DECISIONS

COMMISSION DECISION

of 9 June 2010

on state aid C 1/09 (ex NN 69/08) granted by Hungary to MOL Nyrt.

(notified under document C(2010) 3553)

(Only the Hungarian text is authentic)

(Text with EEA relevance)

(2011/88/EU)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union, and in particular the first subparagraph of Article 108(2) thereof,

Having regard to the Agreement on the European Economic Area, and in particular Article 62(1)(a) thereof,

Having regard to the Commission Decision initiating the procedure laid down in Article 108(2) of the Treaty [1] in respect of aid No C 1/09 (ex NN 69/08) [2],

Having called on interested parties to submit their comments pursuant to the provisions cited above, and having regard to their comments,

Whereas:

I. PROCEDURE

(1) On 13 January 2009, following a complaint received on 14 November 2007, the Commission opened a formal investigation procedure into measures put in place by Hungary allegedly constituting state aid in favour of a company called Hungarian Oil & Gas Plc (*Magyar Olaj- és Gázipari Nyrt.*; hereinafter 'MOL').

(2) Hungary submitted its comments on the Commission's opening decision on 8 April 2009.

(3) The opening decision was published in the *Official Journal of the European Union* on 28 March 2009 [3]. Comments were received from two interested parties: MOL and the Hungarian Mining Association (*Magyar Bányászati Szövetség*), both on 27 April 2009.

(4) The Commission transmitted the comments to Hungary by letter of 2 June 2009. By letter of 3 July 2009 Hungary reported that it had no comments to make on the observations of the interested parties.

(5) The Commission requested further information from the Hungarian authorities on 21 September 2009 and 12 January 2010, and Hungary replied by letters of 19 October 2009 and 9 February 2010.

II. THE BENEFICIARY

(6) MOL is an integrated oil and gas company based in Budapest, Hungary. MOL's core activities in the Hungarian market include: exploration for and extraction of crude oil and natural gas; manufacturing of gas products; the refining, transportation, storage and distribution of crude oil products at both retail and wholesale; transmission of natural gas; and the production and sale of olefins and polyolefins. In addition, the MOL Group (to which MOL belongs) also includes several other Hungarian and foreign subsidiaries [4].

(7) In Hungary and Slovakia the MOL Group is market leader in each of its core activities. In 2008 the net sales of MOL and the MOL Group were around EUR 6,8 billion and EUR 13 billion respectively [5]. In the same year their respective operating profits were around EUR 400 million and EUR 732 million.

[1] With effect from 1 December 2009, Articles 87 and 88 of the EC Treaty became Articles 107 and 108, respectively, of the Treaty on the Functioning of the European Union; the two sets of provisions are, in substance, identical. For the purposes of this Decision, references to Articles 107 and 108 of the TFEU should be understood as references to Articles 87 and 88, respectively, of the EC Treaty as appropriate.

[2] Commission Decision 2009/C 74/05 (OJ C 74, 28.3.2009, p. 63).

[3] See footnote 2.

[4] For example, TVK (one of Hungary's leading chemical companies), Slovnaft (a Slovak oil company) and Roth (an Austrian retail and wholesale company). The Group also has a strategic partnership with the Croatian company INA.

[5] http://www.molgroup.hu/en/investors/financial_reports/

III. **DESCRIPTION OF THE MEASURE**

The Mining Act

(8) The general rules governing mining activities in Hungary are laid down in the 1993 Act on Mining (hereinafter 'Mining Act') [6], which also governs mining activities (prospecting, exploration and extraction) involving hydrocarbons (i.e. crude oil and natural gas).

(9) The Mining Act distinguishes mining activities exercised on the basis of two different legal instruments: (i) concession [7] and (ii) authorisation [8].

— In the case of a *concession*, the minister responsible for mining (hereinafter 'competent minister') concludes a contract [9] with the successful bidder following an open tender [10] for the exploitation of a 'closed area'.

— This is different from 'open areas' [11], where *authorisation* of mining rights cannot be refused by the Mining Authority if the applicant fulfils the conditions laid down by law [12].

(10) According to the definition in the Mining Act [13], closed areas are reserved for mining activities on the basis of a concession. Consequently any area other than a closed area qualifies as an open area. According to the explanation provided by Hungary, the original intention was to classify all fields as closed areas designated for concession. Open areas presumed to be less rich in minerals would have been the exception. In such cases, the fields were thought to be less valuable and no bids were expected to be received in an open tender.

(11) The Mining Act also stipulates that the extraction of mineral resources is subject to a mining fee payable to the State, the amount being a percentage of the value of the minerals extracted [14]. The mining fee differs depending on the regime applicable:

— In the case of concessions, the amount of the mining fee is laid down in the concession agreement [15],

— For mineral resources extracted under authorisation, the fee is governed by the Mining Act [16]. Until January 2008, the mining fee related to the extraction of hydrocarbons under authorisation amounted to 12 % for fields put into operation as from 1 January 1998 and J % for fields put into production before 1 January 1998 [17]. The factor 'J' was to be calculated according to a formula based on historical gas prices, extracted quantity and value; its minimum value was set at 12 %.

Section 26/A(5) of the Mining Act

(12) Section 26/A(5) of the Mining Act stipulates that where a mining company under the authorisation regime does not start extraction within 5 years from the date of the Mining Authority's authorisation, the mining right is withdrawn [18].

(13) This Section also provides for the possibility of an extension of this deadline by agreement between the competent minister and the mining company [19]. The Section provides for three different fees to be paid where extension of the mining right is granted:

(a) firstly, an extension fee has to be paid for the idle fields until operation is actually started; this fee is maximum 1,2 times the original mining fee, calculated on the basis of a stipulated hypothetical amount of minerals, since this charge has to be paid at a time when there has still not been any actual production on the field;

(6) *1993. évi XLVIII. Törvény a bányászatról* (Act No XLVIII of 1993 on Mining).
(7) Section 8 of the Mining Act.
(8) Section 5 of the Mining Act.
(9) Section 12 of the Mining Act.
(10) Section 10 of the Mining Act.
(11) Section 5(1)(a) of the Mining Act.
(12) Section 5(4) of the Mining Act.
(13) Section 9 of the Mining Act.
(14) Section 20(1) of the Mining Act.
(15) Section 20(11) of the Mining Act.
(16) Section 20(2)-(7) of the Mining Act.
(17) Other fees were stipulated for other types of minerals, such as solid minerals.
(18) Section 26/A(5) of the Mining Act reads as follows: 'the mining company shall start production […] within 5 years of the mining field being established. The mining company may ask the Mining Authority to extend this deadline by up to 5 years once only. The mining company shall pay a charge if an extension is granted. The amount of mineral raw material corresponding to the charge and the percentage of mining fee to be paid in accordance with the value shall be laid down in an agreement concluded between the minister and the mining company at a higher rate than the percentage applied at the time of the application but at no more than 1,2 times the original level. The Mining Authority shall decide on the extension of the deadline. The decision shall state the value of the payment obligation laid down in the agreement. The mining company may be granted a deadline extension for more than two mining fields at the same time if the application of the increased mining fee for the mining fields in respect of which the deadline has been extended covers all the mining sites of the mining company in an agreement with a duration of at least 5 years. If a request is made to extend the deadline for more than five mining fields, in addition to the mining fee increased in accordance with the agreement concluded between the minister and the mining company, a further single payment may also be established corresponding to 20 % of the amount payable in accordance with the increased mining fee'.
(19) See footnote 18.

(b) secondly, if the extension application concerns more than two fields, the level of the extension fee (the increased mining fee) has to be applied to all mining fields of the company;

(c) thirdly, if the extension concerns more than five fields a one-off payment may be charged in addition [20].

