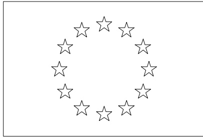

EUROPEAN COMMISSION

Brussels, 2010.12.21

C (2010) /

PUBLIC VERSION

WORKING LANGUAGE

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Subject: C 38/2010 (ex NN 69/2010 CP 63/2010) – Malév- Hungarian Airlines – various State support measures

Sir,

The Commission wishes to inform Hungary that, having examined the information supplied by your authorities on the measure mentioned above, it has decided to initiate the procedure laid down in Article 108 (2) of the Treaty on the functioning of the European Union.

1. PROCEDURE

1. In accordance with Article 88(3) of the EC Treaty, and by electronic notification dated 10 April 2008, the Hungarian authorities notified the Commission of the financing arrangements in relation to the privatisation of Malév Zrt. also referred to as Malév Hungarian Airlines (hereinafter Malév). This measure was registered under reference N 190/2008. In response to repeated requests for information the Hungarian authorities provided delayed and incomplete answers. In February 2009, Hungary acknowledged that the negotiations for the privatisation of Malév were still ongoing. On 12 November 2009 the Hungarian authorities withdrew the abovementioned notification acknowledging that the privatisation would not go ahead.

2. In March 2010, the Commission became aware through press reports that the Hungarian authorities intended to re-acquire Malév and to increase its capital. By e-mail of 2 March 2010 the Hungarian authorities confirmed these press reports.

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

4. 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 knew how far reaching this restructuring would go.

5. A second complaint 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.

6. 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.

2. MALÉV, AND THE MEASURE CONCERNED

7. Malév is based at Budapest Airport and operates a fleet of 26 aircraft to destinations in Europe and the Middle East. In 2009, it transported 3.2 million passengers.

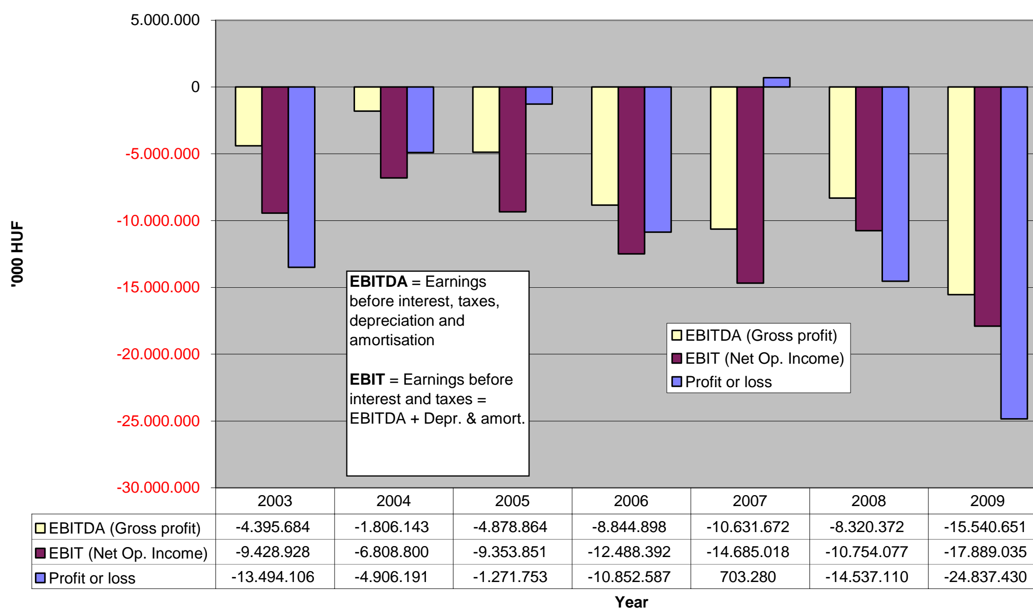
8. The Hungarian authorities have tried to privatise Malév on several occasions. In 1992, a 35% stake in Malév was sold to an Italian State-controlled consortium of Alitalia and Simest. In 1997, Alitalia-Simest sold its stake to a consortium of two privately owned Hungarian banks (OTP & MKB). In 1999,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

9. 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 below). Following Hungarian accession to the European Union in 2004 it also had to adjust to the liberalised aviation market within the EU.

Table 1 Malév's key financial data 2003-2009

Million HUF	2003	2004	2005	2006	2007	2008	2009
Sales	116.399	130.306	129.822	137.110	133.986	134.694	109.032
EBITDA	-4.396	-1.806	-4.879	-8.845	-10.632	-8.320	-15.541
EBIT	-9.429	-6.809	-9.354	-12.488	-14.685	-10.754	-17.889
Profit/loss	-13.494	-4.906	-1.272	-10.853	703	-14.537	-24.837
Shareholder's equity	2.646	3.298	6.398	-5.073	90	-14.409	-41.143
Total Assets	69.726	71.111	75.493	69.371	60.613	47.881	40.966
Total Financial Debt	49.232	49.425	48.834	53.325	43.125	38.715	57.244
Free Cash Flows		1.635	-254	-3.235	-8.011	-2.277	-12.090

Source: Information provided by the Hungarian authorities



	2003	2004	2005	2006	2007	2008	2009
EBITDA (Gross profit)	-4.395.684	-1.806.143	-4.878.864	-8.844.898	-10.631.672	-8.320.372	-15.540.651
EBIT (Net Op. Income)	-9.428.928	-6.808.800	-9.353.851	-12.488.392	-14.685.018	-10.754.077	-17.889.035
Profit or loss	-13.494.106	-4.906.191	-1.271.753	-10.852.587	703.280	-14.537.110	-24.837.430

10. It was against this background that the State decided once again to privatize Malév.

11. Below is a description of measures that the Commission considers relevant for a State aid assessment under Article 107 TFEU. These measures can be divided into two distinct periods characterised by a difference in the ownership of the company. These measures were implemented (1) in the framework of the 2007 privatisation and in the period of private ownership of Malév and (2) in the framework of its 2010 renationalisation and subsequent to this.

