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# EFFECTS OF THE EU COURTS' JUDGMENTS DELIVERED IN MOL'S STATE AID CASE ON THE INTERPRETATION OF SELECTIVITY

#### Abstract/Introduction

In a 2010 decision the European Commission found that the combined effect of a 2005 agreement between MOL Hungarian Oil and Gas Plc. and the Hungarian State and of a 2008 amendment of the Hungarian Mining Act constituted illegal State aid. The 2010 Commission decision was annulled by the General Court of the European Union and the annulment was confirmed by the Court of Justice in 2015. Following that ruling the European Commission closed the case file by concluding that the measure did not constitute State aid. The reason of the annulment and of the final conclusion was that the Commission did not, and was actually not able to prove that the measure granted a selective advantage to MOL. Both judgments delivered in MOL's State aid case have laid down new interpretations of selectivity and are being referred to in other cases brought before the EU Courts. The present article is an overview of recent references and the actual influence of MOL's judgments on the evolution of the concept and interpretation of selectivity.

# 1. The general prohibition of State aid and the basic concept of selectivity

The prohibition of State aid as laid down in Article 107(1) of the Treaty on the Functioning of the European Union (TFEU)<sup>2</sup> is one of the EU's legal instruments combat-

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<sup>2 &</sup>quot;Save as otherwise provided in the Treaties, any aid granted by a Member State or through State

ting nation protectionism: it is intended to prevent distortions of competition and of intra-Community trade caused by national measures favouring certain undertakings or the production of certain goods. The prohibition has four cumulative conditions: in order for a measure to qualify as State aid within the meaning of Article 107(1) TFEU, there must be a State intervention procuring an advantage to its beneficiary, the advantage must be financed from State resources, it must be selective, distorting thereby competition (at least potentially), and trade between Member States must be affected.<sup>3</sup> One of those conditions is thus selectivity of the measure, appearing in the wording of the Article as "(...) any aid (...) favouring certain undertakings or the production of certain goods (...)", meaning that the measure is not a general one, since, among other undertakings in a similar legal and factual situation, it favours only those selected by the State.<sup>4</sup>

The concept of selectivity and its application to different situations, different aid measures has given rise to considerable debate<sup>5</sup> and the EU Courts have also nowadays been called upon to reconsider certain aspects of the interpretations governing the assessment of selectivity with regard to certain types of State measures.<sup>6</sup> The judgments

resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market." in Article 107(1) of the Treaty on the functioning of the European Union (Consolidated version 2016), OJ C 2002, 07.06.2016, p. 91.

- This categorisation appears in several different ways in interpretations of the Court of Justice of the European Union. Although the Court always refers to four cumulative conditions, the text of the prohibition includes five elements, so the different interpretations lay down different groupings of those five elements. See in that regard, for example: judgment of 16 July 2014 in Greece v Commission, T-52/12, EU:T:2014:677, par. 39., judgment in Germany v Commission, C-446/16 P, EU:C:2016:97, par. 22. and judgment in Belgium v Commission, C-270/15 P, EU:C:2016:489, par. 31.
- Accordingly, selectivity refers to some kind of differential treatment or discrimination between undertakings being in a similar legal and/or factual position. There is a long line of case-law interpreting the selectivity concept and its different aspects which is not the subject of the present article. A quite thorough overview and explanation of that framework is provided in the recent Commission guidance concerning the notion of State aid. See: Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union, C/2016/2946, OJ C 262, 19.7.2016, p. 1–50, http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:O-J.C\_.2016.262.01.0001.01.ENG&toc=OJ:C:2016:262:TOC accessed 29 September 2016
- In one of his recent opinions Advocate General *Bobek* referred to a rich debate concerning the precise contours of the selectivity concept. See Opinion of Advocate General *Bobek* in Belgium v Commission (C-270/15 P, EU:C:2016:289), sections 19 and 34 and the references included in the footnotes to those sections.
- See for example opinion of Advocate General Bobek in Belgium v Commission, op. cit. and opinion of Advocate General Wathelet in joined cases Commission v World Duty Free Group and Commission v Banco Santander (C-20/15 P and C-21/15 P, EU:C:2016:624.

in MOL's State aid case have added important new interpretations to the relevant case-law, and – as it will be presented later in this paper – gave rise to new debates, or at least issues which still need to be resolved by the Court.

### 2. Background - MOL's State aid case

In order to provide the relevant background of the new interpretations at issue, a short overview of MOL's State aid case is set out hereunder.

