Reports of Cases

OPINION OF ADVOCATE GENERAL
WAHL
delivered on 22 January 2015 [1]

Case C-15/14 P

European Commission
v

MOL Magyar Olaj- és Gázipari Nyrt.

(Appeal — State aid — Agreement between the Hungarian State and the oil and gas company MOL relating to mining fees in connection with the extraction of hydrocarbons — Subsequent legislative amendment increasing the rate of mining fees — Increase not applied to MOL — Existence of a selective advantage)

1. By the present appeal, the European Commission seeks to have set aside the judgment of the General Court of the European Union of 12 November 2013 in *MOL* v *Commission*,[2] by which the General Court annulled Commission Decision 2011/88/EU of 9 June 2010 on State aid C 1/09 (ex NN 69/08) granted by Hungary to MOL Nyrt.[3]

2. In this instance, the Court is being asked principally to determine whether the General Court was right in concluding that the contested decision should be annulled on the ground that the Commission had not established the selective nature of the contested measure, which has the unusual feature of being a combination of an agreement concerning fee rates concluded between the State and a particular undertaking and a subsequent legislative amendment introducing a fee increase that is not applicable to that undertaking. More generally, this case provides an opportunity to clarify the parameters to be applied in the examination of the selectivity condition that defines the concept of State aid under Article 107(1) TFEU.

I – **Background to the proceedings**

3. The background to the proceedings, as set out in the judgment under appeal, may be summarised as follows.

4. MOL Magyar Olaj- és Gázipari Nyrt. ('MOL') is a company established in Budapest (Hungary) which has as its core activities the exploration for and production of crude oil, natural gas and gas products, the transportation, storage and distribution of crude oil products at both retail and wholesale levels, the transmission of natural gas and the production and sale of alkenes and polyolefins.

1 — Original language: French.

2 — T-499/10, EU:T:2013:592; 'the judgment under appeal'.

3 — OJ 2011 L 34, p. 55; 'the contested decision'.

A – *The Hungarian Mining Act*

5. All mining activities in Hungary, including those involving hydrocarbons, are governed by Act XLVIII of 1993 on mining activities.[4] Under that Act, regulatory functions are exercised by the Minister in charge of mining issues and by the Mining Authority, which is a central government body responsible for supervising mining activities.

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

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

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

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

4 — 1993. évi XLVIII. törvény a bányászatról; 'the Mining Act'.

B – *The mining rights extension agreement concluded between MOL and the Hungarian State in 2005*

10. On 19 September 2005, MOL sought to extend the mining rights in respect of twelve of its hydrocarbon fields for which authorisation had been obtained, but in which exploitation had not yet started on expiry of the five-year period commencing on the date on which those authorisations had been granted.

11. On 22 December 2005, the Minister in charge of mining issues and MOL concluded an extension agreement pursuant to Article 26/A(5) of the Mining Act in respect of the twelve hydrocarbon fields ('the 2005 agreement'), point 1 of which granted a five-year extension on the deadline to start exploiting those twelve fields and set the extension fee to be paid by MOL to the State for each of the five years (for Year 1, 12% x 1.050 = 12.600%; for Year 2, 12% x 1.038 = 12.456%; for Year 3, 12% x 1.025 = 12.300%; and, for Years 4 and 5, 12% x 1.020 = 12.240%).

12. Under point 4 of the 2005 agreement, the increased mining fee applies to all of MOL's fields already exploited under authorisation, that is to say, 44 hydrocarbon fields in which production started after 1 January 1998 and 93 natural gas fields in which production started before that date, for a period of 15 years from the date on which that agreement entered into effect. The rate of the increased mining fee for the fifth year of the extension period applies until the fifteenth year. In respect of the natural gas fields in which production started before 1 January 1998, the multiplier for each of the five years of extension (see point 11 of this Opinion) applies to the mathematical formula established by Article 20(3)(b) of the Mining Act, with the multiplier for the fifth year applying until the fifteenth year.

13. Point 6 of the 2005 agreement provides for payment of a special fee of 20 000 million Hungarian forints (HUF).

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

15. According to point 11 of the 2005 agreement, the agreement comes into force as of the date on which the Mining Authority's resolution takes effect. The same provision prohibits the parties from unilaterally terminating the 2005 agreement, save in the case where a third party were to acquire more than 25% of MOL's capital.

16. The 2005 agreement formed the subject-matter of a Mining Authority resolution of 23 December 2005, which confirms the extension of the deadline to start exploiting the twelve hydrocarbon fields referred to in point 10 of this Opinion and the payments to be made by MOL, which are determined by that agreement.

C – *The 2008 amendment to the Mining Act relating to mining rights*

17. Act CXXXIII of 2007 on mining activities amending Act XLVIII of 1993,[5] which came into force on 8 January 2008, amended the rate of the mining fee.

5 — 2007. évi CXXXIII. törvény a bányászatról szóló 1993. évi XLVIII. törvény módosításáról; 'the amended Mining Act'.

18. Article 20(3) of the amended Mining Act, in principle, provides for a rate of 30% of the value of the quantity extracted for fields put into production between 1 January 1998 and 31 December 2007, for the existing mathematical formula under the Mining Act regime to be applied to natural gas fields put into production before 1 January 1998, subject to a floor of 30%, and for a differentiated rate of mining fee to be applied to fields put into operation after 1 January 2008, according to the quantity of crude oil or natural gas extracted, that is to say, a rate of 12% where the annual quantity produced does not exceed 300 million m^3 of natural gas or 50 kilotonnes (kt) of crude oil, a rate of 20% for production between 300 million m^3 of natural gas and 500 million m^3 of natural gas or between 50 kt of crude oil and 200 kt of crude oil, and a rate of 30% for production over 500 million m^3 of natural gas or 200 kt of crude oil. Finally, for all fields, regardless of the date on which they were brought into production, the mining fee payable is increased by 3% or 6% if the price of Brent crude oil exceeds 80 United States dollars (USD) or 90 USD respectively.

