Reports of Cases

OPINION OF ADVOCATE GENERAL
KOKOTT
delivered on 5 September 2013 [1]

**Case C-385/12**

**Hervis Sport- és Divatkereskedelmi Kft.**
**v**
**Nemzeti Adó- és Vámhivatal Közép-dunántúli Regionális Adó Főigazgatósága**

(Request for a preliminary ruling from the Székesfehérvári Törvényszék (Hungary))

(Tax law — Freedom of establishment — Article 401 of Directive 2006/112/EC — National tax on store retail trade in certain economic sectors — Progressive rate of tax in the case of a taxable amount based on turnover — Comparison of undertakings related in a group and in a franchise system)

## I – Introduction

1. Because of the financial and economic crisis of the last few years, Member States are giving greater consideration again to a traditional source of revenue: taxation. This not only takes the form of increasing the rates of existing taxes. The introduction of new kinds of tax can also be seen.

2. The present request for a preliminary ruling concerns such a new kind of tax. In order to cope with higher public financial requirements, for a limited period of time Hungary levied a tax which was based on the turnover of certain undertakings but was associated with a progressive rate that was unusual for such a tax.

3. Of course, criticism of a new tax is no surprise. However, in the present case the Court will consider the question whether the criticism regarding the lawfulness of such a tax under European Union (EU) law is also justified. In this regard, taxable persons in particular claim that because of the progressive scale the tax distorts competition to the detriment of foreign undertakings. It will be necessary to clarify the extent to which such distortions of competition merely give rise to serious economic effects or are, in fact, also incompatible with EU law.

## II – Legislative context

4. Law No XCIV 2010 on the special tax in certain sectors ('Law No XCIV 2010') introduced in Hungary a tax on, among other things, store retail trade in certain economic sectors (the 'special tax'). The law entered into force on 4 December 2010 and applied to the activity of a taxable person retroactively for the entire 2010 calendar year and for a subsequent limited period.

1 — Original language: German.

5. The taxable amount for the purposes of that tax is the net turnover of a taxable person in each tax year. The rate of tax is dependent on the taxable amount. Up to a turnover of HUF 500 million (approximately EUR 1.7 million) the rate of tax is 0%, increasing in three stages from 0.1% through 0.4% and finally to 2.5% for turnover in excess of HUF 100 000 million (approximately EUR 333 million). On the basis of this progressive scale, no tax is therefore levied up to a certain turnover level. Where tax is levied, the higher the turnover, the higher the average rate of tax and thus the percentage tax burden.

6. Under Article 7 of Law No XCIV 2010, in the case of related undertakings for the purposes of Hungarian corporation tax law, the tax liability is calculated in such a way that, first, the tax rate is applied to the total turnover of all related taxable persons. The tax liability of each individual taxable person then results from its proportion of the total turnover of all the related taxable persons. Under the applicable Hungarian corporation tax law, related undertakings means inter alia taxable persons where one exercises a controlling influence over the other.

## III – Main proceedings and procedure before the Court

7. The Hungarian company Hervis Sport- és Divatkereskedelmi Kft. ('Hervis') sells sports goods and is subject in this regard to the special tax.

8. Hervis is related, for the purposes of Article 7 of Law No XCIV 2010, to a parent company established in Austria which generates turnover in Hungary, either itself or through other related undertakings, in particular in retail trade in food products, which is likewise subject to the special tax. Because the group's entire turnover is taken into consideration for the purposes of the application of the tax rate, Hervis is subject to a much higher average rate of tax than would have been the case if only its own transactions were taken as the basis for the calculation of tax.

9. Hervis objects to its tax assessment for 2010 on the ground that the levying of the special tax infringes various provisions of EU law. The tax discriminates against foreign-owned undertakings compared with Hungarian-owned undertakings and against single undertakings compared with undertakings operating on the franchise model. For example, in retail trade in food products in particular, companies with Hungarian shareholders operate their business on the franchise system and thus avoid an aggregation of turnover in connection with the special tax, as only the turnover of each individual franchisee is relevant for the calculation of the tax.

10. Against this background, the Székesfehérvári Törvényszék (Székesfehérvári Local Court), which is now hearing an action brought by Hervis, has referred the following question to the Court pursuant to Article 267 TFEU:

'Is the fact that taxpayers engaged in store retail trade have to pay a special tax if their net annual turnover is higher than HUF 500 million compatible with the provisions of the Treaty governing the general principle of non-discrimination (Articles 18 TFEU and 26 TFEU), the principle of freedom of establishment (Article 49 TFEU), the principle of equal treatment (Article 54 TFEU), the principle of equal treatment as regards financial participation in the capital of companies or firms within the meaning of Article 54 (Article 55 TFEU), the principle of freedom to provide services (Article 56 TFEU), the principle of the free movement of capital (Articles 63 TFEU and 65 TFEU) and the principle of equality of taxation of companies (Article 110 TFEU)?'

11. In the proceedings before the Court, Hervis, Hungary, the Republic of Austria and the European Commission submitted written observations and took part in the hearing held on 18 June 2013.

## IV – Legal assessment

### A – *Admissibility of the request for a preliminary ruling*

12. First of all, it is necessary to examine the admissibility of the request for a preliminary ruling, which is called into question by Hungary.

13. Hungary complains that the order for reference does not contain any explanations, contrary to the requirements laid down in case-law, as to why the referring court considers that the provisions of EU law mentioned in the question require interpretation. Specifically, it is not explained how the Hungarian special tax is purported to have a discriminatory effect.

14. It is settled case-law that in its order for reference the national court must specify the factual and legal context of the questions which it is asking or, at the very least, explain the factual assumptions on which those questions are based. Furthermore, the order for reference must set out the reasons why the national court is unsure as to the interpretation of EU law and explain the link it establishes between the provisions of EU law and the national legislation applicable to the dispute before it. [2]

15. Two aims are associated with these requirements. First, it should be ensured that the Court can provide an interpretation of EU law which will be of use to the national court. Second, at least some explanation should allow the Member States and the other interested parties in proceedings under Article 267 TFEU to take a position effectively. As only the order for reference is notified to the interested parties, it must contain all the necessary information so that the interested parties have the opportunity to submit observations in accordance with Article 23 of the Statute of the Court of Justice of the European Union. [3]

16. It is, in fact, doubtful whether the present request for a preliminary ruling in itself satisfies the requirements relating to the provision of at least some explanation. For example, the referring court fails to explain fully, in particular, the legal and factual circumstances on which the discrimination claimed by Hervis in the main proceedings is allegedly based. There is insufficient information not only regarding Article 7 of Law No XCIV 2010, but also regarding Hervis' integration in a group structure and regarding the tax burden on domestically-owned and foreign-owned undertakings or on undertakings operating with or without a franchise system.

