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Mining fees and the criterion of selectivity or the MOL state aid case

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Introduction

Our case indicates the complexity of state aid law and the criterion of selectivity. Before the analysis, it is worth taking a quick skim at this field of EU law to understand the background. So, let us get it started!

State aid policy is one the most important but also the most disputed issue in Europe. It is well-known that the principles of free competition and undistorted market are paramount in the European Union. Therefore, it seems to be a legitimate aim to control state aid granted by Member States. Albeit, it is a unique feature of the European competition policy: only the EFTA has a similar supranational system. We can say that it is an uncommon regulation, even in federal states: for instance, there is no such a mechanism in the USA.

So, why is it necessary to be regulated on European level? Since development policy is one of the key areas of the Member States and typically the governments who determine which field of the economy should be subsidized due to its situation.

It is seemingly true, but in the European Union we have to take into account other factors as well. First, unduly subsidies can distort competition which endangers the stability of the internal market. Namely, state policy does not reckon with measures detrimental to both domestic and foreign rival companies. Furthermore, it compels other states to participate in a so-called subsidy race or prison dilemma: by aiding their undertakings at the cost of their rivals, they persuade the other party to use similar techniques which could lead into a classical retaliatory war. In addition, it could be a source of further inefficiencies.

Secondly, according to the European concept, the overall level of state aid must be reduced. Therefore, the hands of the government are tied: they cannot solve their problems simply by applying more subsidies because there is an assumption that a significant proportion of it is distortive.

The European Commission can prescribe for the Member States to conduct ex ante impact assessments and ex post evaluations. It is clear that the focus is on the target, not on the

quantity[1]. The main goal of this policy is to ensure that state interventions are allowed only in case of market failures[2].

David Spector added that state aids can be not only distortive but can also contribute to a less competitive market. According to his view, the funded firm can initiate a predatory strategy against its rivals which forces them to be merged with the recipient or to leave the relevant market. In my opinion, this situation can entail an inefficient company because the executive will be reluctant to develop the production; services since the government "certainly" bail-out the respective firm. Hence, it would cost dearly the state to conduct this policy.

Other negative effect of misused subsidy is a less resistant state to lobby groups. According to various surveys, the allocation of aid is largely determined by political factors. I think it is not a surprising fact because some companies have huge wealth and strong alignment with the political sphere which gives them enough power to influence government behaviour.

On the other hand-as I touched upon it before- it can contribute to the unpleasant situation when firms have a certain expectation to be bailed-out in case of emergency. It is likely to distort their behaviour which could decrease the willingness of innovation. Therefore, instead of trying to be productive, they would probably use their lobby to achieve their goals. Unfortunately, it is often welcomed by the governments because they have usually horizons in order to enjoy short-term benefits of aid. But in the long term, it costs a lot[3].

Nevertheless, governmental support can be justifiable in certain conditions. The academic literature acknowledged that it is a useful device to correct market failures. By contrast, it does not contain those issues when the market cannot provide the politically desired results, just only those when the free play of forces is at risk[4]. A typical form of that are the externalities which can be both negative and positive. In these cases, the external effects are not considered demanding governmental actions[5].

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[1] Christian BUELENS, Gaëlle GARNIER, Roderick MEIKLEJOHN: The economic analysis of state aid: Some open questions*, Directorate-General for Economic and Financial Affairs, European Commission*, http://ec.europa.eu/economy_finance/publications/pages/publication9549_en.pdf; 5-9.

[2] SZABÓ Marcel- LÁNCOS Petra Lea- GYENEY Laura: Uniós szakpolitikák, Szent István Társulat, Budapest, 2013; 81.

[3] David SPECTOR: State Aids: Economic Analysis and Practice in the European Union, http://www.parisschoolofeconomics.eu/docs/spector-david/07-xaviervives-chap-07.pdf, 177-186.

[4] Justus HAUCAP, Ulrich SCHWALBE: Economic Principles of State Aid Control, http://www.dice.hhu.de/fileadmin/redaktion/Fakultaeten/Wirtschaftswissenschaftliche_Fakultaet/DICE/Discussion_Paper/017_Haucap_Schwalbe.pdf; 5.