19. Article 235 of Act LXXXI of 2008 amending rates of taxes and fees [6] amends the Mining Act by reducing, back down to 12%, the mining fee for fields put into production between 1 January 1998 and 31 December 2007 and the minimum mining fee payable for natural gas fields put into production prior to 1 January 1998. That amendment entered into force on 23 January 2009.

D – *The formal investigation procedure and the adoption of the contested decision*

20. Following a complaint received on 14 November 2007, the Commission, by letter of 13 January 2009, informed the Hungarian authorities of its decision to initiate the formal investigation procedure provided for in Article 88(2) EC with respect to the 2005 agreement, which was alleged to have exempted MOL from the mining fee increase resulting from the amended Mining Act ('the opening decision'). The Commission took the view that, given the manner in which the 2005 agreement and the amended Mining Act had been designed, they should be regarded as part of the same measure, and, having assessed their joint impact, it concluded that the combined effect of the 2005 agreement and the amended Mining Act was to confer an unfair advantage on MOL. The Commission took the view that the measure fulfilled the criteria set out in Article 87(1) EC and had to be regarded as State aid, and that there was nothing to indicate that it could be compatible with the common market. The opening decision was published and interested parties were invited to submit their observations.

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

22. By two letters of 27 April 2009, MOL and the Magyar Bányászati Szövetség (Hungarian Mining Association) submitted their respective observations on the opening decision. MOL considered that it had not enjoyed any kind of privileged position by dint of the 2005 agreement, since it paid a much higher level of mining fee than its competitors and much higher than what it would have paid in the absence of the agreement, and that the agreement was consistent with the provisions and the logic of the Mining Act. The Magyar Bányászati Szövetség stressed in particular the need for the State, inter alia in its function as legislator, to respect the legitimate expectations of economic operators and the principle of legal certainty as regards the long-term stability of the rates of mining fees applicable to fields for which mining authorisation had already been issued.

6 — 2008. évi LXXXI. törvény egyes adó- és járuléktörvények módosításáról.

23. On 9 June 2010, the Commission adopted the contested decision, which states, first, that the measure taken by Hungary, namely the fixing in the 2005 agreement of the mining fee payable by MOL, combined with the changes resulting from the amended Mining Act, constituted State aid within the meaning of Article 107(1) TFEU that was incompatible with the common market under Article 108(3) TFEU, and, secondly, that Hungary had to recover the aid from MOL.

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

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

II – **Procedure before the General Court and the judgment under appeal**

26. By application lodged at the Registry of the General Court on 8 October 2010, MOL brought an action, primarily, for the annulment of the contested decision, and, in the alternative, for the annulment of that decision in so far as it orders recovery of the amounts concerned.

27. MOL raised three pleas in law in support of its action, alleging, respectively, infringement of Article 107(1) TFEU, infringement of Article 108(1) TFEU and Article 1(b)(v) of Council Regulation (EC) No 659/1999,[7] and, lastly, infringement of Article 14(1) of that regulation.

28. In its first plea, MOL contested the categorisation of the measure at issue as State aid.

29. The General Court examined in particular the second complaint raised in that first plea, to the effect that the measure in question was not selective.

7 — Council Regulation of 22 March 1999 laying down detailed rules for the application of Article [108 TFEU] (OJ 1999 L 83, p. 1).

30. In that context, the General Court, after outlining the assessment made by the Commission in the contested decision and setting out the arguments relied on by the parties in this regard before it, found in particular, in paragraph 54 of the judgment under appeal, that the application of Article 107(1) TFEU requires it to determine whether, under a particular statutory scheme, a State measure is such as to favour 'certain undertakings or the production of certain goods' over others which are in a legal or factual situation that is comparable in the light of the objective pursued by the measure in question.

31. Next, having set out, in paragraphs 56 to 61 of the judgment under appeal, the arguments presented by Hungary and MOL during the administrative procedure, the Court recalled, in paragraph 62 of that judgment, that, in this case, the contested measure consists of two elements, namely the 2005 agreement, which sets the mining fee rates for all of MOL's fields, whether in production or subject to an extension, for each of the fifteen years of duration thereof, and the amended Mining Act, which increases mining fee rates for all hydrocarbon fields under authorisation, but does not contain any provisions relating to fields that have already been subject to an extension agreement.

32. The General Court took the view that, configured in this way, the contested measure may be categorised as State aid where it is established that 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 (see paragraph 66 of the judgment under appeal). The General Court thus held in particular, in paragraph 67 of the judgment under appeal, that a combination of elements may be categorised as State aid where the State acts in such a way as to protect one or more operators already present on the market, by concluding with them an agreement granting them fee rates guaranteed for the entire duration thereof, whilst having the intention at that time of subsequently exercising its regulatory power, by increasing the fee rate so that other market operators are placed at a disadvantage, be they operators already present on the market on the date on which the agreement was concluded or new operators.

33. In this instance, taking into account, first, the absence of selectivity characterising the legal framework governing the conclusion of the extension agreements and the considerations justifying the granting of discretion to the Hungarian authorities during negotiations relating to fee rates (see paragraphs 70 to 74 of the judgment under appeal) and, secondly, the absence of any evidence that those authorities treated MOL favourably as compared with any other undertaking in a comparable situation (see paragraphs 75 to 80 of the judgment under appeal), the General Court concluded, in paragraph 81 of the judgment under appeal, that the selective nature of the 2005 agreement could not be regarded as established.