The extension agreement between MOL and the Hungarian State

(14) On 19 September 2005, MOL applied for the extension of the mining right for twelve of its hydrocarbon fields, which it had previously obtained on the basis of an authorisation and on which it had not started extraction within the deadline. On 22 December 2005 MOL and the minister concluded an extension agreement on the basis of Section 26/A(5) of the Mining Act, on the following terms:

(a) Extension fee: The twelve mining authorisations subject to the request were extended by 5 years (i.e. MOL would have 5 more years to begin extraction on these fields). The extension fee was stipulated for each of the 5 years of the extension period by using the mining fee of 12 %, which was in force at the time, and a multiplier ('c') ranging between 1,020 and 1,050, resulting in the extension fees listed below in Table 1 [21]. The extension fee was stipulated for the 5 years of the extension period. Where the fields were actually put into operation, the stipulated fee had to be applied to the remainder of the 15-year period as the mining fee for the fields covered by the extension [22].

Table 1

Fees stipulated by the extension agreement

Year	Original fee × c	Extension fee for idle fields/Increased fee extended to all fields
1	12 % × 1,050	12,6 %
2	12 % × 1,038	12,456 %
3	12 % × 1,025	12,3 %
4	12 % × 1,020	12,24 %
5	12 % × 1,020	12,24 %
6-15	12 % × 1,020	12,24 %

(b) Extension of increased fee to all mining fields: Since the extension of the mining right had been requested for more than two fields, the increased fee (which is equal to the extension fee, as shown in Table 1) had to be applied for the following 15 years, i.e. until 2020, for all MOL fields under authorisation that were put into operation after 1 January 1998. As regards fields put into operation before 1 January 1998, the factor 'J' multiplied by 'c' is applicable [23].

(c) Fixed mining fee: The parties also explicitly agreed that the stipulated mining fee would remain applicable for the entire duration of the contract (i.e. until 2020), regardless of any amendments to the Mining Act [24].

(d) One-off payment: Since the extension of the mining right had been requested for more than five fields, a one-off payment of HUF 20 billion [25] was also laid down in the agreement [26].

(e) Termination clause: The agreement stipulated that it could not be modified unilaterally (but only with the agreement of both parties). It could be terminated by one of the parties only in the event of a change of ownership in MOL (at least 25 % of shares).

(15) By decision of 23 December 2005, the Mining Authority extended MOL's mining rights for the requested twelve fields and extended the increased fee to apply to all fields of the company.

Amendments of the Mining Act as regards the mining fee for mining rights granted by authorisation

(16) An amendment [27] to the Mining Act that took effect on 8 January 2008 [28] (hereinafter 'the 2008 amendment') raised the mining fee considerably for certain categories of hydrocarbons. The mining fee for other types of minerals was not affected by this amendment. Section 5 of the amending Act provided for a differentiated

(20) Maximum 20 % of the amount based on the increased mining fee.
(21) Point 1 of the extension agreement.
(22) Point 3 of the extension agreement.
(23) Point 4 of the extension agreement.
(24) Point 9 of the extension agreement stipulates that all factors determining the level of the mining fee remain unchanged for the entire duration of the contract.
(25) Approximately EUR 76 million at the ECB exchange rate of EUR/HUF 263 on 16 April 2010. In this Decision all EUR/HUF conversions have been done at this rate.
(26) Point 6 of the extension agreement.
(27) This amendment was referred to in the opening decision as the '2008 amendment'. The Hungarian authorities pointed out in their submission that this amendment was approved by the Parliament in 2007. For the sake of consistency with the opening decision, the amendment of the Mining Act which entered into force on 8 January 2008 will continue to be referred to as the '2008 amendment'. In the same vein, the amendment that entered into force on 23 January 2009 will be referred to as the '2009 amendment'.
(28) Act No CXXIII of 2007.

mining fee depending on: (i) the date on which the mining field was put into operation; (ii) the quantity of hydrocarbons extracted, and (iii) the crude oil price at the time.

— A 30 % mining fee was stipulated for fields put into production between 1 January 1998 and 1 January 2008,

— For fields put into operation after 1 January 2008, differentiated rates apply (12 %, 20 % or 30 %) depending on the quantity of hydrocarbons extracted,

— For mines put into production before 1 January 1998, the factor 'J' is used, its minimum value being set at 30 %.

Moreover, all these rates are subject to a surcharge depending on the crude oil price: + 3 % if the crude oil price is over 80 USD/bbl or + 6 % if it is over 90 USD/bbl (hereinafter 'Brent Clause'). There are special rates applicable to, for example, difficult extracting conditions (12 %) and high inert gas (8 %).

(17) These mining rates were in force between 8 January 2008 and 23 January 2009 and applied to all mining companies working on mining sites under authorisation, including those which received authorisation before January 2008, from the entry into force of the amendments to the Mining Act. A new amendment to the Mining Act entered into force on 23 January 2009 (after the Commission's decision to open the formal investigation procedure), reducing the mining fee for fields put into production between 1 January 1998 and 1 January 2008 back to 12 % (while maintaining the 'Brent Clause') [29]. The applicable mining fee for other types of fields remained the same as in the Mining Act applicable in 2008.

(18) Table 2 summarises the applicable mining fees under the authorisation regime according to the different versions of the Mining Act.

Table 2

Summary of the applicable mining fees in the authorisation regime under the Mining Act

<table>
<tr><th colspan="2"></th><th>Fee applicable up until 2008</th><th>Fee applicable in 2008</th><th>Fee applicable from 23 January 2009</th></tr>
<tr><td colspan="2">Production started before 1 January 1998</td><td>J %
(at least 12 %)</td><td>J %
(at least 30 %, + 3 % or 6 % Brent Clause)</td><td>J %
(at least 30 %, + 3 % or 6 % Brent Clause)</td></tr>
<tr><td colspan="2">Production started between 1 January 1998 and 1 January 2008</td><td>12 %</td><td>30 %
(+ 3 % or 6 % Brent Clause)</td><td>12 %
(+ 3 % or 6 % Brent Clause)</td></tr>
<tr><td rowspan="3">Production started after 1 January 2008</td><td>Gas fields with an annual production of less than 300m m^3
Oil fields with an annual production of less than 50 kt</td><td rowspan="5">NA</td><td>12 %
(+ 3 % or 6 % Brent Clause)</td><td>12 %
(+ 3 % or 6 % Brent Clause)</td></tr>
<tr><td>Gas fields with annual production between 300-500m m^3
Oil fields with an annual production between 50-200 kt</td><td>20 %
(+ 3 % or 6 % Brent Clause)</td><td>20 %
(+ 3 % or 6 % Brent Clause)</td></tr>
<tr><td>Gas fields with an annual production above 500m m^3
Oil fields with an annual production above 200 kt</td><td>30 %
(+ 3 % or 6 % Brent Clause)</td><td>30 %
(+ 3 % or 6 % Brent Clause)</td></tr>
<tr><td colspan="2">Hydrocarbons with special mining conditions</td><td>12 %</td><td>12 %</td></tr>
<tr><td colspan="2">High inert gas</td><td>8 %</td><td>8 %</td></tr>
</table>

'J' is to be calculated according to a formula based on historical gas prices, extracted quantity and value; see recital 11.

[29] Section 235 of Act No LXXXI of 2008.

IV. **GROUNDS FOR INITIATING THE PROCEDURE**

(19) The alleged state aid measure under scrutiny is the 22 December 2005 extension agreement between MOL and the Hungarian State, which allowed the company a certain degree of exemption from the increased mining fee on hydrocarbon extraction stipulated in a subsequent amendment to the Hungarian Mining Act. Given the way the agreement and the subsequent amendment were designed, the Commission regards them as part of the same measure (the measure) and the opening decision assessed their joint impact.