[5] David SPECTOR: op. cit.; 186-187.

Besides, there is always an uninvolved third party who is favoured or damaged by these effects but there is no compensation for that. In this situation, we have to decide:

- whether it should be identified as serious and be quantified in the form of external costs or
- it is worth applying state aids[6].

As we can see, the use of these measures should be well-defined and –targeted. It is a common mistake of the Member States that they want to provide definitely selective aid to their national champions in order to make them competitive against their rivals. The distortion competition and external effects are not taken into account most of the time. The integrity of the internal market would be seriously endangered without regulating competition policy on European level. Therefore, it is essential that the EU has state aid control in contrast with other federal entities. We can say that it derives from the logic of the system: the principles of the EU and the stability of the internal market require limiting state aids.

Nonetheless, as I said before, they are sometimes welcomed by the Commission e.g.: to achieve competitiveness by concentrating state resources[7].

Finally, it is worth dealing with the situation in Hungary briefly which is a typical example of misusing subsidies. I think it could be one of the reasons why the Commission decided to initiate its investigation procedure. So, let me show you the details!

According to various researches, state aid granted to companies in Hungary was 2.7 times higher than the European average in the last 10 years. It turned out again that not the quantity is the decisive: subsidies could not improve economic performance alone. The government should have focused on the effectiveness of the system by creating favourable legal environment and ensuring well-operating business services. Researches also pointed out that the growth of the Hungarian economy fell behind its neighbours despite the higher amount of state aid. Countries like Poland, Latvia or Slovakia could achieve better performance by using less than half of Hungary's aid level. Other indicators, such as investment and employment rate also show similar data. Simultaneously, the competitiveness of Hungary decreased from the 39th rank to the 63rd according to the World Economic Forum. The main problem is the worse

[6] Justus HAUCAP, Ulrich SCHWALBE: op. cit.; 7.

[7] dr. COGOI Márk: Az állami támogatások versenyjogi szabályozása az Európai Unióba, http://www.jogiforum.hu/files/publikaciok/cogoi_mark__az_allami_tamogatasok_versenyjogi_szabalyozasa_az_euban[jogi_forum].pdf; 14-16.

composition of entrepreneurial structure compared to countries with similar development level. Besides, analysts highlighted the following weaknesses:

- the execution and regulation of the system is not standardised
- the high share of aid to enterprises controlled by the state or local governments
- investments are funded by European sources even if it is unnecessary

It also should be mentioned that the governmental policy had a strategic mistake: it focused only on calling the subsidies instead of dealing with the proper application. Therefore, the less effective tenders were preferred by the system which swallowed sources without generating significant economic output[8].

One can ask why it is important to our case. Well, on the basis of these facts, the Commission could be suspicious about the Hungarian state aid system. Also, it was easily imaginable that the given government wanted to hide something from the European institutions. Therefore, it was up to the Commission to find a legal base initiating an investigation. We can say that the malfunction of the system created the chance to be challenged. In the next chapters, we will see how the Commission justified its action and how the case concluded.

The case

In the following chapter, I briefly introduce the case which triggered the Commission to launch its procedure. I try to focus on the relevant facts in order to highlight the most disputed parts of it. I hope it will awaken the reader's attention and his/her interest.

Coming to the point, the very centre of the case was the Mining Act and its amendments. According to that, the exploration and exploitation of hydrocarbons can be exercised by the following methods:

- conclusion of a contract between the respective minister and the party who won the announced tender within the framework of a concessional procedure
- obtaining the permission of the Mining Supervisory Board

The former enabled the party concerned to pursue mining activities in closed areas, the latter one gives exploration and exploitation regarding open areas. Until 2008, the mining fees were

[8] KÁLLAY László: Állami támogatások és gazdasági teljesítmény. *Közgazdasági Szemle, LXI. évf., 2014. március (279–298. o.);* 279-298.

12 % for those fields which were put into production after 1st January 1998. Activities started before that date, the minimum rate was 12 %.