34. Lastly, the General Court pointed out, in paragraph 82 of the judgment under appeal, that the increase in fees under the amended Mining Act, which entered into force in 2008, occurred in a context of an increase in international crude oil prices. It inferred from this that, since the Commission had not argued that the 2005 agreement had been concluded in anticipation of an increase in mining fees, the combination of that agreement with the amended Mining Act could not validly be categorised as State aid for the purposes of Article 107 TFEU.

35. Consequently, the General Court upheld the action brought by MOL and annulled the contested decision.

III – **The forms of order sought and the procedure before the Court**

36. By its appeal, the Commission claims that the Court should:

— primarily:

  — set aside the judgment under appeal;

  — dismiss the action for annulment of the contested decision;

  — order MOL to pay the costs.

— in the alternative:

  — refer the case back to the General Court;

  — reserve the costs of the proceedings at first instance and on appeal.

37. MOL contends, primarily, that the appeal should be dismissed and the Commission ordered to pay the costs.

38. The parties set out their positions in writing and presented oral argument at the hearing on 13 November 2014.

IV – **Analysis of the appeal**

39. For its part, the General Court, although it did address, albeit briefly,[8] the question of possible links between the sequence of interventions referred to by the Commission, none the less also seemed somewhat confused, when it came to reviewing the condition as to the selectivity of the contested measure, in so far as it sometimes referred to the selective nature of the 2005 agreement alone[9] and sometimes to the selective nature of the 'contested measure' as a whole.[10]

40. In the present appeal, the Commission advances a single ground alleging errors of law in the examination of the condition as to the selectivity of the contested measure for the purposes of Article 107(1) TFEU.

41. The Commission takes the view that, as several passages in the judgment under appeal show, the General Court misinterpreted and misapplied that condition. Its line of argument focuses essentially on four aspects of the judgment under appeal.

42. Before addressing each of those aspects of the Commission's line of argument, it seems essential to me to make a number of points in connection with the meaning of the selectivity requirement laid down in Article 107(1) TFEU and its scope in circumstances such as those in the case at issue.

8 — See paragraphs 67 and 82 of the judgment under appeal.

9 — See paragraphs 75 to 81 of the judgment under appeal.

10 — See paragraphs 68 and 83 of the judgment under appeal.

A – *Preliminary observations concerning the meaning of the selectivity requirement laid down in Article 107(1) TFEU and its scope in circumstances such as those in the case at issue*

43. It should be recalled that, according to Article 107(1) TFEU, save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods is, in so far as it affects trade between Member States, incompatible with the internal market.

44. It is settled case-law of the Court that classification as State aid within the meaning of Article 107(1) TFEU requires that all the conditions set out in that provision are fulfilled. [11]

45. It is thus well established that, for a national measure to be classified as State aid for the purposes of Article 107(1) TFEU, first, there must be an intervention by the State or through State resources; second, that intervention must be liable to affect trade between Member States; third, it must confer a selective advantage on the recipient; and fourth, it must distort or threaten to distort competition. [12]

46. In the present case, it is the interpretation and application of the third criterion alone, more specifically the requirement of 'selectivity', which have been called into question.

47. That requirement as to selectivity or — to use another term frequently employed — 'specificity' of the measure must be clearly distinguished from the detection of an economic advantage. In other words, once an advantage, understood in a broad sense, has been identified as arising directly or indirectly from a particular measure, it is then for the Commission to establish that that advantage is specifically directed at one or more undertakings. It falls to the Commission to show that the measure, in particular, creates differences between undertakings which, with regard to the objective of the measure, are in a comparable situation. [13] What is prohibited is not the granting of an advantage as such, but the fact that, if carried out in a discriminatory and selective manner, such granting is liable to place certain undertakings in a more favourable situation than others.

48. That said, the selectivity requirement cannot, none the less, in my view, be completely disconnected from the concomitant, albeit separate, identification of an economic advantage.

49. To my mind, two general points have to be made here.

50. First, it seems quite obvious to me that this selectivity requirement plays a role which differs depending on whether the measure in question is envisaged as individual aid or as a general scheme of aid.

51. After all, in the assessment of an individual measure, the identification of the economic advantage is, in principle, sufficient to support the presumption that it is 'specific' and, therefore, the conclusion that it is also selective.

52. By contrast, in the context of the examination of a general scheme (subsidy schemes, a charging scheme, tax relief, a scheme derogating from the rules of ordinary law in matters of insolvency, facilities for the payment of fees or miscellaneous charges, etc.), selectivity provides a means of identifying whether the presumed advantage, although directed at economic operators in general, is, in fact and in the light of the objective criteria which it selects, of benefit only to certain types of undertakings or groups of undertakings.

11 — Judgment in *Commission* v *Deutsche Post* (C-399/08 P, EU:C:2010:481, paragraph 38 and the case-law cited).

12 — Judgment in *Commission* v *Deutsche Post* (EU:C:2010:481, paragraph 39 and the case-law cited).

13 — See the judgment in *Commission* v *Netherlands* (C-279/08 P, EU:C:2011:551, paragraph 62).

53. This makes it necessary to identify whether the measure in question, notwithstanding the finding that it confers an advantage of general application, does so 'to the exclusive benefit of certain undertakings or certain sectors of activity'. This approach seeks, by another route, to ensure that State measures do not give rise to a differentiation between undertakings — or, more precisely, between operators which, with regard to the objective assigned to the national scheme in question, are in a comparable factual and legal situation — which is not justified by the nature and rationale of the scheme in question.

54. Although Member States enjoy, from the point of view of State aid law, discretion in setting their fiscal, industrial or social policies, they cannot act in a discriminatory manner. It must be pointed out in this regard that the concept of selectivity is linked to that of discrimination [14] and it is thus accepted that the introduction of measures which confer discretion on the authority is not necessarily prohibited.

