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CURTEA DE JUSTIȚIE A UNIUNII EUROPENE  
SÚDNY DVOR EURÓPSKEJ ÚNIE  
SODIŠČE EVROPSKE UNIJE  
EUROOPAN UNIONIN TUOMIOISTUIN  
EUROPEISKA UNIONENS DOMSTOL

## JUDGMENT OF THE COURT (Fifth Chamber)

22 January 2026 \*

(Failure of a Member State to fulfil obligations – Freedom of establishment – National legislation establishing reference prices for certain basic construction materials below market prices – Obligation to pay an ‘additional mining fee’ corresponding to 90% of the difference between the reference price and the selling price – Measure mainly affecting undertakings held by companies established in other Member States – No justification – Procedure for the provision of information in the field of technical standards and regulations and of rules on Information Society services – Directive (EU) 2015/1535 – Article 1(1)(d) – Concept of ‘other requirements’)

In Case C-144/24,

ACTION under Article 258 TFEU for failure to fulfil obligations, brought on 23 February 2024,

**European Commission**, represented by L. Armati, M. Mataija and A. Tokár, acting as Agents,

applicant,

v

**Hungary**, represented by M.Z. Fehér, R. Kissné Berta and K. Szíjjártó, acting as Agents,

defendant,

THE COURT (Fifth Chamber),

composed of M.L. Arastey Sahún (Rapporteur), President of the Chamber, J. Passer, E. Regan, D. Gratsias and B. Smulders, Judges,

\* Language of the case: Hungarian.

Advocate General: A. Rantos,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after hearing the Opinion of the Advocate General at the sitting on 30 April 2025,

gives the following

## **Judgment**

1 By its application, the European Commission seeks a declaration from the Court that, by adopting

- the provisions relating to the payment of an additional mining fee and to the minimum extraction volume of certain mineral resources contained, respectively, in the a gazdaság újraindítása érdekében fizetendő kiegészítő bányajáradékról szóló 404/2021. (VII. 8.) Korm. rendelet (Government Decree No 404/2021 (VII. 8.) relating to the additional mining fee to be paid with a view to reviving the economy), ('Decree No 404/2021') and in the a bányászatról szóló 1993. évi XLVIII. törvény eltérő alkalmazásáról szóló 405/2021. (VII. 8.) Korm. rendelet (Government Decree No 405/2021 (VII. 8.) derogating from Law No XLVIII of 1993 on mining), ('Decree No 405/2021'), and
- Paragraphs 27/A, 27/B and 27/C of the a bányászatról szóló 1993. évi XLVIII. törvény (Law No XLVIII of 1993 on mining), as amended by the az egyes energetikai és közlekedési tárgyú, valamint kapcsolódó törvények módosításáról 2021. évi CXXXVI. törvény (Law No CXXXVI of 2021 amending certain laws relating to energy, transport and related matters), ('Law No CXXXVI of 2021') ('the Mining Law'),

Hungary has failed to fulfil its obligations under Article 49 TFEU and Article 5(1) of Directive (EU) 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services (OJ 2015 L 241, p. 1).

### **I. Legal context**

#### **A. European Union law**

2 Under the terms of Article 49 TFEU:

‘Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. Such prohibition shall also apply to restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State.

Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 54, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of the Chapter relating to capital.’

3 Article 1(1) of Directive 2015/1535 states:

‘For the purposes of this Directive, the following definitions apply:

...

(d) “other requirements” means a requirement, other than a technical specification, imposed on a product for the purpose of protecting, in particular, consumers or the environment, and which affects its life cycle after it has been placed on the market, such as conditions of use, recycling, reuse or disposal, where such conditions can significantly influence the composition or nature of the product or its marketing;

...

(g) “draft technical regulation” means the text of a technical specification or other requirement or of a rule on services, including administrative provisions, formulated with the aim of enacting it or of ultimately having it enacted as a technical regulation, the text being at a stage of preparation at which substantial amendments can still be made.’

4 The first subparagraph of Article 5(1) of that directive provides:

‘Subject to Article 7, Member States shall immediately communicate to the Commission any draft technical regulation, except where it merely transposes the full text of an international or European standard, in which case information regarding the relevant standard shall suffice; they shall also let the Commission have a statement of the grounds which make the enactment of such a technical regulation necessary, where those grounds have not already been made clear in the draft.’

**B. Hungarian law**

**1. *The Mining Law***

5 Under Paragraph 27/A of the Mining Law:

‘(1) Under its powers to manage mineral resources, the Mining Supervisory Authority [(Hungary)] shall closely monitor the economic processes related to the search for, extraction of, trade in and use of mineral raw materials at the level of the national economy. The Mining Supervisory Authority shall verify in that context whether a situation exists which justifies a market surveillance measure.

(2) If the monthly price index for the basic construction materials industry published by the [Központi Statisztikai Hivatal (Central Statistics Office, Hungary)] ... shows an increase in prices in the construction materials industry of at least 5% compared with the same period in the previous year – on at least 2 occasions over a period of 12 months – the [President of the Mining Supervisory Authority] may establish by decree the existence of a situation justifying a market surveillance measure.

...

(4) The decree referred to in subparagraph 2 shall specify the duration of the situation justifying a market surveillance measure, which may not exceed one year.

...’

6 Paragraph 27/B of the Mining Law provides as follows:

‘(1) The [President of the Mining Supervisory Authority] shall specify by decree, for mining sites established for the purpose of the exploitation of raw materials and basic construction materials with at least 5 000 000 m<sup>3</sup> of extractable mineral resources[,]

- (a) the detailed requirements relating to the minimum volume of mineral resources to be extracted and the associated extraction schedule,
- (b) the rules that differ, in terms of quantities and time limits for operational extraction, from those in Paragraph 49(49),
- (c) the rules that differ, in terms of the time limit for the commencement of operational extraction and the extension of that time limit, from those in Paragraph 26/A(4), (6b) [and] (6c),
- (d) the rules that differ, in terms of the suspension or interruption of extraction, from those in Paragraph 30(4),

for the duration of the situation justifying a market surveillance measure.

...

(5) In the event of failure to comply with the requirements set out in subparagraph 1(b) and (c), as defined in the decree referred to in subparagraph 1, the Mining Supervisory Authority shall withdraw the mining operator's mining permit.'

7 Paragraph 27/C of that law provides:

'(1) In the event of a situation justifying a market surveillance measure, the undertaking within the meaning of subparagraphs 2 and 3 shall be liable for the additional mining fee within the meaning of this Paragraph.

(2) An additional mining fee shall be payable by an undertaking which

(a) is required to pay a mining fee in accordance with Paragraph 20(2)(a) and (b), and

(b) carries out, as its principal activity,

(ba) in the field of the extraction of raw materials and basic construction materials, and

(bb) in the field of the manufacture of products used as basic construction materials,

an economic activity defined by the [President of the Mining Supervisory Authority] in a decree, and which

(c) generated a turnover which reached or exceeded the sum of 3 000 000 000 forint (HUF) [approximately EUR 7 715 000] – excluding related undertakings – in the second tax year preceding the situation justifying a market surveillance measure established by decree of the [President of the Mining Supervisory Authority].

...

(5) The party liable for payment within the meaning of subparagraph 2 shall be required to pay an additional mining fee in the event of the sale of products used as basic construction materials, extracted or processed by it, if the selling price per tonne shown on the accounting document, excluding value added tax [(VAT)], exceeds the reference unit price per tonne fixed by the Decree of [the President of the Mining Supervisory Authority]. The amount of the additional mining fee shall be equivalent to 90% of the product of multiplying the quantity sold by the difference between the selling price per tonne and the unit reference price per tonne. The selling price shown on the accounting document may not include the

cost of the service and the selling price may not be reduced by the cost of the service.

