Reports of Cases

JUDGMENT OF THE GENERAL COURT (Second Chamber)

12 November 2013*

(State aid — Agreement between the Hungarian State and the oil and gas company MOL relating to mining fees in connection with the extraction of hydrocarbons — Subsequent change in the statutory system of fees — Decision declaring the aid incompatible with the internal market — Selective nature)

In Case T-499/10,

MOL Magyar Olaj- és Gázipari Nyrt., established in Budapest (Hungary), represented by N. Niejahr, lawyer, F. Carlin, Barrister, and C. van der Meer, lawyer,

applicant,

v

European Commission, represented by L. Flynn and K. Talabér-Ritz, acting as Agents,

defendant,

principally, application for annulment of 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 2011 L 34, p. 55) and, in the alternative, for annulment of that decision in so far as it orders the recovery of amounts from the latter,

THE GENERAL COURT (Second Chamber),

composed of N.J. Forwood, President, F. Dehousse and J. Schwarcz (Rapporteur), Judges,

Registrar: S. Spyropoulos, Administrator,

having regard to the written procedure and further to the hearing on 22 January 2013,

gives the following

Judgment

Facts

1 The applicant, MOL Magyar Olaj- és Gázipari Nyrt., is a company established in Budapest (Hungary) whose core activities are the exploration for and production of crude oil, natural gas and gas products, the transportation, storage and distribution of crude oil products at both retail and wholesale levels, the transmission of natural gas and the production and sale of alkenes and polyolefins.

* Language of the case: English.

2 Hungary has regulated all mining activities, including those relating to hydrocarbons, by the 1993. évi XLVIII. törvény a bányászatról (Act XLVIII of 1993 on mining activities, 'the Mining Act'). Pursuant to the Mining Act, regulatory functions are exercised by the Minister in charge of mining issues and by the Mining Authority, which supervises mining activities.

3 The Mining Act provides that exploration and mining activity may be carried out under two different legal regimes. For areas considered rich in raw materials on the basis, inter alia, of geological data and categorised as 'closed' (Article 9(1) of the Mining Act), Articles 8 to 19 of the Mining Act establish a regime in which, following an open tendering procedure for each closed area, a concession is granted on the basis of a contract concluded between the Minister in charge of mining issues and the winner of the open tender competition (Articles 10 to 12 of the Mining Act). Areas categorised as 'open', a priori considered less rich in mineral raw materials, may be exploited by way of authorisation issued by the Mining Authority, provided the operator fulfils the legal conditions (Article 5(1)(a) and (4) of the Mining Act).

4 Article 20 of the Mining Act establishes the rules for fixing the mining fees which must be paid to the State. Article 20(11) of the Mining Act provides that the amount of the mining fees is a percentage defined, as the case may be, in the Act, in the concession contract or in the contract concluded pursuant to Article 26/A(5) of the Mining Act. In the case of concessions, the rate of the mining fee is established by the Minister in charge of mining issues, who is to take account of certain parameters laid down in Article 20(8) of the Mining Act. In respect of the contract referred to in Article 26/A(5) of the Mining Act, the rate of the fee is determined pursuant to the provisions of that article. For mineral resources extracted under the authorisation regime, the fee is regulated by the Mining Act (Article 20(2) to (7) of the Mining Act).

5 Prior to 2008, the mining fee for the extraction of hydrocarbons, crude oil and natural gas under authorisation was fixed at 12% of the value of the quantity mined for fields put into production from 1 January 1998 onwards or was derived from the application of a mathematical formula taking into account, inter alia, the average price of natural gas purchased by the public gas service, subject to a floor of 12%, for natural gas fields put into production before 1 January 1998 (Article 20(3)(b) of the Mining Act).

6 Article 26/A(5) of the Mining Act provides that where, under the authorisation regime, i.e. for fields located in open areas, a mining company does not start extraction within five years of the date of authorisation, it may ask the Mining Authority, on one occasion only, to extend this deadline by no more than five years. Where the Mining Authority agrees to this, a contract between the Minister in charge of mining issues and the mining company establishes, for the extended fields, the quantity of mineral raw materials to be used as a basis for calculating the mining fee and the rate of that fee, which must be higher than the rate applicable at the date of the extension application but no more than 1.2 times that rate ('the extension fee'). If the extension application concerns more than two fields, the rate of the extension fee is applied to all the mining company's fields by a contract entered into for a period of at least five years ('the increased mining fee'). If the extension application concerns more than five fields, an additional one-off payment may also be required, corresponding to a maximum 20% of the amount payable on the basis of the increased mining fee ('the one-off payment').

7 On 19 September 2005, the applicant sought extension of the mining rights for 12 of its hydrocarbon fields for which authorisation had been obtained but where extraction had not yet started.

8 On 22 December 2005, the Minister in charge of mining issues and the applicant concluded an extension agreement pursuant to Article 26/A(5) of the Mining Act in respect of the 12 hydrocarbon fields mentioned in paragraph 7 above ('the 2005 agreement'), point 1 of which granted a five-year extension on the deadline to start exploiting those 12 fields and set the extension fee to be paid by

the applicant to the State for each of the five years (for Year 1, 12% x 1.050 = 12.600%; for Year 2, 12% x 1.038 = 12.456%; for Year 3, 12% x 1.025 = 12.300%; for Year 4 and for Year 5, 12% x 1.020 = 12.240%).

9 Under point 4 of the 2005 agreement, the increased mining fee applies to all the applicant's fields already exploited under authorisation, i.e. 44 hydrocarbon fields where production started after 1 January 1998 and 93 natural gas fields where production started before that date, for a period of 15 years from the date when the agreement came into effect. The rate of the increased mining fee for the fifth year of the extension period applies until the fifteenth year. In respect of the natural gas fields where production started before 1 January 1998, the multiplier for each of the five years of extension (see paragraph 8 above) applies to the mathematical formula established by Article 20(3)(b) of the Mining Act, with the multiplier for the fifth year applying until the fifteenth year.