55. Secondly, where the measure at issue is an aid scheme, it is first of all necessary to identify how that scheme entails in and of itself a mechanism liable to mitigate the costs which are, in principle, included in an undertaking's budget.

56. This is the very difficulty that defines the present case, which is concerned with a highly unusual State measure.

57. First of all, notwithstanding the fact that this conclusion was discussed in MOL's action before the General Court, [15] it should be noted that the contested measure consists of two components, namely the 2005 agreement setting the mining fees applicable to all the fields operated by the applicant, whether put into production or extended, for each of the fifteen years of its term, and the amended Mining Act, which increases the rate of mining fees for all hydrocarbon fields under authorisation, but which does not apply to fields which were already the subject of an extension agreement. [16]

58. Next, since, in the contested decision, the Commission did not specifically comment on the links between the 2005 agreement and the 2008 legislative amendment, there is some confusion when it comes to defining the relevant reference framework for the purposes of examining the selective nature of the contested measure.

59. It has to be noted, indeed, that the Commission considered the measure in question to consist of a combination of the 2005 agreement and the 2008 legislative amendment [17] without even stating the reasons why those consecutive interventions were closely linked to each other, having regard to their chronology, function and context. [18] Moreover, it confined itself to assessing whether the selectivity condition was fulfilled in the light of the authorisation regime applicable at the time when the 2005 agreement was concluded. [19]

14 — Even though it has been pointed out that the concept of discrimination may appear ambiguous, so far as aid is concerned, since discrimination necessarily implies the existence of undertakings or products in an identical situation, and therefore in competition, which are excluded from the benefit of the contested measure (see the Opinion of Advocate General Darmon in *Sloman Neptun*, C-72/91 and C-73/91, EU:C:1992:130, point 61).

15 — In this regard, it is interesting to note that, in its action before the General Court, MOL, first of all (see paragraphs 38 to 44 of the application before the General Court), criticised the Commission for having taken the view, in the contested decision, that the 2005 agreement and the 2008 legislative amendment together constituted a single measure. To use the language employed by MOL in its application, the Commission committed an error of law in deciding that the 2005 agreement and the 2008 amendment to the Mining Act constitute a single aid measure, when it had accepted that each of those two separate measures did not in itself constitute an aid measure. It was only later that MOL argued that, assuming this to be the case, that single measure could not be regarded as selective in nature.

16 — See the findings set out in paragraphs 62 and 63 of the judgment under appeal and in recitals 19 (in the statement of the grounds on which the investigation procedure was initiated) and 53 (in the actual assessment of the measure at issue) of the contested decision.

17 — See recitals 53 and 69 of the contested decision.

18 — See the judgment in *Bouygues and Bouygues Télécom* v *Commission and Others* and *Commission* v *France and Others* (C-399/10 P and C-401/10 P, EU:C:2013:175, paragraph 104 and the case-law cited).

19 — See recitals 62 to 68 of the contested decision.

60. Thus, notwithstanding the fact that it was 'the entire sequence of the State's actions',[20] that is to say, the 2005 agreement in combination with the subsequent amendments to the Mining Act, which was regarded as being in dispute, the selectivity of that measure was examined only from the point of view of the 2005 agreement,[21] the reference framework having been defined as the authorisation regime applicable at the time when that agreement was concluded.

61. Following that approach, the General Court, quite rightly in my view, focused its analysis on the question whether the 2005 agreement contained a mechanism of a selective nature.

62. Even though the General Court itself reiterated the assessment to the effect that the contested measure comprised two components, the 2005 agreement and the 2008 amendment to the Mining Act, its examination of the 2005 agreement in isolation is, in this instance, somewhat problematic.

63. Indeed, as the Court pointed out in *Bouygues and Bouygues Télécom* v *Commission and Others* and *Commission* v *France and Others*,[22] as State interventions take various forms and have to be assessed in relation to their effects, it cannot be excluded that several consecutive measures of State intervention must, for the purposes of Article 107(1) TFEU, be regarded as a single intervention. That could be the case in particular where consecutive interventions, especially having regard to their chronology, their purpose and the circumstances of the undertaking at the time of those interventions, are so closely related to each other that they are inseparable from one another.[23]

64. By failing to set out its views from the outset[24] on the question of whether the Commission had sufficiently established the existence of the close links between the State interventions at issue in this case, as it is obliged to do by the case-law of the Court of Justice, the General Court leaves some uncertainty as regards the reference framework which should have been taken into account for the purpose of establishing the selective nature of the contested measure or measures. The determination of the reference framework for the purposes of examining the selectivity of a particular scheme may, as the Commission itself, moreover, pointed out,[25] be of fundamental importance.[26]

65. The fact remains, however, that that examination of the selectivity of the contested measure in the light of the legal framework governing the 2005 agreement has not in any way been called into question in the present appeal.

66. The present appeal thus requires the Court solely to determine whether the General Court did not err in concluding that the Commission had not established to the requisite legal standard, as it was required to do, that the alleged aid measure was selective in nature.

67. As will be discussed below, it is necessary, bearing in mind the highly unusual nature of the measure at issue, to refrain from drawing any hasty analogy with previous examinations of the selectivity of schemes which the EU Courts have had occasion to hear and determine.

68. It is in the light of those considerations that I will now examine the criticisms levelled at the judgment under appeal.

20 — See the terms used in recital 53 of the contested decision.

21 — See the findings of the General Court in paragraph 46 of the judgment under appeal.

22 — EU:C:2013:175.

23 — Judgment in *Bouygues and Bouygues Télécom* v *Commission and Others* and *Commission* v *France and Others* (EU:C:2013:175, paragraphs 103 and 104).

