Reports of Cases

OPINION OF ADVOCATE GENERAL
BOBEK
delivered on 21 April 2016[1]

Case C-270/15 P

Kingdom of Belgium v Commission

(Appeal

(State aid — Prevention, control and eradication of transmissible spongiform encephalopathies (TSE) — Financing of screening tests of bovine spongiform encephalopathies (BSE) — Concept of selectivity — Reference framework — Comparability)

I – Introduction

1. Regulation (EC) 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 ('TSE'),[2] adopted in the wake of the bovine spongiform encephalopathy ('BSE') crisis, required Member States to carry out compulsory screening tests on certain animals at risk of being infected by a TSE, such as bovines but also sheep and goats ('screening tests'). From 1 January 2001 to 31 December 2005, the Kingdom of Belgium, partially or fully, financed the screening tests for the bovine sector. The Commission decided that the financing of those tests through State resources constituted State aid for farmers, slaughterhouses and other entities that process, handle, sell or trade in bovine animal products which are subject to compulsory BSE screening tests.

2. By the present appeal, the Kingdom of Belgium ('the appellant') contests the classification of the measure as State aid by the Commission, which was upheld by the General Court in its judgment of 25 March 2015 ('the judgment under appeal').[3] In particular, the appellant considers that one of the four criteria for State aid, namely the selective nature of the measure, is not fulfilled because the reference framework used to establish selectivity has been defined too broadly by the Commission and by the General Court.

3. In accordance with the request made by the Court of Justice, this Opinion will be confined to an analysis of the question of selectivity which is the crux of the appellant's second ground of appeal.

1 — Original language: English.

2 — OJ 2001 L 147, p. 1.

3 — Judgment of 25 March 2015 in *Belgium* v *Commission* (T-538/11, EU:T:2015:188).

II – Legal framework

A – *Primary law*

4. Article 107(1) of the Treaty on the Functioning of the European Union (TFEU) (previously Article 87(1) EC) provides that:

'Save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market.'

B – *Secondary law*

5. Recital 9 of Regulation No 999/2001 states that 'Member States should carry out an annual programme for monitoring BSE and scrapie and should inform the Commission and the other Member States of the results and of the emergence of any other TSE'. Pursuant to Article 6(1) of the Regulation, entitled 'Monitoring system', 'each Member State shall carry out an annual programme for monitoring BSE and scrapie in accordance with Annex III, Chapter A. That programme shall include a screening procedure using rapid tests'.

6. Paragraph 12 of the Community guidelines for State aid concerning TSE tests, fallen stock and slaughterhouse waste ('the TSE guidelines')[4] states that 'these guidelines concern State aid towards the costs of TSE tests, fallen stock and slaughterhouse waste granted to operators active in the production, processing and marketing of animals and animal products falling within the scope of Annex I to the Treaty and in so far as Articles 87, 88 and 89 of the Treaty have been declared applicable to such products'.

7. Paragraphs 23 and 24 of the TSE guidelines explain that:

'23. In order to promote the taking of measures for the protection of animal and human health, the Commission has decided that it will continue to authorise State aid of up to 100% towards the costs of TSE tests, following the principles of point 11.4 of the agriculture guidelines.

24. However, from 1 January 2003, as far as compulsory BSE testing of bovine animals slaughtered for human consumption is concerned, total direct and indirect public support, including Community payments, may not be more than EUR 40 per test. The obligation for testing may be based on Community or national legislation. This amount refers to the total costs of testing, comprising: test kit, taking, transporting, testing, storing and destruction of the sample. This amount may be reduced in future, as test costs fall.'

III – Facts and legal proceedings

8. Following the outbreak of BSE, otherwise known as 'mad cow disease', in the 1990s, the European Parliament and the Council passed Regulation No 999/2001 laying down rules for the prevention, control and eradication of certain transmissible spongiform encephalopathies. That regulation required each Member State to carry out an annual programme for monitoring BSE and scrapie,[5] which included a screening procedure using rapid tests. In particular, all bovine animals aged more

4 — OJ 2002 C 324, p. 2.