17. Nevertheless, the content of an order for reference may, under certain circumstances, be supplemented by other sources of information without fundamentally undermining the aims connected with the formal requirements governing an order for reference.

18. Thus, the written observations submitted by the interested parties in particular may allow the Court to provide a useful interpretation of EU law. [4] In the present case, the information provided by the referring court was supplemented adequately from a legal and a factual point of view by the written observations submitted by Hervis and Hungary.

2 — See, for example, Case C-242/10 *Enel Produzione* [2011] ECR I-13665, paragraph 32 and the case-law cited. Those requirements are now also laid down in Article 94 of the Rules of Procedure of the Court of Justice of 25 September 2012 (OJ 2012 L 265, p. 1), which are not, however, applicable in the present case.

3 — See, for example, Case C-370/12 *Pringle* [2012] ECR, paragraph 84 et seq. and the case-law cited.

4 — See, to this effect, Case C-316/93 *Vaneetveld* [1994] ECR I-763, paragraph 14.

19. Furthermore, it was also possible in the present case for the other interested parties effectively to adopt a position on the request for a preliminary ruling. This is confirmed, first, by the fact that with their written observations the Republic of Austria and the Commission effectively adopted positions.[5] In addition, the legal questions at issue have already, to some extent, been the subject of a public discussion, in particular in the form of parliamentary questions and answers from the Commission.[6] Furthermore, because a hearing was held in the present case, lastly, the other interested parties were also able, at the latest after the written observations submitted in the proceedings before the Court were brought to their notice, effectively to adopt a position at the hearing.[7]

20. The request for a preliminary ruling is therefore admissible.

B – *Answer to the question referred*

21. The referring court is seeking to ascertain whether the fact that taxpayers have to pay the Hungarian special tax if their net annual turnover is higher than HUF 500 million is compatible with various provisions of the Treaty on the Functioning of the European Union (FEU Treaty).

22. Hervis and the Republic of Austria have claimed that the question referred has not been sufficiently refined and propose that it be reformulated. In particular, the question does not mention the special character of the tax, which places retail undertakings owned by foreign shareholders at a disadvantage on account of the highly progressive rate of tax and the difference in treatment of franchise and branch systems.

23. There is, however, no reason to reformulate the question. Due account must be taken of the actual effects of the levying of the special tax, to which Hervis and the Republic of Austria have referred, in the context of the interpretation of EU law.

24. In addition to the provisions mentioned in the question referred, the Court should also explore the importance of Article 401 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax[8] ('the Value Added Tax Directive') for the present case in order to provide the referring court with an answer which will be of use to it.[9] That provision deals specifically with the lawfulness of taxes on turnover in EU law.[10]

25. First, however, I will turn to the provisions of primary law mentioned by the referring court.

1. The prohibition of tax discrimination in respect of products

26. It must be examined, first of all, whether the prohibition of discrimination under Article 110 TFEU precludes the levying of the special tax. Under that provision, no Member State may impose, directly or indirectly, on the products of other Member States any internal taxation of any kind in excess of that imposed on similar domestic products.

5 — See, to this effect, Joined Cases C-115/97 to C-117/97 *Brentjens'* [1999] ECR I-6025, paragraph 40, and Case C-345/06 *Heinrich* [2009] ECR I-1659, paragraph 35.

6 — See, in particular, the parliamentary questions of 20 December 2010 (E-010535/2010), 2 February 2011 (E-000576/2011) and 19 January 2012 (O-000009/2012), and the Commission's answer of 15 March 2011 to questions E-000576/11 and E-000955/11.

7 — See, to this effect, *Brentjens'*, cited in footnote 5, paragraph 42, and Joined Cases C-51/96 and C-191/97 *Deliège* [2000] ECR I-2549, paragraph 38.

8 — OJ 2006 L 347, p. 1.

9 — With regard to this power of the Court, see, for example, Case 35/85 *Tissier* [1986] ECR 1207, paragraph 9, and Case C-342/12 *Worten* [2013] ECR, paragraph 30.

10 — See also the Commission's answer of 15 March 2011 to questions E-000576/11 and E-000955/11, according to which, following a complaint to that effect, the Commission has already addressed the possibility that the special tax infringes Article 401 of the Value Added Tax Directive.

27. Since merely indirect taxation on products is also covered, that provision encompasses not only charges which are imposed on a product as such. Rather, regard must also be had to Article 110 TFEU in the case of charges which are imposed on the necessary activity in connection with products in so far as they have a direct effect on the cost of the products. [11]

28. It is perfectly possible that the special tax may have directly affected the price of products on account of its taxable amount based on turnover except when levied retroactively in respect of the 2010 calendar year. Nevertheless, a tax charged infringes the first paragraph of Article 110 TFEU only where it is calculated in a different manner for imported and for similar domestic products – at least indirectly [12] – which leads, if only in certain cases, to higher taxation being imposed on the imported product. [13] In the present case, however, it is not evident that higher taxation would be imposed on products from other Member States than on domestic products as a result of the special tax. Even if foreign-owned undertakings were subject to a higher tax burden than domestically-owned undertakings, it is not clear that the foreign-owned undertakings concerned in the present case also prefer to sell products of foreign origin.

29. Article 110 TFEU does not therefore preclude a special tax as described by the referring court.

## 2. The law concerning freedom of establishment

30. It must also be examined whether Article 49 TFEU in conjunction with Article 54 TFEU precludes the levying of the Hungarian special tax. Under those provisions, the Member States are prohibited from restricting the freedom of establishment of a company established in one Member State in the territory of another Member State. Under the second paragraph of Article 49 TFEU, freedom of establishment also includes the right to pursue economic activities.

31. In the present case, the freedom of establishment in Hungary of Hervis's parent company could be unlawfully restricted through the levying of the special tax. In that case, Hervis could also rely on its parent company's right of establishment in order to prevent the special tax being levied on it in contravention of EU law. [14]

### a) Discrimination

32. Freedom of establishment prohibits, in principle, any discrimination based on the place in which companies have their seat. [15] Discrimination arises through the application of different rules to comparable situations or the application of the same rule to different situations. [16] Consequently, Article 49 TFEU in conjunction with Article 54 TFEU prohibits the different tax treatment of non-resident and resident companies where, with regard to the national measure at issue, those companies are in an objectively comparable situation. [17]

11 — See Case C-221/06 *Stadtgemeinde Frohnleiten and Gemeindebetriebe Frohnleiten* [2007] ECR I-9643, paragraph 43, and Case C-206/06 *Essent Netwerk Noord and Others* [2008] ECR I-5497, paragraph 44, each with regard to Article 90 EC.

