Reports of Cases

OPINION OF ADVOCATE GENERAL
KOKOTT
delivered on 4 July 2019[1]

Case C-323/18

Tesco-Global Áruházak Zrt.
v
Nemzeti Adó- és Vámhivatal Fellebbviteli Igazgatósága

(Request for a preliminary ruling
from the Fővárosi Közigazgatási és Munkaügyi Bíróság (Budapest Administrative and Labour Court, Hungary))

(Request for a preliminary ruling — Freedom of establishment — Aid — System of value added tax — Turnover-based tax for retail undertakings — Disadvantage for foreign undertakings arising from tax rate with progressive effect — Indirect discrimination — Justification of tax with progressive effect based on turnover)

I. Introduction

1. In these proceedings the Court is once again[2] concerned with the question of an indirect restriction of the fundamental freedoms arising from a tax regime, where the discriminatory effect can be inferred solely from its progressive rate, which taxes economically stronger persons more heavily.[3] As economically stronger persons tend to engage in cross-border business, this could be seen as indirect discrimination against them, in particular where the progressive scale is specifically employed to catch economically stronger multinational undertakings.

2. In addition to an infringement of freedom of establishment, consideration must also be given to an infringement of the prohibition of State aid. Progressive taxation of economically stronger undertakings could also constitute aid to economically weaker undertakings, which are taxed at a lower level on account of the progressive tax rate, and as such be incompatible with the single market.

1 Original language: German.

2 The currently pending proceedings in *Vodafone* (C-75/18) concern a special tax for telecommunications services. See also judgments of 26 April 2018, *ANGED* (C-233/16, EU:C:2018:280); of 26 April 2018, *ANGED* (C-234/16 and C-235/16, EU:C:2018:281); of 26 April 2018, *ANGED* (C-236/16 and C-237/16, EU:C:2018:291); and of 5 February 2014, *Hervis Sport- és Divatkereskedelmi* (C-385/12, EU:C:2014:47).

3 A proportional tax rate combined with a basic allowance also produces a progressive effect for the tax. For example, the average tax rate in the case of a proportional tax of 10% and a basic allowance of 10 000 amounts to precisely 0% for an income of 10 000, precisely 5% for an income of 20 000 and precisely 9% for an income of 100 000.

II. Legal framework

A. EU law

3. Article 401 of Directive 2006/112/EC[4] ('the VAT Directive') states:

'Without prejudice to other provisions of Community law, this Directive shall not prevent a Member State from maintaining or introducing taxes on insurance contracts, taxes on betting and gambling, excise duties, stamp duties or, more generally, any taxes, duties or charges which cannot be characterised as turnover taxes, provided that the collecting of those taxes, duties or charges does not give rise, in trade between Member States, to formalities connected with the crossing of frontiers.'

B. National law

4. The main proceedings are taking place against the background of the Az egyes ágazatokat terhelő különadóról szóló 2010. évi XCIV. törvény (Law No XCIV of 2010 on the special tax charged in certain sectors) ('the Law on the special tax'), which established a turnover-based special tax for undertakings operating in certain sectors from 2010 to 2012.

5. The preamble to the Law on the special tax provides:

'In the context of the adjustment of budgetary balance, the Parliament introduces this law on the establishment of a special tax imposed on taxpayers whose capacity to bear public burdens surpasses the general obligation to pay tax.'

6. Paragraph 1 of the Law on the special tax contains the following explanatory provisions:

'For the purposes of the present law:

1. store retail trade: in accordance with the Gazdasági Tevénkenységek Egységes Osztályozási Rendszerre [uniform system for classification of economic activities], in force on 1 January 2009, the activities classified in sector 45.1, apart from wholesale trade in vehicles and trailers, in sectors 45.32, 45.40, apart from repairs of and wholesale trade in motorcycles, and in sectors 47.1 to 47.9. …'

7. Under Paragraph 2 of the law on the special tax:

'Tax shall be chargeable on:

(a) store retail trade;

(b) telecommunications activities; and

(c) supply of energy.'

8. Paragraph 3 of the Law on the special tax defines taxable persons as follows:

'(1) Taxable persons are legal persons, other organisations within the meaning of the general tax code and self-employed persons who pursue an activity subject to tax within the meaning of Paragraph 2.

4 Council Directive of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1).

(2) Non-resident organisations and individuals shall also be subject to the tax with respect to the activities subject to the tax referred to in Paragraph 2, where they pursue those activities in the internal market through subsidiaries.'

9. The taxable amount under Paragraph 4(1) of the Law on the special tax is

'the net turnover of the taxable person resulting from the activities referred to in Paragraph 2 during the tax year'.

10. The special tax has a progressive tax rate structure. Under Paragraph 5(a) of the Law on the special tax, the tax rate for

'the performance of an activity referred to in Paragraph 2(a) shall be set at 0% on a taxable amount not exceeding HUF 500 million, 0.1% on a taxable amount in excess of HUF 500 million but not exceeding HUF 30 billion; 0.4% on a taxable amount in excess of HUF 30 billion but not exceeding HUF 100 billion, and 2.5% on a taxable amount in excess of HUF 100 billion'.

11. Paragraph 7 of the Law defines the circumstances in which the tax is applicable to 'linked undertakings':

'The tax levied on taxable persons classified as linked undertakings within the meaning of Law [No LXXXI of 1996] concerning tax on companies and dividends shall be calculated by aggregating the net turnovers from the activities referred to in Paragraph 2(a) and (b), pursued by taxable persons acting as linked undertakings, and the amount obtained by applying the rate defined in Paragraph 5 to that total shall be divided between the taxable persons in proportion with their respective net turnovers from the activities referred to in Paragraph 2(a) and (b) compared with the total net turnover from the activities referred to in Paragraph 2(a) and (b) generated by all the linked taxable persons.'

12. Furthermore, Az adózás rendjéről szóló 2003. évi XCII. törvény (Law No XCII of 2003 on General Taxation) ('the Law on Taxation') provides in Paragraph 124/B as follows:

'The tax authority shall give a decision on the supplementary return within 15 days of the filing date of that return, without carrying out any checks, where the taxpayer has filed such a supplementary return claiming only that the legal provision on which the tax liability is based is unconstitutional or contrary to a binding legal act of the European Union or that a municipal decree is contrary to another legal provision, provided that the Constitutional Court, the Supreme Court or the Court of Justice of the European Union had not yet given a ruling on that issue at the time of filing of the supplementary return or that return does not comply with the terms of the published ruling. The decision adopted in relation to the supplementary return may be the subject of an administrative appeal or legal proceedings in accordance with the general provisions of this Law.'

13. Paragraph 128(2) of the Law on Taxation provides:

'No supplementary assessments shall be issued where taxes or public subsidies are not required to be adjusted by means of a supplementary return.'

III. Main proceedings

14. The applicant in the main proceedings, Tesco-Global Áruházak Zrt. ('Tesco'), is a public limited company governed by Hungarian law which is engaged in store wholesale and retail trade. The referring court did not provide any information on the composition of the shareholder structure during the years at issue. Only from the written pleadings submitted by the Commission is it evident that Tesco is part of the Tesco Plc group, whose seat is in the United Kingdom. They do not, however, reveal the precise ownership structure. At present, Tesco Plc is owned largely by free float shareholders and a few larger shareholders from non-member countries.

15. In the context of that activity, during the tax years subject to inspection, Tesco paid the Treasury around 35 500 million forint (HUF) in respect of special sectoral tax and filed its tax returns on time.

16. The Nemzeti Adó- és Vámhivatal Kiemelt Adózók Adóigazgatósága Ellenőrzési Főosztály II Ellenőrzési Osztály 5. (National Tax and Customs Authority, Tax Directorate for Major Taxpayers, General Inspection Service II, Inspection Department No 5) ('the tax authority') carried out an inspection on Tesco. As a result of the inspection, the tax authority issued a notice declaring that there was a tax discrepancy payable by Tesco. Tesco brought an administrative appeal against that notice. The notice was confirmed with regard to the special tax for store retail trade. Consequently, Tesco was ordered to make an additional payment of roughly HUF 1 397 million in respect of the special tax for store retail trade (plus a tax fine and a late-payment surcharge).

17. The applicant's claim in the action brought against the tax notice is based on the contention that there is no foundation for the tax liability imposed on it. In particular, it asserts that the special tax for store retail trade is incompatible with EU law.

18. In view of the specific features of the Hungarian retail trade market, the referring court has doubts regarding the compatibility of the special tax with EU law. According to the referring court, the effect of the tax is that 'the actual tax burden falls predominantly on taxable persons under foreign ownership'.

19. This is confirmed by the statistics submitted to the Court. According to the overviews submitted by the Commission and Hungary, in the first year of the tax (2010) only companies more than half-owned by foreign shareholders fell within the highest tax rate (2.5%), whilst the second highest tax rate (0.4%) included a total of 90% (if I understand the statistics provided by Hungary correctly, even 100%) of companies with such shareholder structure. Of the companies in the third highest tax rate (0.1%), 40.3% are more than half-owned by foreign shareholders. The statistics do not, however, reveal whether the foreign shareholders come from Member States or from non-member countries.

20. It is nevertheless clear from these statistics that only 3 of the 7 highest-turnover undertakings in the sector paid corporate taxes in 2010. In 2012 too, the last year of the tax, only 3 of the 7 highest-turnover undertakings in the sector paid corporate taxes. However, in 2012 'only' 70% of undertakings in the second highest tax band (0.4%) were more than half-owned by foreign shareholders. The proportion for the undertakings in the first (exempt) band cannot be inferred from the statistics provided.

21. The referring court also asks whether it constitutes discrimination if a taxable person which engages in store retail trade through a number of retail establishments has to pay a special tax corresponding to the highest band of the progressive tax rate, whereas (generally domestic) taxable persons which operate, through stores which constitute independent companies, as a franchise under a single banner are in fact included in the exempt band or are subject to one of the lower tax rates following that band on account of their lower turnovers.

22. The referring court further points out that in 2012 the Commission had brought infringement proceedings against Hungary, which were nevertheless terminated in 2013. The Commission stated that the reason for this was that the Law on the special tax was already no longer in force and was not therefore applicable for 2013.

