COMMISSION 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

(notified under document C(2016) 6929)

(Only the Hungarian text is authentic)

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union, and in particular the first subparagraph of Article 108(2) thereof,

Having regard to the Agreement on the European Economic Area, and in particular Article 62(1)(a) thereof,

Having called on interested parties to submit their comments pursuant to the provisions cited above ([1]) and having regard to their comments,

Whereas:

1. PROCEDURE

(1) In July 2014, the Commission became aware that Hungary had adopted a legislative act on the basis of which turnover from advertising activities is taxed (hereinafter: 'the advertisement tax'). By letter of 13 August 2014, the Commission sent an information request to the Hungarian authorities, to which they replied by letter of 2 October 2014. By letter of 1 December 2014, the Hungarian authorities were asked another set of questions, in response to which they submitted additional information by letter of 16 December 2014.

(2) By letter of 2 February 2015, the Hungarian authorities were informed that the Commission would consider issuing a suspension injunction decision in accordance with Article 11(1) of Council Regulation (EC) No 659/1999 ([2]). By letter of 17 February 2015, the Hungarian authorities submitted their comments on that letter.

(3) By decision of 12 March 2015, the Commission informed Hungary that it had decided to initiate the procedure laid down in Article 108(2) of the Treaty (hereinafter: 'the Opening Decision') and issue a suspension injunction in accordance with Article 11(1) of Regulation (EC) No 659/1999 in respect of the measure.

(4) The Opening Decision and suspension injunction were published in the *Official Journal of the European Union* ([3]). The Commission invited interested parties to submit their comments on the measure.

(5) The Commission received comments from three interested parties. It forwarded them to the Hungarian authorities who were given the opportunity to react.

(6) On 21 April 2015, the Hungarian authorities sent a draft proposal to the Commission for an amendment of the advertisement tax. On 8 May 2015, the Commission requested information from Hungary as regards the planned amendment.

([1]) OJ C 136, 24.4.2015, p. 7.

([2]) Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 108 of the treaty on the functioning of the European Union (OJ L 83, 27.3.1999, p. 1), repealed and replaced by Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (OJ L 248, 24.9.2015, p. 9).

([3]) Cf. footnote 1.

(7) On 4 June 2015, Hungary amended the advertisement tax, without prior notification to — or authorisation by — the Commission. On 5 July 2015, the amendments entered into force.

(8) By letter of 6 July 2015, Hungary provided observations on the Opening Decision and on interested parties' comments, as well as clarifications on the amendment to the advertisement tax.

2. **DETAILED DESCRIPTION OF THE ADVERTISEMENT TAX**

2.1. *SCOPE OF THE TAX AND TAX BASE*

(9) On 11 June 2014, Hungary adopted Act XXII of 2014 on Advertisement Tax (hereinafter: 'the Act'), with further amendments on 4 July and 18 November 2014. The Act introduced a new special tax on turnover derived from the publication of advertisements in Hungary and applies in addition to existing business taxes, in particular income tax. According to Hungary, the purpose of the Act is to promote the principle of public burden sharing.

(10) The advertisement tax is due on turnover derived from the publication of advertisements in the media spaces specified under the Act (e.g. in media services; in press materials; on outdoor advertising media; on any vehicle or immovable property; in printed material; and on the internet). The tax applies to all media undertakings and the taxable person is in principle the publisher of the advertisement. The territorial scope of the tax is Hungary.

(11) The tax base to which the tax is applied is the turnover of the publisher derived from the advertising services provided by it, without deduction of any costs. The tax base of affiliated companies is aggregated. Therefore, the applicable tax rate is determined by the advertising turnover derived by the entire group in Hungary.

(12) There is a special tax base for self-advertising, i.e. advertisement relating to the publisher's own products, goods, services, activities, name and appearance. In this case, the tax base to which the tax is applied is the costs directly incurred by the publisher in connection with publishing the advertisement.

2.2. *PROGRESSIVE TAX RATES*

(13) The Act laid down a progressive rates structure with rates ranging from 0 % and 1 % for companies with small or medium-sized advertising turnover to 50 % for companies with high advertising turnover as follows:

— for the part of the turnover below HUF 0,5 billion: 0 %

— for the part of the turnover between HUF 0,5 billion and 5 billion: 1 %

— for the part of the turnover between HUF 5 billion and 10 billion: 10 %

— for the part of the turnover between HUF 10 billion and 15 billion: 20 %

— for the part of the turnover between HUF 15 billion and 20 billion: 30 %

— for the part of the turnover above HUF 20 billion: 50 %.

(14) The top bracket was increased from 40 % to 50 % as from 1 January 2015 by Act LXXIV of 2014 on the modification of certain tax and related legislation and the Act CXXII of 2010 on the National Tax and Customs Administration, which amended the Act.

2.3. *DEDUCTION OF LOSSES CARRIED-FORWARD FROM THE 2014 TAX BASE*

(15) Under the Act, companies could deduct from their 2014 tax base 50 % of the losses carried-forward from the previous years under corporate and dividend tax law or personal income tax law.

(16) An amendment of 4 July 2014 to that Act limits that deduction to companies that were not profit-making in 2013 (i.e. only if the amount of pre-tax profit in the 2013 business year is zero or negative). Therefore, companies that carried forward losses from previous years, but were profit-making in 2013, are not eligible for the deduction. According to Hungary, the objective of the amendment is to prevent tax avoidance and circumvention of tax obligations.

(17) The possibility to deduct losses carried-forward applies only to the tax due for 2014. It does not apply to the tax due for 2015 or the following years.

