Reports of Cases

JUDGMENT OF THE COURT (First Chamber)

4 June 2015*

(Appeals — State aid — Agreement between Hungary and the oil and gas company MOL relating to mining fees in connection with the extraction of hydrocarbons — Subsequent amendment to the statutory rules increasing the rate of the fees — Increase in fees not applied to MOL — Decision declaring the aid incompatible with the common market — Selective nature)

In Case C-15/14 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 15 January 2014,

European Commission, represented by L. Flynn and K. Talabér-Ritz, acting as Agents, with an address for service in Luxembourg,

appellant,

the other party to the proceedings being:

MOL Magyar Olaj- és Gázipari Nyrt., established in Budapest (Hungary), represented by N. Niejahr, Rechtsanwältin, and F. Carlin, Barrister,

applicant at first instance,

THE COURT (First Chamber),

composed of A. Tizzano, President of the Chamber, S. Rodin, A. Borg Barthet, M. Berger and F. Biltgen (Rapporteur), Judges,

Advocate General: N. Wahl,

Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 13 November 2014,

after hearing the Opinion of the Advocate General at the sitting on 22 January 2015,

gives the following

* Language of the case: English.

Judgment

1 By its appeal, the European Commission seeks to have set aside the judgment of the General Court of the European Union in *MOL* v *Commission*, T-499/10, EU:T:2013:592 ('the judgment under appeal'), 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. (OJ 2011 L 34, p. 55) ('the decision at issue').

Legal context

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

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

4 Article 20 of the Mining Act establishes the rules for fixing the mining fees which must be paid to the State. Article 20(11) provides that the amount of the mining fee is a percentage defined, as the case may be, in the Mining Act, in the concession contract or in the contract concluded pursuant to Article 26/A(5) of the Mining Act. Article 20(2) to (7) of that act provides that for mineral resources extracted under the authorisation regime, the fee is regulated by the Mining Act.

5 Before 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 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.

6 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, once only, to extend this deadline by no more than five years. If 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.

7 Act CXXXIII of 2007 on mining activities amending the Mining Act (2007. évi CXXXIII. törvény a bányászatról szóló 1993. évi XLVIII. törvény módosításáról) ('the 2008 amendment'), which came into force on 8 January 2008, amended the rate of the mining fee.

8 Thus, following this amendment, Article 20(3) of the Mining Act provides for a rate of 30% of the value of the quantity extracted for fields put into production between 1 January 1998 and 31 December 2007, for the existing mathematical formula under the Mining Act regime to be applied to natural gas fields put into production before 1 January 1998, subject to a floor of 30%, and for a differentiated mining fee to be applied to fields where production began after 1 January 2008, according to the quantity of crude oil or natural gas extracted, 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 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.

9 Article 235 of Act LXXXI of 2008 amending rates of taxes and fees (2008. évi LXXXI. törvény egyes adó- és járuléktörvények módosításáról) 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 before 1 January 1998. That amendment entered into force on 23 January 2009.

Background to the dispute

10 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.

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

12 On 22 December 2005, the Minister for Mines and MOL concluded an extension agreement pursuant to Article 26/A(5) of the Mining Act ('the 2005 agreement'), granting a five-year extension of the deadline to start exploiting those 12 hydrocarbon fields and setting the extension fee to be paid by MOL to the State as follows: 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%.

13 Under point 4 of the 2005 agreement, the increased mining fee applies for a period of 15 years from the date when that agreement came into effect to all MOL's fields already exploited under authorisation, that is to say, 44 hydrocarbon fields where production started after 1 January 1998 and 93 natural gas fields where production started before that date. The rate of the increased mining fee for the fifth year of the extension period applies until the 15th year. In respect of the natural gas fields, the multiplier for each of the five years of extension 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 15th year.

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

15 Point 9 of that 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 2005 agreement, exclusively by the provisions of that agreement and that the rates defined in that agreement will remain unchanged or constant for its entire duration.

16 Point 11 of the 2005 agreement prohibits the parties from unilaterally terminating that agreement, save in the case in which a third party were to acquire more than 25% of MOL's capital. It also provides that the agreement comes into force as of the date on which the Mining Authority's resolution takes effect. That resolution was passed on 23 December 2005, effectively confirming the extension of the deadline to start exploiting the 12 hydrocarbon fields and the payments to be made by MOL and determined by that agreement.