(20) In its opening decision the Commission reached the preliminary conclusion that as a result of the extension agreement MOL was shielded from future changes in the mining fee and, in particular, from the changes laid down in the subsequent 2008 amendment to the Mining Act. Thus the company has been treated more favourably than its competitors, who are operating under the current authorisation regime and, not having concluded a similar extension agreement previously, have had to pay the new increased mining fees. In its preliminary assessment the Commission took the view that the measure constituted state aid within the meaning of Article 107(1) TFEU and could not see any grounds on which it could be compatible with the internal market, since no derogation seemed to be applicable.

(21) Further details can be found in the opening decision, which is to be taken as an integral part of this Decision.

V. **COMMENTS FROM HUNGARY**

(22) Hungary's main arguments with regard to the cumulative criteria defining state aid include: (i) the absence of selectivity and (ii) the absence of any advantage to the alleged beneficiary.

(23) As regards selectivity, the Hungarian authorities basically argue that the measure is not selective, because by concluding the extension agreement MOL became subject to another regime different from the authorisation regime.

(24) In the first place, Hungary confirms that there is a difference between the concession and the authorisation regimes, emphasising that in the case of a concession the mining company can, in its concession bid, offer a higher fee than stated in the tender notice, whereas under the authorisation regime the fee is stipulated by the Mining Act. Hungary further argues that alongside these two regimes there was a need for a new 'quasi-concessionary' solution, laying down the mining fee in an individual contract outside the concession system. In Hungary's view the extension agreement under Section 26/A(5) of the Mining Act can be seen as an appropriate legal basis for such a 'quasi-concessionary' solution, effectively taking the mining right out of the authorisation regime and placing it on a contractual basis.

(25) Hungary adds that the extension agreement stems directly from the logic of the Mining Act. According to Hungary, fixing the mining fee for the duration of the extension agreement is a natural element of the agreement referred to in Section 26/A(5) of the Mining Act and the extension could not have been concluded on different terms. Moreover, all other mining companies could expect the same, so there was no preferential treatment for MOL.

(26) Specifically, Section 20(11) of the Mining Act stipulates that the mining fee is the fee as laid down in: (i) the concession agreement; (ii) the Mining Act, or (iii) the extension agreement. Thus, the Hungarian authorities argue that the Mining Act explicitly allows for the fee under an extension agreement to stay unchanged, even in the event of changes in the legislation. In the view of the Hungarian authorities this is clearly stated in the Mining Act, i.e. in Section 26/A(5), which stipulates that the increased fee is maximum 1,2 times the original mining fee [30]. Therefore, Hungary argues, the Hungarian Act precludes application of any higher fee.

(27) As regards the claimed lack of advantage, Hungary explains that mineral resources are the property of the State and they pass into private ownership through mining by companies holding a mining right acquired against payment. Hungary cites the *Ryanair* judgment as an analogy and insists that this particular activity of the State is comparable to that of a market operator, even if the State acts in the role of a public authority [31].

(28) Hungary denies that the mining fee is a kind of tax, defining it as the price paid for the extraction of the minerals, or the State's share. Hungary stresses that the fact that the fee is set by law is not decisive grounds for concluding that it is a type of tax.

(30) Section 26/A(5) of the Mining Act: '[…] at a higher rate than the percentage applied at the time of the application but at no more than 1,2 times the original level.'.

(31) Case T-196/04 *Ryanair Ltd* v *Commission* [2008] ECR II-3643.

(29) Moreover, Hungary also explains that the three different payment obligations under the extension agreement (i.e. the extension fee, the increased mining fee extended to all fields and the one-off payment) which stem from the relevant provisions of the Mining Act should not be viewed as compensation for the State's renouncing income to which it is entitled in any event. According to Hungary, from the point of view of the State these payments may be regarded as additional income, in exchange for which the State renounces its right to put the fields up for tender under the concessionary regime, bearing in mind the associated risks and potential revenue.

(30) Hungary emphasises that following the disputed amendment of the Mining Act no other market participant has actually had to pay a higher mining fee than MOL, since there were no competitors falling into the categories with higher mining fees in the relevant period.

Table 3

MOL's yearly mining fee payments (actual and hypothetical)

(in HUF millions)

Payment item	Actual: under the extension agreement	Hypothetical: under the Mining Act in force	Difference	Net present value of the difference in 2009
2005				
One-off payment [1]	[…] (*)	[…]	20 000,0	28 064,5
2006				
Extension fee [2]	[…]	[…]	835,8	1 092,1
Mining fee [3]	[…]	[…]	5 755,7	7 520,0
Total	[…]	[…]	*6 591,6*	*8 612,1*
2007				
Extension fee	[…]	[…]	769,7	926,5
Mining fee	[…]	[…]	3 428,0	4 126,4
Total	[…]	[…]	*4 197,7*	*5 052,9*
2008				
Extension fee	[…]	[…]	345,8	382,9
Mining fee	[…]	[…]	– 28 444,7	– 31 498,5
Total	[…]	[…]	*– 28 099,0*	*– 31 115,6*
2009				
Extension fee	[…]	[…]	211,2	211,2
Mining fee	[…]	[…]	– 1 942,1	– 1 942,1
Total	[…]	[…]	*– 1 730,9*	*– 1 730,9*
GRAND TOTAL	[…]	[…]	959,5	8 883,0

The figures are based on data provided by the Hungarian authorities.
[1] One-off payment: see recital 14(d).
[2] Extension fee: see recital 14(a).
[3] Increased mining fee for all fields: see recital 14(b).
(*) Data covered by professional secrecy have been replaced in the text of the Decision by […].

(31) Furthermore, Hungary argues that as a result of the extension agreement, over the years and taking into account all the components in the agreement, including the extension fee and the one-off payment, MOL actually paid more in absolute terms to the State than it would have paid without the extension agreement, i.e. under the Mining Act. The actual payments made by MOL compared to the hypothetical ones are shown in Table 3 above. The figures were provided by the Hungarian authorities.

(32) In Hungary's view, mining companies have a legitimate expectation as regards the predictability of the mining fee, which therefore should be stable over time. This was the thinking behind the amendment to the Mining Act, since, although the mining fee changed, there was not actually any mining company whose mining fee changed as a result of the amendment. According to Hungary, the amendments to the Mining Act might suggest that the State could change the mining fee in respect of fields already in operation. The 2008 amendment, however, was the result of a compromise in the course of the negotiations preceding the adoption of the Mining Act. Thus, it was implicitly accepted that there were legitimate expectations. Consequently, a mining company can legitimately expect that the State will not increase any of these fees unilaterally. Hungary concludes that the system of the Mining Act and its specific provisions entail that mining fees remain unchanged during the whole duration of the contract.

(33) Finally, the Hungarian authorities explain that the 'termination clause' is based on reasons of national security.

VI. **COMMENTS FROM INTERESTED PARTIES**

(34) The Commission received comments from the following interested parties: MOL (the beneficiary of the alleged aid measure) and the Hungarian Mining Association, of which MOL is a member. Both interested parties commented along the same lines as Hungary and their observations overlapped to a large extent with those of Hungary.

MOL

(35) MOL, the alleged beneficiary of the measure in question, states that, contrary to what the Commission maintains in the opening decision, it did not enjoy any preferential treatment on the Hungarian hydrocarbon extraction market. A major share of MOL's mining fees paid to the Hungarian State comes from the mining fields subject to J % (i.e. put into operation before 1 January 1998), which in practice means that MOL pays 64-75 %, whereas its competitors (who started production at a later stage and operate small fields) are subject merely to the 12 % fee.