2.4. *DETERMINATION OF THE TAX LIABILITY AND DECLARATION*

(18) According to the Act, the taxpayer determines its tax liability by self-assessment and returns a declaration to the tax authority by the last day of the fifth month following the tax year.

2.5. *PAYMENT OF THE TAX*

(19) The Act provides that the taxpayer shall determine and declare its tax liability, and pay the tax by the last day of the fifth month following the tax year.

(20) For 2014, the tax was due pro rata from the entry into force of the Act on 18 July 2014 on the basis of the advertising turnover of 2014. The taxpayer had to determine and declare a tax advance for 2014 (based on its advertising turnover of 2013) by 20 August 2014, and pay it in two equal instalments by 20 August 2014 and 20 November 2014.

(21) According to the provisional data received from the Hungarian authorities, as of 28 November 2014, a total amount of HUF 2 640 100 000 (~ EUR 8 500 000) was collected in tax advances for 2014. Approximately 80 % of the total tax revenue collected from those advances was paid by one group of companies.

2.6. *THE AMENDMENTS INTRODUCED BY ACT LXII OF 2015 OF 4 JUNE 2015*

(22) By Act LXII of 2015 of 4 June 2015, after the Opening Decision had been adopted, Hungary amended the Advertisement Tax Act by replacing the progressive scale of six tax rates ranging from 0 % to 50 % by a dual rate system as follows:

— 0 % applicable on the part of the turnover that does not exceed HUF 100 million, and

— 5,3 % applicable on the turnover that exceeds HUF 100 million.

(23) The amendment introduces an optional retroactive application back to the entry into force of the Act in 2014. In other words, taxpayers can choose, for the past, to be subject either to the new dual rate system or to remain subject to the old progressive scale of six tax rates.

(24) The provisions on deduction from the 2014 tax base of losses carried-forward, which is limited to companies that were not profit-making in 2013, remain unchanged.

3. **THE FORMAL INVESTIGATION PROCEDURE**

3.1. *GROUNDS FOR INITIATING THE FORMAL INVESTIGATION PROCEDURE*

(25) The Commission opened the formal investigation procedure because it considered at that stage that the progressivity of the tax rates and the provisions on the deduction of losses carried-forward from the tax base as laid down in the Act constituted State aid.

(26) The Commission considered that the progressive tax rates differentiate between undertakings with high advertisement revenues (and thus larger undertakings) and undertakings with low advertisement revenues (and thus smaller undertakings), and grant a selective advantage to the latter based on their size. The Commission had doubts whether ability to pay, which has been referred to by Hungary, could serve as the guiding principle for turnover taxes. The Commission therefore considered, on a preliminary basis, that the progressive character of the advertisement tax rate under the Act constituted State aid, since all the other criteria for such a qualification also seemed to be fulfilled.

(27) The Commission also considered that the provisions of the Act allowing the deduction of past losses carried-forward under corporate and dividend tax law or personal income tax law from the tax due and, in particular, the limitation to undertakings that were not profit-making in 2013, differentiate between companies that are, in the light of a turnover-based tax, in a comparable situation. It considered that the provisions appear to grant a selective advantage to undertakings which were not profit-making in 2013 compared to undertakings which were not profit making the years before or have not been loss making at all. The Commission considered that differential treatment not to be justified by the nature and logic of the tax system, in particular since Hungary has argued that the advertisement tax is based on the idea that the mere receipt of advertisement revenues justifies taxation. The Commission therefore considered that those provisions constitute State aid, since all the other criteria for such a qualification seemed to be fulfilled.

(28) The measures did not appear compatible with the internal market.

3.2. *COMMENTS FROM INTERESTED PARTIES*

(29) The Commission received comments from three interested parties.

(30) The *Hungarian Advertising Association* described the state of the advertisement industry in Hungary and expressed concerns about the advertisement tax as such. It considers that the tax places an additional burden on a sector already hit by decreasing revenues. It points out that any advertisement tax on small media companies can drive those companies out of the market because of their low profit margins.

(31) *TV2*, a Hungarian private TV operator, submitted comments only on the deduction of past losses carried-forward for corporate and personal income tax purposes. TV2 considers that the provision concerning the offsetting of past losses is non-selective because it falls within the scope of discretion of a Member State to design a turnover-based tax while at the same time taking into account elements of a tax based on the ability to pay. If the Commission were to find an element of selectivity in the rules on the deduction of past losses, this element could only be the further restriction to companies that were not profit-making in 2013, but not the general rule allowing for the deduction of past losses.

(32) *RTL* agrees with the Commission's assessment in the Opening Decision. It submitted that there are two additional elements of selectivity created by the advertisement tax: (i) the tax would benefit public broadcasters over commercial broadcasters, because the former are allegedly primarily financed through State funding and therefore less affected by the tax; (ii) the tax would benefit Hungarian-owned broadcasters over international players because Hungarian-owned broadcasters allegedly have typically lower advertising revenues than larger international players.

3.3. *POSITION OF THE HUNGARIAN AUTHORITIES*

(33) The Hungarian authorities contest that the measures constitute aid. In essence, they argue that the ability to pay is not only reflected by the profitability of an undertaking, but also by its market share and therefore its turnover. Hungary argues that progressive tax rates for a turnover-based tax are justified by the ability to pay and that it falls within the national competence to define the precise rate brackets. Hungary considers that the transitional measure for companies not profitable in 2013 is justified because for those companies the tax burden would be too high without this measure.

