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V. Illegality of the imposition of an obligation for financial compensation

According to Article 3 of Directive 2003/54/EC, Member States may impose on energy suppliers PSOs, which they shall clearly define and, when financial compensation is provided for, this shall be done in a non-discriminatory and transparent way. The Directive, however, does not regulate other issues, as e.g. who is burdened with the obligation for financial compensation, leaving this responsibility to Member States. Thus, in a situation as such where, in violation of the Directive, PPC's monopoly in the energy supply market is maintained, the granting of financial compensation to PPC so as to balance its costs, and further on, the imposition of the obligation for financial compensation on all other energy suppliers active in the Interconnected System, is in breach of the Directive's provision and, more specific, of Article 3 thereof.

Therefore, the Council of State found that the financial compensation may not be regarded as being provided for in a non-discriminatory and transparent way, as it reflects a cost which occurs for PPC from its function in a market closed to competition, under conditions of an illegal monopoly.

Following the above mentioned reasoning, the Council of State pronounced the annulment of the contested Ministerial Acts, by which the annual allocation for PSO cost and the charges applicable to each category of consumers for the years 2008, 2009 and 2010 were determined.

Alexia-Eirini Xeniti, LL.M.
Metaxas & Associates, Athens

Hungary

The insolvency of Malév Hungarian Airlines after the decision of the European Commission and Hungarian rules on companies of strategic importance

In a decision dated from 21 December 2010, the European Commission found that financing granted to Malév Hungarian Airlines between 2007 and 2010 in the context of its privatisation and renationalisation constitutes illegal State aid, meaning that Hungary needs to recover the aid granted to Malév and may no longer subsidize it on the same terms.[1] Malév has been in a difficult financial situation for years and finally, as a result of the Commission's negative decision, it appears that it will not be able to operate any further, due to the huge debts accumulated over years and because of the obligation to repay the illegal aid.

To prevent this development, the Hungarian government declared on 30 January 2012 that Malév is a company of "outstanding strategic importance",[2] which is a relatively new legal concept. It was introduced as of 4 August 2011 by the Hungarian Parliament and slightly amended as of 1 January 2012.[3]

The rules relating to companies of strategic importance and to companies of outstanding strategic importance authorize the Hungarian government to declare companies that meet the conditions set out in the legislation as being of strategic or of outstanding strategic importance which allows to provide for certain derogations to the general rules of bankruptcy (reorganization) proceedings, liquidation proceedings and to the rules relating to the approval of concentrations executed as part of a liquidation.

These special rules – outlined below – are aimed at ordering and executing the liquidation in an expedited manner and at preserving the company's operability during this period as much as possible. Furthermore, they provide for the sale of the company's assets as a whole, at the highest price available. As such, they also enable unlawful State aid received by Malév to be repaid to the greatest achievable extent.

1 Commission Decision on Case C38/2010 (ex NN 69/2010), pending OJ publication.

2 Government Decree no. 4/2012 (I. 30.)

3 See Act CXV of 2011 on The Special Rules of The Bankruptcy Proceeding and Liquidation of Companies Having a Special Importance for The National Economy, and on Related Amendment of Acts and Act CXCVII of 2011 on the Amendment of Act XLIX of 1991 on Bankruptcy Proceedings and Liquidation Proceedings, of Act IV of 2006 on Business Associations, of Act V on Company Registry, Company Registration Proceedings and Winding-Up Proceeding, and of Certain Related Acts. The rules are incorporated in Act CXCVII of 2011 on the Amendment of Act XLIX of 1991 on Bankruptcy Proceedings and Liquidation Proceedings.

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According to the relevant legislation, a company may be declared to be of "strategic importance" in a government decree, if the company (i) performs a strategic activity significant for the national economy or (ii) performs a project significant for the national economy, (iii) carries out a state task, (iv) received a significant State aid, or (v) has a great significance for national security, defence, energy provision, environmental protection, national health, traffic, or for the provision of the population with basic services, etc. It is also a precondition that there should be a special national or public interest in the reorganization or the fast and transparent liquidation of the company. It follows that not only state-owned companies may be declared of "strategic importance". It is also important to note that the legislation does not allow the judiciary to supervise whether the above statutory conditions are met by the company declared by the government decree to be of "strategic importance".

In the case of companies of strategic importance, the following special rules apply:

- The liquidator or bankruptcy trustee shall be the single non-profit state entity also appointed for the liquidation of financial institutions.
- The public liquidator may not be dismissed for the breach of its duties, only a fine may be imposed upon him.
- Somewhat shorter deadlines apply to the liquidation proceedings.
- A settlement may be concluded in the liquidation proceedings with a smaller majority of the creditors (representing at least 50% of the claim amounts, instead of two thirds).

In addition to the above, the Government may also decide that not only those rules, but also further specific rules shall apply to companies of strategic importance that have *outstanding* importance in defence, national security, law enforcement, energy provision or in the provision of the population with public utilities (companies of outstanding strategic importance).

The government may declare such a classification if the lack of assets cannot be remedied, the accumulation of loss cannot be stopped or no subsidy can be granted, but there is a public interest in selling the assets of the company as a "going concern".