First period – 2007 privatisation and Malév under private control

Sale to AirBridge

12. 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 called AirBridge Zrt. had made the most attractive offer. AirBridge offered an attractive and apparently commercially viable business and restructuring plan.

13. 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[1], 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.

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

14. The most significant parts of this agreement were:

    (a) AirBridge bought 99.95 % of the shares in Malév for HUF 200 million (EUR 780,000)[2]. By 31 December 2008 at the latest, AirBridge was obliged to increase Malév's capital by some EUR [30-50][*] million.

    (b) A loan granted in 2003 to Malév by MFB (the 100 % state-owned Hungarian Development Bank) amounting to HUF [13,500-20,500] million (EUR [52-79] million[3]) was taken off Malév's balance sheet and transferred to a 100% State-owned special purpose vehicle (*Malév Asset Management Company*, hereinafter MAVA). According to the Hungarian authorities, assets worth EUR [52-79] million (comprising the Malév trademark, a kerosene pipeline and one B767 aircraft) were transferred to MAVA along with the loan[4]. Were Malév to be profitable it would also have to pay [17-28] % of after tax profits to MAVA. AirBridge also provided a bank guarantee from Vnesheconombank (hereinafter VEB) to cover the reimbursement of the loan up to EUR [27-35] million.

    (c) Malév would also pay MAVA the sum of EUR [150,000-230,000] per year as a license fee for the use of the name "Malév" and logo. AirBridge is obliged to keep using the brand name and ensure the operation of the company as an airline until 31 December 2017, new expiry date of the loan.

    (d) Malév would lease[5] the B767 aircraft – just transferred to MAVA (see b) – back from MAVA from 1 January 2008 to 31 December 2017.

15. 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 corresponded with a massive increase in fuel prices they had no overall effect on the company's profitability.

16. 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 name. Once Malév had decided to suspend long haul routes it no longer needed the B767 aircraft leased from MAVA and stopped paying for the use of this aircraft.

17. 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 loans reimbursement to VEB. As the 49% shareholding in AirBridge was pledged to VEB, VEB acquired those shares. VEB indicated that it was willing to continue to finance Malév, but as a bank not as an owner. […]

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[2] Figures in Euro are approximations provided only as indications.

[*] Business secret

[3] 100 % State guaranteed loan, interest rate: 3-month EUR LIBOR + 0.5 %

[4] The expiry date of the loan was also extended from 2013 to 2017.

[5] For a fee made up of a "one time fee" of EUR [80,000-120,000] until 15 January 2008, an "annual fee" of EUR [0.5-1.3] million and Malév paying for all related maintenance and operational costs.

Sale of Malév Ground Handling

18. As previously stated Malév's financial situation had deteriorated in early 2009. Its shareholders therefore approached MNV Zrt. (the State Holding Company) with the proposal to sell to MNV Zrt. Malév Ground Handling, which […] was Malév 100% subsidiary (hereinafter Malév GH).

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

20. A preliminary purchase agreement was signed in January 2009 (and amended in February) providing for advance payments of HUF 4.285 billion (EUR 15.6 million). MNV Zrt. made advance payments to Malév in January and February 2009. These advance payments were to be repaid within 2 working days if, after proceeding with the due diligence, MNV Zrt. 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 Zrt. eventually decided not to proceed with the transaction and the repayment of the purchase price became due.

21. The advance payment was never reimbursed to MNV Zrt. Interest due on advance payments were never paid to MNV Zrt.[6].

Tax deferral

22. Between January 2007 and March 2010, the Hungarian Tax and Financial Control Administration (APEH) has permitted Malév to defer or reschedule payments for different types of taxes and social security obligations. On 11 March 2010, the remaining balance of Malév's current account with APEH i.e. HUF [10-24] billion (EUR [36.6-87.8] million) was settled. According to the Hungarian authorities, the possibility for deferred payment is provided for in Hungary's general tax rules and APEH required Malév to pay the resulting surcharges (interest). The total amount of interest imposed on Malév for those deferrals would exceed the amount of HUF [1-3] billion. Malév reimbursed the total amount (principal and surcharges) in March 2010 making use of part of the cash obtained through the February 2010 increase of capital.

Second period – 2010 renationalisation and Malév under public control

Renationalisation of Malév

23. In 2010 it was not possible to find private investors to take over from AirBridge / VEB as main shareholder for Malév.

24. 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. The negotiations between the government and AirBridge are not final yet but already resulted in several measures which have been implemented in 2010. These measures are set out below.

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[6] 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).

February 2010 Capital increase through debt/equity swap and with fresh capital

25. On 26 February 2010, VEB, AirBridge, MNV Zrt. (the Hungarian State Holding Company), Malév and the government agreed to a capital increase, partly with fresh capital (HUF 20,700 million or EUR 75,6 million) and partly (HUF 6,117 million or EUR 22,3 million) through a debt/equity swap. Owners of claims against Malév (MNV Zrt.: HUF 4.664 million or EUR 17 million – and AirBridge: HUF 1,453 million or EUR 5.3 million) contributed them to Malév in exchange of shares in Malév's capital. As a consequence, the claims against Malév disappeared and the former creditors became owners of part of the company.

26. 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 HUF 26,817,125,673 (EUR 97.9 million) by issuing new shares in the nominal amount of HUF 0.01 each.

27. The HUF 20.7 billion (EUR 75.6 million) contributed by MNV Zrt. in cash enabled Malév to reimburse all outstanding tax obligations in paragraph 22 above and stabilize its operation.

