28 Hungarian Experiences and Regulations Regarding the Recovery of State Aid That Are Incompatible with the Internal Market[1]

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28.1 Legal Background

Hungarian law does not lay down specific provisions regarding the procedure of recovering State aid that, as determined by the European Commission, is incompatible with the internal market and were granted in an unlawful manner (in violation of Art. 108(3) of the Treaty on the Functioning of the European Union). Such provisions are not required by EU law, as the Member States – according to Art. 14 of Council Regulation (EC) No. 659/1999 – apply their national procedures and law in such cases. The Hungarian procedures described below are compatible with EU law but, in certain cases, may not be suitable for ensuring 'immediate and effective' recovery as required.

In Hungarian law, the fundamental rules regarding the recovery procedure are laid down by the following pieces of legislation:

- Act CXCV of 2011 on Public Finances (Public Finances Act),
- Government Decree No. 37/2011 (III. 22.) on the procedures relating to State aid under EU competition law and on the regional aid map, and
- Act XCII of 2003 on the Rules of Taxation (Taxation Act).

According to Section 99 of the Public Finances Act: If the European Commission orders the recovery of illegal state aid, the sum to be recovered shall be collectable as taxes.

According to Section 24(2) of Government Decree No. 37/2011: If the European Commission orders the recovery of state aid, the minister (leading the Prime Minister's Office) shall request the entity granting the aid to order the repayment of the recovered amount plus interest.

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Should the beneficiary be unwilling to cooperate, the rules pertaining to the procedure of collecting the sum as taxes are laid down in the Taxation Act.

According to the relevant rules, if the European Commission adopts a decision on recovering an aid granted by a Hungarian body, the minister leading the Prime Minister's Office informs the body concerned accordingly through the State Aid Monitoring Office and invites the body to comply with the provisions of the decision within the deadline stipulated therein.[2] If the European Commission orders the recovery of illegal state aid, the sum to be recovered is collectable as taxes.[3]

The particular method of collection is not regulated by Hungarian law, presumably because aid may be granted in rather diverse forms and manners (legislation, civil contract, other legal means of administration, omission etc.), so the legislator did not intend to set forth any more detailed rule concerning the procedure. Consequently, it is always *up to the body granting the aid to choose* the most suitable means of recovering the aid.

Available legal means of recovery:
1. legislation,
2. amendment of the legal act on granting the aid (if any) with mutual agreement,
3. amendment of the legal act on granting the aid (if any) unilaterally,
4. judicial proceedings.

Ad 1. If the aid is granted by virtue of legislation (e.g. tax measure) or the body granting the aid finds it to be the most effective means, the aid may be recovered through the amendment of the relevant piece of legislation or the adoption of a new piece of legislation ordering the repayment of the aid. Of course, the requirements following from the hierarchy of the various sources of law need to be taken into account in the course of the legislative procedure, meaning that the repayment of the aid may not be ordered in a piece of legislation that is outranked by the piece of legislation granting the aid. Having regard to the retrospective impact (i.e. repayment of a granted aid) and the protection of constitutional rights, it is advisable to adopt an act of Parliament regarding the recovery of the aid.

Another way of recovery through legislation is the statutory amendment of the grant contract or the granting legal act under Section 6:60 § (2) of the Civil Code. However, certain constitutional guarantees may raise legal issues regarding the amendment of a contract through legislation. In such cases, the conditions of judicial contract amendment must be met[4] (meaning that the issues covered there apply here as well), and – according to the case law of the Constitutional Court – the material change in circumstances that

2 See Section 24(2) of Government Decree No. 37/2011.
3 See Section 99 of the Public Finances Act.
4 See later.

requires statutory interference must affect society, i.e. it must affect a large number of contracts. Since Hungary, as a Member State of the EU, is obliged to implement the decisions of the European Commission – as also confirmed by Art. E(3) of the Fundamental Law – and doing so is also necessary to eliminate a situation that is incompatible with EU law, the constitutional guarantees laid down by domestic law are to be interpreted accordingly and also with due regard to the primacy of EU law.[5] According to EU case law, domestic legal procedures and remedies may be applied as long as they contribute to the immediate and effective execution of the Commission's decision.

Ad 2. If the aid was not granted through a normative act, it may be recovered most easily through the agreement and cooperation of and between the body granting the aid and the beneficiary. If the beneficiary recognises that, under EU law, it has fairly limited options to avoid repayment (in practice, recovery of the aid cannot be avoided unless the undertaking has been terminated), the interests of both parties are served best by the amendment of the grant contract with mutual agreement and the repayment of the aid that is incompatible with the internal market – plus late interest – to the body granting the aid. Domestic experiences show (see below) that, with the current legal background, this solution is the most efficient and suitable for achieving immediate and effective recovery as required by EU law.

