



EUROPEAN COMMISSION

Brussels, 5 October 2017
C(2017) 6563 final

<p>In the published version of this decision, some information has been omitted, pursuant to articles 30 and 31 of Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union, concerning non-disclosure of information covered by professional secrecy. The omissions are shown thus [...]</p>	<p style="text-align: center;">PUBLIC VERSION</p> <p>This document is made available for information purposes only.</p>
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**Subject: State Aid SA.41116 (2017/NN) – Poland
Alleged aid to KGHM Polska Miedź S.A.**

Sir,

1. PROCEDURE

- (1) On 25 February 2015, Darley Energy Poland Sp. z o.o. ("DEP" or "the Complainant") submitted a complaint to the European Commission ("Commission") alleging that Poland granted incompatible State aid to KGHM Polska Miedź S.A. ("KGHM"). Upon request of the Commission, on 30 March 2015, the Complainant submitted a summary of the State aid aspects of the case.
- (2) On 1 April 2015, the Commission forwarded the complaint to the Polish authorities with the request to provide their own summary of the facts, as well as the reasons why they do not consider the alleged aid to be unlawful aid. Poland replied on 20 July 2015.
- (3) The Complainant submitted additional information on 30 October 2015 and 16 February 2016.

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- (4) On 26 May 2016, the Commission communicated its preliminary assessment of the complaint to the Complainant, concluding that the measure objected to *a priori* does not constitute State aid. On 8 September 2016, the Commission communicated to the Complaint that, since no comments had been received on the letter of 26 May 2016, pursuant to Article 24(2) of Regulation (EU) 2015/1589 the Complaint was deemed to have been withdrawn.
- (5) On 16 September 2016, the Complainant submitted comments to the preliminary assessment letter. On 18 January 2017, the Commission communicated to the Complainant that his letter of 16 September 2016 had not brought any new elements to alter the Commission's preliminary assessment on the absence of aid provided on 26 May 2016. The Complainant once again disagreed with the Commission's assessment and by letter of 17 February 2017 asked the Commission to adopt a decision under Article 4(2), (3), or (4) of Regulation 2015/1589¹.
- (6) In order to complete the inquiry of the measure at issue in the most exhaustive manner to address all the complainant's allegations, the Commission requested additional information from Poland on 11 April 2017 and 12 June 2017, to which Poland replied on 13 April 2017 and 28 June 2017.
- (7) On 7 July 2017, the Commission communicated its second preliminary assessment of the complaint to the Complainant, concluding again that the measure objected to *a priori* does not constitute State aid. On 7 August 2017, the Complainant submitted comments to the second preliminary assessment letter, again disputing the conclusion thereof and by making reference to his previous submissions. In that letter, the Complainant also requested the Commission to provide access to the latest information submitted by Poland on 13 April 2017 and 28 June 2017, to open a formal investigation procedure or, alternatively, to adopt a formal decision under Article 4(2), (3), or (4) of Regulation 2015/1589 susceptible to be appealed.

2. DESCRIPTION AND FACTS OF THE CASE

2.1. The alleged beneficiary and the Complainant

- (8) The alleged beneficiary, KGHM, is one of Poland's biggest companies, Europe's second biggest copper producer and the world's biggest silver miner. The share capital of KGHM amounts to 2 billion PLN (c. EUR 500 million). The Polish State holds a 31.8 % stake in KGHM.
- (9) The Complainant, DEP, is a Polish subsidiary of Honwood Services Limited, a company registered in Cyprus. Honwood Services Limited is wholly-owned by Darley Energy PLC registered on the Isle of Man. The share capital of DEP amounts to PLN 50,000 (c. EUR 12,000).

¹ Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (Text with EEA relevance), OJ L 248, 24.9.2015, p. 9–29.

2.2. The grounds of complaint

- (10) The Complainant alleges that Poland granted incompatible State aid to KGHM by awarding KGHM a concession for the prospection and exploration of polyhalite (potash) deposits in the area of Puck (hereafter "concession" or "concession for exploration") without conducting an open, transparent, non-discriminatory and unconditional tender, to the detriment of DEP, who was refused that concession despite submitting a better offer. That offer was allegedly proposing the most rational method of exploration by focusing on sole exploration of potash deposits, better location of boreholes based on previous drilling works also avoiding mining works on densely populated or protected coastal areas.
- (11) The Complainant claims that the administrative proceedings which led to granting the concession for exploration to KGHM did not comply with Polish and EU law. On the latter aspect, the Complainant submitted a separate complaint to the Commission's Directorate General for Internal Market, Industry, Entrepreneurship and SMEs ("DG GROW"). Despite this case being closed (see recital (35)), the Complainant asserts that the Commission (DG GROW) had serious doubts as to whether the award of the concession to KGHM violated the principles of transparency and equal treatment and that the preliminary assessment of the present complaint set out in the Commission letter of 7 July 2017 contradicts those earlier conclusions of the Commission (DG GROW) in the context of the infringement procedure.
- (12) According to the Complainant, the alleged measure was granted from State resources, since it involved foregone revenues to which the State would have been entitled to, if a competitive selection procedure had been conducted. The award of the concession without conducting a transparent and non-discriminatory tender procedure could allegedly not result in the choice of the best offer. The best offer is a function of the price paid and the services provided. In the course of transparent and non-discriminatory proceedings, DEP could allegedly have offered a better quality service in return for the concession.
- (13) Furthermore, in view of the Complainant, the prospect of exploitation of the potash deposit under the terms foreseen in Polish law, and not the concession for exploration *per se*, provides an economic advantage in favour of KGHM through the award of the exploration rights. The Complainant seems to imply that the amount of the aid is the net present value (NPV) of the total potash reserves concerned, that is to say [...]*, as estimated by a report of a consultant.
- (14) In its last letter of 7 August 2017, the Complainant did not modify the broad terms of its complaint but provided specific observations with respect to the second preliminary assessment of the Commission. In particular, the Complainant claimed that the Polish authorities had unfairly and discriminatorily set out and/or modified the rules for award of the concession in the course of the procedure (namely "*shifted the goalposts*") to its detriment, notably by delaying the establishment of award criteria by one and half years after the Complainant had filed its initial application. The Complainant further alleged that the market economy operator test is applicable and should be applied to the measure under

