COMMISSION DECISION (EU) 2016/1848

of 4 July 2016

on the measure SA.40018 (2015/C) (ex 2015/NN) implemented by Hungary on the 2014 Amendment to the Hungarian food chain inspection fee

(notified under document C(2016) 4056)

(Only the Hungarian text is authentic)

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

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 called on interested parties to submit their comments pursuant to the provisions cited above ([1]) and having regard to their comments,

Whereas:

1. PROCEDURE

(1) By press articles published in December 2014, the Commission became aware of the 2014 amendment to the 2008 Hungarian Food Chain Act, regulating the food chain inspection fee. By letter of 17 March 2015, the Commission sent a request for information to the Hungarian authorities, who replied by letter of 16 April 2015.

(2) By letter dated 15 July 2015, the Commission informed Hungary that it had decided to initiate the procedure laid down in Article 108(2) of the Treaty on the Functioning of the European Union (hereinafter: 'the Treaty') in respect of the aid measure (the 'Opening Decision'). The Commission also ordered the immediate suspension of the measure in accordance with Article 11(1) of Regulation (EC) No 659/1999 ([2]) in the Opening Decision.

(3) The Opening Decision was published in the *Official Journal of the European Union* ([3]). The Commission invited interested parties to submit their comments on the aid measure.

(4) The Commission received comments from one interested party. By letter of 13 October 2015, the Commission forwarded the comments to Hungary, which was given the opportunity to react. Hungary did not react to those comments.

2. DETAILED DESCRIPTION OF THE MEASURE

2.1. The 2008 Food Chain Act establishing a food chain inspection fee

(5) The provisions applicable to the food chain inspection fee are set forth in Act XLVI of 2008 on the food chain and the official supervision thereof (the 'Food Chain Act') and in Decree No 40 of 27 April 2012 of the Minister for Rural Development on the rules of making a declaration on and paying the food chain inspection fee.

([1]) OJ C 277, 21.8.2015, p. 12.
([2]) Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 108 of the treaty on the functioning of the European Union (OJ L 83, 27.3.1999, p. 1).
([3]) Cf. footnote [1].

Undertakings regarded as food chain operators pursuant to the Food Chain Act have to pay the fee in respect of their turnover made in relation to certain activities. The Act provides a list of the activities ([4]) in respect of which companies are obliged to pay the inspection fee.

(6) All undertakings (companies and other legal persons, but also private persons who pursue their activities as sole traders or primary producers) operating in Hungary that generated turnover from the listed activities in the year preceding the declaration are subject to the payment of the food chain inspection fee. The purpose of the food chain inspection fee is to cover the cost of performance by the National Food Chain Safety Office (a State agency) of tasks relating to certain food chain regulatory and supervisory activities. The supervisory fee is calculated on a yearly basis and the person subject to the fee is obliged to declare and pay regardless of whether specific on-the-spot official controls have been carried out.

(7) Until 31 December 2014, the rule established by the Food Chain Act was that all food chain operators had to pay the fee in respect of the relevant turnover at a flat rate of 0,1 %.

(8) The collected food chain inspection fee may be spent only on the tasks set forth in the food chain safety strategy and the activities of the food chain authority.

2.2. **The 2014 amendment of the Food Chain Act**

(9) Pursuant to the amendment of Article 47/B of the Food Chain Act by Act LXXIV of 2014 ([5]) that entered into force on 1 January 2015 (hereinafter: 'the 2014 amendment'), specific rules were introduced for the calculation of the inspection fee applicable to turnover generated by stores selling fast-moving consumer goods ([6]) on the Hungarian market.

(10) The 2014 amendment of the Food Chain Act introduces a progressive fee structure for operators of stores selling fast-moving consumer goods ([7]), with rates ranging from 0 % to 6 %. More precisely, the following rates applied to turnover subject to the food chain inspection fee:

— 0 % on the part of the turnover not exceeding HUF 500 million (approximately EUR 1,6 million),

— 0,1 % on the part of the turnover exceeding HUF 500 million but not exceeding HUF 50 billion (approximately EUR 160,6 million),

— 1 % on the part of the turnover exceeding HUF 50 billion but not exceeding HUF 100 billion (approximately EUR 321,2 million),

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([4]) According to the Hungarian authorities in their response letter of 16 April 2015 to the Commission: 'The following qualify as activities subject to the inspection fee:
— distribution of animals kept for food production, breeding or experimental purposes,
— distribution of plants, sowing seeds, plant products and propagation and planting stock grown for food or animal feed production purposes,
— food production or distribution, including restaurant catering and public catering,
— production or distribution of animal feed,
— production or distribution of veterinary preparations and veterinary products,
— production or distribution of pesticides, yield-increasing materials or EC fertilisers,
— treatment, use, further processing and transport of by-products of animal origin or placing products made of them on the market,
— operation of a company engaged in the transport of livestock, a facility washing and disinfecting livestock-transporting vehicles, a quarantine station selected for receiving animals of foreign stock, an animal-loading facility, a collection station, a trading site, a feeding and watering station, a resting station or an animal market,
— production or storage of reproductive materials,
— operation of a phytosanitary, veterinary or food or animal feed analysis laboratory,
— distribution of devices used for marking animals.'