5 — Scrapie is a spongiform encephalopathy similar to BSE that notably afflicts sheep and goats.

than 30 months and those aged more than 24 months undergoing emergency slaughter were subject to those compulsory tests. The financing of those screening tests was, however, not specifically addressed by the regulation. On account of the disparities between Member States not only regarding the costs, but also the way in which screening tests were financed, the Commission adopted the TSE guidelines with the view of avoiding distortions of competition between Member States. Those guidelines stated in particular that financial aid provided by a State should be capped at EUR 40 per screening test as of 1 January 2003.

9. Following a number of complaints concerning the financing of screening tests in Belgium and after requesting information from the Kingdom of Belgium, the Commission decided in January 2009 to initiate the formal investigation procedure under Article 88(2) TEC (now Article 108(2) TFEU). The Commission's investigation concerned the Belgian system of financing the costs of screening tests for TSE in bovine animals between 1 January 2001 and 31 December 2005.

10. On 27 July 2011, the Commission adopted Decision 2011/678/EU concerning the State aid for financing screening of transmissible spongiform encephalopathies in bovine animals implemented by Belgium ('the Commission Decision').[6] In that Decision, the Commission held that the financing of BSE screening tests through State resources conferred a selective economic advantage on undertakings in the bovine sector by reducing the cost that they must pay for screening tests and constituted State aid. The Commission further decided, on the basis of the TSE guidelines, that that aid was compatible with the internal market except for the amounts in excess of EUR 40 per test for the period between 1 January 2003 and 30 June 2004.[7]

IV – The judgment under appeal and the proceedings before the Court

11. Before the General Court, the Kingdom of Belgium sought the annulment of the Commission Decision to the extent that the Decision classified the Belgian measures to finance screening tests for BSE in the bovine sector through State resources as State aid. It submitted in a single plea that the measure at issue was not State aid because it did not confer a selective advantage on undertakings in the bovine sector.

12. The General Court dismissed the action and ordered the Kingdom of Belgium to pay the costs. According to the General Court, the cost of the compulsory screening tests was a charge normally borne by the budget of an undertaking. By trying to mitigate that cost by providing the screening tests free of charge, the Kingdom of Belgium had conferred an advantage on the undertakings in the bovine sector that was not available for 'undertakings in other sectors'.[8] The condition of selectivity of the measure, which had to be assessed by reference to 'all undertakings' and not only to those undertakings that benefited from the same advantage within the same group, was thereby fulfilled.[9] Consequently, the General Court held that the Commission had not erred in holding that the financing of BSE screening tests through State resources constituted State aid within the meaning of Article 107(1) TFEU.

13. Before the Court of Justice, the appellant seeks the annulment of the General Court's judgment and the Commission Decision. The appellant claims that the General Court erred in law and violated its duty to state reasons. In support of this proposition, it raises two grounds of appeal: the first relates to the existence of a selective advantage within the meaning of Article 107 TFEU, and the second relates to the particular application of the test of selectivity to the facts of this case.

6 — State aid C 44/08 (ex NN 45/04) (OJ 2011 L 274, p. 36).

7 — See recitals 90 to 92 of the Commission Decision.

8 — See paragraph 110 of the judgment under appeal.

9 — See paragraph 114 of the judgment under appeal.

14. Only the second ground of appeal will be addressed in this Opinion. The appellant argues that the General Court erred in law by stating broadly that all undertakings under an obligation to carry out tests prior to the marketing of their products are, by definition, in a comparable legal and factual situation. Furthermore, the appellant submits that the General Court failed to state reasons explaining why it held that undertakings in the bovine sector subject to compulsory BSE screening tests are in a comparable situation, for the purposes of State aid rules, to undertakings that are obliged to carry out any tests prior to the marketing of their products.

15. In its Decision, the Commission considered that 'the financing of the BSE tests by the State only benefited one given sector, namely the sector involved in breeding animals subject to BSE tests'.[10] It found that 'if the State finances the costs of the obligatory controls that concern the production or the marketing of products, this has to be considered as a selective advantage for the enterprises'. Since 'the State reduced the charges that are normally included in the budget of an enterprise, … the farmers, the slaughterhouses and other entities which process, handle, sell or market products from bovine animals for whom BSE tests are obligatory by virtue of the legislation in force during the period in question … have benefited from State aid for the financing of the BSE tests by the State, …'[11]