IV. Request for a preliminary ruling and procedure before the Court

23. By decision of 19 March 2018, received on 16 May 2018, the referring court decided to make an order for reference pursuant to Article 267 TFEU and referred the following questions to the Court for a preliminary ruling:

'(1) Is the fact that taxable persons under foreign ownership which operate a number of retail establishments through a single company and which are engaged in store retail trade in fact have to pay the special tax corresponding to the highest band of a steeply progressive tax rate, whereas taxable persons under domestic ownership operating as a franchise under a single banner — through stores which generally constitute independent companies — are in fact included in the exempt band or are subject to one of the lower tax rates following that band, with the result that the proportion of the tax paid by companies under foreign ownership of the total tax collected through the special tax is substantially higher than in the case of taxable persons under domestic ownership, compatible with the provisions of the FEU Treaty governing the principles of non-discrimination (Articles 18 TFEU and 26 TFEU), freedom of establishment (Article 49 TFEU), equal treatment (Article 54 TFEU), equal treatment as regards financial participation in the capital of companies or firms within the meaning of Article 54 TFEU (Article 55 TFEU), freedom to provide services (Article 56 TFEU), free movement of capital (Articles 63 TFEU and 65 TFEU) and equality of taxation of companies (Article 110 TFEU)?

(2) Is the fact that taxable persons which operate a number of retail establishments through a single company and which are engaged in store retail trade in fact have to pay the special tax corresponding to the highest band of a steeply progressive tax rate, whereas taxable persons under domestic ownership which are their direct competitors and which operate as a franchise under a single banner — through stores which generally constitute independent companies — are in fact included in the exempt band or are subject to one of the lower tax rates following that band, with the result that the proportion of the tax paid by companies under foreign ownership of the total tax collected through the special tax is substantially higher than in the case of taxable persons under domestic ownership, compatible with the provisions of the FEU Treaty governing the principle of the prohibition of State aid (Article 107(1) TFEU)?

(3) Must Articles 107 TFEU and 108(3) TFEU be interpreted as meaning that their effects extend to a tax measure which is intrinsically linked to a tax exemption (constituting State aid) financed by means of the tax receipts generated by the tax measure, inasmuch as the legislature has achieved the amount of budgetary revenue forecast, which was fixed before the introduction of the special tax on retail trade (based on the turnover of market operators), through the application of a progressive tax rate based on turnover and not through the introduction of a standard tax rate, meaning that the legislation deliberately seeks to grant a tax exemption to some market operators?

(4) Is a practice of the bodies of a Member State with responsibility for applying the law, whereby, during tax inspections commenced *ex officio* or subsequent court proceedings it is not possible — despite the principle of effectiveness and the obligation to disapply an incompatible provision of national law — to submit an application for a refund of tax set under a national tax provision which is contrary to EU law, on the ground that the tax authority or the court examined the issue of incompatibility with EU law only in special proceedings commenced on application by a party which may be brought prior to the *ex officio* procedure, whereas, as far as tax which has

been set in breach of national law is concerned, there is nothing to prevent an application for a refund from being submitted in proceedings before the tax authority or a court, compatible with the principle of procedural equivalence and the principles of effectiveness and the primacy of EU law?'

24. In the proceedings before the Court, Tesco, Hungary, the Republic of Poland and the European Commission submitted written observations on these questions and took part in the hearing on 29 April 2019.

V. Legal assessment

25. The request for a preliminary ruling primarily concerns the compatibility of the Hungarian Law on the special tax with EU law.

26. The referring court thus raises several questions: on the one hand, whether a tax of the kind described infringes inter alia the freedom of establishment enshrined in Articles 49 and 54 TFEU (see B.); on the other hand, whether such a tax is compatible with the prohibition of State aid under Articles 107 and 108 TFEU (see C.). As the referring court expressly states in the request for a preliminary ruling that an interpretation of Article 401 of the VAT Directive is necessary for the purpose of adjudicating on the dispute, this point will be briefly examined first (see A.), even though none of the questions relates to that provision.

27. Furthermore, the referring court also raises the question whether a specific preclusion of the *ex post* amendment of previously issued tax assessment notices is compatible with the principles of equivalence and effectiveness, which I will examine lastly (see D.).

A. Infringement of Article 401 of the VAT Directive

28. Article 401 of the VAT Directive makes clear that Member States are not prevented from introducing new taxes if they cannot be characterised as turnover taxes. Characterisation as a turnover tax must be rejected here, however, as I have already explained in my Opinion concerning the special tax for telecommunications services. [5]

29. It appears from case-law that there are four essential characteristics of VAT that are decisive in characterising a tax as a turnover tax: (1) it applies generally to transactions relating to goods or services; (2) it is proportional to the price charged by the taxable person in return for the goods and services which he has supplied; (3) it is charged at each stage of the production and distribution process, including that of retail sale, irrespective of the number of transactions which have previously taken place; and (4) the amounts paid during the preceding stages of the process are deducted from the tax payable by a taxable person, with the result that the tax applies, at any given stage, only to the value added at that stage and the final burden of the tax rests ultimately on the consumer. [6]

30. In any case, the first, second and fourth conditions are not satisfied in this instance. First of all, the Hungarian special tax does not cover any transaction, but only the transactions of retail undertakings. It is not therefore a (general) turnover tax in accordance with the first criterion, but would be at best a special excise duty. Second, tax is not levied proportionally on each individual transaction according to its price (second criterion) but, according to Paragraphs 1 and 2 of the Law on the special tax, on the (net) total turnover from store retail trade.

5 See my Opinion in *Vodafone Magyaország* (C-75/18, EU:C:2019:492, point 25 et seq.).

6 Judgments of 3 October 2006, *Banca popolare di Cremona* (C-475/03, EU:C:2006:629, paragraph 28); of 8 June 1999, *Pelzl and Others* (C-338/97, C-344/97 and C-390/97, EU:C:1999:285, paragraph 21); and of 7 May 1992, *Bozzi* (C-347/90, EU:C:1992:200, paragraph 12).

31. Ultimately, it is not designed to be passed on to the consumer (fourth criterion). This cannot be taken to be the case simply because a tax has been reflected arithmetically in the price of the goods or services. That is more or less the case with any tax charge on an undertaking. Rather, if the consumer — as with the Hungarian special tax for retail undertakings at issue — is not the person liable for payment, the tax must be designed to be passed on to the consumer specifically.

32. This would require the amount of tax to be established at the time when the transaction is carried out (at the time of the supply to the consumer), as is the case with VAT. However, as that amount cannot be calculated until the end of the year and depends on the volume of annual turnover, the supplying retail undertaking does not yet know any tax charge, which may have to be passed on, at the time when the supply is made or at least its precise amount.[7] It is not therefore a tax *designed to be passed on*.

33. Rather, the Hungarian special tax for retail undertakings is conceived such that those undertakings are intended to be taxed directly, as Hungary rightly points out. According to the preamble, the intention is therefore to tax the particular financial capacity of those undertakings and not the financial capacity of customers of the retail undertakings.

34. Accordingly, the special tax for retail undertakings is similar in character to a special direct income tax. Unlike 'normal' direct income taxes, however, the taxable amount is not the profit generated — as the difference between two operating assets within a certain period — but the turnover generated within a certain period. Nevertheless, this does not affect its character as a *direct* income tax.

35. Consequently, it cannot be characterised as a turnover tax seeking to tax the consumer. Article 401 of the VAT Directive does not therefore prevent Hungary from introducing that tax in addition to VAT.

B. First question: infringement of freedom of establishment

36. The first question asks in essence whether freedom of establishment under Articles 49 and 54 TFEU, which alone is relevant here, precludes the Hungarian special tax for retail undertakings.

37. It should be stated, first of all, that, although direct taxation — which the special tax at issue should be classified as (see above, point 33 et seq.) — does not as such fall within the purview of the Union, the powers retained by the Member States must nevertheless be exercised consistently with EU law, in particular the fundamental freedoms.[8]

38. Freedom of establishment, which Article 49 TFEU grants to European Union nationals, includes, in accordance with Article 54 TFEU, for companies formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the European Union, the right to exercise their activity in other Member States through a subsidiary, branch or agency.[9]

7 See, with regard to this requirement, for example, judgments of 7 August 2018, *Viking Motors and Others* (C-475/17, EU:C:2018:636, paragraphs 46 and 47) — detrimental if passing on is uncertain — and of 3 October 2006, *Banca popolare di Cremona* (C-475/03, EU:C:2006:629, paragraph 33).

8 Judgments of 12 September 2006, *Cadbury Schweppes and Cadbury Schweppes Overseas* (C-196/04, EU:C:2006:544, paragraph 40); of 11 August 1995, *Wielockx* (C-80/94, EU:C:1995:271, paragraph 16); and of 14 February 1995, *Schumacker* (C-279/93, EU:C:1995:31, paragraph 21).

9 Judgments of 4 July 2018, *NN* (C-28/17, EU:C:2018:526, paragraph 17); of 1 April 2014, *Felixstowe Dock and Railway Company and Others* (C-80/12, EU:C:2014:200, paragraph 17); and of 12 September 2006, *Cadbury Schweppes and Cadbury Schweppes Overseas* (C-196/04, EU:C:2006:544, paragraph 41).

39. Freedom of establishment is applicable in the present case only if there is a cross-border situation (1.). If so, it must then be asked whether the special tax constitutes a restriction of freedom of establishment (2.) and whether that restriction might be justified by overriding reasons in the public interest (3.).

1. Cross-border situation

40. With regard to the examination whether there is a cross-border situation, it should be stated that, according to established case-law, it is the corporate seat of a company that serves as the connecting factor with the legal system of a particular State, like nationality in the case of natural persons.[10] As Tesco has its seat in Hungary, it is therefore to be regarded as a Hungarian company with the result that there is not a cross-border situation.

41. However, Tesco's parent company is a company which has its seat in the United Kingdom. In so far as that foreign company pursues its activity through a subsidiary — the applicant in the main proceedings — on the Hungarian market, the freedom of establishment of the parent company is affected.

42. The Court has already held in this regard that a company may, for tax purposes, rely on a restriction of the freedom of establishment of another company which is linked to it in so far as such a restriction affects its own taxation.[11] The applicant in the main proceedings may therefore rely on a possible restriction of the freedom of establishment of its parent company.