Ad 3. If the aid is granted through a unilateral legal act, the body granting the aid may also amend or withdraw the relevant legal act unilaterally. The beneficiary may make use of domestic legal remedies against such unilateral and – from his perspective – detrimental amendments, thereby delaying the recovery procedure (appeal, judicial review,[6] petition for interim relief etc.). In such cases, domestic legal remedies are limited by EU case law, and – as a minimum – the requirements of recovery are to be taken into account in the course of applying such remedies.[7]

Ad 4. In the absence of mutual agreement between the parties, a possible way of unilaterally amending the grant contract entered into with unanimous intention by the parties is through the courts under Section 6:192 § of the Civil Code. However, using this option is rather lengthy and, with great probability, does not make it possible to meet the deadline

5 Recovery may not be prevented by the provisions of domestic law: Case C-24/95 Alcan Deutschland [1997] ECR I-1591, and Case C-232/05 *Commission v. France (Scott)* [2006] ECR I-10071.

6 It should be noted that judicial review by national courts does not extend to the revision of decisions of the European Commission, as such decisions may be reviewed by EU courts (i.e. the General Court and the Court of Justice of the European Union) only.

7 See the above-mentioned Scott case, and Case C-1/09 Centre d'exportation du livre français (CELF) and *Ministre de la Culture et de la Communication v. Société internationale de diffusion et d'édition (SIDE)*, [2010] ECR I-2099.

specified by the Commission in the recovery decision. Furthermore, the outcome of the proceeding is uncertain and, as a consequence, implies the risk of the Commission launching legal proceedings against Hungary before the Court of Justice of the European Union for violating Article 108(2) TFEU by failing to implement the relevant decision. The requirements for judicial contract amendment include that the continuation of the contract with unaltered terms and conditions would harm the material and lawful interests of one of the contracting parties due to a change in circumstances that occurred after contracting, that the change in circumstances was not reasonably foreseeable, and that it exceeds the risk of normal changes. In the context of State aid cases, the scope of post-contracting changes and foreseeability may be significant issues, because they fall within the scope of responsibility of one of the contracting parties – i.e. the state. Thus, it would be difficult to establish any harm to the interests of the state. The use of this method (i.e. judicial contract amendment based on the principle of *clausula rebus sic stantibus*) also requires – in addition to the requirements discussed in the context of statutory amendment of the grant contract – that the post-contracting material change in circumstances affects society, i.e. it affects a large number of contracts. Since such a judicial proceeding is yet to take place in Hungary, it is unclear how a judge would view, for example, a claim by the state regarding the lack of foreseeability, considering that the Member States are obliged to give advance notice of State aids. On the other hand, a material change in circumstances would not be deemed to affect society, if the contract actually affects only a handful of economic operators.

28.2 Detailed Rules of Collection as Taxes

According to Section 4(2) of the Taxation Act, the provisions laid down in the Taxation Act regarding tax collection and collection related records are to be applied to any and all public debts that are to be collected as taxes under a separate act of parliament.

When collecting a claim as taxes, the tax authority carries out the collection procedure upon request – for our purposes, upon request by the body granting the aid. The fundamental rules of collection carried out upon request are laid down in Sections 146(2), 161, and 163(1) of the Taxation Act.

The requesting body (requestor) and the formal requirements regarding the request: According to Section 161(1) of the Taxation Act, the bodies imposing or keeping records of a payment obligation qualifying as a public debt collectable as taxes, as well as the obligor of the public debt may act as requestors. According to Section 161(2), a letter of request has to contain the data for the identification of the requestor and the debtor, the legal grounds of the debt, the file number of the resolution (ruling) imposing the payment obligation, the date of such becoming definitive, the payment deadline, the amount of the

debt and any associated charges, and the accurate description of the legal regulation that provides for collection in the same manner as taxes.

According to the Taxation Act, the procedure of collection as taxes is launched upon request by the obligor body and the tax authority collects the claimed amount for the obligor (Section 161(1) of the Taxation Act). Under the rules currently in force, the obligor must belong to the central budget, meaning that the obligor is the body from whose budget the incompatible aid has been disbursed. A resolution adopted by a body with official powers is required for the collection.

In other words, the above provisions presume that the body granting the aid is capable of adopting a public administrative decision (resolution) regarding the recovery of the aid according to Section 72 of the Administrative Proceedings Act. However, this option is most probably unfeasible in situations where the aid was granted through a private contract (e.g. property sale and purchase, inadequate public procurement etc.).