16. In the judgment under appeal, the General Court, referring with approval to the Commission's position, compared screening tests with 'obligatory controls relating to the production or marketing of the products'.[12] It confirmed the Commission's findings in the sense that 'operators in the bovine sector benefited from an advantage which was not available for undertakings in other sectors, since the tests which they were required to perform before placing their products on the market or trading in them were provided free of charge, whereas undertakings in other sectors were unable to avail themselves of that possibility …'.[13]

17. According to the appellant, the General Court should have properly explained which were the relevant 'undertakings in other sectors'.[14] In adopting such a vague and implicitly broad approach to comparability, the General Court wrongly put in the same basket, on the one hand, the compulsory tests to which, for instance, manufacturers of elevators or lorries are subject and, on the other hand, temporary screening tests aiming at eradicating an animal disease. Even if the reference framework were to be restricted to compulsory tests for agricultural products, those tests are, according to the appellant, very different with regard to their nature, objective, cost and frequency. They are therefore not comparable to compulsory BSE screening tests.

V – Assessment

18. Pursuant to Article 107(1) TFEU, a national measure is considered to be State aid when it meets the four cumulative conditions that are set out in that provision. First, the measure must involve aid granted by the State or through State resources; second, it must favour certain undertakings or the production of certain goods, thereby constituting a selective advantage that is not available to comparable undertakings; third, it must distort or threaten to distort competition; fourth, it must be likely to affect trade between Member States.

10 — See recital 92 of the Commission Decision.
11 — See recital 90 of the Commission Decision.
12 — See paragraph 104 of the judgment under appeal.
13 — See paragraph 110 of the judgment under appeal.
14 — See also paragraph 115 of the judgment under appeal.

19. The discussion on the precise contours of the second condition — selectivity of the aid — has given rise to a rich debate amongst Advocates General.[15] It is, however, fair to admit that in spite of these efforts, the assessment of selectivity continues to be 'a difficult exercise with an uncertain outcome'[16] in practice.

20. Drawing on that rich debate, this Opinion first provides some general reflections on the concept of selectivity in the State aid context (Section A), which are then applied to the present case (Section B).

A – *General considerations on the concept of selectivity*

21. The second condition of the Article 107(1) TFEU test is that of selectivity: the advantage must be awarded to just *certain undertakings* or for the production of *certain goods*. It is clear that selectivity implies differentiation or inequality: the advantage is available only to some undertakings within a given sector or to a (sub)sector within a given market. However, what is much less clear is the way in which selectivity is to be defined, in particular regarding the second type of selectivity, concerned not with *individual* differentiation (for example an advantage given to undertaking X, but not to Y and Z) but with *sectoral* differentiation (for example an advantage awarded to all undertakings producing A but not to those producing B).

22. It is particularly regarding the latter type of differentiation that selectivity becomes a more difficult issue. This is because the way in which favoured undertakings are singled out is not via an individual decision, but by the application of a general, often legislative, measure.[17] In such cases, the borderline between the 'selective' and the 'general' becomes much more tenuous.

23. In general, when assessing selectivity, the case-law of the Court requires the determination of undertakings which are in a 'comparable legal and factual situation'.[18] The concrete fleshing out of this general requirement has nonetheless varied over time, depending on the complexity of the case and the number of undertakings concerned.

24. In cases of individual selectivity, that is when State aid is awarded to a single undertaking only, the Court has not always emphasised the requirement of defining a reference framework of comparable undertakings within which the existence of a selective advantage would be evaluated. This is to a great extent understandable: if an advantage is awarded only to one undertaking out of several that are intuitively comparable, the issue of selectivity does not pose any problem.

15 — See, for example, Opinion of Advocate General Wahl in *Commission* v *MOL* (C-15/14 P, EU:C:2015:32, point 43 et seq.); Opinion of Advocate General Jääskinen in Joined Cases *Commission and Spain* v *Government of Gibraltar and United Kingdom* (C-106/09 P and C-107/09 P, EU:C:2011:215, point 176 et seq.); Opinion of Advocate General Jääskinen in Joined Cases *Paint Graphos and Others* (C-78/08 to C-80/08, EU:C:2010:411, point 79 et seq.); Opinion of Advocate General Poiares Maduro in *Enirisorse* (C-237/04, EU:C:2006:21, point 47 et seq.); Opinion of Advocate General Mischo in *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke* (C-143/99, EU:C:2001:250, point 36 et seq.); Opinion of Advocate General Darmon in Joined Cases *Sloman Neptun* v *Bodo Ziesemer* (C-72/91 and C-73/91, EU:C:1992:130, point 47 et seq.).