## 2.1. Facts and procedures

In December 2005 MOL and the competent Hungarian Minister concluded an agreement concerning the extension of statutory deadlines for the putting into production of some of MOL's hydrocarbons mining plots (the 2005 Agreement). According to the applicable legal framework, MOL had to undertake in that agreement the payment of somewhat higher rates of mining fees (mining royalties) than those applicable under the Mining Act, and the rates thus set were fixed by the parties for the entire duration of the Agreement, i.e. for 15 years, until the end of 2020. The Agreement set the mining fee rates for all of MOL's hydrocarbons fields put into production before its conclusion. Two years later, following a considerable and rather unexpected increase in international crude oil prices, the Hungarian legislator decided to modify the Mining Act, to increase some of its rates (the 2008 Amendment). However, as MOL's hydrocarbons production was covered by the 2005 Agreement, the modified mining fee rates did not become applicable to its production.

Namely, Article 26/A(5) of Act XLVIII of 1993 on Mining (the Mining Act) in force in the material time.

<sup>8</sup> The rates thus set were 2-5% higher than the original rates laid down by the Mining Act.

The modification was effected by Act CXXXIII of 2007, with effect from 8 January 2008. Some mining fee rates increased, while by the introduction of a lower rate for natural gas with high inert content, the rate applicable to such production decreased. The modification also introduced the so-called Brent-rate, an additional mining fee rate becoming applicable only in case international crude oil prices rose to high levels (USD 80/bbl or USD 90/bbl). The modifications actually did not apply to ongoing production, except for the Brent rate. The rational in introducing the Brent-rate with a 'retroactive' effect (i.e. to apply it also to ongoing hydrocarbons production) was that when producing mining plots were under exploration and when investment decisions were made with regard to those fields, prospections concerning international oil prices (expected revenues) were considerably lower, so the Brent-rate only provided a share to the State from revenues originally not expected by the investors concerned.

Following a complaint concerning MOL's alleged preferential treatment, the European Commission opened State aid investigations<sup>10</sup> concerning the combined effect of the 2005 Agreement and the 2008 Amendment. The formal investigation procedure was closed in 2010<sup>11</sup> by the conclusion that the measure granted an unfair advantage to MOL over its competitors, and constituted thereby illegal State aid. In autumn 2010 MOL had to pay to Hungary an amount of HUF 35 billion<sup>12</sup> as alleged aid with interest, and brought proceedings against the Commission's decision before the European Court of Justice.

At first instance the General Court of the European Union upheld MOL's application and annulled the Commission Decision of 2010.<sup>13</sup> The General Court held that the Commission did not prove the selectivity of the measure. The Commission appealed against that judgment, but the Court of Justice completely rejected its appeal in June 2015,<sup>14</sup> so the General Court's judgment became final. Following those judgments, the Commission was required to reassess the case, which led it to admit that it was unable to prove the selectivity of the measure and to conclude that MOL's agreement with the Hungarian State did not involve illegal State aid.<sup>15</sup>

# 2.2. The specific nature of MOL's case

MOL's case was specific from several aspects which influenced the overall picture, but did not necessarily give rise to new interpretations by the Court. These specificities are however important elements of the general context of the EU Courts' rulings.

First, as Hungary explained to the Commission during the formal investigation, <sup>16</sup> the 2008 Amendment was so construed that it did not rise the mining fee rates applicable to ongoing projects of other operators, and consequently it did not bring

Following informal investigations during 2008, the formal investigation procedure was opened in January 2009. See: Commission decision C(2008) 8842 of 13 January 2009, State aid C 1/2009 (ex NN 69/2008) – Hungary - Alleged aid to MOL, OJ C 74, p. 63. (the Opening Decision).

<sup>11</sup> 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. (Negative decision with recovery, subsequently annulled by the Court).

<sup>12</sup> The amount was calculated as the difference between mining royalty actually paid by MOL and mining royalties which would have been due according to the modified Mining Act.

<sup>13</sup> Judgment of 12 November 2013 in MOL v Commission, T-499/10, EU:T:2013:592.

<sup>14</sup> Judgment in Commission v MOL, C-15/14 P, EU:C:2015:362.

Commission Decision (EU) 2016/995 of 26 October 2015 on the State aid SA.24571
— 2009/C (ex C 1/09, ex NN 69/08) granted by Hungary to MOL Nyrt. OJ L 162, 21.6.2016, p. 22–26. (Positive decision, does not constitute aid).