2. Restriction of freedom of establishment

43. It is settled case-law that all measures which prohibit, impede or render less attractive the exercise of freedom of establishment are restrictions on that freedom.[12] In principle this covers cases of discrimination, but also non-discriminatory restrictions. However, in the case of taxes and duties it must be borne in mind that they constitute a burden *per se* and thereby reduce the attractiveness of establishment in another Member State. An examination based on non-discriminatory restrictions would therefore make all national taxable events subject to EU law and thereby seriously call into question the sovereignty of the Member States in tax matters.[13]

44. The Court has thus ruled on a number of occasions that Member States' rules on the conditions and the level of taxation are subject to fiscal autonomy, provided the treatment of the cross-border situation is not discriminatory compared with the domestic situation.[14]

45. Accordingly, a restriction of freedom of establishment requires, first, that two or more comparison groups are actually treated differently (see (a)). If that is the case, the further question arises whether that unequal treatment of cross-border situations compared with purely domestic situations disadvantages the former, consideration being given to both overt and covert discrimination (see (b)).

10 Judgments of 2 October 2008, *Heinrich Bauer Verlag* (C-360/06, EU:C:2008:531, paragraph 25), and of 14 December 2000, *AMID* (C-141/99, EU:C:2000:696, paragraph 20); see also my Opinion in *ANGED* (C-233/16, EU:C:2017:852, point 40).

11 Judgments of 1 April 2014, *Felixstowe Dock and Railway Company and Others* (C-80/12, EU:C:2014:200, paragraph 23), and of 6 September 2012, *Philips Electronics* (C-18/11, EU:C:2012:532, paragraph 39); see also to that effect judgment of 12 April 1994, *Halliburton Services* (C-1/93, EU:C:1994:127, paragraph 18 et seq.).

12 Judgments of 21 May 2015, *Verder LabTec* (C-657/13, EU:C:2015:331, paragraph 34); of 16 April 2015, *Commission* v *Germany* (C-591/13, EU:C:2015:230, paragraph 56 and the case-law cited); and of 29 November 2011, *National Grid Indus* (C-371/10, EU:C:2011:785, paragraph 36).

13 See my Opinions in *X* (C-498/10, EU:C:2011:870, point 28); *Hervis Sport- és Divatkereskedelmi* (C-385/12, EU:C:2013:531, point 82 et seq.); *X* (C-686/13, EU:C:2015:31, point 40); *C* (C-122/15, EU:C:2016:65, point 66); and *ANGED* (C-233/16, EU:C:2017:852, point 28).

14 See judgment of 14 April 2016, *Sparkasse Allgäu* (C-522/14, EU:C:2016:253, paragraph 29); order of 4 June 2009, *KBC-bank* (C-439/07 and C-499/07, EU:C:2009:339, paragraph 80); and judgment of 6 December 2007, *Columbus Container Services* (C-298/05, EU:C:2007:754, paragraphs 51 and 53).

46. Lastly, in the present case, it must first be explained that a relevant unequal treatment — unlike in *Hervis Sport*[15] — cannot be based on the 'aggregation rule' in Paragraph 7 of the Law on the special tax, but solely on the progressively structured tax rate.

47. The situation in that case was distinguished by the interaction of a progressive turnover-based income tax for the retail trade with an 'aggregation rule' for groups of companies. Under that rule, in essence, classification in bands was not based on the turnover of the individual company, but on the consolidated turnover of the overall group of companies. The rule was introduced against the background of the application of a tax with progressive effect also to legal persons, which is fairly uncommon in taxation law. Such an aggregation rule is necessary in principle to prevent the possibility of the progressive effect being circumvented by an entity being split into multiple legal persons.

48. The Court nevertheless expressed concerns regarding the aggregation rule from the point of view of EU law.[16] Even if, however, the aggregation rule did infringe EU law in the present case, this would not be relevant to the decision in this case, nor would it answer the question asked by the referring court. As the aggregation rule is not applicable to Tesco, this would have no impact on the main proceedings.

49. Accordingly, the Court must consider in this case whether the structure of the special tax as such — irrespective of the aggregation rule — has a discriminatory effect. This question was not answered in the judgment in *Hervis Sport*, in particular, as Hungary asserts, to the effect that the progressive character in itself cannot be sufficient for discrimination. In that case the Court only considered the combination of the progressive tax rate and the aggregation rule, but, as Tesco and the Commission rightly state, did not rule out that the progressive rate alone could also give grounds for discrimination.[17]

(a) Different treatment

50. It must therefore be asked, first of all, whether the Law on the special tax actually treats different undertakings unequally. A point militating against this would appear to be that it does not, for example, fix different tax rates for different undertakings. Instead, it merely defines certain turnover bands which can, in principle, cover all undertakings. The respective tax rates associated with those turnover bands apply uniformly to every undertaking. Against this background, the Hungarian Government takes the view that there is no unequal treatment.

51. It cannot be objected in this regard that unequal treatment resides in the fact that higher-turnover undertakings have to pay more special tax in absolute terms than lower-turnover undertakings. This does not in itself constitute unequal treatment, but this taxation is consistent with the generally recognised principle of taxation according to ability to pay. Provided the taxable amount and the tax liability are proportionate to one another, as is the case with a proportional tax rate ('flat tax') for example, unequal treatment can be rejected.

15 Judgment of 5 February 2014, *Hervis Sport- és Divatkereskedelmi* (C-385/12, EU:C:2014:47).

16 Judgment of 5 February 2014, *Hervis Sport- és Divatkereskedelmi* (C-385/12, EU:C:2014:47, paragraph 39 et seq.).

17 Judgment of 5 February 2014, *Hervis Sport- és Divatkereskedelmi* (C-385/12, EU:C:2014:47, paragraph 34).

52. With a progressive tax rate, however, the taxable amount and the tax liability are not proportionate in the case of all taxable persons. This is illustrated very clearly in the present case if a comparison is made of the average tax rates to which taxable persons are subject in respect of their total turnover, and not only in respect of the individual bands. That average tax rate increases as the turnover bands are reached, with the result that, on the whole, higher-turnover undertakings are also subject to a higher average tax rate than lower-turnover undertakings. They thus pay higher tax both in absolute and in relative terms. This constitutes unequal treatment of the undertakings concerned. [18]

(b) Disadvantage for the cross-border situation

53. The question therefore arises whether this different treatment disadvantages foreign undertakings compared with domestic undertakings.

54. There is no overt or direct discrimination against foreign undertakings. This is because the rules governing the levying of the special tax make no distinction according to an undertaking's seat or 'origin'.

55. However, the fundamental freedoms prohibit not only overt discrimination, but also all covert forms of discrimination which, by the application of other criteria of differentiation, lead to the same result. [19] A crucial factor in discriminatory character for the purposes of Articles 49 and 54 TFEU is therefore whether the different treatment of telecommunications undertakings in respect of the criterion of annual net turnover amounts to unequal treatment according to the origin or seat of the undertakings.

56. In this connection it must be clarified, first of all, what requirements are to be applied to the correlation between the chosen distinguishing criterion — here turnover — and the seat of the undertakings (see point 57 et seq.). Second, it must be examined whether indirect discrimination is to be taken to exist in any case if the distinguishing criterion was intentionally chosen with a discriminatory objective (see point 79 et seq.).

(1) Relevant correlation

57. Existing case-law does not provide a consistent picture with regard to either the extent or the character of the abovementioned correlation. As regards the quantitative extent, the Court has had in view both a correspondence in the majority of cases [20] and a mere preponderance of non-residents being affected; [21] in some instances it even mentions a mere risk of disadvantage. [22] In qualitative terms

18 See also to that effect my Opinion in *Hervis Sport- és Divatkereskedelmi* (C-385/12, EU:C:2013:531, point 49).

19 Judgments of 26 April 2018, *ANGED* (C-233/16, EU:C:2018:280, paragraph 30); of 5 February 2014, *Hervis Sport- és Divatkereskedelmi* (C-385/12, EU:C:2014:47, paragraph 30); of 8 July 1999, *Baxter and Others* (C-254/97, EU:C:1999:368, paragraph 13); and of 14 February 1995, *Schumacker* (C-279/93, EU:C:1995:31, paragraph 26).

20 See judgments of 26 April 2018, *ANGED* (C-233/16, EU:C:2018:280, paragraph 31); of 5 February 2014, *Hervis Sport- és Divatkereskedelmi* (C-385/12, EU:C:2014:47, paragraph 39); of 22 March 2007, *Talotta* (C-383/05, EU:C:2007:181, paragraph 32); of 8 July 1999, *Baxter and Others* (C-254/97, EU:C:1999:368, paragraph 13); of 13 July 1993, *Commerzbank* (C-330/91, EU:C:1993:303, paragraph 15); and of 7 July 1988, *Stanton and L'Étoile 1905* (143/87, EU:C:1988:378, paragraph 9); see also judgments of 26 October 2010, *Schmelz* (C-97/09, EU:C:2010:632, paragraph 48, with regard to freedom to provide services), and of 3 March 1988, *Bergandi* (252/86, EU:C:1988:112, paragraph 28, with regard to Article 95 of the EEC Treaty).

21 Judgment of 1 June 2010, *Blanco Pérez and Chao Gómez* (C-570/07 and C-571/07, EU:C:2010:300; paragraph 119).

22 Judgment of 22 March 2007, *Talotta* (C-383/05, EU:C:2007:181, paragraph 32); see also judgment of 1 June 2010, *Blanco Pérez and Chao Gómez* (C-570/07 and C-571/07, EU:C:2010:300; paragraph 119).

it is uncertain whether the correlation must typically [23] exist or must be inherent in the distinguishing criterion, as is indicated in a number of judgments, [24] or can also be based on more incidental factual circumstances. [25] In addition, it is not clear whether the quantitative and the qualitative correlation must exist cumulatively or might also be sufficient in themselves.

58. As I have already stated elsewhere, strict criteria must be applied to the existence of covert discrimination. This is because 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. [26]

(i) Quantitative criterion

59. Therefore, in quantitative terms, under no circumstances can a mere preponderance — meaning more than 50% of undertakings being affected — be sufficient; instead, the correlation between the distinguishing criterion and the place in which the company has its seat must be identifiable in the vast majority of cases. [27]

60. However, this quantitative element can cause considerable difficulties in applying the law, as the result of the examination depends on the comparative figures chosen in the case at issue. Thus, the Court asked in *Hervis Sport* whether the majority of linked companies *in the highest band of the special tax* were linked to foreign parent companies. [28]

61. It can hardly be justified, however, to single out only the highest band as a general criterion. It is not clear why only that one band should be relevant in establishing discriminatory character. An examination with reference to the highest band alone becomes more questionable the more progressive bands are provided for in a tax. This approach even fails entirely where there is a linear progression curve that does not have any bands at all, as is commonly the case with the taxation of income.