(34) Hungary contests the selective nature of the tax scheme, in particular, by arguing that there is no derogation from the reference system, since the system of reference in the case of progressive taxes is the combination of the tax base and the corresponding tax rates. Therefore, companies in the same legal and factual situation (that have the same tax base) are subject to the same amount of tax.

3.4. *COMMENTS FROM HUNGARY ON INTERESTED PARTIES' COMMENTS*

(35) Hungary stated that the submission of the Hungarian Advertisement Association correctly describes the functioning of the Hungarian advertisement market and, in particular, draws conclusions that smaller undertakings and new entrants are in a more difficult position than larger undertakings with higher turnover. Therefore, the position of smaller players in the advertisement market is not comparable with that of larger publishers which have the ability to pay more and should bear a progressively higher tax burden.

(36) Hungary agrees with the comments of TV2 and points out that it follows from the judgment of the Court of Justice in the Gibraltar case that profitability as a taxation criterion is a general tax measure because it results from a random fact.

(37) Hungary disagrees with the arguments of RTL on the grounds already explained in its previous submissions. Hungary further explains that the Act treats public and commercial broadcasters equally and any publication of advertisement for remuneration is subject to the same tax liability.

4. **ASSESSMENT OF THE AID**

4.1. *PRESENCE OF STATE AID WITHIN THE MEANING OF ARTICLE 107(1) TFEU*

(38) According to Article 107(1) of the TFEU, 'save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market'.

(39) The qualification of a measure as aid within the meaning of this provision therefore requires the following cumulative conditions to be met: (i) the measure must be imputable to the State and financed through State resources; (ii) it must confer an advantage to its recipient; (iii) that advantage must be selective; and (iv) the measure must distort or threaten to distort competition and affect trade between Member States.

4.1.1. STATE RESOURCES AND IMPUTABILITY TO THE STATE

(40) To constitute State aid, a measure must be imputable to a Member State and financed through State resources.

(41) Since the contested measures result from an Act of the Hungarian Parliament, it is clearly imputable to the Hungarian State.

(42) As regards the measure's financing through State resources, where the result of a measure is that the State forgoes revenues which it would otherwise have to collect from an undertaking in normal circumstances, that condition is also fulfilled ([4]). In the present case, Hungary waives resources it would otherwise have to collect from undertakings with a lower level of relevant turnover (and thus smaller undertakings), if they had been subject to the same level of tax as undertakings with a higher turnover (and thus larger undertakings).

4.1.2. ADVANTAGE

(43) According to the case-law of the Union Courts, the notion of aid embraces not only positive benefits, but also measures which, in various forms, mitigate the charges which are normally included in the budget of an undertaking ([5]). An advantage may be granted through different types of reduction in a company's tax burden

([4]) Case C-83/98 P *France* v *Ladbroke Racing Ltd and Commission* EU:C:2000:248 and EU:C:1999:577, paragraphs 48 to 51. Likewise, a measure allowing certain undertakings a tax reduction or to postpone payments of tax normally due can amount to State aid, see Joined Cases C-78/08 to C-80/08 *Paint Graphos and Others*, paragraph 46.

([5]) Case C-143/99 *Adria-Wien Pipeline*, EU: C: 2001:598, paragraph 38.

and, in particular, through a reduction in the applicable tax rate, taxable base or in the amount of the tax due ([6]). Although a tax reduction does not involve a positive transfer of resources from the State, it gives rise to an advantage by virtue of the fact that it places the undertakings to which it applies in a more favourable financial position and results in a loss of income to the State ([7]).

(44) The Act lays down progressive rates of taxation that apply to the annual turnover derived from the publication of advertisements in Hungary depending on the brackets into which an undertaking's turnover falls. The progressive character of those rates has the effect that the percentage of tax levied on an undertaking's turnover increases progressively depending on the number of brackets within which that turnover falls. This has the result that undertakings with low turnover (smaller undertakings) are taxed at a substantially lower average rate than undertakings with high turnover (larger undertakings). Being taxed at this substantially lower average tax rate mitigates the charges that undertakings with low turnover have to bear as compared to undertakings with high turnover and therefore constitutes an advantage to the benefit of smaller undertakings over larger undertakings for the purposes of Article 107(1) of the Treaty.

(45) Equally, the possibility under the Act to deduct losses carried-forward for corporate or personal income tax purposes constitutes an advantage for those undertakings that were not profit-making in 2013, since it reduces their tax base and thus their tax burden as compared to undertakings that cannot benefit from that deduction.

4.1.3. SELECTIVITY

(46) A measure is selective if it favours certain undertakings or the production of certain goods within the meaning of Article 107(1) of the Treaty. For fiscal schemes the Court of Justice has established that the selectivity of the measure should in principle be assessed by means of a three-step analysis ([8]). First, the common or normal tax regime applicable in the Member State is identified: 'the reference system'. Second, it should be determined whether a given measure constitutes a derogation from that system insofar as it differentiates between economic operators who, in light of the objectives intrinsic to the system, are in a comparable factual and legal situation. If the measure in question does not constitute a derogation from the reference system, it is not selective. If it does (and therefore is prima facie selective), it must be established, in the third step of the analysis, whether the derogatory measure is justified by the nature or the general scheme of the reference tax system ([9]). If a prima facie selective measure is justified by the nature or the general scheme of the system, it will not be considered selective and it will thus fall outside the scope of Article 107(1) of the Treaty.

4.1.3.1. ***System of reference***

(47) The reference system constitutes the framework against which the selectivity of a measure is assessed.