(36) Furthermore, the conclusion of the extension agreement meant that MOL paid more to the State (taking into account all components in the extension agreement) than it would have paid without the agreement, merely on the basis of the original Mining Act.

(37) As regards the Commission's argument that the extension agreement cannot be considered analogous to a concession, because it was subject to the authorisation regime, MOL notes that the extension of the mining right is not a right subject to authorisation on the basis of a unilateral decision by the State, but only following an agreement with the mining company. If the purpose of the legislation had been to make this a matter for the State's discretion, the relevant provision would have been drafted differently. The wording of the Mining Act suggests that the legislative intention was to treat the extension agreement in a way analogous to concessions.

(38) In the opening decision the Commission argues that there is a contradiction between the Hungarian authorities' claim that the amendment of the Mining Act was necessary to raise more revenue and the fact that MOL was in practice exempted from the increased fees.

(39) In the view of MOL, this statement is not contradictory. For one thing, the company paid more to the State under the extension agreement, than it would have paid under the Mining Act. MOL also pays very high mining fees on the fields subject to J. In addition, the amendment to the Mining Act could have an effect on fields put into operation in the future.

(40) MOL maintains that the extension payment components are not in any way a fine, as the Commission suggests. The Mining Act also lays down penalties/fines for where mining activity is carried out in breach of the Mining Act. The fees under the extension agreement are a result of the negotiation process between the mining company and the State. It was not compulsory to conclude the contract: the mining company could also have chosen not to conclude one, lose its mining right and then bid under the open tender procedure, whereby it might have ultimately obtained the mining right more cheaply.

(41) It is misleading to compare MOL, who concluded such an extension agreement, with competitors operating under the authorisation regime. Moreover, MOL emphasises that it fulfilled all its obligations and the provisions of the legislation.

(42) MOL also takes issue with the Commission's view that the multiplier 'c' is too low (as it is less than the legal ceiling of 1,2 times). What also has to be taken into account is that the application of the increased mining fee concerned almost 150 fields, so the increased fee yielded a substantial increase in mining revenue for the State.

(43) Finally, as regards the Commission's argument that MOL is being treated preferentially by not being subject to the Brent Clause, the company notes that J is also price-sensitive.

The Hungarian Mining Association

(44) The Hungarian Mining Association (hereinafter 'Mining Association') represents companies engaged in mining activities or activities related to mining. Its main objective is to improve the overall operational framework for carrying out mining activities in Hungary, monitor legislative procedures and act in its members' interests. Currently, it has 66 members, including MOL. The Chairman of the Mining Association's board is a senior manager of MOL ([32]).

(45) According to the Mining Association, mining companies have a legitimate expectation that the mining fee will remain unchanged for mining fields already in operation. Thus the State cannot unilaterally raise fees 'retroactively' (i.e. for fields which are already operating). The Mining Association expressed this opinion in connection with the bill preceding the amendment to the Mining Act and, according to the Mining Association, this principle was taken into account when the Mining Act was amended. The final wording was not opposed, because, in terms of effect, it does not raise the mining fee for operations already commenced.

(46) As regards the general characteristics and economic conditions of the mining market, the Mining Association explains that the time span of mining projects is relatively long. The time between the start of exploration and actual extraction can be as long as 10-15 years. During this phase the mining company has only costs; income is not made until extraction starts. In addition, there is an inherent geological risk, since it is not certain that the exploration will be successful. Therefore, projects must be planned with the utmost care. The profitability of a project depends on multiple factors. Given the manifold risks, the industry expects that at least those which can be influenced by the State will remain stable during the lifespan of the project, i.e. the legislative framework or the mining fee. Given the specific characteristics of the industry, the financing structures play an important role in the projects. Creditors scrutinise the projects constantly and can even withdraw financing if the conditions change substantially.

(47) Therefore, in countries involving a high political risk, the mining company and the State conclude a contract based on private law. In stable regions, such as Western Europe, such agreements are unnecessary, because it can be assumed that the legal framework will not be changed every now and then by the State. Stability as regards the State's share is expected by both the mining company and the creditors. Without this stability the risk of the project would be increased; a country with a stable economic policy cannot allow itself frequent policy changes, since this would scare off the mining undertakings.

(48) The Mining Association also points out that the principles of legal certainty and protection of acquired rights are enshrined in the case-law of the European courts and the Hungarian Constitution. Thus, the Hungarian legislature is not entitled to raise mining fees for fields already in operation, as legislation must be predictable. Moreover, the Mining Association also considers that the 'stability' of the mining fee is an acquired right.

(49) A further argument adduced by the Mining Association is the prohibition of discrimination. In particular, there must not be discrimination between market players operating on a concession basis and market players under the authorisation system. Accordingly, the Hungarian legislature is not entitled to raise mining fees 'retroactively' for fields already in operation. The ECJ has clarified in numerous judgments that legal certainty is a fundamental element of EU law. Legislation is meant to be unambiguous, precise and predictable, especially if it has a negative impact on individuals or companies (see the case-law cited). The Mining Association goes on to argue that the principle of legal certainty and acquired rights are also enshrined in the Hungarian Constitution and it concludes that on the basis of EU law and constitutional principles legislation must be predictable.

(50) The Mining Association finally adds that the principle of the protection of acquired rights derives from the principle of legal certainty. This principle of the protection of acquired rights has been respected in the course of national and international legislative procedures governing mining rights. Other EU Member States also have stable mining legislation which does not change frequently.

VII. EXISTENCE OF AID WITHIN THE MEANING OF ARTICLE 107(1) OF THE TFEU

(51) In order to ascertain whether a measure constitutes state aid, the Commission has to assess whether the contested measure fulfils the conditions of Article 107(1) TFEU. This Article states that: 'Save as otherwise provided in the Treaties, any aid granted by 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 common market'. Below, in the light of this provision, the Commission assesses whether the contested measure constitutes state aid.

([32]) http://www.mabsz.hu/webset32.cgi?Magyar_Baanyaaszati_Szoevetseeg@@HU@@4@@364124456

General comments

(52) To begin with, it must be recalled that a measure can constitute state aid within the meaning of 107(1) TFEU regardless of its legal form. Even if the extension agreement was concluded in accordance with the relevant provisions of the Mining Act and even if it is up to Hungary to set the mining fee by law, this does not in itself mean that these actions, or their effects, are compatible with EU state aid rules. The fact that a measure is compatible with national law does not have a bearing on its compatibility with the state aid rules of the TFEU.

(53) Moreover, as already set out in the opening decision, the Commission does not consider that any of the elements of the case in isolation, i.e. the relevant provisions of the Mining Act, the extension agreement and the amendment of the Mining Act, are contrary to state aid rules. Instead, in the present case the Commission regards the entire sequence of the State's actions as 'the measure' and assesses the effect of the extension agreement in combination with the subsequent amendments to the Mining Act.

(54) As regards Hungary's arguments that the mining fee is not a tax, but the State's share, the Commission notes that this argument is irrelevant from the point of view of state aid assessment. State aid rules are applicable to all kinds of costs which have to be borne by undertakings and from which they are exempted through a state measure. In any event, it has to be noted that administrative authorisation of exploitation of mineral and hydrocarbon resources appears to be a typical role of a public authority; payments for such authorisation are comparable to a tax or administrative fee.

(55) Finally, with regard to the termination clause, the Commission considers that this is not a state aid issue. The fact that the agreement states that the contract ends if a third party acquires more than 25 % of MOL is a measure which does not involve state resources.

Selectivity

(56) To be considered state aid, a measure must be specific or selective in that it favours only certain undertakings or the production of certain goods.