16 — Opinion of Advocate General Jacobs in *PreussenElektra* (C-379/98, EU:C:2000:585, point 157).

17 — See, in this sense, Opinion of Advocate General Wahl in *Commission* v *MOL* (C-15/14 P, EU:C:2015:32, points 50-54).

18 — See, for example, judgments of 4 June 2015 in *Commission* v *MOL* (C-15/14 P, EU:C:2015:362, paragraph 61); of 4 June 2015 in *Kernkraftwerke Lippe-Ems* (C-5/14, EU:C:2015:354, paragraph 74); of 15 November 2011 in *Commission and Spain v Government of Gibraltar and United Kingdom* (C-106/09 P and C-107/09 P, EU:C:2011:732, paragraph 75); of 8 September 2011 *Commission* v *Netherlands* (C-279/08 P, EU:C:2011:551, paragraph 52); of 22 December 2008 in *British Aggregates* v *Commission* (C-487/06 P, EU:C:2008:757, paragraph 82); of 3 March 2005 in *Heiser* (C-172/03, EU:C:2005:130, paragraph 40) and of 8 November 2001 in *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke* (C-143/99, EU:C:2001:598, paragraph 41).

25. Selectivity becomes more problematic in cases of advantages awarded to certain undertakings on a sectoral basis. Within this category, the way in which selectivity has been defined and applied has been more diverse. To account for that diversity, the literature distinguishes a two-step and a three-step approach to selectivity. [19]

26. Under the two-step approach, [20] the first step consists of determining whether the measure is prima facie selective, that is, whether some undertakings enjoy an advantage with regard to other undertakings that are in a comparable legal and factual situation in the light of the objective pursued by the measure. If the answer to the first step is in the affirmative, a presumption of selectivity is established. It might still be possible to justify the measure in the second step if the differentiation arose from the nature or general scheme of the system of which the measure is part. While it is incumbent on the Commission to establish that the measure is prima facie selective in the first step, [21] it is for the Member States to rebut this presumption in the second step. [22]

27. Under the three-step approach, the initial step deals with the definition of the reference framework, sometimes referred to as the 'common' or 'normal' regime. [23] The remaining steps of this approach are essentially the same as those outlined above for the two-step approach. Thus, the second step consists of assessing whether the Commission has established that the measure distinguishes between comparable undertakings. The third step assesses whether the Member State has managed to prove that the measure was justified on the basis of the nature and general scheme of the system of which it forms part.

28. On closer inspection, it would appear that the only discernable difference between the two approaches is rather academic. It consists of splitting the first step into two separate steps in the three-step approach. Under both approaches, it is necessary to define the appropriate reference framework. However, within the two-step approach, that definition is less apparent, being hidden in the first step. As a result, the three-step approach might be better suited in terms of its clarity and pedagogical potential. It provides a more structured reasoning pattern and makes more explicit the various elements of the analysis.

29. There is no doubt that the heart of the selectivity test is establishing the 'reference framework'. However, as far as the relationship between its textual expression and its genuine content are concerned, that heart reminds one of a Russian doll: only by opening the external layer does one see that the key notion is in fact that of discrimination. [24] And again, hidden further within the notion of discrimination is comparability. Thus, when searching for the genuine content of selectivity, one arrives at the notion intimately known from other areas of EU law: comparability.

30. Comparability examines whether, in relation to a given quality (that is, *tertium comparationis*, which may be a value, aim, action, situation, etc.), the elements of comparison (undertakings, persons, products, etc.) demonstrate more similarities or more differences.

19 — See, for instance, Romariz, C., 'Revisiting Material Selectivity in EU State Aid Law — Or "The Ghost of Yet-To-Come"', EStAL 1, 2014, pp. 41-42; Bousin, J., and Piernas, J., 'Developments in the Notion of Selectivity', EStAL 4, 2008, pp. 640-642.