(48) In the present case, the reference system is the application of a special advertisement tax on turnover derived from the provision of advertising services, i.e. the full remuneration received by publishers for the publication of advertisements, without deduction of any costs. The Commission does not consider that the progressive rate structure of the advertisement tax can form a part of that reference system.

(49) As the Court of Justice has specified ([10]), it is not always sufficient to confine the selectivity analysis to whether a measure derogates from the reference system as defined by the Member State. It is also necessary to evaluate whether the boundaries of that system have been designed by the Member State in a consistent manner or, conversely, in a clearly arbitrary or biased way, so as to favour certain undertakings over others. Otherwise,

([6]) See Case C-66/02, *Italy* v *Commission*, EU: C: 2005:768, paragraph 78; Case C-222/04, *Cassa di Risparmio di Firenze and Others*, EU: C: 2006:8, paragraph 132; Case C-522/13, *Ministerio de Defensa and Navantia*, EU: C: 2014:2262, paragraphs 21 to 31. See also point 9 of the Commission notice on the application of the State aid rules to measures relating to direct business taxation (OJ C 384, 10.12.1998, p. 3).

([7]) Joined Cases C-393/04 and C-41/05, *Air, Air Liquide Industries Belgium* EU: C: 2006:403 and EU: C: 2006:216, paragraph 30 and Case C-387/92 *Banco Exterior de España* EU: C: 1994:100, paragraph 14.

([8]) See, for example, Case C-279/08 P *Commission* v *Netherlands (NOx)* EU:C:2011:551; Case C-143/99 *Adria-Wien Pipeline* EU: C: 2001:598, Joined Cases C-78/08 to C-80/08, *Paint Graphos and others* EU:C:2011;550 and EU:C:2010:411, Case C-308/01 *GIL Insurance* EU:C:2004:252 and EU:C:2003;481.

([9]) Commission Notice on the application of the State aid rules to measures relating to direct business taxation.

([10]) Joined Cases C-106/09 P and C-107/09 P *Commission and Spain* v *Government of Gibraltar and United Kingdom* EU:C:2011:732.

instead of laying down general rules applying to all undertakings from which a derogation is made for certain undertakings, the Member State could achieve the same result, side stepping the State aid rules, by adjusting and combining its rules in such a way that their very application results in a different burden for different undertakings ([11]). It is particularly important to recall in that respect that the Court of Justice has consistently held that Article 107(1) of the Treaty does not distinguish between measures of State intervention by reference to their causes or their aims, but defines them in relation to their effects, and thus independently of the techniques used ([12]).

(50) The progressive tax structure introduced by the Act appears deliberately designed by Hungary to favour certain undertakings over others. Under the progressive tax structure introduced under the Act, the undertakings publishing advertisements are subject to different tax rates progressively increasing from 0 % towards 50 %, depending on the brackets into which their turnover falls. Consequently, a different average tax rate applies to undertakings subject to the advertisement tax depending on the level of their turnover.

(51) The effect of the progressive rate structure introduced by the Act is therefore that different undertakings are subject to different levels of taxation (expressed as a proportion of their overall annual advertisement turnover) depending on their size, since the amount of advertisement turnover achieved by an undertaking correlates to a certain extent with the size of that undertaking.

(52) Because each company is taxed at a different rate, it is not possible for the Commission to identify one single reference rate in the advertisement tax. Hungary did not present any specific rate as the reference rate or 'normal' rate and did not explain either why a higher rate would be justified for undertakings with a high level of turnover, nor why lower rates should apply to undertakings with lower levels of advertisement turnover.

(53) The stated objective of the advertisement tax is to promote the principle of public burden sharing. In light of that objective, the Commission considers all operators subject to the advertisement tax to be in a comparable legal and factual situation. As a consequence, unless it is duly justified, all operators should be treated equally and pay the same proportion of their turnover, regardless of their level of turnover. The Commission observes that the consequence of the application of a single tax rate to all operators is already that those with higher turnovers contribute more to the State budget than those with low turnovers. Hungary has advanced no convincing argument justifying the discrimination between those types of undertakings by progressively imposing a proportionately higher tax burden on those with a higher advertisement turnover. Hungary has therefore deliberately designed the advertisement tax in such a manner so as to arbitrarily favour certain undertakings, namely those with a lower level of turnover (and thus smaller undertakings), and disadvantage others, namely larger undertakings ([13]).

(54) The reference system is therefore selective by design in a way that is not justified in light of the objective of the advertisement tax, which is to promote the principle of public burden sharing and collect funds for the State budget.

(55) In the same manner, the possibility of deducting past losses carried-forward for corporate and personal income tax purposes from the 2014 tax base, cannot be considered as part of the reference system in this case for at least two reasons. On the one hand, the tax is based on the taxation of turnover as opposed to profit-based tax, which means that costs are normally not deductible from the tax base of a turnover tax. The Hungarian authorities have not been able to explain in this case how this possibility of deduction of costs could be linked to the objective or the nature of the turnover tax. On the other hand, the possibility of deduction is only offered to undertakings, that were not profit-making in 2013. It's not a general rule of deduction and this possibility of deduction appears as being arbitrary or at least not consistent enough to be part of a reference system.

