framework of the sale. The aggregation of the measures concerned results in an overall negative price for the sale of about HUF 53,4 billion (i.e. about EUR 211 million), which is the result of the simplified approach of deducting the value of the State measures since December 1998 from the actual sale price achieved on privatisation. This result does not include any additional costs the State may have to bear with regard to the indemnity undertakings given at the time of privatisation.

([1]) Hytasa (92/317/EEC) — Commission Decision of 25 March 1992 (OJ L 171, 26.6.1992, p. 54), Centrale del Latte di Roma (2000/628/EC) — Commission Decision of 11 April 2000 (OJ L 265, 19.10.2000, p. 15), Crédit Foncier de France (2001/89/EC) — Commission Decision of 23 June 1999 (OJ L 34, 3.2.2001, p. 36), KataLeuna GmbH Catalysts (2001/685/EC) — Commission Decision of 13 February 2001 (OJ L 245, 14.9.2001, p. 26), Entstaubungstechnik Magdeburg GmbH (ETM)(2000/395/EC) — Commission Decision of 22 December 1999 (OJ L 150, 23.6.2000, p. 64), Italstrade (1999/269/EC) — Commission Decision of 16 September 1998 (OJ L 109, 27.4.1999, p. 1), TASQ (2000/647/EC) — Commission Decision of 3 May 2000 (OJ L 272, 25.10.2000, p. 29), Gothaer Fahrzeugtechnik GmbH (2002/896/EC) — Commission Decision of 30 January 2002 (OJ L 314, 18.11.2002, p. 62), Buna/Leuna (96/545/EC) — Commission Decision of 29 May 1996 (OJ L 239, 19.9.1996, p. 1), InfraLeuna (C/1999/646) — Commission Decision of 25 November 1998 (OJ L 260, 6.10.1999, p. 1), Head Tyrolia Mares (97/81/EC) — Commission Decision of 30 July 1996 (OJ L 25, 28.1.1997, p. 26), Koninklijke Schelde Groep (2003/45/EC) — Commission Decision of 5 June 2002 (OJ L 14, 21.1.2003, p. 56).

([2]) Case C-390/98 *H.J. Banks & Co. Ltd* v *The Coal Authority and Secretary of State for Trade and Industry*.

([3]) Case C-277/00 *Federal Republic of Germany* v *Commission*.

(67) The Commission notes that at no point in time since 1998 was the restoration of viability of Postabank through privatisation predicated on the realisation of a 'positive price' for the Hungarian Government, i.e. on the realisation of a reasonable expected return on the investment. This is borne out by the fact that the measures were introduced without any precise determination of a future target sale price.

(68) On this basis, in line with the market economy investor principle, a rational investor operating under normal market conditions would not, on purely commercial grounds, have contributed or committed money to Postabank without having concrete and reasonable expectations of being able to sell it for a price higher than the total funds injected into it.

(69) As mentioned above, the Commission acknowledges that Postabank was sold to the highest bidder in an open unconditional competitive tender. However, an open tender procedure does not always rule out the possibility of State aid. In Case C-344/99 the Court found as follows: '[…] with regard to the German Government's claim that the procedure for GS's privatisation satisfied the requirements of an open, transparent and unconditional procedure laid down in the general privatisation principles, it is enough to state that, regardless of the legal value of those principles, and assuming that claim to be established, it is not such as to challenge the finding that the option of privatising GS at a negative selling price did not satisfy the private investor test and therefore entailed elements of State aid' ([1]). If restructuring and privatisation are considered together, i.e. taking into account the amounts of the public measures implemented before the sale of the Bank, this results in a negative price for the State.

(70) Erste Bank states that the Commission's private investor test analysis is incomplete as it does not examine the costs of liquidation or the relevant Hungarian banking rules preventing liquidations from taking place.