* Business secret

examination. Further, the Complainant claimed that the criteria laid down in the *Altmark* case law were not met, neither when the concession was awarded, nor later because KGHM has failed to perform its obligations under the concession by drilling [...] instead of [...] by May 2017. In addition, the Complainant submitted again that DG Competition's preliminary assessment was inconsistent with the conclusions of DG GROW, which allegedly acknowledged in its pre-closure letter (see recital (35)) that the relevant Polish law did not fulfil the procedural requirements of transparency and non-discrimination. The Complainant further considered that the measure is also selective owing to the discrimination it entailed whilst threatening competition and affecting trade between Member States.

- (15) Finally, the Complainant maintains that the fact that the Commission asked for further information from Poland when the inquiry had been pending for more than two years constitutes evidence of the serious doubts which the Commission should have as to the compatibility of the measure with the internal market. According to the Complainant, these claims should lead the Commission to open a formal investigation procedure under Article 108(2) TFEU.

2.3. Polish national framework for granting the concessions for exploration and exploitation of mineral deposits

- (16) The legal framework in Poland generally applicable to the present case is as follows. In line with Article 10 of the Geological and Mining Law ("the Mining Law")² deposits of potassium salt are covered by the mining ownership which belongs to the State Treasury. According to Article 12 of the Mining Law, the State Treasury can exercise its mining ownership exclusively through the establishment of a mining usufruct. Based on Article 21(1) of the Mining Law, the prospection, exploration and exploitation of such deposits can be conducted only after obtaining the concession. The concession is granted by way of an administrative decision issued by the Minister of Environment. To this end, administrative proceedings are conducted on the basis of the Administrative Proceedings Code³ ("APC"), the Law on Freedom of Economic Activity⁴ and the Mining Law.
- (17) Consequently, prospection and exploration as well as exploitation of mineral deposits require obtaining a concession and conclusion with the State Treasury of an agreement establishing a mining usufruct. The concession and the mining usufruct rights must be granted separately both for prospection and exploration as well as for exploitation activities.

² *Ustawa z dnia 9 czerwca 2011 roku Prawo geologiczne i górnicze. Dz.U. 2011 nr 163 poz. 981 z późn. zm.* The present decision refers to the version of the Mining Law and other legal acts referred to in this decision applicable at the time of the initiation of the administrative proceedings subject to the current Complaint.

³ *Kodeks postępowania administracyjnego, Dz.U. z 2013 r., poz. 267.*

⁴ *Ustawa o swobodzie działalności gospodarczej, Dz. U. z 2015 r. poz. 584.*

- (18) The process of granting the concession is initiated either on the basis of an application submitted by an interested undertaking or a notice issued by the concession authority.
- (19) In line with the Law on Freedom of Economic Activity⁵ and jurisprudence of the Polish Supreme Administrative Court⁶, a tender shall be organised only when the granting of the concession is initiated by the concession authority. In other cases, the concession authority, in line with Polish law,⁷ launches administrative proceedings with the aim of performing a comparative assessment of the applications. Throughout these administrative proceedings, in line with the national rules on the open access to administrative files⁸, each applicant has access to the applications of the other participants of the process and can at any time modify its own application to make it more competitive against the selection criteria.
- (20) The applications for concession are evaluated on the basis of the criteria resulting from generally applicable national laws. Indeed, in line with Article 29(1) of the Mining Law, Article 72 and Article 125 of the Environmental Protection Law⁹, when evaluating concession applications, the concession authority must take into account the following conditions: public interest, security, environmental protection and rational management of mineral deposits. According to Poland, from these conditions and in accordance with its previous decisional practice, the concession authority in the present case derived the following detailed selection criteria: (i) the scope of geological works, (ii) the quantity of new information to be gathered from the planned geological works and (iii) the earliest gathering of geological information enabling protection of resources. According to Poland, these selection criteria express the conditions mentioned in its national law in a more specific form. The concession is granted to the entity that complies best with the above criteria.
- (21) A concession for exploration gives its beneficiary the exclusive right to carry out the exploration of the deposits concerned (i.e. to drill test holes and take samples) and a priority to obtain the "exploitation" mining rights. Under the Mining Law, the entity which explored a deposit, documented it sufficiently to enable a preparation of a deposit development plan and obtained a decision approving the geological documentation may claim the establishment of the mining usufruct for exploitation of a mineral with priority over other parties¹⁰. If such a claim is made, the agreement to establish the relevant mining usufruct shall be concluded within three months. If the exploration concession holder does not claim the

⁵ Article 51 and 52(1).

⁶ Judgment of the Supreme Administrative Court of 4 December 2012, II GSK 1830/11.

⁷ See e.g. Article 61(1) of APC.

⁸ Article 73 of APC.

⁹ *Ustawa z dnia 27 kwietnia 2001 r. Prawo ochrony środowiska*, Dz. U. z 2013 r. poz. 1232

¹⁰ Article 15(1) of the Mining Law.

mining rights within three years from the decision approving the geological documentation, the priority right expires.

- (22) The concession fee for exploration and for the associated mining usufruct right is calculated according to the formula laid down in Article 133 of the Mining Law as a unit price per type of a mineral, multiplied by the area under concession.
- (23) The concession fee for exploitation of a mineral is subject to a fee set up in the contract between the authority granting the concession and the concession holder. The formula to calculate remuneration of the State for the exploitation rights is laid down in the "Principles of calculating remuneration for the mining usufruct"¹¹, issued by the Minister of Environment in 2013, and includes: (i) a basic remuneration component, which is calculated on the basis of a unit price of the mineral concerned and the size of the deposit, and (ii) the usage ratio.