(56) In the Commission's view, the reference system for the taxation of advertisement turnover should be a tax on advertisement turnover which would comply with State aid rules i.e. where:

— advertisement turnovers are subject to the same (single) tax rate,

— no other element is maintained or introduced that would provide a selective advantage to certain undertakings

([11]) Ibid, paragraph 92

([12]) Case C-487/06 P *British Aggregates* v *Commission* EU:C:2008:757, paragraphs 85 and 89 and the case-law cited, and Case C-279/08 P *Commission* v *Netherlands* (NOx) EU:C:2011:551, paragraph 51.

([13]) Joined Cases C-106/09 P and C-107/09 P *Commission and Spain v Government of Gibraltar and United Kingdom* EU:C:2011:732.

4.1.3.2. ***Derogation from the system of reference***

(57) As a second step, it is necessary to determine whether the measure derogates from the reference system in favour of certain undertakings which are in a similar factual and legal situation in light of the intrinsic objective of the system of reference.

(58) The progressivity of the advertisement tax rate structure creates a differentiation amongst undertakings carrying out the activity of publication of advertisement in Hungary based on the scale of their advertisement activity, as reflected in their advertisement turnover.

(59) Indeed, due to the progressive character of the rates laid down by the Act, undertakings with turnover falling in lower brackets are subject to substantially lower taxation than undertakings with turnover falling in higher brackets. As a result, undertakings with low turnover are subject to both substantially lower marginal tax rates and substantially lower average tax rates as compared to undertakings with high levels of turnover, and therefore to substantially lower taxation for the same activities. In particular, the Commission notes that for undertakings with higher advertising turnovers the taxation of turnover falling in the top brackets (30 %/40 %/50 %) is exceptionally high and therefore results in a very substantial differential treatment.

(60) Moreover, the data on the tax advance payments submitted by the Hungarian authorities on 17 February 2015 show that the 30 % and 40 %/50 % tax rates applicable to advertising turnover falling within the two highest brackets have effectively only applied to one undertaking in 2014 and that this undertaking has paid approximately 80 % of the total revenue of the tax advances received by the Hungarian State. Those figures demonstrate the concrete effects of the differential treatment of undertakings under the Act and the selective character of the progressive rates laid down in it.

(61) Hence, the Commission considers that the progressive rate structure introduced by the Act derogates from the reference system consisting of the imposition of an advertisement tax on all operators involved in the publication of advertisements in Hungary in favour of undertakings with lower turnover.

(62) The Commission also considers the possibility for undertakings that were not profit-making in 2013 to deduct from the 2014 tax base past losses carried-forward for corporate and personal income tax purposes to derogate from the reference system, i.e. from the general rule to tax operators on the basis of their turnover from advertisement. The tax is based on the taxation of turnover as opposed to a profit-based tax, which means that costs are normally not deductible from the tax base of a turnover tax.

(63) In particular, the restriction of the deduction of losses to undertakings that were not profit-making in 2013 differentiates between, on the one hand, undertakings that had losses carried-forward, and were not profit-making in 2013 and, on the other hand, undertakings that were profit-making in 2013 but could have had losses carried-forward from previous fiscal years. Moreover, the provision does not limit the losses that can be offset against the advertisement tax liability to those incurred in 2013, but allows an undertaking that was not profit-making in 2013 to use losses carried-forward from previous years as well. Furthermore, the Commission considers that the deduction of losses already existing at the time of the adoption of the Advertisement Tax Act entails selectivity because the allowance of that deduction could favour certain undertakings with substantial losses carried-forward.

(64) The Commission considers that the provisions of the Act allowing — under the conditions laid down in the Act — the deduction of losses carried-forward differentiate between undertakings that are in a comparable legal and factual situation in light of the objective of the Hungarian advertisement tax.

(65) Therefore, the Commission considers that the measures are prima facia selective.

4.1.3.3. ***Justification by the nature and general scheme of the tax system***

(66) A measure which derogates from the reference system is not selective if it is justified by the nature or general scheme of that system. This is the case where it is the result of inherent mechanisms necessary for the functioning and effectiveness of the system ([14]). It is for the Member State to provide such justification.

([14]) See for example Joined Cases C-78/08 to C-80/08 *Paint Graphos and others* EU:C:2011;550 and EU:C:2010:411, paragraph 69.

Progressivity of the rates

(67) The Hungarian authorities have argued that the turnover and the size of an undertaking reflect the ability of that undertaking to pay and therefore that an undertaking with high advertising turnover has a higher ability to pay than an undertaking with lower advertising turnover. The Commission considers that the information provided by Hungary established neither that the turnover of a group of companies is a good proxy for its ability to pay nor that the pattern of progressivity of the tax is justified by the nature and general scheme of the tax system.

(68) It is a natural consequence of (single-rate) turnover taxes that the bigger the turnover of a company is, the more tax it pays. As opposed to taxes based on profit ([15]), a turnover-based tax is however not intended to take into account — and indeed does not take into account — any of the costs incurred in the generation of that turnover. Therefore, in the absence of specific evidence to the contrary, the level of turnover generated cannot automatically be considered as reflecting the ability to pay of the undertaking. Hungary has not demonstrated the existence of the alleged relationship between turnover and ability to pay nor that such relationship would be correctly mirrored in the pattern of progressivity (from 0 % to 50 % of turnover) of the advertisement tax.

(69) The Commission considers that progressive rates for taxes on turnover could only be justified exceptionally, that is if the specific objective pursued by a tax indeed requires progressive rates. Progressive turnover taxes could, for example, be justified if the externalities created by an activity that the tax is supposed to tackle also increase progressively — i.e. more than proportionately — with its turnover. However, Hungary did not provide any justification of the progressivity of the tax by the externalities possibly created by advertisement.