12 — See Case 112/84 *Humblot* [1985] ECR 1367, paragraph 14, with regard to Article 95 of the EEC Treaty; see also, to this effect, Case 433/85 *Feldain* [1987] ECR 3521, paragraph 16, and Case 252/86 *Bergandi* [1988] ECR 1343, paragraph 28, with regard to Article 95 of the EEC Treaty.

13 — *Stadtgemeinde Frohnleiten and Gemeindebetriebe Frohnleiten*, cited in footnote 11, paragraph 49 and the case-law cited, with regard to Article 90 EC.

14 — See, to this effect, Case C-1/93 *Halliburton Services* [1994] ECR I-1137.

15 — See, for example, Case C-282/07 *Truck Center* [2008] ECR I-10767, paragraph 32, and Case C-303/07 *Aberdeen Property Fininvest Alpha* [2009] ECR I-5145, paragraph 38 and the case-law cited.

16 — See, inter alia, Case C-279/93 *Schumacker* [1995] ECR I-225, paragraph 30; Case C-374/04 *Test Claimants in Class IV of the ACT Group Litigation* [2006] ECR I-11673, paragraph 46; and Case C-459/07 *Elshani* [2009] ECR I-2759, paragraph 36.

17 — See, to this effect, *Test Claimants in Class IV of the ACT Group Litigation*, cited in footnote 16, paragraph 46, and *Truck Center*, cited in footnote 15, paragraph 36.

33. At first sight, there is no evident unequal treatment of Hungarian taxable companies like Hervis based on the place in which their parent company has its seat under the rules governing the special tax. The rules governing the levying of the tax make no distinction according to the place in which a parent company has its seat. In purely formal terms, Hungarian Law No XCIV 2010 does not treat subsidiaries of domestic companies differently from subsidiaries of companies established in another Member State.

34. However, Article 49 TFEU also prohibits any indirect or covert discrimination based on the place in which companies have their seat. Covert discrimination means the application of a distinguishing criterion other than the place in which a company has its seat, but which leads in fact to the same discriminatory result. [18]

35. Hervis, the Republic of Austria and the Commission put forward different considerations to demonstrate covert discrimination against the activity of foreign companies in Hungary. They concern an alleged difference in treatment of taxable persons owned by foreign and domestic shareholders on the basis of their organisation in branch and franchise systems and their affiliation with a group structure or with a franchise system. The interested parties in that regard examined the rules of Law No XCIV 2010 as such only to a certain degree and instead primarily discussed the practical economic consequences of the special tax for different distribution systems.

36. It is the criteria on the basis of which the rules governing the special tax draw distinctions which are decisive in determining whether covert discrimination exists. Those rules do not treat branch and franchise systems differently as such, but different tax results are the consequence of a rule which distinguishes according to the level of turnover of a taxable person and aggregates the turnover of all its businesses. On the basis of the distinguishing criteria under Law No XCIV 2010, from which the considerations put forward by the interested parties are derived, I will therefore examine below the criteria of the level of turnover of a taxable person (Section ii), related taxable persons (Section iii) and the stage of the distribution chain for turnover purposes (Section iv) with regard to possible covert discrimination.

i) Conditions for covert discrimination

37. First of all, however, the precise conditions for covert discrimination must be clarified. It is not certain from the Court's existing case-law on freedom of establishment when a distinguishing criterion other than the place in which a company has its seat leads in fact to the same discriminatory result.

18 — See, inter alia, Case C-3/88 *Commission* v *Italy* [1989] ECR 4035, paragraph 8; Case C-330/91 *Commerzbank* [1993] ECR I-4017, paragraph 14; Case C-254/97 *Baxter and Others* [1999] ECR I-4809, paragraph 10; Case C-329/05 *Meindl* [2007] ECR I-1107, paragraph 21; and Joined Cases C-570/07 and C-571/07 *Blanco Pérez and Chao Gómez* [2010] ECR I-4629, paragraph 117 et seq.

38. On the one hand, the question arises how strong the correlation between the chosen distinguishing criterion and the place in which a company has its seat must be in order for there to be unequal treatment based on the seat. Thus far, the Court has had in view both a correspondence in the majority of cases [19] and a mere preponderance of non-residents being affected, [20] or even mentioned a mere risk of disadvantage. [21] It would appear to have been established thus far only that a 100% correspondence between the criterion and the place in which the company has its seat is not required. [22]

39. On the other hand, not only is the necessary degree of correlation uncertain according to case-law, but also the question whether that correlation must be inherent in the distinguishing criterion [23] or can also be based on more incidental factual circumstances. [24] A connection between the very essence of a distinguishing criterion and the place in which a company has its seat would require that such a criterion typically correlates to the place in which a company has its seat. For a more incidental factual connection, on the other hand, it would be sufficient for such a correlation actually to exist in the situation at hand. This view implies that covert discrimination would cease to exist again where the situation at hand changed, which is possible at any time.

40. I suggest that the Court apply strict criteria to the existence of covert discrimination. Covert discrimination is not intended to extend the scope of the definition of discrimination, but only to include cases which do not constitute discrimination from a purely formal perspective, but have the same effect.

41. The correlation between the distinguishing criterion and the place in which the company has its seat must, first, be identifiable in the vast majority of cases. A mere preponderance of non-residents being affected is not therefore sufficient.

42. Second, however, a general restriction of covert discrimination to cases where the correlation is inherent in the distinguishing criterion and is not based only on more incidental factual circumstances is not a viable option.

43. The correlation between a distinguishing criterion and the place in which a company has its seat always has its basis in the factual circumstances. This also applies to the traditional distinguishing criterion for covert discrimination on grounds of nationality: the residence of a natural person. [25] The correlation between residence and nationality is therefore inherent in the distinguishing criterion of residence only because, on the basis of the current factual circumstances, the vast majority of citizens living in a Member State have the corresponding nationality. However, the extent to which this fact stems from the essence of or the nature of a connection between residence and nationality cannot be assessed without regard to the current factual circumstances as regards the mobility of citizens of the European Union and the importance of the rights of a national. These are nevertheless subject to change with the result that in this regard too unequal treatment, which has been recognised to be inherent in the distinguishing criterion, is ultimately also based on the current factual circumstances.

19 — See Case 143/87 *Stanton and L'Étoile 1905* [1988] ECR 3877, paragraph 9, *Commerzbank*, cited in footnote 18, paragraph 15, *Baxter and Others*, cited in footnote 18, paragraph 13, and Case C-383/05 *Talotta* [2007] ECR I-2555, paragraph 32; see also *Bergandi*, cited in footnote 12, paragraph 28, with regard to Article 95 of the EEC Treaty, and Case C-97/09 *Schmelz* [2010] ECR I-10465, paragraph 48, with regard to freedom to provide services.

20 — See *Blanco Pérez and Chao Gómez*, cited in footnote 18, paragraph 119.