<sup>16</sup> See the negative decision (Commission Decision 2011/88/EU, op. cit.) par. 32.

about any arbitrary discrimination between MOL and its competitors. The 2008 Amendment respected that investments made in hydrocarbons production needed financial stability and legal certainty. So even though the modifications seemed to have certain 'retroactive' effect, as the result of a compromise, <sup>17</sup> only those mining fee rates were risen that would have been applicable to MOL if MOL's mining plots were not covered by the 2005 Agreement. The only exception was the so-called Brent-rate, an extra charge becoming applicable above certain high international oil price levels, which ensured a share for the State from revenues that were unexpected when the original investment decisions were made. <sup>18</sup> So MOL's competitors were not put at a disadvantage. However, the EU Courts decided not to state the facts in that regard, maybe partly because of the difficulties the Commission had in producing evidence, and because of the different legal issues that such facts would have risen. <sup>19</sup>

Second, MOL's case was also specific because the company had paid more mining fees to the State under the 2005 Agreement, than what it would have been required to, had the Agreement not been concluded. In the 2005 Agreement MOL undertook to pay higher mining fee rates than the statutory ones and paid also a considerable one-off fee that was due in 2005, at the time the extension of the statutory deadlines (the original reason of the Agreement) was granted. The Commission disregarded as irrelevant the extra payments made by the company during 2005-2007, and took into account only differences that arose after the taking into effect of the 2008 Amendment.<sup>20</sup> This aspect of the case belonged to pleadings concerning the lack of an advantage (i.e. the measure did not procure an advantage to MOL), so the General Court did not deal with it.<sup>21</sup>

Hungary argued that the 2008 Amendment was the result of a compromise in the course of the negotiations preceding the adoption of the law and was intended to respect mining companies' legitimate expectation concerning the predictability of the mining fee. See par. 32 of the negative decision (Commission Decision 2011/88/EU, op. cit.)

<sup>18</sup> Even the Brent-rate did not practically affect ongoing production, as the only market players that had paid Brent-rate during the relevant period had only exploration projects that time. So the examples cited by the Commission in the negative decision (Commission Decision 2011/88/EU, op. cit. at par. 77 and footnote 40) were mining fields under exploration, i.e. in a factually and legally different situation compared to MOL's producing fields.

<sup>19</sup> Information submitted by Hungary during the administrative proceedings were somewhat confusing in that regard and, as the judge rapporteur Schwartz pointed it out in his report for the hearing, would have risen questions concerning the Commission's duties to investigate diligently a case. The report for the hearing is not publicly accessible.

<sup>20</sup> See paras 82-86 of the negative decision (Commission Decision 2011/88/EU, op. cit.).

As the General Court granted MOL's claim concerning lack of selectivity, it did not have to deal with other claims, including the absence of an advantage.

And finally, MOL's case was specific also because the Commission defined the alleged aid measure as the combination of the 2005 Agreement and the 2008 Amendment, even though the second part of the measure happened about 2 years later than the first part and even though the two parts served manifestly different objectives. This specificity gave rise to new interpretations, but not as a ground for annulment on its own, but as an aspect to be taken into account when evaluating selectivity, as discussed below.

#### 3. Important new interpretations laid down in MOL's judgments

In the 2010 Commission Decision subsequently annulled by the Court, selectivity of the measure was based on the consideration that the Hungarian authorities had certain margin of manoeuvre when they decided about concluding the 2005 Agreement and when setting the exact terms (i.e. the increased mining fee rates, the one-off fee and the duration) thereof.<sup>22</sup> The Commission confined itself to that consideration because, according to relevant case-law of the Court, discretion on the part of national authorities when deciding on the grant of an advantage was sufficient proof for selectivity.<sup>23</sup> However, in MOL's case, when the 2005 Agreement was concluded, it did not confer an advantage, but on the contrary, it made subject the company to higher charges. So the first, and for MOL's case, the most determining new interpretation laid down by the General Court was that individual treatment (provided to MOL under the generally applicable regime of the Mining Act governing prolongation agreements) did not necessarily mean unjustified preferential treatment. As the General Court held, the proof of margin of assessment did not necessarily prove selectivity, as it could be justified by objective factors and it could help the authorities to preserve equal treatment.24 This was confirmed by the Court which (ruling on the Commission's appeal) laid down the following general principle: "(...) 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 authori-

<sup>22</sup> See par. 66 of the negative decision (Commission Decision 2011/88/EU, op. cit.).

<sup>23</sup> See for example the case-law cited by the Commission at par. 66 of the negative decision. Selectivity stemming from discretionary powers or administrative practices is further explained in the Commission's recent State aid notion notice (Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union, C/2016/2946, op. cit. part 5.2.2.)