...’

**2. Decrees No 404/2021 and No 405/2021**

8 Decrees No 404/2021 and No 405/2021 had initially been adopted with effect from 9 July 2021 and only for the duration of the COVID-19 pandemic. However, the effects of those decrees were extended on several occasions on account of the war in Ukraine, with the result that they were still in force on the date on which the present action for failure to fulfil obligations was brought.

**(a) Decree No 404/2021**

9 Paragraph 1 of Decree No 404/2021 provides:

‘(1) By way of derogation from [the a Magyarország gazdasági stabilitásáról szóló 2011. évi CXCV. törvény (Law No CXCV of 2011 on the economic stability of Hungary)], an additional mining fee shall be payable by an undertaking which

- (a) is required to pay a mining fee in accordance with Paragraph 20(2)(a) and (b) of [the Mining Law], and
- (b) is primarily engaged in
  - (ba) the quarrying of ornamental and building stone, limestone, gypsum, chalk and slate (NACE 0811),
  - (bb) the operation of gravel and sand pits, mining of clays and kaolin (NACE 0812),
  - (bc) the manufacture of cement (NACE 2351), or
  - (bd) the manufacture of lime and plaster (NACE 2352),
  - (be) the manufacture of bricks, tiles and construction products, in baked clay (NACE 2332),
  - (bf) the manufacture of ceramic tiles and flags (NACE 2331)

and whose

- (c) net turnover in 2019 – excluding undertakings which are related to it within the meaning of the [a társasági adóról és az osztalékadóról szóló törvény (Law on corporation tax and dividend tax)] – reached or exceeded HUF 3 000 000 000.

(2) The party liable for payment within the meaning of subparagraph 1, which extracts, processes or produces as basic construction materials[,]

- (a) graded sand which it sells at more than HUF 700 [(around EUR 1.80)] per tonne,
- (b) graded gravel which it sells at more than HUF 900 [(around EUR 2.30)] per tonne,
- (c) graded sandy gravel which it sells at more than HUF 700 per tonne,
- (d) natural sandy gravel which it sells at more than HUF 700 per tonne,
- (e) cement which it sells at more than HUF 20 000 [(around EUR 51.50)] per tonne,

...

– excluding VAT – shall be required to pay 90% of the difference between its actual turnover and the turnover established on the basis of the amount sold and the price set by this paragraph as an additional mining fee.

...

(3) When selling the products referred to in subparagraph 2, if the seller is not liable for the additional mining fee, it must aim for a reasonable profit margin, taking into account the values set out in subparagraphs 2 and 2a.

(4) If a seller who is not liable for the additional mining fee applies a pricing policy aimed at obtaining an unreasonable profit contrary to the provisions of subparagraph 3, the Nemzeti Adó- és Vámhivatal Kiemelt Adó- és Vámigazgatóság [(National Tax and Customs Authority, Hungary)] may initiate administrative tax proceedings.

...

(7) For the purposes of the present decree, principal activity within the meaning of subparagraph 1 shall mean the activity which the undertaking carried on as its principal activity at some time during 2019.’

**(b) Decree No 405/2021**

10 Paragraph 1(1) to (3a) of Decree No 405/2021 provides:

‘(1) In view of the exceptional situation caused by the COVID-19 pandemic, the Mining Supervisory Authority shall adopt, for mining sites established for the purpose of the exploitation of raw materials and basic construction materials, a decision obliging mining operators

- (a) which obtained the technical operating plan to start operational extraction before the entry into force of this decree, to commence operational extraction within a period of one year, at a level of at least 50% of the maximum extraction volume authorised in the first technical operating plan for extraction before amendment;
- (b) which obtain the technical operating plan to start operational extraction after the entry into force of this decree, to commence operational extraction within a period of one year, at a level of 100% of the maximum extraction volume authorised in the first technical operating plan for extraction before amendment.

...

(2) Mining operators engaged in the operational extraction of raw materials and basic construction materials may reduce the extraction volume with the authorisation of the Mining Supervisory Authority. Mining operators may submit their application for a reduction of the extraction volume no later than the twentieth day of the month following the last day of the one-year extraction period fixed by Paragraph 1(1).

(2a) A reduction of the extraction volume may be authorised if:

- (a) the mining operator has suffered *force majeure*, or
- (b) there is an overriding external reason not covered by point (a) which falls outside the scope of the mining operator’s field of activity.

(3) Where extraction does not commence in accordance with Paragraph 1(1), with the exception of the cases provided for in Paragraph 1(3a), the Mining Supervisory Authority shall withdraw the mining operator’s mining permit and shall designate as the new holder of the mining permit for the mining site in question the Magyar Nemzeti Vagyonkezelő Zrt. [(Hungarian national asset management company)] so that it may exercise the right of ownership on behalf of the Hungarian State.

(3a) The Mining Supervisory Authority shall not withdraw the mining operator’s mining permit if that operator proves the existence of a reason precluding the application of that rule, in accordance with Paragraph 1(2a).’

## II. Pre-litigation procedure

- 11 On 6 April 2022, the Commission sent Hungary a letter of formal notice calling into question the compatibility of Decrees No 404/2021 and No 405/2021 and Law No CXXXVI of 2021, which inserted Paragraphs 27/A, 27/B and 27/C into the Mining Law, with, inter alia, Article 49 TFEU and Article 5(1) of Directive 2015/1535.

- 12 According to that institution, Decree No 404/2021 had, first, laid down official prices below market prices for certain basic construction materials, such as sand, gravel and cement, and, second, imposed on larger undertakings extracting or manufacturing those materials – almost all of which were held by companies established in other Member States – the payment of a fee, known as the ‘the additional mining fee’, the amount of which corresponded to 90% of the difference between the reference price set by that decree and the actual selling price of those basic materials. At the same time, according to the Commission, the undertakings to which those decrees applied were required, under Decree No 405/2021, to maintain a minimum extraction volume set by the government in order not to lose their mining authorisation. Law No CXXXVI of 2021, for its part, empowered the President of the Mining Supervisory Authority to take similar measures.
- 13 In its reply of 13 June 2022, Hungary disputed the infringements referred to in the letter of formal notice. In particular, that Member State submitted that the additional mining fee was a tax, that the contested provisions were justified by overriding reasons in the public interest and that they restricted freedom of establishment only in a proportionate manner.
- 14 On 26 January 2023, the Commission sent Hungary a reasoned opinion in which it maintained, in essence, the arguments which it had set out in its letter of formal notice. That institution called on that Member State to take the measures necessary to comply with that opinion within two months of its receipt.
- 15 By letter of 30 March 2023, Hungary replied to the reasoned opinion, reiterating that the alleged failures to fulfil obligations were unfounded.
- 16 Unconvinced by that reply, the Commission brought, on 23 February 2024, the present action for failure to fulfil obligations.

### **III. The action**

- 17 In support of its action, the Commission puts forward two complaints, alleging infringement of Article 49 TFEU and infringement of Article 5(1) of Directive 2015/1535 respectively.

#### **A. The first complaint, alleging infringement of Article 49 TFEU**

##### *1. Whether there is a restriction on freedom of establishment*

###### *(a) Arguments of the parties*

- 18 As regards, first of all, Decree No 404/2021, the Commission submits that Paragraph 1(2) of that decree sets a reference price for five basic construction materials, namely graded sand, graded gravel, graded sandy gravel, natural sandy

gravel and cement. If sold above that price, the undertaking concerned must pay the additional mining fee introduced by that decree, the amount of which corresponds to 90% of the difference between its actual turnover and the turnover established on the basis of the quantity sold and that price.