(57) According to the case-law of the Court of Justice [33], as regards the assessment of the condition of selectivity, which is a constituent factor in the concept of state aid, Article 107(1) TFEU requires assessment of whether, under a particular statutory scheme, a state measure is such as to 'favour certain undertakings or the production of certain goods' in comparison with other undertakings which are in a legal and factual situation that is comparable in the light of the objective pursued by the measure in question.

(58) The Court has also held on numerous occasions that Article 107(1) TFEU does not distinguish between the causes or the objectives of state aid, but defines them in relation to their effects [34].

(59) The concept of state aid does not apply, however, to state measures which differentiate between undertakings where that differentiation arises from the nature or the overall structure of the system of which they form part.

(60) The Commission disagrees with the Hungarian authorities' and interested parties' argumentation on the absence of selectivity.

(61) In order to determine whether a measure is selective, the applicable system of reference must be defined [35].

(62) In the case at issue the Commission considers that the applicable system of reference for the assessment is the authorisation regime. MOL did not have to enter into competitive bidding for the right to obtain a concession in a closed area. Instead, it obtained the mining right for its fields under the authorisation regime and competes with market participants under this regime. The extension agreement forms part of the authorisation regime. The mere fact that MOL was not able to commence extraction within the stipulated deadline and needed to request an extension agreement cannot result in a change of the system of reference. Accepting such an argument would lead to a situation where individual treatment is given to one company, as is the case under the concession regime, but without a competitive public tender.

(33) Judgment of the Court of Justice in Case C-88/03, *Portugal* v *Commission* [2006] ECR I-7115, paragraph 54.

(34) See, for instance, judgments of the Court of Justice in Case C-56/93, *Belgium* v *Commission* [1996] ECR I-723, paragraph 79; Case C-241/94, *France* v *Commission*, [1996] ECR I-4551, paragraph 20; Case C- 75/97, *Belgium* v *Commission*, [1999] ECR I-3671, paragraph 25; and Case C-409/00, *Spain* v *Commission*, [2003] ECR I-10901, paragraph 46.

(35) See Cases T-211/04 and T-215/04 *Government of Gibraltar* v *Commission* [2008] ECR II-3745 stating that 'in order to determine whether the measure at issue is selective it is appropriate to examine whether, within the context of a particular legal regime, that measure constitutes an advantage for certain undertakings in comparison with others which are in a comparable legal and factual situation. The determination of the reference framework has a particular importance in the case of tax measures, since the very existence of an advantage may be established only when compared with "normal" taxation'.

(63) In fact, it is a discretionary decision by the Hungarian authorities to determine whether the field is under concession or authorisation. Thus, if the Hungarian authorities wish to award mining rights on a contractual basis they can opt for a transparent concession procedure which includes an open tendering process. The Commission cannot accept that an opaque so-called 'quasi-concession', which currently applies only to one company (MOL), could be regarded as a separate system of reference.

(64) Moreover, Hungary had a wide margin of discretion for extending the authorisation, as well as for subsequently amending the relevant provisions of the Mining Act (despite knowing the advantageous effects this would have on MOL, this company being the sole market player for hydrocarbons to have concluded an extension agreement). Hungary was free to determine the mining fee at any time, i.e. it could have decided not to amend the Mining Act at all. From the point of view of its effects, the sequence of acts unequivocally favoured one particular undertaking.

(65) In view of the above, the Commission concludes that the system of reference is the authorisation regime.

(66) In the framework of the authorisation regime, the extension agreement is clearly selective. Indeed, as the Hungarian authorities themselves confirm, the parties, when negotiating the terms of this agreement, have a certain margin of manoeuvre to stipulate the different payment components and, more importantly, may even decide not to conclude the agreement at all. Thus, the Hungarian authorities had the discretion to conclude such an agreement with MOL (or with any other market participant) ([36]).

(67) Such treatment cannot be explained through the logic and nature of the system. On the one hand, mining fees are imposed to ensure revenue for the State on the extracted value. On the other hand, the payment components under the extension agreement are paid in exchange for the extension as an extra charge. In the present case, however, the conclusion of the extension agreement and the subsequent increase in the fees for MOL led to the paradoxical situation that MOL, having failed to commence production on time, benefits from lower mining fees until 2020 for practically all of its fields under authorisation; whereas its competitors, who are equally subject to the authorisation regime and who started production on time and therefore have not concluded an extension agreement, have to pay higher statutory fees.

(68) This was the only extension agreement concluded for hydrocarbons. MOL noted that there are other extension agreements in force for solid minerals. The Commission observes, however that this concerns other types of minerals which are subject to a different mining fee under the Mining Act than hydrocarbons. It also has to be noted that for solid minerals there was no change in the mining fee introduced by the amendment to the Mining Act, (i.e. the market players having concluded such an agreement have not been affected by the same 'sequence of measures' and therefore no advantage has accrued to them).

(69) On the basis of the foregoing, despite the arguments put forward by Hungary, the Commission considers that the sequence of actions, i.e. the way Section 26/A(5) of the Mining Act is worded, the extension agreement concluded on its basis, and the subsequent amendment to the Mining Act, was selective in favour of MOL.

(70) The combined effects of the sequence of measures is that, among holders of mining authorisations granted under Section 5 of the Mining Act, only MOL was subject to a specific regime which shielded it against any increase in the mining fee normally due for hydrocarbons extraction.

(71) In conclusion, due to the wide discretion in the granting of an extension agreement and in view of the fact that, actually, the exemption is directed to one individual company, the selectivity criterion is met.

Advantage

(72) Contrary to the Hungarian authorities' arguments, the Commission takes the view that the State does not exercise an economic activity by authorising mining activities. Rather, the granting of administrative concessions or mining authorisations is connected with the exercise of powers which are typically those of a public authority because this activity cannot be originally exercised by a private actor ([37]). In Hungary – as in other

([36]) Cases T-92/00 and T-103/00 *Ramondín* [2002] ECR II-1385, points 32-35.

([37]) Hungary compares the authorisation of mining activities with rental fees requested for communal housing, in a case in which the State can also act as a private operator. This comparison, however, is not accurate, because authorisation of mining activity, contrary to the leasing of housing, cannot be originally exercised by a private actor. In this respect, the activity of granting administrative mining authorisations is more akin to other administrative authorisations typically granted by public authorities, such as for example authorisations for use of public domain.

Member States of the EU – no private actor is the original owner of mineral resources. Member States' legal systems generally attribute control over mineral resources to the public authorities [38]. Therefore, the decision to allow a company to exploit mineral resources, in the form the Member State chooses and against payment of certain fees, is, by reason of its nature and rules, a matter for the public authorities and can be categorised as the exercise of public authority powers. Hungary's intervention in making mining activity subject to administrative supervision serves the general interest and not commercial ones. This behaviour must therefore be considered a form of state intervention by a public authority not akin to the behaviour of a private investor in a market economy [39].

(73) Even if in the present case authorisation for mining exploitation were deemed to be an economic activity whereby the State pursues commercial purposes (which it is not), the Commission notes that there is no clear and direct link in monetary terms between the level of the mining fees set by Hungary for MOL and the value of the mining authorisation. Hungary's reasoning, namely that it acted as a market operator when it concluded the extension agreement, is not borne out. In particular, there is no indication that tendering the concession for the twelve fields (which would have not been extended) would not have resulted in a higher bid from a competitor. Hungary also failed to demonstrate that it took into account all relevant factors and risks from a commercial point of view when concluding the extension agreement, i.e. all payment components in the extension agreement, the possible higher fees set by the Mining Act until 2020, the duration of the agreement and possible competitors.