<sup>24</sup> See in particular the evaluation of the applicable legislative framework and MOL's specific situation at par. 72 of the General Court's judgment (judgment of 12 November 2013 in MOL v Commission, *op. cit.*)

ties 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."25

The other important new interpretation concerned the evaluation and proof of selectivity in case of a combined State measure. The Court took account of evidence concerning prospections and actual evolution of international crude oil prices, and stated that the 2008 Amendment was a reaction of the Hungarian legislator to a considerable price increase, which was not foreseeable in 2005<sup>26</sup> when the agreement was concluded with MOL.<sup>27</sup> The Court also reminded to case-law concerning conditions for different State interventions to be defined by the Commission as a single State measure. According to them, the combined elements must be inseparably linked to each other, having regard to their chronology, their purpose and other relevant factors.<sup>28</sup> The General Court applied that test to MOL's case and concluded that in order to prove the selectivity of the combined State aid measure, the Commission should have argued and established that the Hungarian authorities selectively proposed the conclusion of the agreement to MOL in order to exempt it from the effects of the subsequent modification of the Mining Act, and that the Hungarian authorities already

<sup>25</sup> Par. 64 of judgment in Commission v MOL, op. cit.

<sup>26</sup> Before closing the oral part of the procedure, the Court called for further evidence concerning the predictability and actual price levels of crude oil in 2005 when the agreement was concluded. The prospections submitted as evidence proved that the monthly average Brent crude oil price was around USD 56-57 at the end of 2005 and went up to USD 91-92 at the end of 2007, when the 2008 Amendment was adopted. Forecasts for crude oil prices originating from 2005 and regarding quarter 4 of 2007 or the beginning of 2008 ranged between USD 36-41 and 48-82, for example the EIA's projections were between USD 23-46 per Barrel (in three different scenarios). In: Energy Information Administration Office of Integrated Analysis and Forecasting, U.S. Department of Energy: International Energy Outlook 2005, http://www.eia.gov/ forecasts/archive/ieo05/pdf/0484(2005).pdf accessed 10 October 2016, p. 28. The Brent crude oil price went up to USD 100-115 between July 2012 and mid-2014 and decreased substantially (till as low as USD 30) afterwards. It is around USD 50 per barrel nowadays. See for example the EIA International Energy Outlook 2016, http://www.eia. gov/forecasts/ieo/pdf/0484(2016).pdf accessed 10 October 2016, p. 20.

<sup>27</sup> See par. 82 of judgment of 12 November 2013, MOL v Commission, op. cit.

As laid down in judgment in Bouygues and Bouygues Télécom v Commission and Others (C-399/10 P) and Commission v France and Others (C-401/10 P), EU:C:2013:175, par. 103-104: "As State interventions take various forms and have to be assessed in relation to their effects, it cannot be excluded, as the Bouygues companies and the Commission rightly argued, 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 linked to each other that they are inseparable from one another (see, to that effect, Case 72/79 Commission v Italy [1980] ECR 1411, paragraph 24)."

had the intention in 2005 to subsequently modify the statutory mining fee rates. As laid down in the judgment in general terms: "(...) a combination of elements such as that relied upon by the Commission in the contested decision may be categorised as State aid where the State acts in such a way as to protect one or more operators already present on the market, by concluding with them an agreement granting them fee rates guaranteed for the entire duration thereof, whilst having the intention at that time of subsequently exercising its regulatory power, by increasing the fee rate so that other market operators are placed at a disadvantage, be they operators already present on the market on the date on which the agreement was concluded or new operators."<sup>29</sup>

The third important new interpretation seems to be a simple and easily applicable principle, however, it requires some explanation in the particular context. Ruling on the Commission's appeal, the Court of Justice laid down that in the case of an individual measure, the identification of an economic advantage was, in principle, sufficient proof for the selectivity of the measure, or in other words, in the case of individual measures granting an advantage, there was a presumption of selectivity. This was however not relevant for deciding in MOL's case as the legal framework governing the conclusion of the 2005 Agreement was regarded by both Courts as a general scheme. In order to understand why it was included in the judgment, the opinion of the Advocate General is also to be taken into account.

Before drawing attention to the fact that in MOL's case the 2005 Agreement did not confer an advantage, and that in his opinion the evaluation of selectivity could not have been completely disconnected from the concomitant detection of an advantage, Advocate General Wahl laid down some preliminary observations.<sup>30</sup> Among those he reminded that the evaluation of selectivity was different depending on whether the measure at issue was an individual one or a general scheme. The Court has only repeated those preliminary observations when laid down the following interpretation: "(...) 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."31 Than both the Advocate General and the Court of Justice went on to analyse MOL's case (as a general scheme) and pointed out that in the absence of an advantage, MOL's case was to be clearly distinguished from the cases cited by the Commission (i.e. aid schemes granting exemption or relief and procuring thereby

<sup>29</sup> Par. 67 of judgment of 12 November 2013, MOL v Commission, op. cit.