17 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, in so far as it exempted MOL from the mining fee increase resulting from the 2008 amendment. The Commission considered that the 2005 agreement and the provisions of the 2008 amendment were part of the same measure ('the measure at issue'), which had the effect of conferring an unfair advantage on MOL, and therefore constituted State aid within the meaning of Article 87(1) EC. By letter of 9 April 2009, Hungary submitted its comments on the decision to initiate the formal investigation procedure, denying that that measure constitutes State aid.

18 Following on from the observations filed by MOL and the Magyar Bányászati Szövetség (Hungarian Mining Association), and after Hungary had sent, on 21 September 2009 and 12 January 2010, documents requested by the Commission, on 9 June 2010 the Commission adopted the decision at issue according to which the measure at issue constituted State aid within the meaning of Article 107(1) TFEU, incompatible with the common market, and ordering Hungary to recover the aid from MOL.

Procedure before the General Court and the judgment under appeal

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

20 MOL raised three pleas in law in support of its action, alleging, respectively, infringement of Article 107(1) TFEU and Article 108(1) TFEU, and infringement of Article 1(b)(v) and Article 14(1) of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 108 of the [TFEU] (OJ 1999 L 83, p. 1).

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

22 The General Court examined in particular the second argument raised within that plea, alleging that the measure at issue was not selective. In that regard, the General Court first stated in paragraph 54 of the judgment under appeal that the application of Article 107(1) TFEU requires it to be determined whether, under a particular statutory scheme, a state measure is such as to favour 'certain undertakings or the production of certain goods' over others which are in a comparable legal and factual situation in the light of the objective pursued by that scheme.

23 Next, the General Court stated, in paragraph 62 of the judgment under appeal, that, in the present case, the contested measure consists of two elements, that is to say, 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 15 years of its duration, and the 2008 amendment, which increases mining fee rates for all hydrocarbon fields under authorisation, but does not contain any provisions relating to fields that have already been subject to an extension agreement.

24 Finally, the General Court stated in paragraph 63 of the judgment under appeal that the fees stipulated by the 2005 agreement, which applied both to fields already in production and to fields concerned by the extension of authorisation, were higher than the statutory fees applicable at the time of its conclusion, and it concluded that that agreement did not involve any State aid element for the purposes of Article 107 TFEU.

25 In paragraphs 64 and 65 of the judgment under appeal, the General Court also held, 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 as to confer an advantage on that operator is not a sufficient basis on which to conclude that, together, the agreement and the subsequent modification of the conditions external to that agreement may be regarded as constituting State aid.

26 However, the General Court considered in paragraph 66 of the judgment under appeal that the situation would be different if 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, applicable to any operator. The General Court, however, pointed out that the fact that only one operator has concluded an agreement of that type may result, inter alia, from an absence of interest by any other operator, and is not sufficient therefore to establish the selective nature of that agreement.

27 Finally, the General Court observed in paragraph 67 of the judgment under appeal that, for the purposes of Article 107(1) TFEU, a combination of elements may be categorised as State aid if, having regard to their chronology, their purpose and the circumstances of the undertaking at the time of their intervention, those elements are so closely linked to each other that they are inseparable from one another (see, to that effect, 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, paragraphs 103 and 104).

28 The General Court concluded that a combination of elements such as that mentioned by the Commission in the decision at issue 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 of that agreement, whilst having the intention of subsequently exercising its regulatory power by increasing the fee rate so that other market operators, new or already present on the market, are placed at a disadvantage.

29 It is in the light of those considerations that the General Court examined whether, in the present case, the Commission was right to find that the contested measure was selective.

30 In the first place, the General Court, in paragraphs 70 to 73 of the judgment under appeal, examined the legal framework governing the conclusion of the 2005 agreement. It stated in that regard that Article 26/A(5) of the Mining Act, which makes it possible to apply for an extension of the mining rights, does not appear to be a provision of a selective nature; nor can it be inferred from that provision that the Hungarian authorities may refuse to open negotiations with a view to concluding such an agreement. The General Court also found that, even if that provision provides that any mining undertaking may make an application to extend its mining rights, such an undertaking may, however, decide not to make that application or not to accept the rates proposed by the Hungarian authorities so that there is no resulting agreement.