Deduction of losses carried-forward

(70) As regards the deduction of losses carried-forward for undertakings that were not profit-making in 2013, such deduction cannot be justified as a measure to prevent tax avoidance and the circumvention of tax obligations. The measure introduces an arbitrary distinction between two groups of companies that are in a comparable legal and factual situation. Since the distinction is arbitrary and not in line with the nature of a turnover based tax, as described in recitals 62 and 63, it cannot be considered a consistent anti-abuse rule that would justify a differential treatment.

Conclusion on the justification

(71) As a consequence, the Commission considers that ability to pay cannot serve as a guiding principle for the Hungarian advertisement turnover tax. Accordingly, the Commission does not consider the measures to be justified by the nature and general scheme of the tax system. Therefore, the measures confer a selective advantage on advertisement companies with a lower level of turnover (and thus smaller undertakings) and to undertakings that were not profit-making in 2013 and could deduct losses carried-forward from the 2014 tax base.

4.1.4. POTENTIAL DISTORTION OF COMPETITION AND EFFECT ON INTRA-UNION TRADE

(72) According to Article 107(1) of the Treaty, a measure must distort or threaten to distort competition and have an effect on intra-Union trade to constitute State aid.

(73) The measures apply to all undertakings deriving turnover from the publication of advertisements in Hungary. The Hungarian advertisement market is open to competition and characterised by the presence of operators from other Member States, so that any aid in favour of certain advertisement operators is liable to affect intra-Union trade. Indeed, the measures have an influence on the competitive situation of the undertakings subject to the tax. The measures relieve undertakings with lower levels of turnover and undertakings that were not profit-making in 2013 from a tax liability they would otherwise have had to pay, had they been subject to the same advertisement tax as undertakings with a high level of turnover and/or undertakings that were profit-making in 2013. Therefore, the aid granted under those measures constitutes operating aid in that it relieves those undertakings

([15]) See Commission notice on the application of the State aid rules to measures relating to direct business taxation, para. 24. The statement on the redistributive purpose that can justify a progressive tax rate is explicitly only made as regards taxes on profits or (net) income, not as regards taxes on turnover.

from a charge that they would normally have had to bear in their day-to-day management or normal activities. The Court of Justice has consistently held that operating aid distorts competition ([16]), so that any aid granted to those undertakings should be considered to distort or threaten to distort competition by strengthening their financial position on the Hungarian advertisement market. Consequently, the measures distort or threaten to distort competition and have an effect on intra-Union trade.

4.1.5. CONCLUSION

(74) Since all the conditions laid down by Article 107(1) of the Treaty are met, the Commission concludes that the advertisement tax laying down a progressive tax rates structure and the deduction of losses carried-forward from the 2014 tax base limited to companies that were not profit-making in 2013, constitutes State aid within the meaning of that provision.

4.2. *COMPATIBILITY OF THE AID WITH THE INTERNAL MARKET*

(75) State aid shall be deemed compatible with the internal market if it falls within any of the categories listed in Article 107(2) of the Treaty ([17]) and it may be deemed compatible with the internal market if it is found by the Commission to fall within any of the categories listed in Article 107(3) of the Treaty ([18]). However, it is the Member State granting the aid which bears the burden of proving that State aid granted by it is compatible with the internal market pursuant to Articles 107(2) or 107(3) of the Treaty ([19]).

(76) The Commission notes that the Hungarian authorities did not provide any argument liable to establish that the measures would be compatible with the internal market and that Hungary did not comment on the doubts expressed in the Opening Decision as regards the compatibility of the measures. The Commission considers that none of the exceptions provided for in the aforementioned provisions of the Treaty apply, since the measures do not appear to aim to achieve any of the objectives listed in those provisions.

(77) Consequently, the measures cannot be declared compatible with the internal market.

4.3. *IMPACT OF THE 2015 AMENDMENT OF THE ADVERTISEMENT TAX ON THE STATE AID ASSESSMENT*

(78) The advertisement tax introduced by Act XXII of 2014 — as described in the Opening Decision — stopped to apply as of the date of the Commission decision to open the formal investigation and issue a suspension injunction. However, the 2014 advertisement tax was modified by the Hungarian authorities in June 2015, without prior notification and/or approval by the Commission, and therefore the tax continued to apply in its amended version. The Commission considers that the amended version of the advertisement tax is based on the same principles as the initial tax and contains — to a certain extent at least — the same features described in the Opening Decision that led the Commission to open a formal investigation. As a consequence, the Commission considers that the amended version of the advertisement tax falls within the scope of the Opening Decision. In this section, the Commission assesses whether — and to what extent — the amended version of the tax alleys the doubts expressed in the Opening Decision respect of the initial advertisement tax.

(79) While the 2015 amendment addresses some of the State aid concerns expressed by the Commission in the Opening Decision, it does not fully address them all.

([16]) Case C-172/03 *Heiser* EU:C:2005:130, paragraph 55. See also Case C-494/06 P *Commission* v *Italy and Wam* EU:C:2009:272, paragraph 54 and the case-law cited and C-271/13 P *Rousse Industry* v *Commission* EU:C:2014:175, paragraph 44. Joined Cases C-71/09 P, C-73/09 P and C-76/09 P *Comitato 'Venezia vuole vivere' and Others* v *Commission* EU:C:2011:368, paragraph 136. See also Case C-156/98 *Germany* v *Commission* EU:C:2000:467, paragraph 30, and the case-law cited.