- 19 Next, as regards Decree No 405/2021, the Commission notes that, under Paragraph 1(1), (2) and (2a) of that decree, the Mining Supervisory Authority is to require mining operators effectively to commence extraction activity within a period of one year and at a level of either at least 50% of the maximum extraction volume authorised in the technical operating plan, or 100% of that extraction volume, depending on the date on which that plan was obtained ('the minimum extraction obligation'). The applicable minimum extraction volume may be reduced only if authorised by that authority where the mining operator has suffered *force majeure* or there is another overriding external reason. In the absence of such an authorisation, an operator which does not comply with the minimum extraction obligation would have its mining permit withdrawn.
- 20 Lastly, as regards the Mining Law, Paragraphs 27/A to 27/C thereof authorise the President of the Mining Supervisory Authority to adopt measures similar to those provided for in Decrees No 404/2021 and No 405/2021. The fact that the President of that authority did not adopt such measures, even though the conditions for their application had been met, could be explained by the fact that the Hungarian legislature extended, on account of the war in Ukraine, the period of application of those decrees, which was initially limited to the duration of the COVID-19 pandemic.
- 21 The Commission submits that all of those measures have the effect of restricting freedom of establishment.
- 22 In that regard, that institution states that, during the pre-litigation procedure, it found that the prices set by Paragraph 1(2) of Decree No 404/2021 were always lower than the market prices for all the basic materials referred to therein.
- 23 It also found that, of the 340 undertakings active in Hungary in the business sectors defined by that decree, only four of them were liable for the additional mining fee and that all of those undertakings, with one exception, are held by an undertaking established in another Member State. Although those 4 undertakings account for only 1.2% of the total of the 340 undertakings, they together held 25% of the market shares in those business sectors.
- 24 Undertakings liable for the additional mining fee are obliged to sell their products at the price laid down in Decree No 404/2021 in order to avoid having to pay, in respect of that fee, 90% of the difference between that price and the market price. According to the Commission, that forces those undertakings, in contrast to those that are not liable for the fee, to operate at a loss. Decree No 405/2021 reinforces that effect, in that the undertakings which are liable for that fee must, in order to

avoid having their mining permit withdrawn, comply with the minimum extraction obligation prescribed by that decree, even if they operate at a loss.

- 25 That institution maintains that, in those circumstances, those two decrees, both separately and jointly, prevent or render less attractive, for undertakings established in other Member States, the exercise of their freedom of establishment, for three reasons.
- 26 First, as regards undertakings established in other Member States intending to enter the Hungarian market, those rules make their access to that market more difficult. Furthermore, under Decree No 405/2021, they would be required to attain in one year the extraction volume corresponding to the minimum extraction obligation, while Decree No 404/2021 severely hinders, or even precludes, the generation of profits.
- 27 Second, for undertakings established in other Member States already present on the Hungarian market, the introduction of new conditions relating to the pursuit of an economic activity makes it less attractive, if not impossible, to exercise their freedom of establishment, since their profits are considerably restricted. It is even possible that they have to operate at a loss.
- 28 Third, it follows from paragraph 53 of the judgment of 21 December 2016, *AGET Iraklis*, (C-201/15, EU:C:2016:972), that the exercise of freedom of establishment implies, in principle, that economic operators have the freedom not only to determine the nature and scope of the economic activity that will be carried out in the host Member State, but also the freedom, subsequently, to scale down that activity. However, the minimum extraction obligation does not allow that aspect of freedom of establishment to be exercised.
- 29 Lastly, the national legislation at issue gives rise to indirect discrimination since it applies, with one exception, to undertakings owned by companies established in other Member States.
- 30 Hungary argues that, in order to conclude that there has been a failure to fulfil obligations, the Commission wrongly relies on a cumulative application of the national legislation referred to in the present action.
- 31 According to that Member State, the effects of Decrees No 404/2021 and No 405/2021 cannot be cumulated because they cannot be applied together.
- 32 Decree No 405/2021, in accordance with Paragraph 1(1) thereof, concerns only mining operators which had not yet effectively commenced their extraction activity on the date of entry into force of that decree, namely 9 July 2021. Those operators, by definition, do not meet the criteria concerning their main activity in 2019 and the net turnover they generated that same year, to which Decree No 404/2021 refers in order to identify undertakings which are liable for the additional mining fee.

- 33 Thus, in practice, the minimum extraction obligation provided for in Decree No 405/2021 does not concern undertakings liable for the additional mining fee introduced by Decree No 404/2021.
- 34 Furthermore, according to Hungary, Paragraphs 27/A to 27/C of the Mining Law provide only for a regulatory framework intended to empower the President of the competent national authority to lay down certain rules, on an exceptional and temporary basis. Not only have such rules not yet been adopted but, in addition, the provisions of those paragraphs and those of Decrees No 404/2021 and No 405/2021 are not identical in substance.
- 35 As regards the arguments on which the Commission relies in order to demonstrate that those decrees restrict freedom of establishment, Hungary contends, first, concerning undertakings established in another Member State intending to enter the Hungarian market, that the minimum extraction obligation applies to all new entrants to that market, whether national or non-national, which rules out any infringement of freedom of establishment.
- 36 In addition, the Mining Law lays down, as a general rule, the obligation effectively to start extraction activity within a certain period and, for mining sites of a certain size, to attain a minimum extraction volume. Decree No 405/2021 imposes, in relation to that general regime, a reinforced extraction obligation for a transitional period, in view of an emergency situation, and Paragraph 27/B of that law permits, also on a transitional basis, derogations from the rules that are normally applicable. It is not disproportionate if, in a temporary situation, the minimum extraction volume were to exceed the level normally applicable.
- 37 As regards, second, the undertakings already present on the Hungarian market, Hungary submits that the additional mining fee is a tax based on neutral criteria, such as the net turnover generated in 2019 and the reference price set by Decree No 404/2021. The latter, in order for the tax burden to remain proportionate, links the tax liability to the amount of turnover. In that regard, in paragraph 50 of the judgment of 3 March 2020, *Vodafone Magyarország* (C-75/18, EU:C:2020:139), the Court of Justice recognised that turnover could be regarded as a criterion of differentiation that is neutral, in that it constitutes a relevant indicator of a taxable person's ability to pay.
- 38 As regards, third, the judgment of 21 December 2016, *AGET Iraklis* (C-201/15, EU:C:2016:972), that judgment concerns a different context from that of the present case, with the result that no general conclusion can be drawn from it that Member States cannot, within the limits of their powers, adopt measures capable of affecting the volume of undertakings' economic activity.
- 39 As regards, lastly, the existence of indirect discrimination, the fact that the undertakings which are liable for the additional mining fee are mainly held by undertakings established in other Member States results from the specific structure of the Hungarian market, in which the most powerful undertakings in the sector

concerned are foreign undertakings. In that regard, the present case is comparable to those which gave rise to the judgments of 3 March 2020, *Vodafone Magyarország* (C-75/18, EU:C:2020:139) and of 3 March 2020, *Tesco-Global Áruházak* (C-323/18, EU:C:2020:140).

