



EUROPEAN COMMISSION

Brussels, 20.7.2017  
C(2017) 5050 final

<p>In the published version of this decision, some information has been omitted, pursuant to articles 30 and 31 of Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union, concerning non-disclosure of information covered by professional secrecy. The omissions are shown thus [...]</p>		<p>PUBLIC VERSION</p> <p>This document is made available for information purposes only.</p>
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**Subject: SA.38121 (2016/FC) – Slovakia**  
**Investment aid to the Slovak glass sand producer NAJPI a.s.**

Sir,

**1. PROCEDURE**

- (1) By electronic letter dated 12 December 2013 (2013/125535 and 2013/126554) a complainant, who has requested to stay anonymous (hereinafter: "the complainant"), lodged a complaint concerning allegedly unlawful regional investment aid granted to the Slovak company NAJPI a.s. with its seat in Bratislava and its head office in Senica (hereinafter: NAJPI) concerning an investment in western Slovakia in an Art. 107 (3)(a) region. This complaint was registered at the Commission under the case number SA.38121 (2013/125535).
- (2) By letter of 24 February 2014 (2014/017474) and 2 May 2014 (2014/047218), the Commission forwarded the non-confidential version of the complaint to the Slovak authorities and invited them to comment by providing requested information.

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- (3) By letters of 30 May 2014 (2014/057149) and 1 July 2014 (2014/068568) the Slovak authorities submitted comments concerning the allegations of the complainant.
- (4) By letter of 30 July 2014 (2014/078708) the Commission sent a first preliminary assessment letter to the complainant. In this letter the Commission services provided reasoning why the aid measure is granted in full conformity with the provisions of Regulation (EC) 800/2008, and *prima facie* compatible with the internal market.
- (5) The complainant submitted additional information to the Commission by letters dated 12 February 2014 (2014/016564), 4 September 2014 (2014/092233), 7 November 2014 (2014/113201), 21 November 2014 (2014/118969), 28 May 2015 (2015/053731), 8 July 2015 (2015/067414), 15 July 2015 (2015/07054), 1 September 2015 (2015/085685), 15 October 2015 (2015/101726), 3 November 2015 (2015/107973), 13 June 2016 (2016/056380), 5 July 2016 (2016/065803) and 17 August 2016 (2016/079540).
- (6) Further to the additional information submitted by the complainant, the Commission sent additional requests for information to the Slovak authorities on 2 May 2014 (2014/047218), 30 June 2014 (2014/065511), 10 September 2014 (2014/089621), 9 January 2015 (2015/001488), 25 February 2016 (2016/014050), 10 March 2016 (2016/019842), 22 April 2016 (2016/039453), 23 June 2016 (2016/060510), 25 January 2017 (2017/013580), 15 March 2017 (2017/027401) and 13 June 2017 (2017/055587).
- (7) The Slovak authorities submitted responses to the Commission requests for information on the aid measure granted to NAJPI by letters dated 1 July 2014 (2014/068568), 3 October 2014 (2014/099287), 6 February 2015 (2015/012175), 22 April 2016 (2016/039350), 19 May 2016 (2016/047597), 1 July 2016 (2016/064401), 7 February 2017 (2017/013580), 12 April 2017 (2017/037128) and 21 June 2017 (2017/059346).
- (8) By letter of 9 July 2015 (2015/067355) the Commission sent a second preliminary assessment letter to the complainant in which it confirmed that the beneficiary was an SME, that the beneficiary was not a firm in difficulties at the time of the granting of the aid and that the requirements of Regulation (EC) 800/2008 had been complied with, and that, as a result, the aid measure did not qualify as *ad-hoc* aid. The complainant replied to this letter on 15 October 2015 (2015/101726) and submitted further additional information to its complaint.
- (9) The complainant also lodged two separate complaints on 28 May 2015 claiming the breach of Articles 49 and 35 TFEU respectively. Closure letters were sent by the relevant Commission service on 19 May 2016 for the former and on 2 December 2015 for the latter.

## **2. DETAILED DESCRIPTION OF THE AID MEASURE**

### **2.1. Objective**

- (10) In 2013, the Slovak authorities approved a direct grant in the amount of EUR 4,999,999.46 to the beneficiary NAJPI for an initial investment in a new plant for the extraction of glass sand in the Západné Slovensko region. According to

Slovakia, the investment aid granted to NAJPI was to support the development of the region which was (on the date when the aid was granted) an assisted area by virtue of Article 107(3)(a) of the Treaty on the functioning of the European Union (hereinafter: "TFEU"). Under the regional state aid map<sup>1</sup> in force at the time of granting of the measure, the aid ceiling for the region SK02 Západné Slovensko was 40% GGE for large enterprises. This percentage could be increased by 10% GGE for medium-sized enterprises<sup>2</sup> and 20% GGE for small enterprises<sup>3</sup>.

## **2.2. The aid beneficiary**

- (11) The company NAJPI was established on 15 November 2001 and is active in the extraction and processing of glass and foundry sand on the site Borský Peter and Šajdíkove Humence. The core business activities of NAJPI, registered in the Commercial Register concern opening, preparation and mining of exclusive deposits, establishing, securing and liquidation of quarries, processing and refining of minerals related to their extraction, establishing and operation of heaps, spoil tips and ponds during activities listed in points (b) to (d) (Section 2(e) of Act No 51/1988), exploiting non-reserved mineral deposits, including the processing and refining of minerals related to their extraction, securing and liquidation of quarries, with the exception of the identification and exploration of non-reserved mineral deposits. In addition to the activities listed above, there are additional secondary activities registered in the Commercial Register but, according to NAJPI, these have not yet been performed by the company.