10 Point 6 of the 2005 agreement provides for a one-off payment of 20 000 million Hungarian forints (HUF).

11 Point 9 of the 2005 agreement provides that the rate of the extension fee, the rate of the increased mining fee, the basis of calculation, the percentage and all the factors used to calculate those fees are determined for the entire duration of the agreement exclusively by the provisions of the agreement and that the rates defined in the 2005 agreement will remain unchanged or constant for its entire duration.

12 According to point 11 of the 2005 agreement, the agreement comes into force as of the date of effect of the Mining Authority's resolution. The same provision prevents the parties from unilaterally terminating the 2005 agreement, except in the event that a third party acquires more than 25% of the applicant's capital.

13 The 2005 agreement formed the subject-matter of a Mining Authority resolution of 23 December 2005, which confirms the extension of the deadline to start exploiting the 12 hydrocarbon fields mentioned in paragraph 7 above and the payments to be made by the applicant which are determined by that agreement.

14 The 2007. évi CXXXIII. törvény a bányászatról szóló 1993. évi XLVIII. törvény módosításáról (Act CXXXIII of 2007 on mining activities amending the Mining Act; 'the 2008 amendment') came into force on 8 January 2008. The 2008 amendment amended the rate of the mining fee. Most importantly, following this amendment, Article 20(3) of the Mining Act provides for a rate of 30% of the value of the quantity extracted for fields put into production between 1 January 1998 and 31 December 2007, for the existing mathematical formula under the Mining Act regime to be applied to natural gas fields put into production before 1 January 1998, subject to a floor of 30%, and for a differentiated mining fee to be applied to fields where production began after 1 January 2008, according to the quantity of crude oil or natural gas extracted, i.e. a rate of 12% where the annual quantity produced does not exceed 300 million m3 of natural gas or 50 kt of crude oil, a rate of 20% for production between 300 and 500 million m3 of natural gas or between 50 and 200 kt of crude oil and a rate of 30% for production over 500 million m3 of natural gas or 200 kt of crude oil. Finally, for all fields, whenever they were put into production, the mining fee payable is increased by 3% or 6% if the price of Brent crude oil exceeds 80 or 90 US dollars (USD) respectively.

15 Article 235 of the 2008. évi LXXXI. törveny egyes adó- és járuléktörvények módosításáról (Act LXXXI of 2008 amending rates of taxes and fees) amends the Mining Act by reducing the mining fee for fields put into production between 1 January 1998 and 31 December 2007 inclusive and the minimum mining fee payable for natural gas fields put into production before 1 January 1998 back to 12%. That amendment entered into force on 23 January 2009.

Background to the dispute and contested decision

16 The Commission of the European Communities received a complaint on 14 November 2007 and, as a result, it wrote to Hungary on 24 January 2008, requesting certain documents relating to the 2005 agreement and asking questions about that agreement and about the application of the Mining Act and the 2008 amendment.

17 Following Hungary's reply of 17 March 2008, the Commission asked, by letter of 18 June 2008, for additional information about the 2005 agreement; Hungary replied on 8 September 2008.

18 By letter of 13 January 2009, the Commission informed the Hungarian authorities of its decision to initiate the formal investigation procedure provided for by Article 88(2) EC, with respect to the 2005 agreement, which had exempted the applicant from the increase in the mining fee resulting from the 2008 amendment (OJ 2009 C 74, p. 63) ('the opening decision'). The Commission took the view that, given the way the 2005 agreement and the provisions of the 2008 amendment had been designed, they should be regarded as part of the same measure, and, having assessed their joint impact, it concluded that the combined effect of the 2005 agreement and the 2008 amendment was to confer an unfair advantage on the applicant. The Commission considered that the measure fulfilled the criteria enshrined in Article 87(1) EC and should be considered as State aid, and that there was nothing to indicate that it could be compatible with the common market. The opening decision was published, and interested parties were invited to submit their comments.

19 By letter of 9 April 2009, Hungary submitted its comments on the opening decision. The Hungarian authorities took the view that the measure did not constitute State aid, since the 2005 agreement conferred no advantage on the applicant and was not selective, as the applicant received no preferential treatment resulting from application of that agreement.

20 By two letters of 27 April 2009, the applicant and the Magyar Bányászati Szövetség (the Hungarian Mining Association) submitted their respective comments on the opening decision. The applicant considered that it had not enjoyed a privileged position through application of the 2005 agreement, since it claims to have paid a much higher level of mining fee than its competitors paid or than it would have paid in the absence of the agreement, and that the agreement is consistent with the provisions and the logic of the Mining Act. The Magyar Bányászati Szövetség particularly emphasised the necessity for the State, inter alia in its function as legislator, to observe the legitimate expectations of economic operators and the principle of legal certainty as regards the long-term stability of the rates of mining fees applicable to fields for which mining authorisation had already been issued.

21 By letter of 3 July 2009, Hungary reported that it had no comments to make on the observations of the interested parties.

22 By letters of 16 October 2009 and 8 February 2010, Hungary replied to the requests for information sent by the Commission on 21 September 2009 and 12 January 2010, producing the documents requested by the Commission.

23 On 9 June 2010, the Commission adopted Commission Decision 2011/88/EU on State aid C 1/09 (ex NN 69/08) granted by Hungary to MOL Nyrt. (OJ 2011 L 34, p. 55) ('the contested decision') according to which, firstly, the measure taken by Hungary, namely the combination of the fixed mining fee payable by the applicant in the 2005 agreement and the increases resulting from the 2008 amendment, constituted State aid within the meaning of Article 107(1) TFEU that was incompatible with the common market under Article 108(3) TFEU, and, secondly, Hungary had to recover the aid from the applicant.