([5]) Act LXXIV of 2014 amending specific tax acts, other acts relating to them and Act CXXII of 2010 on the National Tax and Customs Administration.

([6]) Fast-moving consumer goods are defined as follows in Article 2(18a) of the Act on Commerce: 'fast-moving consumer goods: with the exception of products sold in the catering business, those foodstuffs, cosmetics, drugstore products, household cleaners and chemicals, hygiene paper products satisfying the daily needs and requirements of the population which the consumer typically consumes, depletes or replaces within one year'. In accordance with Article 2(18b) of the Act on Commerce, 'stores selling fast-moving consumer goods' are 'those shops for which fast-moving consumer goods constitute the vast majority of the turnover'.

([7]) For the purpose of the present Decision, reference to operators of stores selling fast-moving consumer goods includes all undertakings subject to the food chain inspection fee with respect to turnovers derived from stores selling fast-moving consumer goods.

— 2 % on the part of the turnover exceeding HUF 100 billion but not exceeding HUF 150 billion (approximately EUR 481,8 million),

— 3 % on the part of the turnover exceeding HUF 150 billion but not exceeding HUF 200 billion (approximately EUR 642,4 million),

— 4 % on the part of the turnover exceeding HUF 200 billion but not exceeding HUF 250 billion (approximately EUR 803 million),

— 5 % on the part of the turnover exceeding HUF 250 billion but not exceeding HUF 300 billion (approximately EUR 963,5 million),

— 6 % on the part of turnover exceeding HUF 300 billion.

(11) Pursuant to the 2014 amendment of the Food Chain Act, all other food chain operators remained subject to the fee calculated on the relevant turnover at a flat rate of 0,1 %.

(12) Neither the amended provision of the Hungarian Food Chain Act nor its explanatory memorandum make reference to the reasons behind the introduction of specific rules with regard to the fee rate for stores selling fast-moving consumer goods. No explanation is given either as to the determination of the different turnover brackets and corresponding fee rates.

(13) The fee is subject to declaration by the food chain operators. It is payable annually in two equal instalments by 31 July and 31 January. The law also provides for simplified procedures in cases where the fee is less than HUF 1 000 (approximately EUR 3,20). In that case, the fee is still subject to declaration, but it does not have to be paid.

(14) A penalty for belated payment is payable on any inspection fee unpaid by the deadline. A default penalty may be imposed if the persons or entities subject to the food chain inspection fee fail to fulfil their obligation to make a declaration, or fulfil it belatedly, incompletely or with untrue data.

3. THE FORMAL INVESTIGATION PROCEDURE

3.1. Grounds for initiating the formal investigation procedure

(15) The Commission opened the formal investigation procedure because it considered at that stage that the progressive fee structure (rates and turnover brackets) introduced by the 2014 amendment constituted unlawful and incompatible State aid.

(16) In particular, the Commission considered that the progressive rates introduced by the 2014 amendment differentiate between undertakings based on their turnover and therefore on their size and grant a selective advantage to undertakings with low turnover and thus smaller undertakings. Hungary had not provided evidence that the progressive fee structure applicable to stores selling fast-moving consumer goods, such as supermarkets, corresponds to a similar progressive pattern observed in the costs incurred by the National Food Chain Safety Office for the inspection of those stores. Hungary had therefore not demonstrated that the measure was justified by the nature or general scheme of the tax system. Therefore, the Commission considered that the measure constituted State aid, since all the other conditions laid down by Article 107(1) of the Treaty appeared to have been met.

(17) Finally, the Commission raised doubts as to the compatibility of the measure with the internal market. In particular, the Commission recalled that it cannot declare compatible a State aid measure that breaches other rules of Union law, such as the fundamental freedoms established by the Treaty or the provisions of Union regulations and directives. At that stage, the Commission could not exclude that the measure predominantly targeted foreign-owned undertakings, which could entail a breach of Article 49 of the Treaty establishing the fundamental freedom of establishment and also expressed doubts that the differences in tax treatment entailed by the measure were necessary and proportionate to the objective of fulfilling the obligations laid down by Regulation (EC) No 882/2004 of the European Parliament and of the Council ([8]).

([8]) Regulation (EC) No 882/2004 of the European Parliament and of the Council of 29 April 2004 on official controls performed to ensure the verification of compliance with feed and food law, animal health and animal welfare rules (OJ L 165, 30.4.2004, p. 1).

3.2. **Modifications of the legal base of the inspection fee after the opening of the formal investigation procedure**

(18) On 27 October 2015, the Hungarian government submitted to the Hungarian Parliament a proposal for an Act amending Act XLVI of 2008 on the food chain and its official supervision. On 17 November 2015, the Hungarian Parliament adopted Act CLXXXII of 2015 amending Act XLVI of 2008 on the food chain and its official supervision, which was published in the Hungarian Official Gazette (*Magyar Közlöny*) No 182/2015 on 26 November 2015. The new law entered into force on the 31st day following that of its publication, i.e. on 27 December 2015.