2.4. Procedure for granting the concession for exploration of polyhalite (potash) deposits in the area of Puck to KGHM

- (24) The application of the relevant Polish legal framework in the present case was as follows. On 2 November 2012, DEP submitted an application for concession for exploration of polyhalite (potash) deposits in the area of Puck, in northern Poland. The Minister of Environment, i.e. the concession authority, asked DEP to supplement its application, which the applicant did by 27 March 2013. DEP's application covered the area of 78.86 km².
- (25) The concession authority subsequently received applications for concession for exploration of the same mineral (potash) from: Polski Potas Sp. z o.o. ("PP"), on 11 April 2013 (covering the area of 27.82 km²), KGHM, on 23 September 2013 (103.75 km²) and Mineralis Sp. z o.o. ("Mineralis"), on 27 November 2013 (42.6 km²). In addition to potash, KGHM's application concerned copper, silver ores and halite ("the associated minerals"), while the application of Mineralis concerned also halite.
- (26) According to the Complainant, the applicants submitted their applications based on studies conducted by Polish geologists in the 1960s and 1970s, which were re-examined a couple of years ago. The Complainant also refers to a report by an industry consultant from April 2013 which showed that there are significant reserves of potash in the area concerned. In addition, according to Poland, the concession authority published on its website a map (updated monthly) showing the concession areas applied for by all the applicants.
- (27) As the applications covered partially overlapping areas, the concession authority conducted administrative hearings with the aim of reconciling the conflicting interests of the applicants, in line with the Polish administrative law (Article 89 of APC). The administrative hearings did not lead to a compromise solution since none of the applicants modified their applications.
- (28) In these circumstances, the Minister of Environment carried out six administrative proceedings concerning the granting of the concession in order to assess and compare the competing applications, in relation to the three applications

¹¹ *Zasady ustalania wynagrodzenia z tytułu użytkowania górniczego*, Ministry of Environment, 27 February 2013.

submitted by PP and one for each application submitted by the remaining three applicants. During these proceedings, in line with the national rules laid down in Article 73 of APC on the open access to administrative files, each applicant had access to the applications of other participants of the proceedings and could at any time modify its own application. According to Poland, all applicants (including the Complainant) used this possibility.

- (29) In the present case, the Minister of Environment did not conduct a tender procedure since the administrative proceedings were not initiated on a prior notice published by the concession authority, but instead on the basis of the applications submitted by the applicants (see recital (19)). In addition, the Minister of Environment could not conduct a tender since the applicants did not compete for a concession for the same area, the same minerals and the same scope of works (PP applied only for concession for prospection whereas the other applicants also for exploration).
- (30) The Minister of Environment acting in its capacity as the concession authority assessed the applications according to the selection criteria established on the basis of the general Polish law (see recital (20)), as further clarified in the document published on the Ministry of Environment's website on 8 May 2014¹² and then communicated to the applicants on 11 August 2014.
- (31) In the areas where the applications of KGHM and DEP overlapped, DEP proposed to make four obligatory drills (including one obligatory drill in the first stage of works) to the depth of 950 m and to explore potash only. In the remaining area covered by DEP's application which did not overlap with KGHM's application, no geological works were proposed. The requested duration of the concession was 68 months and the total area of exploration amounted to 78.86 km². KGHM proposed to make eight obligatory drills (including five obligatory drills in the first stage of works located in the area overlapping with the DEP's application) to the depth of 1,265 m to explore potash and the associated minerals. The requested duration of the concession was 60 months and the total area of exploration amounted to 103.75 km².
- (32) On the basis of the selection criteria mentioned before (see recital (20)), taking into account also the applications of PP and Mineralis, the concession authority came to a conclusion that KGHM proposed the largest scope of geological works which would enable it to gather more geological information and in a shorter timeframe than the other applicants.
- (33) Consequently, on 1 October 2014, the concession authority decided to grant the concession for exploration of potash in the area of Puck along with the associated minerals to KGHM and to refuse the concession to the remaining applicants. DEP and PP asked the concession authority to re-assess the case. Upon re-assessment the concession authority maintained its original decision on 30 December 2014.

¹² *Procedura porównania konkurencyjnych wniosków o udzielenie koncesji na poszukiwanie lub rozpoznanie złóż kopalin (z wyłączeniem węglowodorów)*, Ministry of Environment, 8 May 2014.

- (34) On 19 March 2015, the Minister of Environment signed a mining usufruct agreement with KGHM giving it the right to carry out the exploration concession works in the areas concerned.
- (35) On 11 December 2014, DEP submitted a complaint to the Commission (DG GROW) alleging that, by the award of the concession for the exploration of potash within the Puck region Poland infringed Article 49 TFEU. On 8 August 2016, the Commission (DG GROW) sent a letter informing DEP that it had no intention to open infringement proceedings against Poland, following which on 13 September 2016 it closed the file.¹³
- (36) In response to the assertions of the Complainant in the present case, it must be noted first that the Commission has not initiated infringement proceedings against Poland by sending any letter of formal notice and, a fortiori, the Court of Justice has not established any infringement of Article 49 TFEU in this matter. To be clear, contrary to what the Complainant alleges, DG GROW did not find that the selection procedure at issue lacked transparency or violated the principle of equal treatment. DG GROW merely highlighted that new provisions of the Geological and Mining Law provided for more transparency and better fulfilment of the principle of equal treatment. Second, the infringement procedures on failure to comply with Union law and State aid procedures are governed by different substantive and procedural rules and the Commission cannot (mis)use its powers under State aid rules related to a possible violation of Article 107(1) TFEU to examine, let alone establish, an infringement of Article 49 TFEU or the absence thereof. Third, the position of the Commission as regards the alleged violation of State aid rules is set out below, including on the alleged violation of the principles of transparency and equal treatment (recitals (65)-(80)).
- (37) On 4 February 2015, DEP submitted a complaint to the Voivodship Administrative Court in Warsaw against the decision of the Minister of Environment to grant the concession to KGHM. On 27 September 2016, the Court rejected the complaint in its entirety, finding that the concession authority did not breach Polish and EU law.¹⁴ On 8 December 2016, DEP appealed the judgment to the Supreme Administrative Court.