24 — The question of the links between the various State interventions at issue in this case seems, however, by contrast with the contested decision, to have been the subject of a brief examination in paragraph 82 of the judgment under appeal.

25 — See recital 61 of the contested decision.

26 — See, to that effect, the judgment in *Portugal* v *Commission* (C-88/03, EU:C:2006:511, paragraph 56).

B – *Examination of the arguments raised in the appeal*

1. First head of complaint: examination of the selectivity of the State intervention and assessment of the discretion enjoyed by the national authorities

a) Brief summary of the Commission's line of argument

69. By its first head of complaint, the Commission criticises the General Court's analysis of the discretion enjoyed by the Hungarian authorities, on the one hand, with regard to the choice of whether or not to conclude an extension agreement in the case where a mining undertaking submits a request to that effect and, on the other hand, with regard to the level of the fee which they set in such an agreement. It also criticises the conclusion which the General Court drew from that analysis with respect to the selective nature of the contested aid measure.

70. In the Commission's view, the General Court failed to take into account the conclusions to be drawn from case-law [27] with regard to the examination of the discretion enjoyed by the competent national authorities for the purpose of concluding whether the contested measure is selective.

71. The Commission submits, first of all, that, on receipt of a request under Article 26/A(5) of the Mining Act, the Hungarian authorities enjoy a measure of discretion in deciding whether or not to conclude an agreement extending mining rights. The General Court's analysis in paragraphs 70 to 74 and 79 to 81 of the judgment under appeal, it contends, is erroneous and the conclusion contained in paragraph 83 of that judgment, to the effect that the selective nature of the measure has not been established, should be overturned.

72. The Commission also takes the view that, even if it is assumed that, in this instance, the Hungarian authorities were required to conclude an agreement extending mining rights when presented with a request to that effect by an undertaking, the General Court's analysis is not for that matter any less erroneous in law, given that it disregards the 'unlimited' latitude extended to those authorities with respect to the level of the mining fee set by them, a finding which, moreover, it seems to have reiterated, at least in part, in paragraph 72 of the judgment under appeal. In ruling that the discretionary power conferred on the national authorities by the legislative framework as regards the level of the mining fee was such as to render the 2005 agreement selective, the General Court failed, in the Commission's opinion, to have regard to its own case-law.

b) My assessment

73. It is appropriate at the outset to provide some clarification with regard to the review that the Court is called upon to carry out here. After all, it is well-established case-law that, where the General Court has established or assessed the facts, the Court of Justice has jurisdiction, under Article 256 TFEU, solely to review the legal characterisation of those facts and the conclusions in law drawn from them. The assessment of the facts is not therefore, other than in cases where the evidence produced before the General Court has been distorted, a question of law which is subject, as such, to review by the Court of Justice. [28]

27 — The Commission refers both to the case-law of the Court of Justice (judgments in *France* v *Commission*, C-241/94, EU:C:1996:353, paragraphs 23 and 24; *Ecotrade*, C-200/97, EU:C:1998:579, paragraph 40; Piaggio, C-295/97, EU:C:1999:313, paragraph 39; *DM Transport*, C-256/97, EU:C:1999:332, paragraph 27; and P, C-6/12, EU:C:2013:525, paragraph 27) and to that of the General Court (judgments in *HAMSA* v *Commission*, T-152/99, EU:T:2002:188, paragraphs 156 and 157; *Lenzing* v *Commission*, T-36/99, EU:T:2004:312, paragraphs 129 to 132; *Diputación Foral de Álava and Others* v *Commission*, T-127/99, T-129/99 and T-148/99, EU:T:2002:59, paragraphs 152 and 154; and *Diputación Foral de Álava and Others* v *Commission*, T-227/01 to T-229/01, T-265/01, T-266/01 and T-270/01, EU:T:2009:315, paragraph 168).

28 — See the judgment in *Council* v *Alumina* (C-393/13 P, EU:C:2014:2245, paragraph 16 and the case-law cited).

74. The question here is whether it is possible to identify, in the context of the assessment of the discretion enjoyed by the national authorities in concluding an agreement extending mining rights, any distortion of the facts, any error of law or any error in the legal characterisation of the facts.

75. In my view, that question must be answered in the negative.

76. First, with regard to the determination of whether there has been a distortion of the facts, it is sufficient to point out that the Commission has not pleaded any such distortion. In any event, it is my view that there is no evidence to support the conclusion that the General Court arrived at findings that were manifestly at odds with the content of the provisions of Hungarian law at issue or that it attached to any one of them a significance which it manifestly does not have in relation to the other elements of the case-file.

77. Secondly, it is necessary to establish whether the General Court's analysis concerning the discretion enjoyed by the Hungarian authorities, set out in paragraphs 70 to 74 and 79 to 81 of the judgment under appeal, is vitiated by any error of law or error in the legal characterisation of the facts.

78. I am not convinced that that is the case.

79. With regard, first of all, to paragraphs 70 to 74 of the judgment under appeal, it is important to point out that their purpose was to analyse the legal framework in the light of which the 2005 agreement had been concluded. From that point of view, and with respect to the examination of the discretion enjoyed by the Hungarian authorities in concluding the 2005 agreement, the General Court simply drew the inference, based on a detailed examination of the parameters and conditions for concluding agreements extending mining rights, that Article 26/A(5) of the Mining Act, which allows any mining undertaking to request an extension of its mining rights in respect of one or more fields which it has not put into production within five years from the date on which authorisation was granted, did not appear to be selective in nature.

80. Contrary to what the Commission has argued, I am not convinced that those assessments contain any error whatsoever in the legal characterisation of the facts or any error of law.

81. In this regard, the present case must be distinguished clearly from those mentioned by the Commission in support of its argument calling into question the assessment of the discretion conferred on the Hungarian authorities when concluding agreements extending mining rights.[29] The case-law precedents mentioned by the Commission in its appeal relate to provisions of national law granting relief on taxes or other charges, or exceptions in matters of insolvency.

82. Thus, in the case that gave rise to the judgment in *France* v *Commission* (EU:C:1996:353), which concerned a Commission decision relating to aid granted to Kimberly Clark Sopalin, the Court held that the contested intervention of the Fonds national de l'emploi (National Employment Fund) (FNE) in the implementation of social plans was liable to place certain undertakings in a more favourable situation than others, since the FNE enjoyed a *degree of latitude* which enabled it to adjust its intervention in accordance with a number of considerations. As Advocate General Jacobs pointed out in that case, the discretion and degree of discretion enjoyed by the FNE in the administration of the aid scheme meant that the FNE contributions were not necessarily available to all undertakings on an equal footing.[30]

29 — In this regard, the Commission cites the judgments in *France* v *Commission* (EU:C:1996:353, paragraphs 23 and 24); *Ecotrade* (EU:C:1998:579, paragraph 40); *Piaggio* (EU:C:1999:313, paragraph 39); *DM Transport* (EU:C:1999:332, paragraph 27); and *Diputación Foral de Álava and Others* v *Commission* (EU:T:2002:59, paragraph 152).

30 — Opinion of Advocate General Jacobs in *France* v *Commission* (C-241/94, EU:C:1996:195, points 38 and 57).

83. Similarly, in the case that gave rise to the judgment in *Ecotrade* (EU:C:1998:579, paragraph 43), the Court held that the scheme derogating from the general rules in matters of insolvency which was at issue in the main proceedings fulfilled the specificity condition and was such as to entail 'an additional burden for the State', in the form of various advantages granted by the public authorities, as compared with the advantages that would have followed from application of the ordinary insolvency provisions.

84. The circumstances of the case at issue here are entirely different. The fact that the agreement extending rights related to only one undertaking does not necessarily constitute evidence that the agreement is selective in nature. The correct comparator for establishing whether or not the contested measure was selective was to ascertain whether the procedure for concluding and setting the terms and conditions of the agreement extending mining rights was open to undertakings which were in a comparable situation.

85. In my view, one cannot but subscribe to the statement made in paragraph 72 of the judgment under appeal to the effect that '[m]ore broadly, it must be observed that the margin of assessment at issue here can be distinguished, by its nature, from cases where the exercise of such a margin is connected with the grant of an advantage in favour of an economic operator. In the present case, the Hungarian authorities' margin of assessment allows the fixing of an additional charge on economic operators in such a manner as to take account of the imperatives arising from the principle of equal treatment'.

86. In my view, there is a fundamental difference between the assessment of the selectivity of general schemes for exemption or relief, which, by definition, automatically confer an advantage, and that of optional provisions of national law prescribing the imposition of additional charges. In cases where the national authorities impose such charges in order to maintain equal treatment between operators, the simple fact that the national authorities enjoy discretion which is defined by law — and not unlimited, as the Commission stated in its appeal — cannot be sufficient to establish that the corresponding scheme is selective.

87. I therefore take the view that the General Court did not err in law in stating, in paragraph 74 of the judgment under appeal, that 'the fact that the rates set by year of validity of that agreement are the result of negotiation does not suffice to confer on that agreement a selective character' and that 'the situation would have been different only if the Hungarian authorities had exercised their margin of assessment … in such a way as to favour the applicant by agreeing to a low fee level without any objective reason having regard to the rationale of increasing fees in the event of an extension of authorisation and to the detriment of any other operator which has sought to extend its mining rights or, in the absence of such an operator, where there is concrete evidence that unjustified favourable treatment has been reserved to the applicant'.

88. With regard to paragraphs 79 to 81 of the judgment under appeal, which consist essentially of a number of factual findings concerning the fixing of fee rates in contracts for the extension of mining rights, these too do not appear to contain any error of law or error in the legal characterisation of factors relevant to the examination as to whether the contested measure was selective.

89. Consequently, I am of the opinion that, in order not to proceed with a defective reading of the judgment under appeal, the first limb of the line of argument put forward by the Commission in its single ground of appeal cannot be accepted.

2. Second head of complaint: examination of selectivity and consideration of objective criteria

a) Brief summary of the Commission's line of argument

90. By its second head of complaint, the Commission submits that the General Court erred in concluding, in paragraphs 76 to 78 of the judgment under appeal, that the presence of objective criteria necessarily ruled out any possibility of selectivity. After all, it argues, that assertion is clearly at odds with the conclusions to be drawn from the case-law of the Court and the General Court.[31] The aforementioned passages of the judgment and the conclusion contained in paragraphs 81 and 83 of that judgment, to the effect that the selective nature of the measures at issue cannot be regarded as established, are therefore, the Commission submits, open to censure.

b) My assessment

91. In my view, this line of argument proceeds from an erroneous reading of that section of the judgment under appeal, which relates solely to the mechanism for extending agreements concluded with mining undertakings, as provided for in Article 26/A(5) of the Mining Act and implemented in respect of MOL in 2005. The principal issue there, unlike the situation in the case-law precedents mentioned by the Commission, was not an examination as to whether or not the *beneficiaries* of State aid schemes were selected on the basis of objective criteria.

92. In this regard, the General Court first of all noted, in paragraph 76 of the judgment under appeal, that the Mining Act was drafted in general terms as regards the undertakings eligible for the extension.