31 With regard to the margin of assessment granted to the Hungarian authorities by Article 26/A(5) of the Mining Act in relation to the rate of the extension fee, which determines, where applicable, that of the increased mining fee, the General Court found that such a margin of assessment cannot automatically be regarded as favouring certain undertakings or the production of certain goods over

others and, thus, conferring a selective nature on the extension agreements concluded, given that it may be justified by various factors, such as the number of fields for which an extension has been granted and their estimated importance in relation to the fields already in production.

32 In the present case, the General Court found that the margin of assessment conferred by Article 26/A(5) of the Mining Act is such as to enable the administration to preserve equal treatment between operators according to whether they are in comparable or different situations, by adjusting its proposed fees to the characteristics of each extension application submitted, and that it appears to be the expression of a latitude limited by objective criteria, which are not unrelated to the system of fees established by the legislation in question. According to the General Court, that margin of assessment 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, since, in the present case, it 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.

33 Furthermore, the General Court stated in paragraph 73 of the judgment under appeal that it follows from Article 26/A(5) of the Mining Act that the rates of the extension fee and, where applicable, the rates of the increased mining fee are determined exclusively by the extension agreement, in accordance with Article 20(11) of the Mining Act.

34 The General Court concluded in paragraph 74 of the judgment under appeal that the fact that the rates set by year of validity are the result of negotiation does not suffice to confer on the 2005 agreement a selective character, and that the situation would have been different only if the Hungarian authorities had exercised their margin of assessment during the negotiations resulting in that agreement in such a way as to favour MOL 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 having sought to extend its mining rights or, failing such an operator, where there is concrete evidence that unjustified favourable treatment had been reserved to MOL.

35 In the second place, the General Court examined whether the selective nature of the 2005 agreement had been demonstrated by the Commission, inter alia, in the light of the clause setting the precise rate of the increased mining fee for each of the 15 years of the period of validity of that agreement, and of the clause providing that those rates remain unchanged.

36 In that regard, the General Court observed in paragraph 76 of the judgment under appeal that the Mining Act is drafted in general terms as regards the undertakings that may benefit from the provisions of Article 26/A(5) of that act. The General Court also found in paragraph 77 of the judgment under appeal that, in the decision at issue, the Commission merely found that MOL was the only undertaking in practice to have concluded an extension agreement in the hydrocarbons sector. However, according to the General Court, this may be explained by an absence of interest on the part of other operators, and thus by an absence of any extension application or any agreement between the parties on the rates of the extension fee. The General Court concluded that, in the two latter cases, since the criteria laid down by the Mining Act for the conclusion of an extension agreement are objective and applicable to any potentially interested operator fulfilling those criteria, the conclusion of the 2005 agreement cannot be regarded as being of a selective nature.

37 Furthermore, the General Court found in paragraph 78 of the judgment under appeal that by setting the rate of the increased mining fee for each of the 15 years of the period of validity of the 2005 agreement and by providing that those rates would remain unchanged, MOL and Hungary merely applied the provisions of Article 20(11) and Article 26/A(5) of the Mining Act.

38 Next, the General Court emphasised in paragraph 79 of the judgment under appeal that the rates stipulated in the 2005 agreement apply to all of MOL's fields already in production under authorisation, that is, to 44 hydrocarbon fields and to 93 natural gas fields, whereas the extension concerns only 12 other fields not in production at the time of conclusion of the agreement. Therefore, the fact that the multiplier is below the ceiling of 1.2, and specifically between 1.02 and 1.05, may be explained objectively by the limited significance of the fields concerned by the extension in relation to the fields already in production in 2005. The Commission having failed to examine that aspect, the General Court considered that no evidence of MOL's unjustified preferential treatment is apparent from the decision at issue, and that it cannot be assumed that MOL was afforded favourable treatment in relation to any other undertaking that was potentially in a comparable situation.

