



Press and Information

Court of Justice of the European Union

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Advocate General's Opinion in Case C-385/12
Hervis Sport- és Divetkereskedelmi Kft v Nemzeti Adó- és Vámhivatal
Közép-dunántúli Regionális Adó Főigazgatósága

According to Advocate General Kokott the Hungarian special tax applicable to the retail trade does not discriminate against foreign undertakings

The special tax may however infringe EU value added tax rules

In order to meet increased financial needs arising from the financial and economic crisis, Hungary introduced, in 2010, a tax on specific retail activities. That special tax is assessed on the basis of the retailer's annual turnover and is chargeable on turnover above HUF 500 million (c. €1.7 million). The progressive tax rate is 0.1% or 0.4% or, on turnover in excess of HUF 100 000 million (approximately €336 million), 2.5%. With regard to related undertakings, that is undertakings where one exercises a controlling influence over the other, the tax rate is applied not to the annual turnover of the individual undertaking but to the total turnover of all related undertakings. The tax liability of the individual undertaking then results from its share of the total turnover.

The Hungarian sports goods retailer Hervis regards that tax as contrary to EU law on account of its discriminatory nature and has therefore brought the matter before a Hungarian court. It is part of an Austrian group of companies which in Hungary is also active in food retailing. Because in calculating its tax liability the group's total turnover in Hungary was taken into account, the tax rate applied to Hervis was much higher than it would have been had only its own turnover been considered. Hervis claims that in the food retailing sector it is mainly foreign-owned undertakings which are affected by such aggregation. Whereas they are organised in a company group structure, Hungarian proprietors employ the franchise model, concerning which only each individual franchisee's turnover is relevant. Against that background the Hungarian court has asked the Court of Justice about the compatibility of the special tax with EU law.

In her Opinion today, **Advocate General Kokott takes the view that the EU law prohibitions on discrimination and the fundamental freedoms, in particular the freedom of establishment, do not preclude a tax such as the Hungarian special tax.**

Hervis' group parent company is not – insofar as the Court can judge on the basis of the information available to it – restricted in a prohibited manner in the exercise of its freedom of establishment by the levying of the special tax. There is no provision in the rules on the Hungarian special tax which discriminates overtly or covertly against companies in respect of their **freedom of establishment** on the ground that their seat is situated abroad.

The **criterion of the amount of turnover** used for taxation purposes does not therefore give rise to any covert discrimination between residents and non-residents. It is not obvious and according to the available information also not apparent that in the vast majority of cases retail undertakings with high turnover are operated by non-residents, whereas retail undertakings with low turnover are operated by residents.

The **distinguishing criterion of related undertakings**, according to which the turnover of other companies in the group is taken into account, whereas integration in a franchise structure is irrelevant, cannot justify the assumption that there is covert discrimination. It need not be decided whether there is any covert unequal treatment of non-residents compared to residents because it may be that, where its parent undertaking is non-resident, in the vast majority of cases the retail undertaking is integrated in a group company structure. In any case, for the purposes of the

assessment of the Hungarian special tax on the basis of turnover, retail undertakings which are part of a franchise structure and those belonging to a company group are not in an objectively comparable situation.

Finally, **the distinguishing criterion of the stage of the distribution chain for turnover purposes**, that is, the taxation only of the last link in the chain, does not lead to the assumption of covert discrimination. In this case there is also no need to decide whether there is any covert unequal treatment of non-residents compared to residents because it may be that, in the vast majority of cases, the former operate in Hungary by means of a branch system whereas the latter operate franchises as franchisors. In any event, with reference to the Hungarian rules, the situation of undertakings which operate a branch system, and of franchisors, is not comparable.

According to the Advocate General, in addition, the prohibition under EU law of tax discrimination in respect of products, according to which no Member State may impose, directly or indirectly, on the products of other Member States any internal taxation of any kind in excess of that imposed on similar domestic products, **does not preclude the Hungarian special tax**. There is no indication that the special tax results in a higher tax burden on goods from other Member States than on Hungarian goods.

Advocate General Kokott points out however that the Hungarian special tax may infringe the VAT Directive¹. According to that directive, Member States are prohibited from levying taxes which can be characterised as turnover taxes. Contrary to previous case-law, that prohibition applies not only to national taxes which exhibit the essential characteristics of VAT but to all national taxes which exhibit the essential characteristics of a turnover tax and which jeopardise the functioning of the common system of value added tax by distorting the conditions of competition, whether at national or EU level. The Hungarian special tax at least fulfils what can be regarded as the defining characteristic of a turnover tax, that is, assessment on the basis of the price charged, even if it is assessed on the basis of total annual turnover. It also distorts the conditions of competition at national level. It is however not possible, on the basis of the available information, to determine whether, in addition, the tax is general in nature. **It is thus finally for the Hungarian Court to examine whether the special tax is compatible with the VAT Directive.**

NOTE: The Advocate General's Opinion is not binding on the Court of Justice. It is the role of the Advocates General to propose to the Court, in complete independence, a legal solution to the cases for which they are responsible. The Judges of the Court are now beginning their deliberations in this case. Judgment will be given at a later date.

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 Opinion is published on the CURIA website on the day of delivery.

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¹ Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 237, p. 1).