— 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 Courts 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;
b) The ferry operator had to cancel a full season of sailings;

c) No suitable alternative vessel could be obtained;

d) Over 20,000 passengers were rebooked by the ferry operator on different sailings or refunded their fares;

e) The sailings were on a new route being opened by the ferry operator with no similar alternative service on the route?

B. Interpretation of Article 18 of the Regulation

This question need only be answered if Article 18 is capable of applying.

2) Where a passenger is re-routed in accordance with Article 18 does a new transport contract come into existence such that the right to compensation under Article 19 is to be determined in accordance with that new contract rather than the original transport contract?

3) a) If Article 18 is applicable then if a sailing is cancelled and there was no alternative service operating on that route (i.e. no direct service between those two ports) does providing an alternative sailing on any other route or routes available and chosen by the passenger including by ‘landbridge’ (e.g., travelling from Ireland to the UK by ferry and then driving, with the fuel costs reimbursed to the passenger by the ferry operator, to a UK port with a connection to France and travelling from there to France with the passenger choosing each of the sailings) amount to ‘re-routing to the final destination’ for the purposes of Article 18? If not, what criteria are to be employed in determining if a re-routing is ‘under comparable conditions’?

b) If there is no alternative sailing on the cancelled route, such that the affected passenger cannot be accommodated on a direct sailing from the original port of embarkation to the final destination as set out in the transport contract, is the carrier required to pay any additional costs incurred by a re-routed passenger in travelling to and from the new port of embarkation and/or to and from the new port of destination?

C. Interpretation of Article 19 of the Regulation

4) a) Can Article 19 apply when the voyage has in fact already been cancelled at least seven weeks prior to the scheduled departure? If Article 19 does apply, does it apply where Article 18 has been applied and the passenger has been re-routed at no additional cost and/or reimbursed and/or has chosen a later sailing?

b) If Article 19 does apply what is the ‘final destination’ for the purposes of Article 19.

5) If Article 19 is capable of applying:

a) How is the period of delay to be measured in such circumstances?

b) How is the price within the meaning of Article 19 to be calculated when determining the level of compensation payable and in particular does it include costs referable to extras (e.g., cabins, kennels and premium lounges)?

D. Interpretation of Article 20(4)

6) If the Regulation does apply then do the circumstances and considerations outlined in Q.1 amount to ‘extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken’ for the purposes of Article 20(4) of the Regulation?
E. Interpretation of Article 24

7) Does Article 24 have the effect of imposing a mandatory obligation on any passenger seeking to benefit from compensation under Article 19 of the Regulation to make a complaint within two months from the date on which the service was performed or should have been performed?

F. Interpretation of Article 25

8) Is the jurisdiction of the national competent body responsible for the enforcement of the Regulation limited to sailings involving the ports specified in Article 25 of the Regulation or may it also extend to a return sailing from the port of another Member State to the state of the national competent body?

G. The validity of the Decision and the Notices

9) a) What principles and rules of EU law should the referring court apply in assessing the validity of the Decision and/or the Notices of the national enforcement body by reference to Article 16, 17, 20 and/or 47 of the Charter (1) and/or principles of proportionality, legal certainty, and equal treatment?

b) Is the test of unreasonableness that should be applied by the domestic court that of manifest error?

H. Validity of Regulation 1177/2010

This question will only arise depending on the answers to the previous questions.

10) Is Regulation 1177/2010 valid as a matter of EU law having regard in particular to:

a) Articles 16, 17, and 20 of the Charter?

b) The fact that airline operators have no obligation to pay compensation if it informs the airline passenger of the cancellation at least two weeks before the scheduled time of departure [Article 5(1) (c)(i) of Regulation 261/2004 (2)]?

c) The principles of proportionality, legal certainty and equal treatment?

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Reference for a preliminary ruling from Supreme Court of the United Kingdom (United Kingdom) made on 30 July 2019 — X v Kuoni Travel Ltd

(Case C-578/19)

(2019/C 328/35)

Language of the case: English

Referring court

Supreme Court of the United Kingdom (United Kingdom)

Parties to the main proceedings

Applicant: X