

COMMISSION DECISION (EU) 2016/995**of 26 October 2015****on the State aid SA.24571 — 2009/C (ex C 1/09, ex NN 69/08) granted by Hungary to MOL Nyrt.***(notified under document C(2015) 7324)***(Only the Hungarian text is authentic)****(Text with EEA relevance)**

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 decision by which the Commission decided to initiate the procedure laid down in Article 108(2) of the Treaty on the Functioning of the European Union, in respect of the aid SA.24571 (ex C 1/09, ex NN 69/08) ⁽¹⁾,

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

Whereas:

1. BACKGROUND**1.1. Measures at issue**

- (1) The general rules governing mining activities in Hungary are laid down in the 1993 Act on Mining ⁽²⁾ ('the Mining Act'). The Mining Act distinguishes mining activities exercised on the basis of two different legal instruments: (i) concession ⁽³⁾; and (ii) authorisation ⁽⁴⁾. In both cases the extraction of mineral resources is subject to a mining fee payable to the state constituting a percentage of the value of the minerals extracted.
- (2) The Mining Act stipulates that where a mining company which obtained the mining authorisation does not start extraction within five years from the date of the authorisation, the mining right is withdrawn. However, according to Section 26/A (5) of the Mining Act this deadline may be extended by agreement between the mining authority and the mining company. In such case the mining company shall pay a fee which is higher than the fee applied at the time of the original application but at no more than 1,2 times the original level.
- (3) Hungarian Oil & Gas Plc (*Magyar Olaj- és Gázipari Nyrt.*; 'MOL') obtained several authorisations to extract hydrocarbons. Since MOL did not start the extraction of hydrocarbons within five years from the date of the authorisations, on 22 December 2005 the competent minister concluded an extension agreement ('the 2005 agreement') with MOL. The 2005 agreement provided for an extension fee calculated on a yearly basis until 2020 by using the original authorisation mining fee of 12 % and a multiplier ranging between 1,020 and 1,050.
- (4) On the basis of the amendment to the Mining Act that which entered into force on 8 January 2008, the mining fee for authorisations to extract hydrocarbons was increased from 12 % to 30 % of the value of the minerals extracted ⁽⁵⁾ ('the 2008 amendment to the Mining Act'). The increased fee was not applicable to those operators whose mining authorisations had previously been extended.

⁽¹⁾ OJ C 74, 28.3.2009, p. 63.

⁽²⁾ 1993. évi XLVIII. Törvény a bányászatról (Act No XLVIII of 1993 on Mining).

⁽³⁾ Concessions concern so called 'closed areas' considered to be rich in minerals and highly valuable. Concessions are granted by the competent national authority to successful bidders following an open tender procedure.

⁽⁴⁾ Authorisations concern so called 'open areas' considered to be less rich in minerals and less valuable. Authorisations cannot be refused by the competent national authority if the applicant fulfils the conditions laid down by law.

⁽⁵⁾ This increase concerned the fields put into production between 1 January 1998 and 1 January 2008.

1.2. Opening of the formal investigation

- (5) On 13 January 2009, the Commission decided to initiate the formal investigation procedure laid down in Article 108(2) of the Treaty on the Functioning of the European Union ⁽⁶⁾ ("TFEU") into measures put in place by Hungary allegedly constituting State aid in favour of MOL. The Commission Decision of 13 January 2009 concerning the case SA.24571 (ex C 1/09; ex NN 69/08) ('the opening decision') was published in the *Official Journal of the European Union* on 28 March 2009 ⁽⁷⁾.
- (6) In the opening decision the Commission expressed its concerns as to whether the combined sequence of actions undertaken by Hungary led to a selective advantage being granted to MOL. The sequence of actions was composed of two elements: the 2005 agreement and the 2008 amendment to the Mining Act. In the preliminary assessment of the Commission, the Hungarian authorities treated MOL more favourably than its competitors operating under the same authorisation regime.

1.3. Closing of the formal investigation

- (7) By its Decision 2011/88/EU ⁽⁸⁾ on State aid SA.24571 (ex C 1/09; ex NN 69/08) granted by Hungary to MOL ('the contested decision'), the Commission concluded that the measure in favour of MOL, i.e. the combination of the 2005 agreement and the 2008 amendment to the Mining Act, constituted State aid incompatible with the internal market within the meaning of Article 107(1) TFEU. The Commission requested that Hungary recover the aid from MOL in order to re-establish the situation that existed on the market before it was granted ⁽⁹⁾.