62. The Commission's insistence that the majority of the total revenue from the special tax falls to foreign undertakings [29] is also not convincing. This is not a reliable indicator for a correlation, but only an incidental one. First of all, as Hungary points out, this would probably also be the case in this instance with a proportional tax, against which the Commission also rightly does not raise any objection. This characteristic would also be fulfilled wherever the market is dominated preponderantly by foreign undertakings.

23 See judgment of 8 July 1999, *Baxter and Others* (C-254/97, EU:C:1999:368, paragraph 13).

24 See judgment of 1 June 2010, *Blanco Pérez and Chao Gómez* (C-570/07 and C-571/07, EU:C:2010:300, paragraph 119, with regard to freedom of establishment); see also, with regard to free movement of workers, judgments of 2 March 2017, *Eschenbrenner* (C-496/15, EU:C:2017:152, paragraph 36); of 5 December 2013, *Zentralbetriebsrat der gemeinnützigen Salzburger Landeskliniken Betriebs* (C-514/12, EU:C:2013:799, paragraph 26); of 28 June 2012, *Erny* (C-172/11, EU:C:2012:399, paragraph 41); and of 10 September 2009, *Commission* v *Germany* (C-269/07, EU:C:2009:527).

25 See judgments of 9 May 1985, *Humblot* (112/84, EU:C:1985:185, paragraph 14), and of 5 December 1989, *Commission* v *Italy* (C-3/88, EU:C:1989:606, paragraph 9, with regard to freedom of establishment).

26 See my Opinions in *Hervis Sport- és Divatkereskedelmi* (C-385/12, EU:C:2013:531, point 40); *ANGED* (C-233/16, EU:C:2017:852, point 38); and *Memira Holding* (C-607/17, EU:C:2019:8, point 36).

27 See my Opinion in *Hervis Sport- és Divatkereskedelmi* (C-385/12, EU:C:2013:531, point 41).

28 Judgment of 5 February 2014, *Hervis Sport- és Divatkereskedelmi* (C-385/12, EU:C:2014:47, paragraph 45).

29 See paragraph 40 of its written observations.

63. Second, cases would not be covered, for example, where individual foreign undertakings are subject to quite significant tax rates, whilst many smaller domestic undertakings with low tax rates nevertheless contribute so much to the total revenue from the special tax that the correlation would have to be rejected. To make discriminatory character dependent on that contribution made by smaller domestic undertakings would thus produce incidental results and it is not therefore reasonable.

64. The same applies to the consideration of the average tax rate. Because unequal treatment in respect of progressive taxes resides in the application of different *average* tax rates, it could be asked at most whether in the vast majority of cases all foreign undertakings are disadvantaged in respect of that rate compared with domestic undertakings. This would be the case only if in the vast majority of cases that average tax rate far exceeds the average rates to which domestic undertakings are subject. It is not clear either from the request for a preliminary ruling or from the figures submitted by the parties whether that is the case here.

65. Nevertheless, here too, discriminatory character would ultimately depend on the average tax rate for smaller domestic undertakings. This would also produce incidental results and is not therefore reasonable. Member States which are specifically seeking to attract foreign investors would suddenly be unable to levy progressive income tax if and because, on account of their economic success, the new investors would — as is intended — be responsible for the majority of the tax revenue (either in absolute terms or through their higher average tax rates). This would be an absurd result, showing that a quantitative approach is not appropriate.

66. In addition to the abovementioned difficulties with calculation (see above, point 59 et seq.), a purely quantitative examination would also have the disadvantage of causing considerable legal uncertainty in so far as regard is not had to a specific threshold.[30] However, a specific threshold would also entail resulting problems, such as differences between contradictory statistics which are difficult to resolve and fluctuations in figures occurring over time. Thus, in the present case the number of 'domestic' undertakings included in the second highest band has tripled in 2 years (from 10% to 30%).

67. Furthermore, according to press reports, the 'digital services tax' just introduced in France currently covers approximately 26 undertakings, only 4 of which are resident in France. If a change in these figures in the next year led to a different legal assessment, the existence of a restriction of the fundamental freedoms (assuming the other 22 undertakings are able to rely on the fundamental freedoms) would always depend on those statistics, which are available only years later.

68. In addition, focusing on the shareholders in the case of free float companies (public limited companies with thousands of shareholders) in order to determine a quantitative criterion causes considerable problems. It would also be unclear, moreover, how a company with two shareholders is to be assessed where one shareholder is resident abroad and the other is resident in national territory. If regard is had — as advocated by the Commission and the referring court — to the shareholders, then should regard be had, in the case of larger group structures, not just to the group head (the group parent company) and its shareholders in order to determine whether an undertaking from another EU country, an undertaking from a non-member country or a domestic undertaking is affected?

69. In the present case, the Court does not know precisely the shareholder structure of the parent company or of the actual group parent company. This case therefore clearly shows the futility of a quantitative approach which is also based on the way in which a company's shareholder structure is organised.

30 In the judgment of 26 April 2018, *ANGED* (C-233/16, EU:C:2018:280, paragraph 38), the Court evidently considered that 61.5% and 52% are not sufficient to find indirect discrimination, but did not examine what threshold would have had to be achieved.

(ii) Qualitative criterion

70. It would therefore seem that more important than this purely quantitative element is the qualitative criterion now used more frequently by the Court, according to which the distinguishing criterion must *intrinsically* or *typically* affect foreign companies.[31] A merely incidental link, even if it is sufficiently high in quantitative terms, cannot therefore be sufficient, in principle, to establish indirect discrimination.

71. However, the criterion of an intrinsic correlation must be defined more precisely. The Court has accepted an intrinsic correlation, for example, in a case where pharmacists who had already pursued their activities in the national territory were given preferential treatment in connection with the issue of licences to open pharmacies.[32] This was based on the correct idea that a correlation between an undertaking's seat and its place of activity follows a certain internal logic or typicality and is not merely based on the incidental characteristics of a certain market or economic sector.

72. The same holds, as Advocate General Wahl[33] has recently stated, for owners of vehicles registered in a Member State who are, for the vast majority, nationals of that State because registration of vehicles is linked to the residence of the vehicle owner. The choice of a criterion which only vehicles manufactured abroad can satisfy, because no such vehicles are manufactured in national territory, is also such a case.[34]

73. Furthermore, an intrinsic correlation is also to be accepted in the case of the criterion of generation of 'taxable revenue'. This is because company tax law is characterised by the dualism of revenue which is generated and is taxable domestically and revenue which is generated abroad and not therefore taxable domestically. If an advantage is thus linked to concurrent generation of taxable revenue, it is intrinsically correlated to an advantage for domestic undertakings.[35]

74. The important factor is therefore a connection intrinsic to the distinguishing criterion which, on an abstract analysis, clearly suggests the likelihood of a correlation in the vast majority of cases.

75. If these principles are applied to the present case, the key question is whether the volume of an undertaking's turnover is intrinsically correlated to an undertaking's (foreign) seat or its controlling shareholders. I have already stated in this regard in my Opinion in *Hervis Sport* 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 are also active in other Member States.[36]

76. However, that is not sufficient in itself. High-turnover undertakings can be operated just as well by residents.[37] This applies in particular if, as in this case — see Article 3(2) of the Law on the special tax — regard is had to turnover generated in national territory and not to worldwide turnover. There is no clear reason why it should be generally considered that foreign undertakings operating in Hungary will generate a higher turnover based on retail sales *in Hungary* than domestic undertakings.

31 See judgments of 2 March 2017, *Eschenbrenner* (C-496/15, EU:C:2017:152, paragraph 36, with regard to free movement of workers); of 5 December 2013, *Zentralbetriebsrat der gemeinnützigen Salzburger Landeskliniken Betriebs* (C-514/12, EU:C:2013:799, paragraph 26); of 28 June 2012, *Erny* (C-172/11, EU:C:2012:399, paragraph 41); of 1 June 2010, *Blanco Pérez and Chao Gómez* (C-570/07 and C-571/07, EU:C:2010:300, paragraph 119, with regard to freedom of establishment); of 10 September 2009, *Commission* v *Germany* (C-269/07, EU:C:2009:527); and of 8 July 1999, *Baxter and Others* (C-254/97, EU:C:1999:368, paragraph 13).
See also my Opinions in *ANGED* (C-233/16, EU:C:2017:852, point 38), and *Memira Holding* (C-607/17, EU:C:2019:8, point 36); to the opposite effect, my Opinion in *Hervis Sport- és Divatkereskedelmi* (C-385/12, EU:C:2013:531, point 42 et seq.).

32 Judgment of 1 June 2010, *Blanco Pérez and Chao Gómez* (C-570/07 and C-571/07, EU:C:2010:300, paragraph 122).

33 Opinion of Advocate General Wahl in *Austria* v *Germany* (C-591/17, EU:C:2019:99, point 47).

34 Judgment of 9 May 1985, *Humblot* (112/84, EU:C:1985:185, paragraphs 14 and 16).

35 See my Opinion in *Memira Holding* (C-607/17, EU:C:2019:8, point 38).

36 See my Opinion in *Hervis Sport- és Divatkereskedelmi* (C-385/12, EU:C:2013:531, point 51).

37 See my Opinion in *Hervis Sport- és Divatkereskedelmi* (C-385/12, EU:C:2013:531, point 51).

77. In other words, the criterion of turnover is not an intrinsically cross-border distinguishing criterion, but a neutral distinguishing criterion. Turnover is just as neutral as a basis of assessment for calculating a direct tax as, for example, profit (or wealth). The fundamental freedoms favour neither one nor the other. In this regard, there is a historical 'randomness' in the retail trade market which was possibly exploited intentionally by the Hungarian legislature (on this point, see below, point 79 et seq.).

78. This is also confirmed by the statistics submitted to the Court. Thus, one statistic from the *Vodafone* case (C-75/18) shows that, of the 10 highest corporate tax payers in Hungary in 2010, just 3 undertakings were not owned by foreign shareholders. It is evident that the Hungarian economy as the whole has a high proportion of successful (that is to say, large, high-turnover and high-profit) undertakings owned by foreign shareholders. According to Hungary, important parts of the Hungarian economy, such as the processing industry, consist primarily of foreign companies, which generate between 85% and 97% of all turnover.[38] Nevertheless, this clearly historically determined fact does not mean that any tax which imposes a higher burden on undertakings that are particularly successful on the market has an indirectly discriminatory effect.