21 — See *Talotta*, cited in footnote 19, paragraph 32, and *Blanco Pérez and Chao Gómez*, cited in footnote 18, paragraph 119; see also Case C-175/88 *Biehl* [1990] ECR I-1779, paragraph 14, with regard to free movement of workers.

22 — See, to this effect, Case C-172/11 *Erny* [2012] ECR, paragraph 41, with regard to free movement of workers.

23 — See *Baxter and Others*, cited in footnote 18, paragraph 13, and *Blanco Pérez and Chao Gómez*, cited in footnote 18, paragraph 119.

24 — See *Commission* v *Italy*, cited in footnote 18, paragraph 9; see also *Humblot*, cited in footnote 12, paragraph 14, with regard to Article 95 of the EEC Treaty.

25 — See *Schumacker*, cited in footnote 16, paragraph 28.

44. Reliance on the current factual circumstances is also not precluded by the fact that, as a result of a change in those circumstances, a national rule against which there was no objection from the point of view of EU law when it was adopted suddenly has discriminatory character. For the purposes of the requirements of the internal market, it is only relevant that a restriction of freedom of establishment exists, and not whether the national legislature which acted in the past can be criticised in this regard.

45. Accordingly, unequal treatment of resident and non-resident companies can also result from a purely factual, more incidental connection between the distinguishing criterion and the place in which a company has its seat.

46. Therefore, covert unequal treatment based on the place in which a company has its seat exists where, on the basis of the current factual circumstances, the distinguishing criterion chosen in the national rules is connected in the vast majority of cases with the seat of a company abroad.

47. However, a condition for the existence of covert discrimination, going beyond covert unequal treatment, is an objectively comparable situation for the categories distinguished by the criterion.[26] It is thus examined whether unequal treatment which has been established is based on different situations and discrimination is therefore ruled out.[27] This additional condition also prevents a situation where the Member States are not able to provide for objectively justified differentiations in their rules merely because the distinguishing criterion correlates – in some cases even incidentally – to the place in which a company has its seat.

ii) Criterion of the level of turnover of a taxable person

48. Against this background, it must now be examined, first of all, whether the criterion of the level of turnover of a taxable person, which the Hungarian special tax uses to determine the level of the rate of tax, constitutes covert discrimination against non-resident companies.

49. Under the rules governing the special tax, the rate of tax increases progressively, depending on the level of turnover. This means that undertakings with a high turnover are treated less favourably by the special tax than undertakings with a low turnover as regards the applicable rate of tax. In addition, under the rules, taxable persons operating a large number of stores in a branch system tend to have to pay a higher average rate of tax on their turnover than taxable persons operating just a single store, such as franchisees.

– Unequal treatment

50. A condition for the existence of covert discrimination is, first of all, the existence of covert unequal treatment of taxable persons based on the place in which their parent company has its seat. Covert unequal treatment of non-resident and resident companies would exist where in the vast majority of cases taxable persons with high turnover were operated by non-residents, whilst taxable persons with low turnover were operated by residents.

51. In my view, this finding does not appear to be evident. It is true that as a rule high-turnover undertakings tend to operate across national borders within the internal market and there may therefore be a certain likelihood that such undertakings also aim for and achieve a high turnover in the other Member State. However, high-turnover undertakings can be operated just as well by residents.

26 — See point 32 above.

27 — See, to this effect, *Test Claimants in Class IV of the ACT Group Litigation*, cited in footnote 16, paragraph 46.

52. Consequently, the referring court would have to examine whether covert unequal treatment nevertheless existed on the basis of the factual circumstances in Hungary in the year at issue.

53. The information for the food sector submitted by Hervis is not sufficient for such an assumption to be made. It could be proved that in the trade in food products the taxable persons with foreign shareholders are organised in branch systems, whilst large food chains, which are domestically owned, are run in franchise systems. However, that information in any case relates to only part of the scope of the special tax and, in particular, not to the sector in which Hervis itself is active. Covert unequal treatment of residents and non-residents must, in principle, be established in respect of the rules in their entirety and cannot be limited only to a certain section of their regulatory scope.

54. The extent to which the aggregation of Hervis' turnover with its parent company's turnover in the trade in food products constitutes covert unequal treatment is not decisive, moreover, for the lawfulness of the criterion of the level of turnover under EU law, but must be examined in connection with the analysis of the criterion of the consideration of related undertakings. [28]

55. Subject to further findings by the referring court, it is thus not evident, on the basis of the information available to the Court, that determining the rate of the special tax with reference to the level of turnover constitutes covert unequal treatment of residents and non-residents.

– Objectively comparable situation

56. If the referring court were nevertheless to establish covert unequal treatment, it would also have to be examined whether high-turnover and low-turnover taxable persons are in an objectively comparable situation in respect of the Hungarian special tax.

57. The Commission rejects the existence of an objectively comparable situation with particular reference to the difference in treatment of branch and franchise systems only where their different treatment corresponds to a different taxable capacity. However, a higher rate of the special tax as a result of the aggregation of the turnover of branches of integrated retail undertakings does not represent higher capacity on the part of such undertakings. A higher capacity can stem only from a higher profit, which takes into consideration not only turnover, but also costs.

58. First of all, the difference in treatment of high-turnover and low-turnover taxable persons is precisely inherent in a tax based on their level of turnover. Unequal treatment is also present where such a tax provides for only a uniform rate of tax. High-turnover taxable persons will always pay higher tax in absolute terms than low-turnover taxable persons.

59. In the present case, however, the question also arises whether high-turnover and low-turnover taxable persons are in an objectively comparable situation in respect of the level of the *rate* of tax. In other words, it must be clarified whether, from the perspective of equality, a different level of turnover rightly results in the application of different rates of tax. Ultimately, it must be examined whether there is an aspect which justifies the difference in treatment. Such an examination is normally the subject of the analysis of a ground for justification. [29]

60. However, irrespective of the question of the theoretical classification of such an examination, I share the Commission's view that, in principle, the different capacity of a taxable person may justify the application of a different rate of tax.

28 — See point 64 et seq. below.

29 — See also my Opinion in Case C-123/11 *A* [2012] ECR, point 40 et seq.

61. The progression of the rate of tax in the rules governing direct taxes on income, that is to say, taxes assessed on the basis of profit, constitutes a recognised differentiation. However, unlike the Commission, I do not wish to rule out a priori the legitimacy of a progression in the case of a tax on turnover. The level of turnover can represent a standardising indicator of taxable capacity because, for example, high profits are not actually possible without high turnover or because the profit from additional turnover (marginal profit) increases with falling fixed unit costs.

62. However, in the final analysis, it cannot be clarified whether, against that background, different levels of turnover justify the application of different rates of tax without recourse to an examination of the proportionality of the progression of the rate of tax. To that end, the referring court would have to ascertain and weigh up a number of factual circumstances. In particular, the distribution of the average tax burden on all taxable persons would have to be clarified having regard to the rate of tax applicable in the different brackets on the scale and how, typically, the margins of the taxable persons' turnover develop.