93. Next, the General Court held, in paragraph 77 of the judgment under appeal, that the fact that MOL was the only undertaking in practice to have concluded an extension agreement in the hydrocarbons sector was not necessarily decisive. Since the criteria for the conclusion of such an agreement were objective and applicable to any potentially interested operator, the absence of other agreements of that kind would not necessarily constitute evidence of the selective nature of the measure, but could result from decisions by undertakings themselves not to apply for extensions.

94. Lastly, the General Court stated, in paragraph 78 of the judgment under appeal, that the mining fees set for the term of the agreement result simply from the application of the provisions of the Mining Act.

95. All of those considerations form part of the process by which the General Court determines whether or not the mining fee rate was set on the basis of objective criteria which were applicable to any potentially interested operator.

96. Those considerations do not in any way run counter to the case-law, referred to by the Commission, to the effect that a particular aid scheme cannot be cleared of being selective solely on the ground that *the beneficiaries* are selected on the basis of objective criteria.

31 — See, inter alia, the judgments in *Spain* v *Commission* (C-409/00, EU:C:2003:92, paragraph 49); *GEMO* (C-126/01, EU:C:2003:622, paragraphs 35 and 39); and *Italy* v *Commission* (T-424/05, EU:T:2009:49, paragraph 126).

97. Thus, in the judgment in *Spain* v *Commission* (EU:C:2003:92), the Court, called upon to give a ruling on an aid regime consisting essentially of a scheme for loans on preferential terms operated by the Spanish authorities with a view to promoting the purchase of commercial vehicles, simply rejected as irrelevant the argument, put forward at that time by the Kingdom of Spain, to the effect that 'the Agreement [was] governed by objective criteria of horizontal application'. The Court stated that such an argument served only to show that the aid at issue formed part of a scheme of aid rather than being an individual aid measure. [32]

98. As regards the judgment in *GEMO* (EU:C:2003:622), which concerned a scheme for the free collection and destruction of animal carcases and slaughterhouse waste, the Court again held that, despite the fact that the beneficiaries of the scheme adopted by national law were defined on the basis of objective and apparently general criteria, its benefits accrued largely to farmers and slaughterhouses. [33]

99. Similar considerations were set out in the judgment in *Italy* v *Commission* (EU:T:2009:49), which concerned a scheme granting a reduced rate of tax on the income of undertakings for collective investment in transferable securities specialising in shares of small- and medium-capitalisation companies. The General Court had thus held that 'the mere fact that the measure at issue may benefit any investment vehicle fulfilling the conditions laid down, that is to say, determines its scope on the basis of objective criteria, does not in itself establish the general nature of that measure and does not preclude it from being selective in nature'. [34]

100. In the present case, the General Court did not in any way fail to take into account the conclusions to be drawn from that case-law. Notwithstanding the fact that MOL was the only undertaking to apply for an extension of its mining rights, Article 26/A of the Mining Act does not differentiate between one category of operator and another.

101. Consequently, I propose that the second head of complaint raised by the Commission be rejected.

3. Third head of complaint: examination of selectivity and alleged consideration of the State authorities' intention to grant an advantage

a) Brief summary of the Commission's line of argument

102. By its third head of complaint, the Commission essentially criticises the General Court for having, in particular in paragraphs 67 and 82 of the judgment under appeal, linked the assessment of the selectivity of the contested measure to whether or not the Member State had the *intention*, at the time of concluding the 2005 agreement, to protect one or more operators from the application of a new fee regime — in this instance, the regime introduced when the Mining Act was amended in 2008.

32 — See paragraph 49 of that judgment. See also the Opinion of Advocate General Alber in that case (C-409/00, EU:C:2002:475, points 57 and 58).

33 — See paragraphs 35 to 39 of that judgment. See also the Opinion of Advocate General Jacobs in that case (C-126/01, EU:C:2002:273, points 79 to 83).

34 — See paragraph 126 of that judgment.

103. In the Commission's view, the General Court failed to take into account a fundamental aspect of the rules applicable in matters of State aid, namely the requirement that the State intervention referred to in Article 107(1) TFEU must be defined by reference to the effects of the measure at issue. [35] It is therefore appropriate, it submits, to set aside that passage of the judgment under appeal and the conclusion contained in paragraph 83 of that judgment to the effect that the selective nature of the contested measure had not been established.

b) My assessment

104. This third aspect of the Commission's line of argument is also unconvincing.

105. It is true that, according to well-established case-law, Article 107(1) TFEU does not distinguish by reference to the causes or aims of measures of State intervention but defines them in relation to their effects. This means, in particular, that the selectivity of a national measure must be assessed by reference to its effects and not in relation to the stated or alleged intention of the Member State concerned to protect one or more economic operators. [36]

106. To my mind, however, the General Court did not disregard that principle when referring, in paragraph 67 of the judgment under appeal, to the question of whether 'the State acts in such a way as to protect one or more operators already present on the market, by concluding with them an agreement granting them fee rates guaranteed for the entire duration thereof, whilst having the intention at that time of subsequently exercising its regulatory power, by increasing the fee rate so that other market operators are placed at a disadvantage, be they operators already present on the market on the date on which the agreement was concluded or new operators'.

107. By that paragraph, and as is clear from the express reference to the case that gave rise to the judgment in *Bouygues and Bouygues Télécom* v *Commission and Others* and *Commission* v *France and Others*, [37] the General Court sought, for the sake of completeness [38] and independently of the actual examination of the selectivity of the contested measure, to raise the question of whether there were any links between the 2005 agreement and the 2008 legislative amendment.

108. Similarly, in paragraph 82 of the judgment under appeal, with the objective once again, in my view, of satisfying itself that the 2005 agreement and the 2008 amendment to the Mining Act did not necessarily have to be viewed as one and the same measure, given the lack of any chronological and functional links between those two interventions, the General Court pointed out, first, that the increase in fees, which came into force in 2008, occurred in a context of an increase in international crude oil prices and, secondly, that the Commission had not argued that the 2005 agreement had been concluded in anticipation of an increase in mining fees.