- 40 In its reply, the Commission disputes the merits of Hungary's position that the effects of Decrees No 404/2021 and No 405/2021 are not cumulative on the ground that those decrees cannot be applied together. It is apparent from Paragraph 1(2) and (2a) of Decree No 405/2021 that undertakings already engaged in extractive activities are subject to the minimum extraction obligation. However, those undertakings also fall within the scope of Decree No 404/2021.
- 41 In that regard, in its rejoinder, Hungary submits that such an interpretation of Paragraph 1(2) and (2a) is incorrect, since it applies only to mining operators commencing a new extraction activity.
- 42 Hungary acknowledges that, in the light of the wording of Decrees No 404/2021 and No 405/2021, it cannot, in principle, be ruled out that a mining operator which is already present on the Hungarian market and which engages in extraction at a new mining site will be covered by those two decrees. However, first, in such a case, the minimum extraction obligation would concern only that new site. Second, given that the application of Decree No 405/2021 to a particular mining operator depends on a decision of the Mining Supervisory Authority, the cumulative application of the two decrees to undertakings liable for the additional mining fee presupposes their being concerned by such a decision. According to the information provided by that authority, none of those undertakings has been the subject of such a decision.
- 43 In addition, in its reply, the Commission states that, even if Paragraphs 27/A to 27/C of the Mining Law merely provide for a regulatory framework allowing the President of the competent national authority to lay down rules, which has thus far not occurred, it follows from paragraph 70 of the judgment of 5 July 2007, *Commission v Belgium* (C-522/04, EU:C:2007:405), that even if, in practice, the authorities of a Member State do not apply a national provision which is at variance with EU law, the principle of legal certainty nevertheless requires that that provision be amended.
- 44 As regards Hungary's arguments based on the judgments of 3 March 2020, *Vodafone Magyarország* (C-75/18, EU:C:2020:139), and of 3 March 2020, *Tesco-Global Áruházak* (C-323/18, EU:C:2020:140), the Commission observes that the cases which gave rise to those judgments concerned progressive taxes on turnover. However, the additional mining fee is not a tax on turnover and is not progressive in nature.
- 45 That fee is not a tax on turnover since its basis of assessment is not calculated in relation to the turnover of the undertakings which are liable for it, that being relevant only for determining the circle of undertakings concerned. Furthermore,

the only turnover of relevance is that which they generated in 2019, with the result that that circle of undertakings, formed predominantly of undertakings held by companies established in other Member States, was known to the Hungarian authorities when Decrees No 404/2021 and No 405/2021 were adopted, nor does it evolve according to their annual turnover.

- 46 The Commission submits that those detailed rules for determining the scope of Decree No 404/2021 are evidence of discriminatory intent, consisting of placing undertakings falling within that scope in a less advantageous position than those not covered by the additional mining fee, mainly held by Hungarian nationals.
- 47 Moreover, the additional mining fee does not have the characteristics of progressive taxation, in so far as the undertakings concerned are not required to pay it for as long as they comply with the price set by Decree No 404/2021, but, if they exceed that price, they must face a charge set at 90% of the difference between that price and the selling price.
- 48 In short, the determination of the scope of that decree, although not founded, strictly speaking, on a distinction based on the nationality or place of establishment of the undertakings concerned, clearly has discriminatory or protective aspects and is therefore incompatible with the fundamental freedoms, in accordance with the judgment of 9 May 1985, *Humblot* (112/84, EU:C:1985:185, paragraph 14).
- 49 In that regard, in its rejoinder, Hungary contends that the additional mining fee is a variable tax in bands since, on account of the turnover threshold, some undertakings are considered to be subject to tax and others are not. It adds that, even if that fee is not progressive in nature, some of the lessons drawn from the judgments of 3 March 2020, *Vodafone Magyarország* (C-75/18, EU:C:2020:139), and of 3 March 2020, *Tesco-Global Áruházak* (C-323/18, EU:C:2020:140) are applicable to the present case, for example, the fact that turnover is a relevant indicator of a taxable person's ability to pay.

**(b) Findings of the Court**

- 50 It should be recalled that, according to settled case-law, all measures which prohibit, impede or render less attractive the exercise of freedom of establishment must be considered to be restrictions on that freedom, within the meaning of Article 49 TFEU (judgment of 25 April 2024, *Edil Work 2 and S.T.*, C-276/22, EU:C:2024:348, paragraph 30 and the case-law cited).
- 51 In that regard, not only overt discrimination based on the location of the seat of companies, but also all covert forms of discrimination which, by the application of other criteria of differentiation, lead in fact to the same result are, in that regard, prohibited (judgments of 5 February 2014, *Hervis Sport- és Divatkereskedelmi*, C-385/12, EU:C:2014:47, paragraph 30 and the case-law cited, and of 4 October

2024, *Staatssecretaris van Financiën (Interest in respect of an intra-group loan)*, C-585/22, EU:C:2024:822, paragraph 37 and the case-law cited).

- 52 In order to assess whether the provisions relating, first, to the obligation to pay the additional mining fee and, second, to the minimum extraction obligation, established by Decrees No 404/2021 and No 405/2021 respectively, and the similar provisions in Paragraphs 27/A to 27/C of the Mining Law, as referred to in the present complaint, infringe Article 49 TFEU, it is necessary, as a preliminary point, to establish whether the effects of those provisions must be examined both jointly and separately, the Commission taking the view that those two types of obligation are capable of being applied jointly, which Hungary disputes.
- 53 It should be recalled that, according to settled case-law relating to the burden of proof in proceedings for failure to fulfil obligations under Article 258 TFEU, it is for the Commission to prove the existence of the alleged infringement and to provide the Court with the information necessary for it to determine whether there has indeed been an infringement, and the Commission may not rely on any presumption for that purpose (judgment of 21 December 2023, *Commission v Denmark (Maximum parking time)*, C-167/22, EU:C:2023:1020, paragraph 47 and the case-law cited).
- 54 However, the existence of a failure to fulfil obligations may be proved, where it has its origin in the adoption of a legislative or regulatory measure whose existence and application are not contested, by means of a legal analysis of the provisions of that measure (judgment of 19 November 2024, *Commission v Poland (Ability to stand for election and membership of a political party)* C-814/21, EU:C:2024:963, paragraph 130 and the case-law cited).
- 55 In the present case, the infringement which is imputed to Hungary by the Commission stems, inter alia, from the adoption of Decrees No 404/2021 and No 405/2021, the existence or application of which is not disputed by that Member State, and the provisions of which are the subject of a legal analysis in the application initiating proceedings.
- 56 It is therefore necessary to examine the merits of that analysis by ascertaining whether, as the Commission maintains, the scope *ratione personae* of those decrees overlaps, so that they may be applied cumulatively to the same undertaking.
- 57 It is apparent from Paragraph 1(1) and (7) of Decree No 404/2021 that the undertakings liable for the additional mining fee are those whose main activity in 2019 was the extraction or manufacture of certain basic construction materials and whose net turnover for that year reached or exceeded the threshold of HUF 3 billion (approximately EUR 7 715 000).
- 58 As regards Decree No 405/2021, it follows from Paragraph 1(1) thereof that the Mining Supervisory Authority must adopt a decision obliging mining operators to effectively commence extraction operations at the mining site concerned within a

period of one year at a level of either at least 50% of the maximum extraction volume authorised in the technical operating plan for that site where the operator has obtained that plan before the entry into force of that decree, or at 100% of that volume where the operator obtained it after that time.