## **2.3. The investment project**

- (12) The investment project of the beneficiary NAJPI is located in the western part of Slovakia, in the region Trnavský kraj. The project has been located in the Borský Peter and Šajdíkove Humence extraction area, which is a site of sand unique in Slovakia in terms of its physical properties, such as particle size (the sphericity of grains), purity and homogeneity, and of a type highly suited to and sought after for use in the glass and foundry industries.
- (13) The aim of the investment project of NAJPI was to set up a glass sand production installation. The extraction facilities are located in site Borský Peter and Šajdíkove Humence.
- (14) The total investment costs of the project are EUR 12,831,372.20 in nominal value. The amount of eligible expenditure for regional aid corresponds to EUR 12,499,998.65 in nominal value.
- (15) NAJPI financed the project partly through own funds and also through a loan taken from the commercial bank Slovenska Sporitelna in the amount of 6,516,617 EUR.

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<sup>1</sup> Commission decision N469/2006 Slovak regional aid map 2007-2013 (OJ C 256, 24.10.2016, p. 6).

<sup>2</sup> As defined in the Annex of Commission Regulation (EC) No 364/2004 of 25 February 2004 amending Regulation (EC) 70/2001, OJ L 63, 28.2.2004, p. 22, or any successor regulation.

<sup>3</sup> Idem.

## 2.4. The aid measure

- (16) The Slovak Ministry of Economy on behalf of the Slovak Innovation and Energy Agency as the Intermediate Body and the Managing Authority approved the aid in question to NAJPI on the basis of a state aid scheme aimed at supporting the introduction of innovative and advanced technologies in industry and services<sup>4</sup>. That aid scheme is classified as a regional investment aid measure under Article 13 of Commission Regulation (EC) No 800/2008 declaring certain categories of aid compatible with the common market in application of Articles 87 and 88 of the Treaty (hereinafter: "GBER 2008")<sup>5</sup>.
- (17) In line with Article 9(1) of the GBER 2008, the Slovak authorities submitted the summary information on the State Aid Scheme by letter of the Ministry of Finance dated 19 May 2009. The submission was registered by the Commission on 27 May 2009 under number SA.28652(X518/2009).

## 3. THE COMPLAINT

### 3.1. The complainant

- (18) The complainant is active in the field of mining, processing and distribution of industrial minerals, including glass sand. The glass sand is being used as a raw material in the glass and foundry industries as well as in the construction and chemical industries.
- (19) The complainant is therefore a direct competitor of NAJPI on the market for the production of sand, and it is therefore an interested party within the meaning of Articles 1(h) and 24 of Council Regulation 2015/1589<sup>6</sup>, as well as Articles 1(h) and 20 of Council Regulation 659/1999<sup>7</sup>, in force at the time the complaint was submitted to the Commission.

### 3.2. The complaint

- (20) The complainant made several allegations with regard to the aid measure described in point 2.4 above. It claims that the aid is unlawful and incompatible because it does not fulfil all the requirements of the aid scheme SA.28652(X518/2009) and that it therefore constitutes unlawful and incompatible ad hoc aid.

#### *3.2.1. Lack of incentive effect*

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<sup>4</sup> The State Aid Scheme (in the wording of Appendix 5) is published as part of the call for grant applications at <http://www.mhsr.sk/kod-vyzvy-kahr-111sp-1101/137255s>.

<sup>5</sup> Commission Regulation (EC) No 800/2008 of 6 August 2008 declaring certain categories of aid compatible with the common market in application of Articles 87 and 88 of the Treaty (General block exemption Regulation, GBER 2008, OJ L 214, 9.08.2008, p. 3).

<sup>6</sup> Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (codification) (OJ L 248, 24.09.2015, p.9).

<sup>7</sup> Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ L 83, 27.03.1999, p. 1).

- (21) As a first ground for incompatibility of the aid measure, the complainant puts forward the lack of the incentive effect required by Article 8 GBER 2008. According to the complainant, in the region concerned, there is no market failure in the supply and trade of glass and foundry sand. The aid granted to the NAJPI does therefore not rectify a market failure, but rather produces one. Due to the saturation of the market and the fact that other companies such as the complainant are not able to compete without State aid on this market, it is also not apparent that NAJPI's project is subject to regional additional costs, which are to be compensated by public funding.
- (22) The complainant claims that the company NAJPI was established with the help of the financial State support despite the fact that the market was saturated at the time of the granting of the aid and that the additional production of glass sand would lead to overcapacity. The complainant further argues that the State aid to NAJPI in this saturated and regionally limited market is undermining the investments without state subsidies. With the aid granted, NAJPI would be able to offer its products at significantly lower prices than its non-subsidized competitors, who must bear the costs of their investments by themselves.

### ***3.2.2. The beneficiary is a company in difficulties***

- (23) Secondly, the complainant argues that NAJPI has been a company in difficulties at least since 2012 and without any business model ("empty company"). The complainant informs that although NAJPI was able to issue negative annual financial statements in 2010, when it had a loss of EUR 64,437.13 and a negative equity in the amount of EUR 22,377.16, in the two subsequent years 2011 and 2012 NAJPI had positive results of modest proportions. However, the business figures were now declining and were tending towards zero. While NAJPI generated a profit of EUR 35,910 in 2011 with equity of EUR 13,532, in 2012, profits had declined to EUR 5,079 with equity at EUR 18,612.

### ***3.2.3. The beneficiary status is not SME***

- (24) Thirdly, the complainant insists that NAJPI was not an SME at the time of the granting of the aid but rather a large company, as it was owned by PATRIA, another undertaking and there were also links between the members of PATRIA's management and supervisory board with other companies. In particular, the complainant insists that the owners/managers of NAJPI/PATRIA, have "links through natural persons" within the meaning of sub-section 4<sup>8</sup> of the Annex I of the GBER 2008 (i.e. Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises, hereinafter "the SME Recommendation") with a range of other companies. A list of these companies (totalling 23 undertakings) and their alleged activities was submitted by the complainant. The listed activities (those including for NAJPI) in most cases only relate to "commerce", "retail", "wholesale" and "mediation" (i.e. acting as an agent).