(74) A further argument by Hungary is that after the disputed amendment of the Mining Act, no other market participant actually had to pay a higher fee than MOL, because in fact there were no competitors falling into the categories with higher mining fees in the relevant period.

Table 4

Summary of the applicable mining fees before and after the amendments to the Mining Act

	Fee applicable up until 2008	Fee applicable in 2008	Fee applicable from 23 January 2009	Fee for the fields under MOL's contract Applicable until 2020
Production started before 1 January 1998	J % [3] (at least 12 %)	J % (at least 30 %, + 3 % or 6 % Brent Clause)	J % (at least 30 %, + 3 % or 6 % Brent Clause)	J % × c [4] (at least 12 %)
Production started between 1 January 1998 and 1 January 2008	12 %	30 % (+ 3 % or 6 % Brent Clause)	12 % (+ 3 % or 6 % Brent Clause)	12 % × c (~ 12,24 % [2])

[38] This reality is recognised in Directive 94/22/EC of the European Parliament and of the Council of 30 May 1994 on the conditions for granting and using authorisations for the prospection, exploration and production of hydrocarbons (OJ L 164, 30.6.1994, p. 3) which, for instance, considers that 'Member States have sovereignty and sovereign rights over hydrocarbon resources on their territories'. In Hungary, Section 3 of the Mining Act states that 'Mineral raw materials and geothermal energy in the locations in which they naturally occur are state-owned. By the act of production the mining undertaking shall become the owner of the mineral raw materials extracted and the geothermal energy obtained for energy purposes'.

[39] Case T-156/2004 *EDF* v *Commission*, not published yet in the ECR, paragraph 233.

<table>
<tr><th colspan="2"></th><th>Fee applicable up until 2008</th><th>Fee applicable in 2008</th><th>Fee applicable from 23 January 2009</th><th>Fee for the fields under MOL's contract
Applicable until 2020</th></tr>
<tr><td rowspan="3">Production started after 1 January 2008 (1)</td><td>Gas fields with an annual production of less than 300m m^3
Oil fields with an annual production of less than 50 kt</td><td rowspan="5">NA</td><td>12 %
(+ 3 % or 6 % Brent Clause)</td><td>12 %
(+ 3 % or 6 % Brent Clause)</td><td rowspan="5">12 % × c
(~ 12,24 % (2))</td></tr>
<tr><td>Gas fields with annual production between 300-500m m^3
Oil fields with an annual production between 50-200 kt</td><td>20 %
(+ 3 % or 6 % Brent Clause)</td><td>20 %
(+ 3 % or 6 % Brent Clause)</td></tr>
<tr><td>Gas fields with an annual production above 500m m^3
Oil fields with an annual production above 200 kt</td><td>30 %
(+ 3 % or 6 % Brent Clause)</td><td>30 %
(+ 3 % or 6 % Brent Clause)</td></tr>
<tr><td colspan="2">Hydrocarbons with special mining conditions</td><td>12 %</td><td>12 %</td></tr>
<tr><td colspan="2">High inert gas</td><td>8 %</td><td>8 %</td></tr>
</table>

(1) Five out of the twelve mining fields granted exemption put into operation after 1 January 2008.
(2) For reasons of simplification the mining fee applicable from the 5th year is indicated.
Note: In the columns referring to the 2008 and 2009 amendments, the white fields refer to the categories of mining fields where in effect MOL paid more under the extension agreement than under the Mining Act. The fields shaded in dark grey represent the types of fields where MOL pays less under the agreement in any case, regardless of the crude oil price. The fields shaded in light grey represent the types of fields where MOL may pay less under the agreement, depending on the crude oil price.
(3) The factor 'J' is to be calculated according to a formula based on historical gas prices, extracted quantity and value.
(4) 'c' is the multiplier stipulated in the extension agreement, ranging between 1,020 and 1,050; see Table 1.

(75) This argument has to be dismissed.

(76) Table 4 above summarises the extent to which the extension agreement and the subsequent amendment of the Mining Act resulted in fees for MOL lower than stipulated by the Mining Act.

(77) Firstly, the data submitted by the Hungarian authorities show that in fact there were some market players operating fields under the authorisation regime who have been subject to a higher mining fee obligation than paid by MOL, between 8 January 2008 and 23 January 2009 owing to the first amendment to the Mining Act and also from 23 January 2009 to date owing to the second amendment to the Mining Act. The submissions from the Hungarian authorities show that in 2008 there were mining fields operated under authorisation by companies other than MOL who paid more than 12 % (between 14,24 % and 18 %) owing to the application of the Brent Clause [40].

(78) Secondly, although the Hungarian authorities claim that there are only competitors who operate or are expected to put into operation smaller fields (i.e. producing less than 500 m^3 or 200 kt), the Commission observes that even if such smaller fields were subject to the 12 % category, they will still have to pay the Brent mark-up, whenever applicable. This could lead to a mining fee of up to 18 %. The Commission recalls once again that the effect of the measures is that MOL is not subject to the Brent Clause laid down in the Mining Act for all other operators.

(79) Thirdly, as regards the current general market environment in Hungary, there are several mining

(40) In 2008 the Nyírség-Dél gas field (operated by the company GEOMEGA until September 2008 and subsequently by the company PetroHungaria) was subject to an average annual mining fee of 14,24 %-18 %. The Hernád gas field (operated by the company HHE North) was subject to an average annual mining fee of 14,95 % in 2008.

companies engaged in hydrocarbon extraction activities. In addition, there are several companies carrying out exploration who might put fields into operation and become MOL's competitors. Any new entrants under the authorisation regime will be subject to the statutory mining fee and face competition with MOL, the only company whose mining fields escape the fee applicable under the general authorisation regime and are subject to a lower level of fees.

(80) Fourthly, the Commission notes that it is a matter of fact that MOL has been subject to a fee of around 12,24 % not only for the twelve fields granted extension but for all of its mining fields put into operation after 1 January 1998 operated under authorisation at the time of the 2005 agreement, and a fee of J % for all fields put into operation before 1 January 1998. Moreover, MOL's fee is set by the extension agreement at 12,24 % until 2020. Thus, there is an advantage for MOL for the majority of its fields under authorisation for a considerable length of time.

(81) Fifthly, if hypothetically the Mining Authority had not agreed to the extension for the twelve fields, all other MOL fields under authorisation would have become subject to the considerably higher mining fee as well, which might have meant higher revenues for the State ([41]). Moreover, as mentioned in recital 73, the State could have put out a tender for the concession for the twelve fields not granted extension, and could thereby potentially have obtained a higher bid from a competitor.

(82) Regarding Hungary's argument that MOL paid a higher mining fee, namely 12,24 %, in 2006 and 2007, the Commission notes that this is irrelevant.

(83) First of all, this was due to the fact that MOL had to pay the stipulated increase in the mining fee (from 12 % to 12,24 %) just as any other company wishing to extend its mining authorisation would have had to. In this respect, MOL received the standard treatment and was not put at a disadvantage. Neither had the advantage to MOL materialised yet: this ultimately occurred at the time of the first amendment to the Mining Act, i.e. as of 8 January 2008.

(84) Furthermore, in 2008 MOL paid HUF 28,4 billion and in 2009 HUF 1,9 billion less in mining fees for its producing fields than it would have paid if it had been subject to the Mining Act in force at that time.

(85) As regards the other payment components under Section 26/A(5) of the Mining Act (i.e. the extension fee and the one-off payment), these were paid in exchange for the extension and not for the right to have fees lower than those applicable to its competitors. Nor can these payment components be regarded as 'advance payment' of mining fees due in later periods. The wording of Section 26/A(5) of the Mining Act is clear in this regard. In particular, it states that 'the company shall pay a charge if an extension is granted'. The two other elements are linked to the number of fields granted extension. Thus Section 26/A(5) of the Mining Act clearly establishes a link between the extension and the payment obligation.

