



## **The Polish tax on the retail sector and the Hungarian tax on advertisements do not infringe EU law on State aid**

*The Court of Justice accordingly dismisses the Commission's appeals and upholds the judgments of the General Court*

By a law which entered into force on 1 September 2016, Poland introduced a tax on the retail sector. That tax was based on the monthly turnover of any retailer involved in the sale of goods to consumers, provided that that turnover exceeded 17 million Polish zlotys (PLN) (approximately € four million). That tax entailed two bands: a rate of 0.8% applied to turnover between PLN 17 and 170 million and a rate of 1.4% was charged for the part of the turnover exceeding that amount.

Following the formal investigation procedure in respect of that measure initiated by decision of 19 September 2016,<sup>1</sup> the European Commission considered, by decision of 30 June 2017,<sup>2</sup> that that progressive tax constituted State aid incompatible with the internal market and required Poland to cancel all the payments suspended in respect of that tax, with effect from the date of adoption of that decision.

By judgment of 16 May 2019,<sup>3</sup> the General Court of the European Union, hearing a case brought by Poland, annulled, first, the decision opening the formal investigation procedure and, second, the negative decision concerning Poland. It held that the Commission was wrong to consider that the establishment of a progressive tax on turnover generated by the retail sale of goods would lead to a selective advantage in favour of undertakings with low turnover linked to that activity and that, as regards the decision opening the formal investigation procedure, it was not entitled, on the basis of the case file at the time of the adoption of that decision, to provisionally classify the tax measure at issue as new aid without relying on the existence of legitimate doubts on that point.

For its part, Hungary had introduced, by a law that entered into force on 15 August 2014, a progressive tax on revenue linked to the publication and broadcasting of advertisements in that Member State. That tax, based on the net turnover of persons who broadcast or publish advertisements (print media, audiovisual media or billposters), operating in Hungary, initially included a scale of six progressive rates based on turnover, later adapted to include only two rates, accompanied by the option, for taxable persons whose profits before tax in 2013 were zero or negative, to deduct from their tax base 50% of the losses carried forward from previous years.

Following the formal investigation procedure in respect of that measure, initiated by decision of 12 May 2015,<sup>4</sup> the Commission considered, by decision of 4 November 2016,<sup>5</sup> that the tax

<sup>1</sup> Decision of 19 September 2016 on State aid SA.44351 (2016/C) (ex 2016/NN) – Polish tax on the retail sector – Invitation to submit comments pursuant to Article 108(2) [TFEU] (OJ 2016 C 406, p. 76, ‘the decision opening the formal investigation procedure’).

<sup>2</sup> Decision (EU) 2018/160 of 30 June 2017 on the State aid SA.44351 (2016/C) (ex 2016/NN) implemented by Poland for the tax on the retail sector (OJ 2018 L 29, p. 38, ‘the negative decision concerning Poland’).

<sup>3</sup> Judgment of the General Court of 16 May 2019, *Poland v Commission*, [T-836/16 and T-624/17](#); see also press release [No 64/19](#).

<sup>4</sup> Decision of 12 March 2015 on State aid SA.39235 (2015/C) (ex 2015/NN) – Hungary – Advertisement tax – Invitation to submit comments pursuant to Article 108(2) [TFEU] (OJ 2015 C 136, p. 7).

<sup>5</sup> Commission Decision (EU) 2017/329 of 4 November 2016 on the measure SA.39235 (2015/C) (ex 2015/NN) implemented by Hungary on the taxation of advertisement turnover (OJ 2017 L 49, p. 36).

measure adopted by Hungary, on account of both its progressive structure and the possibility of deducting the losses carried forward that it included, constituted State aid that was incompatible with the internal market and ordered the immediate and effective recovery of the aid paid to the beneficiaries thereof.

By judgment of 27 June 2019,<sup>6</sup> the General Court, hearing a case brought by Hungary, annulled that decision, holding that the Commission had erred in finding that the tax measure at issue and the mechanism for the partial deductibility of losses carried forward constituted selective advantages.

In the two judgments delivered on 16 March 2021, the Court of Justice, sitting as the Grand Chamber, dismisses the appeals brought by the Commission against the judgments under appeal. In support of its appeals, the Commission claimed in particular that the General Court had infringed Article 107(1) TFEU, in holding that the progressive nature of the taxes on turnover respectively at issue did not lead to a selective advantage.

Rejecting, in its judgments, the Commission's objections, the Court of Justice reaffirms, in the sphere of State aid, the principle established concerning the fundamental freedoms of the internal market to the effect that, **given the current state of harmonisation of EU tax law, the Member States are free to establish the system of taxation which they deem most appropriate, so that the application of progressive taxation falls within the discretion of each Member State**,<sup>7</sup> provided that the characteristics constituting the measure at issue do not entail any manifestly discriminatory element.

#### Findings of the Court of Justice

First, the Court of Justice notes that, for the purpose of classifying a measure that is of general scope as 'State aid', within the meaning of Article 107(1) TFEU, the condition relating to the selectivity of the advantage provided for by the measure at issue requires determination of whether it is such as to favour 'certain undertakings or the production of certain goods' over others, which, in the light of the objective pursued by that regime, are in a comparable factual and legal situation and which accordingly suffer different treatment that can, in essence, be classified as discriminatory. In particular, where it concerns a national tax measure, it is for the Commission, after having identified the reference system, namely the 'normal' tax regime applicable in the Member State concerned, to demonstrate that the tax measure in question derogates from that reference system, in so far as it differentiates as between operators who, in the light of the objective pursued by that measure, are in a comparable factual and legal situation, without finding any justification with regard to the nature or scheme of the system in question.