20 — See, for instance, judgments of 22 December 2008 in *British Aggregates* v *Commission* (C-487/06 P, EU:C:2008:757, paragraph 82 et seq.); of 3 March 2005 in *Heiser* (C-172/03, EU:C:2005:130, paragraph 40 et seq.); and of 8 November 2001 *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke* (C-143/99, EU:C:2001:598, paragraphs 41-42).

21 — See for example, judgments of 4 June 2015 in *Commission* v *MOL* (C-15/14 P, EU:C:2015:362, paragraph 59), and of 8 September 2011 in *Commission* v *Netherlands* (C-279/08 P, EU:C:2011:551, paragraph 62).

22 — See, for example, judgment of 8 September 2011 in *Commission* v *Netherlands* (C-279/08 P, EU:C:2011:551, paragraph 62).

23 — See judgments of 8 September 2011 in *Paint Graphos and Others* (C-78/08 to C-80/08, EU:C:2011:550, paragraph 49), and of 2 July 1974 in *Italy* v *Commission* (173/73, EU:C:1974:71, paragraph 15).

24 — See, to the same effect, Opinion of Advocate General Wahl in *Commission* v *MOL* (C-15/14 P, EU:C:2015:32, point 54).

31. The classical problem in such an examination is the selection of the quality with regard to which the comparison is to be carried out. With regard to what precisely are undertakings X and Y comparable? There are, in my view, three factors that should typically be taken into account when carrying out such an assessment in the context of State aid.

32. The first factor is the scope of application of the measure in relation to the persons and/or situations that it covers. The scope of the measure itself would typically define the logical relationship and comparability of those persons and/or situations. Such a measure is also likely to set out potential obligations or charges that are imposed on a certain set of undertakings, as well as the reasons for which a Member State may seek to alleviate those obligations or charges.

33. The second factor is the objective of the measure in terms of the aims and values the measure wishes to pursue or foster. Defining a suitable reference framework requires a decision on the set of undertakings that are in a comparable legal and factual situation 'in the light of the objective of the measure' [25] but also, more broadly, of 'the system in question'. [26]

34. Thirdly, there could be another, perhaps auxiliary factor whereby comparability is assessed in terms of the degree of substitutability of the products involved. It should be clearly acknowledged that such a factor has so far found little traction in the case-law of the Court. [27] On the other hand, much could indeed be said about the need of State aid law to take stronger account of its competition law dimension. [28] In terms of comparability, this would translate into comparability being (co)defined by substitutability and underpinned by the notion of distortion of competition within the relevant market. The search for the relevant reference framework would then come much closer to the definition of the 'relevant market', not dissimilar to the analysis carried out under Article 101 TFEU.

35. The first and the second factors mentioned above ought to be present, in one form or another, in any assessment of comparability. Their precise articulation and their respective weight will depend on the circumstances of each particular case. The same goes for their mutual interplay. In some cases, all factors will point in the same direction. In others, the second factor (the objective of the measure) and the third (the degree of substitutability of the products concerned by the measure) may be used to correct or add nuance to the first one. The first factor (the definition of the scope of application of the measure by the measure itself) should be taken as a starting point when establishing a reference framework. However, it should not be conclusive on its own since a Member State could, in order to escape the classification as State aid, draft a measure the scope of which is restricted to certain undertakings, but which are comparable to others not benefiting from the measure.

36. The 'Dutch NO_x' case [29] illustrates how one of the factors can eventually override the other for the purposes of defining the relevant reference framework. In that case, the second factor corrected the first one. The Netherlands had limited the possibility of trading emissions of nitrogen oxides (NO_x) only to large industrial undertakings producing those kinds of emissions. The scope of the national measure was therefore circumscribed to those undertakings. Yet, in view of the general objective of the

25 — See judgments of 8 September 2011 in *Commission* v *Netherlands* (C-279/08 P, EU:C:2011:551, paragraph 52), and of 8 November 2001 in *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke* (C-143/99, EU:C:2001:598, paragraph 41).

26 — See judgments of 3 March 2005 in *Heiser* (C-172/03, EU:C:2005:130, paragraph 40), and of 29 April 2004 in *GIL Insurance and Others* (C-308/01, EU:C:2004:252, paragraph 68).

27 — However, for a closer assessment of competition between products, albeit focused on a matter other than selectivity , see judgment of 13 February 2003 in *Spain* v *Commission* (C-409/00, EU:C:2003:92, paragraphs 68 et seq.).

