Press and Information

General Court of the European Union

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Judgment in Case T-20/17
Hungary v Commission

The General Court annuls the Commission's decision finding that the Hungarian advertisement tax was incompatible with the EU State aid rules

Neither that tax's progressivity, nor the possibility for undertakings not making a profit in 2013 to deduct from the 2014 basis of assessment for that tax losses carried forward from the earlier financial years constitutes a selective advantage in favour of certain undertakings

In 2014, Hungary introduced an advertisement tax which constitutes a special tax applied on turnover derived from the broadcasting or publication of advertisements in Hungary. Economic operators that broadcast or publish advertisements are subject to that tax, that is to say, in particular, newspapers, audiovisual media and billposters. The taxable amount of the tax is the net turnover for the financial year generated by the broadcasting or publication of advertisements, to which progressive rates ranging from 0% to 50% per bracket of turnover are applied, the first taxable bracket commencing at 500 million Hungarian forint (HUF) (approximately €1 562 000). Subsequently, Hungary replaced that scale of six progressive rates by a scale comprising two rates: a 0% rate for the part of the taxable amount below HUF 100 million (approximately €312 000) and a second rate, of 5.3%, for the part of the taxable amount above that sum.

Taxable persons subject to advertisement tax whose pre-tax profits for the financial year 2013 were zero or negative could deduct from their 2014 taxable amount for that tax 50% of the losses carried forward from the earlier financial years.

By decision of 4 November 2016, the Commission found that the tax system relating to the advertisement tax, composed, first, of progressive tax rates and, secondly, provisions prescribing a reduction in that tax in the form of deduction of losses carried forward for undertakings that were not profit making in 2013, constituted a State aid measure incompatible with the internal market, introduced moreover unlawfully by Hungary. In that context, the Commission found that the progressive tax rates differentiated between undertakings with high advertisement revenues (and thus large undertakings) and undertakings with low advertisement revenues (and thus small undertakings), and that a selective advantage was granted to the latter based on their size. The Commission was also of the view that the 50% deductibility of losses carried forward granted a selective advantage constituting State aid. In those circumstances, the Commission ordered Hungary to ensure that no economic operator could benefit, on account of the tax at issue, from State aid incompatible with the internal market.

Hungary brought before the General Court an action for annulment of the Commission's decision.[1]

In today's judgment, as regards Hungary's application of the progressive rates at issue, the General Court finds in essence, for the same reasons as those set out in its recent judgment concerning the Polish tax on the retail sector,[2] that **the Commission was not entitled to infer that there were selective advantages constituting State aid solely from the progressive structure of the advertisement tax.**

[1] On 16 May 2017, Hungary repealed the advertisement tax with retroactive effect.
[2] Joint Cases: T-836/16 and T-624/17 Poland v Commission, see also Press Release No 64/19

First, in determining the ‘normal’ reference tax system for the tax at issue, in order to ascertain whether certain undertakings benefited from selective advantages, the Commission identified a ‘normal’ system which was either incomplete, without any tax rate, or hypothetical, with a single tax rate. According to the General Court, having regard to the progressive nature of the tax at issue and the absence of differentiated scales of rates for certain undertakings, the only ‘normal’ system which could be chosen in the present case was the advertisement tax itself, with its structure including its single scale of progressive rates and successive bands.

Secondly, nor was the Commission entitled to select for the tax at issue an objective other than that chosen by the Hungarian authorities — namely the objective of establishing sectoral taxation on turnover in accordance with a redistributive purpose — on the ground that the **scheme of the tax at issue**, characterised by a progressive tax structure, **would not have been consistent with that objective.** It may reasonably be presumed that an undertaking which achieves a high turnover may, because of various economies of scale, have proportionately lower costs than an undertaking with a smaller turnover. Consequently, an undertaking with high turnover may have proportionately greater disposable revenue which makes it capable of paying proportionately more in terms of turnover tax. A redistributive objective, such as that pursued in the present case, is, therefore, compatible with a turnover tax.

Thirdly, in the light of the objective sought by the Hungarian authorities, the Commission has failed to show that the tax variation selected entailed selective advantages. As regards a turnover tax such as the tax at issue, a variation criterion taking the form of progressive taxation above a certain threshold — even if that threshold is a high one — which may reflect the wish to tax an undertaking’s activity only when that activity reaches a certain level, does not in itself imply the existence of a selective advantage. Consequently, **the Commission’s characterisation of the advertisement tax as a measure entailing a selective advantage solely because of its progressive structure is unfounded.** In addition, the Commission failed to demonstrate that the progressive taxation structure actually chosen had been adopted in a manner which largely deprived the objective of the tax in question of its substance.

As regards whether the 50% deductibility of the losses of undertakings which were not profit making in 2013 was compatible with the internal market, the General Court finds that **that reduction in the taxable amount is established according to objective criteria irrespective of the choices of the undertakings concerned** and is not, therefore selective. In addition, the concern which the Hungarian legislature sought to meet in allowing that reduction accords with the advertisement tax’s objective. That objective includes a redistributive purpose with which the reduction in the basis of assessment, chosen in order to reduce the tax burden on undertakings that were not profit making the tax year preceding the year of taxation, is consistent.

Furthermore, the General Court holds that the distinguishing criterion chosen by Hungary of whether or not profits were generated in 2013 is objective and that it establishes a difference in treatment between undertakings not in a similar situation: the profit-making undertakings in 2013 and undertakings which did not make a profit that year.

The General Court concludes that **the 50% deductibility of the losses carried forward does not entail a discriminatory element contrary to the advertisement tax’s objective and, accordingly, does not constitute a selective advantage characterising State aid.**

In those circumstances, **the General Court annuls the contested decision in its entirety.**

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 and ten days of notification of the decision.

NOTE: An action for annulment seeks the annulment of acts of the institutions of the European Union that are contrary to European Union 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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