



Press and Information

Court of Justice of the European Union

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Judgment in Cases C-75/18 and C-323/18  
Vodafone Magyarország Mobil Távközlési Zrt. and Tesco-Global Áruházak  
Zrt. v Nemzeti Adó- és Vámhivatal Fellebbviteli Igazgatósága

## **The special taxes levied in Hungary on the turnover of telecommunications operators and of undertakings in the retail trade sector are compatible with EU law**

In the judgments **Vodafone Magyarország** (C-75/18) and **Tesco-Global Áruházak** (C-323/18), delivered on 3 March 2020, the Grand Chamber of the Court **held to be compatible with the principle of freedom of establishment and Directive 2006/112<sup>1</sup> ('the VAT Directive') the special taxes levied in Hungary on the turnover of telecommunications operators and of undertakings active in the retail trade sector.** The fact that those special taxes, the application of which to turnover is progressive (and steeply progressive in the case of the latter), are mainly borne by undertakings owned by persons of other Member States, due to the fact that those undertakings achieve the highest turnover in the Hungarian markets concerned, **reflects the economic reality of those markets and does not constitute discrimination against those undertakings.** The Court also held that, since the tax imposed on the telecommunications operators does not have all the essential characteristics of VAT, that tax cannot be treated as comparable to VAT, and consequently that tax does not jeopardise the functioning of the VAT system of the European Union and, therefore, is compatible with the VAT Directive.

Since questions were also referred to the Court on the compatibility of the Hungarian legislation enacting those special taxes with the EU rules on state aid, the Court initially gave a ruling on the admissibility of those questions.<sup>2</sup> In that regard, the Court recalled that taxes do not fall within the scope of the provisions of the FEU Treaty concerning State aid unless they constitute the method of financing an aid measure, so that they form an integral part of that measure. For a tax to be regarded as forming an integral part of an aid measure, it must be hypothecated to the aid measure under the relevant national rules. In this case, the Court found, however, that the applications for exemption from the special taxes submitted by the applicant companies to the Hungarian tax authorities concern general taxes, the revenue from which is transferred to the State budget, those taxes not being specifically allocated to the funding of a tax advantage for which a particular category of taxable persons qualify. The Court concluded that the special taxes imposed on those applicant companies are not hypothecated to the exemption for which some taxable persons qualify, and consequently any illegality under EU rules relating to State aid of such an exemption is not capable of affecting the legality of those special taxes themselves. Accordingly, the applicant companies cannot rely, before the national courts, on that possible illegality in order to avoid payment of those taxes.

Next, the Court examined whether the Hungarian legislation enacting the special taxes at issue constitutes discrimination based on where companies have their registered office, which is prohibited by the provisions of the FEU Treaty on freedom of establishment. In that regard, the Court, first, found that the parent companies of the applicants have their registered offices in the UK and in the Netherlands respectively, and that, since those parent companies conduct business

<sup>1</sup>Council Directive of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1).

<sup>2</sup>In 2019 the General Court annulled two decisions of the Commission that classified as State aid the Polish tax in the retail sector and the Hungarian advertisement tax [judgment of the General Court of 16 May 2019, Poland v Commission (Joined Cases [T-836/16 and T-624/17](#), Press Release No. [64/19](#)) and judgment of the General Court of 27 June 2019, Hungary v Commission (T-20/17, Press Release No. [84/19](#))]. Those judgments are subject to appeal before the Court ([C-562/19 P](#) and [C-596/19 P](#)).

in the Hungarian market through subsidiaries, their freedom of establishment may be affected by any restriction that affects those subsidiaries. The Court referred to its case-law on the prohibition of direct and indirect discrimination and then held that, in this case, the special taxes at issue make no distinction according to where companies have their registered office.

In that context, the Court stated, in the first place, that, since all the undertakings active in Hungary in the sectors concerned are liable to pay the taxes at issue and since the rates of taxation respectively applicable to the various bands of turnover apply to all those undertakings, the Hungarian legislation enacting those taxes does not establish any direct discrimination against undertakings owned by persons (natural or legal) of other Member States.

The Court, in the second place, determined whether the fact that the special taxes are (steeply) progressive may be considered to be a source of indirect discrimination against the latter undertakings.

In that regard, the Court found that, in relation to the tax years at issue, namely those covering the period from 1 April 2011 to 31 March 2015 in the *Vodafone* case and that from 1 March 2010 to 28 February 2013 in the *Tesco* case, the taxable persons that fell only within the base tax band, charged at 0%, were all taxable persons owned by Hungarian persons, whereas those falling within the higher tax bands were predominantly taxable persons owned by persons of other Member States. Accordingly, the greater part of the special tax was borne by taxable persons owned by persons of other Member States.

The Court recalled, however, that the Member States are free to establish the system of taxation that they deem the most appropriate and to establish progressive taxation on turnover, since the amount of turnover constitutes a criterion of differentiation that is neutral and a relevant indicator of a taxable person's ability to pay. In that context, the fact that the greater part of the special taxes at issue is borne by taxable persons owned by natural persons or legal persons of other Member States cannot be sufficient ground for the conclusion that there is discrimination against them. That situation is due to the fact that the markets concerned in the present cases are dominated by such taxable persons, who achieve the highest turnover in those markets. That situation is, accordingly, an indicator that is fortuitous, if not a matter of chance, which may arise whenever the market concerned is dominated by undertakings of other Member States or of non-Member States or by national undertakings owned by persons of other Member States or of non-Member States. Moreover, the basic band of tax charged at 0% does not exclusively affect taxable persons owned by Hungarian persons, since any undertaking operating on the market concerned has the benefit of the reduction for the proportion of its turnover that does not exceed the maximum amount of that band. Consequently, the (steeply) progressive rates of the special taxes at issue do not, inherently, create any discrimination, based on where companies have their registered office, between taxable persons owned by Hungarian persons and taxable persons owned by persons of other Member States.

Further, in the judgment in Case C-75/18, a question was referred to the Court on the compatibility of the introduction of the special tax on the turnover of telecommunications operators with the VAT Directive.<sup>3</sup> In that regard, the Court stated that it is necessary, in particular, to determine whether the tax in question has the effect of jeopardising the functioning of the common system of value added tax (VAT) by being levied on the movement of goods and services and on commercial transactions in a way comparable to VAT, which is the case when, inter alia, taxes have the essential characteristics of VAT. The Court found, however, that the Hungarian legislation enacting the special tax at issue does not provide for the charging of the tax at each stage of the production and distribution process or for a right to deduction of the tax paid during the preceding stages of that process. Accordingly, since two of the four essential characteristics laid down by the Court in its earlier case-law are not met by the special tax concerned, the VAT Directive does not preclude the introduction of that tax.

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<sup>3</sup>Article 401.

**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-75/18](#) and [C-323/18](#) are published on the CURIA website on the day of delivery.*

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

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