39 Finally, the General Court found in paragraph 80 of the judgment under appeal that, although the Commission mentioned the existence of other extension agreements concluded by mining undertakings in the solid minerals sector, it did not attempt to find any more information about them from the Hungarian authorities and did not take account of them in the decision at issue, from which it is clear, moreover, that the selective nature of the measure at issue stems from the selectivity of the 2005 agreement and not from the nature of the minerals extracted, the rates of fees applicable to those categories of minerals or from the fact that those rates were not subsequently modified. The General Court concluded that, by its approach, the Commission did not take account of all the factors which would have enabled it to assess whether the 2005 agreement was selective as regards MOL in the light of the situation created by other extension agreements also concluded on the basis of Article 26/A(5) of the Mining Act.

40 In the light of all those considerations, 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.

41 In addition, the General Court stated, 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.

42 Consequently, the General Court upheld the action brought by MOL and annulled the decision at issue.

The appeal

43 In support of its appeal, the Commission relies on a single ground, alleging an error of law, in that the General Court misinterpreted and misapplied the condition of selectivity laid down in Article 107(1) TFEU.

44 The ground of appeal is divided into four parts.

Preliminary observations

45 Under Article 107(1) TFEU, 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 provision of certain goods is to be incompatible with the common market, in so far as it affects trade between Member States, save as otherwise provided for in the Treaties.

46 According to settled case-law of the Court, for a measure to be categorised as aid within the meaning of Article 107(1) TFEU, all the conditions set out in that provision must be fulfilled (see judgment in *Commission* v *Deutsche Post*, C-399/08 P, EU:C:2010:481, paragraph 38 and the case-law cited).

47 It is thus well established that, for a national measure to be categorised as State aid within the meaning of Article 107(1) TFEU, there must, first, be an intervention by the State or through State resources; second, the intervention must be liable to affect trade between Member States; third, it must confer an advantage on the recipient and, fourth, it must distort or threaten to distort competition (see judgment in *Commission* v *Deutsche Post*, C-399/08 P, EU:C:2010:481, paragraph 39 and the case-law cited).

48 In the present case, it is only the interpretation and application of the third condition, that the measure at issue must confer a selective advantage on the recipient, that are called into question.

The first part of the single ground of appeal

Arguments of the parties

49 The Commission criticises the General Court's analysis of the legal framework governing the conclusion of the 2005 agreement and, in particular, the discretion enjoyed by the Hungarian authorities with regard to the choice of whether or not to conclude an extension agreement and with regard to the level of the fee which they set in such an agreement.

50 In the first place, the Commission claims that the General Court's examination, in paragraphs 70 to 74 and 79 to 81 of the judgment under appeal, of the discretion enjoyed by the Hungarian authorities in concluding an extension agreement is legally flawed.

51 The General Court did not find that the Hungarian authorities are required to conclude an extension agreement following negotiations, but stated in paragraph 57 of the judgment under appeal that, according to Hungary, 'the conclusion of such an agreement was not obligatory', then found in paragraph 77 of that judgment that the fact that MOL is the only hydrocarbons producer to have concluded an extension agreement may be explained by there being no agreement between the parties on the rates of the extension fee.

52 It is therefore clear from the judgment under appeal that the Mining Act confers on the Hungarian authorities a discretion enabling them to approve of or object to the conclusion of an extension agreement, which is not subject to objective criteria and is therefore selective in nature. The Commission also claims that the fact that the mining undertakings have the choice of whether or not to apply for an extension, as the General Court pointed out in paragraph 71 of the judgment under appeal, is not relevant in that regard.

53 Consequently, the General Court's conclusion in paragraph 83 of the judgment under appeal that the selective nature of the measure at issue has not been established should be reviewed.

54 That conclusion contradicts the case-law of the Court of Justice, in particular the judgment in *France* v *Commission* (C-241/94, EU:C:1996:353, paragraphs 23 and 24), in which the Court of Justice found that, by virtue of its aim and general scheme, the system at issue was liable to place certain undertakings in a more favourable situation than others since the competent authority enjoyed a degree of latitude which enabled it to adjust its financial assistance having regard to various considerations such as, in particular, the choice of the beneficiaries, the amount of financial assistance and the conditions under which it was provided. It also disregarded the judgment in *P* (C-6/12, EU:C:2013:525, paragraph 27), in which the Court of Justice held that, when national legislation

confers a discretion on national authorities with regard to the detailed rules for the application of the measure at issue, the decisions of those authorities lack selectivity only if that discretion is limited by objective criteria, which are not connected with the system put in place by the legislation in question.