- 59 Consequently, the minimum extraction obligation can apply only to mining operators which had not yet effectively commenced extraction at a given mining site on the date on which the latter decree entered into force, namely 9 July 2021.
- 60 As Hungary rightly points out, those operators are not, in practice, liable for the additional mining fee, since the scope *ratione personae* of Decree No 404/2021 covers only undertakings whose main activity was already, in 2019, the extraction or manufacture of certain basic construction materials.
- 61 That conclusion is not called into question by the argument put forward by the Commission that mining operators which were already engaged in an extraction activity when Decree No 405/2021 entered into force are covered by the first sentence of Paragraph 1(2) thereof. According to that institution, since that provision lays down conditions relating to the reduction of the extraction volume for ‘mining operators engaged in the operational extraction of raw materials and basic construction materials’, it is general in scope and is not limited solely to operators effectively commencing their extraction activity after entry into force of that decree.
- 62 However, as Hungary rightly points out, it follows from the second sentence of Paragraph 1(2) of Decree No 405/2021 that that provision refers to the one-year period fixed by Paragraph 1(1) of that decree, which refers to the effective commencement of extraction activity at a mining site. Consequently, Paragraph 1(2) concerns only mining operators which commence such extraction and it does not have the general scope attributed to it by the Commission.
- 63 Accordingly, it must be held that that institution has not discharged its burden of proof, in terms of the case-law referred to in paragraph 53 above, as regards the cumulative application of Decrees No 404/2021 and No 405/2021 to the same undertakings.
- 64 There is therefore no need to examine whether a cumulative application of those decrees to undertakings which have their seat in Member States other than Hungary has the effect of preventing or rendering less attractive the exercise of their freedom of establishment in that Member State. On the other hand, it is necessary to ascertain whether, as the Commission also asserts in support of its action, those two decrees, each taken separately, infringe the freedom of establishment referred to in Article 49 TFEU.
- 65 In the light of the foregoing reasons, Decrees No 404/2021 and No 405/2021 must, for the purposes of the present action, be examined separately, before assessing, in turn, whether Paragraphs 27/A to 27/C of the Mining Law infringe freedom of establishment.

(1) *The obligation to pay the additional mining fee provided for by Decree No 404/2021*

- 66 As regards the question whether the obligation to pay the additional mining fee provided for by Decree No 404/2021 constitutes a restriction on freedom of establishment, it should be observed, in the first place, that the Commission states, without being contradicted by Hungary, that the reference prices set by Paragraph 1(2) of that decree were, during the pre-litigation procedure, always lower than the market prices for all the materials referred to therein.
- 67 In so far as the amount of that fee corresponds to 90%, that is to say almost the entirety of the difference between the selling price of the materials concerned and that reference price, it follows that that fee necessarily renders it less attractive, if not impossible, in accordance with the case-law referred to in paragraph 50 above, to exercise freedom of establishment, given that it may prevent the undertakings which are liable for it from obtaining a return on the investments made (see, by analogy, judgment of 20 December 2017, *Global Starnet*, C-322/16, EU:C:2017:985, paragraph 36).
- 68 In the second place, the Commission states, without being further contradicted by Hungary, that, of the 340 undertakings active in Hungary in the sector concerned, only 4 are liable for the additional mining fee, 3 of which are held by a company established in another Member State.
- 69 It is true that, in accordance with the principle of the fiscal autonomy of the Member States, outside the spheres in which EU tax law has been harmonised, the determination of the characteristics constituting each tax falls within the discretion of those States. However, that power must be exercised in accordance with EU law (see, to that effect, judgment of 16 March 2021, *Commission v Hungary*, C-596/19 P, EU:C:2021:202, paragraph 44), and in particular the provisions of the FEU Treaty on freedom of establishment (judgment of 6 October 2022, *Contship Italia*, C-433/21 and C-434/21, EU:C:2022:760, paragraph 42 and the case-law cited).
- 70 A compulsory fee which provides for a criterion of differentiation that is apparently objective but that disadvantages in most cases, given its features, companies that have their seat in Member States other than the Member State of taxation and which are in a situation comparable to that of companies whose seat is situated in that State, constitutes indirect discrimination based on the location of the seat of the companies, which is prohibited under Articles 49 and 54 TFEU (see, to that effect, judgment of 4 October 2024, *Staatssecretaris van Financiën (Interest in respect of an intra-group loan)*, C-585/22, EU:C:2024:822, paragraph 38 and the case-law cited).
- 71 That is the case with the additional mining fee, in that it applies mainly to companies established in Member States other than Hungary, and does so systematically.

- 72 In particular, contrary to Hungary's submissions, that situation does not result from the application of a neutral tax criterion, such as turnover, unlike the situation at issue in the cases which gave rise to the judgments of 3 March 2020, *Vodafone Magyarország* (C-75/18, EU:C:2020:139, paragraph 46) and of 3 March 2020, *Tesco-Global Áruházak* (C-323/18, EU:C:2020:140, paragraph 66).
- 73 As the Commission rightly points out, in the present case, turnover does not serve to determine the basis of assessment of the additional mining fee, but only to identify the undertakings liable for it. Moreover, as Hungary acknowledges, the amount of that fee invariably corresponds to 90% of the difference between the reference price set by that decree and the selling price of the materials concerned, with the result that that fee is not progressive in nature.
- 74 What is more, the additional mining fee, introduced in 2021 for a theoretically limited period, namely during the COVID-19 pandemic, takes account, in order to identify the undertakings which are liable for it, of a level of turnover that is fixed in time, namely that generated by those undertakings in 2019, even though they remained subject to the obligation to pay that fee at least until the date on which the present action for failure to fulfil obligations was brought, namely 23 February 2024.
- 75 Thus, as long as the effects of Decree No 404/2021 are extended, the additional mining fee will always cover the same four undertakings, three of which are held by a company established in another Member State, that being the case even if their respective turnover generated after 2019 no longer reaches the threshold of HUF 3 billion (approximately EUR 7 715 000).
- 76 Conversely, undertakings active in the same sector whose turnover reached that threshold after 2019 are not required to pay that fee. The Commission submits, without being contradicted by Hungary, that the undertakings which are not liable for that fee are mainly held by Hungarian natural or legal persons.
- 77 The regime established by Decree No 404/2021 is thus characterised by the fact that, given the terms defining the scope *ratione personae* of that decree, the undertakings which are liable for the additional mining fee will always be the same and, in addition, they will remain liable for it irrespective of changes in their turnover. At the same time, no other undertaking will become liable, even if its turnover reaches or exceeds that threshold of HUF 3 billion (approximately EUR 7 715 000).
- 78 In the light of the foregoing considerations, it must be held that the obligation to pay the additional mining fee provided for by Decree No 404/2021 constitutes a restriction on freedom of establishment within the meaning of Article 49 TFEU.

(2) *The minimum extraction obligation provided for by Decree No 405/2021*

- 79 As regards the question whether the minimum extraction obligation constitutes a restriction on freedom of establishment, first of all, the Commission claims on several occasions that that decree means that the undertakings to which it refers are required to attain or maintain a certain extraction volume, even though they are obliged to operate at a loss in order to avoid having to pay the additional mining fee under Decree No 404/2021.
- 80 Such an argument therefore presupposes that undertakings subject to such a constraint on extraction volume are also liable for the additional mining fee. However, as is apparent from paragraph 60 above, those undertakings are not, in practice, liable for the additional mining fee.
- 81 Next, as regards undertakings intending to start an extraction activity in Hungary after the entry into force of Decree No 405/2021, that is to say, the only undertakings which, as is apparent from paragraph 59 above, are concerned by the minimum extraction obligation, the Commission merely asserts, in a general manner, that that obligation makes access to the Hungarian market more difficult for companies established in other Member States.
- 82 However, in the absence of any cumulative effect with the obligation to pay the additional mining fee, it must be held that that institution, by merely relying on such a general argument, has not proved that the minimum extraction obligation renders the exercise of freedom of establishment less attractive, as required by the case-law referred to in paragraphs 50 and 53 above.
- 83 Furthermore, it should be observed that, as Hungary rightly submits, that minimum extraction obligation applies to all mining operators, whether national or non-national, commencing an extraction activity at a mining site in Hungary. On that point, the Commission has not adduced any evidence to show that the companies concerned by that obligation are mainly companies established in other Member States.
- 84 Lastly, the Commission submits that the minimum extraction obligation prevents mining operators from being able to reduce the volume of their economic activity, whereas it follows from the judgment of 21 December 2016, *AGET Iraklis* (C-201/15, EU:C:2016:972, paragraph 53), that freedom of establishment means that economic operators have, inter alia, the freedom to determine the nature and extent of the economic activity to be carried out in the host Member State, and also the freedom subsequently to scale down that activity.
- 85 In that regard, it is sufficient to note that it does not follow from that judgment that economic operators commencing an activity in a Member State other than that in which they are established cannot, as a matter of principle, be subject, in the host Member State, to possible obligations in terms, in particular, of the volume of activity, provided that those obligations are compatible with EU law. In order to assess such compatibility in the light of freedom of establishment, within the