28. The Hungarian State then owned 95% of Malév through MNV Zrt while the remaining 5% was held by AirBridge.

April – July 2010: Shareholder's loans and conversion into equity

29. Between April and July 2010 the Hungarian State provided Malév with a number of "shareholders loans" through MNV Zrt.

30. The first of these loans in April 2010 was in the amount of HUF 2,160,000,000 (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 Ground-handling Zrt.

31. The second of these loans in June 2010 in the amount of HUF 1,340,000,000 (EUR 4.9 million). It 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 Ground-handling Zrt.

32. In July 2010, a third shareholder's loan in the amount of HUF 5,700,000,000 (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).

33. On 24 September, these three loans which totalled HUF 9,200,000,000 (EUR 33.6 million) along with the interest owed thereon (making a total amount of HUF 9,388,976,570 or EUR 34.3 million) was converted from debt to equity in Malév in the amount of EUR 34.3 million and the underlying guarantees were released.

September 2010: A further capital increase and a further shareholder's loan

34. On 24 September 2010, MNV Zrt also increased the capital of Malév by injecting a further HUF 5,299,999,957 (EUR 19.3 million) of cash into the company. MNV Zrt's stake in Malév has thereby increased to 96.5%

35. On the same date, the State granted Malév a further shareholder's loan in the amount of HUF 5,700,000,000 (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.

36. To sum up, at this stage of its investigations the Commission believes that the following measures may qualify as State aid in favour of Malév:

    (1) The taking over on 31 December 2007 by MAVA of a 2003 loan to Malév amounting to EUR [52-79] million along with some Malév's assets.

    (2) The provision of a EUR 15.6 million cash facility for one year in the context of the purchase by MNV Zrt. of Malév's Ground Handling subsidiary.

    (3) The deferral of different tax payments due between January 2007 and March 2010[7]. In March 2010, the overdue amounts totalled EUR [36.6-87.8]million.

    (4) In February 2010, a capital increase of EUR 92.6 million partly realised by injecting fresh capital (EUR 75.6 million) and partly through a debt equity swap (EUR 17 million).

    (5) From April to July 2010, three shareholder's loans totalling EUR 33.6 million granted to Malév by MNV Zrt.

    (6) In September 2010, the conversion of these shareholder's loans (along with the interest owed thereon) from debt to equity in Malév in the amount of EUR 34.3 million.

    (7) In September 2010, a further capital increase in the amount of EUR 19.3 million in cash.

    (8) In September 2010, a further shareholder's loan in the amount of EUR 20.8 million.

Arguments of the Hungarian authorities

37. In relation to the measures accompanying the sale of Malév to AirBridge, it is and has been the contention of the Hungarian authorities that these measures are market conform because of the collateral put in place to secure the taking over of the loan by MAVA. Having regard to the abortive sale of Malév Ground-handling

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[7] See situations of Malév's tax current account as provided by the Hungarian authorities in their partial reply of 11 August 2010 to the Commission's questions of 14 July 2010.

they have 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 generally applicable measures not specific to Malév. As concerns 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 14 above). They add they would have faced significant negative consequences for the national economy[8]. By opting for a negotiation with VEB, the State does not believe that it will increase its losses even if Malév does not improve so the State is of the view that there is little or no risk.

38. 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.

3. ASSESSMENT OF THE MEASURES

3.1. Existence of aid within the meaning of Article 107(1) of the TFEU

39. By virtue of Article 107 (1) TFEU, 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 the Member States, be incompatible with the Internal market.

3.1.1. State resources and imputability

40. The concept of State aid applies to any advantage granted directly or indirectly, financed out of State resources, granted by the State itself or by any intermediary body acting by virtue of powers conferred on it.

41. It has to be established if the measures listed above can be regarded as involving State resources.

42. In relation to the tax deferral, this is clearly a decision of the tax administration which is part of the government therefore this involves State resources and is imputable to the State.

43. MAVA – the State owned special purpose vehicle – and MNV Zrt. – the 100% state owned holding company - appear to be public undertakings according to Article 2 (b) of the Transparency directive[9]. All measures granted by them are

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[8] 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

[9] Commission Directive 2006/111/EC of 16 November 2006 on the transparency of financial relations between Member States and public undertakings as well as financial transparency within certain undertakings, OJ L 318, 17.11.2006, p 17.

financed by State resources. Finally, it appears that the Hungarian authorities have been playing a leading role both in the privatisation process in 2007 the abortive sale of Malév GH to MNV Zrt., in the renationalisation and further restructuring of Malév from February 2010 onwards as well as in the involvement of MAVA and MNV's in the implementation of the decisions made by the Government MAVA and MNV are owned and controlled by the State and the Hungarian authorities have repeatedly referred to them as implementing the instructions of the government with regard to Malév. As a consequence, MAVA and MNV's interventions in favour of Malév appear to be imputable to the State, a conclusion which the Hungarian authorities have never disputed.. Finally, the 26 February 2010 agreement featuring the debt/equity swap was enshrined by a Government decision (Dec 1051/2010) published on the same date in the Hungarian Official Journal.

44. The Commission therefore concludes that all the measures at stake are granted through State resources and are imputable to the State.

3.1.2. Economic advantage

45. In the present case, the Commission has to assess whether the measures listed above confer an economic advantage on Malév taking into account its financial situation. This involves verifying whether the recipient undertaking would have obtained such financing from a private investor under normal market conditions. According to this principle, capital put at the disposal of a company by the State, directly or indirectly, in circumstances which correspond to the normal conditions of the market, should not be qualified as State aid[10].

3.1.2.1. Taking over of the 2003 loan from MFB of EUR [52-79] million

46. In relation to the taking-over by MAVA of the EUR [52-79] million MFB loan the Hungarian authorities have consistently argued that this transaction was market conform because the loan was transferred along with assets worth EUR [52-79] million (see paragraph 14).

47. Notwithstanding repeated requests to clarify how the valuations of these assets (in particular the Malév trademark) were arrived at the Hungarian authorities have not been able to satisfy the Commission that the taking over by MAVA of the MFB loan was market conform. It is therefore questionable whether the value of the assets was correctly assessed at the time it was transferred to MAVA. If the value of the assets is less than the value of the loan, the transaction would not be market conform and would have conferred an advantage on Malév by relieving it of its financial obligations in exchange of assets having a value lower than those obligations. In this respect it is worth mentioning that the whole risk related to the evolution of the value of the assets was born by MAVA, hence the State. In particular, the value of the trademark would appear to depend directly on Malév's economic results which at the time were already poor.

48. On top of the collateralised assets, Malév had to pay MAVA royalties for the use of the trademark and was supposed to be able to pay interest on the loan and for

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[10] Communication of the Commission to the Member States: application of Articles 92and 93 of the EEC Treaty and of Article 5 of the directive 80/723/CEE of the Commission to public undertakings in the manufacturing sector, OJ C 307 of 13.11.1993, p. 3, paragraph 11. This communication deals with the manufacturing sector, but is applicable to the other economic sectors.

the use of the Malév trademark and renting the B767 aircraft. This transaction also entailed a high risk of Malév – the counterparty – defaulting on its payments.

49. To sum up, it appears that MAVA took over a long term obligation to repay a EUR [52-79] million loan in 2017 and that this obligation was secured by assets whose value could decline sharply and without any possibility to call for more collateral during the remaining life of the loan. MAVA also takes over the obligation to service the loan until 2017 with revenues to be paid by Malév, which appeared to be a company in difficulty (see section 3.2.1 below.). It is therefore questionable whether a reasonable private investor would have agreed to enter such a deal and release Malév of its financial obligation under the 2003 loan.

3.1.2.2. The abortive sale of Malév Ground Handling to MNV Zrt.

50. Before the sale was finalised Malév was paid the sum of EUR 15.6 million. Although the sale was abandoned in July 2009, the debt for the prepaid sales price, plus interest due for the delay in giving back the sum to MNV Zrt., was converted into equity in February 2010 against Malév shares through a debt/equity swap. Malév therefore had the use of this money for some 12 months. Due to its financial situation, it seems highly doubtful that any bank or private lender would have lent that money to Malév. Moreover, even assuming that Malév could have found such money on the market (quod non) there is no indication that the interest charged to Malév would reflect the risk profile of that company at the relevant time In conclusion, at this stage, the Commission cannot exclude that the prepayment of the sale price of Malév GH conferred an advantage on Malév, which could be as high as the total amount of the prepayments.

3.1.2.3. Tax and social security deferral

51. With regard to the tax deferral the Hungarian authorities have argued that this is a general measure available to all tax payers when the later reimbursement is certain. However, given Malév's difficult financial situation, it is far from clear if the State had any realistic expectation to be repaid at the time the deferral was granted. In this connection the Commission notes that while Malév repaid the deferred tax with interest and penalty payments it was only able to do this by using additional resources provided by the State. Accordingly at this stage of its investigation the Commission cannot exclude that this tax deferral granted an economic advantage to Malév. Account being taken of Malév's financial difficulties, the amount of the advantage could be as high as the total amount of tax deferred.

52. The Commission invites the Hungarian authorities to provide further clarification regarding (i) whether private undertakings in similar financial situations as that of Malév are regularly or automatically granted similar tax deferral facility and (ii) whether a private creditor would have granted a payment facility of HUF 20.3 billion for the period in question to an undertaking in a similar financial situation as Malév and under which interest and conditions.

3.1.2.4. The February 2010 capital increase by a debt/equity swap and by injection of fresh capital

53. In relation to capital increase of EUR 92.6[11] million, the Hungarian authorities have clearly indicated that their decision to invest in Malév was at least in part motivated by considerations such as loss of employment, the 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. Such considerations fall outside the scope of the market economy investor principle and so cannot be taken into account to exclude the presence of an advantage to the company. Furthermore, they have added that given the difficult financial situation of the company no investor could be found. None of these reasons are likely to be taken into account by a private investor considering investing in the equity capital of a company. The Commission recalls moreover, that Malév was loss making since 2003 with negative gross operating profits (EBITDA) and net operating profit (EBIT) and that Hungary did not provide any element confirming that this capital injection had any prospect of reasonable return for a private investor. Thus the Commission believes at this stage that the decision of the public authorities to participate in the debt/equity swap provided an economic advantage to Malév. In this case, the amount of the advantage could be as high as the total amount contributed by the State through MNV Zrt.

3.1.2.5. The three successive shareholder loans of April – July 2010

54. With regard to the shareholder loans, these have been granted for three years at an interest rate of 9.97% i.e. 856 basis points above Euribor 12 months (1,214 %).

55. In view of the financial situation of Malév the Commission has doubts whether at the time MNV Zrt. granted these shareholder loans Malév would have obtained comparable financing, if any, on the financial market.

56. Therefore on the basis of what precedes the Commission must, at this stage of investigation express doubts as to whether the actions of MNV Zrt. can be compared to those of a private market economy investor and be therefore free of economic advantage to Malév. The amount of the advantage could be as high as the total amount of loans.

3.1.2.6. The September 2010 increase in capital and debt/equity swap

57. In relation to the decision of 24 September 2010 to convert the three shareholder loans mentioned above (along with interest due thereon) into further equity in Malév in the amount of EUR 34.3 million and to increase the capital of Malév by a further EUR 19.3 million in cash, this would not appear to have been the action of a prudent market economy investor, account being taken of Malév's financial difficulties and absence so far of any business plan demonstrating an adequate return on the investment. For the reasons set out above the decision of the public authorities to participate in the capital increase seems to provide an economic advantage to Malév. The amount of the advantage could be as high as the total amount contributed by the State through MNV Zrt.

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[11] The total amount of capital increase is EUR 97.9 million but the Hungarian state only contributed 95%, the remaining 5% being contributed by AirBridge.

3.1.2.7. The further September 2010 shareholder's loan

58. In relation to the September shareholder's loan in the amount of HUF 5.7 billion (EUR 20.8 million) the Commission understands that this was granted on similar terms to the previously mentioned shareholder's loans. Given the financial difficulties faced by Malév and for the same reasons mentioned above the Commission finds at this stage that, by granting this shareholder's loan, the State conferred an advantage on Malév. The amount of the advantage could be as high as the total amount of the loan.

3.1.2.8. Joint assessment of non autonomous measures under the Market Economy Investor principle (MEIP)

59. For the reasons set out above the Commission considers at this stage that all the measures concerned by this decision individually confer an economic advantage on Malév. The Commission also wishes to draw the attention of the Hungarian authorities to the application of the BP Chemicals jurisprudence.

60. In its judgment of 15 September 1998 - *BP Chemicals / Commission* (T-11/95) – the Court of First Instance concluded that when several measures are taken in favour of the same company it is necessary to assess their chronology, their finality and the economic situation of the company in order to establish if they can be appraised separately or jointly from the point of view of State aid rules.

61. At this stage, the Commission considers that the measures implemented in favour of Malév between its sale to AirBridge in 2007 and before renationalisation in 2010 (see measures (1) to (3) in paragraph 36) are not autonomous and appear to be linked through their chronology, the financial situation of Malév and the finality of financing AirBridge's restructuring plan for Malév. The Commission also takes the view that the measures implemented in the framework or after Malév's renationalisation (see measures (4) to (8) in paragraph 36) are not autonomous and appear to be linked through their chronology, the financial situation of Malév and the finality of financing the Hungarian State's restructuring plan for Malév.

3.1.3. Selectivity

62. Article 107 (1) TFEU requires that a measure, in order to be defined as State aid, favours *"certain undertakings or the production of certain goods"*. In the case at issue, the Commission notes on the basis of what precedes that the measures in question have been granted to Malév only. Thus they are selective within the meaning of Article 107 (1) TFEU.

63. With regard to the tax deferral, while the Hungarian authorities have argued that the tax deferral is a general measure available to all undertakings the Commission is not convinced by this argument and wants to check if similar tax deferral are automatic or the tax authorities enjoy a certain discretion on whether to grant them or not, in which case the measure would be certainly selective. At this stage of its investigation the Commission cannot exclude that this measure while arguably available to all undertakings was only made available to Malév because of its relationship with the State. In conclusion the Commission considers at this stage that the tax deferral in question was selective.

3.1.4. Distortion of competition and affectation of trade

64. Moreover the measures at stake affect trade between Member States and distorts or threatens to distort competition in the internal market. Thanks to them Malév can continue operating and does not have to face the consequences normally deriving from its poor financial results over a long laps of time. Malév is moreover in competition with other Hungarian as well as Community airlines, in particular since the entry into force of the third stage of liberalisation of air transport ("third package") on 1 January 1993.

3.1.5. Conclusion

65. Under these conditions the Commission considers at this stage that the measures identified above amount to State aid within the meaning of Article 107 (1) TFEU.

3.2. Compatibility with the common market of any potential aid

66. The Commission underlines that it is for the Member State concerned and the beneficiary of State aid to demonstrate that the aid is compatible with the internal market. However, neither Hungary nor Malév have presented any argument in this respect that would allow the Commission to conclude that the measure is compatible under any of the provision set out in Article 107 (2) and (3) of the TFEU. The Commission observes that at this stage only the exemption provided for in Article 107(3)(c), as interpreted by the Commission in the *Community guidelines on State aid for rescuing and restructuring firms in difficulty*[12] (hereinafter "the Guidelines") and in the Communication on the *application of Articles 92 and 93 of the EC Treaty and Article 61 of the EEA Agreement to State aids in the aviation sector*[13] (hereinafter "the Communication") might apply in the present case.

3.2.1. Eligibility for Rescue and Restructuring Aid

67. To be eligible for Rescue and restructuring aid, it must be demonstrated that Malév is a company in difficulty within the meaning of the Guidelines.

68. Point 9 of the Guidelines states that "*the Commission regards a firm as being in difficulty when it is unable, whether through its own resources or with the funds it is able to obtain* from *its owners/shareholders or creditors, to stem losses which without outside intervention by the public authorities, will almost certainly condemn it to going out of business in the short or medium term*".

Subsequently in point 10 the Guidelines clarify that "*a firm is, in principle and* irrespective of its size, regarded as being in difficulty for the purposes of these Guidelines *in the following circumstances:*

(a) in the case of a limited liability company, where more than half of its registered capital has disappeared and more than one quarter of that capital has been lost over the preceding 12 months
(…)
(c) whatever the type of company concerned, where it fulfils the criteria under its domestic law for being the subject of collective insolvency proceedings".

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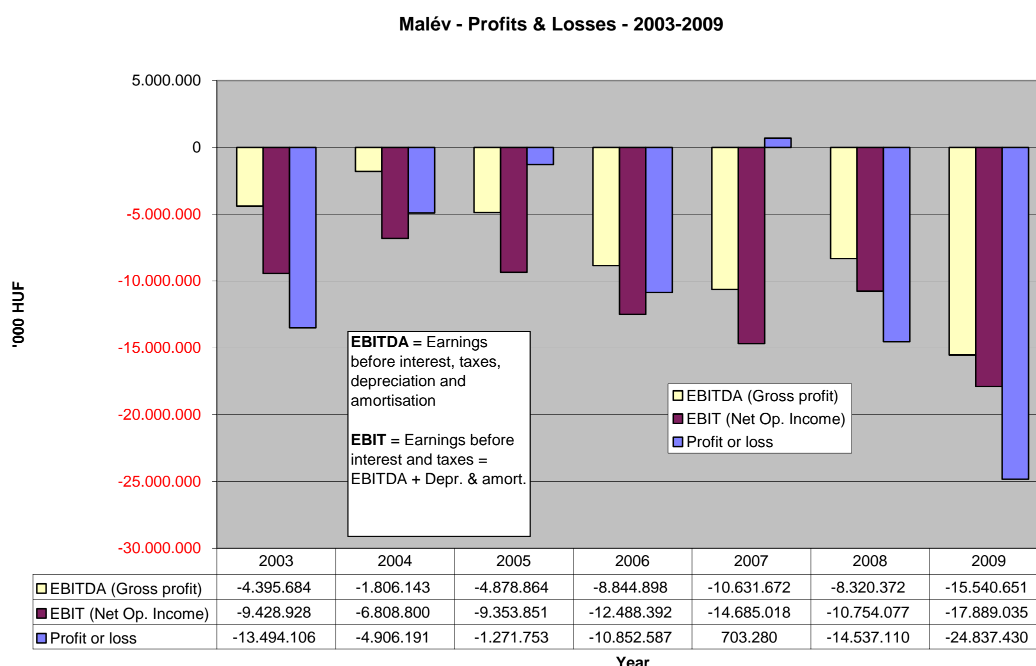
[12] OJ C244 of 1.10.2004 p.2

[13] OJ C350 of 10.12.1994, p.5

69. Point 11 of the Guidelines also provides that *"even when none of the circumstances set out in point 10 are present, a firm may still be considered to be in difficulties, in particular where the usual signs of a firm being in difficulty are present, such as increasing losses, diminishing turnover, growing stock inventories, excess capacity, declining cash flow, mounting debt, rising interest charges and falling or nil net asset value*."

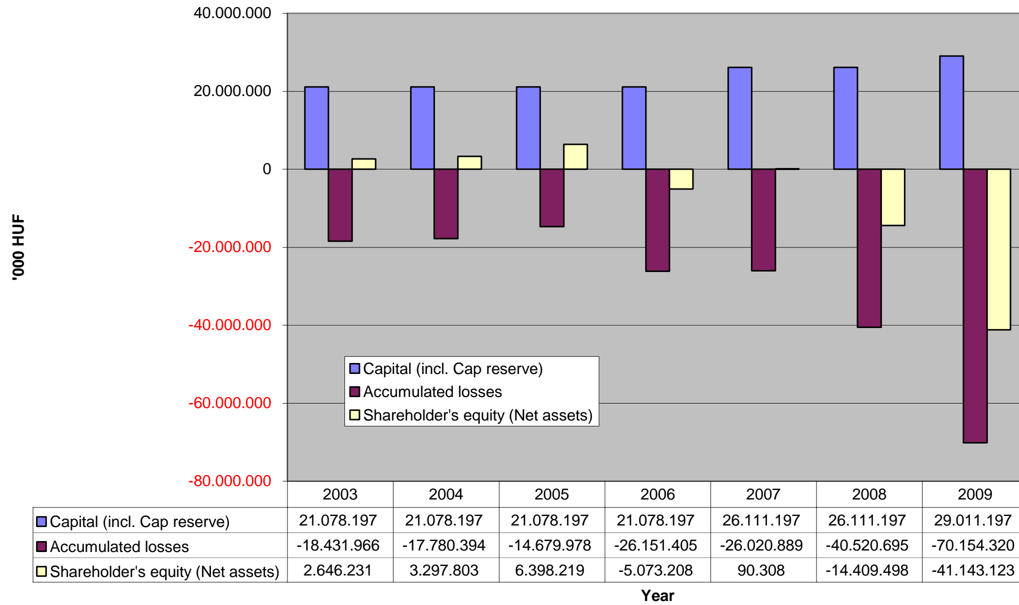
70. In this regard the Commission notes that Malév is a limited liability company. The Hungarian authorities have clarified in their response to the Commission of 30 April 2010 that under Hungarian law, Malév would have fulfilled the criteria for being the subject of collective insolvency proceedings for some time. However, in practical terms, due to the fact that only small partners were potentially adversely affected so far the practical risk of such a procedure being conducted was considered to be small and the State decided not to trigger it either.

71. Furthermore, the value of Malév's shareholders' equity became negative in 2006. Despite the measures taken in the context of the sale of Malév to AirBridge, at the end of 2009, Malév lost much more than half of its registered capital, in this period Malév continued to accumulate losses which at the end of 2009 amounted to more than twice the value of its registered capital. Finally, Malév shows the typical symptoms of a company in difficulty, such as increasing negative EBITDA since 2004 reaching HUF -15.5 billion in 2009, increasing losses since 2005 reaching HUF -25 billion in 2009, increasing debt reaching 200% of assets in 2009, increasingly negative free cash flow since 2005, reaching HUF -12 billion in 2009 and decline and loss of net assets.



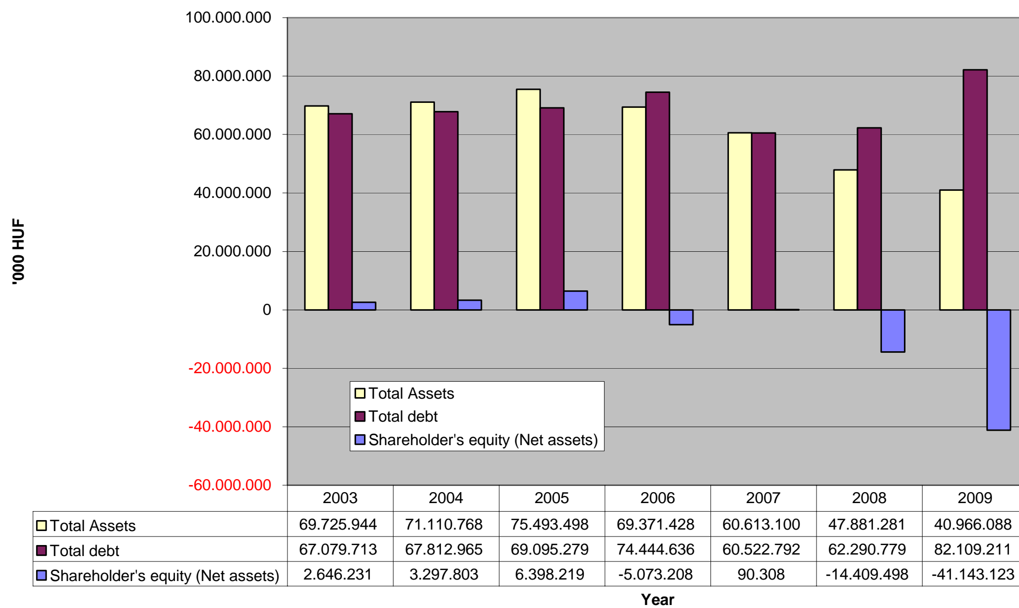
	2003	2004	2005	2006	2007	2008	2009
EBITDA (Gross profit)	-4.395.684	-1.806.143	-4.878.864	-8.844.898	-10.631.672	-8.320.372	-15.540.651
EBIT (Net Op. Income)	-9.428.928	-6.808.800	-9.353.851	-12.488.392	-14.685.018	-10.754.077	-17.889.035
Profit or loss	-13.494.106	-4.906.191	-1.271.753	-10.852.587	703.280	-14.537.110	-24.837.430

Malèv - Equity - 2003-2009

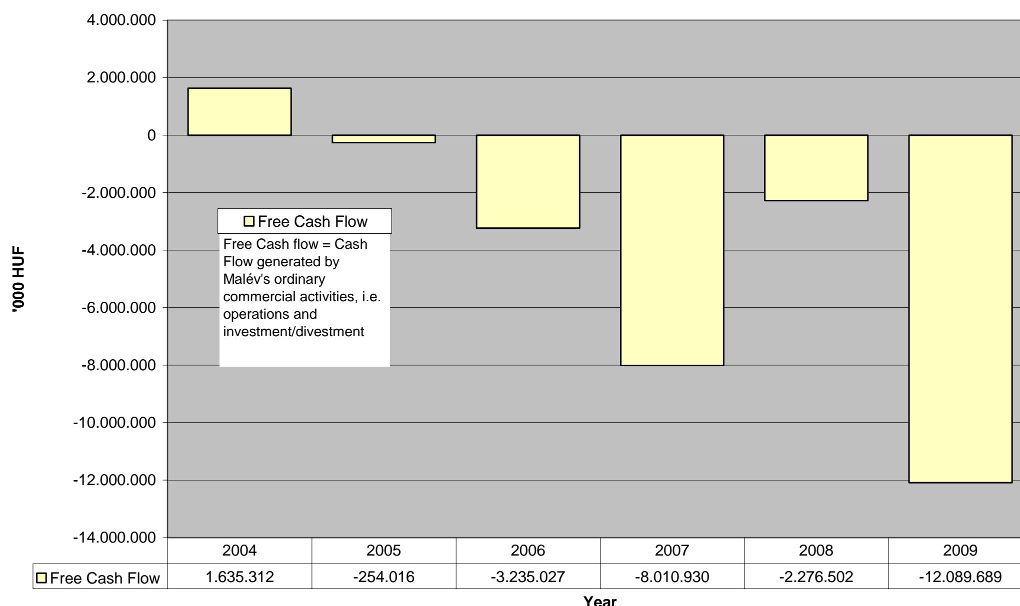


	2003	2004	2005	2006	2007	2008	2009
Capital (incl. Cap reserve)	21.078.197	21.078.197	21.078.197	21.078.197	26.111.197	26.111.197	29.011.197
Accumulated losses	-18.431.966	-17.780.394	-14.679.978	-26.151.405	-26.020.889	-40.520.695	-70.154.320
Shareholder's equity (Net assets)	2.646.231	3.297.803	6.398.219	-5.073.208	90.308	-14.409.498	-41.143.123

Malév - Net Assets - 2003-2006



	2003	2004	2005	2006	2007	2008	2009
Total Assets	69.725.944	71.110.768	75.493.498	69.371.428	60.613.100	47.881.281	40.966.088
Total debt	67.079.713	67.812.965	69.095.279	74.444.636	60.522.792	62.290.779	82.109.211
Shareholder's equity (Net assets)	2.646.231	3.297.803	6.398.219	-5.073.208	90.308	-14.409.498	-41.143.123



	2004	2005	2006	2007	2008	2009
Free Cash Flow	1.635.312	-254.016	-3.235.027	-8.010.930	-2.276.502	-12.089.689

72. On the basis of financial situation described above, Malév appears to be a company in difficulty within the meaning of the Guidelines and would thus be eligible to receive rescue or restructuring aid in compliance with the Guidelines and the Communication.. Based on the figures reported above, the Commission considers at this stage that Malév already was a company in difficulty in 2007 when the first measure identified above was implemented. As the financial situation of Malév seems to have continuously worsened since 2007, the Commission considers at this stage that Malév also was a company in difficulty in 2008, 2009 and 2010 when the measures described above were implemented. However the Commission invites the Hungarian authorities to provide further comments as to the point in time when Malév would have first been considered as a company in difficulty according to the various criteria set out in paragraph 9 to 11 of the Guidelines and in particular the criteria under its domestic law for being the subject of collective insolvency proceedings. The Commission also invites the Hungarian authorities to comment on the situation of the company at the time each individual measure identified above was implemented.