(86) According to the case-law, aid given to a company cannot be offset by a charge imposed on the same company which represents a specific and distinct charge without a link with the measure constituting aid ([42]). In the case at issue, as described in recital 85, the other payment components under Section 26/A(5) of the Mining Act represent a charge for the extension which can be regarded as a specific and distinct charge without a link to the subsequent amendment of the statutory fees under the authorisation regime.

(87) Finally, the Commission points out that the conclusion of the extension agreement and the subsequent increase in the fees for MOL led to the paradoxical situation that MOL, having failed to start production on time, will be paying lower mining fees for almost all of its fields under authorisation until 2020, whereas its competitors, who have not concluded an extension agreement because they started production on time and are equally subject to the authorisation regime, have to pay higher statutory fees.

(88) On the basis of the foregoing, the Commission concludes that the measure conferred an advantage on MOL. It shields MOL from bearing costs which it otherwise would have to bear. The combined effect of the extension agreement and the subsequent modification of the Mining Act result in an advantage being conferred on the company.

State resources

(89) The measure involves forgone revenues to which the State would be entitled and is therefore granted from state resources.

Distortion of competition and affect on trade

(90) MOL is an integrated oil and gas company and qualifies as an undertaking. It competes with other undertakings which do not benefit from the same advantage. Hence, the measure distorts competition. Furthermore, MOL is active in a sector in which trade exists between Member States; the criterion of affecting trade within the Union is also fulfilled.

([41]) In terms of volume (i.e. m^3 of output), 99,8 % of MOL oil fields and 97,6 % of MOL gas fields were subject to the extension agreement in 2008.

([42]) Joined Cases T-427/04 and T-17/05 *France* v *Commission* and France Telecom v Commission, not yet published, point 207.

Conclusions on the presence of aid

(91) On the basis of the arguments set out above, the Commission takes the view that the measure fulfils the criteria laid down in Article 107(1) TFEU. Under those circumstances, the measure at stake has to be considered state aid in the meaning of Article 107(1) TFEU.

VIII. COMPATIBILITY OF THE AID WITH THE INTERNAL MARKET

(92) Articles 107(2) and 107(3) TFEU provide for exemptions to the general rule that state aid is incompatible with the internal market as stated in Article 107(1).

(93) Below the Commission assesses the compatibility of the measure under those exceptions. It should be noted that Hungary did not put forward any arguments as regards compatibility with the internal market.

(94) Moreover, it should also be noted that the measure results in a reduction of costs which should normally be borne by MOL and must therefore be considered to be operating aid.

(95) The exemptions in Article 107(2) TFEU do not apply in the present case because this measure does not have a social character, has not been awarded to individual consumers, is not designed to make good damage caused by natural disasters or exceptional occurrences and has not been awarded to the economy of certain areas of the Federal Republic of Germany affected by the division of that country.

(96) Further exemptions are laid down in Article 107(3) TFEU.

(97) Article 107(3)(a) states that 'aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment' may be declared compatible with the internal market. Hungary's entire territory was regarded as such an area at the time of accession and most of its regions are still eligible for such aid ([43]).

(98) Compatibility of state aid to assisted areas is governed by the Commission guidelines on national regional aid for 2007-2013 ([44]). (hereinafter 'Regional Aid Guidelines') Under the Regional Aid Guidelines, state aid can in principle be authorised only for investment costs ([45]). As already mentioned above, the aid at issue cannot be regarded as investment aid. As far as operating aid is concerned, the measure does not facilitate the development of any activities or economic areas and it is not limited in time, degressive or proportionate to what is necessary to remedy specific economic handicaps ([46]).

(99) In view of the above, the Commission concludes that the aid is not eligible for the derogation provided for in Article 107(3)(a) TFEU.

(100) Article 107(3)(b) TFEU states that 'aid to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State' may be declared compatible with the internal market.

(101) The Commission notes that the aid in question is not designed to promote the execution of an important project of common European interest nor has the Commission found any evidence that it is designed to remedy a serious disturbance in the Hungarian economy.

(102) In view of the above, the Commission concludes that the aid does not qualify for the derogation laid down in Article 107(3)(b) TFEU.

(103) Article 107(3)(d) TFEU states that aid to promote culture and heritage conservation may be declared compatible with the TFEU where such aid does not affect trading conditions and competition in the EU to an extent that is contrary to the common interest. This obviously does not apply to the current case.

(104) Article 107(3)(c) TFEU provides for the authorisation of state aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest. The Commission has produced a number of guidelines and communications that explain how it will apply the derogation contained in Article 107(3) TFEU.

(105) However, the Commission considers that because of the nature and characteristics of the aid, the exceptions under

([43]) Regional aid map of Hungary approved by the Commission on 13 September 2006 and published in OJ C 256 of 2006. Almost the entire territory of Hungary is defined as 107(3)(a) regions, with the exception of Budapest and Pest county, which are 107(3)(c) regions.

([44]) OJ C 54, 4.3.2006, p. 13.

([45]) Point 5 of the Regional Aid Guidelines.

([46]) Section 5 of Regional Aid Guidelines allows operating aid under strict conditions. Moreover, the measure is *ad hoc* aid. In this regard, the Guidelines state that 'Where, exceptionally, it is envisaged to grant individual *ad hoc* aid to a single firm, or aid confined to one area of activity, it is the responsibility of the Member State to demonstrate that the project contributes towards a coherent regional development strategy and that, having regard to the nature and size of the project, it will not result in unacceptable distortions of competition'. Hungary did not provide any information to demonstrate this.

these guidelines and communications are not applicable to the present case. Moreover, Hungary has not claimed that the aid could be compatible under those rules.

(106) The aid under assessment thus constitutes incompatible state aid.

IX. LEGITIMATE EXPECTATIONS, ACQUIRED RIGHTS AND DISCRIMINATION

(107) Although the Commission does not dispute the argument that predictability is generally an incentive for investments, it must be noted that, in view of the mandatory nature of the supervision of state aid by the Commission under Article 108 TFEU, undertakings to which aid has been granted may not, in principle, entertain a legitimate expectation that the aid is lawful unless it has been granted in compliance with the state aid procedure ([47]). In this regard, no beneficiary can cite good faith in order to defend acquired rights and avoid recovery ([48]).

(108) It is true that the Court has repeatedly held that the right to rely on the principle of the protection of legitimate expectations extends to any person in a situation where an authority of the European Union has caused him or her to have justified expectations. However, a person may not plead infringement of the principle unless he or she has been given precise assurances by the administrative body ([49]). In the present case, MOL has not been given any assurance by an authority of the EU which could justify a legitimate expectation.

(109) It is also true that a recipient of unlawfully granted aid is not precluded from citing exceptional circumstances on the basis of which it had legitimately assumed the aid to be lawful and thus declining to refund that aid. However, no exceptional circumstances obtain in the present case. On the contrary, the 2008 amendment to the Mining Act demonstrates that mining companies can in principle not count on there being no changes whatsoever in the law.

(110) The Commission points out that the mining fee for fields already in operation has been amended twice recently, namely as of 8 January 2008 and as of 23 January 2009. Firstly, it has to be stressed that the 2008 amendment to the Mining Act was designed to apply to existing mining authorisations. This is clearly shown by the fact that the wording of the 2008 Mining Act also concerns the terms of the authorisations granted before 2008. For these authorisations, the fees were adapted as from the entry into force of the new Mining Act. This proves that authorisation holders have no legitimate expectation or acquired right that the royalty level imposed would remain unaltered throughout the whole duration of their authorisation.

