



Reports of Cases

Case T-20/17

Hungary

v

European Commission

Judgment of the General Court (Ninth Chamber), 27 June 2019

(State aid — Hungarian tax on the turnover from the broadcasting or publication of advertisements — Progressivity of tax rates — Deduction from the basis of assessment of the tax of 50% of the losses carried forward for companies not generating a profit in 2013 — Decision characterising the measures as aid incompatible with the internal market and ordering its recovery — Concept of State aid — Condition relating to selectivity)

1. *State aid — Concept — Grant by the public authorities of favourable tax treatment to certain undertakings — Included*
(Art. 107(1) TFEU)

(see paragraphs 71-73)

2. *State aid — Concept — Selective nature of the measure — Measure conferring a tax advantage — Reference framework for determining the existence of an advantage — Material scope — Criteria — Identification of the common or 'normal' tax system — Differentiation between economic operators in a comparable factual and legal situation not justified by the nature and general scheme of the common or 'normal' tax system — Nature and general scheme of a tax system — Concept*
(Art. 107(1) TFEU)

(see paragraphs 74-77)

3. *State aid — Concept — Selective nature of the measure — Reference framework for determining the existence of an advantage — Sectoral tax on the turnover of broadcasters or publishers of advertisements — Identification of the common or 'normal' tax system — Progressive tax structure — Included — Identification by the Commission of an incomplete or hypothetical reference tax system — Not permissible*
(Art. 107(1) TFEU)

(see paragraphs 78-83)

4. *State aid — Concept — Selective nature of the measure — Sectoral tax on the turnover of broadcasters or publishers of advertisements — Nature of the tax — Objective put forward by the State concerned of introducing sectoral taxation with a redistributive purpose — Objective consistent with the progressive tax structure — Whether permissible*
(Art. 107(1) TFEU)

(see paragraphs 84-90)

5. *State aid — Concept — Selective nature of the measure — Progressive sectoral tax on the turnover of broadcasters or publishers of advertisements — General scheme of the tax — Principle of progressive tax structure — Non-discriminatory differentiation justified by the objective of tax redistribution pursued — No selectivity*
(Art. 107(1) TFEU)

(see paragraphs 91-105)

6. *State aid — Concept — Selective nature of the measure — Progressive sectoral tax on the turnover of broadcasters or publishers of advertisements — General scheme of the tax — Review of the progressive tax structure actually chosen — Compatibility with the substance of the objective of tax redistribution pursued — No discriminatory treatment of taxable persons in a comparable factual and legal situation — No selectivity*
(Art. 107(1) TFEU)

(see paragraphs 107-111)

7. *State aid — Concept — Selective nature of the measure — Sectoral tax on the turnover of broadcasters or publishers of advertisements — Mechanism for deducting losses reducing the taxable amount for the first tax year — Whether permissible — Conditions — Compatibility with the objective of tax redistribution pursued — No discrimination*
(Art. 107(1) TFEU)

(see paragraphs 117-124)

Résumé

By its judgment in *Hungary v Commission* (T-20/17), delivered on 27 June 2019, the General Court annulled the Commission's decision which characterised the progressive tax on turnover derived from the broadcasting or publication of advertisements, introduced by Hungary, as State aid incompatible with the internal market.¹

On 15 August 2014, the Law on Advertisement Tax entered into force in Hungary, which introduced a progressive tax by bands on turnover derived from the broadcasting or publication of advertisements. Based on the net turnover of broadcasters or publishers of advertisements (newspapers, audiovisual media, billposters) operating in Hungary, that tax comprised a scale of six progressive rates based on turnover, and included the option for taxable persons whose

¹ Decision (EU) 2017/329 of 4 November 2016 on the measure SA.39235 (2015/C) (ex 2015/NNN) implemented by Hungary on the taxation of advertisement turnover (OJ 2017 L 49, p. 36).

pre-tax profits for the 2013 financial year were zero or negative to deduct from their taxable amount 50% of losses carried forward from earlier financial years. On 12 March 2015,² the Commission, taking the view that the progressive nature of that tax and the reduction of the taxable amount as a result of the deductibility of losses amounted to State aid, informed Hungary of its decision to initiate the formal investigation procedure in respect of those measures, and issued an injunction to suspend them.³ In its decision of 4 November 2016, the Commission found, *inter alia*, that, as a result of its progressive tax structure and the option to deduct losses, the measure constituted State aid incompatible with the internal market, and ordered the immediate and effective recovery of the aid paid to the beneficiaries.

Having been called upon once again, following the judgment of 16 May 2019, *Poland v Commission*,⁴ to determine whether a turnover tax with a progressive tax structure thereby constitutes a selective measure amounting to State aid, the Court holds, in the present case, that the Commission committed several errors.

In that respect, it finds, first of all, that the Commission could not, for the purposes of determining whether that tax was selective, adopt a reference tax system that was incomplete or hypothetical. The Commission had identified a 'normal' system with a single rate tax structure, regardless of its amount, whereas it should have adopted the actual features of the 'normal' tax system established by law, that is to say, the advertisement tax itself, with its structure comprising its single scale of rates and successive bands. Noting, however, that the Commission's conclusion might be justified by other grounds demonstrating the existence of a selective advantage in favour of undertakings with a low level of turnover, the Court also examined whether the Commission had succeeded in demonstrating that the general scheme of that tax, that is to say, its tax structure, failed to have regard to its nature, that is to say, its objectives.

In that regard, the Court finds, first of all, that the Commission also committed an error of law in concluding that the objective of the tax was simply to collect budgetary revenue, whereas, according to the Hungarian authorities, it was to introduce a tax on the turnover of broadcasters or publishers of advertisements combined with a redistributive purpose. Next, it finds that the Commission did not succeed in demonstrating that a progressive structure of the tax was, in principle, contrary to the objective pursued. In particular, the Court notes that there is no selectivity if the differences in taxation result from the application, without derogation, of the 'normal' system, if comparable situations are treated comparably and if they do not misconstrue the objective of the tax concerned. Lastly, it finds that the Commission did not demonstrate that the progressive tax structure actually chosen had been adopted in a manner which largely deprived the objective of the tax in question of its substance.

The Court also holds that the Commission did not establish that the reduction in the taxable amount as a result of the deductibility of losses comprised a discriminatory element contrary to the objective of that tax, constituting a selective advantage characterising State aid. In that regard, it notes, *inter alia*, that that reduction in the taxable amount was established on the basis of objective criteria irrespective of the choices of the undertakings concerned.

² Decision of 12 March 2015 on State aid SA.39235 (2015/C) (ex 2015/NN) — Hungary — Advertisement tax — Invitation to submit comments pursuant to Article 108(2) of the Treaty on the Functioning of the European Union (OJ 2015 C 136, p. 7).

³ Injunction issued pursuant to Article 11(1) of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty (now Article 108 TFEU) (OJ 1999 L 83, p. 1).

⁴ Judgment of the Court of 16 May 2019, *Poland v Commission* (T-836/16 and T-624/17, EU:T:2019:338).