63. Nevertheless, irrespective of the question whether high-turnover and low-turnover taxable persons are thus in an objectively comparable situation in respect of the level of the rate of tax, in the absence of a finding of unequal treatment of non-resident companies [30] the criterion of the level of turnover of the taxable person is not a distinguishing criterion which can establish covert discrimination against non-resident companies.

iii) Criterion of related taxable persons

64. It must also be examined whether the difference in treatment of taxable persons which are related to other taxable persons in a certain way constitutes covert discrimination based on the place in which companies have their seat.

65. The Hungarian special tax distinguishes, with regard to the level of the applicable rate of tax, not only on the basis of the level of turnover of the taxable person. Under certain circumstances, the turnovers of different taxable persons are even aggregated for the purposes of determining the rate of tax. This occurs in the case of taxable persons related in a group, but not in the case of taxable persons related to other taxable persons in a franchise system. Because Hervis is integrated into a group structure, which also generates turnover in the trade in food products inter alia in Hungary, it is subject to a higher rate of tax than taxable persons integrated into a franchise system.

66. The distinguishing criterion in the present case is thus the way in which a taxable person, whether a subsidiary or a franchisee, is related to an undertaking which has influence over a taxable person's business activity. In one case, that undertaking is the controlling shareholder of the taxable person, while in the other that undertaking may enjoy extensive rights under a franchise agreement.

67. The referring court would first have to establish, on the basis of the factual circumstances, that covert unequal treatment of resident and non-resident undertakings exists. That would be the case where, in the year at issue, in the vast majority of cases a taxable person was integrated into a group structure where the seat of its parent company was abroad.

68. The question then arises whether taxable persons integrated into a group structure and taxable persons integrated into a franchise system are in an objectively comparable situation. The crucial factor is whether in respect of the assessment of the special tax based on turnover the links between a subsidiary and its parent company are objectively comparable with the links between a franchisee and its franchisor.

30 — See point 48 et seq. above.

69. Group structures and franchise systems are not comparable, however, at least in relation to the present case of a parent company's controlling influence over a subsidiary. On account of that controlling influence, the turnover of subsidiaries is attributable to the parent company. It is largely up to the controlling parent company whether it generates turnover itself or through a taxable subsidiary. The same is not possible, however, for franchisors because of the legal and economic autonomy of their franchisees.

70. Consequently, for the purposes of the assessment of the Hungarian special tax based on turnover, taxable persons affiliated to a franchise system and taxable persons integrated into a group structure are not in an objectively comparable situation.

71. The distinguishing criterion of related taxable persons cannot therefore lead to covert discrimination.

iv) Criterion of the stage of the distribution chain for turnover purposes

72. Lastly, it must still be ascertained whether the taxation of only the last stage in the distribution chain constitutes covert discrimination against companies having their seat in another Member State.

73. Under the rules governing the special tax, only store retail trade is taxed, but not wholesale activities at the preceding stage of the distribution chain. This differentiation is the reason why taxable persons with branches are treated differently for tax purposes in comparison with an entire system of franchisors and franchisees, as the transactions of the franchisors are not taxed at all.

74. This difference lies at the heart of Hervis' complaint, according to which unequal treatment of foreign-owned and domestically-owned undertakings takes place in the food sector, with which Hervis is connected through its parent company for the purposes of the special tax.

75. In this respect too, the referring court would first have to ascertain, in order to establish the existence of covert unequal treatment, whether in the vast majority of cases non-residents in Hungary operate a branch system, whereas residents operate a franchise system directly or indirectly as franchisors.

76. If this were to be established, it would have to be examined whether undertakings operating a branch system and franchisors are in an objectively comparable situation in respect of the Hungarian special tax.

77. Hervis and the Republic of Austria claim in this regard that the Hungarian franchise system is not really different from integrated retail undertakings with branches. This is true in particular of the uniform practices in terms of brand identity, procurement of supplies, pricing, sales promotion and electronic data processing.

78. Nevertheless, it is not crucial to the assessment of an objectively comparable situation whether the categories under comparison are comparable in a few or many aspects. The crucial factor is whether they are in a comparable situation in respect of the national rules.

79. That is not the case, however, for franchisors and undertakings operating a branch system. In so far as franchisors are not subject to the special tax, they do not generate sales to final consumers, but only to their franchisees. They are thus more comparable to wholesalers or producers whose services are also used by undertakings operating a branch system, which are likewise not subject to the special

tax. If the turnover of franchisors were also made subject to the special tax, there would be a double taxation of products, since tax would be levied both at the franchisor stage and at the franchisee stage. Undertakings operating a branch system, on the other hand, would not be exposed to comparable double taxation.

80. Accordingly, the distinguishing criterion of the stage of the distribution chain for turnover purposes also does not lead to covert discrimination.

v) Interim conclusion

81. The rules governing the Hungarian special tax do not therefore, according to the information available to the Court, contain any provision which discriminates overtly or covertly against companies in respect of their freedom of establishment on the ground that their seat is abroad.

b) Non-discriminatory restriction

82. It is settled case-law that, going beyond discrimination, all measures which prohibit, impede or render less attractive the exercise of the freedom of establishment must be regarded as restrictions on that freedom. [31]

83. As I have already explained elsewhere, however, in the area of tax law an examination based on that criterion is not possible, otherwise all national duties would always have to be examined against EU law. [32]

84. This view is not only shared by the Court in its case-law, because it has not yet explored a non-discriminatory restriction on the freedom of establishment in the area of tax law. Furthermore, the special status of tax law as regards the application of the fundamental freedoms is also supported by the Treaties. For example, numerous provisions of the FEU Treaty regarding EU tax legislation provide for more stringent formal conditions [33] and thus underline the fiscal sovereignty of the Member States.

c) Interim conclusion

85. It must therefore be stated that, according to the information available to the Court, the freedom of establishment in Hungary of Hervis' parent company is not unlawfully restricted as a result of the levying of the special tax.

3. Freedom to provide services and free movement of capital

86. As the right of establishment of Hervis' controlling parent company is concerned in the present case, the free movement of capital [34] is of secondary importance, as the interested parties have also rightly argued. Irrespective of the complementary relationship between freedom to provide services and freedom of establishment, I also cannot see how freedom to provide services is affected in the present case, as the object of Hervis' activity is the sale of goods.

31 — See for example, *Truck Center*, cited in footnote 15, paragraph 33; *Blanco Pérez and Chao Gómez*, cited in footnote 18, paragraph 53; and Case C-380/11 *DI. VI. Finanziaria di Diego della Valle & C.* [2012] ECR, paragraph 33 and the case-law cited.

