Court of Justice of the European Union
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Press and Information

Advocate General's Opinions in Cases C-562/19 P Commission v Poland and C-596/19 P Commission v Hungary

According to Advocate General Kokott, the Polish tax on the retail sector and the Hungarian advertisement tax do not infringe EU State aid rules

State aid rules do not preclude taxation of turnover of undertakings at a progressive rate

Following the international trend, Poland and Hungary introduced direct business taxes which are calculated according to turnover rather than profit and are based on a progressive rate structure. Such taxes primarily affect undertakings with a high turnover, that is to say, large undertakings.

On 6 July 2016, Poland adopted the Law on the tax on the retail sector, which came into force on 1 September 2016. According to that law, retailers were required to pay tax on their monthly turnover from the sale of goods to consumers where turnover exceeds 17 million Polish złoty (PLN; approximately EUR 4 million), at the rate of 0.8% on turnover between PLN 17 million and 170 million and at the rate of 1.4% for the portion of monthly turnover above that.

On 11 June 2014, Hungary enacted the Law on advertisement tax, pursuant to which broadcasters or publishers of advertisements (newspapers, audiovisual media, billposters) were required to pay tax at a progressive rate on annual net turnover generated by the broadcasting or publication of advertisements in Hungary (six rates of tax between 0% and 50%). Those rates of tax were subsequently replaced by just two tax rates, namely 0% for the portion of the taxable amount below HUF 100 million (approximately EUR 312 000) and 5.3% for the portion of the taxable amount above that. For the first tax year, as a transitional measure, the law provided for the apportionment of any losses from the previous year.

By decisions of 4 November 2016 [1] and 30 June 2017 [2], the Commission declared both taxes incompatible with the common market since they grant smaller undertakings, which are 'taxed at too low a level', an impermissible advantage and therefore constitute State aid.

Poland and Hungary challenged the Commission's decisions before the General Court of the European Union.

In its judgments of 16 May 2019[3] and 27 June 2019,[4] the **General Court** upheld the actions and **annulled the Commission's decisions since there was no evidence in either tax regime of any selective advantage and therefore State aid in favour of undertakings with lower turnover.** The Commission brought an appeal against both judgments before the Court of Justice.

In today's Opinions, Advocate General Juliane Kokott proposes that the Court of Justice dismiss the Commission's appeals and **uphold the General Court's judgments**.

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[1] 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).
[2] 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).
[3] 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)
[4] Judgment of the General Court of 27 June 2019, *Hungary* v *Commission* (T-20/17, see Press Release No 84/19).

She refers to the recent case-law of the Court of Justice [5] in the context of the fundamental freedoms, according to which progressive tax may be based on turnover since, first, the amount of turnover constitutes a criterion of differentiation that is neutral and, second, turnover constitutes a relevant indicator of a taxable person's ability to pay.

The same must apply to the rules on State aid. In the absence of relevant EU rules governing the matter, it falls within the tax competence of the Member States to designate bases of assessment and to spread the tax burden across the various factors of production and economic sectors. [6] In principle, only an exception to this autonomously designated tax system can be assessed on the basis of the rules on State aid, not the creation of the tax system itself.

It is not possible to infer 'normal' taxation from EU law. **The basis can only ever be the decision by the national legislature in question** as to what it deems to be normal taxation. In the present cases, this is an income tax for retailers or broadcasters or publishers of advertisements which is progressive in nature and the basis of assessment of which is turnover.

A generally applicable tax law – which, like here, just creates the reference framework – can therefore constitute aid only if its design was manifestly inconsistent. Such inconsistency in the Polish tax on the retail sector or the Hungarian advertisment tax was ultimately rightly found by the General Court not to exist.

Turnover-based income taxation – like profit-based income taxation – has its **advantages and disadvantages**. However, these must be weighed up and accounted for not by an authority or a court, but by a democratically mandated legislature. The tax legislature (here the Polish or Hungarian legislature) can decide which tax is, in its view, appropriate. In any case, the rules on State aid do not require the tax which is, in the Commission's view, most appropriate to be introduced.

Around the world turnover-based income taxes are on the rise, as is shown by the Commission's proposed digital services tax. That also uses annual turnover as the basis for the taxation of undertakings. The Polish tax on the retail sector or the Hungarian advertisment tax and the planned EU digital services tax are no different in this respect.

In addition, a progressive rate does not constitute an inconsistency per se. Progressive rates are a perfectly common means in income taxation of achieving taxation according to financial capacity. This holds both for profit-based income taxation and for turnover-based income taxation. High turnover does not necessarily lead to high profit, but high turnover is a prerequisite for high profit. The differentiation is therefore not inconsistent.

Nor does **the use within the first year of the advertisement tax of losses for the purposes of income tax,** as introduced by Hungary, constitute State aid. Since the fact that losses existed in the previous year is an objective criterion and undertakings with losses and undertakings with profits in the previous year are different in terms of the ability to bear additional non-profit-related taxation, the implementation of this transitional provision is similarly not inconsistent.

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: An appeal, on a point or points of law only, may be brought before the Court of Justice against a judgment or order of the General Court. In principle, the appeal does not have suspensive effect. If the

[5] Judgments of the Court of Justice of 3 March 2020, *Vodafone Magyarország* (C-75/18) and *Tesco-Global Áruházak* (C-323/18), see also Press Release No 20/20.
[6] Judgments of 26 April 2018, *ANGED* (C-233/16 to C-237/16, see also Press Release No 57/18), and of 15 November 2011, *Commission and Spain* v *Government of Gibraltar and United Kingdom* (C-106/09 P and C-107/09 P, see also Press Release No 120/11).

appeal is admissible and well founded, the Court of Justice sets aside the judgment of the General Court. Where the state of the proceedings so permits, the Court of Justice may itself give final judgment in the case. Otherwise, it refers the case back to the General Court, which is bound by the decision given by the Court of Justice on the appeal.

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