General Court of the European Union
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Press and Information

Judgment in Joined Cases T–836/16 and T–624/17
Poland v Commission

The General Court annuls the Commission's decisions concerning the Polish tax on the retail sector

The Commission incorrectly classified the measure at issue as State aid

On 1 September 2016 the law concerning the tax on the retail sector came into force in Poland. All retailers were liable to pay tax under that law, irrespective of their legal status. The tax was based on the turnover of the companies concerned and was progressive in nature. The basis of assessment was a monthly turnover of more than 17 million Polish zloty (PLN) (approximately € 4 million). The tax rates applied to such a monthly turnover were 0.8% from PLN 17 million to 170 million inclusive and 1.4% beyond PLN 170 million.

After a few exchanges between the Polish authorities and the Commission regarding that law, the Commission initiated a procedure in respect of that national measure, which it considered to be State aid. By decision of 19 September 2016, the Commission not only gave notice to the parties concerned to submit their comments but also ordered the Polish authorities to suspend immediately the 'application of progressive rates to its tax, until the Commission has taken a decision on the compatibility of the [law] with the internal market'. The Polish Government suspended the application of that law.

By decision of 30 June 2017, the Commission found that the tax at issue constituted State aid incompatible with the internal market and that it had been implemented unlawfully. Under that decision, the Polish authorities had to definitively annul all payments suspended under the decision to initiate the procedure. Since the measure at issue had not been implemented, the Commission took the view that it was not necessary to recover the aid components from the recipients.

Poland submits that the Commission was wrong to take the view that the tax on the retail sector constituted a selective measure favouring certain undertakings on account of the progressive nature of the rates applied to the turnover constituting the basis of assessment. It[1] therefore asked the General Court to annul the decision to initiate a procedure (Case T-836/16) as well as the final decision (Case T-624/17).

In today's judgment, the General Court emphasises, first of all, that a measure by which the public authorities grant certain undertakings favourable tax treatment which, although not involving the transfer of State resources, places the recipients in a more favourable financial position than that of other taxpayers constitutes State aid. In order to demonstrate the existence of favourable tax treatment reserved for certain undertakings, it is necessary to determine whether, in the context of a particular legal regime, that measure favours certain undertakings over others who are in a comparable legal and factual situation in the light of the objective pursued by the regime in question. Thus, in order to classify a favourable tax measure as 'selective' it is necessary, first, to identify and examine the common or 'normal' system of taxation applicable. In relation to that system it is then necessary to assess any advantage granted by the tax measure at issue and, where appropriate, determine whether that advantage may be selective, by demonstrating that the measure derogates from that 'normal' system by introducing a means of differentiating between

[1] Supported by Hungary.

operators who are in a comparable legal and factual situation in the light of the common or 'normal' system of taxation applicable.

The General Court notes, in that respect, that it is not possible to exclude tax rates from the substance of a system of taxation as the Commission did. Whether tax is levied at a single rate or at a progressive rate, the tax rate forms part of the fundamental characteristics of a tax levy's legal regime, just as the basis of assessment, the taxable event and the group of taxable persons do. It is apparent from the contested decisions that, for the Commission, that regime should be one in which retailers' turnover is subject to a single (flat) rate of tax as from the first Polish zloty. However, it must be noted that the 'normal' single-rate system referred to by the Commission is a hypothetical system on which it was not entitled to rely. Whether or not a tax advantage is selective must be analysed in the light of the actual characteristics of the 'normal' system of taxation of which it forms part, and not in the light of assumptions that have not been accepted by the competent authority.

As a result, the fact that the Commission identified, in the contested decisions, a 'normal' system that was either incomplete, without tax rates, or hypothetical, with a single tax rate, constitutes an error of law. According to the General Court, given the sectoral nature of the tax in question and the absence of differentiated tax rates for certain undertakings, the only 'normal' system which could be relied on in the present case was the tax on the retail sector itself, with its structure including its range of progressive tax rates and its brackets.

The General Court goes on to consider whether the structure of the tax on the retail sector, with its progressive rates and its brackets, was contrary to the objective pursued by that tax and had, in that regard, the effect of discriminating between undertakings in that sector. It is possible for the tax rules of a system of taxation to be inherently discriminatory with regard to the objective that that system is supposed to pursue. The General Court notes that the objective of producing revenue for the general budget, identified by the Commission in the decision to initiate the procedure, is common to all taxes not allocated for particular funding, which account for the bulk of systems of taxation, and is not sufficient, in itself, to determine the nature of the various taxes. Moreover, the progressive structure of the rates of a given tax cannot, in itself, be contrary to the objective of collecting revenue for the budget.

Furthermore, the objective identified in the final decision of the Commission, namely of taxing the turnover of all the undertakings in the sector concerned, could not be relied on either. Indeed, the aim of the Polish authorities was to introduce a sectoral tax in line with a principle of tax redistribution. The General Court also notes that the progressive structure of the tax at issue was *a priori* consistent with that objective. It is reasonable to presume that undertakings with high turnovers might, through various economies of scale, have proportionately lower costs than those with smaller turnovers. Therefore the Commission was also wrong to consider that the objective of the tax on the retail sector was different to that put forward by the Polish authorities.

In noting the errors made by the Commission as regards the identification of the 'normal' system of taxation and its objective, the General Court emphasises that, in the context of the control it exercises over tax measures liable to constitute State aid, the Commission may not, except where there is manifest inconsistency, define, in the place of the Member State in question, the nature and general scheme of that system, without potentially undermining that Member State's competence in the field of taxation.

As regards whether the tax structure chosen by the Polish authorities was contrary to the objective of that system, the General Court, relying on the case-law of the Court of Justice, notes that some taxes may contain adaption mechanisms, which may go so far as including exemptions, without those mechanisms leading to the granting of selective advantages. Therefore, as regards a turnover tax, **an adaption criterion in the form of progressive taxation as from a certain threshold, even a high threshold, which may reflect the intention to tax the activity of an undertaking only when that activity reaches a certain level, does not, in itself, imply the existence of a selective advantage.**

The General Court concludes, on that basis, that the Commission was not entitled to infer solely from the progressive structure of the new tax on the retail sector that that tax entailed selective advantages. Moreover, the Commission failed to establish in the contested decisions the existence of a selective advantage introducing a means of differentiating between operators in a comparable legal and factual situation in the light of the objective set by the Polish legislature for the tax on the retail sector.

As a result, the General Court annuls the Commission's final decision.

Lastly, the General Court notes that the Commission's decision to initiate the procedure is based on a manifestly incorrect analysis since it was not justified, in the light of the question whether there was new aid, by legitimate doubts given the state of discussions, but by an opinion supported by legal reasoning that does not enable it to be justified in law. It therefore also annuls that decision.

NOTE: An appeal, limited to points of law only, may be brought before the Court of Justice against the decision of the General Court within two months of notification of the decision.

NOTE: An action for annulment seeks the annulment of acts of the institutions of the EU that are contrary to EU law. The Member States, the European institutions and individuals may, under certain conditions, bring an action for annulment before the Court of Justice or the General Court. If the action is well founded, the act is annulled. The institution concerned must fill any legal vacuum created by the annulment of the act.

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The full text of the judgment is published on the CURIA website on the day of delivery

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