



EUROPEAN COMMISSION

Brussels, 15.07.2015
C(2015) 4808 final

PUBLIC VERSION

This document is made available for information purposes only.

**Subject: State aid No SA.40018 (2015/NN) – Hungary
2014 Amendment to the Hungarian food chain inspection fee**

Sir,

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

1. PROCEDURE

(1) The Commission services became aware of the 2014 amendment to the 2008 Food Chain Act, regulating the food chain inspection fee, by press articles published in December 2014. In March 2015, the Commission also received a complaint about that amendment. 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. DESCRIPTION OF THE MEASURES

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

(2) 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") which entered into force in 2012 and in Decree No 40 of 27 April 2012 of the Minister for Rural

Őexcellenciája Péter SZIJJÁRTÓ
Külügyminiszter
Bem rakpart 47
H - 1027 BUDAPEST

Development on the rules of making a declaration on and paying the food chain inspection fee. 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 activities¹ in respect of which companies are obliged to pay the inspection fee.

- (3) 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. Amounts of excise tax and public health product tax that have already been paid may be deducted from the fee base. 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.
- (4) 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%.
- (5) 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. It is mandatory to spend 10 % of the collected inspection fees on development.²

2.2. The 2014 amendment of the Food Chain Act

- (6) Pursuant to a 2014 amendment of Article 47/B of the Food Chain Act that entered into force on 1 January 2015, specific rules for the calculation of the inspection fee applicable

¹ According to the Hungarian authorities: '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.'

² See Article 47/B(10) of the Food Chain Act

to turnover generated by stores selling fast-moving consumer goods³ on the Hungarian market were introduced.

- (7) The 2014 amendment of the Food Chain Act introduces a multiple, progressive fee rate structure for stores selling fast moving consumer goods, with rates ranging from 0% to 6%. More precisely, the following rates are applicable 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);
 - 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.
- (8) Pursuant to the amended Food Chain Act, all other food chain operators remain subject to the fee calculated on the relevant turnover at a flat rate of 0.1%.
- (9) 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.

³ 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.”

- (10) The fee 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 this case the fee must be declared, but it does not have to be paid.
- (11) 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.

2.3. Context of the amendment

- (12) The 2014 amendment was adopted in parallel with several other regulations on retail. Many of these provisions apply more restrictive operating conditions to retailers with relatively high turnover compared to those with relatively low turnover.
- (13) In particular, Article 9/A of the Act CLXIV of 2005 on Commerce as introduced by Article 4 of the Act CXII of 2014 prohibits pursuing retail sale activities of consumable goods for retailers with a turnover exceeding 15 billion HUF who have not generated profit for two consecutive years.

3. POSITION OF THE HUNGARIAN AUTHORITIES

- (14) The Hungarian authorities contest that the 2014 amendment constitutes aid because it is not selective. In the view of the Hungarian authorities the progressive rates introduced by that amendment affect all operators generating turnover in respect of activities subject to the food chain inspection fee in Hungary.
- (15) According to the Hungarian authorities, the purpose of the 2014 amendment to the provisions applicable to the food chain inspection fee 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).
- (16) Furthermore, the Hungarian authorities claim that the food chain inspection fee is not a fiscal measure and it does not constitute revenue for the central budget of the Hungarian State, but revenue required for the operation and development of the competent food chain supervision authorities.
- (17) The Hungarian authorities also claim that the legal basis of the food chain inspection fee is 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 (herein Regulation (EC) No 882/2004)⁴ which allows and in certain cases requires Member States to collect fees or charges to cover the costs occasioned by official controls⁵ and that the 2014 amendment of the fee complies with that Regulation. In particular, in recent correspondence with Commission departments⁶ the Hungarian authorities have relied on Article 27(4) of Regulation (EC) No 882/2004, which provides that fees "may be fixed at a flat-rate on the basis of the costs borne by the competent authorities over a given period of time or, where applicable, at the amounts fixed in Annex IV, section B or in Annex V, section B"⁷.

4. ASSESSMENT

- (18) 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 progressive rates on stores selling fast moving consumer goods in Hungary.
- (19) The present Decision does not consider, and thus is without prejudice to a possible assessment of other elements of the retail chain inspection fee, in particular but not limited to, the question of whether the compensation provided to the food chain authority under the Food Chain Act constitutes State aid (thus the question whether inspection fees are hypothecated to certain food inspection activities) and other elements of the Food Chain Act.