2.5. Position of Poland

- (38) Poland considers that the alleged measure does not involve State aid because it has not conferred any economic advantage on KGHM. According to Poland the mere fact that the concession was granted without a tender is not sufficient to establish the existence of State aid. Poland argues that the administrative proceedings leading to the granting of the concession for exploration was conducted on the basis of objective, transparent and non-discriminatory selection criteria, derived from the general law, communicated in advance and applied by the concession authority in previous administrative proceedings.
- (39) In addition, Poland argues that the concession fee for exploration is pre-determined by Polish law and, for a given mineral, depends only on a unit price set out by law and the area under concession. Given that KGHM's application

¹³ EU Pilot investigation 8310/16/GROW.

¹⁴ Judgment of the Voivodship Administrative Court in Warsaw of 27 September 2016, VI SA/Wa 708/15.

covered the largest area, the State maximised its revenue by granting the concession for exploration to KGHM.

- (40) Finally, in the view of Poland, the priority for the holder of the concession for exploration to claim the exploitation rights is not unconditional: the applicant must first explore the deposit, document it sufficiently to enable preparation of a deposit development plan and obtain a decision approving the geological documentation. The priority right for the concession for exploitation is justified by the logic of the concession system, which is to incentivise a concession holder who invests significant resources and bears high business risk related to exploration and prospection of deposits and, furthermore, applies to all undertakings that explore and document a deposit, and not selectively to KGHM.

2.6. The measure under assessment

- (41) The measure under assessment is the granting of the concession for exploration to KGHM with the associated priority right to obtain the exploitation mining rights.
- (42) The Commission notes that the granting of the exploitation mining rights does not automatically follow from the award of the concession for exploration. The holder of the concession for exploration must still fulfil certain conditions, that is to say explore and properly document the deposit and obtain the necessary approval of geological documentation. Moreover, the deposits must prove to be economically viable for exploitation. There is always a business risk that they will not be viable or not to the extent expected, for example if the size of deposit turns out to be smaller than assumed before the exploration or if the price of mineral at the time when exploitation begins is lower than originally expected.
- (43) Nevertheless, the award of the exploitation rights depends solely on the holder of the concession for exploration. If the concession holder fulfils the conditions and decides to claim the priority right, the concession authority cannot refuse granting the exploitation rights. Whether the priority right is actually exercised or not, it has a certain economic value from the outset, as it effectively gives the owner of the concession for exploration an option to exploit the mineral. Poland itself implicitly acknowledges it by explaining that the priority right is an incentive for the concession holder to bear the costs and risk related to exploration. If so, it must have a certain value for the concession holder. Therefore, the granting of the concession for exploration must be assessed together with the associated priority right for exploitation, as a single measure.
- (44) The Commission further observes that, for the assessment of that single measure at the moment it is granted, i.e. when the concession for exploration is awarded, the actual works effectively carried out subsequently and a possible difference with the works committed to in the application of KGHM, as the Complainant alleges, cannot be taken into consideration since they are not known by the granting authority when assessing the various applications. Therefore, the insufficient implementation by KGHM of the obligations it assumed in its bid alleged by the Complainant in recital (14) cannot be taken into account for the evaluation of the award decision.

3. ASSESSMENT OF THE MEASURE

- (45) Article 107(1) of the Treaty on the Functioning of the European Union ("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 shall, in so far as it affects trade between Member States, be incompatible with the internal market.
- (46) It follows that, for a measure to be qualified as State aid within the meaning of Article 107(1) TFEU, the following cumulative criteria must be met: (i) it must be granted by the State or through State resources; (ii) it must confer an advantage upon an undertaking; (iii) it must be selective, i.e. favour certain undertakings or the production of certain goods; and (iv) it must distort or threaten to distort competition and it must affect trade between Member States.
- (47) Economic transactions carried out by public bodies do not confer an advantage on their counterparts, and therefore do not constitute aid, if they are carried out in line with normal market conditions.¹⁵ Compliance with normal market conditions is normally assessed on the basis of the "*market economy operator*" (MEO) test, whose purpose is to determine whether with regard to a certain transaction the State acted as a private operator in a similar situation. The MEO test is, however, not applicable in transactions where the State acts as a public authority rather than as an economic operator.¹⁶
- (48) In this respect, the Commission notes that under Polish law deposits of potassium salt belong to the State and their exploration and exploitation can be conducted only after obtaining the concession from the State. No market operator can grant any such or similar concession, and, therefore, no market operator can be in a similar situation as the State. In addition, according to Polish law, when evaluating applications for the concession, the State must take into account public interest, security, environmental protection and rational management of mineral deposits (see recital (20)). These are legitimate considerations which are relevant for a public authority rather than for an economic operator that is ultimately concerned only with profit maximisation and which, furthermore, are not prone to any meaningful quantifiable economic analysis.
- (49) More generally, the granting of concessions for exploration or exploitation of mineral deposits is, due to its regulatory nature, typically performed by the State in Member States of the Union and can be categorised as the exercise of public authority powers. In view of that, and contrary to the view of the Complainant, the Commission takes the view that in granting the concession for exploration, the

¹⁵ Judgment of the Court of Justice of 11 July 1996, *SFEI and Others*, C-39/94, ECLI:EU:C:1996:285, paragraphs 60 and 61.