([17]) The exceptions provided for in Article 107(2) TFEU concern: (a) aid of a social character granted to individual consumers; (b) aid to make good the damage caused by natural disasters or exceptional occurrences; and (c) aid granted to certain areas of the Federal Republic of Germany.

([18]) The exceptions provided for in Article 107(3) TFEU concern: (a) aid to promote the development of certain areas; (b) aid for certain important projects of common European interest or to remedy a serious disturbance in the economy of the Member State; (c) aid to develop certain economic activities or areas; (d) aid to promote culture and heritage conservation; and (e) aid specified by a Council decision.

([19]) Case T-68/03 *Olympiaki Aeroporia Ypiresies* v *Commission* EU:T:2007:253, paragraph 34.

(80) First, the new tax rates structure still provides for an exemption for companies (groups) with a turnover below HUF 100 million, approx. EUR 325 000 (0 % rate applies) while the others will pay 5,3 % for the part of their turnover above HUF 100 million. In practice this means that progressivity is maintained in the taxation of companies with an advertisement turnover bigger than the threshold.

(81) The new threshold under which the 0 % rate applies (HUF 100 million) is lower than the one under which the 0 % tax rate applied according to the old legislation (which was HUF 500 million). However, it results in non-collection of taxes up to approx. EUR 17 000 per year (5,3 % × EUR 325 000).

(82) The Commission gave Hungary the opportunity to justify the application of a 0 % tax rate to advertisement turnover below HUF 100 million by the logic of the tax system (e.g. administrative burden). However, Hungary did not bring forward arguments to demonstrate that the cost of collection of the tax (administrative burden) would outweigh the amounts of tax collected (up to around EUR 17 000 of tax per year).

(83) Second, the amendment introduces an optional retroactive application back to the entry into force of the tax in 2014: for the past, taxpayers can choose to apply either the new system or the old one.

(84) This means that, in practice, companies that have been subject to the tax rate of 0 % and 1 % in the past will not be retroactively taxed at the rate of 5,3 % as it is unlikely that they will opt in to pay more taxes. Therefore, the optional retroactive effect of the modified tax allows companies to escape the payment of the tax under the new system, and provides an economic advantage to those who will not opt for the 5,3 % rate.

(85) Third, the deduction from the 2014 tax base of past losses carried-forward limited to companies that have not made profit in 2013 remains unchanged. The State aid concerns expressed in the Opening Decision are therefore not addressed in the amended scheme and remain valid.

(86) As a consequence, the Commission considers that the 2015 amendments to the Advertisement Tax Act only partially address the concerns spelled out in the Opening Decision concerning the 2014 Advertisement Tax Act. Indeed the amended act features the same elements that the Commission considered entailing State aid in respect of the previous scheme. Even though the number of applicable rates and brackets has been reduced from 6 to 2 and the highest rate substantially lowered from 50 % to 5,3 %, the tax has remained progressive, its progressivity has remained unjustified and the deduction of losses carried-forward continues to apply as it did before. This assessment is valid for the future but also for the past, i.e. since the entry into force of the amended Act on 5 July 2015 and possibly, with retroactive effect back to the entry into force of the Act in 2014.

(87) Therefore, the 2015 amendments to the advertisement tax do not affect the Commission's conclusion that the advertisement tax still entails unlawful and incompatible State aid.

4.4. *RECOVERY OF AID*

(88) As already stated in recital 78, the Commission considers that the Opening Decision also covers the amended scheme. Therefore, this decision concerns the Advertisement Tax Act as in force at the time of the Opening Decision, i.e. 12 March 2015, as well as its amendments of 5 June 2015.

(89) The measures have not been notified to — or been declared compatible with the internal market by — the Commission. Those measures constitute State aid within the meaning of Article 107(1) of the Treaty and new aid within the meaning of Article 1(c) of Regulation (EU) 2015/1589. Since those measures have been put into effect in violation of the standstill obligation laid down in Article 108(3) of the Treaty, they also constitute unlawful aid within the meaning of Article 1(f) of Regulation (EU) 2015/1589.

(90) The consequence of the finding that the measures constitute unlawful and incompatible State aid is that the aid has to be recovered from its recipients pursuant to Article 16 of Regulation (EU) 2015/1589.

(91) As regards the progressivity of the tax rate, recovery of the aid means that Hungary needs to treat all undertakings equally as if they had been subject to a single fixed rate. By default, the Commission considers that the single fixed rate to be 5,3 % as determined by Hungary in the amended version of the tax unless Hungary

decides, within two months from the date of adoption of the present decision, to set a different level for the single tax rate that will apply retroactively to all undertakings over the whole period of application of the advertisement tax (original and amended versions) or to abolish the advertisement tax retroactively as of the date of its entry into force.

(92) As regards the aid granted to undertakings that were not profit-making in 2013 resulting from the deduction of losses carried-forward, Hungary has to recover the difference between the tax due by application of the fixed tax rate to the entire advertisement turnover of the companies subject to the tax without any deduction of losses, and the tax actually paid. This difference corresponds to the tax that has been avoided following the deduction.

(93) As stated in recital 56, the reference system for the taxation of advertisement turnover would be a tax where:

— all advertisement turnovers are subject to the tax (no optionality), without the deduction of any loss carried-forward,

— turnovers are subject to the same (single) tax rate; by default, this single rate is set at 5,3 %,

— no other element is maintained or introduced that would provide a selective advantage to certain undertakings.