Besides, the regulation contains special provisions regarding those issues where the extraction did not begin in 5 years after the issuance of the beforementioned permission. However, it was eligible only for those enterprises who conduct their activities on open areas. Within the framework of the procedure, the parties concerned can ask the Mining Supervisory Board to prolong the deadline of the extraction by 5 years but it provides only a single opportunity for them. Prior to that, an agreement has to be made between the minister in charge and the party concerned. By concluding this agreement, the entrepreneur must accept the higher percentage of fee (extension fee) which must be above the original mining fee but it cannot exceed that by more than 20%. Although, it means that the future amendments of the law do not influence the rate during the effect of the agreement.

In 2005, MOL signed a prolongation agreement with minister in charge for mining activities. It stipulated fees for the next 5 years between 12,6% and 12,24%. According to that the rate applied in the 5th year shall be also applied in the 15th year calculated from the date of conclusion. Besides, the company had to pay a lump-sum charge of 20 billion HUF.

Nevertheless, the law concerned was amended in 2007 which entered into effect in 2008. It reregulated the rates as followings: 30% for those fields which were put into production between 1st January 1998 and 31st December 2007, minimum rate of 30% for those which were put into production before 1st January 1998 and a differentiated system was set up for the rest with rates between 12-30%. An additional mining fee was also introduced based on the price of Brent crude oil (3-6%).

However, this newly established system was quickly abolished by Act LXXXI of 2008. The former regulation remained in place for those fields where the production only began after 1st January 2008; the rates of the rest were uniformly decreased to 12%[9]. As a consequence, it seemed to be that the MOL was preferred to its rivals by the Hungarian government because it had to pay fewer fees due to its agreement with the minister in charge for mining activities[10]. Hence, it was not surprising that a complaint was submitted to the Commission which launched an in-depth investigation in 2009[11]. In the same year, it delivered its resolution in which it held

[9] C-15/14 P - *Commission v MOL;* par. 2-18

[10] Resolution of the Commission on the MOL case, http://eur-lex.europa.eu/legal-content/HU/TXT/PDF/?uri=CELEX:32011D0088&from=EN; par. 20

[11] *IP/09/39*, http://europa.eu/rapid/press-release_IP-09-39_hu.htm

that the Hungarian measure had to be considered as unlawful state aid. It was based on the alleged selective advantage to MOL and on the discretionary rights of the Hungarian authorities regarding the agreement concluded in 2005. Simultaneously, it ordered the company to pay back 35 billion HUF[12].

Finally, the case brought before the Court of Justice. Did it accept the arguments of the Commission? How can the criteria of selectivity be determined? Did the Court resist the expansive interpretation of the Commission regarding unlawful state aid? These were all crucial questions which could designate the future framework of state development policy.

Legal context and the base of the legal dispute

As we saw in the previous chapters, state aid is one of the most complex issues in the field of competition policy. In the context of the case, the main question was whether the applied measure, namely the extension agreement and the amendments of the Mining Act met criteria, especially in the light of the alleged infringement of the selectivity principle. In this respect EU law serves as a good point of departure.

Article 107 TFEU sets up as a general rule that every state aid is illegal if all of the following conditions are fulfilled:

- granted by Member State or through state resources
- distorts or threatens to distort competition
- favouring certain undertakings or the production of certain goods
- affects trade between Member States[13]

Besides, the Treaty defines exceptions which can be categorised into 2 groups, namely automatic and optional compatibility. The former includes provisions such as: *"aid having a social character granted to individual consumers provided that such aid is granted without discrimination related to the origin of the products concerned*". In the case of the latter, the Commission has discretionary right. It contains provisions such as: *regional aid* (to regions where GDP PPP is under 75% of the EU average level). As a general rule, every state aid must

[12] SIMON Dorottya: Az Európai Bizottság gyakorlata tiltott állami támogatást megállapító határozatait megsemmisítő ítéletek végrehajtásával kapcsolatban- a MOL Nyrt. állami támogatásos ügyét lezáró határozat európai kontextusa. *Versenytükör, XI. évfolyam, 2015/2. szám;* 33-35.