¹⁶ Judgment of the Court of Justice of 5 June 2012, *Commission v EDF*, C-124/10 P, ECLI:EU:C:2012:318, paragraphs 79 to 81; Judgment of the Court of Justice of 10 July 1986, *Belgium v Commission*, 234/84, ECLI:EU:C:1986:302, paragraph 14; Judgment of the Court of Justice of 10 July 1986, *Belgium v Commission*, 40/85, ECLI:EU:C:1986:305, paragraph 13; Judgment of the Court of Justice of 14 September 1994, *Spain v Commission*, Joined Cases C-278/92 to C-280/92, ECLI:EU:C:1994:325, paragraph 22; Judgment of the Court of Justice of 28 January 2003, *Germany v Commission*, C-334/99, ECLI:EU:C:2003:55, paragraph 134.

State acted as a public authority and, consequently, the MEO test is not applicable.

- (50) Nevertheless, the granting of the concession for exploration can have an economic value in that it is associated with the priority right to claim exploitation of the minerals which do have an economic value since those minerals are tradeable, and therefore, the concession for exploration may still entail an economic advantage for the concession holder in the present case. Insofar as the mineral resources of Poland are under ownership of the State Treasury (see recital (16)), any undue advantage conferred by the concession for their eventual exploitation is to be regarded as involving State resources within the meaning of Article 107(1) TFEU.
- (51) The Commission considers that the examination of the outcome of the procedure chosen and carried out by the Polish authorities does not lead to discerning any economic advantage having been conferred on KGHM. The facts show that it would not have been in the interest of Poland to award the concession immediately to the Complainant by November 2012 or by March 2013 when its application was supplemented. Indeed, the other three competitors filed applications in the following months until November 2013 (see recitals (24) and (25)). Eight months in this case is not an unreasonable lapse of time in the context of an administrative procedure, also since other applications could have been expected. Indeed, this period allowed competitors to formalise their proposals and the Polish authorities to test the market interest for the concession. This test would not have been possible if the concession had been awarded on a first come first served basis to DEP.
- (52) Considering that there were four competing applicants and given the outcome of the award procedure, the Complainant has failed to show that a different outcome of the award process could have been more beneficial for Poland. The General Court has already ruled that the public authorities of the Member State may take into consideration, in the absence of a competitive tender, the comparability of the offers received, whether they are binding in national law and the broader fulfilment of other objectives than the mere sales price for the purposes of adjudicating a sale of land, without the choice of a lower bid unduly favouring and granting an undue economic advantage within the meaning of Article 107(1) TFEU to the preferred bidder¹⁷. This conclusion holds true *a fortiori* in the present case where none of the alternative offers filed by three other applicants were more advantageous than KGHM's, according to the information available, and KGHM has best met the conditions set out by Poland for the award of this concession.
- (53) In any event, the Commission considers it appropriate to examine also, in addition to the outcome of the award process, whether KGHM was unduly favoured and received an advantage not available at market conditions, within the meaning of Article 107 (1) TFEU. This examination can be done by way of assessing, in line with the case law¹⁸, whether the process of granting the concession for

¹⁷ See judgment 13 December 2011, *Konsum Nord ekonomisk förening v European Commission*, T-244/08, ECLI:EU:T:2011:732, in particular paragraphs 66 to 75.

¹⁸ See e.g. judgement of 14 January 2015, *Eventech v The Parking Adjudicator*, C-518/13, ECLI:EU:C:2015:9, paragraphs 48 and 49: "[W]here the State, in order to pursue the realisation of an

exploration was conducted in line with the principles of the TFEU on public procurement, i.e. that such a process was conducted in a (i) competitive, (ii) transparent, (iii) non-discriminatory and (iv) unconditional manner. The Commission assesses below whether and how the process of granting the concession fulfilled these conditions.

(i) competitive process

- (54) A selection process is competitive if any qualified entity can participate in it and those entities indeed were given the chance to compete against each other to be selected.
- (55) The Commission observes that, under Polish law, any entity interested in prospection and exploration of potash could submit application for the concession to the concession authority. Such an application only had to fulfil the formal requirements set out in Article 49 of the Law on Freedom of Economic Activity and Article 24 and 25 of the Mining Law. The concession authority would then be obliged by law (Article 61 of APC) to initiate administrative proceedings with respect to such an application and thus to include it in the selection process.
- (56) As it happened, four entities submitted applications for the concession for exploration. The applications ultimately met formal requirements and the concession authority accepted all applicants to be considered in the selection process. Since the areas proposed to be explored by the applicants partially overlapped and the applicants did not agree to modify their applications to resolve their conflicting interests, the concession authority, in line with Polish law, launched administrative proceedings with the aim of performing a comparative assessment of the applications. Throughout the proceedings each applicant had access to the applications of the other participants of the process and could at any time modify its own application to make it more competitive against the selection criteria. It is undisputed that all the applicants, including the Complainant, used this possibility during the administrative proceedings.
- (57) As regards the allegation of the Complainant that there was no competitive tender formally speaking, the Commission notes that there was no obligation to organise one. According to Polish law, a tender is organised when the granting of the concession is initiated by the concession authority. In the present case, the concession process was not initiated by the Ministry of Environment, but by the applicants themselves. In addition, the applicants competed for different geographic areas, different minerals (potash, copper, silver ores and halite) and different scope of works (prospection and exploration). Therefore, a formal tender procedure could not have been organised because it would have required standardised applications based on the same terms of reference.

objective laid down by that State's legislation, grants a right of privileged access to public infrastructure which is not operated commercially by the public authorities to users of that infrastructure, the State does not necessarily confer an economic advantage for the purposes of Article 107(1) TFEU (...) Further, it must be stated that the identification of the objective pursued is, in principle, a matter within the prerogative of the competent national public authorities alone and they must have a degree of discretion both as regards whether it is necessary, in order to achieve the regulatory objective pursued, to forgo possible revenue and also as regards how the appropriate criteria for the granting of the right, which must be determined in advance in a transparent and non-discriminatory manner, are to be identified"