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<sup>8</sup> In fact the complainant refers to sub-paragraph 3 of Article 3 of Annex I of the GBER 2008 (i.e. Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises") but its argumentation is: "[a]ccording to sub-paragraph 4 of this Annex, 'Enterprises which have [links] through a natural person or group of natural persons acting jointly are also considered linked enterprises if they engage in their activity or in part of their activity in the same relevant market or in adjacent markets'."

### ***3.2.4. Aid amount not proportionate***

- (25) Fourthly, the complainant argues that the aid amount was not proportionate as NAJPI has deliberately used artificially high eligible costs in order to benefit from the maximum possible aid granted.

### ***3.2.5. Negative effects of aid exceed the positive effects***

- (26) As a fifth allegation, the complainant put forward that in the present case, no positive effect is apparent. If necessary, the number of jobs created by NAJPI should only be regarded as a positive effect to the extent that they exceed the number of jobs that are lost by competitors of the beneficiary in the region.

### ***3.2.6. Aid distorts competition and is contrary to principles of TFEU***

- (27) As a next allegation, the complainant puts forward that the aid granted for the investment of NAJPI distorts competition in the market for the production of glass sand and that it destroys jobs in competing firms in the same sector. The complainant is therefore of the view that Slovakia has granted unlawful and incompatible regional aid to NAJPI for the above mentioned investment project.

### ***3.2.7. No innovative element in the project***

- (28) Finally, the complainant argues that the Slovak legal basis for the grant contains a requirement that the investment projects should be of a technologically innovative character. In the complainant's view, the investment project for which the above-mentioned aid was granted is not innovative. The investment project relies on currently available technologies. The method provided for the sand "attrition" is comparatively simple and corresponds at best to state of the art technology. The planned dewatering process by means of a filter also corresponds to the conventional state of the art technology, as is also used in other plants. The planned use of a drum dryer for the drying process is common in simple sandpits. The same applies to the intended use of multi-deck screening machines for dry sieving. The technical specifications of the grant agreement therefore contain no innovative elements.

### ***3.2.8. Conclusion of the complainant***

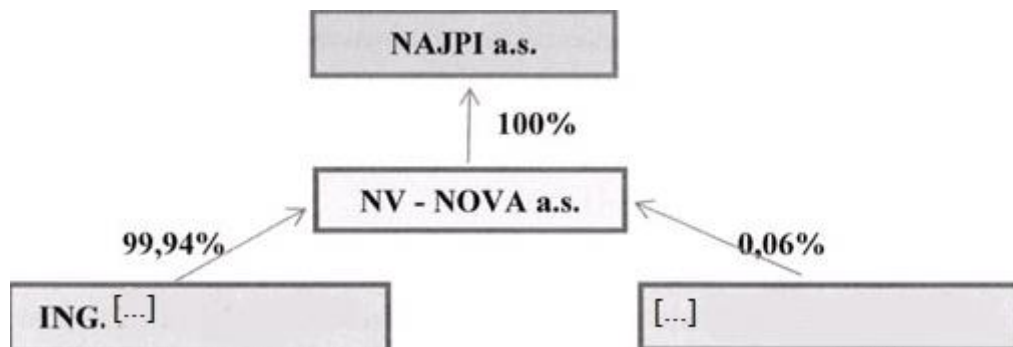
- (29) In view of the above, the complainant argues that the aid is not covered by the aid scheme invoked by the Slovak authorities, and that it therefore constitutes an *ad hoc* aid which falls outside the scope of the GBER 2008. The complainant did not agree with the Commission's preliminary positions in the two preliminary assessment letters that the scheme SA.28652(X518/2009) has been correctly implemented by the Slovak authorities and the regional investment aid granted to NAJPI fulfils the relevant conditions of that scheme while being in conformity with GBER 2008.

## **4. COMMENTS BY SLOVAKIA ON THE COMPLAINT**

- (30) Slovakia argues that the direct grant to NAJPI was given lawfully and under the existing aid scheme SA.28652(X518/2009), which is block-exempted in accordance with the GBER 2008. The aid was granted under Chapter 7 of the national legal basis.

- (31) The Slovak authorities provided the information needed by the Commission to assess whether: i) the aid scheme SA.28652(X518/2009) fulfils the conditions of the GBER 2008, and ii) the individual aid granted to NAJPI fulfils both the relevant conditions laid down in both the aid scheme SA.28652(X518/2009) and in the GBER 2008.
- (32) The company NAJPI is a beneficiary of a measure granted from the resources of the Operational Programme Competitiveness and Economic Growth (the 'Competitiveness Operational Programme'), approved under Commission Decision C(2007) 5940 of 28 October 2007 adopting the operational programme "Competitiveness and Economic Growth" for Community assistance from the European Regional Development Fund under the Convergence objective in the regions in Slovakia except for Bratislava CCI 2007SK161PO006.
- (33) The funding granted on the basis of a call under the Competitiveness Operational Programme comes from European Union sources (specifically the European Regional Development Fund) and from Slovakia's central government budget. The call was announced under the Operational Programme's Priority Axis 1 – Innovation and competitiveness growth, Measure 1.1 – Innovation and technology transfers, Sub-measure 1.1.1 – Support for the introduction of innovations and technology transfers.
- (34) The aim of granting aid under Call KaHR-111SP-1101 was *"to increase the competitiveness of existing undertakings by introducing innovative and advanced technologies, to create an environment that would be conducive to enhancing the innovation potential of undertakings in industry and services, to develop organic production as a necessity for the preparation of sustainable development in industry"*, and is consistent with the Operational Programme's global objective of *"ensuring sustainable economic growth and employment; greater deployment of innovative and advanced technologies in the business arena is also embraced in the pursuit of the global objective"*.
- (35) The Slovak authorities explained how they verified that the aid to NAJPI respects all the relevant conditions of the scheme SA.28652(X518/2009), notably the respect of the incentive effect requirement, the fact that the beneficiary NAJPI was not a firm in difficulties and enjoyed a status of an SME at the time of granting of the aid, the proportionality of the aid amount and the project's compliance with the criterion of innovativeness.
- (36) When it comes to the respect of the incentive effect, the Slovak authorities confirmed that the aid application was submitted on 19 March 2012, whilst the works on the project started only in 2013.
- (37) Furthermore, the Slovak authorities explained how they checked that NAJPI was not a firm in difficulties. By reference to the disclosures in the relevant financial statements (even after the period examined was extended to cover the years 2009 to 2013), the Slovak authorities were in a position to verify that the beneficiary could not be classified as an undertaking in difficulty pursuant to Article 1(7) of the General Block Exemption Regulation at the time of aid granting. They submitted the relevant documents to the Commission for verification (see paragraph 55 below).
- (38) For the purpose of establishing the status of the beneficiary as an SME, the Slovak authorities provided information on the ownership structures of the beneficiary NAJPI