(2) Effects of an intentional and specific disadvantage

79. However, the Commission also claims that the Hungarian legislature intentionally and specifically brought about the discriminatory effect of the special tax. In this respect it relies on statements made in the relevant parliamentary debate and extracts from government documents.

80. In this regard, the question arises whether a restriction of a fundamental freedom is also to be taken to exist where a distinguishing criterion — that is intrinsically not disadvantageous — was, in subjective terms, intentionally chosen to effect a high degree of disadvantage, in quantitative terms, for undertakings with generally foreign shareholders. To that end, such an intention must be legally relevant (see (i)) and have been accordingly proven (see (ii)).

(i) Relevance of a political intention for the assessment of indirect discrimination

81. I can see certain risks in a subjective analysis of indirect discrimination, which is actually to be determined objectively.[39] In particular, the uncertainties connected with a finding of a Member State's subjective intent to discriminate raise concerns[40] and give rise to ensuing problems (such as demonstrability).

82. Nevertheless, in the light of the spirit and purpose of the qualitative criterion in the context of indirect discrimination (see above, point 55 and point 70 et seq.) and of the prohibition of abuse of rights (or the principle of *venire contra factum proprium*) recognised in EU law, this question should be answered in the affirmative in principle, but only subject to very strict conditions.

38 See paragraph 53 of the written observations.

39 See Opinion of Advocate General Wahl in *Austria* v *Germany* (C-591/17, EU:C:2019:99, points 71 and 72), which, with reference to the judgment of 16 September 2004, *Commission* v *Spain* (C-227/01, EU:C:2004:528, paragraph 56 et seq.), rightly states that in the context of infringement proceedings an objective assessment is made. The same must apply to a request for a preliminary ruling, as there is an assessment of discrimination in both cases.

40 See, for example, the concerns rightly raised in the Opinion of Advocate General Wahl in *Austria* v *Germany* (C-591/17, EU:C:2019:99, point 70 et seq.).

83. The purpose of the qualitative criterion is to exclude purely incidental quantitative correlations from the scope of indirect discrimination. In a sense, this criterion protects the Member States' fiscal sovereignty against restrictions imposed by EU law which might, on a purely quantitative analysis, result simply from an incidental preponderance of foreign taxable persons in a certain area. If, however, the correlation is chosen intentionally and solely in this form in order to disadvantage foreign taxable persons specifically, the circumstances are not incidental and the Member State does not therefore warrant protection.

84. This approach can be based on the general legal principle of the prohibition of abuse of rights, [41] which applies throughout the European Union not only to taxable persons (see now at EU level Article 6 of Directive 2016/1164 [42]). Like Advocate General Campos Sánchez-Bordona, [43] I consider that the Member States are also subject to this general legal principle by virtue of Article 4(3) TEU.

85. The Court has thus ruled that EU law is based on the fundamental premiss that each Member State shares with all the other Member States, and recognises that they share with it, a set of common values on which the EU is founded, as stated in Article 2 TEU. It is precisely in that context that the Member States are obliged, by reason inter alia of the principle of sincere cooperation set out in the first subparagraph of Article 4(3) TEU, to ensure in their respective territories the application of and respect for EU law, and to take for those purposes any appropriate measure, whether general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the EU. [44]

86. In particular, the third subparagraph of Article 4(3) TEU requires the Member States to refrain from any measure which could jeopardise the attainment of the Union's objectives. If, however, powers existing at national level (in this case the introduction of an additional income tax) are chosen intentionally and solely in a certain form in order to disadvantage foreign undertakings alone and thus to restrict the fundamental freedoms conferred on them by EU law (and thereby to circumvent EU law), this is contrary to the principles underlying Article 4(3) TEU and under certain circumstances can certainly be regarded as an abuse of rights. Under these circumstances, it can also be seen as indirect discrimination.

87. It also follows from the abovementioned concerns, however, that, having regard to the autonomy of the Member States, this must be a very limited exception which must be dealt with restrictively and requires concrete proof. An indirect restriction of the fundamental freedom arising from conduct by a Member State constituting an abuse of rights may not under any circumstances be taken to exist flippantly based on mere speculation, inadequately proven statistics, individual statements [45] or other conjecture.

88. Rather, there must be clear evidence that disadvantaging foreign companies was the primary objective of the measure which was perceived and endorsed as such by the Member State (and not merely individuals involved) and — as in other cases of abuse — there also cannot be any other evident objective reason for the option chosen.

41 See, for example, judgment of 5 July 2007, *Kofoed* (C-321/05, EU:C:2007:408, paragraph 38).

42 Council Directive (EU) 2016/1164 of 12 July 2016 laying down rules against tax avoidance practices that directly affect the functioning of the internal market (OJ 2016 L 193, p. 1).

43 Opinion of Advocate General Campos Sánchez-Bordona in *Wightman and Others* (C-621/18, EU:C:2018:978, points 153 and 170).

44 Judgment of 6 March 2018, *Achmea* (C-284/16, EU:C:2018:158, paragraph 34); Opinion 2/13 (Accession of the EU to the ECHR) of 18 December 2014 (EU:C:2014:2454, paragraphs 168 and 173); and Opinion 1/09 (Agreement on the creation of a unified patent litigation system) of 8 March 2011 (EU:C:2011:123, paragraph 68).

45 Statements made by politicians in particular during an electoral campaign are not sufficient in this regard, as is correctly stated in the Opinion of Advocate General Wahl in *Austria* v *Germany* (C-591/17, EU:C:2019:99, points 70 and 71). The same must apply to a public parliamentary debate, as referred to, among other things, by the Commission in the present case.

(ii) Proof of a relevant intention to discriminate

89. There are serious doubts in this regard. The Commission states as grounds for the existence of an intention to discriminate, on the one hand, its observation that the line that divides the upper turnover band (in excess of HUF 100 billion) from the middle band (between HUF 30 billion and HUF 100 billion) is almost precisely the dividing line between domestic and foreign companies.

90. However, this cannot be inferred from the statistical information supplied, even though there are in fact predominantly foreign-owned undertakings in the two highest bands. This is because there are also many undertakings owned by nationals from other EU countries in the third band. From 2012 at least, moreover, 30% of the undertakings included in the second band were owned by nationals. It is not therefore possible to talk of a clear dividing line. In addition, the proportion of foreign-owned undertakings which also 'profit' from a lower tax rate is also too high. Furthermore, the proportion of foreign-owned undertakings which benefit from the exemption is unknown.

91. If, as the referring court suggests, a feature of the Hungarian economy in the retail sector is indeed an organisational model of many smaller retailers under one brand (franchise model), then the above finding is also the logical consequence. Many taxable persons might have the same aggregated turnover, but each one has only a small turnover which is then also subject to a lower tax rate. In essence, however, with its centralised organisational model, Tesco is not competing with the other taxable Hungarian retailers as a whole, but only with each individual (independent) taxable retailer.

92. But does a centralisation of the rest of the European retail trade (many stores in the hands of a single taxable person) now mean that progressive income taxation for the retail trade in Hungary constitutes an abuse, when a European retail chain, using its organisational model, has become established in Hungary?

93. This is doubtful. In particular, Tesco was not prevented from adapting its organisational structure to the changed tax conditions and also operating its branches on a franchise model. It would also be possible to be organised through a number of controlled legal persons. In so far as the aggregation rule is not applicable, this would also reduce the average tax rate. Taxation thus depends on the chosen legal form. The fundamental freedoms do not, however, require taxation that is neutral as to legal form,[46] but only taxation that does not discriminate against a cross-border situation. Accordingly, heavier taxation of a certain centralised organisational form also cannot be regarded per se as an abuse.

94. On the other hand, the choice of words in the parliamentary debate, which concerned the introduction of a 'crisis tax' (Hungary was seeking to restore compliance with the EU's budget deficit criteria), is very similar to the current BEPS[47] debate. In broad terms, the Hungarian parliamentary debate also concerned the problem whereby large multinational groups are able to minimise their profits in Hungary with the result that the tax burden falls mainly to small and medium-sized undertakings, a situation which the Law on the special tax is intended to prevent to some extent. This special tax legislation is thus directed less at *foreign* undertakings than at international, cross-border (*multinational*) undertakings.

46 See my Opinion in *X* (C -68/15, EU:C:2016:886, point 24). See also to that effect judgments of 25 February 2010, *X Holding* (C-337/08, EU:C:2010:89, paragraph 37 et seq.), and of 6 December 2007, *Columbus Container Services* (C-298/05, EU:C:2007:754, paragraph 53).

47 In simple terms, this means the tax structure of multinational groups which have available (lawful) possibilities within the existing tax systems for minimising their assessment bases in high-tax countries and for shifting profits to low-tax countries (Base Erosion and Profit Shifting = BEPS).

95. This also demonstrates the objective reason for the contested tax legislation. As is shown by a statistic provided to the Court in the *Vodafone* case, in 2010, only half of the 10 undertakings in Hungary with the highest turnovers paid corporate tax. These are undertakings owned both by nationals and by nationals of other EU countries. Of the 7 highest-turnover undertakings in the retail sector (all undertakings owned by nationals of other EU countries), even less than half paid corporate taxes. This may be connected with real losses. However, the Commission asserted several times at the hearing that the average profit in the retail sector in Hungary was 2.68% of turnover. This would have to give rise to a corresponding corporate tax liability. In this regard, it also cannot be ruled out that this average profit of 2.68% of turnover has been shifted to low-tax countries. Linking taxation to turnover can certainly attempt to remedy this situation.

96. This is also consistent with the approach taken by the Commission in the planned EU-wide digital services tax.[48] The Commission is also attempting to obtain a greater contribution to public costs from multinational undertakings (in that case primarily from certain non-member countries) if they generate profits within the EU, without being subject to income tax there. If the Commission considers a turnover-based progressive tax for certain undertakings to be necessary in order to ensure fair taxation between larger, globally operating undertakings and smaller undertakings operating (only) throughout Europe, a comparable national tax which seeks to obtain a greater contribution to the public burden from larger undertakings than from smaller undertakings can hardly, in principle, constitute an abuse of rights.

97. In particular, the Commission relies only on statements made by three members of parliament in the parliamentary debate and on extracts from government documents. This too would appear to be an insufficient basis for an allegation of an abuse of rights against a Member State. If statements made in a parliamentary debate were sufficient, it would be possible for the opposition (or even a single member of parliament) to thwart any decision by the legislature by making a suitable statement.