The resolution imposing the payment obligation must contain at least the components that are required by the Taxation Act in the context of letters of request. The due and payable amount of interest must be specified in the first letter of request. If the collection procedure is dragging on for a long time, the requestor must calculate and specify the relevant amount at least one or two times every year. The due date of the repayment obligation must be specified in the decision imposing the repayment obligation. It should be noted that in case the obligee has any other debt that is collected by the National Tax and Customs Administration (NTCA), the NTCA will use the collected amount to settle the debts in the order of their due date.

Jurisdiction: Upon receipt of a request by the obligor of a public debt that is collectable as taxes, the tax authority having jurisdiction launches the relevant proceeding against the legal entity or other organisation concerned (unless an act of Parliament stipulates that the collection of the public debt falls within the competence of another body). The tax authority with jurisdiction is the tax authority having jurisdiction over the registered seat or, in the lack thereof, the premises (place of pursuing activities) of the legal entity or other organisation concerned.

Cooperation between the requestor and the tax authority during the collection procedure: The requestor must inform the tax authority without delay about any change that may occur after sending the letter of request. In the context of public debts collectable as taxes, the tax authority may not grant any payment relief, may not reduce the amount of debt, and may not delete the debt as uncollectable. Consequently, the tax authority forwards any petition the obligee may file for payment in instalments or debt reduction to the requestor. Payment in instalments may not be granted without the approval of the European Commission. On the other hand, the Commission does not allow for any payment in instalments, because doing so would be contrary to the ultimate goal (restitution *in integrum*, cancelation of the provided advantage) of immediate and effective recovery.

Means and measures applied in collection procedures: With the exception of establishing mortgage rights on real property, the tax authority may apply any and all means of tax collection in the course of the requested collection procedure.

Closure of the procedure, settlement of costs: The amount collected as taxes is transferred by the tax authority to the obligor of the public debts (requestor) without delay, or the requestor is notified if the debt is uncollectable. All costs associated with the collection procedure are to be borne by the obligee of the public debt that is collectable as taxes. If the tax authority was unable to recover the costs of collection from the tax payer even through collection against movable assets or real property, the minimum fee paid by the requestor in advance is used to settle the incurred costs.

28.3 Experiences of Hungarian Recovery Cases

The European Commission has adopted four negative recovery decisions so far.

- Case CR41/2005: long-term power purchase agreements ('PPAs'),
- Case CR1/2009: Special agreement between the Hungarian State and MOL Zrt. relating to mining fees
- Case CR14/2009: State guarantee for Péti Nitrogéművek Zrt.
- Case SA 30.584: State aid granted to Malév Zrt.

Three of these cases (PPAs, MOL, Péti Nitrogénművek) has already been closed, while the decision in fourth case (Malév[8]) was published on 9 January 2012, so the experiences of that case cannot be taken into account. As for the three closed cases, it seems that the definite and low number of beneficiaries was the most important common factor in each case. In other words, no aid had to be recovered on the ground that it was granted under the framework of an aid scheme where the group of beneficiaries was unknown or where significant effort was required to identify the beneficiaries (e.g. automatic tax reliefs). Nevertheless, there were also significant – both content-related and technical – differences between these cases.

Case CR14/2009[9]

The PPAs case was started in 2004 and, after the Commission adopted its negative decision in 2008, the Hungarian authorities faced numerous difficulties that prevented the procedure from reaching a swift closure. On the one hand, the Commission requested power market simulations for the period between the day of joining of Hungary to the EU and the end of 2008, with a view to determining the revenues the power generators concerned would

8 Case SA 30.584: State aid granted to Malév Zrt.

9 Case CR41/2005: long-term power purchase agreements ('PPAs').

have received without the long term agreements – i.e. to determining the advantage received. Since the government intended to reduce the amount of the recoverable aid, the Hungarian authorities also had to determine the amount of stranded costs – i.e. costs incurred before the day of joining to the EU that certifiably would not be returned before the original date of expiry of the cancelled long term agreement – and had to notify the aid scheme seeking to provide compensation for such costs.[10] These two procedures burdened the authorities with considerable simultaneous tasks, while a public procurement procedure had to be completed as well in order to select a sectoral expert who would support the calculations with appropriate software products. Last, but not least, it should be noted that a domestic legislative procedure also had to be completed in order to implement the recovery and compensation efforts, because, on the one hand, the previously presented general rules failed to provide adequate basis for implementing the procedure, and, on the other hand, various complex issues had to be settled and the competent body needed to be appointed (the most important tasks were carried out by the Hungarian Energy Office). In the course of adopting the act of Parliament – and the corresponding legislative procedure – cancelling the PPAs as of end December 2008 and laying down the principles of recovery and the calculation of stranded costs (Act CXX of 2008), the EU requirements (provisions of the recovery decision and the case law on recovery) needed to be observed and it also had to be taken into account that the attitude of the power generators concerned was strongly unsupportive. Numerous power generators sued Hungary before the Washington-based ICSID, an international court of arbitration, for cancelling the PPAs and the resulting situation. Five power generators also challenged the Commission's decision before the General Court. With a view to minimizing the interference with the contractual intention of the parties, the act allowed the power generators to terminate their PPAs with MVM Zrt. jointly, and the act did not prohibit the conclusion of a new contract that conforms to market practices.