- (58) The Complainant argues that there is an *ex ante* presumption that transactions in violation of the principle of non-discrimination and transparency entail a State aid element, unless it can be proven that the deficiencies in the process did not affect its outcome. In this respect the Complainant invokes the *Land Burgenland* case¹⁹, in which the Court of Justice confirmed the finding of the General Court that where a public authority proceeds to sell an undertaking belonging to it by way of an open, transparent and unconditional tender procedure, it can be presumed that the market price corresponds to the highest offer.
- (59) The Commission notes first that this case law concerns primarily the outcome of a tender procedure (an undertaking was not sold to the highest bidder) and not the obligation to conduct it as such. Second, the transaction concerned in *Land Burgenland* consisted in the sale of an undertaking where the State acted as an economic operator whose behaviour could be compared to a private vendor interested in maximising proceeds, whereas the present case concerns the granting of the concession where the State acted as a public authority whose behaviour cannot be compared to a private vendor, as explained in recitals (48)-(49). Thus, the Commission considers that the reference to the *Land Burgenland* case is inapposite in view of the different facts of the measure at issue. In any event, as further assessed below (recitals (65)-(80)), the Commission considers that the selection procedure was conducted in accordance with the principles of non-discrimination and transparency.
- (60) The Complainant also refers in the same context to the decision²⁰ in which the Commission found that Greece had protected the dominant position of the State-owned electricity incumbent by giving it quasi-exclusive access to lignite. The Commission notes that that case concerns a violation of Article 86 in combination with Article 82 of the EC Treaty (now Articles 102 and 106 TFEU) and not the State aid rules. In that decision the Commission did not examine whether the quasi-exclusive access to lignite conferred a State aid, but rather whether such an action could be deemed as reinforcing the dominant position. Therefore, it is not relevant for the assessment of the present case.
- (61) The same is true with regard to the Complainant's broad allegation that the conditions laid down by the Court of Justice in *Altmark* are not met in the present case.²¹ The Complainant seems to claim that KGHM has not been chosen pursuant to a public procurement procedure which would allow for the selection of the bidder capable of providing the services at issue at the least cost –or with the highest return *in casu* - to the community. Thus, the Complainant refers to the fourth *Altmark* condition for the finding of absence of a financial advantage having the effect of KGHM being in a more favourable competitive position than

¹⁹ Judgment of the Court of Justice of 24 October 2013, *Land Burgenland v Commission*, Joined Cases C-214/12P, C-215/12P and C-223/12P, ECLI:EU:C:2013:682, paragraph 94.

²⁰ Commission Decision of 5 March 2008 on the granting or maintaining in force by the Hellenic Republic of rights in favour of Public Power Corporation S.A. for extraction of lignite, OJ C 93, 15.04.2008.

²¹ Judgment of the Court of Justice of 24 July 2003 in case C 380/00, *Altmark Trans GmbH and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH*, and *Oberbundesanwalt beim Bundesverwaltungsgericht*, ECLI:EU:C:2003:415, paragraphs 87 to 95.

competing undertakings. However, the Commission cannot discern that any of the competing applications actually submitted were *a priori* more capable of maximising the proceeds accruing to Poland from the possible subsequent exploitation of the areas for which the concession for exploration was awarded and it is not appropriate to speculate with hypothetical competing offers. Moreover, KGHM could be deemed to incur higher costs and risks than its competitors in the exploration of more drills in a wider geographic area, not recouped if the exploration proves less successful than planned.

- (62) Furthermore, the Commission considers that the *Altmark* case law, which concerns compensations for the losses incurred in the provision of services of general economic interest, is not relevant for the present case. The exploration and possible subsequent exploitation of minerals in the present case does not exhibit the genuine characteristics of a service of general economic interest nor can KGHM be deemed to discharge public obligations when performing its activity, nor is there a plan, possibly announced in advance to all applicants, to compensate the successful one for possible losses incurred in the exploration.
- (63) In any event, the lack of a formal tender procedure alone does not preclude the selection process from being competitive, as long as potential participants were not unduly restricted from participating in it. There is no evidence that this was the case. The Complainant itself does not question the fact that all interested entities could have participated in the selection process.
- (64) Therefore, the Commission considers that the selection process was conducted in a competitive manner.

(ii) transparency

- (65) The process is transparent when it allows all interested entities to be equally and duly informed at each stage.
- (66) The concession authority informed all the applicants about the conduct of the administrative proceedings, in particular about their initiation, activities performed throughout the selection process and termination. In addition, as mentioned above, each applicant had access to competing applications on an equal basis. From the justification of the decisions (to grant the concession to KGHM and to refuse it to the other applicants) of the concession authority, it appears that none of the applicants complained about having insufficient information about the conduct of the administrative proceedings, except DEP, which only alleged that it was not regularly informed about the reasons of delay in the selection process. However, the Commission observes that between September 2013 and May 2014 the concession authority provided such information four times. This does not seem manifestly insufficient and, in any event, it did not have any impact on the outcome of the selection process. On the other hand, the longer duration of the process gave the applicants more time to obtain the necessary information and improve their applications. At the same time, such duration permitted Poland to test the interest for a potential concession in the area at issue.
- (67) The concession authority established the selection criteria on the basis of the generally applicable national laws (see recital (20)). These criteria were consistent with the decisional practice of the concession authority and the jurisprudence of

Polish courts²². Therefore, they did not come as a surprise to the applicants who must have been familiar with the exploration and mining business. In any event, the concession authority announced and communicated the selection criteria sufficiently in advance so that the applicants had time to clarify any doubts in this respect and to improve their offers before submitting final applications (see recital (30)). Consequently, the allegation of the Complainant that in the course of a tender DEP could have offered a better quality service in return for the concession is not justified. DEP had the same opportunity as others to offer a better quality service in the course of the administrative proceedings.