(19) The amendment of November 2015 abolishes the progressive fee structure introduced by the 2014 amendment and reintroduces a 0,1 % flat inspection fee for all food chain operators, as was the case before the 2014 amendment to the Act.

3.3. **Comments from Hungary**

(20) Hungary did not send any comments to the Commission in response to the Opening Decision.

(21) Instead, by letter of 16 September 2015 addressed to the Commissioner for Competition, Hungary sent a proposal for an amended food chain inspection fee to the Commission. In this proposal, the 0 % rate would be repealed and, instead of the progressive fee structure with eight rates (between 0 % and 6 %), a two-rate system would be introduced (0,1 % for retail sector operators with low turnover and 0,3 % for retail sector operators with higher turnover).

(22) By letter of 7 October 2015, the Commission's services informed Hungary that even though, the difference between the fee rates decreased under the new proposal, the proposed new fee would still feature a progressive fee structure, which would be problematic from a State aid perspective if it was not justified by the guiding principles of the inspection fee system.

(23) By letter of 7 October 2015, Hungary sent additional information and data aimed at justifying the dual progressive fee structure on the basis of the supervision cost of major market players and other commercial units. In particular, Hungary argued that major players have a complex structure, which requires a more complicated control and far more resources from the authority performing such controls.

(24) Following Hungary's request to receive feedback on the proposal made in its letter of 16 September 2015 and on the additional information provided in its letter of 7 October 2015, the Commission's services informed Hungary by letter of 17 March 2016 that the data provided does not demonstrate that the cost of controls as a proportion of turnover increases in the same way as the fee rates. In particular, the Commission's services confirmed their view that the figures provided did not show that the cost of inspections for companies falling under the 0,3 % rate are three times higher — for each forint of turnover controlled — than those for the companies falling under the 0,1 % rate. Hence, the progressive two-fee structure would have to be considered to provide a selective advantage to the undertakings falling under the lower bracket.

(25) In the end, Hungary did not submit this legislative proposal to the Hungarian Parliament to amend the Act XLVI of 2008 on the food chain and its official supervision.

3.4. **Comments from interested parties**

(26) The Commission received comments from one interested party. That interested party operates in the Hungarian market and agrees with the Commission's assessment in the Opening Decision. That interested party argues that the measure was designed to specifically target foreign companies, which it contends is possible because of the structure of the Hungarian retail market. According to that party, foreign companies in the retail sector in Hungary operate branches or subsidiaries, which increases the level of their (consolidated) turnover. By contrast, Hungarian undertakings are organised in a franchise system, with each individual store — or a limited number of them — being operated by a different legal entity which is not part of the franchisor's corporate entity or group.

According to estimates provided by the interested party, foreign retailers (corporate groups) together would currently have a market share of approximately 50 % in Hungary, but they bear around 95 % of the inspection fee volume, while Hungarian retailers generally fall within the 0 % or 0,1 % fee brackets under Article 47/B of the Food Chain Act.

(27) In other words, Hungarian food retailers, due to their franchise system organisation, automatically fall within lower fee brackets (subject to 0 % or 0,1 % rates), while branches/subsidiaries of foreign EU parents which are not organised according to a franchise system, are generally affected by high fee levels. Hence, according to the interested party, the food chain inspection fee grants a selective advantage both to smaller undertakings and to those undertakings operating in the retail trade which are not organised in a branch system, i.e. to Hungarian vs foreign-owned undertakings.

3.5. **Comments from Hungary on interested parties' comments**

(28) The Commission has not received any response from Hungary on the comments from the sole interested party, which were forwarded to it by letter of 13 October 2015.

4. **ASSESSMENT OF THE AID**

(29) The Commission limits its assessment in the present Decision to the provisions of the 2014 amendment to the Food Chain Act, more specifically to the amended provision laying down a progressive fee structure (rates and turnover brackets) on stores selling fast-moving consumer goods in Hungary as set out in recital 10 above.

4.1. **Presence of State aid within the meaning of Article 107(1) of the Treaty**

(30) According to Article 107(1) of the Treaty, '[s]ave as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market'.

(31) The classification of a measure as aid within the meaning of this provision therefore requires the following cumulative conditions to be met: (i) the measure must be imputable to the State and financed through State resources; (ii) it must confer an advantage on its recipient; (iii) that advantage must be selective; and (iv) the measure must distort or threaten to distort competition and affect trade between Member States.

4.1.1. *State resources and imputability to the State*

(32) To constitute State aid, a measure must be financed through State resources and be imputable to a Member State.

(33) Since the measure results from an Act of the Hungarian Parliament, it is clearly imputable to the Hungarian State. Hungary's argument that, given that the legal basis of the fee is Regulation (EC) No 882/2004, the fee cannot be imputed to the Hungarian State, cannot be accepted.

(34) The Union Courts have previously held that a tax exemption adopted by a Member State implementing a Union directive in accordance with its obligations under the Treaty is not imputable to that Member State, but stems from an act of the Union legislature and therefore does not constitute State aid ([9]). However, Regulation (EC) No 882/2004 sets out general obligations for Member States and does not impose upon them the obligation to establish progressive fees based on turnover for the performance of controls, so that the 2014 amendment cannot be said to stem from an act of the Union legislature. Article 26 of Regulation (EC) No 882/2004 provides that 'Member States shall ensure that adequate financial resources are available to provide the necessary staff and

([9]) Case T-351/02 *Deutsche Bahn* v *Commission* EU:T:2006:104, paragraph 102.

other resources for official controls by whatever means considered appropriate, including through general taxation or by establishing fees or charges'. Pursuant to Article 27(1), 'Member States may collect fees or charges to cover the costs occasioned by official controls'. It is thus the responsibility of individual Member States to set the amount of the fees within the bounds of the said legislation, and in particular in compliance with Article 27 thereof. Any choice made in that context is therefore imputable to the Hungarian State.

(35) As regards the measure's financing through State resources, where the result of a measure is that the State forgoes revenues which it would otherwise have to collect from an undertaking in normal circumstances, that condition is also fulfilled ([10]). In the present case, the Hungarian State waives resources it would otherwise have to collect from operators of stores selling fast-moving consumer goods with a lower level of turnover (and thus smaller undertakings), if they had been subject to the same inspection fee as operators of stores selling fast-moving consumer goods with a high level of turnover.

4.1.2. *Advantage*

(36) According to the case law of the Union Courts, the notion of aid embraces not only positive benefits, but also measures which, in various forms, mitigate the charges which are normally included in the budget of an undertaking ([11]). Although a measure that entails a reduction to a tax or a levy does not involve a positive transfer of resources from the State, it gives rise to an advantage because it places the undertakings to which it applies in a more favourable financial position than other taxpayers and results in a loss of income to the State ([12]). An advantage may be granted through different types of reduction in a company's tax burden and, in particular, through a reduction in the applicable tax rate, taxable base or in the amount of tax due ([13]).

(37) The 2014 amendment to the Food Chain Act lays down a progressive fee structure that applies to operators of stores selling fast-moving consumer goods depending on the brackets into which those undertakings' turnover falls. The progressive character of those fees has the effect that the average percentage of the fee levied on a store's turnover increases when its turnover increases and reaches the next upper brackets. This has the result that undertakings with low turnover (smaller undertakings) are subject to the fee at substantially lower average rates than undertakings with high turnover (larger undertakings). Being subject to the fee at this substantially lower average rate mitigates the charges that undertakings with low turnover have to bear as compared to undertakings with high turnover and therefore constitutes an advantage to the benefit of smaller undertakings over larger undertakings for the purposes of Article 107(1) of the Treaty.

4.1.3. *Selectivity*

(38) A measure is selective if it favours certain undertakings or the production of certain goods within the meaning of Article 107(1) of the Treaty.

(39) For fiscal schemes the Court of Justice has established that the selectivity of a measure should in principle be assessed by means of a three-step analysis ([14]). First, the common or normal tax regime applicable in the Member State is identified: 'the reference system'. Second, it should be determined whether a given measure constitutes a derogation from that system in so far as it differentiates between economic operators who, in light of the objectives intrinsic to the system, are in a comparable factual and legal situation. If the measure in question does not constitute a derogation from the reference system, it is not selective. If it does (and therefore is prima facie selective), it must be established, in the third step of the analysis, whether the derogatory measure is justified by

([10]) Case C-83/98 P *France* v *Ladbroke Racing Ltd and Commission* EU:C:2000:248, paragraphs 48 to 51. Likewise, a measure allowing certain undertakings a tax reduction or to postpone payments of tax normally due can amount to State aid, see Joined Cases C-78/08 to C-80/08 *Paint Graphos and Others*, EU:C:2011:550, paragraph 46.

([11]) Case C-143/99 *Adria-Wien Pipeline* EU:C:2001:598, paragraph 38.

([12]) Joined Cases C-393/04 and C-41/05 *Air Liquide Industries Belgium* EU:C:2006:403, paragraph 30 and Case C-387/92 *Banco Exterior de Espana* EU:C:1994:100, paragraph 14.

([13]) See Case C-66/02 *Italy* v *Commission* EU:C:2005:768, paragraph 78; Case C-222/04 *Cassa di Risparmio di Firenze and Others* EU:C:2006:8, paragraph 132; Case C-522/13 *Ministerio de Defensa and Navantia* EU:C:2014:2262, paragraphs 21 to 31. See also point 9 of the Commission notice on the application of the State aid rules to measures relating to direct business taxation (OJ C 384, 10.12.1998, p. 3).

([14]) See, for example, Case C-279/08 P *Commission* v *Netherlands (NOx)* [2011] EU:C:2011:551; Case C-143/99 *Adria-Wien Pipeline* EU:C:2001:598; Joined Cases C-78/08 to C-80/08, *Paint Graphos and others* EU:C:2011:550; Case C-308/01 *GIL Insurance* EU:C:2004:252.

the nature or the general scheme of the (reference) tax system ([15]). If a prima facie selective measure is justified by the nature or the general scheme of the system, it will not be considered selective and it will thus fall outside the scope of Article 107(1) of the Treaty.

(a) *System of reference*

(40) In the present case, the Commission considers the reference system to be the inspection fee on food chain undertakings operating in Hungary ([16]). The Commission does not consider that the progressive fee structure introduced by the 2014 amendment can form a part of that reference system.

(41) As the Court of Justice has specified ([17]), it is not always sufficient to confine the selectivity analysis to whether the measure derogates from the reference system as defined by the Member State. It is also necessary to evaluate whether the boundaries of that system have been designed by the Member State in a consistent manner or, conversely, in a clearly arbitrary or biased way, so as to favour certain undertakings over others. Otherwise, instead of laying down general rules applying to all undertakings from which a derogation is made for certain undertakings, the Member State could achieve the same result, side stepping the State aid rules, by adjusting and combining its rules in such a way that their very application results in a different burden for different undertakings ([18]). It is particularly important to recall in that respect that the Court of Justice has consistently held that Article 107(1) of the Treaty does not distinguish between measures of State intervention by reference to their causes or their aims, but defines them in relation to their effects, and thus independently of the techniques used ([19]).

(42) Whereas the application of a flat fee to the turnover of food chain operators is an appropriate means to cover the costs incurred by the State for its inspection activities in line with Regulation (EC) No 882/2004, the progressive fee structure introduced by the 2014 amendment to the Food Chain Act appears deliberately designed by Hungary to favour certain undertakings over others. Prior to the 2014 amendment, all food chain operators, including store selling fast moving consumer goods, had to pay the fee in respect of their turnover at a flat rate of 0,1 %. Under the progressive fee structure introduced under the 2014 amendment operators of stores selling fast-moving consumer goods are potentially subject to a series of eight different fee rates, starting from 0 % and progressively increasing towards 6 %, depending on the brackets into which their turnover falls. Consequently, as a result of the 2014 amendment, a different average tax rate applies to undertakings subject to the fee depending on the nature of their activities (whether they operate stores selling fast moving consumer goods) and the level of their turnover (whether it surpasses the thresholds laid down by that amendment).

(43) Because each company is taxed at a different rate, it is not possible for the Commission to identify one single reference rate in the fees as amended in 2014. Hungary also did not present any specific rate as the reference rate or 'normal' rate and also did not explain why a higher rate would be justified by exceptional circumstances for operators of stores selling fast moving consumer goods with a high level of turnover, nor why lower rates should apply to certain categories of operators or operators of stores selling fast moving consumer goods with lower levels of turnovers.

(44) The effect of the 2014 amendment is therefore that different undertakings pay different levels of taxation (expressed as a proportion of their overall annual turnover) depending on their activities and, since the amount of turnover achieved by an undertaking correlates to a certain extent with the size of that undertaking, their size. However, the objective of the food inspection fee is to finance health and safety-related checks of food as it passes through the food chain and the progressive fee structure, with rates ranging between 0 % and 6 %, does not mirror the relationship between the cost of inspections on the premises of the undertakings covered by the measure and their turnover.

(45) In light of that objective, the Commission considers all food chain operators, in general, and all operators of stores selling fast-moving consumer goods, in particular, to be in a comparable legal and factual situation, regardless of their activities or their level of turnover, and Hungary has advanced no convincing justification to discriminate between those types of undertakings when it comes to levying the food chain inspection fee. The Commission refers, in this regard, to recitals 52 to 57 below. Hungary has therefore deliberately designed the food chain inspection fee in such a manner so as to arbitrarily favour certain undertakings, namely operators of

([15]) Commission Notice on the application of the State aid rules to measures relating to direct business taxation (OJ C 384, 10.12.1998, p. 3).
([16]) See above footnote 4.
([17]) Joined Cases C-106/09 P and C-107/09 P *Commission and Spain* v *Government of Gibraltar and United Kingdom* EU:C:2011:732.
([18]) Ibid, paragraph 92.
([19]) Case C-487/06 P *British Aggregates* v *Commission* EU:C:2008:757, paragraphs 85 and 89 and the case-law cited, and Case C-279/08 P *Commission* v *Netherlands (NOx)* EU:C:2011:551, paragraph 51.

stores selling fast-moving consumer goods with a lower level of turnover (and thus smaller undertakings), and disadvantage others, namely larger undertakings, which also tend to be foreign-owned ([20]).

(46) The reference system is therefore selective by design in a way that is not justified in light of the objective of the food inspection fee, which is to finance health and safety-related checks of food as it passes through the food chain. Consequently, the appropriate reference system in the present case is the imposition of an inspection fee on food chain undertakings operating in Hungary based on their turnover, without the progressive fee structure being a part of that system.