meaning of Article 49 TFEU, it is necessary to take account of the specific features of the national legislation establishing such obligations, as is apparent from that judgment. In that context, it is apparent from Paragraph 1(1) of Decree No 405/2021 that the minimum extraction obligation depends on the ‘maximum extraction volume authorised in the first technical operating plan for extraction’. It must be stated that the Commission has not provided any specific evidence in that regard enabling the Court to determine the specific effect which that obligation may have, in and of itself, on the exercise of freedom of establishment by the undertakings concerned.

86 In the light of the foregoing, it must be held that the Commission has not adduced proof, to the requisite legal standard, that the minimum extraction obligation constitutes a restriction on freedom of establishment within the meaning of Article 49 TFEU.

(3) *Paragraphs 27/A to 27/C of the Mining Law*

87 As regards, lastly, the question whether Paragraphs 27/A to 27/C of the Mining Law constitute a restriction on freedom of establishment, it should be noted that the Commission merely submits, in its application, that those paragraphs involve measures similar to those contained in Decrees No 404/2021 and No 405/2021.

88 In that regard, it should be observed that Paragraph 27/A of the Mining Law provides, in essence, for the conditions under which the President of the Mining Supervisory Authority may declare the existence of a ‘situation justifying a market surveillance measure’.

89 During the period covered by such a situation, the President of that authority has the power to adopt, again by decree, measures similar to those provided for by Decrees No 404/2021 and No 405/2021. First, Paragraph 27/B of that law allows the president to lay down, inter alia, a minimum extraction obligation for mining sites fulfilling certain conditions. Second, Paragraph 27/C of that law establishes a special fee, also known as an ‘additional mining fee’. The President must establish by decree, for the purpose of the payment of that fee, the reference prices of certain basic construction materials.

90 In those circumstances, it must be held that, first, Paragraphs 27/A to 27/C of the Mining Law provide only for a general legislative framework to be implemented by means of various decrees which will, as needed, be adopted by the President of the Mining Supervisory Authority. It is common ground that, on the date on which the present action was brought, no decree to that effect had been adopted.

91 Second, it is true that the measures envisaged by Paragraph 27/B and Paragraph 27/C of that law are comparable to those provided for, respectively, by Decrees No 405/2021 and No 404/2021, without, however, being identical to them.

- 92 In particular, as regards the regime relating to the additional mining fee, it must be borne in mind that Decree No 404/2021 itself sets the reference prices for the calculation of that fee, those prices having, during the pre-litigation procedure, always been below market prices, as is apparent from paragraph 66 above.
- 93 By contrast, Paragraph 27/C of that law does not set the reference prices for the calculation of the fee it lays down, as those prices must be established by decree of the President of the Mining Supervisory Authority. Consequently, it is not certain that any prices fixed by the latter will be lower than the market prices.
- 94 Similarly, whereas, as is apparent from paragraphs 74 to 77 above, the undertakings that are liable for the additional mining fee introduced by Decree No 404/2021 will always be the same, since that fee is based on a turnover that is fixed in time, the undertakings which would be liable for the fee provided for in Paragraph 27/C of the Mining Law could change over time. In order to identify the latter undertakings, that paragraph refers to their turnover generated ‘in the second tax year preceding the situation justifying a market surveillance measure’, namely a level of turnover that is not fixed in time.
- 95 It follows from those considerations that the reasons which establish that the obligation to pay the additional mining fee provided for by Decree No 404/2021 constitutes a restriction on freedom of establishment cannot be applied to the regime provided for by Paragraph 27/C of the Mining Law, or would be capable of being applied, as the case may be, only if Paragraphs 27/A to 27/C of that law had been implemented by the President of the Mining Supervisory Authority, which was not the case as of the date when the present action was brought or, a fortiori, as of the date of expiry of the period laid down in the reasoned opinion.
- 96 That conclusion is not called into question by the case-law of the Court to which the Commission refers, such as follows in particular from paragraph 102 of the judgment of 26 June 2019, *Commission v Greece* (C-729/17, EU:C:2019:534), according to which, even if, in practice, the authorities of a Member State do not apply a national provision which is at variance with EU law, legal certainty nevertheless requires that that provision be amended.
- 97 That case-law presupposes that it is established that the contested provision is contrary to EU law, which is not the case at the present stage with regard to Paragraphs 27/A to 27/C.
- 98 In the light of the foregoing reasons, it must be held that Paragraphs 27/A to 27/C of the Mining Law do not, as such and in the absence of their implementation by means of decrees adopted by the President of the Mining Supervisory Authority, constitute a restriction on freedom of establishment within the meaning of Article 49 TFEU.

**2. *Justification for the restriction on freedom of establishment arising from the obligation to pay the additional mining fee provided for by Decree No 404/2021***

**(a) *Arguments of the parties***

- 99 The Commission states that, in its reply to the reasoned opinion, Hungary relied on several overriding reasons in the public interest justifying the adoption and maintenance of the additional mining fee.
- 100 First of all, it referred to reviving the economy and protecting the national economy and its main sectors. However, those are economic objectives which cannot constitute overriding reasons in the public interest, including in an exceptional situation such as reviving the economy after the COVID-19 pandemic, as is apparent from paragraphs 23 and 64 of the judgment of 13 July 2023, *Xella Magyarország* (C-106/22, EU:C:2023:568).
- 101 Next, Hungary relied on combating market failures, preserving a housing construction programme and suppressing unfair pricing practices, which are general and vague concepts that are difficult to dissociate from the economic objectives referred to in the preceding paragraph, and in respect of which that Member State has not specified either the content or the extent to which Decree No 404/2021 would contribute to the achievement of those objectives.
- 102 Lastly, Hungary referred to objectives which, according to the Commission, constitute overriding reasons in the public interest recognised by EU law, namely security of supply and the protection of consumers and recipients of services.
- 103 In the first place, as regards security of supply, the Commission states that the Court held, in paragraphs 67 and 69 of the judgment of 13 July 2023, *Xella Magyarország* (C-106/22, EU:C:2023:568), that such an objective may be relied on only if there is a genuine and sufficiently serious threat to a fundamental interest of society, stating that it cannot be held that the objective of ensuring security of supply to the construction sector as regards certain basic raw materials concerns such a fundamental interest.
- 104 First of all, Hungary has not demonstrated that there is a genuine and sufficiently serious threat to the security of supply of the materials covered by Decree No 404/2021. Even if the volume of production of those materials in that Member State were insufficient, there was nothing to prevent them from being imported. Nor has the Hungarian Government restricted their export.
- 105 Next, the legislation at issue in the present case is manifestly inappropriate for ensuring such security of supply because, by requiring the undertakings concerned to sell at a loss, it harms their financial stability and encourages them to cease their activities on the Hungarian market. Even if it were accepted that the setting

of reference prices improves the security of supply of basic construction materials, 75% of the production of those materials is not subject to that requirement.