- (68) The process of granting the concession was initiated by the applicants and not on the initiative of the concession authority. Nevertheless, given the nature of the exploration and mining business, it can be legitimately assumed that potential applicants would have sooner or later learnt about the opportunity to explore potash in the area of Puck, be it from own research, public sources or industry network. Indeed, according to the Complainant, the applicants submitted their applications based on studies conducted by Polish geologists in the 1960s and 1970s, which were re-examined a couple of years ago. The Complainant also recalls a report by an industry consultant from April 2013 which showed that there are significant reserves of potash in the area concerned. In addition, the concession authority published on its website the updated information about the concession areas applied for by all the applicants. It seems rather unlikely that an undertaking specialising in exploration and mining of minerals would not have been aware of such opportunity and on the ongoing selection process, which was also reported in the media.²³
- (69) Therefore, the Commission considers that the selection process was conducted in a transparent manner, where all potential participants knew about it and were properly informed and aware of its initiation, the conditions to be selected, the activities performed throughout the selection process and its termination.

(iii) Non-discrimination

- (70) The selection process is non-discriminatory if applicants are treated equally and assessed on the basis of objective selection criteria set in advance.
- (71) The concession authority set and announced the selection criteria sufficiently in advance and communicated them to all the applicants at the same time (see recital (30)). These criteria were objective, that is to say independent of the content of any of the applications, and were the same for all the applicants. They were not adapted ex-post to favour any of the applications. The concession authority assessed the applications against these criteria and found that KGHM met them best.

²² See e.g. the concession for prospection and exploration of coal no. 32/2010/p of 30.06.2010 and the judgement of the Supreme Administrative Court of 4 December 2012, sygn. Akt. II GSK 1830/11.

²³ See e.g. <http://www.dziennikbaltycki.pl/artykul/3376577.powiat-pucki-liczy-na-zastrzyk-pieniedzy-bedzie-biznes-na-kopalniach-soli.id.t.html>

- (72) Moreover, in line with case law²⁴, the concession holder does not obtain an advantage by paying the fees established by law and applicable to all applicants in similar circumstances. The Commission observes that the concession fee for exploration and exploitation is established by means of an objective formula, laid down in Polish law. Any applicant granted the concession would have paid the concession fee calculated on the basis of the same algorithm. Of note, the Complainant does not argue that the fees paid by KGHM were set on a discriminatory basis or that they confer an advantage *per se*.
- (73) The Commission further stresses that the outcome of the selection process for the award of the exploration rights has led to choosing KGHM, the applicant offering the highest probability of maximising the proceeds accruing to Poland from the possible subsequent exploitation of the areas for which the concession for exploration was awarded. Indeed, among all companies having shown a potential interest, KGHM offered to explore the highest number of different minerals within the widest geographical area (recitals (31)-(32)).
- (74) As indicated in recital (22), the concession fee for exploration and for the associated mining usufruct right is a product of a unit price per type of a mineral and the area under concession. Given that KGHM proposed the largest scope of geological works, both in terms of the area concerned and the number of minerals to be explored, by granting the concession for exploration to KGHM, Poland has indeed chosen the applicant that maximised its potential revenue. Given the formula to calculate remuneration of the State for the exploitation rights (recital (23)), Poland can reasonably expect the highest revenue from the future exploitation rights from the applicant that proposed to explore the largest area and more minerals than other applicants.
- (75) The Complainant in its request to re-assess the case criticized the concession authority (1) for not having assessed DEP's application sooner and (2) for having determined criteria for award after its application was filed. The Commission disagrees with both criticisms. As to the first, Poland was entitled to test the market interest for the concession, which would not have been possible if the concession had been awarded on a first come first served basis. As a result, three additional competitors submitted their applications. Had the concession authority closed the administrative proceedings sooner, those competitors would have been eliminated from the selection process. On the second criticism, the criteria for award were based on Polish law and consistent with the past practice of the concession authority and jurisprudence of Polish courts preceding the present selection process (see recitals (20) and (67)) and therefore were not unfamiliar to the applicants.
- (76) The Complainant claims that the concession authority assessed the applications of KGHM and DEP based on different criteria. In the case of KGHM the concession authority allegedly took into account the number of obligatory drills proposed in both, the first and the second stage of geological works, whereas in the case of DEP it took into account only one obligatory drill proposed in the first stage of

²⁴ Judgement of 4 July 2007, T-475/04, *Bouygues y Bouygues Télécom SA/Comission*, EU:T:2007:196, paragraph 110: "[A]lthough the right to use the wireless space granted to the operators has an economic value, the amount payable as a fee can constitute State aid only if, all other things being equal, there is a difference between the price paid by each of the operators concerned".

geological works. The Commission notes that according to the justification of the decision of 1 October 2014, as confirmed by Poland, the concession authority took into account obligatory drills proposed by both KGHM and DEP in the first and in the second stage of geological works. KGHM proposed to make more obligatory drills than DEP in the first stage and in total (see recital (31)). Therefore, the allegation is unfounded.

- (77) The Complainant also alleges that it was discriminated in that the concession authority requested it to supplement its application with additional documents, including evidence for having sufficient financial resources, which the concession authority did not require from PP. The Commission notes that Article 24(1)(4) of the Mining Law requires that application for concession should include information about the financial resources of the applicant available to carry out the proposed works. Poland explained that the application submitted by DEP did not contain sufficient financial information, whereas the application of PP provided the concession authority with sufficient assurance in this respect. On this basis the Commission considers that the request to supplement DEP's application was not discriminatory. In any event, it did not affect the outcome of the selection process.
- (78) The Commission further notes that throughout the process of granting the concession the applicants had equal access to information about the conduct of the administrative proceedings and to competing applicants. They could modify their applications on equal terms and all of them used this possibility, including the Complainant. They could also participate in hearings organised by the concession authority in an attempt to resolve their conflicting interests.
- (79) Finally, the Commission notes that the Voivodship Administrative Court in Warsaw concluded in its judgment (see recital (37)) that the concession authority assessed the applications in an objective and non-discriminatory manner and did not favour any of the applicants. The Court also concluded that the concession authority chose the applicant who best met the selection criteria. While this judgement is not a decisive factor for the Commission, it still provides an additional assurance on the proper conduct of the selection process.
- (80) Therefore, the Commission considers that the selection process was conducted in a non-discriminatory manner.