24 In the contested decision, the Commission held that the aid measure under examination was the combination of the 2005 agreement and the 2008 amendment, since the first exempted the applicant from changes introduced to mining fees by the second (recitals 19 and 20). According to the Commission, even if the 2005 agreement was concluded in accordance with the Mining Act then in force and even if it was up to the Member State to set the mining fees, the effects produced were not necessarily compatible with the State aid rules of the Treaty, although, taken in isolation, neither the 2005 agreement nor the 2008 amendment was contrary to these rules (recitals 52 and 53).

25 In respect of the criterion relating to the selectivity of the measure, the Commission considered in the contested decision that the system of reference was the mining authorisation regime and rejected arguments that agreements extending such authorisations might constitute a separate system of reference (recitals 61 to 65). According to the Commission, an extension agreement was 'clearly' selective, since the Hungarian authorities had a margin of manoeuvre whether or not to conclude such an agreement and to set the payment components contained in that agreement (recital 66). The Commission stressed that, firstly, the applicant benefited from lower fees until 2020 for practically all its fields subject to a mining authorisation, while its competitors who were subject to the same regime and had started production within the statutory time-limits had to pay higher fees (recital 67), and, secondly, the applicant was the only operator in the hydrocarbons sector to have obtained an extension of its mining rights granted in the context of authorisation, since other extension agreements concerned undertakings extracting solid minerals, for which mining fees were not amended (recital 68). The Commission took the view that the sequence of actions at issue, namely the way Article 26/A(5) of the Mining Act is worded, the 2005 agreement concluded on its basis and the 2008 amendment, was selective (recital 69). According to the Commission, only the applicant was subject to a specific regime which shielded it against any increase in mining fees (recital 70).

26 In discussing the advantage granted, the Commission rejected in the contested decision the arguments of Hungary, which submitted that it acted as an economic operator by authorising mining activities. According to the Commission, granting mining authorisations is not an activity that can be exercised by private actors, but is connected with the exercise of powers which are those of a public authority, since mineral resources are always controlled by the public authorities and, moreover, no link has been shown between the level of mining fees and the value of mining authorisations (recitals 72 and 73). The Commission stated that, contrary to Hungary's claims, other companies were subject to the increase in mining fees resulting from the 2008 amendment, inter alia through the application of the increase related to the Brent crude oil price described in paragraph 14 above (recitals 77 and 78). The Commission declared that other companies, inter alia new entrants, would have to face competition from the applicant, which was the only company to benefit from a lower rate of mining fees until 2020, giving it an advantage over a long period (recitals 79 and 80). The Commission held that the payment of increased mining fees by the applicant in 2006 and 2007 because of the 2005 agreement was irrelevant, since this was a matter of application of the provisions of the Mining Act or, as far as the increased mining fee and the one-off payment were concerned, a matter of amounts paid in exchange for extension and linked to the number of fields affected by extension; the Commission thus refused to take account of these charges, which had no link with the 2008 amendment (recitals 82 to 86). The Commission took the view that the aid measure conferred an advantage on the applicant.

27 In the contested decision, the Commission carried out an overview of the other conditions for the presence of State aid, holding that the measure involved foregone revenues for the State, distorted competition and affected trade between Member States. It concluded that the measure constituted State aid within the meaning of Article 107(1) TFEU (recitals 89 to 91).

28 In recitals 92 to 106 of the contested decision, the Commission examined the compatibility of the State aid with the FEU Treaty, maintaining that, by its very nature, the measure was operating aid and that none of the exceptions provided for by Article 107(2) and (3) TFEU was applicable. The Commission concluded that the measure constituted incompatible State aid.

29 In recitals 107 to 112 of the contested decision, the Commission replied to Hungary's arguments relating to the protection of legitimate expectations, to the protection of acquired rights and to discrimination with respect to the applicant. First, it pointed out that undertakings may not entertain a legitimate expectation that aid is lawful unless it has been granted in compliance with the State aid investigation procedure; secondly, it stated that no assurance had been given by an authority of the European Union as to the compatibility of the aid and that no exceptional circumstances could, in the present case, justify a legitimate expectation of such compatibility; and, thirdly, it stressed that the 2008 amendment had increased the rate of mining fees for fields already in operation on the date it came into force, which proved that mining authorisation holders have no legitimate expectation that their legal position will remain unaltered (recitals 107 to 111). As regards the argument alleging discrimination, the Commission replied that raising the fee for everyone operating under authorisation is not discriminatory (recital 112).

30 Finally, in recitals 113 to 120 of the contested decision, the Commission explained that Hungary must recover the State aid from the applicant, given that the advantage granted to the latter materialised on the date when the 2008 amendment came into force, i.e. 8 January 2008, and consisted of the difference between the actual mining fee paid by the applicant for its operating fields and the fees to which it should have been subject pursuant to the 2008 amendment. The Commission stated that neither the extension fee, the increased mining fee due in respect of 2006 and 2007 nor the one-off payment should be taken into account in calculating the amount of the aid which must be recovered, but only the increased mining fee paid by the applicant from 8 January 2008, the date on which the 2008 amendment entered into force.

31 The operative part of the contested decision reads as follows:

'*Article 1*

1. The combination of the fixed mining fee defined in the [2005] agreement concluded between [Hungary] and [the applicant] on 22 December 2005 and the [2008 amendment] constitutes State aid to [the applicant] within the meaning of Article 107(1) TFEU.