4.1. Existence of aid

- (20) According to Article 107(1) of the TFEU, *"save 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"*.
- (21) The qualification of a measure as aid within the meaning of this provision therefore requires the following cumulative conditions to be met: (i) it must confer an advantage on its recipient; (ii) that advantage must be selective; (iii) the measure must be imputable to the State and financed through State resources; and (iv) the measure must distort or threaten to distort competition and affect trade between Member States.

⁴ OJ L 165, 30.4.2004, p. 1.

⁵ See Title II, Chapter VI of Regulation 882/2004.

⁶ The Hungarian authorities have provided information to the Directorate General for Health and Food Safety by means of two letters, dated 26 February 2015 [Ares(2015)835210] and 19 May 2015 respectively [Ares (2015)2083309].

⁷ The Hungarian authorities have also referred to recital 32 of the preamble to Regulation (EC) No 882/2004 which states that Member States should be enabled 'to establish the fees and charges [for official controls] as flat-rate amounts based on the costs incurred and taking the specific situation of the establishments into account'.

4.1.1. Advantage

- (22) 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.⁸ 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.⁹
- (23) The 2014 amendment to the Food Chain Act lays down progressive rates for the inspection fee which apply depending on whether the turnover of the stores selling fast-moving consumer goods falls within certain brackets. The progressive character of those rates and the manner in which those brackets have been established have the effect that the percentage of the fee levied on an undertaking's turnover increases steeply when its turnover increases and reaches the next upper brackets. This has the result that undertakings with low turnover are subject to the fee at substantially lower average rates than undertakings with high turnover. 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 the former for the purposes of Article 107(1) TFEU.

4.1.2. Selectivity

- (24) A measure is selective if it favours certain undertakings or the production of certain goods within the meaning of Article 107(1) TFEU. For measures which mitigate the charges that undertakings would normally have to bear, such as a preferential treatment with regard to levies and taxes or in the present case concerning the payment of the inspection fee, the Court of Justice has established that the selectivity of the measures should be assessed by means of a three-step analysis.¹⁰ First, the system of reference must be identified. Second, it should be determined whether a given measure constitutes a derogation from that system insofar 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 test, whether the derogatory measure is justified by the nature or the general scheme of the (reference) tax system. If a *prima facie* selective measure is

⁸ Case C-143/99 *Adria-Wien Pipeline* [2001] ECR I-8365, paragraph 38.

⁹ Joined Cases C-393/04 and C-41/05 *Air Liquide Industries Belgium* [2006] ECR I-5293, paragraph 30 and Case C-387/92 *Banco Exterior de Espana* [1994] ECR I-877, paragraph 14.

¹⁰ See, for example, Case C-279/08 P *Commission v Netherlands (NOx)* [2011] ECR I-7671; Case C-143/99 *Adria-Wien Pipeline* [2001] ECR I-8365; Joined Cases C-78/08 to C-80/08, *Paint Graphos and others* [2011] ECR I-7611; Case C-308/01 *GIL Insurance* [2004] ECR I-4777.

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) TFEU.

a) System of reference

- (25) The reference system constitutes the framework against which the selectivity of a measure is assessed. The reference system is composed of a consistent set of rules that generally apply – on the basis of objective criteria – to all undertakings falling within its scope as defined by its objective.
- (26) In the present case, the reference system is the application of an inspection fee on food chain undertakings operating in Hungary in respect of their turnover generated from certain activities¹¹. The Commission considers, at this stage, that the application of the fee in respect of the turnover generated by activities subject to food chain inspection demonstrate that the Hungarian authorities implicitly regard turnover as an appropriate proxy for the level of control activities to be performed and that the application of a flat rate to those turnovers is implicitly regarded by the Hungarian authorities as an appropriate proxy for the calculation of the costs incurred by the State for its inspection activities, in line with Regulation (EC) No 882/2004. The Commission also considers, at this stage, that the rate of reference to be applied to the activities performed by stores selling fast moving consumer goods is the implicit average rate applicable to the store selling fast moving consumer goods subject to the highest level of fees.
- (27) The progressive character of the fee rate structure applied to the turnover, as introduced by the 2014 amendment, cannot, however, form part of that reference system. As set out in the case law, it is not sufficient to confine the selectivity analysis to whether the measure derogates from the rules of any reference system as defined by a Member State. It is also necessary to evaluate whether the boundaries of the system of reference 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.¹² 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 fee burden for different undertakings¹³. It is particularly important to recall in that respect that the Court of Justice has consistently held that Article 107(1) TFEU does not distinguish between measures of State intervention by

¹¹ See above footnote 1.