(iv) Un-conditionality

- (81) The selection process can be considered as unconditional when an applicant is generally free to obtain the concession, without assuming any special obligations for the benefit of the public authorities.
- (82) The Complainant argues, referring to case practice²⁵, that the selection criteria applied by the concession authority included non-market conditions, such as the scope of geological works and the quantity of geological information, that do not comply with the market economy vendor test.

²⁵ Commission Decision C(2007) 5919 final of 11 December 2007 *Aid to Fluorite di Silius S.p.A.*, OJ C 30/2008, 02.02.2008; Commission Decision C(2011) 1006 final of 23.02.2011 on the State aid implemented by Greece in favour of Ellinikos Xrysos SA, OJ L 193/2011, 23.07.2011.

- (83) As mentioned in recitals (48)-(49), in the present case the State acted as a public authority and not as a market operator, therefore the market economy vendor test is not applicable. It is not appropriate to assess whether a market vendor would have applied such criteria as no market vendor could have granted the concession in the first place. In line with case law²⁶, the concession authority had a degree of discretion in identifying appropriate selection criteria. In any event, in the present case, the selection criteria applied by the concession authority arose from the general Polish law and were established by the concession authority in exercise of its public authority powers (see recital 20). Thus, the Commission observes that the applicants did not have to assume any special obligations (e.g. maintenance or increase of workforce) to obtain the concession and were assessed solely on the basis of the objective selection criteria.
- (84) In view of the assessment made in recitals (54) to (83), the Commission concludes that the process for granting the concession for exploration was conducted in a competitive, transparent, non-discriminatory and unconditional manner in line with the EU principles on public procurement and, therefore, the measure under assessment did not confer an economic advantage on KGHM. As explained in recital (32), taking into account all the applications by the entities involved in the process, the concession authority came to a conclusion that, in accordance with the relevant selection criteria (see recital (20)), KGHM proposed the largest scope of geological works which would enable it to gather more geological information and in a shorter timeframe than the other applicants and, thus, selected KGHM on the basis of the best offer.
- (85) Concerning the Complainant's allegation that the administrative proceedings leading to the granting of the concession for exploration did not comply with Polish and EU law on public procurement, the Commission observes that it is not in itself a State aid issue and, in any event, this allegation has been dismissed (see recital (37)).
- (86) Finally, the Complainant requested the Commission to provide it with access to the latest information submitted by Poland (see recital (7)). In this respect, the Commission notes that the complainant had access to all the information provided by the Polish authorities until May 2016 as it was attached to the preliminary assessment letter of 26 May 2016. With respect to the latest information provided by the Polish authorities, the Commission wishes to explain that the submissions in question related to the judgment of the Voivodship Administrative Court in Warsaw of 27 September 2016²⁷ and further information on how the applicants learnt about the opportunity to apply for the concession and about the ongoing administrative proceedings. The Complainant already has access to this information as the party in the court proceedings and the participant in the concession process. Therefore, it is not necessary for the Commission to provide it.

²⁶ See footnote 20.

²⁷ See footnote 14.

- (87) Given that the criteria of Article 107(1) TFEU are cumulative, the lack of economic advantage not otherwise available at market conditions is sufficient to conclude that the measure complained of does not constitute State aid.
- (88) Without prejudice to the conclusion reached in the previous recital, the Commission notes that, even if the alleged measure were considered to confer economic advantage on KGHM (*quod non*), such measure would still not have constituted State aid on the grounds that it was not selective, as explained below.
- (89) Even if the selection process were considered not to meet all the relevant criteria taken together (i.e. competitiveness, transparency, non-discrimination and unconditionality), it undoubtedly was non-discriminatory. The concession authority assessed the applicants on the basis of objective selection criteria derived from general law, set sufficiently in advance and applied equally to all applicants (see recitals (70) - (80)). Although the concession authority has ultimately granted the concession to one applicant, who best met those criteria, all of the applicants competed on equal terms and had been in the same position throughout the selection process to obtain the concession. Had any of them offered to carry out a larger scope of geological works ensuring more geological information and in a shorter timeframe than KGHM, the concession authority could have chosen such applicant and not KGHM. In the MOL case²⁸ the Court ruled that "[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 view of that, the Commission concludes that even if the award of the concession under assessment were found to entail an economic advantage, such advantage would not have been selective.
- (90) It follows from all the above that the alleged measure does not constitute State aid within the meaning of Article 107(1) TFEU, as it did not provide a selective advantage to KGHM.

4. CONCLUSION

- (91) The Commission accordingly decides that the granting of the concession for exploration of polyhalite (potash) deposits in the area of Puck with the associated priority right to obtain the exploitation mining rights to KGHM does not constitute State aid.

If this letter contains confidential information which should not be disclosed to third parties, please inform the Commission within fifteen working days of the date of receipt. If the Commission does not receive a reasoned request by that deadline, you will be deemed to agree to the disclosure to third parties and to the publication of the full text of the letter in the authentic language on the Internet site: <http://ec.europa.eu/competition/elojade/isef/index.cfm>.

Your request should be sent electronically to the following address:

²⁸ Judgment of 12 November 2013, T-499/10, *MOL v Commission*, EU:T:2013:592, paragraph 66.

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Yours faithfully
For the Commission

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