



Euro Tax Flash from KPMG's EU Tax Centre



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CJEU decisions on the Polish tax on the retail sector and the Hungarian tax on advertisements

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On March 16, 2021 the Court of Justice of the European Union ('CJEU' or 'Court') gave its decisions in the *Commission v Poland* ([C 562/19 P](#)) and *Commission v Hungary* ([C 596/19 P](#)) cases on the compatibility with EU State aid rules of the Polish tax on the retail sector and the Hungarian tax on advertisements, respectively. The key issue was whether these regimes constitute State aid since, due to their design (direct business taxes calculated according to turnover rather than profit and based on a progressive tax rate structure), they primarily affect companies with a high turnover, which the European Commission ('EC') found to represent a selective advantage for smaller undertakings.

The CJEU upheld the judgments of the EU General Court and ruled that neither the Polish tax nor the Hungarian tax infringe EU law since they are not manifestly discriminatory.

[Background](#)

On September 1, 2016 Poland introduced a tax on the retail sector which was based on the monthly turnover of any retailer from the sale of goods to consumers, where turnover exceeds PLN 17 million (approximately EUR 4 million) at the rate of 0.8 percent on turnover between PLN 17 million and 170 million and at the rate of 1.4 percent for the portion of monthly turnover above that threshold.

On August 15, 2014 Hungary enacted a tax on advertisements, requiring broadcasters or publishers of advertisements (newspapers, audio-visual media, billposters) to pay tax at a

progressive rate on annual net turnover generated by the broadcasting or publication of advertisements in Hungary, with six rates of tax between 0 percent and 50 percent. Those rates of tax were subsequently replaced by two tax rates: 0 percent for the portion of the taxable amount below HUF 100 million (approximately EUR 312,000), and 5.3 percent for the portion of the taxable amount above that threshold. For the first tax year, as a transitional measure, the law gave taxpayers whose profits before tax in 2013 were zero or negative the option to deduct from their taxable base 50% of the losses carried forward from previous years.

In the Commission's view, both taxes were incompatible with the common market because they granted undertakings with lower turnover an advantage in the form of a lower tax rate, and therefore constituted State aid incompatible with the internal market.

Poland and Hungary challenged the EC's decision before the General Court of the European Union ('General Court'). In its 2019 judgments, the General Court annulled the EC's decision, finding no evidence in either tax regime of any selective advantage and therefore no State aid in favour of undertakings with lower turnover.

The EC brought an appeal before the CJEU, which Advocate General ('AG') Kokott proposed should be dismissed in her [opinion](#) issued on October 15, 2020.

The CJEU decisions

In its decision the CJEU first recalled the conditions to be fulfilled in order for a national measure to be classified as State aid incompatible with the internal market, i.e.:

- there must be an intervention by the State or through State resources;
- such an intervention must be liable to affect trade between the Member States;
- it must confer a selective advantage on the recipient;
- it must distort, or threaten to distort, competition.

As regards the condition relating to the selectivity of the advantage, the CJEU notes that, on the basis of settled EU case-law, in order for a national measure to be classified as 'selective', it is up to the EC, first, to determine the reference system, or 'normal' tax system applicable in the relevant Member State and, second, to prove that the disputed tax measure constitutes a derogation from that reference systems, in so far as they favor 'certain undertakings or the production of certain goods' over other undertakings which, in the light of the objective pursued by that regime, are in a comparable factual and legal situation.

The CJEU noted that Member States are free to establish the tax systems that they deem most appropriate and have discretion over the application of progressive tax rates, provided that the characteristics of those systems do not entail any manifestly discriminatory element.

In line with existing case law (see Euro Tax Flash [Issue 426](#) for further details), the CJEU further noted that EU law does not preclude progressive taxation from being based on turnover, which represents a criterion of differentiation that is neutral and a relevant indicator of a taxable person's ability to pay.

The Court found that the EC had not established that the characteristics of the disputed measures had been designed in a manifestly discriminatory manner and could therefore be excluded from reference system. The CJEU upheld the General Court's view that, by not assessing the progressive scale of the measures as an integral part of the 'normal' regime, the EC had incorrectly relied on an incomplete and fictitious reference system.

In view of these considerations, the CJEU confirmed the General Court's decisions, and annulled the EC's decisions on the incompatibility with EU State aid rules of the Polish tax on the retail sector and the Hungarian tax on advertisements.

EU Tax Centre comment

The CJEU's decisions represent the end of a long-winded dispute between the European Commission on the one hand and Hungary and Poland on the other hand and confirm that the two Member States may choose to apply their respective tax regimes.

The CJEU's judgement refers strictly to the two disputed regimes and does not comment on the design of digital services taxes. However, in her October 2020 opinion, the AG drew a parallel between the disputed Polish and Hungarian taxes and the Commission's proposed digital services tax. The AG noted that the exemption limits in the Commission's 2018 proposal for an EU digital services tax result in a progressive rate curve and is therefore also a progressive tax on turnover, which is not – in and of itself, incompatible with EU law.

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