98. Since the government is normally bound by the parliament's decision, and not vice versa, I also have reservations over having regard to individual government documents. Greater importance is attached to the official (legal) explanatory memorandum and not the merely political reasons given to voters for the content of legislation.[49] It is not clear from the former, however, that that tax was aimed primarily at imposing taxation on nationals from other EU countries.

99. Furthermore, the limit of HUF 500 million for the first tax band does not cover only domestic undertakings. Any new domestic or foreign undertaking operating on the Hungarian retail trade market also benefits from the allowance. In this regard, the chosen tax rate structure primarily favours smaller undertakings, in particular start-ups, compared with larger undertakings that are already firmly established on the market.[50] As Poland submitted at the hearing, it also favours smaller and medium-sized undertakings compared with large groups and thus a decentralised market structure. Whether the limits of HUF 30 and 100 billion turnover are the 'best' limits or another amount — at the hearing the Commission 'proposed' a limit of HUF 10 to 50 million — would not have been 'better' is a decision for the national legislature which cannot be reviewed by either the Court or the Commission, unless there is abuse.

48 See inter alia recital 23 of the Proposal for a Council Directive on the common system of a digital services tax on revenues resulting from the provision of certain digital services, 21 March 2018, COM(2018) 148 final, and the reason given on p. 2 of the Proposal, according to which the current corporate tax rules are inadequate for the digital economy.

49 Advocate General Wahl also rightly points out in his Opinion in *Austria* v *Germany* (C-591/17, EU:C:2019:99, point 70): 'I[n] this context, it is immaterial that some German politicians openly stated, during an electoral campaign, that they intended to introduce a charge for foreign travellers on German motorways. Those statements are arguably a manifestation of — paraphrasing a famous quote — a spectre that is haunting Europe in the last years: the spectre of populism and souverainism'.

50 Interestingly, the Commission justifies the graduated rate of the planned digital services tax on the ground that the threshold 'excludes small enterprises and start-ups for which the compliance burdens of the new tax would be likely to have a disproportionate effect' (recital 23 of the Proposal for a Council Directive on the common system of a digital services tax on revenues resulting from the provision of certain digital services, 21 March 2018, COM(2018) 148 final).

100. On the other hand, the Commission repeatedly stated at the hearing that turnover-based income taxation 'makes no sense'. I do not consider this statement, based on the argument that only profit-based income taxation is consistent with the principle of taxation according to ability to pay, to be correct.

101. As I have already stated in my Opinion in *Hervis Sport*, the level of turnover can certainly represent a standardising indicator of taxable capacity. This is suggested, first, by the fact that high profits are not actually possible without high turnover and, second, by the fact that as a rule the profit from additional turnover (marginal profit) increases with falling fixed unit costs.[51] It would not therefore appear unreasonable to regard turnover, as a reflection of an undertaking's size or market position and potential profits, also as a reflection of its financial capacity and to tax it on that basis.

102. Consequently, the general presumption evidently made by the Hungarian legislature that, as a rule, larger (higher-turnover) undertakings also have more financial capacity than smaller undertakings (see also the preamble to the Law on the special tax) is in any case not manifestly incorrect.[52] The (private) banking sector also differentiates in lending operations according to the volume of turnover of the borrower. Even the planned EU digital services tax appears to be based on this presumption if only undertakings from a certain turnover limit are to be taxed (regardless of whether they actually generate profits). Therefore, turnover is perhaps not an ideal indicator, but neither is it an irrelevant indicator of financial capacity.

103. In addition, focusing on turnover gives less scope for organisational models of multinational undertakings, which has been one of the main points of the BEPS debate over the last decade and was also a key element of the Hungarian parliamentary debate. The Commission also expressly justifies its proposal for the planned EU digital services tax, in recital 23,[53] on the ground that 'the opportunity of engaging in aggressive tax planning lies with larger companies'.

(c) Interim conclusion

104. There is no indirect restriction of the fundamental freedoms arising from the introduction of the turnover-based income tax with progressive effect for retail undertakings. First, the criterion of turnover chosen by the Hungarian legislature does not intrinsically disadvantage the cross-border situation. Second, in the absence of sufficient evidence and in the light of an objective reason for the structure of the tax, Hungary as a Member State cannot be criticised in this regard for any conduct constituting an abuse of rights.

3. In the alternative: justification for indirect discrimination

105. In the event that the Court should nevertheless consider that there is indirect discrimination, it should be asked, in the alternative, whether the resulting different average tax rate is justified. A restriction of fundamental freedoms may be justified by overriding reasons in the public interest, provided it is appropriate for ensuring the attainment of the objective pursued and does not go beyond what is necessary to attain that objective.[54]

51 See my Opinion in *Hervis Sport- és Divatkereskedelmi* (C-385/12, EU:C:2013:531, point 61). See also to that effect my Opinion in *ANGED* (C-233/16, EU:C:2017:852, point 57).

52 See also to that effect judgment of 16 May 2019, *Poland* v *Commission* (T-836/16 and T-624/17, EU:T:2019:338, paragraph 75 et seq.).

53 Proposal for a Council Directive on the common system of a digital services tax on revenues resulting from the provision of certain digital services, 21 March 2018, COM(2018) 148 final.

54 Judgments of 5 February 2014, *Hervis Sport- és Divatkereskedelmi* (C-385/12, EU:C:2014:47, paragraph 42); of 24 March 2011, *Commission* v *Spain* (C-400/08, EU:C:2011:172, paragraph 73); and of 5 October 2004, *CaixaBank France* (C-442/02, EU:C:2004:586, paragraph 17).

(a) Overriding reasons in the public interest

106. According to the preamble to the Law on the special tax, the special tax seeks to restore budgetary balance at the expense of taxable persons whose capacity to bear public burdens surpasses the general obligation to pay tax. The Court has made clear that the restoration of budgetary balance by increasing fiscal receipts cannot justify a tax system like the one at issue.[55] The particular mechanism of the tax should not be justified by mere fiscal interests, but by making a link to the different economic strength of the taxable persons, that is to say, on the basis of an equitable sharing of burdens in society.

107. The different ability to pay of a taxable person may, however, justify a different treatment of taxable persons.[56] Accordingly, it is recognised in tax law that in principle the State has a legitimate interest in applying progressive tax rates. It is also widespread within Member States, for profit-based taxes at least, for persons with greater financial capacity to be able to contribute disproportionately to public expenditure.[57] In many Member States the principle of taxation according to ability to pay is even a constitutional principle, which in some cases is expressly enshrined in the constitutions[58] and in others has been derived from the principle of equal treatment by the highest courts.[59]

108. The underlying reason in a welfare state is to relieve the burden on the weaker parts of society and thus partially to redistribute the to some extent unequally distributed funds by means of taxation law. As under the second subparagraph of Article 3(3), the Union is not only to establish an internal market, but also to promote social justice, these reasons relating to the welfare state may also justify a progressive tax rate in EU law. This holds in any case for a tax covering not only undertakings, but also natural persons, as is the case under Paragraph 3(1) and (2) of the Law on the special tax. Even the European Union has recourse to a progressive rate for the taxation of its officials and other employees.[60]

109. The Court has also recognised the principle of taxation according to ability to pay, at least in the context of the justification for the coherence of the tax system.[61] The volume of turnover is at least a plausible indicator for financial capacity (see above, point 100 et seq.). Consequently, the justification of taxation according to financial capacity in conjunction with the principle of the welfare state can justify a restriction of the fundamental freedoms.

(b) Proportionality of the restriction

110. The restriction of the fundamental freedom must also be appropriate for ensuring the attainment of the objective and may not go beyond what is necessary for attaining that objective.[62]

55 Judgment of 5 February 2014, *Hervis Sport- és Divatkereskedelmi* (C-385/12, EU:C:2014:47, paragraph 44).

56 See my Opinion in *Hervis Sport- és Divatkereskedelmi* (C-385/12, EU:C:2013:531, point 60) and my Opinion in *ANGED* (C-233/16, EU:C:2017:852, point 44).

57 See also, with regard to the ability-to-pay principle at Union level, Kokott, J., *Das Steuerrecht der Europäischen Union*, Munich, 2018, § 3, paragraph 54 et seq.

58 See, for example, Article 4(5) of the Constitution of Greece, Article 53(1) of the Constitution of Italy, Article 31(1) of the Constitution of Spain, Article 24(1) of the Constitution of Cyprus and, in particular, Article O and Article XXX of the Fundamental Law of Hungary.

59 For example, in Germany, inter alia: Bundesverfassungsgericht (Federal Constitutional Court), order of 15 January 2014 (1 BvR 1656/09, ECLI:DE:BVerfG:2014:rs20140115.1bvr165609, paragraph 55 et seq.).

60 See Article 4 of Regulation (EEC, Euratom, ECSC) No 260/68 of the Council of 29 February 1968 laying down the conditions and procedure for applying the tax for the benefit of the European Communities (OJ, English special edition, Series I Chapter 1968(I), p. 37) with a progressive tax rate between 8% and 45%.

61 Judgment of 12 June 2018, *Bevola and Jens W. Trock* (C-650/16, EU:C:2018:424, paragraphs 49 and 50).

62 Judgments of 17 July 2014, *Nordea Bank* (C-48/13, EU:C:2014:2087, paragraph 25); of 29 November 2011, *National Grid Indus* (C-371/10, EU:C:2011:785, paragraph 42); of 15 May 2008, *Lidl Belgium* (C-414/06, EU:C:2008:278, paragraph 27); of 12 September 2006, *Cadbury Schweppes and Cadbury Schweppes Overseas* (C-196/04, EU:C:2006:544, paragraph 47); of 13 December 2005, *SEVIC Systems* (C-411/03, EU:C:2005:762, paragraph 23); and of 13 December 2005, *Marks & Spencer* (C-446/03, EU:C:2005:763, paragraph 35).

(1) Appropriateness

111. According to the Court's case-law, national legislation is appropriate for ensuring attainment of the objective pursued only if it genuinely reflects a concern to attain it in a consistent and systematic manner. [63]

112. In this regard, the Court takes into consideration the discretion enjoyed by the Member States in laying down general laws. [64] In particular, political, economic and social choices are entailed on the part of the legislature. It is also called upon to undertake complex assessments. [65] In the absence of EU harmonisation, the national legislature has a certain discretion in the field of tax law. The abovementioned requirement of consistency is therefore satisfied if the special tax is not manifestly inappropriate having regard to the objective. [66]

113. In so far as the special tax at issue takes account of the economic capacity of taxable undertakings, it is clearly based (see point 102) on the assumption that undertakings with a higher turnover have a greater financial capacity than undertakings with a lower turnover.