32 — See, in detail, my Opinion in Case C-498/10 *X* [2012] ECR, point 28.

33 — See, with regard to internal market legislation, Article 114(2) TFEU and Article 115 TFEU, with regard to industrial policy, the second subparagraph of Article 173(3) TFEU, with regard to environmental policy, point (a) of the first subparagraph of Article 192(2) TFEU and, with regard to energy policy, Article 194(3) TFEU.

34 — See Case C-35/11 *Test Claimants in the FII Group Litigation* [2012] ECR, paragraphs 91 and 94.

4. The general prohibition of discrimination

87. As the general prohibition of discrimination based on nationality in relation to establishment finds expression in the current Article 49 TFEU,[35] Article 18 TFEU is not applicable in the present case as special provisions apply.

5. The lawfulness of turnover taxes under the Value Added Tax Directive

88. Lastly, I will consider the importance of Article 401 of the Value Added Tax Directive for the lawfulness of the levying of the special tax at issue under EU law.

89. Under that provision, the Value Added Tax Directive does not preclude the Member States from levying taxes which *cannot* be characterised as turnover taxes. It follows, however, that Member States are prohibited from levying taxes which can be characterised as such.[36]

90. In the present case, the question which in fact arises is whether the Hungarian special tax, which is assessed on the basis of turnover, can be characterised as a turnover tax within the meaning of Article 401 of the Value Added Tax Directive and is thus prohibited under EU law. Because of its progressive rate of tax, the special tax leads to a considerable distortion of competition between high-turnover and low-turnover undertakings. However, as has been explained, that distortion of competition does not constitute cross-border discrimination,[37] with the result that the fundamental freedoms do not preclude the special tax. The prevention of such distortions of competition in EU law is the aim not only of the rules on State aid, but also – specifically in the area of turnover taxes – of the provisions governing the common system of value added tax.

91. I am aware that the referring court has not asked a question regarding the interpretation of Article 401 of the Value Added Tax Directive and the interested parties have not submitted observations on that question to the Court. That is not surprising if it is borne in mind that the Court has consistently held that there is no infringement of the current Article 401 of the Value Added Tax Directive where the national tax lacks just one of the four essential characteristics of value added tax (VAT).[38] Those four essential characteristics include its general levying, its assessment on the basis of the price charged, its charging at each stage of the production and distribution process and the deduction of input tax, with the result that the tax applies, at any given stage, only to the value added and the final burden of the tax rests ultimately on the final consumer.[39] However, the Hungarian special tax manifestly exhibits neither the third nor the fourth characteristic, as it is charged exclusively at the distribution stage of the retail trade.

92. I nevertheless wish to mention the importance of Article 401 of the Value Added Tax Directive for the present case since, first of all, I am convinced that the abstract conditions for the application of that provision are in need of revision in order to safeguard its effectiveness (see Section a). Second, following a possible revision of those conditions by the Court, it would be uncertain whether the Hungarian special tax would be compatible with Article 401 of the Value Added Tax Directive (see Sections b and c).

35 — See on this subject Joined Cases C-397/98 and C-410/98 *Metallgesellschaft and Others* [2001] ECR I-1727, paragraph 39.

36 — See, for example, Case C-200/90 *Dansk Denkavit and Poulsen Trading* [1992] ECR I-2217, paragraph 10 and the case-law cited, and Case C-347/95 *UCAL* [1997] ECR I-4911, paragraph 32.

37 — See point 48 et seq. above.

38 — See, inter alia, Case C-437/97 *EKW and Wein & Co* [2000] ECR I-1157, paragraph 23, Case C-101/00 *Tulliasiamies and Siilin* [2002] ECR I-7487, paragraph 105, Case C-475/03 *Banca popolare di Cremona* [2006] ECR I-9373, paragraph 27 et seq., and Joined Cases C-283/06 and C-312/06 *KÖGÁZ and Others* [2007] ECR I-8463, paragraph 36; see also Case C-347/90 *Bozzi* [1992] ECR I-2947, paragraph 10.

39 — See, inter alia, Joined Cases C-338/97, C-344/97 and C-390/97 *Pelzl and Others* [1999] ECR I-3319, paragraph 21; *Banca popolare di Cremona*, cited in footnote 38, paragraph 28; and *KÖGÁZ and Others*, cited in footnote 38, paragraph 37.

a) The spirit and purpose of Article 401 of the Value Added Tax Directive

93. The purpose of the prohibition on levying taxes which can be characterised as a turnover tax can be described as follows: the European Union's common system of value added tax is intended to replace the different turnover taxes previously applicable in the individual Member States.[40] As is shown by the fourth and eighth recitals in the preamble to Directive 67/227/EEC,[41] turnover taxes were previously levied in most Member States in the form of a cumulative multi-stage system and not in the form of VAT. Through the common system of value added tax, all turnover taxes within the European Union are now replaced by a specific form of turnover tax, the applicable VAT.

94. Accordingly, the common system of value added tax does not harmonise the field of value added taxes but the broader field of turnover taxes by making mandatory a certain form of turnover tax, the applicable VAT. It would naturally run counter to that harmonisation if, in addition to the common system of value added tax, the Member States maintained other turnover taxes, in whatever form.

95. Against that background, the previous view taken in case-law, according to which a national tax comes under the prohibition in Article 401 of the Value Added Tax Directive on the levying of *turnover tax* only where that tax displays the essential characteristics of *VAT*, is too narrow.[42] Advocate General Léger already pointed out that this view taken by the Court paradoxically allowed the Member States to reimpose a cumulative multi-stage system which the common system of value added tax is intended to eliminate.[43] A cumulative multi-stage system does not display the essential characteristics of VAT, as it does not provide for the deduction of input tax.

96. In addition, it is settled case-law that a national tax can be characterised as a turnover tax within the meaning of Article 401 of the Value Added Tax Directive and is thus prohibited under EU law if it has the effect of jeopardising the functioning of the common system of value added tax.[44] However, that functioning is based on the fact that a certain form of turnover tax – the applicable VAT – is intended to ensure equal conditions of competition in all Member States. According to recital 4 in the preamble to the Value Added Tax Directive, the aim of introducing the common system of value added tax is the application in Member States of legislation on turnover taxes that does not distort conditions of competition or hinder the free movement of goods and services. It is thus intended to eliminate, as far as possible, factors which may distort conditions of competition, whether at national or EU level.