as well as those of its owner, NOVA a.s. (hereinafter "NOVA") (see the diagram below). They also provided information on the links of all natural persons that are in the management or supervisory board of those companies with other companies. To that extent, the Slovak authorities provided available information on the activities of all these other companies in order to allow the Commission to verify whether they are active on markets adjacent to those of NAJPI. In the view of the Slovak authorities, NAJPI was an SME at the time of granting of the aid, when it was 100% owned by NOVA.



(39) In addition neither NOVA, nor NAJPI had shares in any other companies at the time of the granting of the aid. The statements of the Slovak authorities contained reference documents such as the list of the shareholders, share-purchase agreement and the confirmation of the shareholder's registration as well as Declaration of the company NOVA. The owners of NOVA, Ing. [...]\* and Mr [...], are both natural persons. Mr [...] only owns 0.06% of the company. The Slovak authorities also provided a list of the companies where Ing. [...] holds a management position. As opposed to the list submitted by the complainant, consisting of 23 undertakings, the companies in which according to the Slovak authorities, Mr [...] holds a management position are as follows:

- a. A. – G. – B., a.s. the business activity of which is unknown to the Slovak authorities; the complainant states that it is active in "commerce" and in "retail" and "wholesale" and "mediation"; there is no existing or past business relationship between NAJPI and this company;
- b. BIOLES, a.s. in the business of forestry and food processing, which is different from the activities of NAJPI; there is no existing or past business relationship between NAJPI and this company;
- c. EcoForrest, a.s. in the business of real estate renting, a company from which NAJPI leased property;
- d. IVEFLY, a.s. in the business of air transport; there is no existing or past business relationship between NAJPI and this company;
- e. LESSAND, a.s. in the business of real estate renting and there is no existing or past business relationship between NAJPI and this company;
- f. PRO DOMO, a.s.; the Slovak authorities have no information about the business activity of this company (the complainant indicates that the undertaking is active

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\* Confidential information



in "commerce" and in "retail" and "wholesale" and "mediation"); the Slovak authorities state that there is no existing or past business relationship between NAJPI and this company;

- g. PVOD Reka, a.s.; in the business of buying and selling real estate property, but there is no existing or past business relationship between NAJPI and this company;
  - h. SUKO spol. s r.o. in the business of owning and managing real estate property, and there is no existing or past business relationship between NAJPI and this company
  - i. VIVANT, a.s. the business activity of which is unknown to the Slovak authorities; (the complainant states that it is active in "commerce" and in "retail" and "wholesale" and "mediation"), and there is no existing or past business relationship between NAJPI and this company.
- (40) With regard to the allegation that the aid amount was not proportionate, the Slovak authorities argue that it is not clear what the complainant considers to be the real investment costs of the project. Regardless of this argumentation, they declared that NAJPI conducted a market research that was also attached to the aid application based on which NAJPI established the estimated costs to be spent for a realisation of the project. As part of the market research, three offers submitted by three entities were assessed by NAJPI. The offers ranged between EUR 12,831,372.20 and EUR 13,687,317.00. NAJPI duly conducted an open and transparent procurement process for the supply of goods, construction works and provision of services.<sup>9</sup> NAJPI selected UNIPID TRADE spol. s.r.o. as it offered overall the lowest price, i.e. EUR 12,831,372.20 without VAT.
- (41) Finally, in the opinion of the Slovak authorities, the innovative aspect of the investment project consists in the technology used for the production of the chemical compounds to be produced at the plant and also in the improved quality of the products. In particular, through the new process innovation it will be possible to optimise the production process, whereby the generation of the harmful substances will be reduced and the products obtained will have higher repeatability of quality, greater safety for humans and environment, and lower levels of impurities.
- (42) The Slovak authorities confirmed that the project concerned the implementation of new production technology. They explained that innovative elements, such as new innovation approaches, new technology to reduce the environmental impact, energy savings, etc., were assessed at the stage of evaluation taking into account all criteria concerning the innovative elements and impact of the business activities carried out in the context of the project on the environment within the meaning of Article 4.3 of the Guide for grant applicants. According to the project submitted, NAJPI will put a treatment line into operation which is innovative in terms of its dry sorting process. This new process also has a positive impact on the environment because it does away with the problem of sludge water and cuts down on water consumption, thus reducing the environmental burden.

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<sup>9</sup> The tender was published in the Journal of Public Procurement No. 127/2013 on 1 July 2013, code 10890-WYT as an Invitation to tender – "*Supply and installation of technology for the treatment of glass and foundry sands*".