- 106 Lastly, Hungary has not explained why such security of supply could not be ensured by measures that are less restrictive of freedom of establishment.
- 107 As regards, in the second place, the protection of consumers and of recipients of services, the Commission states that Hungary claimed that the size of the market shares held by the undertakings liable for the additional mining fee was a relevant factor in assessing the appropriateness and proportionality of that fee and that applicability on the basis of net turnover targets undertakings with sufficient market shares to be able to contain production and maintain artificially high selling prices.
- 108 In that regard, the Commission notes that if the real objective of the additional mining fee was to combat windfall profits, it is questionable why the imposing of that fee is limited to a very small number of undertakings active in the sector concerned.
- 109 Furthermore, the Commission observes that, under Paragraph 1(4) of Decree No 404/2021, if a seller which is not liable for that fee applies a pricing policy aimed at obtaining an unreasonable profit, the National Tax and Customs Administration may initiate administrative tax proceedings against it. That provision thus lays down, in order to achieve the objective of preventing unreasonable profits, a less restrictive measure than the imposition of that fee.
- 110 In addition, Hungary has not demonstrated that the undertakings that are liable for the additional mining fee have a market share size such that they are capable of distorting market conditions. The market distorting effects described by that Member State are comparable to abuse of a dominant position, within the meaning of Article 102 TFEU, which must, where appropriate, be countered by means of legal instruments derived from competition law. Moreover, proceedings are pending before the Hungarian Competition Authority with regard to undertakings in the sector concerned.
- 111 Hungary disputes the Commission's argument that Decrees No 404/2021 and No 405/2021 pursue a purely economic objective. On the contrary, it claims that those decrees relate to the interests of consumers and recipients of services by ensuring, on the one hand, the availability of sufficient quantities of raw materials for the construction industry and, on the other, reasonable prices by means of non abusive pricing practices.
- 112 The negative economic effects felt between 2020 and 2021 as a result of the COVID-19 pandemic were exacerbated by the commercial policies of certain market participants concerning products such as sand and gravel. The price of mining products increased by an average of 20% over the last five years, irrespective of national supply and demand. During the same period, the largest operators in the sandy gravel extraction sector not only increased their turnover

significantly, but also their profit after tax. They therefore generated additional profits by taking advantage of the extreme increase in demand from other participants in the construction sector.

- 113 It is not necessary to adduce evidence, as claimed by the Commission, that there is a shortage of the materials concerned on the Hungarian market, since the action to counteract the likelihood of a threat to the security of supply of basic construction materials could also be regarded as a legitimate objective where there are indications that that security is likely to be compromised. It is therefore not necessary to wait until such security is effectively compromised in order for a Member State to be justified in introducing appropriate and proportionate preventive measures designed to obviate such a risk.
- 114 As regards the Commission's arguments relating to the manifestly inappropriate nature of Decree No 404/2021 for the purpose of ensuring the security of supply in question, Hungary contends that even undertakings which are not subject to the additional mining fee, which contribute 75% of the total production of the materials concerned, must take into account the price level fixed in Decree No 404/2021 and move towards a reasonable profit margin. Proportionality would be undermined precisely if the obligation to pay the additional mining fee were applicable to all operators and not only to those whose economic power enables them to bear it.
- 115 Lastly, as regards the competition proceedings referred to by the Commission, it argues that even if competition law could provide a solution with regard to unfair pricing practices, it would not be able to guarantee the availability of sufficient quantities of basic construction materials.

**(b) Findings of the Court**

- 116 As the Court has consistently held, a restriction on freedom of establishment is permissible only if, in the first place, it is justified by an overriding reason in the public interest and, in the second place, it observes the principle of proportionality, which means that it is suitable for securing, in a consistent and systematic manner, the attainment of the objective pursued and does not go beyond what is necessary in order to attain it (judgment of 6 October 2020, *Commission v Hungary (Higher education)*, C-66/18, EU:C:2020:792, paragraph 178 and the case-law cited).
- 117 Moreover, it is for the Member State concerned to demonstrate that those cumulative conditions are met (judgment of 6 October 2020, *Commission v Hungary (Higher education)*, C-66/18, EU:C:2020:792, paragraph 179 and the case-law cited).
- 118 In that context, it must also be borne in mind that the reasons which may be invoked by a Member State by way of justification must be accompanied by appropriate proof or an analysis of the appropriateness and necessity of the

restrictive measure adopted by that State and specific evidence substantiating its arguments (see, to that effect, judgments of 21 May 2019, *Commission v Hungary (Usufruct over agricultural land)* C-235/17, EU:C:2019:432, paragraph 94 and the case-law cited, and of 10 July 2025, *INTERZERO and Others*, C-254/23, EU:C:2025:569, paragraph 101).

- 119 In the present case, Hungary submits that the adoption of Decree No 404/2021 was necessary for reviving the economy, for protecting the national economy and its principal sectors, including ensuring the supply of basic construction materials, preserving and securing the housing construction programme, combating market failures, ensuring fair trading, suppressing unfair pricing practices and protecting the recipients of services.
- 120 That Member State states that those objectives are not purely economic, as that decree is ultimately intended to serve the interests of consumers and recipients of services, by ensuring the availability of basic construction materials in sufficient quantities and at prices which are not abusive.
- 121 It is apparent from the written pleadings of that Member State that all of those reasons are based, in essence, on the alleged combined effects of unfavourable market developments due to the COVID-19 pandemic and a shortage of those materials. The effects of that shortage were exacerbated by the conduct of the largest operators in the sector concerned, which thus obtained extraordinary profits by taking advantage of the extreme increase in demand.
- 122 According to settled case-law, objectives of a purely economic nature cannot constitute an overriding reason in the public interest capable of justifying a restriction on a fundamental freedom guaranteed by the FEU Treaty (judgment of 10 July 2025, *INTERZERO and Others*, C-254/23, EU:C:2025:569, paragraph 123 and the case-law cited).
- 123 That is true, in particular, of objectives linked to promotion of the national economy or its proper functioning (see, to that effect, judgment of 13 July 2023, *Xella Magyarország*, C-106/22, EU:C:2023:568, paragraph 64 and the case-law cited), such as the objective of reviving the economy and protecting the national economy and its principal sectors, relied on in the present case by Hungary.
- 124 By contrast, the Court has accepted that national legislation may constitute a justified restriction on a fundamental freedom when it is dictated by reasons of an economic nature in the pursuit of an objective in the public interest (judgment of 10 July 2025, *INTERZERO and Others*, C-254/23, EU:C:2025:569, paragraph 123 and the case-law cited).
- 125 However, it is settled case-law that where the overriding reasons in the public interest such as public policy and public security referred to in Article 52(1)TFEU allow a derogation from a fundamental freedom provided for by the FEU Treaty they must be interpreted strictly, so that their scope cannot be determined unilaterally by each Member State without any control by the EU institutions.

Accordingly, those grounds may be relied on only if there is a genuine, present and sufficiently serious threat to a fundamental interest of society (see, to that effect, judgments of 21 May 2019, *Commission v Hungary (Usufruct over agricultural land)*, C-235/17, EU:C:2019:432, paragraph 59; of 18 June 2020, *Commission v Hungary (Transparency of associations)*, C-78/18, EU:C:2020:476, paragraph 91 and the case-law cited; and of 13 July 2023, *Xella Magyarország*, C-106/22, EU:C:2023:568, paragraph 66).