114. The Commission raises the objection against this assumption that turnover is an indication only of an undertaking's size and market position, but not its financial capacity. An increase in turnover does not automatically mean an increase in profit. There is therefore no direct connection between an undertaking's turnover and its financial capacity. This argument made by the Commission is surprising as precisely the opposite reasons are given at present for the planned turnover-related digital services tax at EU level. [67]

115. In particular, a *direct* connection between the object of taxation (here turnover) and the aim of the tax (here taxation of ability to pay), as required by the Commission, is not necessary to justify the appropriateness of the measure. Such strict requirements would run counter to the discretion enjoyed by the Member States. The measure is to be considered inappropriate only if no plausible connection at all is evident. In the present case, however, an *indirect* connection between the annual turnover generated and financial capacity is certainly identifiable (see above, point 101 et seq.).

63 Judgments of 11 June 2015, *Berlington Hungary and Others* (C-98/14, EU:C:2015:386, paragraph 64); of 12 July 2012, *HIT and HIT LARIX* (C-176/11, EU:C:2012:454, paragraph 22 and the case-law cited); and of 17 November 2009, *Presidente del Consiglio dei Ministri* (C-169/08, EU:C:2009:709, paragraph 42).

64 See judgments of 6 November 2003, *Gambelli and Others* (C-243/01, EU:C:2003:597, paragraph 63); of 21 September 1999, *Läärä and Others* (C-124/97, EU:C:1999:435, paragraphs 14 and 15); and of 24 March 1994, *Schindler* (C-275/92, EU:C:1994:119, paragraph 61) — all concerning games of chance; and of 5 March 1996, *Brasserie du pêcheur and Factortame* (C-46/93 and C-48/93, EU:C:1996:79, paragraph 48 et seq., concerning foodstuffs legislation).

65 For a comparable test for assessing acts of Union institutions and of the Member States, see also judgment of 5 March 1996, *Brasserie du pêcheur and Factortame* (C-46/93 and C-48/93, EU:C:1996:79, paragraph 47).

66 See, in this respect, my Opinion in *ANGED* (C-233/16, EU:C:2017:852, point 48) and judgments of 4 May 2016, *Poland* v *Parliament and Council* (C-358/14, EU:C:2016:323, paragraph 79), and of 10 December 2002, *British American Tobacco (Investments) and Imperial Tobacco* (C-491/01, EU:C:2002:741, paragraph 123 and the case-law cited), with regard to the discretion of the EU legislature, which is applicable to the situation of the national legislature; see also, with regard to the comparable criteria concerning the actions of EU institutions and Member States judgment of 5 March 1996, *Brasserie du pêcheur and Factortame* (C-46/93 and C-48/93, EU:C:1996:79, paragraph 47).

67 With regard to the turnover-based digital services tax proposed by the Commission, it is stated in recital 23 that the turnover-based threshold should limit the application of the digital services tax to companies of a certain scale. These are undertakings which heavily rely on the exploitation of a strong market position. The threshold also excludes small enterprises and start-ups for which the compliance burdens of the new tax would be likely to have a disproportionate effect. In the justification of this (p. 12), the Commission explicitly states that these (higher-turnover) undertakings, because of their strong market position, are relatively more capable of benefiting from their business models than smaller undertakings. On the basis of this 'economic capacity' these undertakings are considered especially 'tax-worthy' and classified as taxable persons.

116. Contrary to the view expressed by the Commission at the hearing, unequal treatment does not therefore depend on whether the progressive rate is applied in the context of a profit-based or a turnover-based tax. Furthermore, an undertaking's profit too is merely a technical figure which shows a notional (taxable) ability to pay and does not always correspond to the real ability to pay. This is illustrated in the case of high special depreciation, which reduces profit only notionally, but not in real terms ('hidden reserves'), or in the case of 'restructuring gains' (a waiver of a claim by a creditor of an insolvent undertaking results in a profit for accounting purposes in its balance sheet).

117. The problem, arising in both cases, of taxation notwithstanding real losses (or on account of notional profits) is a matter of national law. National law can take this into account through a remission or a deferral of such tax if there are in fact real losses (and not merely accounting losses) or only accounting profits (and not real profits).

118. In addition, turnover is in some ways even more appropriate than profit for representing an undertaking's financial capacity. Unlike profit, turnover is much less amenable to reduction by decreasing the taxable amount or shifting profits, for example using transfer prices. Focusing on turnover can therefore also be an effective means of countering aggressive tax planning, as the Commission rightly stresses in connection with its proposed turnover-based digital services tax. [68]

119. The Hungarian special tax is therefore not manifestly inappropriate for attaining the abovementioned objective of taxation according to ability to pay.

(2) Necessity

120. A profit-based income tax is not a less onerous, equally appropriate means, however, but an *aliud* to a turnover-based income tax. The method of taxing income (turnover-based or profit-based) does not — as explained in point 116 — offer any indication as to whether taxes are also payable in the event of a genuine loss.

121. It would likewise be difficult to reconcile with the Member States' autonomy in matters of tax law if EU law were to prescribe the specific taxation technique in the area of non-harmonised taxes. In any event, a primacy of profit-based tax over turnover-based taxes cannot be inferred from EU law.

122. Furthermore, a profit-based income tax is also not equally appropriate for achieving efficient and less malleable taxation. The link to turnover as the basis for assessment has the abovementioned advantage that it is easier to determine and renders circumvention strategies more difficult.

(3) Proportionality

123. The restriction of freedom of establishment alleged in the alternative is also proportionate with its legitimate objectives of taxation according to ability to pay, compliance with the stability criteria and combating abuse. All those objectives are recognised in the European Union and in some cases enjoy the highest status.

124. In particular, the special tax clearly does not render an economically viable activity in the Hungarian retail trade impossible. It does not appear to have a choking effect, as the last few years have shown. The Commission itself has submitted several times that the average profit in the retail sector in Hungary was higher than the top rate of the special tax of 2.5% and thus a fortiori higher than the average rate (in the case of Tesco this was between 2% and 2.2% [69]).

68 Recital 23 of the Proposal for a Council Directive on the common system of a digital services tax on revenues resulting from the provision of certain digital services, 21 March 2018, COM(2018) 148 final.

69 As is at least stated by Tesco itself in paragraph 62 of the written observations.

125. It is true that the resulting income taxation (with a 2% tax rate and a profit margin of 2.68% this would correspond to a tax rate of 75%, and with a 2.2% tax rate and the same profit margin a tax rate of 82% on profit) is significant. However, it depends on Tesco's profit margin, which is not known to the Court and can be influenced by Tesco to some degree. The special tax also reduces profit, such that there is also a reduction in profit-based income tax, where income taxes are paid. In addition, the special tax was levied from the outset as a 'crisis tax' for just 3 years and is thus merely temporary in nature.

126. An alleged restriction of freedom of establishment arising from a turnover-based progressive income tax on high-turnover retail undertakings would therefore be justified in any case.

4. Conclusion on the first question referred

127. Articles 49 and 54 TFEU do not preclude the Hungarian special tax for retail undertakings.

C. Second and third questions: infringement of the prohibition of State aid

128. The second and third questions ask whether the progressively structured Hungarian special tax for the retail trade can be characterised as State aid. The referring court considers this to be the case, first, given that taxable persons which operate a number of retail establishments 'in fact have to pay the special tax corresponding to the highest band of a steeply progressive tax rate', whereas taxable persons which have just one retail establishment, but compete with the former category as a franchise, 'are in fact included in the exempt band or are subject to one of the lower tax rates following that band'.

129. Second, the referring court links the character of aid to a possible use of revenue from the special tax for the benefit of smaller undertakings not affected by it.

1. The admissibility of the second and third questions

130. It must be first clarified, however, whether the request for a preliminary ruling is actually admissible in so far as the second and third questions are concerned since, according to the Court's settled case-law, a business liable to pay a tax cannot rely on the argument that the exemption enjoyed by other businesses constitutes State aid in order to avoid payment of that tax.[70]

131. Because, however, the tax is used for specific purposes, in particular to favour other businesses, it must be examined whether the revenue from the tax is used in a manner compatible with the rules on State aid.[71] In such a case, the relevant business liable to pay tax can also challenge its own burden, which is necessarily accompanied by the favouring of third parties. This requires the tax be hypothecated to the aid. The revenue from the tax must necessarily be allocated to the financing of the aid and have a direct impact on the amount of the aid and, consequently, on the assessment of the compatibility of that aid with the internal market.[72]

70 Judgments of 6 October 2015, *Finanzamt Linz* (C-66/14, EU:C:2015:661, paragraph 21); of 15 June 2006, *Air Liquide Industries Belgium* (C-393/04 and C-41/05, EU:C:2006:403, paragraph 43 et seq.); of 27 October 2005, *Distribution Casino France and Others* (C-266/04 to C-270/04, C-276/04 and C-321/04 to C-325/04, EU:C:2005:657, paragraph 42 et seq.); and of 20 September 2001, *Banks* (C-390/98, EU:C:2001:456, paragraph 80 and the case-law cited).

71 With regard to the relevance of this question, see inter alia judgment of 27 October 2005, *Distribution Casino France and Others* (C-266/04 to C-270/04, C-276/04 and C-321/04 to C-325/04, EU:C:2005:657, paragraphs 40, 41 and 45 et seq.).

72 See to that effect judgments of 20 September 2018, *Carrefour Hypermarchés and Others* (C-510/16, EU:C:2018:751, paragraph 19); of 10 November 2016, *DTS Distribuidora de Televisión Digital* v *Commission* (C-449/14 P, EU:C:2016:848, paragraph 68); and of 22 December 2008, *Régie Networks* (C-333/07, EU:C:2008:764, paragraph 99).

132. In this case, however, the use of the funds received does not result by operation of law in specific undertakings being favoured. Rather, the burden is imposed on the applicant in the main proceedings by a general tax, which is paid into the general public budget and does not therefore specifically favour any third party. Accordingly, in the present case the applicant is challenging only a tax notice addressed to it, which it considers to be unlawful because other taxable persons are not taxed to the same extent.

133. Nor is this finding affected by the fact established by the referring court that, before the tax was introduced, the necessary tax revenue had been ascertained and the allowance thus influenced the tax rate in the other bands. The revenue from the tax is not therefore used for the benefit of other competitors, but still for the public benefit and to cover general public expenditure.