(71) The Commission notes that the case-law of the Community Courts makes it clear that the private operator criterion is applicable only to situations in which the intervention of the State is of an economic nature and not to those where it forms part of the exercise of public powers ([2]). In the present case, the State acted with the aim of protecting the stability of the financial system and not as a private investor acting with the aim of making a profit.

(72) In addition, to assess whether it is more profitable for the State to wind up a company rather than to sell it, the Community Courts have clarified that a distinction must be drawn between the obligations which the State must assume as owner of the share capital of a company and its obligations as a public authority: only the former can be duly taken into account for the assessment of the existence of aid ([3]). Therefore, excluding from the calculations the costs that would not have been taken into account by a private investor, liquidation would have cost less for the State than restructuring and privatisation taken together.

(73) As mentioned above, Erste Bank argues that the measure does not confer a commercial advantage, because it arose pursuant to a competitive procedure and therefore the benefit of any advantage would remain with the seller and would not be passed on to the buyer.

(74) As stated above, this holds true only if the open and competitive tendering procedure takes place under normal market conditions. This condition is, however, not fulfilled since a private seller would not have pledged unlimited indemnities for unknown claims. Furthermore, a private investor would not have implemented the measures for Postabank, since the total measures following the State's capital injection resulted in a negative price for the State.

(75) In view of the above, the whole set of State measures since December 1998 adopted with a view to facilitating the restructuring and privatisation of Postabank, of which the measure at issue forms part, does not meet the private investor test, and therefore confers an economic advantage on Postabank and Erste Bank, which were merged on 1 September 2004.

Selectivity

(76) Since it has been established that despite the tender procedure, the measure resulted in an advantage for Erste Bank (as no private seller would have pledged unlimited indemnity), it follows that the measure is selective.

([1]) See Case C-334/99 *Germany* v *Commission*, pp. 133-142.

([2]) See the conclusions of 14 January 2003 of Advocate General Léger in the *Altmark* case (Case C-280/00, p. 20 *et seq.*).

([3]) See Joined Cases C-278/92 to C-280/92 *Spain* v *Commission*, p. 22 and Case C-334/99, cited above, pp. 133-134.

Potential distortion of competition and impact on intra-Community trade

(77) At the end of 2002 Postabank was the seventh largest commercial bank in Hungary. Throughout the period under assessment it was active in the financial sector, which is open to intense international competition and where there was trade between Hungary and the European Union, including a substantial number of EU banks operating in the Hungarian banking market.

(78) According to case-law [1], when State aid strengthens the position of an undertaking compared with other undertakings competing in intra-Community trade, the latter undertakings must be regarded as being affected by that aid. It has been established that by giving the indemnity undertaking for unknown claims the Hungarian State granted a selective advantage to Erste Bank. It can, therefore, be concluded that this selective advantage in connection with the purchase of Postabank strengthened Erste Bank's position and consequently has the potential to affect intra-Community trade and to distort competition.

(79) In conclusion, all the criteria of Article 87(1) being met, the indemnity undertaking for unknown claims constitutes State aid within the meaning of the EC Treaty.

3. **Compatibility assessment**

(80) Under the interim mechanism the Commission has the power to take action only in respect of those aid measures that are considered applicable after accession. The notified measure is applicable after accession and constitutes State aid within the meaning of Article 87(1) of the EC Treaty. Therefore the Commission has to assess its compatibility with the common market.

Article 87(2)(b) and Article 87(3)(b) of the EC Treaty

(81) The conditions according to which an aid measure is compatible or may be deemed compatible with the common market are set out in Article 87(2) and (3) EC.

(82) The exemptions provided for in Article 87(2) of the EC Treaty do not apply to the present case. The Commission considers in particular that the aid granted in the present case was not aimed at making good damage caused by natural disasters or exceptional occurrences pursuant to Article 87(2)(b) EC. The term 'exceptional occurrences' does not cover financial losses caused by commercial decisions of economic operators. The Commission also notes that there was no general banking crisis in Hungary.

(83) Likewise, the aid cannot be exempted on the basis of Article 87(3)(b). In 2003, at the time when the indemnity undertaking was given, there was no systemic crisis in the Hungarian banking sector that might have led to a serious disturbance of the Hungarian economy.

Article 87(3)(c) of the EC Treaty

(84) According to Article 87(3)(c) of the EC Treaty, the Commission may authorise State aid that is granted 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.

(85) The Hungarian authorities notified most of the measures introduced between 1998 and 2002 for Postabank as restructuring measures, whereas the indemnity undertaking in connection with the Bank's privatisation was notified separately. The Commission assesses whether the measure can be considered compatible in the light of Article 87(3)(c) of the EC Treaty, under the rescue and restructuring guidelines.

Rescue and restructuring guidelines

(86) The Article 87(3)(c) compatibility conditions for rescue and restructuring aid are set out in Community guidelines. The current Community guidelines on State aid for rescuing and restructuring firms in difficulty entered into force on 10 October 2004 [2]. For aid granted before the publication of these guidelines the previous Community guidelines on State aid for rescuing and restructuring firms in difficulty [3] set out the conditions under which such aid was considered compatible [4]. The sale purchase agreement, which includes the indemnity undertaking for unknown claims, was signed on 20 October 2003. The Commission thus considers that the 1999 guidelines should apply in the present context.

[1] See Case 730/79 *Philip Morris* v *Commission*.

[2] OJ C 244, 1.10.2004, p. 2.

[3] OJ C 288, 9.10.1999, p. 2.

[4] See p. 104 of the 2004 guidelines.

Eligibility of the firm

(87) The 1999 guidelines consider a firm to be in difficulties if it is unable to recover through its own resources or by raising the funds it needs from shareholders or borrowing.

(88) The Commission considers that Postabank's problems in 1997-1998 were severe and it was a firm in difficulty since it would have been unable to recover without State intervention.

(89) As the Hungarian authorities stated, the measure did not form part of the restructuring, since it was related to the sale of the Bank and the need for it arose only during the tendering procedure. The indemnity undertaking for unknown claims was given as part of the privatisation in 2003. By that time, the capital structure and the position of the Bank had stabilised. Postabank had regained its viability. The Hungarian State Audit Office issued a report in April 2003, recognising that the restructuring of Postabank had been successfully completed and that the Bank was operating soundly.

(90) Therefore, since Postabank was already viable in 2003, no further restructuring aid could be granted.

(91) Therefore, the Commission considers that at the time when the indemnity undertaking was given in 2003 Postabank did not qualify as a firm in difficulty and therefore was not eligible for rescue or for further restructuring aid. This means that there is no basis to find it compatible under the rescue and restructuring guidelines.

(92) The secondary assessment involves considering the measure in conjunction with the earlier restructuring measures as part of one restructuring and privatisation operation (see secondary reasoning above). As discussed above, Postabank was already viable in 2003 when the decision to provide the indemnity undertaking was taken.

(93) In order for the measure to be considered as compatible restructuring aid, it would need to have been part of a pre-existing restructuring plan implemented at the time when the difficulties of the firm arose. The granting of restructuring aid is conditional on the implementation of a restructuring plan that must restore the long-term viability of the firm within a reasonable timescale on the basis of realistic assumptions as to future operating conditions.

(94) The restructuring plan submitted by the Hungarian authorities was produced after the event for the purpose of the notification in 2004. It did not exist at the time of the earlier restructuring measures, which makes it clear that no restructuring plan existed, as required by the rescue and restructuring guidelines, incorporating the indemnity undertaking for unknown claims as part of the restructuring operation.

(95) Consequently, even if the indemnity undertaking is assessed together with the other measures, it cannot be found compatible under the rescue and restructuring guidelines since Postabank was not eligible as a firm in difficulty at the time of the decision to provide the undertaking and the undertaking did not form part of a pre-existing restructuring plan.

Article 45(2) of the Europe Agreement

(96) Article 45(2) of the Europe Agreement reads as follows: 'In respect of financial services, described in Annex XIIa, this Agreement does not prejudice the right of the Parties to adopt measures necessary for the conduct of the Party's monetary policy, or for prudential grounds in order to ensure the protection of investors, depositors, policy holders, or persons to whom a fiduciary duty is owed, or to ensure the integrity and stability of the financial system. These measures shall not discriminate on grounds of nationality against companies and nationals of the other Party in comparison to its own companies and nationals.'

(97) In the decision initiating the procedure, the Commission had serious doubts as to whether Article 45(2) of the Europe Agreement applied to State aid measures at all, since it forms part of the 'Establishment' chapter of the Europe Agreement, whereas the provisions concerning State aid are listed in Article 62 *et seq*. In addition, the Commission considered that this provision could apply to any measures with a general scope of application adopted by a financial supervisory authority and that there was no general banking crisis in Hungary.

(98) The Hungarian authorities argue that the Hungarian Government could not have allowed Postabank to fail in 1998 at a time when it was experiencing its worst difficulties and the Hungarian market was not stable and that the failure of Postabank, given its size, could have led to a major financial crisis.

(99) However, the indemnity undertaking was given at a time when Postabank was no longer a firm in difficulty. In any event, the Commission considers that Article 45(2) of the Europe Agreement does not in itself provide a legal basis to consider any measure in the form of State aid to be compatible with the common market.

(100) In conclusion, the indemnity undertaking for unknown claims constitutes incompatible State aid.

4. **The issue of recovery**

(101) In the context of the interim mechanism, any action that the Commission is empowered to take is limited to measures applicable after accession, which in the present case means the indemnity undertaking for unknown claims.

(102) In spite of the argument that this measure was paid for in the purchase price, on the basis of the foregoing considerations, the Commission believes that the measure constitutes incompatible aid and should therefore be terminated with retroactive effect from 30 April 2004.

(103) In practical terms, termination with retroactive effect from 30 April 2004 would imply the recovery of any claims paid after that date that do not qualify as claims inapplicable after accession. However, no recovery is necessary as no payments have actually been made under the indemnity undertaking. This is due to the entirely contingent character of the indemnity undertaking.

(104) The Commission should in principle ask for a charge to be levied for the indemnity undertaking in order to offset the advantage of the measure.

(105) However, the Commission accepts the argument that levying such a charge could contravene the principle of legal certainty, having regard to the specific circumstances in which an entirely contingent undertaking/-guarantee, such as the indemnity for unknown claims, was given. Although the concept of 'applicability after accession' is an objective one, the specific criteria applicable to the indemnity undertaking were not fully clear or foreseeable for the Hungarian Government or Erste Bank at the time when the undertaking was provided, i.e. when the privatisation of Postabank took place. Therefore, in the absence of clear and transparent criteria relating to the concept of applicability after accession with regard to indemnities, the interested parties may not have been in a position to foresee that indemnity undertakings for unknown claims granted before accession would be regarded as applicable after accession in circumstances such as those of the Postabank sale.

(106) Moreover, despite the objective character of the legal text in the Treaty of Accession, the Commission's guidelines on the concept of applicability after accession with regard to guarantees and indemnity undertakings were only gradually clarified over time. The Treaty of Accession was signed on 16 April 2003. Annex IV.3 does not specify the criteria that the Commission would apply for the assessment of applicability after accession in the case of contingent measures such as guarantees and indemnity undertakings. Instead, Commission departments informed the acceding countries about the post-accession applicability criteria in the form of guidance letters.