It is in the light of those considerations that the Court of Justice examines, first, whether, in the present cases, the General Court was right to find, in essence, that the Commission had not demonstrated that the progressive nature of the tax measures at issue entailed conferring a selective advantage on 'certain undertakings or the production of certain goods'. With regard to that point, the Court of Justice upholds the General Court's analysis that the progressivity of the rates provided for by the tax measures respectively at issue formed an integral part of the reference system in the light of which it was necessary to assess whether the existence of a selective advantage could be established.

**Taking into account the fiscal autonomy which the Member States are recognised as having outside the fields subject to harmonisation under EU law, they are free to establish the system of taxation which they deem most appropriate and to adopt, as required, progressive taxation.** In particular, EU law on State aid does not preclude, in principle, Member States from deciding to opt for progressive tax rates, intended to take account of the ability to pay

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<sup>6</sup> Judgment of the General Court of 27 June 2019, *Hungary v Commission*, [T-20/17](#); see also press release [No 84/19](#) (together with the judgment in *Poland v Commission* 'the judgments under appeal').

<sup>7</sup> See, inter alia, to that effect, judgments of 3 March 2020, *Vodafone Magyarország*, [C-75/18](#), paragraph 49, and of 3 March 2020, *Tesco-Global Áruházak*, [C-323/18](#), paragraph 69 (see also press release [No 20/20](#)), and, as regards State aid, judgment of 26 April 2018, *ANGED*, [C-233/16](#), paragraph 50 (see also press release [No 57/18](#)).

of taxable persons, while nor does it require Member States to reserve the application of progressive rates only to taxes based on profits, to the exclusion of those based on turnover.

In those circumstances, the characteristics constituting the tax, which include progressive tax rates, form, in principle, the reference system or the 'normal' tax regime for the purposes of analysing the condition of selectivity. It is for the Commission, where necessary, to demonstrate that the characteristics of a national tax measure were designed in a way that is manifestly discriminatory, with the result that they should be excluded from the reference system, which could in particular reveal a choice of taxation criteria in the light of the objective pursued by that measure. In that regard, the Court of Justice finds, however, in the present cases, that the Commission had not established that the characteristics of the measures adopted by the Polish and Hungarian legislatures respectively had been designed in a manifestly discriminatory manner, with the aim of circumventing the requirements of EU law on State aid. In those circumstances, the General Court was therefore justified in holding, in the judgments under appeal, that the Commission had incorrectly relied on an incomplete and notional system in considering that the progressive scale of tax measures respectively at issue did not form part of the reference system in the light of which the selective nature of those measures had to be assessed.

**In the case (C-562/19 P) concerning the tax on the retail sector established in Poland**, the Court of Justice then examines the grounds relied on by the Commission in order also to annul the decision opening the formal investigation procedure concerning the tax measure adopted by that Member State. In that instance, the General Court, in essence, held that the Commission had based the provisional classification of the tax measure at issue as new aid on a manifestly incorrect analysis of that measure, which was, consequently, not capable of substantiating to the requisite legal standard, the existence of legitimate doubts concerning the classification of that measure as new aid. In that regard, the Court of Justice notes that the EU Courts, when reviewing the validity of such a decision opening a formal investigation procedure, are called upon to carry out a limited review of the assessment made by the Commission as regards the classification of a measure as 'State aid', within the meaning of Article 107(1) TFEU. However, the Court of Justice finds that, in ruling as it has, the General Court merely carried out in respect of the Commission's provisional State aid classification in the decision opening the formal investigation procedure a review of the manifest error of assessment and notes in that regard that it did not, in any event, annul that decision following mere repetition of the grounds that led it to annul the negative decision concerning Poland. Consequently, **the Court of Justice rejects the grounds of appeal concerning the judgment of the General Court in so far as it annulled the decision opening the formal investigation procedure and the accompanying suspension injunction.**

**Finally, in the case (C-596/19 P) concerning the tax on advertisements established in Hungary, the Court of Justice finds that the General Court did not err in considering that the transitional measure of the partial deductibility of losses carried forward did not lead to a selective advantage.** The establishment of a transitional measure taking into account profits is not inconsistent in the light of the redistribution objective pursued by the Hungarian legislature, when establishing the tax on advertisements. The Court of Justice highlighted in that regard that, in that case, the criteria concerning the lack of profits recorded in the financial year preceding the entry into force of that tax was objective in nature, since the undertakings benefiting from the transitional measure of partial deductibility of the losses had, from that point of view, a lesser ability to pay than others.

On those grounds, **the Court of Justice rejects all the appeals brought by the Commission against the judgments under appeal in their entirety.**

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**NOTE:** A reference for a preliminary ruling allows the courts and tribunals of the Member States, in disputes which have been brought before them, to refer questions to the Court of Justice about the interpretation of European Union law or the validity of a European Union act. The Court of Justice does not decide the dispute itself. It is for the national court or tribunal to dispose of the case in accordance with the Court's decision, which is similarly binding on other national courts or tribunals before which a similar issue is raised.

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The full text of the judgments ([C-562/19 P](#) and [C-596/19 P](#)) is published on the CURIA website on the day of delivery.

Press contact: Jacques René Zammit ☎ (+352) 4303 3355

Pictures of the delivery of the judgment are available from "[Europe by Satellite](#)" ☎ (+32) 2 2964106