28 — See, for example, da Cruz Vilaça, J.L., 'Material and Geographic Selectivity in State Aid — Recent Developments', EStAL 4, 2009, 443-451; Romariz, C., 'Revisiting Material Selectivity in EU State Aid Law — Or "The Ghost of Yet-To-Come", EStAL 1, 2014, pp. 47-48; Nicolaides, P., and Rusu, I.E., 'The Concept of Selectivity: An Ever Wider Scope', EStAL 4, 2012, pp. 796-797; Lo Schiavo, G., 'The role of competition analysis under article 107 paragraph 1 TFEU: the emergence of a "market analysis" assessment within the selectivity criterion?', 34 E.C.L.R. 8, 2013, pp. 400-406.

29 — Judgment of 8 September 2011 in *Commission* v *Netherlands* (C-279/08 P, EU:C:2011:551).

measure, namely the protection of the environment, the Court held that all undertakings that were subject to the 'same *kind* of obligations', namely to reduce NO_x emissions, were in a comparable legal and factual situation, irrespective of their size.[30] Therefore, the possibility of trading NO_x emissions should not have been limited to the larger facilities.[31]

37. There is no doubt that the factors outlined above only provide rough indications of the kind of reflections that should be carried out when assessing comparability for the purpose of establishing a reference framework. It is also quite obvious that any assessment of a similar kind, however neatly structured in algorithmic, almost mathematical terms, will always entail some elements of subjective value choice as to what undertakings are comparable and why, putting more stress on one factor instead of another.

38. At the same time, however, such a choice must be made explicit in the reasoning of the decision-making authority. In practice, therefore, the Commission ought to make clear what reference framework it chooses to establish and on what grounds.

39. Delineating the appropriate reference framework when deciding on the selectivity of potential State aid is crucial for a number of reasons. First, it allows the parties to know the reasons why a measure was or was not considered to be State aid.[32] Second, it secures higher legal predictability for Member States, which will be able to anticipate whether the measures they adopt should be notified to the Commission, or whether they can freely pursue a particular economic policy without limitation.[33] Third, it enables EU courts to carry out effective legal review as the General Court and, ultimately, the Court of Justice will be able to determine with greater clarity whether the condition of selectivity has been met.

B – *The condition of selectivity in the present case*

40. In the present case, the Court is asked to assess whether the condition of selectivity should be examined within a broadly defined reference framework encompassing undertakings in the bovine sector and 'undertakings in other sectors'.

41. In its reasoning, the General Court did not provide further detail as to what should be understood by 'undertakings in other sectors'. The General Court merely referred approvingly to the Commission's assessment,[34] which was, in itself, not entirely clear with regard to what those 'other sectors' were.[35]

42. In the present case, a number of reference frameworks could be contemplated depending on the level of abstraction chosen for defining the *tertium comparationis* and on the respective weight attributed to the different factors sketched out above. I will outline three of them: the narrow approach, the intermediate approach and the broad approach.

43. The narrow approach, advocated by the appellant, focuses on undertakings carrying out TSE tests. The reference framework is established by the scope of Regulation No 999/2001. That regulation only requires screening tests for those sectors concerned by TSE. Thus on the narrow approach, the first factor outlined above is dominant and operates on a low level of abstraction: the set of comparable undertakings is defined by the specific obligation to test for TSE.

30 — Judgment of 8 September 2011 in *Commission* v *Netherlands* (C-279/08 P, EU:C:2011:551, paragraph 66). Emphasis added.

31 — For another similar example, see judgment of 8 November 2001 in *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke* (C-143/99, EU:C:2001:598, paragraph 52), where the objective of the measure led to the consideration of a wider group of undertakings than the one resulting from the scope of the measure.

32 — See judgment of 29 April 2004 in *Netherlands* v *Commission* (C-159/01, EU:C:2004:246, paragraphs 65-67).

33 — Opinion of Advocate General Geelhoed in *GIL Insurance and Others* (C-308/01, EU:C:2003:481, point 76).

34 — See paragraphs 107, 108, 110 and 111 of the judgment under appeal.

35 — See point 16 of this Opinion.