[13] Article 107 TFEU

be reported to the Commission which examines whether it is under the regulation and were any overcompensation[14].

Coming to our case, it is worth analysing the notion of selectivity because it was in the centre of the dispute between the parties during the whole procedure. For this reason, it is worth analysing the resolution of the Commission which outlines its interpretation. I think it is the only way to understand the legal dispute.

The Commission held that the extension agreement and the amendments of the Mining Act should have treated as one due to their joint effect. It refused the observations of the parties which regarded the extension agreement as a separate measure that derives from the nature of the system. In contrast with these arguments, the Commission pointed out to the fact that the only goal of the measure was to prefer MOL to its rivals who did not conclude such a contract. It seemed that there was a fundamental difference in the interpretation of the parties. Knowing the outcome, it is not surprising that it constituted the factual legal base of the dispute.

According to the academic literature, the judgement of selectivity is often uncertain and vague. In addition, there is no generally accepted notion which would obviously mark the frame for the jurisprudence. Nevertheless, we can use Article 107 TFEU itself as a point of departure: *"favouring of certain undertakings or the production of certain goods"*. The ECJ set up the following criteria:

- produces advantage exclusively for certain undertakings or certain sectors
- the operators concerned must be in comparable legal and factual situation and they must be in the same Member State

Despite all these, we must face some difficulties. How can we judge cases where are no comparable market players? It applies mainly to the so-called services of general economic interest. According to the ECJ, the only solution is to compare the situation before and after the introduction of the relevant state measure.

The academic literature distinguishes between two forms of selectivity, namely geographical and material. The former is quite logical: everything belongs to here which prefers undertakings in a certain part of the country to the rest of its territory. From the view of our case, the latter is the decisive. Bartosch describes it as followings: *"all other forms of unequal treatment of undertakings by way of intervention of public authorities"*. In my opinion, this notion provides broad interpretation: the Court has a wide-ranging discretion over issues belonging to this topic which can cause several problems. On the one hand, it is difficult to define the borders of state

[14] SZABÓ Marcel- LÁNCOS Petra Lea- GYENEY Laura: op. cit.; 83.

aid control and legitimate state policy since the goal of the former is to ensure the stability and the proper functioning of the internal market. Nevertheless, it must not entail the excessively interventionist policy of the Commission: Member States' right to pursue their economic goals must be respected. On the other hand, it is disputed by the Member States whether we should use the objective-based approach or let some room for the aims of state measures. According to the ECJ case law and the concept of state aid, the former shall be applied. But the rigid application of this approach would mean that few measures could be compatible with EU law. However, it would undermine the effectiveness of state aid control.

It is not surprising that the delineation of selective and general measures is a crucial question. Member States can produce various reasons to introduce policies affecting certain undertakings. Thus, the ECJ case law is inevitable. According to that, one of the following conditions shall not be met:

- incidentally benefit individuals
- discretionally applied general measures
- sectoral aids
- measures applied to undertakings formed as from a certain date or on an experimental basis
- aid for exports

Alleviating the rigidity of the regulation, the Court introduced the principle of general scheme of the system. In order to decide whether a given measure can fall under this notion, the internal function of the system shall be assessed. Besides, the reference also shall be defined. If it deviates from that by preferring certain undertakings, the criterion of selectivity is fulfilled[15].

Now, it is worth returning to our case and see how the Commission justified the violation of selectivity.

Analysing the adopted resolution, it seems to be clear that the Commission almost exclusively based its arguments on the discretion of public authorities. In my opinion, it is difficult to outline the legitimate scope. If the concept is lenient, almost everything can be acceptable. On the other hand, strict rules can diminish this right. The jurisprudence of the Court provides the following examples:

- vaguely formulated conditions

[15] JAKUB Kociubiński: Selectivity Criterion in State Aid Control. *Wroclaw Review of Law, Administration & Economics · December 2012;* 1-15.