55 In the second place, the Commission claims that the General Court's analysis is also incorrect in that it disregards the discretion conferred on the Hungarian authorities as regards the level of the mining fee set by them in an extension agreement. That is liable to render the 2005 agreement selective.

56 According to the Commission, the reasons given by the General Court in paragraph 72 of the judgment under appeal, that the margin of assessment is such as to enable the administration to preserve equal treatment between operators, are not presented in the national legislative framework as factors determining the measure in which the mining fee must be increased and therefore constitute mere suppositions. Consequently, the General Court disregarded the case-law of the Court of Justice, in particular, the judgments in *France* v *Commission* (C-241/94, EU:C:1996:353); *Ecotrade* (C-200/97, EU:C:1998:579); *Piaggio* (C-295/97, EU:C:1999:313); *DM Transport* (C-256/97, EU:C:1999:332); *P* (C-6/12, EU:C:2013:525); *Ministerio de Defensa and Navantia* (C-522/13, EU:C:2014:2262); and *British Telecommunications* v *Commission* (C-620/13 P, EU:C:2014:2309).

57 Furthermore, the Commission claims that, contrary to what the General Court stated in paragraph 72 of the judgment under appeal, the fact that the 2005 agreement gave rise to a charge for MOL at the time that agreement was concluded does not mean that it is not selective.

58 MOL disputes the Commission's line of argument contending, first, that it is not apparent from the judgment under appeal that Article 26/A(5) of the Mining Act leaves the Hungarian authorities a margin of discretion with regard to the conclusion of an extension agreement, and secondly, that the case-law relied on by the Commission is not relevant in the present case.

Findings of the Court

59 It must be observed at the outset that, as the Advocate General stated in point 47 of his Opinion, the requirement as to selectivity under Article 107(1) TFEU must be clearly distinguished from the concomitant detection of an economic advantage, in that, where the Commission has identified an advantage, understood in a broad sense, as arising directly or indirectly from a particular measure, it is also required to establish that that advantage specifically benefits 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. It is necessary therefore that the advantage be granted selectively and that it be liable to place certain undertakings in a more favourable situation than that of others.

60 It must, however, be noted that the selectivity requirement differs depending on whether the measure in question is envisaged as a general scheme of aid or as individual aid. In the latter case, the identification of the economic advantage is, in principle, sufficient to support the presumption that it is selective. By contrast, when examining a general scheme of aid, it is 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.

61 It follows that the appropriate comparator for establishing the selectivity of the measure at issue in the present case was to ascertain whether the procedure for concluding and setting the terms and conditions of the agreement extending mining rights, laid down in Article 26/A(5) of the Mining Act, draws a distinction between operators that are, in the light of the objective of the measure, in a comparable factual and legal situation, a distinction not justified by the nature and general scheme of the system at issue.

62 It follows from those considerations that the present case must be clearly distinguished from those cases giving rise to the case-law mentioned by the Commission in support of its arguments, set out in paragraphs 54 and 56 above, seeking to criticise the analysis made by the General Court of the legal framework governing the 2005 agreement.

63 Those cases relate to provisions of national law granting relief on taxes or other charges (judgments in *France* v *Commission*, C-241/94, EU:C:1996:353; *Piaggio*, C-295/97, EU:C:1999:313; *DM Transport*, C-256/97, EU:C:1999:332; *P*, C-6/12, EU:C:2013:525; *Ministerio de Defensa and Navantia*, C-522/13, EU:C:2014:2262; and *British Telecommunications* v *Commission*, C-620/13 P, EU:C:2014:2309), or exceptions in matters of insolvency (judgment in *Ecotrade*, C-200/97, EU:C:1998:579).

64 As the Advocate General stated in point 86 of his Opinion, there is a fundamental difference between, on the one hand, the assessment of the selectivity of general schemes for exemption or relief, which, by definition, confer an advantage, and, on the other, the assessment of the selectivity of optional provisions of national law prescribing the imposition of additional charges. In cases in which the national authorities impose such charges in order to maintain equal treatment between operators, the simple fact that those authorities enjoy discretion defined by law, and not unlimited, as the Commission claimed in its appeal, cannot be sufficient to establish that the corresponding scheme is selective.