<sup>30</sup> Opinion of Advocate General *Wahl* in Commission v MOL, C-15/14 P, EU:C:2015:32, paras 47-55.

<sup>31</sup> Par. 60 of judgment in Commission v MOL, op. cit.

an automatic advantage to their beneficiaries). So, the principle appearing in MOL's judgment delivered at second instance, according to which there is a presumption for the selectivity of individual aid measures, seems to be an *obiter dictum*: it was beyond the boundaries of the dispute before the Court, and it was not taken into account for deciding in any point in law in MOL's judgment.<sup>32</sup> Although that principle might be an *obiter dictum* (not having the force of *res iudicata*), it has been included in the recently published Commission guidance concerning the notion of State aid,<sup>33</sup> as the only reference to MOL's judgments. So – as also references in other cases support it – this principle might become the one that MOL's case will be known for.

The above described new interpretations have also been included in the relevant part of the digest of the case-law, published at the Curia website.<sup>34</sup> The most important references taking account of them are opinions of Advocates General, analysing different aspects of selectivity, and also calling upon the Court to clarify its case-law, or even reconsider certain parts thereof.<sup>35</sup>

# 4. References to MOL's judgments in cases before the Court of Justice of the European Union

# 4.1. The individual measure issue in the Orange v Commission case

In a State aid appeal case<sup>36</sup> concerning the social security contributions payable by Orange (originally France Télécom), Advocate General *Wahl* referred to his own opinion in MOL's case in the sense that the selectivity of the measure should be established on the basis of the selectivity presumption of individual measures, regardless of the situation of other operators active on the relevant market. This approach was upheld by the Court of Justice: ruling on the appeal the Court laid down unambiguously that the test requiring a comparison of the beneficiary with other undertakings in a

According to relevant case-law (confirmed also recently in judgment in Éditions Odile Jacob v Commission, C-514/14 P, EU:C:2016:55, par. 26.) statements made by the Court but going beyond the bounds of the dispute before it are to be regarded as *obiter dictum*, i.e. not having the force of *res iudicata*. See: judgment in ThyssenKrupp Nirosta v Commission, C-352/09 P, EU:C:2011:191, paras 129-132.

<sup>33</sup> See Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union, C/2016/2946, op. cit., par. 126.

Sections 5-6 and 14-16 under the heading "Aides accordées par les États/Notion d'aide/Sélectivité de la mesure/ Généralités", http://curia.europa.eu/common/recdoc/repertoire\_jurisp/bull\_4/data/index\_4\_09\_01\_04\_00.htm accessed 30 September 2016.

<sup>35</sup> The general consideration concerning the different evaluation of selectivity in case of an individual aid measure and an aid scheme has been referred to also in a closed case, see judgment in Belgium v Commission, C-270/15 P, EU:C:216:489, paras 48-49.

<sup>36</sup> Orange v Commission, C-211/15 P

comparable factual and legal situation was not applicable to the assessment concerning the selectivity of an individual measure favouring only one undertaking.<sup>37</sup> This is the first and – so far – the single judgment, in which a reference to MOL's judgments, i.e. the selectivity presumption of individual aid measures, had a determining importance on dealing with the case.

According to the facts giving rise to the dispute, France Télécom was first a department in a French Ministry, and when it was separated from the Ministry in 1990, the French legislator issued a law regulating the social security contributions payable after its workers having civil servant status. The separate undertaking France Télécom also continued to employ people with a civil servant status, and the original arrangement of the law prescribed that it had to finance in full the pensions paid by the French State to its retired civil servants. In 1996 France Télécom's privatisation had started, it was transformed into a public limited liability company and - in order to eliminate the considerable competitive disadvantage due to the specific social security contribution - the law was modified. The new arrangement made an equalisation between social security contributions paid by France Télécom and those paid by competing undertakings active in the telecommunications sector. It practically decreased the level of social security contributions payable after its retired civil servants to the level paid by its competitors as wage-related mandatory social security contributions of ordinary employees.<sup>38</sup> Following a complaint and a State aid investigation, the European Commission found that this modification constituted State aid, 39 and the General Court dismissed the applications<sup>40</sup> lodged by France and France Télécom against that decision. The applicants claimed at both instances that the modification was necessary in order to eliminate a structural disadvantage that France Télécom was subject to because of the special legal status of its employees, and that the measure did not confer a selective advantage on France Télécom, but only had put it at an equal footing with its competitors.