(b) *Derogation from the system of reference*

(47) As a second step, it is necessary to determine whether the measure derogates from reference system in favour of certain undertakings which are in a similar factual and legal situation in light of the intrinsic objective of the system of reference.

(48) As explained in recital 44, the intrinsic objective of the food inspection fee is to finance health and safety-related checks of food as it passes through the food chain in Hungary. As further explained in that recital, all food chain operators, in general, and all operators of stores selling fast-moving consumer goods, in particular, should be considered to be in a comparable legal and factual situation in light of that objective, regardless of their activities or their level of turnover.

(49) As explained in recital 37, the progressive fee structure, which pursuant to the 2014 amendment applies only to operators of stores selling fast-moving consumer goods, has the result that undertakings with high levels of turnover are subject to both substantially higher marginal inspection fees and substantially higher average inspection fee rates as compared to operators of stores with low levels of turnover and other food chain operators. In other words, the progressive fee structure introduced by the 2014 amendment differentiates between undertakings in a comparable factual and legal situation as regards the objective of the food inspection fee based on their activities and their size.

(50) The Commission notes, in particular, that the fee rates laid down by the 2014 amendment to the Food Chain Act and the brackets to which they apply result in an increase of the fee for undertakings subject to the fee depending on their turnover from certain activities and thus their size. The marginal fee rate is 0,1 % for undertakings generating a turnover higher than HUF 500 million, but not exceeding HUF 50 billion. That marginal rate is multiplied by 60 to reach 6 % for undertakings selling fast-moving consumer goods that generate a turnover exceeding HUF 300 billion. The consequence of that increase in the marginal fee rate is that for a store with turnover in the top bracket, the average level of fee is substantially higher than the one applicable to undertakings with lower levels of turnover (and thus smaller undertakings).

(51) Consequently, the progressive rate structure introduced by the 2014 amendment derogates from the reference system consisting of the imposition of an inspection fee on food chain undertakings operating in Hungary in favour of operators of stores selling fast-moving consumer goods with a lower level of turnover (and thus smaller undertakings). The Commission therefore considers the contested measure to be prima facie selective.

(c) *Justification*

(52) A measure which derogates from the reference system is not selective if it is justified by the nature or general scheme of that system. This is the case where the selective treatment is the result of inherent mechanisms necessary for the functioning and effectiveness of the system ([21]). For this purpose, external policy objectives —

([20]) Joined Cases C-106/09 P and C-107/09 P *Commission and Spain* v *Government of Gibraltar and United Kingdom* EU:C:2011:732. See also, by way of analogy, Case C-385/12 *Hervis Sport- és Divatkereskedelmi Kft.* EU:C:2014:47, by which the Court of Justice held: 'Articles 49 TFEU and 54 TFEU must be interpreted as precluding legislation of a Member State relating to tax on the turnover of store retail trade which obliges taxable legal persons constituting, within a group, "linked undertakings" within the meaning of that legislation, to aggregate their turnover for the purpose of the application of a steeply progressive rate, and then to divide the resulting amount of tax among them in proportion to their actual turnover, if — and it is for the referring court to determine whether this is the case — the taxable persons covered by the highest band of the special tax are "linked", in the majority of cases, to companies which have their registered office in another Member State.'.

([21]) See for example Joined Cases C-78/08 to C-80/08 *Paint Graphos and others* EU:C:2011:550, paragraph 69.

such as regional, environmental or industrial policy objectives — cannot be relied upon by the Member States to justify the differentiated treatment of undertakings under a certain regime. It is for the Member State, i.e. for the Hungarian authorities, to provide a justification.

(53) The Hungarian authorities have argued that the purpose of the derogation is to ensure that the rate of the inspection fee is more proportional to the resources of the authority required for the inspection of significant market players (e.g. certificates, time required for inspection with IT and quality assurance systems, number of company sites, use of experts and motor vehicle costs). In the view of the Hungarian authorities, food chain operators with larger turnovers or which represent a greater risk by virtue of the greater number of consumers they deal with should contribute more to the financing of food chain inspection.

(54) The Commission considers that progressive turnover fees can only be justified if the specific objective pursued by the fee requires such progressive rates, i.e. if the costs that the fee is supposed to cover or the negative externalities created by an activity that the fee is supposed to address also increase — and increase more than proportionately ([22]) — in respect of turnover. As the retail chain supervision fee is supposed to finance health and safety-related checks of food as it passes through the food chain, the Commission has found no reason why the cost of such controls should increase more than proportionately with the turnover of larger undertakings.

(55) For example, Hungary has not provided evidence explaining why the operator of a retail store with substantial levels of turnover selling, for example, a package of sugar would represent 60 times the hazards or warrant controls 60 times more costly compared to the operator of a small supermarket with low turnover selling the same package of sugar. Indeed, while the turnover resulting from the sale of that package of sugar is similar for both undertakings, the fee due for each forint of turnover generated by the sale of that package is 60 times lower for the operator of the small supermarket.

(56) The Commission further observes that Hungary's purported justification that food chain operators with larger turnovers should contribute more to the financing of food chain inspection is undermined by the fact that a store selling fast moving consumer goods that generates a high level of turnover will be subject to higher rates on that turnover than food chain operators other than undertakings selling fast-moving consumer goods which generate the same level of turnover but remain subject to a 0,1 % flat fee.

(57) Accordingly, the Commission does not consider that the measure is justified by the nature and general scheme of the reference system. The measure should therefore be considered to confer a selective advantage on undertakings operating stores selling fast-moving consumer goods with a lower level of turnover (and thus smaller undertakings).

4.1.4. *Distortion of competition and effect on intra-Union trade*

(58) According to Article 107(1) of the Treaty, a measure must distort or threaten to distort competition and have an effect on intra-Union trade to constitute State aid. The measure applies to undertakings deriving turnover from certain food chain related activities and selling fast-moving consumer goods on the Hungarian market, including operators from other Member States. The market served by undertakings selling fast-moving consumer goods is characterised — both in Hungary and in other Member States — by the presence of operators from other Member States that effectively operate — or could develop their operations — on an international scale. The progressive character of the turnover fee may substantially favour some of those operators, to the detriment of others and reinforce their position both on the Hungarian market and on the European market at large. The measure therefore has an influence on the competitive situation of the undertakings subject to the progressive fee, distorts or threatens to distort competition and has an effect on intra-Union trade.

4.1.5. *Conclusion*

(59) Since all the conditions laid down by Article 107(1) of the Treaty are met, the Commission considers that the 2014 amendment to the Food Chain Act laying down a progressive fee rate structure for undertakings selling fast-moving consumer goods constitutes State aid within the meaning of that provision.

([22]) Indeed, a flat rate fee already imposes a higher fee on stores with a higher turnover.

4.2. **Compatibility of the aid with the internal market**

(60) State aid shall be deemed compatible with the internal market if it falls within any of the categories listed in Article 107(2) of the Treaty ([23]) and it may be deemed compatible with the internal market if it is found by the Commission to fall within any of the categories listed in Article 107(3) of the Treaty ([24]). However, it is the Member State granting the aid which bears the burden of proving that State aid granted by it is compatible with the internal market pursuant to Articles 107(2) or 107(3) of the Treaty ([25]).

(61) The Commission notes that the Hungarian authorities have not provided any arguments why the 2014 amendment to the Food Chain Act would be compatible with the internal market. Hungary did not comment on the doubts expressed in the Opening Decision as regards the compatibility of the measure and did not react to the comments expressed by the third party on compatibility ([26]). The Commission considers that none of the exceptions referred to in the aforementioned provisions apply, since the measure does not appear to aim to achieve any of the objectives listed in those provisions. Consequently, the measure cannot be declared compatible with the internal market.

(62) The Commission further recalls that it cannot declare compatible a State aid measure that breaches other rules of Union law such as the fundamental freedoms established by the Treaty or the provisions of Union regulations and directives. In that respect, the doubts expressed by the Commission in the Opening Decision that the measure predominantly targets foreign-owned undertakings, which could entail a breach of Article 49 of the Treaty establishing the fundamental freedom of establishment, have not be alleviated. Hungary did not comment on the possible breach of Article 49 of the Treaty or the comments of the interested third party on this aspect.

(63) Hungary claimed that Regulation (EC) No 882/2004 is the legal basis for the food chain inspection fee as amended by the 2014 amendment. However, based on the information provided by the Hungarian authorities ([27]), the Commission disagrees that the measure — as amended in 2014 — complies with Regulation (EC) No 882/2004 for the following four reasons.

(64) First, on the basis of the information provided by Hungary, it has not been established that the inspection fee — as amended in 2014 — was calculated in accordance with the criteria for the calculation of fees enshrined in Regulation (EC) No 882/2004, nor that it did not exceed the overall costs that the competent authorities incur in the performance of official controls, as is expressly required by Article 27(4)(a) of that Regulation.

(65) Second, the costs that were taken into account when the calculation method of the inspection fee was established do not appear to be in line with those referred to in Article 27(4)(a) when read in conjunction with Annex VI to Regulation (EC) No 882/2004. In particular, whilst the latter states that the costs to be considered for the calculation of fees can include those of staff '*involved in official controls*', the Hungarian authorities have informed the Commission that the inspection fee they charge also covers the (wider) costs stemming from the broader category of '*staff salaries*' ([28]).

(66) Third, although the Hungarian authorities are entitled to charge flat rate fees in accordance with Article 27(4)(b) of Regulation (EC) No 882/2004, they have failed to provide a convincing justification for the progressive nature of the inspection fee and for its structures (fee bands and rates). In particular, Hungary has not provided any evidence that the progressive rate structure (rates and turnover brackets) applicable to operators of stores selling fast-moving consumer goods corresponds to a similar progressive pattern observed in the costs incurred by the National Food Chain Safety Office for the inspection of the said undertakings.