65 Consequently, it must be stated, first, that the General Court correctly held in paragraph 72 of the judgment under appeal that the margin of assessment at issue in the present case allows the fixing of an additional charge imposed on economic operators in order to take account of the imperatives arising from the principle of equal treatment, and can be distinguished, by its very nature, from cases in which the exercise of such a margin is connected with the grant of an advantage in favour of a specific economic operator.

66 Secondly, it cannot validly be argued that the General Court erred in law by finding, in paragraph 74 of the judgment under appeal that the fact that the rates set by year of validity of the 2005 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 MOL 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 having sought to extend its mining rights or, if there is no such operator, where there is concrete evidence that unjustified favourable treatment has been reserved to MOL.

67 In addition, in order to determine whether the selective nature of the 2005 agreement had been demonstrated by the Commission, the General Court first analysed, in paragraph 79 of the judgment under appeal, the rates stipulated under that agreement and found that no evidence of unjustified preferential treatment of MOL was apparent from the decision at issue, and that therefore it could not be assumed that MOL was afforded favourable treatment in relation to any other undertaking that was potentially in a situation comparable to its own for the purposes of the case-law cited in paragraph 54 of the judgment under appeal.

68 Secondly, the General Court found in paragraph 80 of the judgment under appeal that, although the Commission had mentioned that there were other extension agreements in the solid minerals sector, it did not take account of them, and that in doing so it did not take into consideration all the factors by means of which it would have been in a position to assess whether the 2005 agreement was selective as regards MOL in the light of the situation created by other agreements extending mining rights, also concluded on the basis of Article 26/A(5) of the Mining Act.

69 Following the analysis carried out in paragraphs 70 to 74 and 79 to 80 of the judgment under appeal, the General Court was right to conclude, in paragraph 81 of that judgment, that, in the light, first, of the absence of selectivity characterising the legal framework governing the conclusion of agreements extending mining rights and given the considerations justifying the grant of a margin of assessment, and secondly, of the absence of any evidence that those authorities treated MOL favourably in relation to any other undertaking in a comparable situation, the selective nature of the 2005 agreement cannot be regarded as established.

70 In the light of all the above considerations, it must be held that the General Court did not err in law in its examination, in paragraphs 70 to 74 and 79 to 81 of the judgment under appeal, of the legal framework governing the conclusion of the 2005 agreement.

71 The first part of the single ground of appeal must, therefore, be rejected as unfounded.

Second part of the single ground of appeal

Arguments of the parties

72 The Commission claims that, in holding in paragraphs 76 to 78 of the judgment under appeal that the presence of objective criteria necessarily rules out any possibility of selectivity, the General Court disregarded the case-law of the Court of Justice to the effect that reliance on objective criteria in order to determine whether certain undertakings are covered by a national measure does not necessarily lead to the conclusion that there was no selectivity (see, to that effect, judgments in *Spain* v *Commission*, C-409/00, EU:C:2003:92, paragraph 49, and *GEMO*, C-126/01, EU:C:2003:622, paragraphs 35 and 39).

73 It is therefore appropriate, in the Commission's view, to review paragraphs 76 to 78 of the judgment under appeal and the General Court's conclusion in paragraphs 81 and 83 of that judgment that the selective nature of the 2005 agreement and the measure at issue cannot be regarded as having been established.

74 MOL contends that the Commission's arguments are based on a misreading of the judgment under appeal and that the case-law cited by the Commission is not relevant in the present case.

Findings of the Court

75 It must be stated that, in paragraphs 76 to 78 of the judgment under appeal, the General Court analysed the legal framework governing the conclusion of agreements extending mining rights, including the 2005 agreement, as provided for in Article 26/A(5) of the Mining Act.