In its opinion delivered in the case,<sup>41</sup> Advocate General *Wahl* referred to MOL's judgments, in the sense that the contested measure was an individual one (as it concerned only France Télécom) and that, taking into account that it also procured an

<sup>37</sup> Judgment in Orange v Commission, C-211/15 P, EU:C:2016:798, par. 53.

More exactly it decreased the level of those contributions to the levels of wage-related mandatory social security contributions in respect of risks common to ordinary employees and civil servants, but excluding risks which were not common to those two categories of workers.

<sup>39</sup> Commission Decision 2012/540/EU of 20 December 2011 on State aid C 25/08 (ex NN 23/08) – reform of the arrangements for financing the retirement pensions of civil servants working for France Télécom implemented by the French Republic in favour of France Télécom, OJ 2012 L 279, p. 1.

<sup>40</sup> Judgment of 26 February 2015 in Orange v Commission, T-385/12, EU:T:2015:117.

<sup>41</sup> Opinion of Advocate General Wahl in Orange v Commission, C-211/15 P, EU:C:2016:78

advantage, it was necessarily selective. So even in this particular case the Advocate General was of the firm view that the identification of the advantage was enough to support the presumption that it was selective, regardless of the situation of other operators present on the relevant market. Consequently, and according to the Advocate General, the elimination of the structural disadvantage was not relevant in the case, since - as it has been laid down in MOL's judgment - there was no need to further analyse selectivity.

As mentioned above, the Court has followed the same reasoning when rejecting the appeal.<sup>42</sup> It is interesting to note however that in a recent judgment<sup>43</sup> delivered in a factually similar (or nearly identical) case the General Court has drawn the opposite conclusion: in Germany v Commission the General Court ruled that the extra charges imposed on Deutsche Post with regard to its workers with a civil servant status constituted a structural disadvantage, and that those extra charges could not have been regarded as charges normally included in the budget of an undertaking.<sup>44</sup> So the General Court concluded that the Commission should have undertaken the same analysis of selectivity (i.e. take as a reference framework the charges paid by other operators as social contributions for ordinary employees and compare them to the charges as applicable to Deutsche Post following the equalisation) which was not relevant in Orange's factually identical case.<sup>45</sup>

**4.2.** Identification of the right reference framework and the essence of selectivity, as analysed by Advocate General Wahl in the Lübeck airport case

Advocate General *Wahl* extensively referred to his own opinion concerning MOL's case and to the judgment delivered in it in a pending appeal case concerning the State aid allegedly provided by the operator of the Lübeck airport.<sup>46</sup> In this case the contested (alleged aid) measure was a schedule of charges issued and applied by the

<sup>42</sup> The Court concluded that the General Court did not err in law when refused to conduct the comparative test, and stated – referring to MOL's 2015 judgment – that that approach was consistent with the relevant case-law. See: judgment in Orange v Commission, *op. cit.*, par. 53-54.

<sup>43</sup> Judgment of 14 July 2016, Germany v Commission, T-143/12, EU:T:2016:406.

The General Court referred to existing case-law in that regard: in judgment of 16 March 2004, Danske Busvognmænd v Commission (T-157/01, EU:T:2004:76) the Court has already recognised that similar charges constituting a structural disadvantage are not to be considered as charges normally included in the budget of an undertaking (which influences the reference framework for the evaluation of selectivity).

This is the assessment to be done, both according to relevant case-law and according to the Advocate General, in case the measure is an aid scheme.

<sup>46</sup> Opinion of Advocate General Wahl delivered in Commission v Hansestadt Lübeck, C-524/14 P, EU:C:2016:693.

public undertaking Flughafen Lübeck operating the Lübeck airport. The Commission found that the schedule applied preferential charges compared to those applicable at other German airports, and that the advantage was selective because it favoured only the users (airline companies) of the Lübeck airport.<sup>47</sup> In that regard, the Commission referred to case-law according to which sectoral measures or measures defined in general terms but favouring only a certain group of undertakings were also selective. 48 The General Court annulled the Commission's decision on ground of manifest error of assessment concerning selectivity, because in the Court's view it was irrelevant that airport charges might have been higher at the Hamburg airport or else, as Flughafen Lübeck only had the power to issue the schedule of charges for the Lübeck airport operated by itself, and as that schedule of charges did not discriminate between different users of the Lübeck airport. 49 So the General Court concluded that the reasoning provided by the Commission, according to which the fact that the charges at issue applied only to the users of the Lübeck airport rendered them necessarily selective, was false, and that the Commission made a manifest error of assessment when it drew such a conclusion. The Commission appealed that judgment and the Advocate General is now suggesting the Court to dismiss the appeal.