Malév was the first company declared to be of outstanding strategic importance. Practically, the government decree issued in relation to Malév does not mention exactly why Malév qualifies as a company of outstanding strategic importance, but it refers to the legal background only in general.[4]

If a company is classified as having outstanding strategic importance, creditors may not initiate bankruptcy (reorganization) proceedings against the company.[5] Instead, liquidation proceedings may be initiated, which aims to provide satisfaction to the creditors of an insolvent debtor upon its winding-up without succession. After the initiation of the liquidation proceedings and before the decision whether or not to start the liquidation is taken, the court shall order an "extraordinary moratorium" (similar to the bankruptcy moratorium) and appoint the public liquidator immediately after receiving the liquidation request. The aim of the extraordinary moratorium is to ensure a temporary operation of the company, during which payments can only be made if they are countersigned by the public liquidator, and third parties may not terminate their contracts with the debtor company.

The court must examine the request for liquidation within five days, and hold a hearing with the debtor company and the applicant. If the company is not declared insolvent and liquidation does not commence, the extraordinary moratorium lapses. If the company is declared insolvent, the liquidation shall be commenced and the extraordinary moratorium is extended for 90 days after the publication of the insolvency (the commencement of the liquidation).

Once the liquidation of the company commences, the most important rule is that the public liquidator shall make efforts to sell the assets of a company of outstanding importance as a "going concern", and at the highest price available. If necessary, the liquidator may also

4 According to the procedural rules of the classification (Government Decree 359/2011. (XII. 30.), the reason for strategic importance has to be indicated in the proposal. However, the (intra-government) proposal is not a public document. In November 2011, the Ministry of National Development issued a white paper on "The Heritage of Malév", demonstrating the problems of Malév in the last ten years, the reasons thereof and also explaining why the Government considers that a national airline company is necessary. However, the white paper mainly referred to financial reasons, business, and employment aspects. The reasoning in the white paper does not refer to the importance of Malév in defence, national security, law enforcement, energy provision or in the provision of the population with public utilities.

5 Bankruptcy proceedings are proceedings where the debtor is granted a stay of payment with a view to seeking an arrangement with creditors, or to attempting to enter into a composition arrangement with creditors.

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decide not to sell the assets publicly (contrary to the rules applicable to regular liquidations), but rather will issue a closed tender or negotiate directly. The creditors cannot challenge this decision, but the final contract between the liquidator and the purchaser may be challenged in court. However, if the assets are not sold publicly, the valuation report of at least three independent experts shall be obtained, and the price may not be less than the arithmetic mean of the three valuations.

Throughout the whole liquidation proceedings applicable to companies of outstanding strategic importance, very strict deadlines apply to the court and the liquidator in order to close the proceeding as fast as possible.

On 1 February 2012, in the liquidation proceedings initiated against Malév per request of one of its creditors, Malév was granted the extraordinary moratorium described above from 12:00 pm 1 February 2012.[6] On 14 February 2012, the liquidation of Malév was ordered by the court and the extraordinary moratorium was prolonged for 90 days.[7] In the liquidation proceedings, claims are ranked. The unlawful and (therefore repayable) State aid is ranked as fifth, after the costs of the liquidation, secured claims, life annuities and claims of private persons, small and medium enterprises, and is in the same rank as tax claims. However, it precedes all other ordinary claims and all interest claims.[8]

Although the question may arise that the status granted to Malév by the government is an (unjustified) advantage, it should not raise further concerns, as the legislation in itself does not aim at the subsidization of the company, but rather the continuous provision of services and the sale of the assets at the best price available. It should be noted that creditor's claims that arise during the extraordinary moratorium, and are approved by the liquidator, are payable as first ranking liquidation costs, even before the liquidation is closed.

Anikó Keller and
Bence Molnár
Szecskay Attorneys at Law

6 Published in the Company Gazette dated February 2, 2012.

7 Published in the Company Gazette dated February 14, 2012.

8 Paragraph e) of Section 57 (1) of Act XLIX of 1991.

Italy

From Stability to Growth: State Aid to Credit Institutions in the Italian Anti-Crisis Package

In view of addressing the high national debt and low growth, Italy has launched a deep reform of the entire national system, which encompasses the labour market, pensions, taxation, entrepreneurship, public administration, competition as well as the liberalisation of professional guilds and key public services.

For these purposes the Italian Parliament passed a first set of measures embodied in Decree-Law No 201/2011 ("Save Italy Decree")[1] mainly concerned with stabilisation. By Decree-Law No 1/2012 ("Grow Italy Decree"),[2] the Italian Government provided a second set of measures focused on competition, infrastructures and growth, which has been approved by the Parliament by Law No 27/2012.

In the view of the Italian Government and Parliament, the Save Italy and Grow Italy Decrees constitute valuable first steps in the on-going reform process aiming at the substantial modernisation of the overall national system.

In this broad scenario, Article 8 of Decree-Law No 201/2011 specifically addresses the stabilisation of the Italian credit system by providing a guarantee scheme for national banks' liabilities pursuant to the European Commission *Communication concerning State aid to the banking sector in the financial crisis.*[3]

1 Decree-Law No 201 of 6 December 2011, Disposizioni urgenti per la crescita, l'equità e il consolidamento dei conti pubblici, in GURI No 284 S.O. of 6 December 2011.

2 Decree-Law No 1 of 24 January 2012, Disposizioni urgenti per la concorrenza, lo sviluppo delle infrastrutture e la competitività, in GURI No 19 S.O. of 24 January 2012.

3 OJ 2011 C 356/7.