76 In order to do so, the General Court examined whether or not the mining fee rate was set on the basis of objective criteria applicable to any potentially interested operator. Thus, the General Court noted first, 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 of mining rights. Next, the General Court found, in paragraph 77 of that judgment, that the fact that MOL was the only undertaking to have concluded an extension agreement in the hydrocarbons sector did not necessarily constitute evidence of selectivity, since the criteria for concluding such an agreement are objective and applicable to any potentially interested operator, and the absence of other agreements may result from decisions by undertakings themselves not to apply for an extension of mining rights. Lastly, the General Court stated, in paragraph 78 of the judgment under appeal, that the mining fees set for the term of the 2005 agreement stem simply from the application of the provisions of the Mining Act.

77 It follows from those arguments that, in criticising the General Court for holding that the presence of objective criteria necessarily rules out any possibility of selectivity and for having consequently disregarded the case-law 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 (judgments in *Spain* v *Commission*, C-409/00, EU:C:2003:92, paragraph 49, and *GEMO*, C-126/01, EU:C:2003:622, paragraphs 35 and 39), the Commission misreads the judgment under appeal.

78 In any event, it must be stated that, as MOL contends, in the cases giving rise to those judgments, the Court of Justice addressed the issue of whether or not the beneficiaries of State aid schemes were selected on the basis of objective criteria. Thus, in particular in the judgment in *GEMO* (C-126/01, EU:C:2003:622), the Court found 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, the benefits of that law accrued largely to farmers and slaughterhouses.

79 As the Advocate General stated in point 91 of his Opinion, that issue is not in question in the present case, so that the case-law arising from those judgments is not relevant in these proceedings.

80 Therefore, the second part of the single ground of appeal must be rejected as unfounded.

The third and fourth parts of the single ground of appeal

81 Since the arguments set out in support of the third and fourth parts of the single ground of appeal are closely connected, it is appropriate to examine them together.

Arguments of the parties

82 In essence, the Commission criticises the General Court for holding, in paragraphs 64 and 65 of the judgment under appeal, that the presence of a selective advantage cannot be deduced from the mere fact that the operator is left better off than other operators, when the Member State concerned justifiably confined itself to exercising its regulatory power following a change on the market.

83 The Commission argues that, in doing so, 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 in question is better or worse over time (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).

84 According to the Commission, what is relevant, is that, after 8 January 2008, MOL was the only undertaking to enjoy preferential treatment in relation to the level of the mining fee applicable to hydrocarbon fields.

85 In addition, the Commission claims, first, that, since the change at issue was a legislative amendment on which the Member State was free to decide as it saw fit, the approach followed by the General Court authorises Member States to argue that measures are not selective by reason of the methods they use. Secondly, in paragraphs 67 and 82 of the judgment under appeal, the General Court was wrong to link the assessment of the selective nature of the 2005 agreement, and therefore the measure at issue, to whether or not the Member State concerned had the intention, at the time of concluding that agreement, of protecting one or more operators from the application of a new fee regime, in this instance, the regime introduced by the 2008 amendment.

86 According to the Commission, the General Court thus disregarded the settled case-law of the Court of Justice to the effect that Article 107(1) TFEU defines State interventions on the basis of their effects, and independently of the techniques used by the Member States to implement their interventions

(see, inter alia, judgments in *Belgium* v *Commission*, C-56/93, EU:C:1996:64, paragraph 79; *Belgium* v *Commission*, C-75/97, EU:C:1999:311, paragraph 25; *British Aggregates* v *Commission*, C-487/06 P, EU:C:2008:757, paragraph 89; and *Commission* v *Government of Gibraltar and United Kingdom*, C-106/09 P and C-107/09 P, EU:C:2011:732, paragraphs 91, 92 and 98).

87 MOL contends that the third and fourth parts of the single ground of appeal must be rejected given that, contrary to what the Commission claims, paragraphs 64, 65, 67 and 82 of the judgment under appeal do not concern selectivity.

Findings of the Court

88 As a preliminary point, it must be stated that, in paragraphs 62 and 63 of the judgment under appeal, the General Court observed that the contested measure consists of two elements, namely, the 2005 agreement and the 2008 amendment, and found that that agreement did not involve any element of State aid for the purposes of Article 107 TFEU.

89 In that context, the General Court first of all held, 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 element of State aid 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.