97. Accordingly, the Court itself has required, in its most recent judgments on the subject, that, in any comparison of a national tax with the characteristics of VAT, particular attention must be paid to the need to safeguard the neutrality of the common system of value added tax at all times.[45] However, it is still uncertain why only a tax which satisfies the essential characteristics of VAT can have the effect of jeopardising the functioning of the common system of value added tax by distorting the conditions of competition. As Advocate General Stix-Hackl has already rightly stated, what is likely to interfere most with the common system of value added tax is a tax which, whilst possessing essential features of VAT, also possesses features which conflict with it.[46]

40 — See, for example, *Banca popolare di Cremona*, cited in footnote 38, paragraph 23, and *KÖGÁZ and Others*, cited in footnote 38, paragraph 31.

41 — First Council Directive 67/227/EEC of 11 April 1967 on the harmonisation of legislation of Member States concerning turnover taxes (OJ, English Special Edition 1967, p. 14).

42 — See, for example, *KÖGÁZ and Others*, cited in footnote 38, paragraph 36 and the case-law cited.

43 — See the Opinion of Advocate General Léger in Case C-130/96 *Solisnor-Estaleiros Navais* [1997] ECR I-5053, point 42.

44 — See, for example, *Banca popolare di Cremona*, cited in footnote 38, paragraphs 23 to 25, and *KÖGÁZ and Others*, cited in footnote 38, paragraphs 31 and 34; see also Case 295/84 *Rousseau Wilmot* [1985] ECR 3764, paragraph 16.

45 — *Banca popolare di Cremona*, cited in footnote 38, paragraph 29, and *KÖGÁZ and Others*, cited in footnote 38, paragraph 38.

46 — Opinion of Advocate General Stix-Hackl in Case C-475/03 *Banca popolare di Cremona* [2006] ECR I-9373, point 36.

98. The narrow view taken in case-law is thus not only militated against by the wording of Article 401 of the Value Added Tax Directive, which has regard not to the character of VAT, but to the character of a distinct turnover tax. Above all, the strict interpretation deprives that provision of its effectiveness because it permits the levying of national turnover taxes which – like a turnover tax in the cumulative multi-stage system, for example – have the effect of jeopardising the functioning of the common system of value added tax by distorting the conditions of competition.

99. A broader understanding of Article 401 of the Value Added Tax Directive is allowed by case-law in so far as it has always left open, to some extent, the question whether or not taxes other than those which display the essential characteristics of VAT might be prohibited under EU law. The Court can still be understood to mean that *at least* a tax which exhibits the essential characteristics of VAT is incompatible with the current Article 401 of the Value Added Tax Directive.[47] Consequently, it would not be ruled out that other taxes could also be incompatible with that provision.[48]

100. It therefore seems clear, in my view, that the prohibition of a tax under Article 401 of the Value Added Tax Directive requires that a national tax exhibit the essential characteristics not of VAT, but of a turnover tax. Furthermore, according to its spirit and purpose and in accordance with previous case-law, that provision prohibits only taxes which have the effect of jeopardising the functioning of the common system of value added tax by distorting the conditions of competition, whether at national or EU level.

101. I will therefore briefly examine below what effects such a change in view in case-law could have on the present case.

b) Essential characteristics of a turnover tax

102. It would have to be examined, first of all, whether the Hungarian special tax displays the essential characteristics of a turnover tax within the meaning of Article 401 of the Value Added Tax Directive.

103. A starting point for determining the essential characteristics of a turnover tax is provided by the essential characteristics of VAT according to the Court's case-law. VAT should include the characteristics of the overall concept of turnover tax in addition to the specific characteristics of VAT.

i) Deduction of input tax and ability to pass on the tax

104. First of all, I concur with Advocates General Mischo and Stix-Hackl that deduction of input tax cannot be one of the essential characteristics of a turnover tax.[49] That characteristic would precisely prevent the Member States from prohibiting the reimposition of a cumulative multi-stage system, which the common system of value added tax is intended to eliminate.

47 — See, to this effect, *Dansk Denkavit and Poulsen Trading*, cited in footnote 36, paragraph 11; Joined Cases C-370/95 to C-372/95 *Careda and Others* [1997] ECR I-3721, paragraph 14; Case C-318/96 *SPAR* [1998] ECR I-785, paragraph 22; *Pelzl and Others*, cited in footnote 39, paragraph 20; and *KÖGÁZ and Others*, cited in footnote 38, paragraph 34 et seq.

48 — See, to this effect, Joined Cases 93/88 and 94/88 *Wisselink and Others* [1989] ECR 2671, paragraph 11, with regard to the cumulative multi-stage system, and the Opinion of Advocate General Alber in Joined Cases C-338/97, C-344/97 and C-390/97 *Pelzl and Others* [1999] ECR I-3319, point 85.

49 — Opinion of Advocate General Mischo in Joined Cases 93/88 and 94/88 *Wisselink and Others* [1989] ECR 2671, point 50, and Opinion of Advocate General Stix-Hackl in *Banca popolare di Cremona*, cited in footnote 46, point 110.

105. In addition, the Court's requirement of the ability to pass on the tax to the final consumer,[50] which is always described as a consequence of deduction of input tax,[51] is not a condition for a tax to be characterised as a turnover tax within the meaning of Article 401 of the Value Added Tax Directive. The ability to pass on the tax comes into question specifically in a cumulative multi-stage system because equal conditions of competition do not exist. Furthermore, the requirement of the ability to pass on the tax would ultimately mean that taxes which particularly distort competition and therefore cannot be passed on because of markedly different conditions of competition between taxable persons would not be covered by the prohibition under Article 401 of the Value Added Tax Directive.

ii) Charging at each stage of the production and distribution process

106. The characteristic of charging at each stage of the production and distribution process also does not constitute an essential characteristic of a turnover tax.[52]

107. That view is not only taken by the Court in its earlier case-law.[53] In addition, single-stage systems are also an alternative to the applicable system of value added tax, as they lead to the same tax result in principle when applied to sales to final consumers.

iii) Assessment on the basis of the price charged

108. The characteristic of assessment on the basis of the price charged is in fact the defining characteristic of a turnover tax. Only where the taxable amount for the tax is based on the turnover itself can that tax at all be said to be a turnover tax.

109. It is irrelevant, however, whether the assessment is made with reference to an individual transaction or the total turnover in a certain period, as in the present case of the Hungarian special tax. Even if a tax is assessed on the basis of the total turnover for a year, it affects each individual transaction.[54]

110. In earlier cases the Court partially rejected the applicability of the prohibition specifically in relation to a tax which, like the special tax at issue, is imposed on certain categories of undertakings only on the basis of the total annual turnover.[55] Nevertheless, such a finding may also be guided by the misunderstanding, which can be seen in some case-law, that VAT is levied on the value added at each transaction.[56] That is technically not the case, however, as the taxable amount under Article 73 of the Value Added Tax Directive consists in the full consideration.

111. The Hungarian special tax would thus satisfy the characteristic of assessment on the basis of the price charged.

50 — See, inter alia, *Careda and Others*, cited in footnote 47, paragraph 14 et seq., and *KÖGÁZ and Others*, cited in footnote 38, paragraphs 50 and 57.

