

Other party: Fédération des entreprises du recyclage

Question referred

Must Article 107 of the Treaty on the Functioning of the European Union be interpreted as meaning that a system such as that described in paragraphs 9 to 11, whereby a private, non-profit eco-body, approved by the public authorities, receives contributions from those who place on the market a particular category of product and who enter into a contract with it to that effect, in return for a service consisting in the organisation on their behalf of the treatment of the waste from those products, and redistributes to operators responsible for the sorting and recovery of that waste, subsidies the amount of which is set out in the approval, in the light of environmental and social targets, is to be regarded as State aid within the meaning of that provision?

Appeal brought on 2 July 2019 by the European Commission against the judgment delivered by the General Court of the European Union (Ninth Chamber, Extended Composition) on 16 May 2019 in Cases T-836/16 and T-624/17 Republic of Poland v European Commission

(Case C-562/19 P)

(2019/C 328/33)

Language of the case: Polish

Parties

Appellant: European Commission (represented by: K. Herrmann and P.-J. Loewenthal, acting as Agents)

Other parties to the proceedings: Republic of Poland, Hungary

Form of order sought

The appellant claims that the Court should:

- set aside the entirety of the judgment delivered by the General Court (Ninth Chamber, Extended Composition) in Joined Cases T-836/16 and T-624/17, *Republic of Poland v Commission* EU:T:2019:338; and
- dismiss the action brought by the Republic of Poland against the European Commission in Case T-836/16, seeking annulment of Commission Decision C(2016) 5596 final of 19 September 2016 on the State aid SA.44351 (2016/C) (ex 2016/NN) initiating the formal investigation procedure and containing an injunction suspending the Polish tax on the retail sector; dismiss the action brought by the Republic of Poland in Case T-624/17, seeking annulment of Commission 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; order the Republic of Poland to pay the costs of the proceedings at first instance and of the present proceedings;
- in the alternative, if the two actions are not dismissed in their entirety, refer the cases back to the General Court of the European Union for a new ruling on the pleas which were not examined at first instance and reserve the costs of the proceedings at first instance and of the present proceedings pending a final ruling in the case.

Grounds of appeal and main arguments

In support of its appeal, the Commission relies on two grounds of appeal.

By its first ground of appeal, the Commission claims that the General Court infringed Article 107(1) TFEU, in considering that the Polish tax on the retail sector is not selective. The error of law committed by the General Court is based on the following grounds:

- First, in paragraphs 63 to 68 of the judgment under appeal, the General Court was wrong to state that the Commission had erred in excluding the progressive rates of the Polish tax on the retail sector from the definition of the reference framework. Contrary to the General Court's statement, the approach adopted by the Commission in the decision closing the procedure is consistent with the case-law of the Court of Justice. The General Court therefore erred in law in determining the reference framework.

- Secondly, in paragraphs 69 to 78 of the judgment under appeal, the General Court was wrong to hold that the Commission had not correctly defined the aim of the tax on the retail sector, in the light of which the comparability of the undertakings was to be assessed. The Court of Justice has consistently held that only the tax objective of the measure, defined as the subject matter or chargeable event of the tax in question, is relevant for the purposes of assessing the comparability of undertakings. Other indissociably linked objectives, such as the capacity to pay, are only relevant for the purpose of assessment of objective justification for unequal treatment of comparable undertakings. Consequently, the fact that the General Court finds that the Polish tax on the retail sector has an alleged redistributive purpose when assessing the comparability of the undertakings constitutes an error of law.
- Thirdly, in paragraphs 79 to 93 of the judgment under appeal, the General Court was wrong to consider that the Commission had erred in stating that the progressive rates of the tax on the retail sector were not justified by a redistributive purpose. The General Court's finding that the Polish retail tax is not discriminatory and serves redistributive purposes is based on the incorrect assumption that undertakings with high revenue (turnover) are more profitable than undertakings with lower revenue (turnover). The General Court therefore erred in law in considering that the redistributive purpose, which is not inextricably linked to the tax on the retail sector, can justify unequal treatment of undertakings. In addition, by relying on that incorrect presumption, the General Court wrongly transferred the burden of proof in respect of justifying the progressive tax rates by the alleged redistributive purpose, the Commission thus being required to establish that no such justification exists.

By its second ground of appeal, the Commission claims that the General Court infringed, in paragraphs 104 to 109 of the judgment under appeal, Article 108(2) TFEU and Article 13(1) of Council Regulation (EC) No 2015/1589. The General Court held in the paragraphs cited that the Commission committed a manifest error of law in deciding to open the formal investigation procedure and ordering the suspension of the Polish tax on the retail sector. The General Court based that conclusion on an analysis of the decision closing the formal investigation procedure. The General Court erred in law in applying the same judicial review criterion to the decision to open the formal investigation procedure as to the assessment of the validity of the closing decision. In the case of the former decision, the General Court applied a higher standard of review instead of assessing whether the Commission manifestly could not entertain doubts as to whether the tax at issue was not selective.

Reference for a preliminary ruling from High Court (Ireland) made on 26 July 2019 — Irish Ferries Ltd v National Transport Authority

(Case C-570/19)

(2019/C 328/34)

Language of the case: English

Referring court

High Court (Ireland)

Parties to the main proceedings

Applicant: Irish Ferries Ltd

Respondent: National Transport Authority

Questions referred

A. Applicability of the Regulation ⁽¹⁾

- 1) Does the Regulation (in particular Articles 18 and/or 19) apply in circumstances where passengers have made advance bookings and entered into transport contracts and where the passenger services are cancelled with a minimum of seven weeks' notice prior to the scheduled departure due to the delay in the delivery of a new vessel to the ferry operator? In that regard, are any (or all) of the following matters relevant to the applicability of the Regulation:
 - a) Delivery was ultimately delayed by 200 days;