2. The State aid referred to in Article 1(1), unlawfully granted by Hungary to [the applicant], 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 [contested 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 [Commission] Regulation (EC) No 794/2004 [of 21 April 2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 108 of the [TFEU] Treaty (OJ 2004 L 140, p. 1)] as amended by [Commission] Regulation (EC) No 271/2008 [of 30 January 2008 (OJ 2008 L 82, p. 1)].

Article 3

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

2. Hungary shall ensure that [the contested decision] is implemented within 4 months of its notification.

Article 4

1. Within 2 months following notification of [the contested 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 [the contested 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 [the contested 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 [the contested decision]. It shall also provide detailed information concerning the amounts of aid and recovery interest already recovered from the beneficiary.

Article 5

[The contested decision] is addressed to [Hungary].'

Procedure and forms of order sought

32 By application lodged at the Registry of the Court on 8 October 2010, the applicant brought the present action.

33 The applicant claims that the Court should:

— annul the contested decision;

— in the alternative, annul the contested decision in so far as it orders the recovery of the amounts concerned from the applicant;

— order the Commission to pay the costs.

34 The Commission contends that the Court should:

— dismiss the action as unfounded;

— order the applicant to pay the costs.

35 By way of a measure of organisation of procedure, the Court put several questions to the parties, which replied by letters lodged on 8 January 2013 in the case of the applicant and on 9 January 2013 in the case of the Commission.

36 At the end of the hearing, the Court gave the applicant, within a period of one week from the hearing, an opportunity to submit any information regarding the level of crude oil prices at the end of 2005, when the 2005 agreement was signed, and during the second half of 2007, when the 2008 amendment was drafted and voted upon, and regarding the price forecasts for 2008.

37 The documents submitted by the applicant within the period specified were sent to the Commission for comment. After receiving those comments, the Court closed the oral procedure on 7 February 2013.

Law

38 The applicant puts forward three pleas in law: first, the contested decision infringed Article 107(1) TFEU, since the Commission erred in law when it found that the 2005 agreement and the 2008 amendment constituted unlawful State aid which was incompatible with the internal market; second, in the alternative, that decision infringed Article 108(1) TFEU and Article 1(b)(v) of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article [108] of the [TFEU] Treaty (OJ 1999 L 83, p. 1), since the Commission failed to assess the 2005 agreement under the rules applicable to existing aid, and third, also in the alternative, it infringed Article 14(1) of Regulation No 659/1999 by ordering the recovery of the amounts at issue.

39 In the first plea, the applicant contests the categorisation of State aid given to the measure under examination. By a first complaint, the applicant submits that the 2005 agreement and the 2008 amendment cannot be regarded as a single aid measure. By the second, third and fourth complaints of the plea, the applicant claims respectively that, if it were held that the 2005 agreement and the 2008 amendment constitute a single aid measure, such a measure would not be contrary to the provisions of Article 107(1) TFEU, because that measure is not selective, does not confer an advantage on it and does not distort competition.

40 It is necessary in particular to examine the second complaint of the first plea, relating to the absence of selectivity of the contested measure. For that purpose, it is necessary, first of all, to present the Commission's assessment, set out in the contested decision, as regards the selectivity of the contested measure before presenting, next, the arguments put forward by the parties in that regard before the Court. Lastly, the Court will present its assessment.

The Commission's assessment, set out in the contested decision, as regards the selectivity of the contested measure

41 The Commission analysed the condition relating to the selectivity of the contested measure in recitals 56 to 71 of the contested decision.

42 In that regard, in the first place, the Commission considered that the system of reference was the authorisation regime (recital 65 of the contested decision), of which the extension agreement mechanism formed part, and rejected Hungary's arguments seeking recognition of an independent system of reference consisting of that type of agreement (recitals 62 and 63 of that decision). The Commission observed that Hungary had a wide margin of discretion for extending authorisations, as well as for subsequently amending the provisions of the Mining Act, whilst knowing the advantageous effects that this would have for the applicant, which was the sole operator in the hydrocarbons sector to have concluded an extension agreement. According to the Commission, Hungary was free to fix

mining fees at any time and therefore not to amend the Mining Act (recital 64 of that decision). As regards its effects, the sequence of acts favoured one particular undertaking, according to the Commission.

43 In the second place, the Commission took the view that, in the framework of the authorisation regime, the extension agreement was clearly selective in the light of the parties margin of manoeuvre to set the different payment components or to decide not to conclude such an agreement, and the Hungarian authorities thus had a discretion to conclude an agreement with the applicant or with any other market operator (recital 66 of the contested decision). According to the Commission, such treatment cannot be explained either by the logic or nature of the system, in which mining fees ensure revenue for the State which is calculated on the extracted value, and the sums due under an extension agreement are paid in exchange for the extension. According to the Commission, the conclusion of the 2005 agreement and the 2008 amendment result in the applicant's benefitting from lower mining fees until 2020 for practically all of its fields under authorisation, whereas its competitors, operating fields under such authorisation, which started production on time and did not conclude extension agreements have to pay higher fees (recital 67 of that decision).

44 In the third place, the Commission noted that the 2005 agreement was the only agreement concluded in the hydrocarbons sector, other agreements having been entered into in the solid minerals sector, but that the mining fees in relation to solid minerals were not changed by the 2008 amendment (recital 68 of the contested decision).

45 In the fourth place, the sequence of actions, namely the way in which Article 26/A(5) of the Mining Act is worded, the 2005 agreement and the 2008 amendment were selective vis-à-vis the applicant (recital 69 of the contested decision). By the combined effects of that sequence, the applicant was the only undertaking subject to a specific regime which shielded it against any increase in fees due for hydrocarbons extraction (recital 70 of that decision). The Commission concluded that the selectivity criterion was met in the light of the wide discretion in terms of how an extension agreement could be granted and in view of the fact that the exemption had benefited only one undertaking (recital 71 of that decision).

46 Thus, although the Commission considered that the contested measure had, in those two constituent elements, favoured the applicant, it drew attention to the fact that the extension agreement was, by itself, selective, on account of the manner in which it had been negotiated and concluded (recital 66 of the contested decision). In stating that the 2005 agreement and the 2008 amendment had resulted in the applicant's benefiting from lower mining fees than those of the other operators until 2020, the Commission drew attention to the selective nature of the 2005 agreement vis-à-vis the applicant only (recital 67 of that decision), since the benefit of such mining fees stems solely from the agreement, which sets the rate of the increased mining fee for each of the fifteen years of duration of the agreement, and which provides that the rates thus set will be determined solely in accordance with its provisions and that those rates will stay unchanged (points 4 and 9 of the 2005 agreement). Moreover, by concluding that the applicant was subject to a specific regime shielding it from any increase in mining fees (recital 70 of the contested decision), the Commission necessarily took the view that the criterion of selectivity of the contested measure had been met, on the ground that, in the light of its characteristics mentioned above, the 2005 agreement was selective.

47 The Commission therefore relied on the selective nature of the 2005 agreement, in so far as it sets the rate of the increased mining fee for each of the fifteen years of its duration and as it provides that the rates thus set would remain unchanged, in order to regard the contested measure as State aid incompatible with the internal market.

Arguments of the parties

48 The applicant contests the selective nature of the 2005 agreement. First of all, it observes that the submission of all its fields to the increased mining fee results from the Mining Act, since the conditions that it lays down are satisfied, and is therefore general in scope and application. The applicant then states that all authorisation holders which were in a comparable situation to the applicant's could decide to negotiate an agreement to extend their mining authorisation pursuant to the provisions to that effect set out in the Mining Act. The applicant notes, in the reply, that the Commission itself considered in the contested decision that the 2005 agreement provided for 'standard treatment' with respect to the applicant and did not constitute an 'advantage', even though it fixed the applicant's mining fees for the entire duration of that agreement. The applicant refers to Article 20(11) of the Mining Act, according to which the mining fees paid in the event of concession and extension are those set out and agreed in concession or extension agreements. The applicant recalls that, during the administrative procedure, Hungary explained that undertakings making large investments in mining projects require long-term certainty in respect of the applicable mining fees and charges and that, consequently, mining fees subject to agreement should be fixed and stable for the entire duration of the respective agreement and that this principle must apply to mining fees for fields in production under authorisation.

49 The Commission disputes the arguments of the applicant by three arguments. First, it takes the view that there is no basis for the applicant's contention that there is a single frame of reference under the Mining Act under which concessions, authorisations and extension agreements constitute separate subsystems, since extension agreements are part of the authorisation regime. Second, although the applicant claims that, once the 2005 agreement had been entered into, there was no discrimination between itself and all holders of an authorisation, the Commission is of the opinion that that claim overlooks the fact that the contested measure is the combination of that agreement and the 2008 amendment; after the entry into force of the latter, the applicant was no longer in the same position as those holders. Third, the Commission doubts that the Mining Act lays down a rule of stability of fees under authorisation or that there is a coherent regulatory system ensuring legal certainty for all mining companies in respect of their fields that have already been put into production.

Findings of the Court

50 According to Article 107(1) TFEU, '[s]ave as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market'.

51 According to settled case-law, the classification as aid within the meaning of Article 107(1) TFEU requires that all the conditions set out in that provision are fulfilled. Thus, for a measure to be classified as State aid, first, there must be an intervention by the State or through State resources; second, the intervention must be liable to affect trade between Member States; third, it must confer an advantage on the recipient; fourth, it must distort or threaten to distort competition (see Case C-399/08 P *Commission* v *Deutsche Post* [2010] ECR I-7831, paragraphs 38 and 39 and the case-law cited).

52 As regards the condition relating to the existence of an advantage for the recipient, it is apparent from settled case-law that measures which, whatever their form, are likely directly or indirectly to favour certain undertakings or are to be regarded as an economic advantage which the recipient undertaking would not have obtained under normal market conditions are regarded as State aid (see *Commission* v *Deutsche Post*, paragraph 51 above, paragraph 40 and the case-law cited).

53 According to settled case-law, the definition of aid is more general than that of a subsidy. It includes not only positive benefits but also measures which, in various forms, mitigate the charges which are normally included in the budget of an undertaking and which thus, without being subsidies in the strict sense of the word, are similar in character and have the same effect (see Case C-81/10 P *France Télécom* v *Commission* [2011] ECR I-12899, paragraph 16 and the case-law cited).

54 With respect to the selective nature of the aid measure, it must also be observed that Article 107(1) TFEU does not distinguish between measures of State intervention by reference to their causes or their aims but defines them in relation to their effects (Case C-409/00 *Spain* v *Commission* [2003] ECR I-1487, paragraph 46). It follows that the application of that provision only requires it to be determined whether under a particular statutory scheme a State measure is such as to favour 'certain undertakings or the production of certain goods' over others which are in a legal and factual situation that is comparable in the light of the objective pursued by the measure in question (see *Spain* v *Commission*, paragraph 47 and the case-law cited). If so, the aid measure satisfies the condition of selectivity which defines State aid as laid down by that provision.

55 Before assessing the validity of the conclusions of the contested decision as regards the selective nature of the 2005 agreement, it is necessary to set out the arguments presented by Hungary and the applicant during the administrative procedure.

56 In that regard, Hungary put forward, during the administrative procedure, several arguments contesting the selective nature of the 2005 agreement, which was already relied upon by the Commission in the opening decision, in which it was noted that the contested measure under examination granted exemption from mining fees to a single undertaking (recitals 18 and 21 of the opening decision).

57 During the preliminary stage, Hungary replied, on 17 March 2008, to the Commission's question relating to the provisions of the Mining Act in the light of which the applicant was authorised to pay stable mining fees until 2020, by presenting Article 20(11) and Article 26/A(5) of that act. According to Article 20(11) of the Mining Act, the amount of the mining fee expressed in monetary terms is to be a percentage of the value of the extracted minerals as specified in that act or in the concession agreement or in a contract under Article 26/A(5) of the act in question. Hungary noted that any mining undertaking holding an authorisation was entitled to apply for the extension of the statutory deadline for starting production by payment of a fee replacing the lost mining fee, pursuant to the principles of Article 26/A(5) of the Mining Act (see paragraph 6 above), but that the conclusion of such an extension agreement was not obligatory. Hungary considered that the Mining Act allowed extension of mining rights on the basis of the same principles as the rules applicable to concession. It concluded that any mining undertaking was entitled to enter into extension agreements in a non-discriminatory manner, since such an undertaking had the right to extend the starting date of production subject to compliance with the requirements of Article 26/A(5) of the Mining Act.

58 On 8 September 2008, Hungary moreover provided clarification as regards the legal grounds on which it was possible for an undertaking that had failed to start production in due time to pay lower mining fees than those stipulated by the Mining Act, citing once again the provisions of Article 20(11) of that act in taking the view that, where the activity was undertaken under authorisation, the rate of the mining fee was set, as the case may be, by Article 20(3) of that act which determines the statutory rate of fee according to the type of materials extracted, or by an agreement concluded pursuant to Article 26/A(5) of the act in question in the event of extension of authorisation.

59 In its reply of 9 April 2009 to the opening decision, Hungary first of all concentrated on the logic of the mining legislation, which implies that a clause such as that setting the rate of the increased mining fee for each of the fifteen years of duration of the agreement and providing that the rates thus set would stay unchanged is a 'natural' element of any extension agreement, and that subsequent modifications to mining fee rates could not apply to the rates fixed in such an agreement. According to

Hungary, the 2005 agreement does not grant preferential treatment to the applicant, since any other mining undertaking in the same situation could expect to conclude a similar agreement fixing the mining fee rates in the same way as the 2005 agreement. Next, Hungary turned its attention once more to Article 20(11) of the Mining Act, which, in its view, specifies the methods for calculating mining fee rates. In its submission, by referring to agreements concluded pursuant to Article 26/A(5) of the Mining Act, Article 20(11) of that act has the stated aim of making the mining fees set in those agreements applicable in law to the production of the fields to which those fees relate, irrespective of the mining fee rate set by the act in question. Lastly, Hungary contested the finding in recital 29 of the opening decision that no other market player could have expected to secure such an agreement under the conditions provided for by the 2005 agreement, since, in its submission, the opposite resulted from Article 26/A(5) of the Mining Act, namely that the 2005 agreement was in fact the only type of agreement that could be concluded.

60 Furthermore, the applicant put forward, during the formal investigation procedure, arguments alleging that the 2005 agreement was not selective.

61 In its comments of 27 April 2008, the applicant also submitted that any mining undertaking in the same situation would conclude, on the basis of Article 26/A(5) of the Mining Act, an extension agreement containing the same provisions as the 2005 agreement, setting the mining fee rates laid down in the agreement and precluding a subsequent change in the statutory rate from having an effect. The applicant also contested the selective nature of the 2005 agreement by reference to agreements of the same nature concluded between the Hungarian authorities and mining undertakings in the solid minerals sector which it claims include clauses such as that setting the rate of the increased mining fee for each of the fifteen years of duration of the 2005 agreement and that providing that the rates thus set would remain unchanged. The applicant referred to Article 20(11) of the Mining Act as justification for the fact that the mining fee rates laid down by the 2005 agreement differed from the rate under the authorisation regime, and submitted that, if the legislature had intended that a future change in the statutory mining fee replace the fee rates set by the 2005 agreement, it should have included an express provision to that effect.

62 As a preliminary point, it should be recalled that the contested measure consists of two elements, namely the 2005 agreement, which sets mining fee rates for all the applicant's fields, whether in production or the subject of extension, for each of the fifteen years of duration thereof, and the 2008 amendment, which increases mining fee rates for all hydrocarbon fields under authorisation, but does not contain any provisions relating to fields that have already been the subject of an extension agreement.

63 In that regard, it should be noted at the outset that the Commission was right to state, in recital 53 of the contested decision, that the 2005 agreement is not contrary to the State aid rules. Since the fees stipulated by the 2005 agreement, which were applicable to both fields already in production and fields concerned by extension of authorisation, were higher than the statutory fees applicable at the time of its conclusion, that agreement did not involve any State aid element for the purposes of Article 107 TFEU.

64 Next, the Court considers that, where a Member State concludes with an economic operator an agreement which does not involve any State aid element for the purposes of Article 107 TFEU, the fact that, subsequently, conditions external to such an agreement change in such a way that the operator in question is in an advantageous position vis-à-vis other operators that have not concluded a similar agreement is not a sufficient basis on which to conclude that, together, the agreement and the subsequent modification of the conditions external to that agreement can be regarded as constituting State aid.

65 In the absence of such a principle, any agreement that an economic operator might conclude with a State which does not involve any State aid element for the purposes of Article 107 TFEU would always be open to challenge, where the situation on the market on which the operator party to the agreement is active evolves in such a way that an advantage is conferred on it as described in paragraph 64 above or where the State exercises its regulatory power in an objectively justified manner following a market evolution whilst observing the rights and obligations resulting from such an agreement.