¹² Joined Cases C-106/09 P and C-107/09 P *Commission and Spain v Government of Gibraltar and United Kingdom* [2011] ECR I-11113.

¹³ *Ibid*, paragraph 92.

reference to their causes or their aims but defines them in relation to their effects, and thus independently of the techniques used.¹⁴

- (28) As demonstrated in the following sections, the 2014 amendment to the Food Chain Act, as a result of the progressive character of the fee rates and the manner in which the brackets to which those rates apply have been established, differentiates without any justification between undertakings depending on the amount of turnover they generate.

b) Derogation from the system of reference

- (29) As a second step, it is necessary to determine whether the measure derogates from the application of the rules of reference 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.
- (30) Due to the steeply progressive character of the fee rate introduced by the 2014 amendment, turnover falling in lower brackets is subject to a substantially lower inspection fee than turnover falling in higher brackets. This has the result that undertakings with low turnover are subject to both substantially lower marginal inspection fees and substantially lower average inspection fee rates as compared to undertakings with higher turnover, and therefore to a substantially lower burden.
- (31) At this stage, the Commission considers all stores selling fast moving consumer goods to be in a comparable legal and factual situation, in light of the objective of the Hungarian Food Chain Act. The progressive fee rates and the manner in which the respective turnover brackets have been established by the 2014 amendment differentiate between stores having higher turnover and those having lower turnover. Since the amount of turnover achieved by an undertaking correlates to a certain extent with the size of the undertaking, the 2014 amendment to the Food Chain Act, as a result of the steeply progressive character of the fee rates and the manner in which the brackets to which those rates apply have been established, appears by its very design to differentiate between undertakings based on their size.
- (32) The Commission notes, in particular, that the fee rates laid down by the amended Food Chain Act and the brackets to which they apply result in a steep increase 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 stores achieving turnover higher than HUF 500 million, but not exceeding HUF 50 billion and is multiplied by 60 to reach 6% for stores achieving a turnover higher than HUF 300 billion. The consequence of that steep increase in the marginal fee rate is that for an undertaking with turnover in the top bracket, the average level of fee is exceptionally high.

¹⁴ Case C-487/06 P *British Aggregates v Commission* [2008] ECR I-10515, paragraphs 85 and 89 and the case-law cited, and Case C-279/08 P *Commission v Netherlands (NOx)* [2011] ECR I-7671, paragraph 51.

- (33) Moreover, the Commission notes that according to the data submitted by the Hungarian authorities only 7 food chain operators that declare turnover generated from the retail sale of food and animal feed out of around 21,700 (0.03%) contribute to the food inspection fee at a rate higher than 0.1%¹⁵. These data illustrate the differential treatment of undertakings under the amended Food Chain Act and the selective character of the progressive rates laid down by the 2014 amendment.
- (34) Therefore, at this stage, the Commission considers that the measure is *prima facie* selective.

c) Justification

- (35) 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 system¹⁶. For this purpose, external policy objectives – 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.
- (36) 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.
- (37) However, (steeply) progressive turnover fees can only be justified if the specific objective pursued by the fee requires such (steeply) 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 – more than proportionately¹⁷ – in respect of turnover. As the retail chain supervision fee is supposed to finance health and safety-related checks in supermarkets, the Commission cannot see why the cost of such controls increases more than proportionately (and indeed very steeply) with the turnover of larger stores. For example, Hungary has not provided evidence explaining why a hypermarket with substantial turnover selling a pack of sugar would create 60 times the hazards or warrant 60 times the controls compared to a small supermarket with low turnover selling the same

¹⁵ Those 21 700 operators involved in retail sale of food and animal feed represent +/- 32% of the 68 535 operators subject to the food chain inspection fee.

¹⁶ See for example Joined Cases C-78/08 to C-80/08 *Paint Graphos and others* [2011] ECR I-7611, paragraph 69.

¹⁷ Indeed, a flat rate fee already imposes a higher fee on stores with a higher turnover.

pack of sugar. However, the fee due for one EUR of turnover is 60 times higher for the hypermarket in question.

- (38) Therefore, the Commission, at this stage, does not consider that the measure is justified by the nature and general scheme of the reference system.