109. While it may be regrettable, as I mentioned earlier (see points 58 and 61 of this Opinion), that the General Court did not distinguish more clearly between the examination of the precise identification of the contested measure (set out in paragraphs 67 and 82 of the judgment under appeal) and the assessment of the selective nature of the measure once it had been identified, it would, in my view, be wrong to state that the General Court linked the selectivity of the measure at issue to evidence that the Member State had intended to protect one or more operators.

35 — The Commission refers in particular to the judgments in *Belgium* v *Commission* (C-56/93, EU:C:1996:64, paragraph 79) and *Belgium* v *Commission* (C-75/97, EU:C:1999:311, paragraph 25).

36 — See, inter alia, the judgments in *Belgium* v *Commission* (EU:C:1996:64, paragraph 79); *British Aggregates* v *Commission* (C-487/06 P, EU:C:2008:757, paragraph 89); *Commission* v *Netherlands* (C-279/08 P, EU:C:2011:551, paragraph 51); and *Commission and Spain* v *Government of Gibraltar and United Kingdom* (C-106/09 P and C-107/09 P, EU:C:2011:732, paragraphs 91 and 92).

37 — EU:C:2013:175, paragraphs 103 and 104.

38 — See the use of the word 'moreover' at the beginning of paragraph 67 of the judgment under appeal.

110. Consequently, I am of the opinion that the third head of complaint raised by the Commission should also be rejected.

4. Fourth head of complaint: examination of selectivity and consideration of 'conditions external' to the 2005 agreement

a) Brief summary of the Commission's line of argument

111. The Commission takes the view that the General Court was wrong to consider, in paragraphs 64 and 65 of the judgment under appeal, that the presence of a selective advantage could not be deduced from the mere fact that the operator is left better off than other operators, based on the mere fact, in this instance, that the Member State concerned justifiably exercised its regulatory powers following a change on the market. The Commission's complaint is essentially that, in referring to the subsequent change in conditions external to the 2005 agreement, the General Court disregarded the case-law to the effect that, for the purposes of the application of Article 107(1) TFEU, it makes no difference whether the situation of the presumed beneficiary of the measure is better or worse over time.[39] What is relevant, the Commission submits, is that, after 8 January 2008, MOL was the only undertaking to enjoy preferential treatment in relation to the level of fee applicable to hydrocarbon fields.

112. In any event, the Commission points out, the factors taken into consideration by the General Court cannot be relevant, since the change at issue in this instance was a legislative amendment on which the State was free to decide as it saw fit. That approach, which authorises Member States to argue that measures are not selective by reason of the methods or techniques that they use, fails to take into account the conclusions to be drawn from the relevant case-law.[40]

b) My assessment

113. Here again, a careful reading of paragraphs 64 and 65 of the judgment under appeal leads me to conclude that the Commission's head of complaint should be rejected.

114. While there may indeed be cause to regret a degree of confusion in the line of reasoning adopted by the General Court, which mixes preliminary considerations with the substantive examination of the selectivity of the 2005 agreement, the aforementioned two paragraphs do not appear to relate *stricto sensu* to the examination of the selectivity of the 2005 agreement but, as is clear from the continuation of the General Court's line of reasoning in paragraphs 66 and 67 of the judgment under appeal, seek to address the separate matter of the links between the 2005 agreement and the subsequent legislative amendments. It was in the light of the latter issue, in my view, that the General Court considered it expedient to point out, in paragraph 64 of the judgment under appeal, that, 'where a Member State concludes with an economic operator an agreement which does not involve any State aid element for the purposes of Article 107 TFEU, the fact that, subsequently, conditions external to such an agreement change in such a way that the operator in question is in an advantageous position vis-à-vis other operators that have not concluded a similar agreement is not a sufficient basis on which to conclude that, together, the agreement and the subsequent modification of the conditions external to that agreement can be regarded as constituting State aid'.

39 — Judgments in *Greece* v *Commission* (57/86, EU:C:1988:284, paragraph 10), and *Adria-Wien Pipeline* and *Wietersdorfer & Peggauer Zementwerke* (C-143/99, EU:C:2001:598, paragraph 41).

40 — See the judgments in *British Aggregates* v *Commission* (EU:C:2008:757, paragraph 89); *Commission* v *Netherlands* (EU:C:2011:551, paragraph 51); and *Commission and Spain* v *Government of Gibraltar and United Kingdom* (EU:C:2011:732, paragraphs 91 and 92).

115. The Commission's assertion that '[w]hat is relevant is that, after 8 January 2008, MOL was in a position in which it was uniquely preferred' fails to take into account the fact that the discussion was concerned only with whether the 2005 agreement was selective; it did not consider the possible selectivity of the contested measure resulting from the 2008 amendment. In other words, and by way of extension from my earlier point, the Commission is wrong, in my opinion, to connect the examination of selectivity in this case with the existence of the advantage that is alleged to have followed from the 2008 legislative amendment.

116. To my mind, the General Court did not err in law in stating that, once it was established that a measure, in this case the agreement on mining fees concluded between the Hungarian authorities and MOL, was not selective, that measure should no longer be called into question by the fact that changes in the market were liable to place it in a more favourable situation compared with that of operators which had decided not to enter into such a contract.

117. For all of the foregoing reasons, I take the view that this last head of complaint should be rejected and that the appeal should, consequently, be dismissed in its entirety.

V – **Conclusion**

118. In the light of the foregoing considerations, I propose that the Court should:

(1) dismiss the appeal;

(2) order the European Commission to pay the costs.