- state measure which limits the access to the benefits to certain undertakings[16]

We can see that it is almost impossible to give a precisely formulated definition for discretion which would help the parties concerned. We can trust only the case law elaborated by the Court on a case-by-case method.

Thus, it was logical for the Commission to refer to the alleged infringement of the discretionary right: it had to find only the reasons relying on the evolutionist concept of the Body. In order to justify its procedure, it brought up the undermentioned arguments:

- it depends on the decision of the authorities whether a permission or a concession is needed to the extraction of a field
- the extension of the permission and the amendments of the Mining Act constituted the infringement
- Hungary could always freely define the rate of mining fees
- the authorities could decide not to conclude the agreement

All these indicate that the Commission completely rejected to accept the regulation as the general scheme of the system. Instead, it added that it was the only agreement relating to hydrocarbons and it was drafted for the company concerned. Furthermore, it also stated that the grant of mining activities is typically an act of a public authority rather than an economic one because the state could gain more by announcing a tender[17].

How should we treat the reasoning of the Commission? As I already mentioned, the terminology of discretionary right is complex. Looking at the resolution, it strikes one that every argument can be traced back to the fact that only one extension agreement was concluded. I think it is the weakest part of the Commission's standpoint: it could not accept this situation. However, it did not bring up any evidence proving that a same agreement with another undertaking was impossible under the conditions of the law concerned.

Did the Court accept this kind of reasoning? How did the parties and the Advocate General respond to these arguments? The upcoming chapters will answer these questions.

Parties arguments and the Advocate General Opinion

As I said before, state aid law differs from other fields of European law which has an impact on cases relating to this topic: the Commission has exclusive right whether a given measure shall be considered as state aid or not. As a result, the first stage always starts at the

[16] JAKUB Kociubiński: op. cit.; 9-10.
[17] C-15/14 P - *Commission v MOL;* par. 56-88

Commission. After its adopted resolution, the parties can decide whether they challenge it at the Courts (General Court and ECJ).

Because of the beforementioned facts, we have to overview the judgement of the General Court in order to find the arguments of MOL which was the appellant in that procedure. Maybe, you find it a little bit confusing but you will see that this is the only way to restore the standpoints of the relevant characters.

It was obvious during the legal dispute that the interpretation of the selectivity criterion was in focus. We could see how the Commission justified its arguments. Now, it is time to look at the other side!

MOL referred to three legal bases, namely:

- the Commission's resolution violates Article 107(1) TFEU: the extension agreement and the amended Mining Act cannot be considered as unlawful state aid
- it also violates Article 108(1) TFEU and Council directive 659/1999/EC, since the Commission failed to assess the 2005 agreement under the rules applicable to existing aid
- it infringed Article 14(1) of Regulation no. 659/1999 by ordering the recovery of the amounts at issue

Briefly, the plaintiff challenged the selectivity and stated that the measures concerned could not be regarded as one[18].

It noted that the state regulation fully complied with the principle of general scheme of the system. Besides, other potential rivals also had the chance to conclude such an agreement.

Furthermore, the mining enterprises had to be aware of the mining fees which that the price shall be defined in the long term[19]. If we take a look at the wording of the relevant national law, the arguments of MOL seem to be logical. The regulation says clearly that every party concerned is eligible to conclude that agreement which determines the rate of mining fees for a given period of the time. Thus, I think it cannot be linked with the later amendments of the law since the Commission forgot to justify the connection. As a consequence, it cannot mean that the state wanted to prefer MOL to its potential rivals by adopting a disadvantageous amendment. It can be also proved by the relevant dates: 2005-2007. As we can see, the distance in time is significant to assume this kind of intentions. In my opinion, the Commission should have brought up some background studies and laws in order to underpin its arguments. The

[18] T-499/10 - *MOL v Commission;* par. 38-40

[19] T-499/10 - *MOL v Commission;* par. 48

speciality of the case which created the beforementioned advantage for MOL is not enough in itself.

All these were confirmed by the General Court which annulled the Commission's resolution because the alleged selectivity could not be proved. But the Body did not hold the existence of unlawful state aid[20].