51 — See, inter alia, *Pelzl and Others*, cited in footnote 39, paragraph 21; *Banca popolare di Cremona*, cited in footnote 38, paragraph 28; and *KÖGÁZ and Others*, cited in footnote 38, paragraph 37.

52 — Opinion in *Wisselink and Others*, cited in footnote 49, point 50.

53 — See *Wisselink and Others*, cited in footnote 48, paragraph 11 et seq.

54 — Opinion in *Pelzl and Others*, cited in footnote 48, points 44 and 57; see also the Opinion of Advocate General Jacobs in Case C-475/03 *Banca popolare di Cremona* [2006] ECR I-9373, point 46 et seq., and the Opinion of Advocate General Stix-Hackl in *Banca popolare di Cremona*, cited in footnote 46, point 79.

55 — See *Rousseau Wilmot*, cited in footnote 44, paragraph 16, and *Pelzl and Others*, cited in footnote 39, paragraph 25; but see also *Dansk Denkavit and Poulsen Trading*, cited in footnote 36.

56 — See Case C-109/90 *Giant* [1991] ECR I-1385, paragraph 14, and Case C-208/91 *Beaulande* [1992] ECR I-6709, paragraph 18.

iv) General levying

112. Lastly, the characteristic of general levying is also among the essential characteristics of a turnover tax within the meaning of Article 401 of the Value Added Tax Directive.

113. This follows directly from the interpretation of Article 401 of the Value Added Tax Directive. That provision cites as examples of taxes which cannot be characterised as turnover taxes individual forms of tax which focus on the taxation of certain services such as insurance, property or betting and gambling. Such specific turnover taxes thus continue to be lawful even after the introduction of the common system of value added tax. Only general turnover taxes are prohibited. Only those taxes also have a scope which is capable of jeopardising the functioning of the common system of value added tax.

114. Thus far, the Court has regarded as general turnover taxes only taxes which apply to all economic transactions in a Member State. [57]

115. It must nevertheless be stated that even the applicable VAT covers far from all transactions. Thus, Articles 132 and 135 of the Value Added Tax Directive in particular contain a number of exemptions for individual services or indeed entire sectors. In this regard, the general levying of a tax may not require that all services are in fact taxed. Such an interpretation would also deprive the prohibition under Article 401 of the Value Added Tax Directive of any practically relevant field of application. [58]

116. In particular, in the case of a tax like the one at issue, which is charged only at the last stage of the distribution process, it cannot be required to cover all forms of turnover. With regard to the general levying of the turnover tax, the only question arising is whether it has general character in respect of sales made to final consumers.

117. Irrespective of the question when general levying can be taken to exist, [59] the necessary information on the field of application of the tax is not available in the present case. For example, the referring court merely points out that the special tax covers retail trade activities in certain numbered sectors of the common nomenclature of economic activities which applies in Hungary. However, this does not show the extent of the taxation of sales to final consumers.

118. On the basis of the available information, it cannot therefore be assessed whether a tax like the Hungarian special tax constitutes a general turnover tax for the purposes of Article 401 of the Value Added Tax Directive.

c) Distortion of the conditions of competition

119. If it were to be established that the Hungarian special tax is a general turnover tax for the purposes of Article 401 of the Value Added Tax Directive, a prohibition under EU law would still require that tax to have the effect of jeopardising the functioning of the common system of value added tax by distorting the conditions of competition, whether at national or EU level.

57 — *Beaulande*, cited in footnote 56, paragraph 16, Case C-130/96 *Solisnor-Estaleiros Navais* [1997] ECR I-5053, paragraph 17, and *Tulliasiamies and Siilin*, cited in footnote 38, paragraph 101; see also *EKW and Wein & Co*, cited in footnote 38, paragraph 24.

58 — See, to this effect, the Opinion of Advocate General Saggio in Case C-437/97 *EKW and Wein & Co* [2000] ECR I-1157, point 21.

59 — See, in this regard, the different approaches taken in the Opinion of Advocate General Jacobs in Case C-347/90 *Bozzi* [1992] ECR I-2947, point 14, and in the Opinion of Advocate General Alber in Case C-318/96 *SPAR* [1998] ECR I-785, point 33.

120. That would appear to be the case with the special tax, as the sale of identical products is subject because of the progressive nature of the tax rate to a different level of tax burden depending on the taxable person concerned. This does not apply, however, in respect of the retroactive levying of the special tax, which could not distort competition because it was not known at the time of the transaction.

121. Furthermore, because of the way in which the special tax is levied, the length of the production and distribution chain becomes significant again, in contravention of the fundamental principle laid down in the first subparagraph of Article 1(2) of the Value Added Tax Directive. Where a wholesaler supplies small retailers, no tax burden arises under the progressive scale for the special tax. If, however, the distribution chain is reduced by one stage, and the former wholesaler is now active as a large retailer, a tax burden arises on account of the progression of the scale. The difference in treatment of branch and franchise systems is also the result of this levying of the special tax which is not consistent with the principles of the common system of value added tax. [60]

122. On account of its progressive scale, the Hungarian special tax would thus have the effect of jeopardising the functioning of the common system of value added tax by distorting the conditions of competition at national level. By contrast with the fundamental freedoms, there is no need in such a case for cross-border distortion of competition.

d) Interim conclusion

123. In the light of the insufficient information in the request for a preliminary ruling regarding the general character of the special tax and in view of the fact that the interpretation of Article 401 of the Value Added Tax Directive does not seem to have been an issue in the main proceedings to date, I suggest that the Court should not reopen the oral procedure in order to give the interested parties an opportunity to submit observations in this regard.

124. I consider that it is more appropriate in the present case merely to clarify the questions regarding primary law raised by the referring court and, furthermore, merely to advise the referring court to take due account of Article 401 of the Value Added Tax Directive. Should the referring court consider, in the light of the Court's existing case-law and these observations, that it cannot be ruled out that the Hungarian special tax infringes Article 401 of the Value Added Tax Directive, it should make a fresh request for a preliminary ruling.

6. Conclusion

125. The answer to the question referred must therefore be that Article 49 TFEU, which is applicable in the present case in conjunction with Article 54 TFEU, does not preclude the levying of the Hungarian special tax, as described by the referring court. The referring court must, however, examine whether the special tax is compatible with Article 401 of the Value Added Tax Directive.

60 — See point 72 et seq. above.

## V – Conclusion

126. I therefore propose that the question referred by the Székesfehérvári Törvényszék be answered as follows:

Article 49 TFEU, which is applicable in the main proceedings in conjunction with Article 54 TFEU, does not preclude the levying of a tax as described by the referring court. The referring court must examine, however, whether such a tax is compatible with Article 401 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax.