II

(Non-legislative acts)

DECISIONS

COMMISSION DECISION

of 9 January 2012

SA.30584 (C 38/10, ex NN 69/10) on the State aid implemented by Hungary in favour of Malév Hungarian Airlines Zrt.

(notified under document C(2011) 9316)

(Only the Hungarian text is authentic)

(Text with EEA relevance)

(2013/150/EU)

THE COMMISSION OF THE EUROPEAN UNION,

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

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 the aid C 38/10 (ex NN 69/10) [2],

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

Whereas:

I. BACKGROUND AND PROCEDURE

(1) After several unsuccessful attempts of privatisation, in 2007 the Hungarian State concluded a sale and purchase agreement with *AirBridge Zrt.* (hereinafter: "AirBridge") concerning 99,95 % of the shares of its national flag carrier *Malév Hungarian Airlines Zrt.* (hereinafter: "Malév"). AirBridge paid HUF 200 million (EUR 740 000 [3]) in exchange for the shares. The privatisation agreement was notified to the Commission in accordance with Article 108(2) TFEU but subsequently withdrawn [4].

(2) Following the new owner's financial troubles, Russian Vnesheconohmbank (hereinafter: "VEB") gained a stake of 49,5 % in AirBridge and became Malév's indirect shareholder.

(3) In March 2010, the Commission became aware through press reports about the Hungarian State's intention to re-nationalise Malév. By e-mail of 2 March 2010 the Hungarian authorities confirmed these press reports.

(4) By e-mail dated 10 March 2010, the Commission received a complaint from Wizz Air, a Hungarian based low-cost airline and a main competitor of Malév in Hungary. This complaint alleged illegal and incompatible State aid to Malév by means of a number of

[1] With effect from 1 December 2009, Articles 87 and 88 of the EC Treaty have become Articles 107 and 108, respectively, of the TFEU; the two sets of provisions are, in substance, identical. For the purposes of this Decision, references to Articles 107 and 108 of the TFEU should be understood as references to Articles 87 and 88, respectively, of the EC Treaty where appropriate.

[2] Commission decision C(2010) 9671 final of 21 December 2010 (OJ C 156, 26.5.2011, p. 11).

[3] EUR figures in the present Decision are approximations provided only as indications. All HUF figures (with the exception of the EUR 76 million MFB loan and the EUR 32 million VEB guarantee, which indeed are denominated in EUR, see paragraph (20)) are converted into EUR by using the exchange rate of 2 August 2011: 270 EUR/HUF. In 2011 the HUF was strongly fluctuating between 260 and 300 EUR/HUF.

[4] The Hungarian authorities notified the Commission of the financing arrangements in relation to the privatisation of Malév by electronic notification dated 10 April 2008. This measure was registered under reference N 190/2008. The Hungarian authorities withdrew the measure on 12 November 2009.

different measures. By letter of 29 March 2009, the Commission forwarded a non-confidential version of the complaint to the Hungarian authorities together with a request for additional information. Hungary provided comments about the substance of this complaint on 30 April 2010 providing answers to the issues raised therein.

(5) At a meeting on 5 May 2010, the Hungarian authorities indicated that they intended to restructure the airline. They also indicated however that they did not yet know how far-reaching this restructuring would be.

(6) A second complaint (of a competitor which did not agree to the disclosure of its identity) dated 5 October 2010 was received by the Commission and forwarded to the Hungarian authorities by letter of 21 October 2010. The Hungarian authorities provided comments about the substance of this complaint on 19 November 2010.

(7) Further requests for information were sent to the Hungarian authorities on 14 July 2010, 8 October 2010 and replies were received on 11 August 2010, 16 August 2010, 5 October 2010, 3 November 2010, and 23 November 2010.

(8) Against this background, on 21 December 2010 the Commission opened a formal investigation procedure pursuant Article 108(2) TFEU (hereinafter: "the opening decision") concerning various alleged State aid measures implemented in favour of Malév.

(9) Hungary submitted its comments to the Commission's opening decision on 24 February 2011.

(10) The opening decision was published in the *Official Journal of the European Union* on 26 May 2011 ([5]). Comments were received from two interested parties: Wizz Air on 26 June 2011 and a competitor requesting for its identity not to be disclosed on 28 June 2011.

(11) These comments were transmitted to Hungary by letter of 6 July 2011. Hungary submitted comments to the third party observations on 5 September 2011.

(12) Following the opening decision, two meetings took place in Brussels between the Commission services and the Hungarian authorities: on 10 June 2011 and 19 October 2011 respectively.

(13) The Commission requested further information from the Hungarian authorities on 26 September 2011, to which Hungary replied by letter of 25 October 2011.

([5]) See footnote 2.

II. MALÉV AND THE MEASURES CONCERNED

II.1. The Company

(14) Malév is based at *Budapest Liszt Ferenc International Airport* (hereinafter: "Budapest Airport") and currently operates a fleet of 22 aircraft ([6]) to destinations in Europe and the Middle East. In 2009, it transported 3,2 million passengers ([7]).

II.2. The period prior to the 2007 privatisation

(15) The Hungarian authorities have tried to privatise Malév on several occasions. In 1992, a 35 % stake in Malév was sold to an Italian State-controlled consortium of Alitalia and Simest. In 1997, Alitalia-Simest sold its stake to a consortium of two privately owned Hungarian banks (OTP & MKB). In 1999, most of the shares in private ownership were re-purchased by the State resulting in a 97 % state ownership.

(16) Malév, along with many other airlines suffered significantly from the downturn in the aviation market which followed the events of September 2001 and became loss making (see Table 1 below).

(17) It was against this background that the State decided once again to privatise Malév in 2007.

II.3. The 2007 privatisation and Malév under private control

II.3.1. *Sale to AirBridge*

(18) The company needed to be recapitalised and the State, as owner, was restricted in its ability to fund such investment. Offers were solicited for Malév and in early 2007 it was decided that a special purpose vehicle named AirBridge had made the most attractive offer. AirBridge offered an attractive and allegedly commercially viable business and restructuring plan.

(19) Accordingly, on 23 February 2007, a sale and purchase agreement providing for the sale of 99,95 % of the shares of Malév to AirBridge was concluded. AirBridge was owned 49 % by Boris Abramovich ([8]), a Russian businessman, who held a majority stake in a number of Russian airlines (KrasAir, and the AirUnion alliance of Russian airlines) and 51 % by Hungarian individuals. AirBridge was therefore expected to bring industrial know-how and leadership to Malév, along with business and restructuring plans.

([6]) http://www.malev.com/companyinformation/introduction/malev-company-profile

([7]) According to its website, "more than 3 million revenue passengers flew with Malév in 2010".

([8]) This 49 % stake in AirBridge was pledged by Mr Abramovich to VEB, the Russian State-owned "Bank of Foreign Economic Activity", as a security for a loan from VEB to AirBridge.

(20) The most significant parts of this agreement were:

(a) AirBridge bought 99,95 % of the shares in Malév for HUF 200 million (EUR 740 000). By 31 December 2008 at the latest, AirBridge was obliged to provide funding ([9]) in the amount of EUR 50 million.

(b) A loan granted in 2003 to Malév by the 100 % state-owned Hungarian Development Bank (*Magyar Fejlesztési Bank*, hereinafter "MFB") amounting to EUR 76 million was taken off Malév's balance sheet and transferred to a 100 % State-owned special purpose vehicle Malév Asset Management Company (*Malév Vagyonkezelő Kft.*, hereinafter "MAVA").

This 2003 MFB loan was a EUR denominated, 100 % State guaranteed loan, with an interest rate of 3-month IBOR + 0,5 %. The original expiry of the loan was 2013, the principle to be repaid in one instalment at the end of the maturity. With the transfer of the principle and interest to MAVA, the loan's maturity was also extended until 2017.

According to the Hungarian authorities, assets worth EUR 76 million were transferred to MAVA along with the loan. These assets comprised the Malév trademark, a kerosene pipeline and one B767 aircraft. Were Malév to be profitable, it would also have to pay 25 % of after tax profits to MAVA. AirBridge also provided a bank guarantee to MAVA from VEB to cover the reimbursement of the loan up to EUR 32 million.

(c) Malév would also pay MAVA the sum of EUR 200 000 per year as a license fee for the use of the name "Malév" and logo. AirBridge was obliged to keep using the brand name and to ensure the operation of the company as an airline until 31 December 2017, the new expiry date of the loan.

(d) Malév would lease back the B767 aircraft – just transferred to MAVA (see point b above) – from MAVA from 1 January 2008 to 31 December 2017 ([10]).

(21) A new management was appointed and a number of cost saving and revenue generating measures were put in place. These included the discontinuation of long haul operations and staff cuts. According to Hungary, however, as these measures coincided with a massive increase in fuel prices they had no overall effect on the company's profitability.

([9]) More precisely, capital in the amount of EUR 20 million plus EUR 30 million in the form of capital, subordinated loan or loan.

([10]) For a fee made up of a "one time fee" of EUR 110 000, an "annual fee" of EUR 1,1 million and Malév paying for all related maintenance and operational costs.

(22) Malév's financial position continued to deteriorate and, after 4 months, it lacked the necessary liquidity to make royalty payments for the use of the Malév brand name.

(23) According to Hungary, payments for the B767 aircraft leased from MAVA have not been "stopped" once Malév had decided to suspend long haul routes as Malév is "recognising" those debts and there is merely a delay in payment on which interest is paid.

(24) In the second half of 2008, the global financial crisis began to impact on Malév as well as on its Russian partners. Several of Mr Abramovich's airlines went bankrupt. AirBridge found itself no longer able to finance Malév and defaulted on its loan reimbursement to VEB. As the 49 % shareholding in AirBridge was pledged to VEB, VEB took over those shares. VEB indicated that it was willing to continue to finance Malév, but as a bank not as an owner.

II.3.2. *Sale of Malév Ground Handling*

(25) As previously stated, Malév's financial situation had further deteriorated in early 2009. Its shareholders therefore approached the State Holding Company (*Magyar Nemzeti Vagyonkezelő Zrt.*, hereinafter "MNV") with the proposal to sell to MNV Malév Ground Handling, Malév's 100 % subsidiary (hereinafter: "Malév GH").

(26) According to Hungary, Malév GH was at the time and continues to be a financially sound undertaking.

(27) A preliminary purchase agreement was signed in January 2009 (and amended in February) providing for advance payments of HUF 4,3 billion (EUR 16 million). MNV made advance payments to Malév in January and February 2009. These advance payments were to be repaid within 2 working days if, after the due diligence, MNV decided not to proceed with the signing of the final sale and purchase agreement. This potential repayment obligation was secured by collateral agreements. In July 2009, MNV eventually decided to abort the transaction and the repayment of the purchase price became due.

(28) The advance payment was never reimbursed to MNV. Interest due on advance payments was never paid to MNV ([11]).

([11]) Instead, the repayment claim against Malév was later settled in the framework of the debt/equity swap arrangement of February 2010 mentioned below, i.e. one year after the advance payments were made to Malév. The principal amount plus interest was then determined by an auditor to amount to HUF 4 664 604 041 (EUR 17 million).

II.3.3. *Tax deferral*

(29) Between January 2007 and March 2010, the Hungarian Tax and Financial Control Administration (*Adó- és Pénzügyi Ellenőrzési Hivatal*, hereinafter: "APEH") permitted Malév to defer or reschedule payments for different types of taxes and social security obligations. APEH failed to enforce the overdue debt as from July 2008 and even granted the rescheduling of further amounts subsequently. In March 2010, Malév's tax and social security debt (principal and interest for late payment) totalled HUF 13,7 billion (EUR 51 million). With regard to the entire Malév Group, this figure is HUF 16,8 billion (EUR 62 million). On 11 March 2010, the remaining balance of Malév's current account with APEH was settled making use of part of the cash obtained through the February 2010 increase of capital mentioned further below.

II.4. **The 2010 renationalisation and Malév under public control**

II.4.1. *Reasons leading to the renationalisation of Malév*

(30) In 2010 it was not possible to find private investors to take over Malév from AirBridge /VEB as main shareholder. In particular, VEB did not have the intention to finance the airline as a strategic investor. The airline's financial performance continued to be weak, as shown in Table 1 below.

Table 1

Malév's performance indicators 2003-2010 (HUF billion)

	2003	2004	2005	2006	2007	2008	2009	2010
EBITDA profit/(loss)	(4,4)	(1,8)	(4,9)	(8,8)	(10,6)	(8,3)	(15,5)	(19,1)
EBIT profit/(loss)	(9,4)	(6,8)	(9,4)	(12,5)	(14,7)	(10,8)	(17,9)	(20,6)
Net result profit/(loss)	(13,5)	(4,9)	(1,3)	(10,9)	0,7	(14,5)	(24,8)	(24,6)

Source: Information provided by the Hungarian authorities and Malév's 2010 financial accounts

(31) Rather than liquidation, the Hungarian authorities decided to negotiate with VEB and AirBridge so as to try to improve the commercial position of Malév in the medium to long term.

II.4.2. *February 2010 capital increase: debt-to-equity swap and fresh capital*

(32) On 26 February 2010, VEB, AirBridge, MNV, Malév and the Hungarian government agreed to a capital increase of HUF 25,4 billion (EUR 94 million), partly realised by injecting fresh capital of HUF 20,7 billion (EUR 77 million) and partly through a debt to equity swap of the advanced payment for Malév GH (see section II.3.2 above) plus interest charged thereon, a total of HUF 4,7 billion (EUR 17 million). AirBridge also swapped HUF 1,5 billion (EUR 5,4 million) into equity. As a consequence, the claims against Malév disappeared and the former creditors became owners of part of the company.

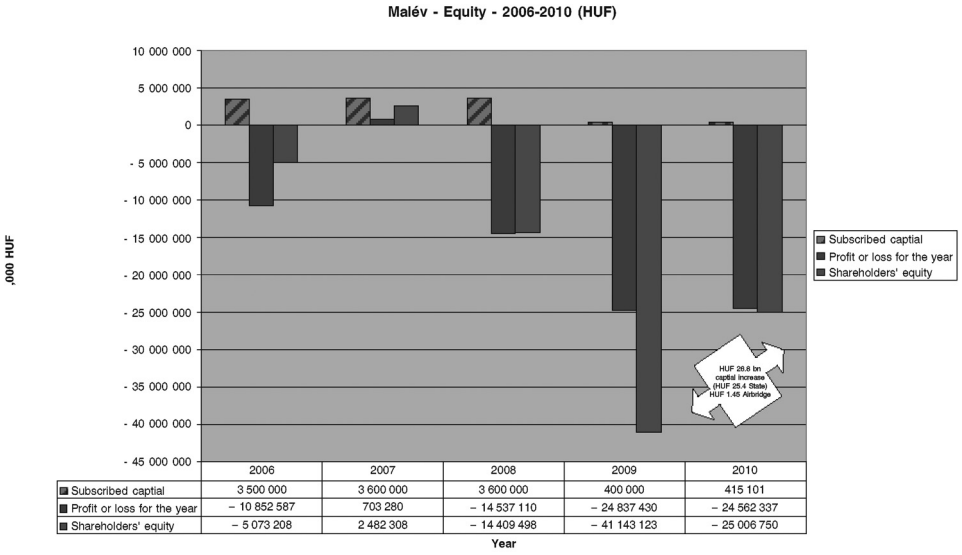
(33) Before the increase, the existing registered capital in Malév was reduced to almost zero to absorb part of the accumulated losses and to reflect the fact that the existing shares in Malév had become worthless. The registered capital of Malév was then increased by issuing new shares in the nominal amount of HUF 0,01 each. The development on Malév's equity situation is shown in Figure 1 below.

(34) The HUF 20,7 billion (EUR 77 million) contributed by MNV in cash enabled Malév to reimburse all outstanding tax obligations (see paragraph (29) above) and to temporarily stabilise its operation.

(35) After the capital increase, the State became a 94,6 % shareholder of Malév and AirBridge/VEB was diluted.

Figure 1

Development of Malév's equity situation



II.4.3. *May – August 2010: Shareholder's loans and conversion into equity*

(36) Between May and August 2010 the Hungarian State provided Malév with a number of "shareholder loans" through MNV totalling HUF 9,2 billion (EUR 34 million).

(37) The first of these loans in May 2010 was in the amount of HUF 2,16 billion (EUR 7,9 million). It was described as a three-year shareholder's loan at an interest rate of 9,97 %. Repayment was by means of a single payment at the end of the maturity period and the security was a lien on the shares of Malév GH.

(38) The second of these loans in June 2010 amounting to of HUF 1,34 billion (EUR 4,9 million) was again a three-year shareholder's loan at an interest rate of 9,97 %, repayment was again by means of a single payment at the end of the maturity period and the security was a lien on the shares of Malév GH.

(39) In August 2010, a third shareholder's loan in the amount of HUF 5,7 (EUR 20,8 million) was granted. This was again a three-year shareholder's loan at an interest rate of 9,97 %, repayable by means a single payment at the end of the maturity period. In this case the security was a lien on an aircraft (HA-LNA - a CRJ jet).

(40) On 24 September, these three loans which totalled HUF 9,2 billion (EUR 33,6 million) along with the interest owed thereon (making a total amount of HUF 9,4 billion or EUR 34,3 million) was converted from debt to equity in Malév in and the underlying guarantees were released.

II.4.4. *September 2010: A further capital increase and shareholder loan*

(41) On 24 September 2010, MNV also increased the capital of Malév by injecting a further HUF 5,3 billion (EUR 19,3 million) of cash into the company. MNV's (i.e. the State's) stake in Malév has thereby increased to 96,5 %

(42) On the same date, the State granted Malév a further shareholder loan in the amount of HUF 5,7 billion (EUR 20,8 million) with a duration of 3 years at an interest rate of 9,97 %. The first interest payment is due 6 months from the date of disbursement while the repayment of principle is by means of a lump sum at maturity. The guarantees on this loan are a registered lien on the HA-LNA CRJ aircraft with an asset value of around HUF 1,8 billion and a lien established on international and Hungarian IATA-organised agent traffic revenue.

III. SUMMARY OF THE MEASURES UNDER INVESTIGATION

(43) In the opening decision the Commission thus questioned whether the measures below constitute State aid in the meaning of 107(1) TFEU.

— Measure 1: The taking over on 31 December 2007 by the state-owned MALÉV MAVA of a loan granted to Malév by MFB, a 100 % state-owned development bank, in 2003, amounting to **EUR 76 million** along with some Malév assets. The maturity of the loan will be prolonged until 2017.

— Measure 2: The provision of a **HUF 4,3 billion** "cash facility" for one year in the context of a planned (subsequently failed) purchase by MNV of Malév's GH subsidiary, which according to the Hungarian authorities was a financially sound undertaking. Despite the non-realisation of the deal, this advanced payment of the purchase price has not been repaid.

— Measure 3: The deferral of different tax and social security payments due between January 2007 and March 2010. In March 2010, Malév's tax and social contribution debt amounted to **HUF 13,7 billion**.

— Measure 4: In February 2010, a capital increase by MNV of **HUF 25,4 billion** partly realised by injecting fresh capital of HUF 20,7 billion (EUR 77 million) and partly through a debt to equity swap of the advanced payment for GH (see measure 2) plus interest, a total of HUF 4,7 billion. (AirBridge also swapped HUF 1,5 billion into equity.)

— Measure 5: From May to August 2010, three shareholder loans totalling **HUF 9,2 billion** granted to Malév by MNV. All three HUF-loans bore an interest rate of 9,97 %, with repayment of the principal as a lump sum at the end of maturity (all tranches 3 years). The first two tranches amounting to a total of HUF 3,5 billion (EUR 13 million) were secured by the subsidiary Malév GH and the third tranche of HUF 5,7 billion (EUR 21 million) by an aircraft (HA-LNA, a CRJ jet).

— Measure 6: In September 2010, the conversion of these shareholder loans (along with the interest owed thereon) from debt to equity in the amount of **HUF 9,4 billion**.

— Measure 7: In September 2010, a further capital increase in the amount of HUF 5,3 billion in cash. The State's stake increased to 96,5 %.

— Measure 8: In September 2010, a further shareholder loan in the amount of **HUF 5,7 billion**, with an interest rate of 9,97 %, with redemption of the principal as a lump sum at the end of maturity. The loan was secured by the HA-LNA CRJ aircraft referred to above and a lien established on international and Hungarian IATA-organised agent traffic revenue.

(44) In the opening decision the Commission also questioned whether these measures, insofar they constitute State aid in the meaning of Article 107(1) TFEU, are compatible with the Internal Market in the light of the exceptions enshrined in the TFEU and, in particular, with the Community Guidelines on State Aid for Rescuing And Restructuring Firms in Difficulty ([12]) (hereinafter: "Rescue and restructuring Guidelines").

IV. **COMMENTS FROM HUNGARY**

(45) In its reply to the opening decision Hungary repeated the facts described above and explained further the reasons which led to the difficulties of the airlines. Hungary also confirmed that Malév qualified as a company in "permanent" difficulty in the meaning of the Rescue and restructuring Guidelines at least since the second half of 2006.

(46) Prior to the opening of the formal investigation, the Hungarian authorities argued, in a nutshell, that all measures comply with the Market Economy Investor (hereinafter: "MEIP") and the Market Economy Creditor Principle (hereinafter: "MECP").

(47) In relation to the measures accompanying the sale of Malév to AirBridge, the Hungarian authorities claimed that these measures are market conform because of the collateral put in place to secure the taking over of the loan by MAVA. As to the abortive sale of Malév GH they argued that no advantage was conferred on Malév as the late reimbursement of the sales price was correctly collateralised and that interest on the sales price had been calculated. With regard to the tax deferral they argue that there was collateral in place for these amounts, that all applicable interest charges and penalties had been applied and furthermore that such deferrals are general measures. Concerning the renationalisation of Malév, the Hungarian authorities state that they could have enforced their claims against Malév leading to the bankruptcy and liquidation of the company. If they had done this they are of the opinion that they would have recovered only a small part of their claims (other than a part covered by the VEB guarantee mentioned in paragraph (20) above). Moreover, they would have faced significant negative consequences for the national economy ([13]).

(48) In relation to the shareholder loans and their subsequent transformation into equity in Malév the State is of the view that these conferred no advantage on Malév as at all times these loans were fully secured against assets, that market conform interest rates applied and that on transformation into equity full account was taken of all interest due.

([12]) Community guidelines on State aid for rescuing and restructuring firms in difficulty, OJ C 244 of 1.10.2004, p. 2.

([13]) Such as loss of employment, an impact on Malév's suppliers, falling traffic volumes at Budapest Airport, a reduced inflow of tourists and negative effects on the general attractiveness of Hungary as an investment location.

(49) The Hungarian authorities did not present any new elements after the opening decision. In fact, Hungary's reaction to the opening decision does neither contain new elements in support of the non-aid character of the measures nor information substantiating the compatibility of the implemented measures with the internal market, in particular with the Rescue and restructuring Guidelines.

V. **COMMENTS FROM INTERESTED PARTIES**

(50) Two competitors submitted comments (see paragraph (10) above), both supporting the Commission's investigation:

(51) The competitor requesting for its identity not to be disclosed alleged that some private investors were interested in acquiring a controlling stake in Malév which demonstrates that there were viable options available for Hungary as an alternative to the 2010 renationalisation of Malév.

(52) Wizz Air evaluated the aggregated market value of the assets which had been transferred to MAVA along with the MFB loan (measure 1), including the Malév trademark, a kerosene pipeline and one B767 aircraft, as not more than EUR 27 million which is substantially lower than the amount of the loan. Therefore, Wizz Air concluded that this transaction was not done on an arm's length basis and conferred a significant advantage to Malév.

(53) As to the tax deferral (measure 3), Wizz Air alleged that under Hungarian law a private undertaking in a financial situation similar to that of Malév could neither automatically nor as a matter of exception be granted a similar tax deferral such as the one at hand.

VI. **HUNGARY'S COMMENTS TO THE OBSERVATIONS OF INTERESTED PARTIES**

(54) After an extension of deadline to reply, Hungary reacted on these comments on 5 September 2011. Hungary maintains its position that the past measures are justified by the Market Economy Investor Principle test (see paragraph 59 below) and therefore do not constitute State aid. According to Hungary, the existence of public policy objectives does not affect the non-aid character of the measures.

(55) Hungary stated that there were no viable options and that only the renationalisation permitted the Hungarian authorities to regain full operational control over Malév, allowing the national flag carrier to actually implement the restructuring procedure that it had pursued since 2007 in order to ensure commercial success of the company. As to measure 1, Hungary took the view that the value of the assets in question corresponded to the value of the loan. As to measure 3, Hungary stated that the Hungarian tax authorities treated Malév as any other tax payer in a similar situation.

VII. **PRESENCE OF AID IN THE MEANING OF ARTICLE 107(1) TFEU**

VII.1. **General**

(56) In order to ascertain whether the measures under scrutiny constitute State aid, the Commission has to assess whether they fulfil the cumulative conditions of Article 107(1) TFEU. This provision states that "[s]ave as otherwise provided in the Treaties, any aid granted by 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".

(57) In the light of this provision, the Commission will assess whether the contested measures in favour of Malév constitute State aid.

(58) With regard to the cumulative criteria of State aid, in the current case, affectation of trade and distortion of competition are indisputable and were not even debated by the Hungarian authorities. Malév is in competition with other European Union airlines, in particular since the entry into force of the third stage of liberalisation of air transport ("third package") on 1 January 1993 ([14]).The measures in question enabled Malév to continue operating so it did not have to face, as other competitors, the consequences normally deriving from its poor financial results.

(59) As regards State resources and imputability of the measures, this has not been disputed by Hungary either. APEH is the Hungarian Tax Authority and as such clearly imputable to the State. MNV is the State Holding Company. Its duties are set out in the most important framework rules of the State Assets Act. MNV executes the government's and the competent minister's decisions. With regard to MAVA, it is also 100 % State-owned (via MNV) and – as the Hungarian authorities explain – represents an "emanation of the Hungarian State".

(60) Concerning selectivity, with the exception of measure 3 (the tax deferral) this was not disputed by Hungary. The measures were to favour a single company, Malév.

([14]) The "third package" included the introduction of harmonised requirements for an operating licence for EU airlines (Regulation (EEC) No 2407/92), the open access for all EU airlines with such an operating licence to all routes within the EU (Regulation (EEC) No 2408/92) and the full freedom with regard to fares and rates was also introduced (Regulation (EEC) No 2409/92).

(61) Whether an economic advantage in favour of Malév is present in the measures under scrutiny will be assessed hereunder.

(62) Hereto, the Commission notes that according to well-established principles of Community law, if additional capital is made available to an 'undertaking' on conditions better than normal market conditions this could fall within the remit of Article 107(1) TFEU as it would result in 'favouring' the particular undertaking within the meaning of this Article. In order to determine whether such advantage is granted, the Commission applies the 'Market Economy Investor Principle'. According to this principle, where, in similar circumstances, '*a private investor operating in normal market conditions of a market economy of a comparable size to that of the bodies operating in the public sector could have been prompted to make the capital contribution in question*', no State Aid would be involved. The Commission must therefore assess '*whether a private investor would have entered into the transaction in question on the same terms*' ([15]). The attitude of the hypothetical private investor is that of a prudent investor ([16]) whose goal of profit maximisation is tempered with caution about the level of risk acceptable for a given rate of return. ([17])

(63) According to the jurisprudence of the European Courts, although the conduct of a private investor with which the intervention of the public investor pursuing economic policy aims must be compared need not be the conduct of an ordinary investor laying out capital with a view to realizing a profit in the relatively short term, it must at least be the conduct of a private holding company or a private group of undertakings pursuing a structural policy - whether general or sectoral - and guided by prospects of profitability in the longer term ([18]).

(64) Moreover, '… *[T]he comparison between the conduct of public and private investors must be made by reference to the attitude which a private investor would have had at the time of the transaction in question, having regard to the available information and foreseeable developments at that time*' ([19]).

(65) The Commission's analysis and assessment must include '*all factors that are relevant to the transaction at issue and its context*'. This will include the financial situation of the beneficiary undertaking and the relevant market. Based on the abovementioned considerations, the main issue that the Commission wishes to explore is whether the undertaking received '*an economic advantage which it would not have obtained under normal market conditions*' ([20]).

(66) The Commission also notes that according to established case law, the MEIP is also applicable to loans. When applied to the grant of a loan, this principle invites the question whether a private investor would have granted the loan to the beneficiary on the terms on which it was actually granted ([21]).

VII.2. **Assessment of the totality of measures**

(67) As already set out in the opening decision, the *BP Chemicals* judgement ([22]) is relevant for the assessment of the case at hand. In fact, the Commission considers that the measures are not autonomous and are linked through their chronology, the financial situation of Malév and their finality as they all aim at keeping the airline afloat and solving its liquidity needs and under-capitalisation due to its losses. In fact, Hungary also argues in its comments to the opening decision that the different steps of the "process" are "inseparable" and all measures were intended to pursue one objective, namely to ensure the airline's operation by finding a strategical investor.

(68) From the submissions of Hungary it has become clear that the measures implemented by Hungary in favour of Malév are motivated by public policy considerations and not based on consideration about the future profitability of the company. Hungary underlined at several occasions the failure of the privatisation and Malév's importance for the national economy. It was acknowledged that, when undertaking the measures, the State took into consideration the "airline's role for the national infrastructure, labour market and the suppliers' interest". The Hungarian authorities also highlighted that there is no private investor which would be willing to take over the airline in its current form. Therefore, the Commission has to assume that no private investor would have acted like the Hungarian government in similar circumstances when undertaking the measures. Hereto, the Commission also recalls that in the *Boch* judgement the Court indicated that *"the test is, in particular, whether in similar circumstances a private shareholder, having regard to the foreseeability of obtaining a return and leaving aside all social, regional policy and sectoral consideration would have subscribed the capital in question"* ([23]).

([15]) Judgment in Joined Cases T-228/99 and T-233/99 *Westdeutsche Landesbank GZ v Commission* [2003] ECR II-435 et seq, paragraph 245.

([16]) Case C-482/99 *France v. Commission* [2002] ECR I-4397, paragraph 71.

([17]) Joined cases T-228/99 and T-233/99, already cited in footnote 15, paragraph 255.

([18]) Case C-305/89 *Italy v Commission* [1991] ECR I-1603, paragraph 20.

([19]) Joined Cases T-228/99 and T-233/99, already cited in footnote 15, paragraph 246. See also, Case T-16/96, *Cityflyer Express vs. Commission,* [1998] ECR II-757, paragraph 76.

([20]) Joined cases T-228/99 and T-233/99, already cited in footnote 15, paragraph 251.

([21]) Case T-16/96 *Cityflyer Express Ltd v Commission,* already cited in footnote 19, paragraphs 45 and 46.

([22]) T-11/95, *BP Chemicals,* Judgement of 15.9.1998, paragraph 170; Joined Cases T-415/05, T-416/05 and T-423/05 *Olympic,* Judgment of 13.9.2010, paragraph 385.

([23]) Case C-40/85 *Belgium v Commission (Boch)* [1986] ECR 2321, at para 13. See also Joined cases T-129/95, T-2/96 and T-97/96, *Neue Maxhütte Stahlwerke GmbH v Commission* [1999] ECR II-17, at para 132.

(69) In the light of Malév's bad financial results over a long time period (see Table 1 and points (103)-(104) below) and the Hungarian authorities claim that the airline has been in a permanent difficulty at least since 2006, a return acceptable to a private investor could have be expected only if the company had undergone a drastic restructuring. However, neither Hungary nor Malév ever demonstrated that such a restructuring plan was at the basis of any of the measures under examination.

(70) On the basis of the above the Commission considers that measures 1-8 taken together do not comply with the MEIP. This assessment is further confirmed by an individual analysis of each measure.

VII.3. **Assessment of measures 1-8 individually**

VII.3.1. *Measure 1*

(71) According to Hungary, MAVA's activities are limited to a one-time function, i.e. holding certain assets formerly owned by Malév and acting as a "conduit for certain payments between Malév and MFB". MAVA is created only for this very purpose.

(72) With regard to debt amounting to EUR 76 million transferred to MAVA, this originates in a 2003 loan agreement between Malév and MFB. The loan was to be repaid in one single instalment at the end of the maturity and covered by a State guarantee. This 2003 loan was included in the list of existing aid measures of the Accession Treaty ([24]). However, in the 2007 agreement the loan's maturity was prolonged until 2017. Therefore, as of 2007, the measure cannot be regarded as an existing aid measure anymore. Indeed, the prolongation of an aid measure constitutes a new aid scheme as set out in Article 4(2)(b) of Commission Regulation (EC) No 794/2004 ([25]).

(73) The investigation has shown that this transaction (i.e. prolongation of the maturity of the debt, creation of MAVA, transfer of the debt to MAVA, transfer of the assets to MAVA and the lease back agreements) solely aimed at restructuring Malév's debt. Hungary admitted itself that MAVA was never intended to make profit. As a result of this transaction, the debt (together with the assets) was taken off the Malév's balance sheet.

(74) Hungary's argument that the financial obligations undertaken by Malév and AirBridge were sufficient to cover MAVA's costs, is not acceptable to demonstrate that the transaction is market conform, as no private market actor would have had the incentive to act in the same way. With regard to the collaterals offered, these were to enable MAVA to repay the debt at the end of the maturity of the loan, i.e. in 2017 ([26]). No private investor would have undertaken such risk, i.e. to take over assets of an uncertain future value against a certain payment obligation.

(75) Although the Hungarian authorities have provided fairly comprehensible evaluations ([27]) for the B767 aircraft ([28]) and the kerosene pipeline ([29]), the evaluation provided (discounted cash-flow method) for the Malév brand (EUR 56 million) seems to be circular and highly dependent on the airline performance so that its result cannot be taken as the objective value of the Malév brand, especially considering the airline's state and performance. Given the fact that the State was aware of the probability that Malév would be not able to fulfil its royalty payment obligations, the discounted cash-flow method should have resulted in a value as low as zero. Under this specific contractual structure, the value of the brand cannot thus be accepted as sufficient collateral.

(76) The contracting parties must have been aware that Malév, as a firm in difficulties already in 2007, was not realistically able to fulfil its royalty payment obligation sufficiently. In fact, in the aftermath of this transaction, MAVA's "costs" (i.e. the interest payment to MFB) could not be covered by Malév's royalty payments for the trademark. MAVA has never taken any steps to enforce the outstanding payments.

(77) With regard to the EUR 32 million VEB guarantee, this was intended to cover not only the principal but also the regular interest payments MAVA has towards MFB.

(78) Against this background and given the fact that no adequate equivalent was transferred to MAVA, taking off the debt from the company's balance sheet has to be regarded as an advantage in favour of Malév.

([24]) List of existing aid measures referred to in point 1(b) of the Existing Aid Mechanism provided for in Chapter 3 of Annex IV of the Treaty of Accession of the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia to the European Union.

([25]) OJ L 140, 30.4.2004, p. 1. See also Case T-332/06, *Alcoa Trasformazioni v Commission*, judgment of 25.3.2009, not yet published, para. 132, and joined cases T-127/99, T-129/99 and T-148/99, *Diputación Foral de Álava v Commission*, [2002] ECR p. II-1275.

([26]) In particular, Malév was under the obligation to repurchase the Malév brand in 2017 for EUR 76 million, from which then MAVA would repay the MFB loan.

([27]) The evaluations for all three assets (the aircraft, the kerosene pipeline and the Malév brand) were prepared by American Appraisal.

([28]) Cost-based method, taking into account also the yearly "The Aircraft Value Reference" magazine's information and an indicative offer for the aircraft. (The indicative offer for the aircraft was provided to American Appraisal based on Malév's information).

([29]) Cost-based method.

VII.3.2. *Measure 2*

(79) As regards the advance payment by MNV for the (later failed) sale of GH, according to the expert evaluation submitted by Hungary, GH had a net asset value of HUF 1,6 billion and an estimated market value of HUF 3,5 billion in 2009. In fact in January 2009 MNV paid to Malév HUF 1,6 billion as advanced payment. This payment was secured by a pledge on HA-LNA, a CRJ jet (estimated market value HUF 1,8 billion). In February 2009 the preliminary purchase agreement was modified and MNV paid an additional HUF 2,7 billion (total HUF 4,3 billion), and a second rank pledge was registered on the same aircraft.

(80) In their comments to the opening decision, the Hungarian authorities admit that the advance payment was in fact undertaken in order to ensure Malév's liquidity during the negotiation phase of the re-nationalisation.

(81) According to the preliminary purchase agreement, the repayment of this sum was immediately due (2 working days) in case the transaction failed. However, no steps were undertaken by MNV to recover this debt after MNV stepped back from the deal in July 2009. Ex-post interest was only *charged* - but never paid - when the debt was swapped into equity in 2010. Malév thus had this cash facility at its disposal free of charge.

(82) The Commission is of the view that the measure transferred to Malév an advantage when the repayment of the advance was not enforced after it became due in July 2009. Moreover, an advantage occurred even before, at the moment when the preliminary purchase agreement was modified in February 2009 and the advanced payment increased (above the evaluated market price of the company) without being sufficiently collateralised.

VII.3.3. *Measure 3*

(83) Concerning the repeated granting of tax and social liabilities obligations deferrals by the tax authority, the Commission notes that on the basis of the submissions by Hungary it is clear that in the course of 2006-2007 a deferral of payment was requested by Malév on 12 different occasions (concerning different payments). The tax authority granted deferrals every time. According to the relevant Hungarian legislation, the granting of such deferrals is discretionary, and could have been refused. Therefore, the measure must be considered selective ([30]).

(84) Until July 2008, the statutory interest was charged and paid by Malév according to the deferral schedules. In its decisions the tax authority reasoned by the difficult situation of Malév and the then envisaged restructuring.

(85) As from July 2008, however, Malév stopped paying its tax and social security contributions and the interest (with the exception of one partial payment in December 2008), and no steps were taken by tax authority to recover this debt. Moreover, further payments were rescheduled also after Malév did not comply with the rescheduling agreements. As from April 2009, the tax and social liabilities due as from that moment (i.e. not the earlier already overdue payments) were not even rescheduled anymore without any concrete action taken by the APEH to enforce any of the debt.

(86) The Commission is of the view that no private creditor would have behaved like the Hungarian State. Indeed, no concrete steps were ever taken to enforce the debt as from July 2008. Moreover, the company's financial situation, despite some restructuring efforts continued to be very weak (see Table 1 above), and there was only little or no prospect at all that the company will return to profitability. In similar circumstances, a private creditor would have pursued the enforcement of the agreement. Furthermore, after Malév failed to comply with the rescheduling agreements, no private creditor would have agreed to a further rescheduling.

(87) Therefore, at latest as from July 2008, the non-enforcement of tax and social contributions liability by the tax authority and the further reschedulings transferred an advantage to Malév.

VII.3.4. *Measure 4*

(88) With regard to the February 2010 capital increase, by which the State re-nationalised the airline in which it had not held a stake since its privatisation, the most striking fact is that while 99,95 % of Malév was sold for a price equivalent of ca. EUR 740 000 in 2007, in 2010 the State *de facto* paid an equivalent of EUR 94 million to regain 94,6 % ownership (by means of the capital increase: partly realised by injecting fresh capital of HUF 20,7 billion and partly through a debt-to-equity swap of the advanced payment for GH of HUF 4,7 billion HUF)), i.e. 127 times the original sales price. This behaviour of the State, especially in view of the fact that in the meantime the airline accumulated losses, continued to have negative equity and no credible restructuring plan was present, is not market conform. In fact, the Hungarian authorities acknowledged themselves that the company has been in "permanent difficulty" and no private investor was willing to purchase Malév early 2010.

([30]) C-256/97 *DM Transport*, Judgement of 29.6.1999, paragraph 27; T-152/99 *HAMSA*, Judgement of 11.7.2002, paragraph 157.

(89) While the capital increase amounted to HUF 25,4 billion (i.e. this was the amount the Hungarian State paid to regain 94,6 % ownership of the airline), at the time of the swap, Malév had a negative equity of HUF 41 billion (EUR 152 million), accumulated losses in the amount of HUF 51 billion (EUR 189 million) and total debt of HUF 75 billion (EUR 278 million) ([31]). According to the 2010 financial accounts, at the beginning of 2010 "the airline's financing problems were serious, debt reached a dramatic level, funding sources were practically not present. […] Due to the absence of a strategic owner, no commercial funding was available." Indeed, the airline has been loss-making at least since 2003 without any realistic prospect to return to viability, not even the private owner had succeeded in turning around the company. Against this background it was clear that the capital increase would not be sufficient to return the company to viability and that after the re-nationalisation Malév would need further capital and liquidity in order merely to stay afloat.

(90) As to Hungary's argument that the State was better off by nationalising the company than enforcing its claims against Malév the Commission notes the following. As Hungary acknowledges, in case of bankruptcy, they would have recovered a very small portion of their claims other than the one covered by the VEB guarantee. (In fact, Malév asset value was negative at the time of the transaction.) By contrast, the Hungarian State decided to keep the airline alive by swapping its debt *and* injecting fresh money in the amount of HUF 20,7 billion (ca. EUR 77 million). No private would have undertaken this further financial burden in a similar situation, especially without realistic chances to return the company to viability.

(91) The Commission also notes that at the same time Hungarian State increased Malév's capital, AirBridge (indirectly VEB) also swapped its debt amounting to HUF 1,4 billion into equity. However, this amount is only 5 % of the new capital and, in addition the State, on the top of the debt converted also contributed a substantial amount of fresh capital. In fact, the injection of fresh money made up for 77 % of the capital increase. Moreover, given the bad financial conditions of Malév, the perspective for AirBridge to obtain the payment of that amount was very limited if not inexistent. Thus the behaviour of the private party in this case is materially different from that of the Hungarian State and it cannot take as a point of reference to consider that the State behaved as a private investor.

Table 2

The 2010 Capital increase

Participant to the capital increase	Contribution HUF billion	Type of contribution	Share of contribution
MNV	20,7	Fresh capital	77 %
MNV	4,7	Debt-to-equity swap	18 %
AirBridge / VEB	1,4	Debt-to-equity swap	5 %
TOTAL	**26,8**		**100 %**

([31]) 2010 Financial accounts

(92) On the basis of the above the Commission concludes that under those circumstances the February 2010 re-nationalisation of Malév by means of the capital increase transferred an advantage to the company.

VII.3.5. *Measures 5-8*

(93) Concerning the measures after the re-nationalisation, it is apparent that the shareholder loans and capital injections were intended to finance Malév's current operations and to avoid its imminent insolvency. The State thus undertook these measures with the same objective: keeping Malév in business. Moreover, they are also closely linked by their chronology, as they took place within very short time intervals (i.e. from May to September 2010). Consequently, the Commission is of the view that, according to *BP Chemicals*, these shareholder loans cannot be assessed under the market economy investor principle and in particular, by applying the Reference Rate Communication ([32]), as they are all directly linked to measure 4 and hence their State aid character cannot be assessed in isolation.

(94) It is clear from the Hungarian submission that no private actor was willing to finance Malév, its only funding sources were supplier credits and the liquidity provided by the State. At the time of granting the loans the State could not seriously count on Malév meeting its interest payment obligation and that it would redeem the loan. Moreover, it is also questionable that any private creditor would take the risk to grant a loan which has to be repaid in a lump sum at the end of the maturity to a company in a comparable state like Malév (i.e. permanent difficulty). Finally, in view of the credit history of the company vis-à-vis the State (e.g. non reimbursement of the advance payment for GH, repeated tax deferrals and non-payments), the State and any other investor could not realistically expect that Malév would meet its obligations.

(95) On the other hand, even according to the Reference rate Communication the stipulated interest and collaterals agreed would not be sufficient to rule out the presence

([32]) Communication from the Commission on the revision of the method for setting the reference and discount rates, OJ C 14, 19.1.2008, p. 6.

of State aid. The stipulated interest rate was 9,97 % whereas the HUF reference rate at the time of the granting amounted to 5,97 %. A mere 400 bps margin over the HUF base rate is insufficient in view of Malév's past performance and financial situation (a company continuously at the edge of bankruptcy). As regards the collateralisation of the loans, the market value of GH (HUF 3,5 billion) in case of Malév's failure is questionable, as Malév was the dominant partner of the ground handling operation: in 2009 63 % of the income was generated by Malév. Therefore, at least in the short term, its economic performance was dependent on Malév's existence and its market value would thus have decreased substantially in case Malév went bankrupt.

(96) In the absence of a credible restructuring plan, it was clear from the beginning that neither the loans nor the capital increase would allow turning around the company which continued to be in a critical state with zero market value. These measures thus are practically equal to a straightforward grant, as the State had no perspective of recovering the "invested" funds.

(97) Therefore the Commission considers that measures 5-8 conferred an advantage to Malév.

VII.4. **Conclusion on the presence of State aid**

(98) According to the foregoing assessment, all measures at stake (measures 1-8) confer an advantage to Malév. This advantage has been granted from State resources.

(99) Moreover, Malév is an airline company and as such qualifies as an undertaking. It competes with other airlines which do not benefit from the same advantage. Hence, the measures distort competition. Furthermore, it is active in a sector (aviation) in which trade definitely exists between Member States; the criterion of the affectation of trade within the Union is also fulfilled.

(100) Finally, the measures are specific and selective in that they favour only one undertaking (i.e. Malév).

(101) On account of the arguments exposed above, the Commission concludes that measures 1-8 fulfil the criteria enshrined in Article 107(1) TFEU. Under those circumstances, they have to be considered State aid in the meaning of Article 107(1) TFEU.

VII.5. **Compatibility of the Aid with the Internal Market**

(102) Articles 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).

(103) The Commission is of the view that Malév has been in permanent difficulty at least since 2006. In particular, it has been loss-making at least since 2003 (see Table 1 above) and already in 2006 its equity was negative (Figure 1 above). In addition, the Hungarian authorities confirmed the airline's permanent difficulties and that since the second half of 2006 it qualified for collective insolvency proceedings and thus fulfilled point 10(c) of the Rescue and restructuring Guidelines. Consequently, the only basis for compatibility would be the Rescue and restructuring Guidelines.

(104) With regard to eligibility and the "one time, last time" condition, the Commission notes that the measures under scrutiny do not form a "restructuring continuum". The airline changed owner twice in the relevant period (i.e. 2007-2010) as it was privatised and re-nationalised. It was under continuous "restructuring" but without a coherent plan. In fact some cost reduction initiatives (layoffs and route cuttings) were started after privatisation but the unit cost did not decrease enough. According to the Hungarian authorities, a new "strategic orientation" was elaborated in 2009, which was again revised by the consultancy Roland Berger in the context of the re-nationalisation. Therefore, the measures in questions are different restructuring measures, in principle violating the "one time, last time" principle.

(105) The Commission notes that, even if Malév were to be eligible for aid under the Rescue and restructuring Guidelines (i.e. the "one time, last time" condition were met, *quad non*), the requirements for compatible rescue and restructuring aid would be not fulfilled, for the reasons set out below.

(106) With regard to rescue aid, points 25(a)-(e) of the Rescue and restructuring Guidelines are not fulfilled. In particular, the measures at hand are not restricted to the minimum necessary, it is not demonstrated that they are warranted on the grounds of serious social difficulties and that they have no unduly adverse spill-over effects on other Member States. Moreover, with the exception of measures 5 and 8, the majority of them were not granted in the form of loans or guarantees.

(107) With regard to restructuring aid, none of the compatibility conditions under the Rescue and restructuring Guidelines is met.

(108) In particular, as regards points 34-35 of the Rescue and restructuring Guidelines, "restoration of long-term viability", the Hungarian authorities did not demonstrate the viability prospects of the airline and did not submit a restructuring plan complying with the requirements set by points 36-37 of the Rescue and restructuring Guidelines.

(109) In addition, concerning the requirement of "avoidance of undue distortion of competition" (points 38-42 of the Rescue and restructuring Guidelines), the Commission notes that no compensatory measures were implemented.

(110) Finally, as regards the condition of "aid limited to the minimum" (points 43-45 of the Rescue and restructuring Guidelines), no own contribution is present.

(111) In view of the foregoing, measures 1-8 implemented in favour of Malév since 2007 are not compatible with the Rescue and restructuring Guidelines. As the measures were granted to a company in difficulty, no other basis for compatibility is applicable. Therefore, the measures are incompatible with the internal market.

VIII. **RECOVERY**

VIII.1. **General**

(112) According to the TFEU and the Court of Justice's established case law, the Commission is competent to decide that the State concerned must abolish or alter aid ([33]) when it has found that it is incompatible with the internal market. The Court has also consistently held that the obligation of a State to abolish aid regarded by the Commission as being incompatible with the internal market is designed to re-establish the previously existing situation ([34]). In this context, the Court has established that that objective is attained once the recipient 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 is restored ([35]).

(113) Following that case-law, Article 14 of Council Regulation (EC) No 659/1999 ([36]) laid down that "where negative decisions are taken in respect of unlawful aid, the Commission shall decide that the Member State concerned shall take all necessary measures to recover the aid from the beneficiary."

(114) Thus, given that the measures at hand are to be considered as unlawful and incompatible aid, the aid has to be recovered in order to re-establish the situation that existed on the market prior to the granting of the aid. Recovery shall be hence effected from the time when the advantage occurred to the beneficiary, i.e. when the aid was put at the disposal of the beneficiary and shall bear recovery interest until effective recovery.

([33]) Case C-70/72 *Commission v Germany* [1973] ECR 813, point 13.
([34]) Joined Cases C-278/92, C-279/92 and C-280/92 *Spain v Commission* [1994] ECR I-4103, point 75.
([35]) Case C-75/97 *Belgium v Commission* [1999] ECR I-3671, points 64-65.
([36]) OJ L 83, 27.3.1999, p. 1.

VIII.2. **Aid element in the individual measures**

VIII.2.1. *Measure 1*

(115) The Commission acknowledges that "Malév" as the brand of the Hungarian national carrier operating over decades has a certain value on the aviation market. On the other hand the Commission is of the view that under the specific contractual structure, the value of the brand as claimed by the Hungarian authorities cannot be accepted. An objective value should have been based on an independent evaluation also taking into account Malév's overall financial situation.

(116) On the basis of the foregoing, the aid element of measure 1 is thus calculated as up to EUR 56 million, i.e. EUR 76 million minus the value of the kerosene pipeline and the aircraft (amounting to EUR 20 million), minus the objective value of the Malév brand ([37]). The exact aid element must be calculated by Hungary. Should Hungary not present convincing arguments for an objective value of the brand at the time of the conclusion of the transaction on the transfer of the brand to MAVA, the entire amount of EUR 56 million is considered as aid element.

VIII.2.2. *Measure 2*

(117) As set out above, the Commission is of the view that the measure transferred to Malév an advantage when the repayment of the advance was not enforced after it became due. Moreover, an advantage occurred even before, at least at the moment when the preliminary purchase agreement was modified in February 2009 and the advanced payment increased (above the evaluated market price of the company).

(118) The Commission concludes that such a cash facilty would not have been granted by any private operator. In fact, no private market operator would have agreed to put these funds at Malév's disposal, in particular free of charge and no steps whatever taken to recover them. In fact, in their comments to the opening decision the Hungarian authorities acknowledge themselves that the advanced payment intended to secure Malév's survival (see paragraph (80) above). Therefore, the entire amount of the facility for the period it was at the disposal of the beneficiary is the aid element: between February 2009 and July 2009 HUF 0,8 billion (the difference between the "overpayment" in respect of GH's market value) and between July 2009 and February 2010 HUF 4,3 billion (the entire amount of the advanced payment). Recovery should thus take account of the fact that the amount was swapped into equity in February 2010 (see measure 4 below).

([37]) As concluded in paragraph (75) above, the Hungarian authorities did not substantiate the value of the Malév brand which can be as low as zero.

VIII.2.3. *Measure 3*

(119) Concerning the deferral and non-enforcement of tax and social contribution, the Commission considers that, all overdue Malév debt from July 2008 to March 2010 towards APEH constituted State aid. Moreover, all rescheduled amount after this date (July 2008) amount entirely to State aid as well. Indeed, nothing suggests that a private creditor would have granted those deferrals and reschedulings. Recovery should take account of the fact that the overdue amounts were paid back in March 2010.

VIII.2.4. *Measure 4*

(120) With regard to the capital increase, the Commission considers that, given Malév's financial state, the apparent need for further support following the capital increase, the lack of any realistic prospective to recoup the "invested" funds, no private investor would have put those funds at Malév's disposal. The injected capital of HUF 25,4 billion plus the debt to equity swap of 4,7 billion HUF for the advanced payments for Malév GH is the aid element.

VIII.2.5. *Measure 5*

(121) As to the loans totalling HUF 9,2 billion, the Commission considers that in view of the debt history and situation of the airline at the moment of the granting of those loans, the State had no reason whatsoever to expect repayment and at the time of the granting of the loan it was even doubtful whether Malév would be able to pay the interest. In fact, the interest charged was not paid but converted subsequently to equity.

(122) Therefore the Commission considers that the loan can be compared to a straightforward grant and hence the aid element is the entire loan amount of HUF 9,2 billion for the period it was at the disposal of the beneficiary, i.e. between the granting of the tranches (May, June, July 2010 respectively) and the conversion of the loans into equity (September 2010). Due and not paid interest should be included in the aid element. Recovery should thus take account of the fact that the amount was swapped into equity in September 2010 (see measure 6 below).

VIII.2.6. *Measure 6*

(123) For the reasons set out above in paragraph (120) above, the Commission considers that total amount of the converted debt to capital can be considered as a straightforward grant and hence the entire amount of HUF 9,4 billion is the aid element starting September 2010.

VIII.2.7. *Measure 7*

(124) For the reasons set out above in paragraph (120), the Commission considers that the aid element is the injected capital of HUF 5,3 billion starting September 2010.

VIII.2.8. *Measure 8*

(125) For the reasons set out above in paragraphs (120) above, the Commission considers that total amount of the loan is comparable to a straightforward grant and hence the entire amount of HUF 5,7 billion is the aid element starting September 2010.

IX. **CONCLUSION**

(126) On the basis of the foregoing, the Commission concludes that measures 1-8 implemented by Hungary in favour of Malév constitute State aid in the meaning of 107(1) TFEU.

(127) In addition, the Commission concludes that measures 1-8 are incompatible with the internal market.

(128) This incompatible aid must be recovered from Malév as set out in section VIII.2 above in order to re-establish the situation that existed on the market prior to the granting of the aid. The exact total amount of recovery plus recovery interest has to be computed by the Hungarian authorities.

HAS ADOPTED THIS DECISION:

Article 1

The following measures granted by Hungary to Malév Hungarian Airlines Zrt. constitute State aid within the meaning of Article 107(1) TFEU:

(a) Measure 1: The taking over on 31 December 2007 by the state-owned MAVA of a loan granted to Malév by MFB, a 100 % state-owned development bank, in 2003;

(b) Measure 2: The provision of a HUF 4,3 billion "cash facility" for one year in the context of a planned (subsequently failed) purchase by MNV of Malév's GH subsidiary;

(c) Measure 3: All overdue tax and social security debt from July 2008 to March 2010 and the deferral of different tax and social security payments as from July 2008;

(d) Measure 4: In February 2010, a capital increase by MNV of HUF 25,4 billion (partly realised by injecting fresh capital of HUF 20,7 billion and partly through a debt-to-equity swap of the advanced payment for GH of HUF 4,7 billion HUF);

(e) Measure 5: From May to August 2010, three shareholder loans totalling HUF 9,2 billion granted to Malév by MNV plus interest due but not paid;

(f) Measure 6: In September 2010, the conversion of the shareholder loans (along with the interest owed thereon) referred to in Article 1(e) from debt to equity in the amount of HUF 9,4 billion;

(g) Measure 7: In September 2010, a further capital increase in the amount of HUF 5,3;

(h) Measure 8: In September 2010, a further shareholder loan in the amount of HUF 5,7 billion, plus interest due but not paid.

Article 2

The State aid measures referred to in Article 1 unlawfully granted by Hungary in breach of Article 108(3) TFEU in favour of Malév Hungarian Airlines Zrt. are incompatible with the internal market.

Article 3

1. Hungary shall recover the aid referred to in Article 1 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 their actual recovery.

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 four months following the date of notification of this Decision.

Article 5

1. Within two months following notification of this Decision, Hungary shall submit the following information to the Commission:

(a) the total amount (principal and recovery interests) to be recovered from the beneficiary;

(b) a detailed description of the measures already taken and planned to comply with this Decision;

(c) 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 Hungary.

Done at Brussels, 9 January 2012.

For the Commission

Joaquín ALMUNIA

Vice-President