On the basis of these, it is not surprising to me that the Commission appealed to the ECJ. Seemingly the General Court sided with the plaintiff but the other party could also be hopeful: it had to prove only its arguments.

However, it chose the wrong strategy. Instead of trying to find evidences, it stated in its claim that the General Court misinterpreted the selectivity criterion in its judgement. According to the reasoning of the Commission, the discretionary rights conferred on the Hungarian authorities were not based on objective criteria regarding the approval or the rejection of a given agreement. It is irrelevant that the entrepreneurs can ask for the prolongation or not. The General Court ignored these facts. For instance, it did not hold that the Hungarian authorities were obliged to conclude an extension agreement.

This discretionary right also appeared regarding the mining fees because the increase of the rates could not be justified by the background of the relevant national law. Besides, the initial disadvantage of the MOL agreement did not exclude the violation of the selectivity principle. Furthermore, the mere fact of applying objective criteria does not rule out the selective nature of the given measure.

Finally, the Commission in contrast with the General Court stated that the selective advantage existed because MOL was preferred regarding the fees. In this respect, it was irrelevant the exercise of regulative jurisdiction was based on objective criteria. It brought up that the state could decide freely on the amendments of law. By approving this measure, the General Court gave reference for the Member States. On the other hand, it wrongly linked the discretion of the extension agreement with the intention of the government which tried to save companies from the new system of the mining fees. This kind of practice contradicts the case law since only the effect matters[21].

[20] SIMON Dorottya: op. cit.; 36.

[21] C-15/14 P - *Commission v MOL;* par 49-57, 72-73, 82-86

All these indicate that the Commission could not stop insisting on its previous reasoning: it repeated the accusations again without providing any additional information regarding the link between the relevant laws. It focused only on the questions of discretion and advantage.
Were the mere facts enough to convince the ECJ? It will turn out soon.
Before coming to the judgement of the Court, it is worth taking a look at the Advocate General Opinion. How did he treat this issue? Did he accept the arguments of the Commission? As we saw, the main characters interpreted completely differently the same legal questions. It seemed that the distance between the parties were irreconcilable.
The Advocate General pointed out in its foreword that the General Court caused uncertainty by referring simultaneously to the selectivity of the extension agreement and the series of disputed state measures. Besides, he emphasised that the mere fact of providing advantage was not enough in this case: it had to be provided to certain undertakings. By this statement, he refused the Commission's argument. Besides, he stressed the need of distinction between individual aids and general scheme of aids. For the former, the identification of economic advantage is enough to assume selectivity. In the case of the latter, it is just the opposite: the selectivity contributes to the identification of an advantage which prefers certain undertakings.
However, he accepted the Commission's argument which stated that the relevant measures had to be considered as one. Simultaneously, he pointed out that there was an uncertainty over the reference because the Commission did not examine the link and it held the violation of the selectivity principle in the case of the extension agreement. Thus, the General Court acted properly when he focused only on the selectivity of that agreement[22].
On the basis of these, MOL could not be sure completely whether its standpoint would be acknowledged by the Advocate General. Seemingly, he accepted arguments from all of the relevant characters. How did he decide after he had valued the details?
As I mentioned before, the Commission criticised the General Court because it ignored the alleged misinterpretation of the authorities' discretionary right since it forgot to take into consideration the case law. In this respect, he highlighted that the ECJ did not have competence over the interpretation of the facts unless the forgery of the evidences. But the latter was not brought up by the Commission and neither the General Court applied wrongly the law.
Secondly, the plaintiff claimed that the Body misinterpreted the law by stating that the existence of objective criteria precludes the selectivity character of the given measure. In that regard, the

[22] C-15/14 P- Advocate General Opinion; par. 39-68

Advocate General emphasised it was the Commission who committed this because it was not the question whether the recipients of the general scheme of aid were designated or not. Instead, the General Court held properly that even if the MOL was the only one who concluded such an agreement, it did not fulfil the criteria of selectivity. Nevertheless, all these did not contradict each other.