1.4. The General Court judgment of 12 November 2013 in Case T-499/10, MOL Nyrt. v European Commission

- (8) Following an action brought by MOL, the General Court by its judgment of 12 November 2013 in Case T-499/10 ⁽¹⁰⁾ annulled the contested decision on the ground that the selectivity of the measure had not been established.
- (9) The General Court concluded that the 2005 agreement was not selective. The General Court stated that the scope of discretion of the Hungarian authorities enabled them to preserve equal treatment between mining companies in a comparable situation. Therefore, in view of the General Court, if conditions external to an agreement which does not involve State aid change later on in such a way that the party to such agreement is in an advantageous position vis-à-vis other operators that have not concluded a similar agreement, this should not be sufficient to consider the agreement and the subsequent modification of the conditions external to that agreement as constituting State aid.

1.5. The European Court of Justice judgment of 4 June 2015 in Case C-15/14 P, European Commission v MOL Nyrt.

- (10) By its judgment of 4 June 2015 in Case C-15/14 P ⁽¹¹⁾, the Court of Justice upheld the judgment of the General Court annulling the contested decision.
- (11) In its ruling, the Court of Justice confirmed the General Court's assessment that the selective nature of the 2005 agreement was not established and that the combination of the 2005 agreement and the 2008 amendment to the Mining Act could not be categorised as a single State aid measure for the purposes of Article 107(1) TFEU.

⁽⁶⁾ OJ C 115, 9.5.2008, p. 92.

⁽⁷⁾ See footnote 1.

⁽⁸⁾ Commission Decision 2011/88/EU of 9 June 2010 on state aid C 1/09 (ex NN 69/08) granted by Hungary to MOL Nyrt. (OJ L 34, 9.2.2011, p. 55).

⁽⁹⁾ The amount to be recovered was 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 was supposed to be calculated by Hungary, in the same way as for 2008 and 2009, until the measure was abolished.

⁽¹⁰⁾ Case T-499/10 MOL v Commission, EU:T:2013:592.

⁽¹¹⁾ Case C-15/14 P Commission v MOL, EU:C:2015:362.

- (12) The Court of Justice underlined that there is a fundamental difference between the assessment of the selectivity of general schemes for exemption or relief which by definition confer an advantage and the assessment of the selectivity of optional provisions of national law prescribing the imposition of additional charges. In cases in which the national authorities impose additional charges in order to maintain equal treatment between operators, the simple fact that those authorities enjoy discretion defined by law, and not unlimited, cannot be sufficient to establish that the corresponding scheme is selective.
- (13) For the above reason, according to the Court of Justice, the present case can be distinguished from cases in which the exercise of such a margin is connected with the grant of an advantage in favour of a specific economic operator ⁽¹²⁾.
- (14) Furthermore, the Court of Justice stated that the legal framework by which the national authorities impose additional charges in order to maintain equal treatment between operators could be only considered as selective if the national authorities while exercising their margin of assessment would favour certain operators without any objective reason.
- (15) The Court of Justice pointed out that in the present case there was no evidence that the Hungarian authorities, when exercising their power to increase the mining fees in the event of an extension of authorisation, treated MOL in unjustified, favourable manner ⁽¹³⁾.
- (16) Therefore, the Court of Justice concluded that the legal framework governing the conclusion of the extension agreements cannot be considered as selective in the present case.
- (17) With reference to the combined sequence of actions constituting a single State aid measure, the Court of Justice made reference to the case-law, by stating that a single aid measure may consist of combined elements on condition that, having regard to their chronology, their purpose and the circumstances of the undertaking at the time of their intervention, they are so closely linked to each other that they are inseparable from one another ⁽¹⁴⁾.
- (18) Nevertheless, in the present case, the Court of Justice underlined that the increase in mining fees, which entered into force in 2008, occurred in a context of an increase in international crude oil prices, i.e. the state exercised its regulatory power in an objectively justified manner following a market evolution. Furthermore, there were no indications that the 2005 agreement had been concluded in anticipation of the 2008 amendment ⁽¹⁵⁾.
- (19) Therefore, the Court of Justice concluded that there was no chronological and/or functional link between the 2005 agreement and the 2008 amendment to the Mining Act that could allow them to be interpreted as a single State aid measure.