44. The intermediate approach moves one level up in terms of abstraction. The set of comparable undertakings could be said to include any agricultural or food undertakings that are obliged to subject their products to health checks. This approach does not rely on the specificity of BSE screening tests, [36] but on the general objective of the EU measure in the present case, namely preserving animal and human health. The obligation to carry out BSE screening tests can be seen as part of a broader obligation for undertakings to perform controls ensuring that their products do not constitute a threat to human and animal health. [37] Such an approach results in comparing undertakings subject to BSE screening tests with other agricultural or food undertakings that are subject to other types of compulsory sanitary controls, but might be producing other types of meat or foodstuffs.

45. Climbing yet higher in the abstraction ladder, an even broader approach can be envisaged. Within this broad approach the set of comparable undertakings could be said to include all undertakings subject to compulsory controls before marketing their products and not strictly limited to animals. Thus, the abstract *tertium comparationis* would be quality or safety controls in general, which obviously generates a much larger pool of comparable undertakings.

46. It is the latter, broad category that, according to the appellant, was the approach chosen by the Commission and later endorsed by the General Court. As the appellant contends, the General Court wrongly put obligatory tests for lorries and elevators and temporary tests aiming at eradicating an animal disease on the same footing.

47. It is indeed true that the General Court did not dwell in great detail on the definition of the relevant reference framework. [38] In paragraphs 107 and 110 of the judgment under appeal, it relied on the Commission's findings that the measure in issue only benefited 'farmers, slaughterhouses and other entities that processed, handled, sold or traded in bovine animal products that were subject to compulsory BSE screening tests', as opposed to 'undertakings in other sectors', without further specification.

48. Even if the General Court did not make explicit what it meant by 'undertakings in other sectors', it is not necessary to set aside the judgment of the General Court under the second ground of appeal. The fact remains that the financing of BSE screening tests through State resources constituted a selective advantage that was not available for 'other sectors'. In the absence of any further evidence provided by the appellant, it appears in no way justified by the nature or general scheme of the system.

49. As to the duty to state reasons, even though the General Court could have been more explicit, I am of the view that it did not breach that obligation to an extent which necessitates the annulment of its decision. According to the settled case-law of the Court, the duty incumbent upon the General Court under Article 36 read in conjunction with the first paragraph of Article 53 of the Statute of the Court of Justice to state reasons for its judgments does not require the General Court to provide an account that follows exhaustively and one by one all the arguments articulated by the parties to the case. The reasoning may therefore be implicit, on condition that it enables the persons concerned to understand the grounds of the General Court's judgment and provides the Court of Justice with sufficient information to exercise its powers of review on appeal. [39]

36 — See, by analogy, judgment of 20 November 2003 in *GEMO* (C-126/01, EU:C:2003:622).

37 — See, for instance, Regulation (EC) No 882/2004 of the European Parliament and of the Council of 29 April 2004 on official controls performed to ensure the verification of compliance with feed and food law, animal health and animal welfare rules (OJ 2004 L 165, p. 1).

38 — See point 16 of this Opinion.

39 — See, for example, judgments of 8 March 2016 in *Greece* v *Commission* (C-431/14 P, EU:C:2016:145, paragraph 38); of 21 December 2011 in *A2A* v *Commission* (C-320/09 P, EU:C:2011:858, paragraph 97); and of 7 January 2004 in *Aalborg Portland and Others* v *Commission* (C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P, EU:C:2004:6, paragraph 372).

50. It is apparent that the statement of reasons in the judgment under appeal enabled the parties to understand the grounds on which the General Court confirmed that there was a selective advantage. Requiring the General Court to be more specific about the actual sectors that were compared with the bovine sector would, at best, have amounted to a minor addition to the reasoning, but would not have affected the operative part of the judgment.

51. It ought to be added, however, that it is, in my view, only the specific facts of this particular case that allow the conclusion that there is selectivity. The advantage would still be only available to just one sector, namely the bovine sector, irrespective of which of the three reference frameworks outlined above were chosen. There is nothing to indicate that this selective advantage could be justified by the nature or general scheme of the system. This should, however, not obfuscate the general duty of the Commission to be explicit in its definition of the relevant reference framework in future cases, in which similar vagueness combined with different facts could lead to a different conclusion.

VI – Conclusion

52. For those reasons, and without prejudice to the examination of the first ground of appeal, I propose to the Court to dismiss the appeal with regard to the second ground of appeal.