66 However, a combination of elements such as that observed by the Commission in the contested decision may be categorised as State aid where the terms of the agreement concluded were proposed selectively by the State to one or more operators rather than on the basis of objective criteria laid down by a text of general application that are applicable to any operator. In that regard, it must be pointed out that the fact that only one operator has concluded an agreement of that type is not sufficient to establish the selective nature of the agreement, since that may result inter alia from an absence of interest by any other operator.

67 Moreover, it should be recalled that, for the purposes of Article 107(1) TFEU, 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 (see, to that effect, Joined Cases C-399/10 P and C-401/10 P *Bouygues and Bouygues Télécom* v *Commission* and *Others and Commission* v *France and Others* [2013] ECR, paragraphs 103 and 104). In that context, a combination of elements such as that relied upon by the Commission in the contested decision may be categorised as State aid where the State acts in such a way as to protect one or more operators already present on the market, by concluding with them an agreement granting them fee rates guaranteed for the entire duration thereof, whilst having the intention at that time of subsequently exercising its regulatory power, by increasing the fee rate so that other market operators are placed at a disadvantage, be they operators already present on the market on the date on which the agreement was concluded or new operators.

68 It is in the light of those considerations that it is necessary to examine whether, in the present case, the Commission was entitled to consider that the contested measure was selective, on the ground that, in so far as the 2005 agreement sets the rate of the increased mining fee for each of the fifteen years of its duration and provides that the rates thus set would remain unchanged, it was selective.

69 In the first place, it is necessary to analyse specifically the legal framework in the light of which the 2005 agreement was concluded.

70 Article 26/A(5) of the Mining Act allows any mining undertaking, whether it operates hydrocarbon or solid mineral fields, to apply for the extension of its mining rights on one or more fields on which it has not started extraction within five years of issuance of the authorisation. To that extent, Article 26/A(5) of the Mining Act does not appear to be a provision of a selective nature.

71 As regards the circumstance, noted in recital 66 of the contested decision, that a mining undertaking and the Hungarian authorities may decide not to conclude an extension agreement, it must be stated, first, that it is not apparent from Article 26/A(5) of the Mining Act that, if an extension application is submitted to them, the Hungarian authorities may refuse to open negotiations with a view to concluding an agreement having as its object the extension of the mining rights in question. Second, in accordance with Article 26/A(5) of the Mining Act, any mining undertaking may apply for the extension of its mining rights (see paragraph 70 above). However, such an undertaking may also decide not to make an extension application - inter alia in the light of the financial cost brought about by the increase of the applicable fee rate on the date of the extension application - relating, as the case may be, to all fields put into production (see paragraph 6 above), or decide not to accept the rates proposed by the Hungarian authorities following an extension application, so that no extension agreement will be concluded.

72 Moreover, it is true that Article 26/A(5) of the Mining Act leaves the Hungarian authorities a margin of discretion, by providing that the rate of the extension fee, which determines, where applicable, that of the increased mining fee, is not to exceed 1.2 times the rate applicable on the date of the extension application. However, such a margin of assessment cannot automatically be regarded as favouring certain undertakings or the production of certain goods over others and, thus, confer a selective nature on the extension agreements concluded. Such a margin of assessment may be justified by various factors, such as the number of fields extended and their estimated importance in relation to the fields already in production. Specifically, if, as Hungary asserted during the administrative procedure (see paragraph 57 above), the increase of the fee rate applicable on the date of the extension application is aimed at offsetting the loss of fees concerning fields that have not been put into production within five years of issuance of authorisation, it is not illogical that the rate of the extension fee and, where applicable, the rate of the increased mining fee, which apply to fields where the date on which production starts is delayed and to fields already put into production respectively, are higher where the number of fields extended is significant in relation to the number of fields already in production and that they are lower where, as in the present case, the number of fields extended accounts for a small proportion of fields in production. It follows from this that the margin of assessment conferred by Article 26/A(5) of the Mining Act is such as to enable the administration to preserve equal treatment between operators according to whether they are in comparable or different situations for the purposes of the case-law cited in paragraph 54 above, by adjusting its proposed fees to the characteristics of each extension application submitted, and that it appears to be the expression of a latitude limited by objective criteria which are not unrelated to the system of fees established by the legislation in question. More broadly, it must be observed that the margin of assessment at issue here can be distinguished, by its nature, from cases where the exercise of such a margin is connected with the grant of an advantage in favour of an economic operator. In the present case, the Hungarian authorities margin of assessment allows the fixing of an additional charge on economic operators in such a manner as to take account of the imperatives arising from the principle of equal treatment.

73 Article 26/A(5) of the Mining Act also provides that an extension agreement sets the rates of the extension fee and, where the extension application relates to more than two or more than five fields, that that agreement sets the rates of the increased mining fee for a period of at least five years and the amount of the one-off payment (see paragraph 6 above). It follows from that provision that, in the event of extension, the rates of the extension fee and, where applicable, the rates of the increased mining fee are determined exclusively by the extension agreement, a principle which is moreover laid down expressly in the first sentence of Article 20(11) of the Mining Act.

74 Accordingly, in the light of the provisions of Article 26/A(5) of the Mining Act, which are applicable to any undertaking wishing to apply for the extension of its authorisation and on the basis of which the 2005 agreement was concluded, the fact that the rates set by year of validity of that agreement are the result of negotiation does not suffice to confer on that agreement a selective character. In the light of what has been held in paragraph 72 above, the situation would have been different only if the Hungarian authorities had exercised their margin of assessment during the negotiations resulting in the 2005 agreement, which sets the rates of the extension fee and of the increased mining fee, in such a way as to favour the applicant by agreeing to a low fee level without any objective reason having regard to the rationale of increasing fees in the event of an extension of authorisation and to the detriment of any other operator which has sought to extend its mining rights or, in the absence of such an operator, where there is concrete evidence that unjustified favourable treatment has been reserved to the applicant. Moreover, in so far as its provisions stipulate that the contractually agreed rates of the increased mining fee are to apply for the entire period of that agreement and cannot be amended unilaterally during that period, the 2005 agreement adds nothing to the rule laid down by Article 26/A(5) of the Mining Act noted in paragraph 73 above.