## **5. ASSESSMENT OF THE AID MEASURE**

### **5.1. Existence of aid**

- (43) Under 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 Member States, be incompatible with the internal market.
- (44) The measure at stake confers to NAJPI an economic advantage in relation to other companies that do not receive such aid. Since it concerns an advantage granted to an individual undertaking, the measure is selective. Given the competitive nature of the chemical sector in which the beneficiary is active and the trade between Member States that takes place in that liberalised sector, the measure threatens to distort competition and affects trade between Member States by strengthening the competitive position of NAJPI. The measure is financed through State resources. Therefore, this measure constitutes State aid within the meaning of Article 107(1) TFEU. This conclusion is not contested by the Slovak authorities.

### **5.2. Aid granting date**

- (45) The Grant Agreement KaHR-111SP-1101/0561/37 (hereinafter "Grant Agreement")<sup>10</sup> for NAJPI's project between the Ministry of Economy as the managing authority for the Competitiveness Operational Programme and, simultaneously, as the aid grantor, represented by the Slovak Innovation and Energy Agency, and NAJPI was concluded on 29 October 2013.
- (46) Under Slovak law<sup>11</sup>, a grant agreement must be concluded in writing. Furthermore, within the meaning of the same provision, the agreement must be published because it constitutes a contract containing information that concerns the handling of the EU's financial resources.
- (47) The Grant Agreement was concluded on 29 October 2013<sup>12</sup>. However, the Grant Agreement is effective from the date it entered into force. In line with the Slovak Civil Code<sup>13</sup>, it entered into force on the day following its publication in the Central Register of Contracts, i.e. on 7 November 2013. The Grant Agreement concluded contained no other conditions deferring the binding effect thereof. Therefore the Commission considers that 7 November 2013 is the date of the granting of aid.

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<sup>10</sup> The Grant Agreement, along with all subsequent addenda thereto, is publicly available on the website of the Central Register of Contracts at <http://www.crz.gov.sk/index.php?ID=1127892&l=-sk>.

<sup>11</sup> Section 5a(1) of Act No 211/2000 on freedom of access to information and amending certain laws (the Freedom of Information Act), as amended.

<sup>12</sup> Within the meaning of Section 46(2) of Act No 40/1964, the Civil Code, as amended, written contracts are regarded as concluded when a written draft has been drawn up and that draft has been accepted in writing. In keeping with the above provision, Grant Agreement KaHR-111SP-1101/0561/37 between the Ministry of Economy as the managing authority for the Competitiveness Operational Programme and, simultaneously, as the aid grantor, represented by the Slovak Innovation and Energy Agency, and NAJPI as the aid beneficiary was concluded on 29 October 2013, because on that date the draft contract was accepted (signed) by the beneficiary's governing body.

<sup>13</sup> Section 47 a.

### 5.3. Conformity of the aid with the GBER

- (48) As a first step, the Commission analysed the conformity of the aid scheme applied by Slovakia with the provisions of the GBER 2008. The Commission then analysed the conformity of the individual aid first with the GBER 2008 and afterwards with the Commission Regulation (EC) No 651/2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty (hereinafter: "GBER 2014")<sup>14</sup>.
- (49) The table below presents the following aid elements (applicable legal basis, date of granting and aid amount in nominal value) concerning the aid measure granted to NAJPI.

	Aid Element	NAJPI
Direct grant	Applicable legal basis	X518/2009
	Aid granting date	7 November 2013
	Nominal aid amount	EUR 4,999,999.46
	Discounted aid amount	EUR 4,946,791.80

#### 5.3.1. The aid scheme X518/2009

- (50) In the case at hand, the aid to NAJPI was granted under the block exempted scheme X518/2009. The national legal basis of the scheme is the "Scheme for support for the introduction of innovative and advanced technologies in industry and services"<sup>15</sup> of 25 March 2008 on granting of aid in the framework of the Operational Programme Innovative Economy 2007-2013.
- (51) The legal basis for the aid scheme explicitly integrates the provisions of the relevant European legislation regarding state aid rules and explicitly refers to the GBER 2008.
- (52) The scheme foresees the granting of the aid in the form of direct grants. The scheme concerns initial investment projects, the applied aid intensity is fixed in conformity with the Slovak regional aid map 2007-2013<sup>16</sup>, the eligible expenditure is defined in line with the GBER 2008 (buildings, equipment, land), the required own contribution of the beneficiaries must exceed 25% of the total investment costs, and the eligible investment has to be maintained for a minimum of five years in the region concerned.
- (53) The Commission therefore concludes that the aid scheme fulfils the conditions of the GBER 2008.

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<sup>14</sup> Commission Regulation (EC) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty (General block exemption Regulation, GBER 2014, OJ L 187, 26.06.2014, p. 1)

<sup>15</sup> Schéma štátnej pomoci na podporu zavádzania inovatívnych a vyspelých technológií v priemysle a v službách, published in the following link: [http://www.mhsr.sk/13849-ext\\_dok/129972c](http://www.mhsr.sk/13849-ext_dok/129972c). The State Aid Scheme was published as part of the call for grant applications at <http://www.mhsr.sk/kod-vyzvy-kahr-111sp-1101/137255s>

<sup>16</sup> Commission decision N469/2006 Slovak regional aid map 2007-2013 (OJ C 256, 24.10.2016, p. 6).