([23]) The exceptions provided for in Article 107(2) of the Treaty concern: (a) aid of a social character granted to individual consumers; (b) aid to make good the damage caused by natural disasters or exceptional occurrences; and (c) aid granted to certain areas of the Federal Republic of Germany.

([24]) The exceptions provided for in Article 107(3) of the Treaty concern: (a) aid to promote the development of certain areas; (b) aid for certain important projects of common European interest or to remedy a serious disturbance in the economy of the Member State; (c) aid to develop certain economic activities or areas; (d) aid to promote culture and heritage conservation; and (e) aid specified by a Council decision.

([25]) Case T-68/03 *Olympiaki Aeroporia Ypiresies* v *Commission* EU:T:2007:253 paragraph 34.

([26]) As indicated in recital 4, those comments were forwarded to Hungary for possible comments on 13 October 2015.

([27]) Information provided to the Directorate General for Health and Food Safety by letters dated 26 February [Ares(2015)835210] and 19 May 2015 respectively [Ares (2015)2083309].

([28]) See letter of the Hungarian authorities of 7 October 2015 to the Commission services.

(67) Finally, although the progressive rate is allegedly justified under Regulation (EC) No 882/2004 by the need to have a fee proportionate to the greater administrative resources that the competent authorities need to obtain for controls on major market operators, the Commission fails to see how, given the nature of official controls, the control of several outlets of large retailers can be any more expensive or complex than the control of several outlets of franchised operators (which, however, are subject to substantially lower inspection fees given that the turnover of each outlet taken individually is much lower).

(68) In view of the above, the Commission does not consider the differences in tax treatment entailed by the measure to be necessary and proportionate to the objective of fulfilling the obligations laid down by Regulation (EC) No 882/2004.

4.3. **The Amended Act food chain inspection fee**

(69) As indicated in Section 3.2, the food chain inspection fee as amended on 17 November 2015 no longer applies progressive rates. Act CLXXXII of 2015 amending Act XLVI of 2008 on the food chain and its official supervision provides instead a 0,1 % flat rate for all food chain operators. The abolishment of the progressive structure of the fee addresses the State aid concerns raised by that progressive structure in the Opening Decision.

4.4. **Recovery of the aid**

(70) The 2014 amendment was never notified nor declared compatible with the internal market by the Commission. Since the 2014 amendment constitutes State aid within the meaning of Article 107(1) of the Treaty and new aid within the meaning of Article 1(c) of Council Regulation (EU) 2015/1589 ([29]) that has been put into effect in violation of the standstill obligation laid down in Article 108(3) of the Treaty, that measure also constitutes unlawful aid within the meaning of Article 1(f) of Regulation (EU) 2015/1589.

(71) The consequence of the finding that the measure constitutes unlawful and incompatible State aid is that the aid has to be recovered from its recipients pursuant to Article 16 of Regulation (EU) 2015/1589.

(72) However, as a result of the suspension injunction issued by the Commission in its Opening Decision, Hungary confirmed it had suspended the payment of the food chain inspection fee for those subject to the relevant category of the progressive inspection fee.

(73) Therefore, no State aid has been effectively granted under the measure. For this reason, there is no need for recovery.

5. **CONCLUSION**

(74) The Commission finds that Hungary has unlawfully implemented the aid in question in breach of Article 108(3) of the Treaty on the Functioning of the European Union.

(75) This Decision does not prejudice possible investigations on the compliance of the measure with the fundamental freedoms laid down in the Treaty, notably the freedom of establishment as guaranteed by Article 49 of the Treaty,

HAS ADOPTED THIS DECISION:

Article 1

The progressive fee structure (rates and turnover brackets) applicable to operators of stores selling fast-moving consumer goods introduced in the Hungarian food chain inspection fee through the amendment by Act LXXIV of 2014 constitutes State aid that is incompatible with the internal market within the meaning of Article 107(1) of the Treaty on the Functioning of the European Union which was unlawfully put into effect by Hungary in breach of Article 108(3) of that Treaty.

([29]) Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (OJ L 248, 24.9.2015, p. 9).

Article 2

Individual aid granted under the scheme referred to in Article 1 does not constitute aid if, at the time it is granted, it fulfils the conditions laid down by the regulation adopted pursuant to Article 2 of Council Regulation (EC) No 994/98 ([30]) or (EU) 2015/1588 ([31]) whichever is applicable at the time the aid is granted.

Article 3

Hungary shall cancel all outstanding payments of aid under the scheme referred to in Article 1 with effect from the date of adoption of this Decision.

Article 4

Hungary shall ensure that this Decision is implemented within 4 months following the date of notification of this Decision.

Article 5

This Decision is addressed to Hungary.

Done at Brussels, 4 July 2016.

For the Commission
Margrethe VESTAGER
Member of the Commission

([30]) Council Regulation (EC) No 994/98 of 7 May 1998 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to certain categories of horizontal State aid (OJ L 142, 14.5.1998, p. 1).
([31]) Council Regulation (EU) 2015/1588 of 13 July 2015 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to certain categories of horizontal State aid (OJ L 248, 24.9.2015, p. 1).