4.1.3. *State resources and imputability to the State*

- (39) A measure has to be financed through State resources and the transfer thereof has to be imputable to the Member State. Since the measure results from an Act of the Hungarian Parliament, it is clearly imputable to the Hungarian State. 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, the relevant measure is financed by State resources"¹⁸ In the present case, the Hungarian State waives resources it would otherwise have to collect from smaller supermarkets if they were subject to the same inspection fee as larger supermarkets.

- (40) The argument of the Hungarian authorities that, given that the legal basis of the fee is Regulation 882/2004, the fee cannot be imputed to the Hungarian State, is invalid. Article 26 of Regulation 882/2004 provides that "*Member States shall ensure that adequate financial resources are available to provide the necessary staff and other resources for official controls by whatever means considered appropriate, including through general taxation or by establishing fees or charges.*" Moreover, pursuant to Article 27, "*Member States may collect fees or charges to cover the costs occasioned by official controls*" and are required to do so in the cases referred to in Article 27(2). Regulation 882/2004 neither imposes upon Hungary the obligation to establish progressive fees for the performance of controls nor does it establish the applicable rates according to a steeply progressive pattern, so that the 2014 amendment cannot be said to stem from an act of the Union legislature. It is 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. Any choice made in that context is therefore imputable to the Hungarian State.

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

- (41) According to Article 107(1) TFEU, a measure must distort or threaten to distort competition and have an effect on intra-Union trade. The measure applies to all undertakings deriving turnover from certain food chain related activities and selling fast moving consumer goods, including providers from other Member States. The market of stores selling fast moving consumer goods is characterised by the presence of operators

¹⁸ Case C-83/98 P *France v Ladbroke Racing Ltd and Commission* [2000] ECR I-3271, 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*, Not yet reported, paragraph 46.

from other Member States that operate on an international scale. The steeply progressive character of the turnover fee may severely disadvantage some operators, to their detriment, compared with others. 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

- (42) As all the requirements laid down in Article 107(1) TFEU are met, the Commission, at this stage, considers that the measure constitutes State aid within the meaning of that provision.

4.2. Compatibility of the aid with the internal market

- (43) State aid measures can be considered compatible with the internal market on the basis of the exceptions laid down in the TFEU, in particular in Article 107(2) and 107(3) and in Article 106(2) TFEU.
- (44) 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.
- (45) The Commission considers, at this stage, that none of the exceptions provided for in these provisions apply, as the measure does not appear to aim at any of the objectives listed in those provisions.
- (46) The Commission also 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.
- (47) At this stage, the Commission cannot exclude that the measure predominantly targets foreign-owned undertakings, which could entail a breach of Article 49 TFEU establishing the fundamental freedom of establishment.
- (48) Hungary claimed that Regulation (EC) No 882/2004 is the legal base for the food chain inspection fee as amended in 2014. Based on the information provided by the Hungarian authorities¹⁹, the Commission has doubts, at this stage that the measure complies with Regulation (EC) No 882/2004 for the following reasons:
- First, the information provided does not demonstrate that the inspection fee is calculated in accordance with the criteria for the calculation of fees enshrined in Regulation (EC) No 882/2004 nor that it does not exceed the overall costs that the competent

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

authorities incur due to the performance of official controls, as is expressly required by Article 27(4)a of that Regulation.

- 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 of 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 "salaries of government staff".
- 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 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 said stores.
- 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. 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).

(49) In view of the above, the Commission has doubts that the differences in tax treatment entailed by the measure are necessary and proportionate to the objective of fulfilling the obligations set by Regulation (EC) No 882/2004.

(50) Therefore, the Commission has strong doubts that the measure can be declared compatible with the internal market.

4.3. Recovery of the aid

(51) The measure has not been notified to the Commission. Based on the preliminary assessment conducted in section 4.1, those measures constitute State aid within the meaning of Article 107(1) TFEU and new aid within the meaning of Article 1(c) of

Regulation (EC) No 659/1999²⁰. Since the measure has been put into effect in violation of the standstill obligation laid down in Article 108(3) TFEU, they also constitute prima facie unlawful aid within the meaning of Article 1(f) of Regulation (EC) No 659/1999.

- (52) If the formal investigation procedure confirms that the measure constitutes unlawful and incompatible State aid, the consequence of this finding is that the aid has to be recovered from its recipients pursuant to Article 14 of Regulation (EC) No 659/1999.
- (53) As regards the State aid nature of the progressivity of the fee rate, recovery of the aid would mean that Hungary would need to treat all undertakings as if they had been subject to a fixed fee rate in respect of the same tax base. It falls within the competence of the Hungarian authorities to decide upon the level of this fixed rate within the limits set by Regulation 882/2004²¹. Hungary would then need to collect payments from those undertakings that have paid less than they would have had to pay with the fixed rate and to reimburse those undertakings that have paid more than they would have had to pay with the fixed rate.