### ***5.3.2. The individual aid in the form of direct grant awarded under the scheme X518/2009***

- (54) As regards the individual aid awarded to NAJPI under the scheme X518/2009, the Commission analysed its conformity with the GBER 2008. In general, that individual aid seems to comply with the conditions of the GBER 2008.
- (55) However, pursuant to Article 3(2) of the GBER 2008, individual aid fulfilling all the conditions of Chapters I and II of that regulation, which is awarded on the basis of a scheme which also fulfils all the provisions of the same regulation, shall be compatible with the internal market and shall be exempt from the notification requirement, provided that the individual aid measure contains an express reference to the relevant provisions of GBER 2008, by citing the relevant provisions, the title of this Regulation and its publication reference in the Official Journal of the European Union. The individual aid measure at hand only contains an express reference to the scheme, but not to the GBER 2008 as required by Article 3(2).
- (56) Nevertheless, Article 58 of the GBER 2014 provides for the retroactive application of the compatibility conditions set out in that Regulation to individual aid measures granted before its entry into force (i.e. before 1 July 2014). The Commission has established that the aid was granted to NAJPI on 7 November 2013. Given that the individual aid does not comply with the Article 3(2) of the GBER 2008, the Commission assessed whether the aid to NAJPI can be declared compatible with the internal market on the basis of its conformity with all provisions of the GBER 2014.
- (57) The Commission notes that the conditions required by GBER 2014 have been fulfilled as follows:
- a. In conformity with Article 14(2) of the GBER 2014, the aid is granted for an initial investment project in the Trnava region in western Slovakia, which is a region eligible for regional aid as an assisted area covered by Article 107(3)(a) TFEU both under the Slovak regional aid map 2007-2013 and under the Slovak regional aid map 2014-2020.
  - b. Article 14(12) of the GBER 2014 states that the aid intensity in GGE shall not exceed the maximum aid intensity which is in force at the time the aid is granted in the area concerned. As described above this was 40% GGE for large enterprises under the Slovak regional aid map 2007-2013.<sup>17</sup> Since the aid to NAJPI had a GGE of 40%, it complies with the Slovak regional aid map 2007-2013. In addition, Articles 14(2) and 2(27) of the GBER 2014 require that the aid intensities in the Slovak regional aid map 2014-2020<sup>18</sup> be respected. The aid ceiling for the region SK02 Západné Slovensko was lowered to 25% GGE for large enterprises. However, this percentage can be increased by 10% GGE for medium-sized enterprises and by 20% GGE for small enterprises. In the present case, applying the standard regional ceiling of 25% and the 20% increase for a small enterprise, a maximum aid intensity of 45% would be allowable for the total eligible costs amounting to EUR 12,499,998.65 (in nominal value) for NAJPI's investment.

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<sup>17</sup> This percentage could be increased by 10% GGE for medium-sized enterprises and 20% GGE for small enterprises.

<sup>18</sup> SA.37447 (2013/N) Slovak regional aid map 2014-2020 (OJ C 210, 4.7.2014, p. 4).

Slovakia granted aid amounting to EUR 4,999,999.46 (in nominal value), corresponding to an aid intensity of 40%, which is below the maximum aid intensity of 45%. In discounted value, the aid intensity remains below 45% with total eligible costs amounting to EUR 12,366,979.49 and the aid to EUR 4,946,791.80.

- c. NAJPI, which is a limited liability company, was not a firm in difficulty at the time of aid granting, as required by Article 1(4)(c) of the GBER 2014. In years 2011 and 2012 the value of ½ of the share capital was 12,500 EUR and the value of ¾ of share capital was 18,750 EUR. As the value of NAJPI's equity in the period between 2011 and 2012 was within the range of 13,532 EUR – 18,612 EUR, the company did not qualify as a company in difficulties (the minimum threshold of ½ of the share capital was achieved) during those two years. In 2013 the company significantly increased its share capital to EUR 1,548,747 as well as its equity to EUR 2,142,157. Therefore, NAJPI did not qualify as a company in difficulties in 2013, i.e. at the time of aid granting, either. Moreover, when the aid was granted, NAJPI did not fulfil the criteria under its domestic law for being the subject of collective insolvency proceedings.
- d. SME status of the beneficiary on the date of the granting of the aid

#### Structure of the beneficiary

The complainant alleged that the beneficiary was not an SME at the day of the granting of the aid and therefore it has not qualified for the SME bonus of 10% GGE as approved by the Slovak authorities.

The Slovak authorities confirmed that they assessed whether NAJPI was an SME in accordance with the criteria set out in Annex I of the GBER 2008 on the date the aid was granted. These criteria have not changed in the GBER 2014 (the SME definition set out in Annex I of GBER 2014 is essentially the same as the definition set out in Annex I of GBER 2008). Therefore, given that NAJPI satisfies the SME criteria set out in GBER 2008, it also satisfies the SME criteria set out in GBER 2014. This is analysed in detail in the recitals that follow.

Until 31 December 2012, PATRIA held 100% of shareholders' voting rights in NAJPI. By virtue of a contract for the purchase of securities concluded on 31 December 2012 between PATRIA and NOVA, PATRIA transferred all the shares of NAJPI to NOVA. Pursuant to information provided in the Business Registry, the change of the shareholder of NAJPI was registered therein on 7 August 2013. However, it is undisputed that at the time of granting, i.e. on 7 November 2013, NOVA owned 100% of NAJPI. The ultimate shareholders are the two natural persons, Ing. [...] and Mr [...], as indicated in the chart in paragraph 38.

#### Relevant point in time for SME status

The SME status of an undertaking which applies for aid must be assessed when that aid is granted to it, in other words, *'at the time that the right to receive it is*

*conferred on the beneficiary under the applicable national rules*'.<sup>19</sup> In the present case, the date that the aid was granted is 7 November 2013.

### The SME Recommendation

Pursuant to Article 3 of Annex I of the GBER 2014 (i.e. Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises) an 'autonomous enterprise' is any enterprise which is not classified as a partner enterprise within the meaning of its paragraph 2 or as a linked enterprise within the meaning of its paragraph 3.

Paragraph 2 of the SME Recommendation stipulates that partner enterprises are all enterprises which are not linked enterprises and between which there is the following relationship: an enterprise (upstream enterprise) holds, either solely or jointly with one or more linked enterprises within the meaning of paragraph 3, 25 % or more of the capital or voting rights of another enterprise (downstream enterprise).

The Commission concludes that neither NAJPI, nor NOVA possessed 25% or more, alone or together with other enterprises, of the initial capital or voting rights in another enterprise. The ultimate shareholders are two natural persons Ing. [...] and Mr [...], as indicated in paragraphs 38-39 of this decision. There are no enterprises that own, alone or with other enterprises, more than 25% of the capital or voting rights in NOVA or NAJPI (and such an allegation was not made in this complaint.)

Pursuant to paragraph 3 of the SME Recommendation "linked enterprises" are enterprises which have any of the following relationships with each other:

- a. one enterprise has a majority of the shareholders' or members' voting rights in the other enterprise;
- b. one enterprise has the right to appoint or remove a majority of the members of the administrative, management or supervisory body of the other enterprise;
- c. one enterprise has the right to exercise a dominant influence over the other enterprise pursuant to a contract entered into with the other enterprise, or to provisions in the other enterprise's memorandum or articles of association, or
- d. one enterprise, which is a shareholder in or a member of another enterprise, controls alone, or pursuant to an agreement with the other shareholders in or members of that other enterprise, a majority of the voting rights of that enterprise.

On the basis of the information from the Slovak authorities, the Commission has concluded that, at the time of the grant of the aid, neither NAJPI nor NOVA had any of the relationships described in the abovementioned points (a) to (d) with another enterprise.

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<sup>19</sup> See the Opinion of Advocate-General Campos Sanchez-Bordona in Case C-245/16 Nerea EU:C:2017:271, para. 71 and the case-law cited therein.

Indent 3 of Article 3(3) of the Annex to the SME Recommendation also states that enterprises having any of the relationships described in points (a) to (d) in the first subparagraph of Article 3(3) through one or more other enterprises, or any one of the investors mentioned in paragraph 2, are also considered to be linked.

The Commission finds that given that no enterprise has a "link" to NAJPI or NOVA that would fall under any one of points (a) to (d) of Article 3(3) (see further details below), and there are no partner enterprises to NAJPI or NOVA upstream or downstream to them pursuant to paragraph 2 of Article 3, there are no enterprises with which NAJPI or NOVA would form a type of link described in Indent 3 of Article 3(3).

#### Case law relating to a finding of links between undertakings "acting jointly"

Indent 4 of Article 3(3) of the Annex to the SME Recommendation also states that if any of the relationships described in points (a) to (d) of the first sub-paragraph of paragraph 3 of Article 3 occurs through the ownership in the enterprise(s) of an individual or individuals acting "jointly", the enterprises are also linked if they are active on adjacent markets.

The notion of "acting jointly" was explored by the Court judgment of 27 February 2014 in case C-110/13 *HaTeFo*<sup>20</sup> (hereinafter "HaTeFo GmbH") and a final Commission decision (SA. 18184 (C 8/2005 (ex N 451/2004)) - *Aid to Nordbrandenburger Umesterungs Werke NUW*<sup>21</sup> (hereinafter "NUW Biofuel").

The *HaTeFo GmbH* judgment concluded that a finding that none of the conditions of points (a) to (d) of Article 3(3) applies in a particular case does not preclude a finding that two enterprises are linked (paragraph 29). However, the persons acting jointly must exercise an influence over the commercial decisions of the enterprises concerned which precludes the enterprises from being viewed as economically independent. A conclusion in a particular case, the Court continues, must depend on the circumstances of each case. The Court's conclusion that the enterprises were linked relied on a number of factors, including that one of the enterprises in question sold its entire output to the second enterprise, which had a monopoly in the market, hence the first enterprise was "not visible" on the market.

In *NUW Biofuel* the Commission opened a formal investigation procedure to determine whether an aid beneficiary (NUW) and "partner" enterprises NBE, and MBE (together still meeting all criteria of the SME definition) constitute one single SME or they are linked to or form part of a group of 16 enterprises presenting a complicated web of ownership by 6 close family members where the relationships between these undertakings do not necessarily meet the formal criteria of Article (3)(2) or Article (3)(3) of the SME Recommendation.

Links between NUW, NBE and MBE and the other 13 member enterprises of the group were found on the following grounds:

1. Majority ownership by one or more members of the family in most of the technically independent enterprises;

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<sup>20</sup> See the Judgment of the Court of 27 February 2014 in Case C-110/13 *HaTeFo GmbH v. Finanzamt Haldensleben*, EU:C:2014:114

<sup>21</sup> Commission Decision of 7 June 2006 on State aid (C 8/2005, ex N 451/2004), OJ L 353, 13.12.2006, p. 60.

2. Managing director positions by the close family members in most of these companies;
3. Operation in the same or related markets (bioethanol, or bio diesel, sales, construction of biofuel plants, trade in bioenergy, marketing of renewables, etc.);
4. Overlapping relations to suppliers and customers;
5. Cooperation between member enterprises in the area of transport, logistics (e.g. transport fleets), marketing, staffing, offices and customers indicate that activities are coordinated;
6. Cooperation among the enterprises in numerous other markets, such as real estate;
7. Treatment of the enterprises as a "group" by banks' analysis;
8. Construction contract by the beneficiary of the aided production plant to another member enterprise and co-financing of the plant by this other enterprise;
9. Common history and evidence of joint development of businesses;

On the basis of these factors, the family was found to constitute a group of natural persons acting jointly within the meaning of Article (3)(3) of the Annex to the SME Recommendation (recital 61 of NUW Biofuel).

It is evident from the information provided by the Slovak authorities that most of the undertakings in which Mr [...] has a management position are not active in the same market as NAJPI. In fact the designation of the market activities by the complainant in most cases only amounting to description as "commerce", "retail", "wholesale" are so vague that it cannot be concluded with any degree of certainty that NAJPI or NOVA or any one of these undertakings are in the same or adjacent market. Further, the Slovak authorities confirmed that with the exception of a lease contract, none of the undertakings in question has had or is having any commercial relationship with NAJPI or NOVA. Both HaTeFo and NUW Biofuel required (among other stringent factors) that there is strong commercial relationship between the allegedly linked undertakings in the form of sales/purchase agreements or shared suppliers and/or other business interests.