75 In the second place, it is therefore for the Court to ascertain whether the Commission has demonstrated the selective nature of the 2005 agreement, inter alia in the light of the clause setting the precise rate of the increased mining fee for each of the fifteen years of duration thereof and of the clause providing that the rates thus set would remain unchanged.

76 First of all, it should be noted that the Mining Act is drafted in general terms as regards the undertakings that may benefit from the provisions of Article 26/A(5) of that act (see paragraph 70 above).

77 Next, it must be observed that, in the contested decision, the Commission merely found that the applicant was the only undertaking in practice to have concluded an extension agreement in the hydrocarbons sector (recital 71 of the contested decision). However, as was noted in paragraphs 66 and 71 above, this may be explained by an absence of interest on the part of other operators, and thus by an absence of any extension application, or by an absence of any agreement between the parties on the rates of the extension fee. With respect to the latter two possibilities, since the criteria laid down by the Mining Act for the conclusion of an extension agreement are objective and applicable to any potentially interested operator which fulfils those criteria, it cannot be accepted that the conclusion of the 2005 agreement is of a selective nature.

78 Moreover, as was stated in paragraph 74 above, by setting the rate of the increased mining fee for each of the fifteen years of the period of validity of the 2005 agreement and by providing that the rates thus set would remain unchanged, Hungary and the applicant merely applied the provisions of Article 20(11) and Article 26/A(5) of the Mining Act, which provide that any extension agreement is to set the rate of the increased mining fee for the duration thereof.

79 It should moreover be noted that the rates stipulated under the 2005 agreement apply to all the applicant's fields already in production under authorisation, that is to 44 hydrocarbon fields where production started after 1 January 1998 and to 93 natural gas fields where production started before that date, whereas extension concerns only twelve other fields not in production at the time of conclusion of the agreement. In those circumstances, the fact that the multiplier is below the ceiling of 1.2 and in particular between 1.02 and 1.05 (see paragraph 8 above) may be explained objectively by the limited significance of the twelve fields concerned by the extension in relation to the 137 fields already in production in 2005 (see paragraph 72 above). It must be stated that the Commission failed to examine that relevant aspect of the 2005 agreement, so that no evidence of unjustified preferential treatment of the applicant is apparent from the contested decision. In those circumstances, it cannot be assumed that the applicant was afforded favourable treatment in relation to any other undertaking which was potentially in a situation comparable to its own for the purposes of the case-law cited in paragraph 54 above.

80 Correlatively, although the Commission mentioned that there were indeed other extension agreements in the solid minerals sector, it took the view that it was not necessary to take account of them, since they concerned other types of minerals subject to other mining fees and that, in respect of those minerals, the fees were not changed by the 2008 amendment (recital 68 of the contested decision). However, it should be pointed out that, according to recital 70 of the contested decision, the selective nature of the contested measure stems from the selectivity of the 2005 agreement (see paragraph 46 above) and not from the nature of the minerals extracted, the rates of fees applicable to those categories of minerals or from the fact that those rates were not subsequently modified. Thus, the Commission's findings in recital 68 of the contested decision are not relevant for the purposes of rejecting the line of argument based on the existence of other extension agreements concluded under Article 26/A(5) of the Mining Act in terms similar to the 2005 agreement. By the approach that it followed, the Commission therefore declined to take account of all the factors by means of which it would have been in a position to assess whether the 2005 agreement was selective vis-à-vis the applicant in the light of the situation created by other extension agreements also concluded on the basis of Article 26/A(5) of the Mining Act the existence of which was revealed to the Commission by

the applicant. In addition, the Commission did not even seek to obtain from the Hungarian authorities more detailed information on the extension agreements concluded by mining undertakings in the solid minerals sector.

81 In the light, first, of the absence of selectivity characterising the legal framework governing the conclusion of the extension agreements and given the considerations justifying the grant of a margin of assessment to the Hungarian authorities during the negotiations relating to the rates of the fees and, second, of the absence of any evidence that those authorities treated the applicant favourably in relation to any other undertaking in a comparable situation (see paragraphs 70 to 74, 79 and 80 above), the selective nature of the 2005 agreement cannot be regarded as established.

82 Lastly, it should be pointed out that the increase in fees under the 2008 amendment, which entered into force only in 2008, occurred in a context of an increase of international crude oil prices, as was argued by the applicant in its written submissions and set out in detail in the letter produced in response to the request made to that effect by the Court (see paragraph 36 above). Moreover, since the Commission did not argue that the 2005 agreement had been concluded in anticipation of an increase in mining fees, the combination of that agreement with the 2008 amendment cannot validly be categorised as State aid for the purposes of Article 107 TFEU (see paragraphs 64 to 67 above).

83 Consequently, it is necessary to uphold the second complaint of the first plea of the action, alleging that the contested measure is not selective, and to annul the contested decision, without there being any need to reply to the other complaints of the first plea, or to the second and third pleas.

Costs

84 Under Article 87(2) of the Rules of Procedure of the Court, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. In the present case, since the Commission has been unsuccessful, it must be ordered to bear its own costs and to pay those of the applicant.

On those grounds,

THE GENERAL COURT (Second Chamber)

hereby:

1. Annuls European 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;

2. Orders the European Commission to pay the costs.

Forwood Dehousse Schwarcz

Delivered in open court in Luxembourg on 12 November 2013.

[Signatures]