5. SUSPENSION INJUNCTION

- (54) By letter of 17 March 2015, the Hungarian authorities were informed that the Commission would consider issuing a suspension injunction decision in accordance with Article 11(1) of Regulation (EC) No 659/1999. The Hungarian authorities submitted their comments on that letter by letter of 16 April 2015, on which they make no comments on the issue of the suspension injunction and they argue that the measure does not constitute State aid.
- (55) For the reasons set out in section 4.1, the Commission considers, at this stage, that the 2014 amendment to the Food Chain Act confers a selective advantage on certain undertakings, derived from State resources and imputable to the Hungarian State, with a potential distortive effect on competition and the ability to affect intra-Union trade. The Commission thus considers, at this stage, that that measure constitutes State aid within the meaning of Article 107(1) TFEU. Moreover, for the reasons set out in recital 48, the Commission considers that aid to be unlawful, since it has not been notified to the Commission prior to its implementation by Hungary as required by Article 108(3) TFEU.
- (56) A suspension injunction constitutes an interim measure that the Commission may adopt, on the basis of Article 11(1) of Regulation (EC) No 659/1999, requiring a Member State to suspend any unlawful aid pending a final decision by the Commission. A suspension injunction is an appropriate instrument in particular when a Member State is still granting the unlawful aid in a manner that prevents the immediate restoration of undistorted competition, as in the present case. In that context, the Commission underlines that the

²⁰ Council Regulation No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty, OJ L 83, 27.3.1999, p. 1-9, as last amended by Council Regulation (EC) No 734/2013 of 22.7.2013, OJ L 204, 31.7.2013, p. 15.

²¹ Which implies inter alia that this level of fixed rate takes into account the costs of the services provided.

steeply progressive character of the turnover fee is capable of having a significant impact on the competitive situation in the market.

- (57) As all stores selling fast moving consumer goods are currently subject to the progressive fee rate set by the Hungarian authorities at the date of this Decision, the Commission therefore considers – in light of the above – that it is crucial to now suspend the application of the progressive rate for the inspection fee laid down by the 2014 amendment to the Food Chain Act. The Commission therefore considers it is necessary to issue a suspension injunction in accordance with Article 11(1) of Regulation (EC) No 659/1999.

6. CONCLUSION

- (58) In light of the above, the Commission has decided to initiate the formal investigation procedure provided for in Article 108(2) TFEU to the measure referred to above.
- (59) The Hungarian authorities and interested third parties are therefore invited to provide in their comments to the opening decision all information necessary to carry out a full assessment and to submit to the Commission the appropriate information.
- (60) 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 aforementioned measure, within one month of the date of receipt of this letter. The Commission invites the Hungarian authorities to transmit immediately a copy of the present decision to all (potential) beneficiaries of the aid, or at least to proceed to inform them with appropriate means.
- (61) The Commission wishes to remind Hungary that Article 108(3) of the TFEU has suspensory effect (i.e. no undertaking should benefit from State aid under this scheme as long as the Commission has not closed the formal investigation), and would draw the attention of the Hungarian authorities to Article 14 of Regulation (EC) No 659/1999, which provides that "where negative decisions are taken in cases of unlawful aid, the Commission shall decide that the Member State concerned shall take all necessary measure to recover the aid from the beneficiary".
- (62) The Commission requires Hungary, in accordance with Article 11(1) of Regulation (EC) No 659/1999, to suspend the application of progressive rates to its inspection fee, until the Commission has taken a decision on the compatibility of the measure with the internal market (suspension injunction).
- (63) The State aid investigation does not prejudice separate investigations on the compliance of the measure with Regulation (EC) No. 882/2004 of the European Parliament and of the Council of 29 April 2004 on official controls or with the fundamental freedoms laid down in the TFEU, notably the freedom of establishment as guaranteed by Article 49 TFEU.
- (64) 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 which 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 which 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 this letter. Your request specifying the relevant information should be sent by registered letter or fax to:

European Commission
Directorate-General for Competition
State Aid Registry
B-1049 Brussels

Fax No: +32-2-296.1242

Yours faithfully,
For the Commission

Margrethe VESTAGER
Member of the Commission