On the basis of these considerations, the Commission concludes that the standards articulated in the above described case law, of finding that undertakings are linked, within the meaning of Article 3(3) subparagraphs 4 of Annex I of the GBER 2014 have not been met, and hence NAJPI and NOVA have no linked enterprises.

Therefore, NAJPI, together with NOVA, was an SME at the relevant point in time, i.e. at the time of granting and no other undertaking's data must be taken into consideration.



	<b>NAJPI &amp; NOVA Year 2010</b>	<b>NAJPI &amp; NOVA Year 2011</b>	<b>NAJPI &amp; NOVA Year 2012</b>	<b>NAJPI &amp; NOVA Year 2013</b>	<b>NAJPI &amp; NOVA Year 2014</b>	<b>NAJPI &amp; NOVA Year 2015</b>
Overall number of staff in the companies	5	5	5	5	8	24
Yearly turnover of the companies (in EUR)	2,076	1,044,282	115,689.76	40,940.24	150,243.29	869,787.79
Balance sheet total (in EUR)	1,563,261	3,118,827	3,288,383	4,726,804	27,492,287	26,754,394

The above data demonstrate that the number of employees, the yearly turnover and balance sheet total for NAJPI and NOVA did not exceed the maximum ceilings set for a small enterprise.

- e. In conformity with Article 3 of the GBER 2014, the financial support given to NAJPI is awarded on the basis of the block exempted scheme X518/2009. On 27 May 2009, the Slovak authorities submitted the information summary sheet on the scheme to the Commission services. It was registered by the State aid registry as SA.28652 (X518/2009).
  - f. As required by Article 14(3) of the GBER 2014, the aid is given for an initial investment project of a new plant. The eligible expenditure is defined in conformity with the applicable rules. In line with Articles 14(5) and 14(14) of the GBER 2014, the investment has to remain in the assisted area for a minimum period of three years after its completion and the own contribution, free of aid, of the beneficiary to the project exceeds the required 25% threshold.
  - g. In conformity with Article 6(2) of the GBER 2014, the incentive effect of the aid awarded on the basis of the aid scheme X518/2009 is ensured, since the beneficiary applied for the aid on 19 March 2012 i.e. before the start of works, which started on 11 November 2013. The underlying grant agreement was signed on 29 October 2013 and entered into force on 7 November 2013. Although not required for SMEs by the GBER 2008 nor by the GBER 2014, Slovakia verified (before granting the individual aid concerned) the incentive effect requirements and provided documentary evidence proving that.
- (58) In conformity with Article 5(2)(a) of the GBER 2014, the aid (i.e. direct grant) awarded to NAJPI constitutes a transparent form of aid.
- (59) NAJPI was active in a sector, which is not excluded from the scope of application of the GBER 2014 (and in particular from the scope of application of Article 13 of the GBER 2014).
- (60) In the two-year period until the date of the application, the beneficiary did not have any establishments in other Member States. Therefore it could not have closed the same or similar activity in another Member State, nor could it have had concrete plans to close such an activity in another Member State within two years after the completion of the aided investment project. As such the beneficiary is considered to comply with the requirement of Article 13(d) of the GBER 2014.

- (61) The Commission notes that the GBER does not include any requirement of innovativeness as a condition for measures to be exempted as regional investment aid. Such requirement seems to stem only from the national legal basis. Therefore, the question whether the project complied with the requirement of innovativeness is not relevant for the assessment of the project's compliance with the GBER 2014.
- (62) In any event, before granting the aid, the Slovak authorities assessed the fulfilment of all the relevant criteria, including its compliance with the requirement for the project to "use innovative and advanced technologies". In the context of the criteria's assessment, it was concluded that the technology introduced as part of the project will contribute to the technical improvement of the current manufacturing process, that it is a low-energy technology, it enables more efficient use of mineral resources in terms of higher yield and a high degree of purity of the final product/raw materials. Technological innovations introduced in the context of the project are demonstrable in three areas: technological process, impact on the environment and energy saving.
- (63) Moreover, the allegations put forward by the complainant concerning the distortion of competition and breach of the principles of the Treaty<sup>22</sup> are not relevant for the present assessment given the fact that the measure fulfils all the criteria required by the GBER 2014 and therefore is exempted from notification and deemed to be compatible with the internal market.

## 6. CONCLUSION

- (64) In light of the foregoing assessment, the Commission has accordingly found that the aid scheme SA.28652(X518/2009) introduced by the Slovak Republic falls under Regulation (EC) 800/2008 and that the individual financing granted on the basis of that scheme and analysed in the present Decision, in particular the regional aid that NAJPI received for its investment project "Úprava zlievarenských a sklárskych pieskov", complies with that scheme and with Regulation (EC) 651/2014. Therefore, those measures are block exempted and the Commission is hence not competent to examine them on the basis of the preliminary investigation procedure foreseen in Article 4 Regulation (EU) 2015/1589.
- (65) The complaint filed by an anonymous complainant on the basis of Article 24(2) of Regulation (EU) 2015/1589 is rejected as unfounded.

If this letter contains confidential information which should not be disclosed to third parties, 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 the disclosure to third parties and to the publication of the full text of the letter in the authentic language on the Internet site: <http://ec.europa.eu/competition/elojade/isef/index.cfm>.

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<sup>22</sup> See in particular the allegations described in recitals (21), (22), (26) and (27) of the present decision.

Your request should be sent electronically to the following address:

European Commission,  
Directorate-General Competition  
State Aid Registry  
B-1049 Brussels  
[Stateaidgreffe@ec.europa.eu](mailto:Stateaidgreffe@ec.europa.eu)

Yours faithfully  
For the Commission

Margrethe VESTAGER  
Member of the Commission