(107) By letter dated 4 August 2003 to the Mission of the Republic of Hungary to the EU, the Commission reiterated its understanding of the concept of 'applicable after accession' in respect of individual aid measures. However, that letter did not explicitly address the assessment of indemnity undertakings, nor did it explicitly require itemisation, namely that the risks should be precisely defined and included in an exhaustive list closed by the date of accession, as a criterion for the indemnity undertaking not to be considered applicable after accession. The Commission letter appeared to be fully exhaustive as regards the concept of applicability after accession and did not refer in any way to the itemisation requirement. Itemisation is the criterion which the measure fails to satisfy in its current form.

(108) Erste Bank purchased Postabank on 20 October 2003 and the sale purchase agreement included the indemnity undertaking.

(109) The next guidance on the applicability test was available through the Commission's formal decisions of 28 January 2004 on Česká Spořitelna (CZ 14/03) and of 16 December 2003 on Komerční Banka (CZ 15/03). These decisions 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, i.e. the requirement that the risks be precisely defined and included in an exhaustive list closed by the date of accession in order for a given indemnity undertaking not to qualify as applicable after accession.

(110) This itemisation requirement was not brought to Hungary's attention by the Commission until the letter dated 19 March 2004. This letter referred explicitly to the Postabank case and gave guidance on the post-accession applicability of the indemnity undertaking, in particular as regards the three criteria referred to in paragraph 14 of this decision and in paragraph 52 of the decision initiating the procedure, as stated above.

(111) Therefore, at the time when the Postabank sale and purchase agreement was drawn up in October 2003, not all the relevant criteria for determining the post-accession applicability of contingent guarantees and indemnity undertakings (as opposed to other measures, such as those giving rise to a certain payment obligation in the period after accession), were known to the parties concerned. With this in mind, it would seem 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 yet may even have given the misleading impression of being complete.

(112) In addition, the positive effect of the indemnity undertaking was to a large extent offset by the fact that markets were aware of the ongoing Commission investigation. The indemnity undertaking could not have a major positive effect on the financial situation of the Bank. It relates to specific litigation risks in connection with Postabank's past and does not constitute a general guarantee that would provide a direct fundraising advantage.

(113) On the basis of the foregoing and the overall circumstances of the case, the Commission is not seeking payment of a charge for the indemnity undertaking for unknown claims.

VIII. **CONCLUSION**

(114) On the basis of the foregoing, the Commission concludes that the part of the indemnities contained in the measure that had been clearly defined by the time of accession is not applicable after accession (i.e. the potential claims of the two audit companies, Arthur Andersen Audit and Prudentia, against Postabank, as set out under 'Risk definition O' in the Erste Bank unilateral declaration of 29 April 2004).

(115) The Commission finds that the rest of the indemnity undertaking for unknown claims given by Hungary to Postabank és Takarékpénztár Rt./Erste Bank Hungary Nyrt. does qualify as applicable after accession and constitutes State aid incompatible with the common market,

HAS ADOPTED THIS DECISION:

Article 1

1. The potential claims by Arthur Andersen Audit Könyvszakértő Korlátolt Felelősségű Társaság and Prudentia Könyvvizsgáló és Gazdasági Tanácsadó Korlátolt Felelősségű Társaság (or their assignees or legal successors), as included in 'Risk definition O' in the Erste Bank unilateral declaration of 29 April 2004, do not qualify as applicable after accession.

2. The rest of the indemnity undertaking for unknown claims implemented by the Republic of Hungary for Postabank és Takarékpénztár Rt./Erste Bank Hungary Nyrt., does qualify as applicable after accession and constitutes State aid incompatible with the common market.

Article 2

The Republic of Hungary shall terminate the part of the indemnity undertaking for unknown claims that qualifies as applicable after accession with retroactive effect from 30 April 2004.

Article 3

The Republic of Hungary shall inform the Commission, within two months of notification of this Decision, of the measures taken to comply with it.

Article 4

This Decision is addressed to the Republic of Hungary.

Done at Brussels, 21 October 2008.

For the Commission

Neelie KROES

Member of the Commission