(94) As regards recovery, this means that for the period between the entry into force of the advertisement tax in 2014 and the date of the its abolishment or replacement by a scheme which would be fully in line with State aid rules, the amount of aid received by the companies with advertisement turnover should be calculated as the difference between:

— on the one hand, the amount of tax (1) that the undertaking should have paid under the application of the reference system in line with State aid rules (with a single tax rate of, by default, 5,3 % to the entire advertisement turnover without the deduction of any loss carried-forward),

— on the other hand, the amount of tax (2) that the undertaking was liable to pay or had already paid.

(95) To the extent that the difference between amount of tax (1) and amount of tax (2) is positive, the amount of aid should be recovered including recovery interest as of the date the tax was due.

(96) There would be no need for recovery if Hungary abolishes the tax system with retroactive effect as of the date of the entry into force of the advertisement tax in 2014. This would not prevent Hungary from introducing for the future, e.g. from 2017, a tax system which is not progressive and does not differentiate between economic operators subject to the tax.

5. **CONCLUSION**

(97) The Commission finds that Hungary has unlawfully implemented the aid in question in breach of Article 108(3) of the Treaty.

(98) Hungary has either to abolish the unlawful aid scheme or replace it with a new scheme which is in line with State aid rules.

(99) Hungary must recover the aid.

(100) However, the Commission observes that the tax advantage, i.e. the tax saved, that results from the application of the HUF 100 million threshold might comply with Commission Regulation (EU) No 1407/2013 ([20]) (hereinafter: '*de minimis* Regulation'). The ceiling that a group of companies can receive is EUR 200 000 per 3-year period, all *de minimis* support taken into account. In order to comply with the *de minimis* rules, all other conditions laid down in the *de minimis* Regulation should be met. In case the advantage resulting from the exemption complied with the *de minimis* rules, it shall not be qualified as unlawful and incompatible State aid and shall not be recovered.

([20]) Commission Regulation (EU) No 1407/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid (OJ L 352, 24.12.2013, p. 1).

(101) This decision is adopted without prejudice to possible investigations on the compliance of the measures with the fundamental freedoms laid down in the Treaty, notably the freedom of establishment as guaranteed by Article 49 of the Treaty,

HAS ADOPTED THIS DECISION:

Article 1

The State aid granted under the Hungarian Advertisement Tax Act, including after its amendment of 5 June 2015, through the application of a turnover tax with progressive rates and the possibility, for companies that were not profit-making in 2013, to deduct losses carried-forward from their 2014 tax base, unlawfully put into effect by Hungary in breach of Article 108(3) of the Treaty on the Functioning of the European Union is incompatible with the internal market.

Article 2

Individual aid granted under the scheme referred to in Article 1 does not constitute aid if, at the time it is granted, it fulfils the conditions laid down by the Regulation adopted pursuant to Article 2 of Council Regulation (EC) No 994/98 ([21]) or Council Regulation (EU) 2015/1588 ([22]) whichever is applicable at the time the aid is granted.

Article 3

Individual aid granted under the scheme referred to in Article 1 which, at the time it is granted, fulfils the conditions laid down by a Regulation adopted pursuant to Article 1 of Regulation (EC) No 994/98 repealed and replaced by Regulation (EU) 2015/1588 or by any other approved aid scheme is compatible with the internal market, up to maximum aid intensities applicable to that type of aid.

Article 4

1. Hungary shall recover the incompatible aid granted under the scheme referred to in Article 1 from the beneficiaries, as stated in recitals 88 to 95.

2. The sums to be recovered shall bear interest from the date on which they were put at the disposal of the beneficiaries until their actual recovery.

3. The interest shall be calculated on a compound basis in accordance with Chapter V of Commission Regulation (EC) No 794/2004 ([23]) as amended by Regulation (EC) No 271/2008 ([24]).

4. Hungary shall cancel all outstanding payments of aid under the scheme referred to in Article 1 with effect from the date of adoption of this decision.

Article 5

1. Recovery of the aid granted under the scheme referred to in Article 1 shall be immediate and effective.

([21]) Council Regulation (EC) No 994/98 of 7 May 1998 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to certain categories of horizontal State aid (OJ L 142, 14.5.1998, p. 1).

([22]) Council Regulation (EU) 2015/1588 of 13 July 2015 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to certain categories of horizontal State aid (OJ L 248, 24.9.2015, p. 1).

([23]) Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EU) 2015/1589 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (OJ L 140, 30.4.2004, p. 1).

([24]) Commission Regulation (EC) No 271/2008 of 30 January 2008 amending Regulation (EC) No 794/2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ L 82, 25.3.2008, p. 1).

2. Hungary shall ensure that this Decision is implemented within four months following the date of notification of this Decision.

Article 6

1. Within two months following notification of this Decision, Hungary shall submit the following information:

(a) the list of beneficiaries that have received aid under the scheme referred to in Article 1 and the total amount of aid received by each of them under the scheme;

(b) the total amount (principal and recovery interests) to be recovered from each beneficiary;

(c) a detailed description of the measures already taken and planned to comply with this Decision;

(d) documents demonstrating that the beneficiaries have been ordered to repay the aid.

2. Hungary shall keep the Commission informed of the progress of the national measures taken to implement this Decision until recovery of the aid granted under the scheme referred to in Article 1 has been completed. It shall immediately submit, on simple request by the Commission, information on the measures already taken and planned to comply with this Decision. It shall also provide detailed information concerning the amounts of aid and recovery interest already recovered from the beneficiaries.

Article 7

This Decision is addressed to Hungary.

Done at Brussels, 4 November 2016

For the Commission
Margrethe VESTAGER
Member of the Commission