90 Next, the General Court made it clear, in paragraph 65 of the judgment under appeal, that, if that were not the case, any agreement that an economic operator might conclude with a State which does not involve any element of State aid for the purposes of Article 107 TFEU would always be open to challenge, when the situation on the market on which the operator party to the agreement is active evolves in such a way that an advantage is conferred on that operator, as described in paragraph 64 of the judgment under appeal, or when the State exercises its regulatory power in an objectively justified manner following a market evolution while observing the rights and obligations resulting from such an agreement.

91 Finally, the General Court held in paragraph 66 of the judgment under appeal that a combination of elements such as that observed by the Commission in the decision at issue may be categorised as State aid where the terms of the agreement concluded were proposed selectively by the State to one or more operators rather than on the basis of objective criteria, laid down by a text of general application, applicable to any operator. The General Court made it clear in that regard that the fact that only one operator concluded an agreement of that type is not sufficient to establish the selective nature of the agreement, since that may result from, inter alia, lack of interest on the part of any other operator.

92 Moreover, the General Court stated, in paragraph 67 of the judgment under appeal, that the case-law of the Court of Justice, according to which, for the purposes of Article 107(1) TFEU, a single aid measure may consist of combined elements on condition that, having regard to their chronology, their purpose and the circumstances of the undertaking at the time of their intervention, they are so closely linked to each other that they are inseparable from one another (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, paragraphs 103 and 104 and the case-law cited).

93 In that context, the General Court emphasised, in paragraph 67 of the judgment under appeal, that a combination of elements such as that relied upon by the Commission in the decision at issue may be categorised as State aid when 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 of that agreement, while 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 that agreement was concluded or new operators.

94 It was in the light of those considerations that the General Court, in paragraph 68 of the judgment under appeal, decided that it was necessary to examine whether, in those proceedings, the Commission was entitled to consider that the contested measure was selective.

95 It follows from the foregoing that, as MOL contends, paragraphs 64 to 67 of the judgment under appeal do not, as such, concern the examination of the selectivity of the 2005 agreement, but are preliminary explanations aimed at introducing the relevant framework in relation to which the General Court examined whether the Commission was correct in finding that the measure at issue was selective.

96 As the Advocate General stated in points 107 and 114 of his Opinion, by those preliminary explanations, the General Court in fact sought to deal with the issue of the links existing between the 2005 agreement and the 2008 amendment, which the Commission had not specifically addressed in the decision at issue, and more particularly, to underline the fact that, given that there is no chronological and/or functional link between those two elements, they cannot be interpreted as constituting a single aid measure.

97 By those preliminary explanations, the General Court merely applied the case-law laid down by the Court of Justice in 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), to which the General Court also expressly referred in paragraph 67 of the judgment under appeal, and according to which, since 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 when consecutive interventions, 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.

98 In a similar vein, in paragraph 82 of the judgment under appeal, the General Court found, first, that the increase in mining fees, which entered into force in 2008, occurred in a context of an increase of international prices, and secondly, the Commission had not argued that the 2005 agreement had been concluded in anticipation of such an increase, and it therefore concluded that the combination of that agreement and the 2008 amendment could not be categorised as State aid for the purposes of Article 107 TFEU.

99 It follows that the General Court's reasoning in paragraphs 64 to 67 and 82 of the judgment under appeal is not vitiated by any error of law.

100 In addition, it must be stated that the Commission's assertion that what is relevant is that, after 8 January 2008, MOL was the only undertaking to enjoy preferential treatment cannot be accepted. It is common ground in the present case, as is clear from paragraph 46 of the judgment under appeal, that the question whether the measure at issue is selective in nature was discussed by the parties solely in respect of the 2005 agreement, and not the 2008 amendment.

101 In the light of all of the foregoing, the third and fourth parts of the single ground of appeal must be rejected as unfounded.

102 Since none of the arguments raised by the Commission in support of its single ground of appeal has been upheld, the appeal must be rejected in its entirety.

Costs

103 Under Article 138(1) of the Rules of Procedure of the Court of Justice, which applies to appeal proceedings by virtue of Article 184(1) thereof, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since MOL sought an order as to costs against the Commission and the latter has been unsuccessful, it must be ordered to pay the costs of these proceedings.

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

1. Dismisses the appeal;

2. Orders the European Commission to pay the costs.

[Signatures]