3.2.2. General Conditions for the authorisation of rescue aid

73. Point 25 of the Guidelines lays down five cumulative conditions under which rescue aid can be granted. Notably, the aid must "*consist of liquidity support in the form of loan guarantees or loans.*" In addition, the rescue aid must *“be accompanied on notification by an undertaking given by the Member State to communicate to the Commission, not later than six months after the rescue aid measure has been authorised, a restructuring plan or a liquidation plan or proof that the loan has been reimbursed in full and/or that the guarantee has been terminated*”.

74. Most of the measures listed above could not be authorized as compatible rescue aid because they were not granted in the form of a loan or a guarantee. Moreover, several measures under examination entered into force more than six months before the adoption of the present decision. As the Member State has not as yet and can no longer provide a restructuring plan, a liquidation plan or the proof that

the company reimbursed the concerned aid measures, as mandated in the Guidelines, this condition has not been satisfied in the present case. The Commission underlines moreover that the Hungarian authorities have not provided sufficient information to enable it to assess compliance with the condition provided for by point 25, (b) and (d) of the guideline s. It must therefore conclude at the present stage that the measures at stake should not be considered to be rescue aid measures compatible with the internal market.

75. As concerns the most recent measures and notably those granted in the form of a loan, it is also questionable whether the earlier implementation of other aid measures, which aimed at restructuring Malév, would trigger the application of the "one time last time" rule provided for by Section 3.3 of the Guidelines.

3.2.3. General Conditions for the authorisation of restructuring aid

76. According to point 34 of the Guidelines, "*the grant of the aid must be conditional on implementation of the restructuring plan which must be endorsed by the Commission in all cases of individual aid (…)*".

77. As no restructuring plan has been presented, the first necessary condition for accepting restructuring aid according to the Guidelines and the Communication is missing, the Commission must therefore conclude at this stage that the measures under examination cannot be considered as restructuring aid compatible with the common market. Indeed, on the basis of the information at its disposal the Commission is not in a position to assess if all the conditions laid down in section 3.2.2 of the Guidelines and chapter V.2 of the Communication are complied with and therefore cannot consider the aid as compatible with the internal market.

78. In addition, section 3.3 of the Guidelines provides for a "one time, last time" rule according to which the grant of rescue and/or restructuring aid should in principle be a one-off operation.

79. At this stage of its investigation, the Commission considers that the compliance by the Hungarian authorities with the one-time-last-time principle is questionable. Indeed, Hungary has been granting repeated aid to a company in difficulties and over a period of almost 4 years (2007-2010). At this stage, the Commission has doubts whether all these measures can be considered as part of the implementation of a single restructuring process.

80. In fact, two sets of support measures are clearly distinguishable: the first set of measures was taken when Malév was a private company (following the 2007 transfer of a loan to MAVA until before the 2010 renationalisation of Malév) and the second set were granted in the context and after the 2010 renationalisation (the 2010 measures).

81. In summary, between 2007 and 2010 there was a change of ownership and the restructuring efforts of AirBridge would appear to be distinct from the restructuring efforts that the State might have undertaken since 2010.

82. Therefore and on the basis of the information at its disposal, the Commission has difficulties to consider that the measures under examination constitute different elements of a continued restructuring process. If it is confirmed that the first set of measures constitute aid aimed at rescuing or restructuring a company in financial difficulties and cannot be considered as part of a continued restructuring process, the one-time-last-time rule would not appear to be fulfilled at this stage and the 2010 measures could not be declared compatible.

83. The Commission invites the Hungarian authorities to comment on the application of the "one time, last time" principle and on the compliance of the measures at stake with all the conditions for compatibility set out in the Guidelines and in the Communication.

4. DECISION

In the light of the foregoing considerations, the Commission, acting under the procedure laid down in Article 108(2) of the TFEU, requests Hungary to submit its comments and to provide all such information as may help to assess the compatibility with State aid rules of the measures at stake, within one month of the date of receipt of this letter. It requests your authorities to forward a copy of this letter to the potential recipient of the aid immediately.

The Commission wishes to remind Hungary that Article 108(3) of the TFEU has suspensive effect, and would draw your attention to Article 14 of Council Regulation (EC) No 659/1999, which provides that all unlawful aid may be recovered from the recipient.

The Commission warns Hungary that it will inform interested parties by publishing this letter and a meaningful summary of it in the *Official Journal of the European Union*. It will also inform interested parties in the EFTA countries that are signatories to the EEA Agreement, by publication of a notice in the EEA Supplement to the *Official Journal of the European Union* and will inform the EFTA Surveillance Authority by sending a copy of this letter. All such interested parties will be invited to submit their comments within one month of the date of such publication.

If this letter contains confidential information that should not be published, please inform the Commission within fifteen working days of the date of receipt. If the Commission does not receive a reasoned request by that deadline, you will be deemed to agree to publication of the full text of the letter. Your request should be sent by registered letter or fax to:

Your request should be sent by registered letter or fax to:

European Commission
Directorate-General for Competition
B-1049 Brussels

Fax No: +0032 (0) 2 2961242

Yours faithfully,
For the Commission

Joaquín ALMUNIA
Vice-President of the Commission