Finally, actual aid to be recovered was established at three of the seven power generators on the basis of market simulation, while the stranded costs of the three power generators were in fact higher than the aid amount. Thus, none of the power generators were required to pay back the aid amount. Such an obligation may be imposed later, if the future return of the power generators turns out to be higher than planned, because that would reduce the amount of their stranded costs. If the amount of stranded costs is reduced to zero, a repayment obligation is established subsequently for the remaining period until the expiry of the original PPA based on any revenue that exceed the amount calculated by the Energy Office. For monitoring purposes, the Energy Office submits annual reports to the European Commission during this period.

10 According to the relevant communication of the Commission: http://ec.europa.eu/competition/state_aid/legislation/stranded_costs_en.pdf.

Any actual repayment would have caused – or may cause – further difficulties. Since the State aid was not granted from the central budget in these cases but was paid by the consumers (if the MVM was unable to resell the energy purchased through PPAs at least at the same price on the market, it was eligible for compensation for its losses from the fund financed by power consumers), the collection of the recoverable amount as state revenue would have constituted expropriation of property from the consumers. However, property may be expropriated only in exceptional cases and for public interest purposes, in situations and in the manner regulated by an act of parliament, and with complete, unconditional, and immediate compensation. This is the reason why the adoption of a separate piece of legislation was needed to determine the legal basis for recovery.

Case CR1/2009[11]

The considerable amount to be recovered (over HUF 32 billion) did not have any impact on the swift completion of the recovery procedure against MOL due to the market power of the company. The company cooperated with the Hungarian authorities during the entire procedure, so the discussions concerning relevant data (volumes extracted from each field in 2010) were free of any obstacle. The procedure was closed swiftly and without difficulty since the company cooperated with the authorities in the amendment of the contract that established the discount mining fees the Commission found to be incompatible aid. Thus, there was no need to exert any legal force. Nevertheless, the company did challenge the Commission's decision before the General Court.[12]

Case CR14/2009[13]

The recovery procedure against Péti Nitrogénművek was closed even before the four months expected by the Commission (2 months), which fact makes this case probably unique among all recovery procedures. It is possible to identify a number of prerequisites to such swiftness. First, the company made efforts to cooperate with the authorities and the aid was paid back with mutual agreement. Second, the Commission did not require the cancellation of the examined state guarantees, only the restructuring of fee to pay (required the use of a discount surcharge scheme established by the crisis rules[14] effective at the time), and the contracts were easy to amend as there were no credit contracts to cancel and the company did not default on its obligations. Consequently, the amount of

11 Case CR1/2009: Special agreement between the Hungarian State and MOL Zrt. relating to mining fees.

12 Case T-499/10 *MOL v. Commission*. In its judgement, the General Court concluded that the state measures affecting MOL do not constitute State aid, so the recovered amount was returned to the company by Hungary. After the Commission filed an appeal against the judgement of the General Court, it was upheld by the Court of Justice of the European Union in Case C-15/14 P.

13 Case CR14/2009: State guarantee for Péti Nitrogéművek Zrt.

14 The rules of guarantees established by the Temporary Framework laying down the rules for granting support to cope with the global economic and financial crisis were applied (OJ L 16, 22.1.2009, p. 1).

the recoverable grant was relatively small in comparison to the credit amounts, so the company did not have to face insurmountable difficulties in the course of repaying the difference plus interest. Nevertheless, the company did challenge the Commission's decision before the General Court.[15]

28.4 Summary

It seems from the three cases discussed above that the current Hungarian regulation is not entirely adequate, especially for situations where the beneficiary is reluctant to cooperate or acts in 'bad faith' to delay the procedure. As a consequence, the legislator needs to decide on a case-by-case basis if it intends to recover the aid by legislative act, with a view to meet the EU requirements regarding effective execution. This seems to be the inevitable option under certain circumstances. Under the current legal framework, it also seems uncertain what a domestic judge would do if he realized in the course of a domestic lawsuit that the provisions of national law do not ensure immediate and effective recovery and – according to the judgement in Scott – he was to set aside the provisions of national law. It is unclear what pieces of legislation or provisions were to be followed in such a situation, since it seems doubtful that a judge – while bound by the Commission's decision – would adopt an enforceable decision based on the Commission's decision directly (and without a legal basis under domestic law).

15 T-387/11 *Nitrogénművek Zrt. v. Commission.*