- 126 As regards specifically an objective linked to security of supply, the Court has held that such an objective may be relied on only if there is a genuine and sufficiently serious threat to a fundamental interest of society (judgment of 13 July 2023, *Xella Magyarország*, C-106/22, EU:C:2023:568, paragraph 67 and the case-law cited).
- 127 However, the Court has already ruled, in paragraph 69 of the judgment of 13 July 2023, *Xella Magyarország* (C-106/22, EU:C:2023:568), that it cannot be held that an objective that seeks to ensure security of supply to the construction sector as regards certain basic raw materials, namely gravel, sand and clay, resulting from extractive activities, concerns a ‘fundamental interest of society’ within the meaning of the case-law referred to in the two preceding paragraphs.
- 128 Similarly, the objective relied on by Hungary in the present case, seeking to ensure security of supply to the construction sector of materials covered by the additional mining fee introduced by Decree No 404/2021, namely calibrated sand, calibrated gravel, calibrated sandy gravel, natural sandy gravel and cement, cannot be regarded as falling within the scope of such a ‘fundamental interest of society’ or, consequently, as constituting an overriding reason in the public interest capable of justifying a restriction on freedom of establishment.
- 129 As regards the objective of preserving and securing the housing construction programme, it must be stated that, in its written pleadings, Hungary has not provided the slightest indication of the content and scope of that programme, in breach of its obligation in that regard, as is apparent from the case-law referred to in paragraph 118 above.
- 130 In any event, that objective, like the objectives relating to combating market failures, suppressing unfair pricing practices and protecting consumers and recipients of services, is based, in essence, as is apparent from paragraph 121 above, on the alleged combined effects of unfavourable market developments due to the COVID-19 pandemic and a shortage relating to the materials covered by the additional mining fee.
- 131 In that regard, the Commission criticises Hungary for not having adduced any evidence of such a shortage on the Hungarian market.
- 132 Hungary submits that it is not necessary to adduce such evidence, as the action to counteract the likelihood of a threat to the security of supply of such materials to

the construction sector could also be considered a legitimate objective, since there are indications that that security may be compromised.

- 133 In so doing, first, that Member State fails to fulfil its obligations, referred to in paragraphs 117 and 118 above, that fall on it where it relies on overriding reasons in the public interest in order to justify a restriction on freedom of establishment.
- 134 Second, by relying on a mere ‘likelihood’ of a threat to the security of supply of certain materials to the construction sector, Hungary does not rely on a ‘genuine’ and ‘present’ threat, within the meaning of the case-law referred to in paragraph 126 of that judgment.
- 135 Accordingly, the existence of a genuine, present and sufficiently serious threat to a fundamental interest of society, allowing overriding reasons in the public interest to be relied on, is not established in relation to the objectives referred to in paragraph 130 above.
- 136 Accordingly, the restriction on freedom of establishment arising from the obligation to pay the additional mining fee provided for by Decree No 404/2021 is not justified by any of the objectives relied on by Hungary.
- 137 Having regard to the foregoing grounds, it must be held that, by adopting the provisions relating to the payment of the additional mining fee introduced by that decree, Hungary has failed to fulfil its obligations under Article 49 TFEU.
- 138 Consequently, the first complaint must be upheld in part, in so far as it relates to the additional mining fee provided for by Decree No 404/2021.

**B. The second complaint, alleging infringement of Article 5(1) of Directive 2015/1535**

*1. Arguments of the parties*

- 139 The Commission submits that Decree No 404/2021 and Paragraphs 27/A to 27/C of the Mining Law should have been notified to it at the draft stage, in accordance with Article 5(1) of Directive 2015/1535.
- 140 It argues that both that decree and Paragraphs 27/A to 27/C fall within the concept of ‘other requirements’ within the meaning of Article 1(1)(d) of that directive, since they are rules with a ‘legally binding form’.
- 141 In addition, Decree No 404/2021 and Paragraphs 27/A to 27/C of the Mining Law affect the marketing of raw materials and basic construction materials referred to therein, first, by setting official prices for those products and, second, by requiring payment of the additional mining fee.
- 142 The Commission’s explanatory guide to Directive 2015/1535 supports that interpretation since it states that the concept of ‘other requirements’ covers

requirements ‘that have an effect on the life cycle of a product, from the period of marketing to the phase of management or disposal of the waste generated by it’, and that those conditions must be likely to have a significant effect on the composition, the nature or the marketing of the product.

143 Hungary maintains that the second complaint should be rejected.

## 2. *Findings of the Court*

144 It follows from the first subparagraph of Article 5(1) of Directive 2015/1535 that Member States must immediately communicate to the Commission any ‘draft technical regulation’, with that concept including, as is apparent from Article 1(1)(g) of that directive, ‘other requirements’.

145 Article 1(1)(d) of that directive defines the concept of ‘other requirements’, as a requirement, other than a technical specification, imposed on a product for the purpose of protecting, in particular, consumers or the environment, and which affects its life cycle after it has been placed on the market, such as conditions of use, recycling, reuse or disposal, where such conditions can significantly influence the composition or nature of the product or its marketing.

146 The definition of the latter concept is therefore of some complexity and, as the Advocate General observed in point 118 of his Opinion, it requires that a series of cumulative conditions be satisfied.

147 It must be observed that, as is apparent from paragraph 53 above, in proceedings for failure to fulfil obligations under Article 258 TFEU, it is for the Commission to establish the existence of the alleged infringement and to provide the Court with the information necessary for it to assess whether the infringement exists, and the Commission may not rely on any presumption for that purpose.

148 It is only where the Commission has adduced sufficient evidence to establish the existence of the alleged infringement that it is incumbent on the Member State to challenge in substance and in detail the information produced and the inferences drawn (judgment of 24 June 2021, *Commission v Spain (Deterioration of the Doñana natural area)*, C-559/19, EU:C:2021:512, paragraph 47 and the case-law cited).

149 In the present case, although the Commission, in support of the second complaint in its application, asserts that Decree No 404/2021 and Paragraphs 27/A to 27/C of the Mining Law fall within the concept of ‘other requirements’, within the meaning of Article 1(1)(d) of Directive 2015/1535, it does not substantiate that assertion in any way, merely stating, in essence, that those rules are in a ‘legally binding form’ which affect the marketing of raw materials and of basic construction materials. However, those assertions fail to establish to the requisite legal standard the reasons why those acts of Hungarian law fall within that concept.

- 150 In the absence of even a brief analysis of the various cumulative conditions laid down by the latter provision in relation to each of those acts, the Commission has not put the Court in a position to determine whether there has been a failure, as alleged, to fulfil obligations.
- 151 In those circumstances, it must be held that the Commission has not established to the requisite legal standard that Hungary has failed to fulfil its obligations under Article 5(1) of Directive 2015/1535.
- 152 Accordingly, the second complaint must be rejected.
- 153 In the light of all the foregoing reasons, it must be held that, by adopting the provisions relating to the payment of an additional mining fee contained in Decree No 404/2021, Hungary has failed to fulfil its obligations under Article 49 TFEU.
- 154 The action is dismissed as to the remainder.

#### **IV. Costs**

- 155 Under Article 138(3) of the Rules of Procedure of the Court of Justice, where each party succeeds on some and fails on other heads, the parties are to bear their own costs.
- 156 In the present case, since the Commission's application has been upheld only in part, each party must be ordered to bear its own costs.

On those grounds, the Court (Fifth Chamber) hereby:

- 1. Declares that, by adopting the provisions relating to the payment of an additional mining fee contained in the a gazdaság újraindítása érdekében fizetendő kiegészítő bányajáradékról szóló 404/2021. (VII. 8.) Korm. rendelet (Government Decree No 404/2021 (VII. 8.) relating to the additional mining fee to be paid with a view to reviving the economy), Hungary has failed to fulfil its obligations under Article 49 TFEU;**
- 2. Dismisses the action as to the remainder;**
- 3. Orders the European Commission and Hungary to bear their own costs.**

[Signatures]