2. PROCEDURE

- (20) In view of the annulment of the contested decision by the Court, the formal investigation procedure remains open. Indeed, neither the General Court nor the Court of Justice had considered that the opening decision in the present case was vitiated by any error. The Commission has therefore to adopt a final decision remedying the defects identified by the EU Courts.

3. ASSESSMENT

- (21) Article 107(1) TFEU provides that 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 and affects trade among Member States, is incompatible with the internal market. Those conditions are cumulative. If one of them is not met, the measure at hand does not qualify as State aid within the meaning of Article 107(1) TFEU.

⁽¹²⁾ Judgment in Case C-15/14 P; see footnote 11 above; paragraphs 64, 65 and 69.

⁽¹³⁾ Judgment in Case C-15/14 P; see footnote 11 above; paragraphs 66 and 69.

⁽¹⁴⁾ Judgment in Case C-15/14 P; see footnote 11 above; paragraph 92.

⁽¹⁵⁾ Judgment in Case C-15/14 P; see footnote 11 above; paragraphs 96 and 98.

- (22) In the circumstances of the present case, it is appropriate to confine the assessment to the condition of selectivity.

3.1. Selectivity

- (23) 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.
- (24) As described above in recitals 12 and 13, Section 26/A (5) of the Mining Act does not constitute a general scheme for an exemption or relief provided to certain undertakings. On the contrary, it allows the Hungarian authorities to impose a higher extension fee for the extension of mining authorisations. The same terms and conditions are applied to all operators in a comparable factual and legal situation.
- (25) As described above in recitals 14 and 15, there is no evidence of unjustified favourable treatment of MOL by the Hungarian authorities in relation to any other operator that could have been potentially in a comparable situation. The fact that the Hungarian authorities enjoy a certain level of discretion which is defined by law but not unlimited when fixing the extension fee cannot be sufficient to establish that the legal framework set out under Section 26/A (5) of the Mining Act is selective.
- (26) With reference to the combined effects of the 2005 agreement and the 2008 amendment to the Mining Act, the Commission notes that in line with the case-law of the Court of Justice a single aid measure may consist of combined elements on condition that, having regard to their chronology, their purpose and the circumstances of the undertaking at the time of their intervention, they are so closely linked to each other that they are inseparable from one another ⁽¹⁶⁾.
- (27) However, in the present case, as described above in recital 18, there is no evidence that Hungary signed the 2005 agreement while having already at that time an intention to subsequently increase the mining fee to the detriment of other market operators already present on the market on the date when that agreement was signed or of new operators. The increase in the mining fees imposed on the basis of the 2008 amendment to the Mining Act occurred in a context of an increase in international prices.
- (28) Therefore, as described above in recital 19, since there is no chronological and/or functional link between the 2005 agreement and 2008 amendment to the Mining Act, they cannot be interpreted as constituting a single aid measure.

3.2. Conclusion on assessment

- (29) On the basis of the foregoing, the Commission concludes that the sequence of actions undertaken by Hungary, i.e. the 2005 extension agreement and the subsequent amendment to the Mining Act, was not selective towards MOL.
- (30) Considering that the sequence of actions composed of the 2005 agreement and the subsequent amendment to the Mining Act is not selective, it is not necessary to assess whether the other conditions for State aid under Article 107(1) TFEU exist.

4. CONCLUSION

- (31) In the light of the above, the re-assessment of the alleged aid which was the object of the opening decision leads to the conclusion that the measure in favour of MOL under scrutiny, i.e. the combination of the 2005 agreement and the 2008 amendment to the Mining Act does not constitute State aid within the meaning of Article 107(1) TFEU,

⁽¹⁶⁾ Joined Cases C-399/10 P and C-401/10 P *Bouygues and Bouygues Télécom v Commission and others*, EU:C:2013:175, paragraphs 103 and 104.

HAS ADOPTED THIS DECISION:

Article 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 does not constitute State aid to MOL Nyrt. within the meaning of Article 107(1) TFEU.

Article 2

This Decision is addressed to Hungary.

Done at Brussels, 26 October 2015.

For the Commission
Margrethe VESTAGER
Member of the Commission