The Advocate General stressed in his opinion that the concept of selectivity was closely related to discrimination, and that in the case of generally defined measures the relevant question was whether it favoured a certain group of undertakings. In order to answer that question, the normal regime, the so-called reference framework had to be defined correctly, as selectivity means that the measure derogates from that normal regime to the exclusive benefit of certain undertakings. <sup>50</sup> It is interesting to note here that the analysis followed in this case by the Advocate General is exactly the one he refused to apply in Orange's case. So the references made to MOL's judgments are practically the same, suggesting again that a different approach is needed in the case

<sup>47</sup> The Commission opened the formal investigation procedure on those grounds (Commission decision C(2012) 1012 final of 22 February 2012 concerning State aid SA.27585 and SA.31149 – Germany)) and that opening decision was contested before the General Court in case T-461/12, Hansestadt Lübeck v Commission.

In particular, the Commission referred to judgment in Italy v Commission, C-66/02, ECR, EU:C:2005:768 par. 99, and judgment in Unicredito Italiano, C-148/04, ECR, EU:C:2005:774, par. 45.

More exactly, such differentiation was not established in the contested decision. Judgment of 9 September 2014 in Hansestadt Lübeck v Commission, T-461/12, EU:T:2014:758.

See sections 73-79 of the Opinion of Advocate General Wahl delivered in Commission v Hansestadt Lübeck, op. cit. This is the analysis usually applicable in the case of generally defined aid schemes in order to assess material selectivity. A general explanation of that approach is provided in the Commission's State aid notion notice (Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union, C/2016/2946, op. cit. part 5.2.3.)

of an individual measure (like in Orange's case) and in the case of an aid scheme (in Flughafen Lübeck's case). In the case of the Lübeck airport the conclusion was that the right reference framework was the one of the users of Lübeck airport, so it did not include those airline companies not intending to offer (and actually not using) Lübeck as a flight destination. Consequently, in the Advocate General's opinion, the charges applied by the airport operator at Lübeck airport did not derogate from a normal regime to the exclusive benefit of a certain group of undertakings, meaning that the measure was not selective.

# 4.3. Selectivity of a sectoral measure, the Belgian BSE screening test State aid case

The reference framework was a strongly debated, key issue also in the case of a Belgian State aid measure concerning the State financing of obligatory BSE tests.<sup>51</sup> The compulsory screening tests of bovines were prescribed by EU regulation, and Belgium decided to fulfil its obligation by financing the tests for the entire bovine sector. The Commission decided<sup>52</sup> that the financing from State resources of the tests constituted State aid for farmers, slaughterhouses and other entities processing, handling, or trading in bovine animal products subject to compulsory BSE screening tests, and the General Court agreed with this classification.<sup>53</sup> Although it was established case-law that similar sectoral measures were selective if they favoured one industry or one sector of the economy against others, Belgium appealed against the judgment.

As Belgium claimed in its appeal, the General Court did not give sufficient reasoning to the statement that operators subject to the BSE screening tests were in a legal and factual situation comparable to that of all economic operators legally obliged to carry out checks prior to marketing their products. The examples enumerated by the Court, like mandatory quality inspections of lift and truck manufacturers, related to essentially different situations. In the appellant's view, since the same scheme applied to all undertakings subject to mandatory BSE screening tests (i.e. all undertakings in the same factual and legal situation), it was not selective.

BSE (bovine spongiform encephalopathy) tests were prescribed by Regulation (EC) No 999/2001 (Regulation No 999/2001 of the European Parliament and of the Council of 22 May 2001 laying down rules for the prevention, control and eradication of certain transmissible spongiform encephalopathies, OJ 2001 L 147, p.1.) requiring Member States to carry out compulsory screening tests on animals at risk of being infected.

<sup>52</sup> Commission Decision 20111/678/EU of 27 July 2011 concerning the State aid for financing of screening of transmissible spongiform encephalopathies (TSE) in bovine animals implemented in Belgium - State aid C 44/08 (ex NN 45/04) – OJ 2011 L 274, p. 36.

<sup>53</sup> Judgment of 25 March 2015 in Belgium v Commission, T-538/11, EU:T:2015:188.