Furthermore, he pointed out that General Court did not link the examination of the disputed measure's selective character with the intention of the government regarding the conclusion of the extension agreement in which it tried to prefer certain undertakings. Instead, the Body dealt with the possible connection between the extension agreement and the amendments adopted in 2008. All these meant that it did not violate the judicial practice of Article 107(1) TFEU in respect of the non-consideration of a given state measure's intention or reason.

Finally, the Advocate General dismissed the 4th objection of the Commission since its statement-only the MOL was preferred by the agreement after the 2008 amendment of the Mining Act-ignored the fact that only the selectivity of the extension agreement was in question[23].

As a consequence, he rejected the complaint which could anticipate the possible outcome of the whole case. Although, the ECJ is not bound by the Advocate General Opinion, it sets the guidelines for the Body. Besides, it was confirmed again that the Commission chose the wrong strategy. As we saw, its objections were considered as unproven. After that, it was not surprising that most experts and the parties expected the dismissal of the claim. What was the judgement of the Court? What were the reactions? All these will be turned out in the last chapter.

Judgement and aftermath

On the basis of the beforementioned, it seemed that the Court would not consider the MOL case as unlawful state aid. Looking at the judgement, it can be seen that the Body mainly upheld the standpoints of the General Court and the Advocate General. It made a clear distinction between individual aids and general scheme of aids. The presumption of selectivity can be applied only in the former, if the advantage is identified. However, this condition was not fulfilled in this case.

Among others, ECJ pointed out that the discretionary rights conferred on the Hungarian authorities were not selective since it aimed the offsetting of further burden placed on undertakings. It also refused the Commission's complaint that the General Court misinterpreted

[23] C-15/14 P- Advocate General Opinion; par. 68-117

the law because the rates of the mining fees were the result of negotiations between the authorities and the MOL. The alleged selectivity would have been proven, if the rates had been unjustifiably low in order to prefer the company.

Similar to the General Court, it highlighted the fact that the Commission ignored other extension agreements in the solid minerals sector. Thus, it missed to take into consideration every circumstance whether the agreement met the criterion. Furthermore, it stressed that the Commission misinterpreted the challenged judgement whether the application of objective criteria preclude any selective character as stated by the General Court. Simultaneously, nor the cited judicial practice is relevant in this case.

Finally, it dismissed the 4th objection of the Commission: the change in the external circumstances and the agreement cannot result state aid even if it puts the relevant undertaking in a more favourable position than its rivals. Besides, it does not matter that only the MOL concluded such an agreement since the other companies also had the opportunity.

The Court also refused the argument of the Commission in which it stated that the MOL was the only one preferred by the state after 8th January 2008. Simultaneously, it emphasised that the mining fees were increased due to the price of crude oil. The government exercised its regulatory policy on objective criteria. As a consequence, the MOL agreement and the amendment of the Mining Act cannot be treated as one measure. Therefore, the Court dismissed the claim[24].

However, it was still questionable whether the Commission accepted the outcome. Dorottya Simon pointed out that similar cases in the previous 15 years indicated the opposite: the Commission always reviewed the judgement of the Court. Despite these facts, the MOL case was the first one which broke the "rule". The Body did not hold the absence of state aid; it just acknowledged that there was no evidence of preferring MOL to its potential rivals. In its resolution, the Commission declared the measures concerned non-selective. Therefore, the alleged violation of state aid law was dismissed[25].

Furthermore, it should be noted that the procedure was relatively quick: it took only 10 years. By contrast, it could take a longer period of time in similar cases. For instance, in the *Salzgütter*

[24] C-15/14 P - *Commission v MOL;* par. 42-102

[25] Resolution of the Commission after the judgement of the ECJ, http://ec.europa.eu/competition/state_aid/cases/229182/229182_1710075_160_2.pdf; par. 21-31

vs. Commission, the procedure lasted for 27 years from providing state aid to the adoption of the final verdict[26].

In conclusion, we can see how complicated these issues are. Besides, it is clear that there is no chance to convince the Court without proving the link between consecutive measures. However, it is still dubious how the Body would have treated the case if the Commission could justify that. But it would be another story. What is your opinion?

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