(111) Contrary to what is stated by Hungary and the other interested parties, EU case-law confirms that individuals may not count on no changes ever being made to the law ([50]). Likewise, changes in the law are not precluded by the principle of legal certainty either.

(112) As regards the discrimination argument, this has to be dismissed as well. Raising the fee is not discriminatory if applied to everyone, especially since there is no differentiation within the regime, i.e. no distinctions are drawn among the undertakings operating under authorisation.

X. RECOVERY

(113) According to the TFEU and the Court of Justice's established case-law, when it has found aid to be incompatible with the internal market the Commission is competent to decide that the State concerned must abolish or alter it ([51]). The Court has also consistently held that the obligation on a State to abolish aid regarded by the Commission as being incompatible with the internal market is designed to re-establish the previously existing situation ([52]). In this context, the Court has established that that objective is attained once the recipient has repaid the amounts granted by way of unlawful aid, thus forfeiting the advantage which it had enjoyed over its competitors on the market, and the situation prior to the payment of the aid has been restored ([53]).

(114) Following that case-law, Article 14 of Council Regulation (EC) No 659/99 ([54]) laid down that 'where negative decisions are taken in respect of unlawful aid, the Commission shall decide that the Member State concerned shall take all necessary measures to recover the aid from the beneficiary.'.

([47]) Case C-5/89 *Commission* v *Germany* [1990] ECR I-3437, point 14.
([48]) Case C-24/95 *Alcan Deutschland* [1997] ECR I-1591, point 43.
([49]) Case C-182/03 and C-217/03 *Belgium and Forum 187 ASBL* v *Commission* [2006] ECR I-5479, point 147.
([50]) Case C-17/03 *Vereniging voor Energie, Milieu en Water* [2005] ECR I-4983, point 81.
([51]) Case 70/72, *Commission* v *Germany*, [1973] ECR 813, paragraph 13.
([52]) Joined Cases C-278/92, C-279/92 and C-280/92 *Spain* v *Commission* [1994] ECR I-4103, point 75.
([53]) Case C-75/97 *Belgium* v *Commission* [1999] ECR I-030671 points 64-65.
([54]) OJ L 83, 27.3.1999, p. 1.

(115) Thus, given that the measure at issue is to be considered unlawful and incompatible aid, it must be recovered in order to re-establish the situation that existed on the market before it was granted. The amount to be recovered is, therefore, to be calculated from the date when the advantage accrued to the beneficiary, i.e. when the aid was made available to the beneficiary, and is to bear recovery interest until effective recovery.

(116) In this case, the measure is to be regarded as a sequence of actions by the State. With the extension agreement, MOL was shielded from future increases in the statutory mining fee. The advantage for MOL materialised when the first amendment to the Mining Act took effect, which was 8 January 2008. This is the date from which MOL was de facto relieved of the burden of higher fees and consequently favoured over its competitors.

(117) As explained in recitals 61 — 65, the applicable system of reference is that of other market participants operating under the authorisation regime. Therefore, the advantage is the difference between the actual mining fee MOL paid after the amendment of the Mining Act for its operating fields under authorisation and the fees as stipulated in the Mining Act.

(118) As already described in recital 85 above, the Commission considers that the other payment components in the agreement (the extension fee and the one-off payment) were paid in exchange for the extension and not for the right to have fees lower than those applicable to its competitors. This means that they are not to be taken into account in the calculation of the advantage.

Table 5

Sum of MOL's actual and hypothetical mining fee obligation for the relevant period

Mining fee payments	Actual (*) (according to the extension agreement) HUF million	Hypothetical (according to the Mining Act in force) HUF million	Difference HUF million
2008	106 226,3	134 671,0	– 28 444,7
2009	67 099,7	69 041,8	– 1 942,1

(*) Calculated on the basis of the mining fee percentages stipulated in the extension agreement (i.e. 12,24 % for fields put into operation after 1 January 1998 and J % × c for fields put into operation before that date).
For details please refer to Table 1.
The other components in the extension agreement (the one-off payment made in 2005 and the extension fee; see recital 14) are not included in this amount.

(119) The difference, as shown in Table 5, is therefore HUF 28,4 billion in 2008 and HUF 1,9 billion in 2009, i.e. a total of HUF 30,3 billion. This is the amount Hungary would have to recover from MOL plus recovery interest. Recovery would have to apply to the amounts for 2010 as well, for which there are as yet no figures available.

(120) The difference in magnitude of the forgone mining fee between 2008 and 2009 is due to the fact that, with the second amendment of the Mining Act that entered into force on 23 January 2009 (after the Commission's decision to open the formal investigation procedure), the legal situation before the 2008 amendment was reinstated, at least partially, for certain fields, i.e. for fields put into operation between 1998 and 2008.

XI. **CONCLUSION**

(121) On the basis of the foregoing, the Commission concludes that the measure in favour of MOL, i.e. the combination of the extension agreement and the 2008 amendment to the Mining Act, constitutes state aid that is incompatible with the internal market within the meaning of 107(1) TFEU.

(122) Given that the measure is to be considered unlawful and incompatible aid, the aid must be recovered from MOL in order to re-establish the situation that existed on the market before it was granted.

(123) The amount to be recovered is HUF 28 444,7 million for 2008 and HUF 1 942,1 million for 2009. As regards 2010, in respect of mining fee payments already made, the amount to be recovered needs to be calculated by Hungary, in the same way as for 2008 and 2009, until the measure is abolished,

HAS ADOPTED THIS DECISION:

Article 1

1. The combination of the fixed mining fee defined in the extension agreement concluded between the Hungarian State and MOL Nyrt. on 22 December 2005 and the subsequent amendments to Act XLVIII of 1993 on Mining constitutes state aid to MOL Nyrt. within the meaning of Article 107(1) TFEU.

2. The state aid referred to in Article 1(1), unlawfully granted by Hungary to MOL Nyrt., in breach of Article 108(3) TFEU, is incompatible with the internal market.

3. Hungary shall refrain from granting the state aid referred to in paragraph 1 within 2 months following the date of notification of the present Decision.

Article 2

1. Hungary shall recover the aid referred to in Article 1 from the beneficiary.

2. The state aid totals HUF 28 444,7 million for 2008 and HUF 1 942,1 million for 2009. As regards 2010, the amount of aid has to be calculated by Hungary until the measure is abolished.

3. The sums to be recovered shall bear interest from the date on which they were put at the disposal of the beneficiary until the date on which they are actually recovered.

4. The interest shall be calculated on a compound basis in accordance with Chapter V of Regulation (EC) No 794/2004 as amended by Regulation (EC) No 271/2008.

Article 3

1. Recovery of the aid referred to in Article 1 shall be immediate and effective.

2. Hungary shall ensure that this Decision is implemented within 4 months of its notification.

Article 4

1. Within 2 months following notification of this Decision, Hungary shall submit the following information to the Commission:

(a) the total amount (principal and recovery interest) to be recovered from the beneficiary, including the calculation of the aid amount for 2010;

(b) a detailed description of the measures already taken and planned to comply with this Decision;

(c) documents demonstrating that the beneficiary has been ordered to repay the aid.

2. Hungary shall keep the Commission informed of the progress of the national measures taken to implement this Decision until recovery of the aid referred to in Article 1 has been completed. It shall immediately submit, on simple request by the Commission, information on the measures already taken and planned to comply with this Decision. It shall also provide detailed information concerning the amounts of aid and recovery interest already recovered from the beneficiary.

Article 5

This Decision is addressed to the Republic of Hungary.

Done at Brussels, 9 June 2010.

For the Commission

Joaquín ALMUNIA

Vice-President