The appeal was dismissed by the Court of Justice<sup>54</sup> with a short reference to MOL's judgment reiterating the wording according to which, in the case of a measure conferring an advantage of general application, it was necessary to identify whether it did so to the exclusive benefit of certain undertakings or certain sectors of activity. As the General Court clearly took as a reference framework all other undertakings which were subject to mandatory inspections before placing their products on the market, and as the relevance of those other sectors (taken into account also by the Commission) was not disputed by Belgium at first instance, that ground of appeal was also dismissed.<sup>55</sup> So the final judgment did not react to the issues raised by Advocate General *Bobek* in his opinion prepared to the case, urging for stronger account to be taken of the competition law dimension of State aid law, especially when defining the reference framework for the evaluation of selectivity.<sup>56</sup>

In this case, the Advocate General also laid down general considerations concerning the concept of selectivity, similarly to the two cases discussed above. He also made several references to MOL's judgments and to the opinion of Advocate General Wahl prepared in MOL's case.<sup>57</sup> They agreed that selectivity remained a controversial issue, especially in the case of aid schemes conferring an advantage of general application. He highlighted that identification of the reference framework was the heart of the selectivity test and that the key notions were discrimination and comparability. As regards comparability, he drew attention to the 'classical' problem of the selection of the quality with regard to which the comparison was to be carried out. Among the typical factors, he enumerated the scope of application of the measure, the objective of the measure, and finally, the substitutability of the products involved.<sup>58</sup> Indeed, substitutability of the products would essentially lead to the identification of a relevant market like in competition law assessment: in such an approach the reference framework could be established with reference to the relevant market of competing goods or services. As a conclusion, the Advocate General stressed the importance of

<sup>54</sup> Judgment in Belgium v Commission, C-270/15 P, EU:C:216:489.

<sup>55</sup> See paras 48-56 of the judgment in Belgium v Commission, C-270/15 P op. cit.

Among his general considerations concerning the concept of selectivity, Advocate General Bobek made an attempt to find out and explain how the establishment of the reference framework was linked to comparability, and how comparability could be assessed in terms of the degree of substitutability of the products involved. As he stated in the opinion, "much could indeed be said about the needs of State aid law to take stronger account of its competition law dimension" and referred to relevant articles discussing this topic, including also the relevance of a market analysis assessment within the selectivity criterion. See: section 34. and footnote 28 of the Opinion of Advocate General Bobek delivered in Belgium v Commission, C-270/15 P, EU:C:2016:289.

He referred essentially to the general considerations of Advocate General *Wahl* without taking account of the specificities of MOL's case or the specific interpretations.

<sup>58</sup> See sections 31-34. of opinion of Advocate General Bobek, op. cit.

the Commission's explanations concerning the grounds on which it established the reference framework, and the possibility to include substitutability as a relevant aspect for the assessment.

#### 5. Conclusion

As Advocate General Bobek admitted in his Opinion in Belgium v Commission, the assessment of selectivity has remained 'a difficult exercise with an uncertain outcome'. <sup>59</sup> Although MOL's judgments include important new interpretations concerning the links between identification of an economic advantage and the 'concomitant, albeit separate' detection of selectivity, <sup>60</sup> and also concerning the burden of proof concerning selectivity in the case of a combined aid measure, what really seems to be influential is the interpretation suggesting a presumption of selectivity in the case of individual measures. References to this presumption and to the wording of the interpretation in recent cases are controversial however: in Orange's case this interpretation was used to support the argument that the situation of the beneficiary's competitors is irrelevant; in the Belgian BSE screening test case it was referred to in a sense that selectivity might be established even though there was no discrimination between competing undertakings; and finally, in the Lübeck airport's case the same wording is referred to in order to support that the General Court correctly identified as a reference framework the users of the airport, i.e. only those undertakings to which the measure applied.

The judgment delivered at first instance in MOL's case was the General Court's reaction to the Commission's vague reference to the Hungarian authorities' margin of manoeuvre: the Court stressed that in spite of the irresponsible application of a general principle, the Commission should have adopted a much more sophisticated approach. Such sophisticated approach would also be needed in pending and future cases raising difficulties concerning the assessment of selectivity or the identification of the right reference framework for that. It will be a matter for the future jurisprudence of the Court that references to the judgments in MOL's State aid case, or the statements cited therefrom do not become controversial principles hindering the sophisticated application of the selectivity criterion.

<sup>59</sup> Opinion of Advocate General Jacobs in PreussenElektra (C-379/98, EU:C:2000:585, section 157), cited by Advocate General *Bobek* in his opinion delivered in Belgium v Commission *op. cit.* section 19.

The expression is the one applied by Advocate General Wahl in his opinion delivered in Commission v MOL (op. cit. at section 48) and in Commission v Hansestadt Lübeck (op. cit. section 71.) stating that "the selectivity requirement cannot, none the less, in my view, be completely disconnected from the concomitant, albeit separate, identification of an economic advantage.".