134. Tesco cannot therefore rely before the national courts on the unlawfulness of the exemption granted to other undertakings in order to avoid payment of that tax.

135. Even in the judgment in *Air Liquide Industries Belgium*[73] cited by Tesco, the Court correctly stated that the business 'liable to pay a tax cannot rely on the argument that the exemption enjoyed by other businesses constitutes State aid in order to avoid payment of that tax'.[74]

136. This is because the 'logical consequence' of aid which is incompatible with the single market is its recovery.[75] However, not taxing Tesco would not amount to recovery, but would extend the State aid to a further person (here Tesco) and thus not eliminate the distortion of competition, but intensify it. This is also the main difference with cases in which 'only' a tax assessment notice is being contested before the national court, but the referring court asks whether it can apply a favouring national rule.[76] In those cases, the taxable person relies on a national rule favouring it, which possibly constitutes aid.

137. The objection also cannot be raised in this regard that recovery is not possible by way of subsequent taxation of smaller undertakings, such that only the abolition of the tax would be possible. If recovery of aid by the Member State is exceptionally not possible, it may also not be recovered according to Article 14(1) of Regulation (EC) No 659/1999.[77] As the Court has ruled, the principle that 'no one is obliged to do the impossible' is among the general principles of EU law.[78] Even in such a case, neither Articles 107 and 108 TFEU nor the rules of that regulation thus provide, in respect of the past, for an *extension* of aid to other persons.

138. Nor can the admissibility of the question referred be inferred — contrary to the intimation made by the Commission — from the Court's recent decision in *ANGED*[79] regarding a Spanish (area-based) retail tax. Those proceedings before the national court concerned a review of the legislation itself (with *erga omnes* effect) and not just a review of an individual tax notice. Further statements regarding Article 107 TFEU were therefore at least useful for the referring court.

73 Judgment of 15 June 2006 (C-393/04 and C-41/05, EU:C:2006:403, paragraphs 25 and 26).

74 Judgment of 15 June 2006, *Air Liquide Industries Belgium* (C-393/04 and C-41/05, EU:C:2006:403, paragraph 43).

75 Judgments of 6 November 2018, *Scuola Elementare Maria Montessori* v *Commission*, *Commission* v *Scuola Elementare Maria Montessori* and *Commission* v *Ferracci* (C-622/16 P to C-624/16 P, EU:C:2018:873, paragraph 77); of 21 December 2016, *Commission* v *Aer Lingus and Ryanair Designated Activity* (C-164/15 P and C-165/15 P, EU:C:2016:990, paragraph 116); of 1 October 2015, *Electrabel and Dunamenti Erőmű* v *Commission* (C-357/14 P, EU:C:2015:642, paragraph 111); and of 15 December 2005, *UniCredito Italiano* (C-148/04, EU:C:2005:774, paragraph 113 and the case-law cited).

76 That was the situation, for example, in the judgment of 19 December 2018, *A-Brauerei* (C-374/17, EU:C:2018:1024).

77 Council Regulation of 22 March 1999 laying down detailed rules for the application of Article [108 TFEU] (OJ 1999 L 83, p. 1).

78 Judgment of 6 November 2018, *Scuola Elementare Maria Montessori* v *Commission*, *Commission* v *Scuola Elementare Maria Montessori* and *Commission* v *Ferracci* (C-622/16 P to C-624/16 P, EU:C:2018:873, paragraph 79); see to that effect, albeit in a different context, judgment of 3 March 2016, *Daimler* (C-179/15, EU:C:2016:134, paragraph 42).

79 Judgments of 26 April 2018, *ANGED* (C-233/16, EU:C:2018:280); of 26 April 2018, *ANGED* (C-234/16 and C-235/16, EU:C:2018:281); and of 26 April 2018, *ANGED* (C-236/16 and C-237/16, EU:C:2018:291).

139. Tesco is entitled to seek an abstract review of the legislation before a national court. The questions asked by the referring court in this case are, however, limited to the tax assessment notice in respect of Tesco and thus the tax burden of an individual.

140. There is therefore neither a reason nor a need to depart from the Court's previous case-law, according to which a business liable to pay a tax cannot rely on the argument that the exemption enjoyed by other businesses constitutes State aid in order to avoid payment of that tax. [80] The request for a preliminary ruling is therefore inadmissible in respect of its second and third questions.

2. In the alternative: legal assessment

141. If the Court were nevertheless to accept the admissibility of the second and third questions, it would then have to examine whether the reduced taxation of medium-sized undertakings or the exemption for smaller undertakings (in relation to turnover) constitutes aid within the meaning of Article 107(1) TFEU.

142. The Court has consistently held that classification as 'State aid' within the meaning of Article 107(1) TFEU requires that, first, there be intervention by the State or through State resources. Second, the intervention must be liable to affect trade between Member States. Third, it must confer a selective advantage on the recipient. Fourth, it must distort or threaten to distort competition. [81]

(a) The notion of advantage

143. According to settled case-law of the Court, measures which, whatever their form, are likely directly or indirectly to favour certain undertakings, or which fall to be regarded as an economic advantage that the recipient undertaking would not have obtained under normal market conditions, are regarded as State aid. [82]

144. Favourable tax treatment, which, although not involving the transfer of State resources, places the recipients in a financial position more favourable than that of other taxpayers can also fall under Article 107(1) TFEU. [83] Thus, measures which, in various forms, mitigate the charges that are *normally* included in the budget of an undertaking and which therefore, without being subsidies in the strict meaning of the word, are similar in character and have the same effect are considered to constitute aid. [84]

80 Judgments of 6 October 2015, *Finanzamt Linz* (C-66/14, EU:C:2015:661, paragraph 21); of 15 June 2006, *Air Liquide Industries Belgium* (C-393/04 and C-41/05, EU:C:2006:403, paragraph 43 et seq.); of 27 October 2005, *Distribution Casino France and Others* (C-266/04 to C-270/04, C-276/04 and C-321/04 to C-325/04, EU:C:2005:657, paragraph 42 et seq.); and of 20 September 2001, *Banks* (C-390/98, EU:C:2001:456, paragraph 80 and the case-law cited).

81 Judgments of 27 June 2017, *Congregación de Escuelas Pías Provincia Betania* (C-74/16, EU:C:2017:496, paragraph 38); of 21 December 2016, *Commission* v *World Duty Free Group and Others* (C-20/15 P and C-21/15 P, EU:C:2016:981, paragraph 53); and of 21 December 2016, *Commission* v *Hansestadt Lübeck* (C-524/14 P, EU:C:2016:971, paragraph 40).

82 Judgments of 27 June 2017, *Congregación de Escuelas Pías Provincia Betania* (C-74/16, EU:C:2017:496, paragraph 65), and of 9 October 2014, *Ministerio de Defensa and Navantia* (C-522/13, EU:C:2014:2262, paragraph 21).

83 See inter alia judgments of 9 October 2014, *Ministerio de Defensa and Navantia* (C-522/13, EU:C:2014:2262, paragraph 23); of 15 November 2011, *Commission and Spain* v *Government of Gibraltar and United Kingdom* (C-106/09 P and C-107/09 P, EU:C:2011:732, paragraph 72); and of 15 March 1994, *Banco Exterior de España* (C-387/92, EU:C:1994:100, paragraph 14).

84 Judgments of 27 June 2017, *Congregación de Escuelas Pías Provincia Betania* (C-74/16, EU:C:2017:496, paragraph 66); of 14 January 2015, *Eventech* (C-518/13, EU:C:2015:9, paragraph 33); of 19 March 2013, *Bouygues and Bouygues Télécom* v *Commission* (C-399/10 P and C-401/10 P, EU:C:2013:175, paragraph 101); and of 15 March 1994, *Banco Exterior de España* (C-387/92, EU:C:1994:100, paragraph 13).

145. It is also doubtful in this instance whether there is a selective advantage. There is no advantage in relation to the exemption and the reduced taxation. All undertakings — both large and small — are not taxed with a turnover of up to HUF 500 million, are taxed at a very reduced rate from HUF 500 million to HUF 30 billion, and are taxed at a reduced rate from HUF 30 billion to HUF 100 billion. This also holds for Tesco.

146. At most, the different average tax rate resulting from the progression could constitute an advantage which favours lower-turnover taxable persons.

(b) Selectivity of the advantage in tax law

(1) Standard of review for selectivity of general tax legislation

147. The Court's case-law repeatedly takes as its starting point the premiss that a tax regime is not selective if it is applicable without distinction to all economic operators.[85] The fact that a tax regime grants an advantage only to those undertakings which satisfy its conditions — here not reaching certain turnover limits — is also not in itself capable of establishing its selectivity.[86] Nevertheless, general tax legislation is also to be assessed having regard to the prohibition of State aid under Article 107 TFEU.[87]

148. The decisive factor is whether, in accordance with the criteria laid down by the national tax system, the conditions governing the tax advantage have been selected in a non-discriminatory manner.[88] To answer that question, it is necessary to begin by identifying the ordinary or 'normal' tax system applicable in the Member State concerned. It is in relation to that ordinary or 'normal' tax regime that it is necessary, secondly, to assess whether the advantage granted by the tax measure in question is selective.[89]

149. The latter point requires there to be unequal treatment of undertakings in a comparable situation which cannot be justified.[90] In essence this selectivity test is a discrimination test.[91]

85 See inter alia judgments of 21 December 2016, *Commission* v *World Duty Free Group and Others* (C-20/15 P and C-21/15 P, EU:C:2016:981, paragraph 53 et seq.); of 9 October 2014, *Ministerio de Defensa and Navantia* (C-522/13, EU:C:2014:2262, paragraph 23); of 29 March 2012, *3M Italia* (C-417/10, EU:C:2012:184, paragraph 39); of 15 November 2011, *Commission and Spain* v *Government of Gibraltar and United Kingdom* (C-106/09 P and C-107/09 P, EU:C:2011:732, paragraph 73); and of 8 November 2001, *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke* (C-143/99, EU:C:2001:598, paragraph 35).

86 See to that effect, in particular, judgments of 19 December 2018, *A-Brauerei* (C-374/17, EU:C:2018:1024, paragraph 24); of 28 June 2018, *Andres (Insolvenz Heitkamp BauHolding)* v *Commission* (C-203/16 P, EU:C:2018:505, paragraph 94); of 21 December 2016, *Commission* v *World Duty Free Group and Others* (C-20/15 P and C-21/15 P, EU:C:2016:981, paragraph 59); and of 29 March 2012, *3M Italia* (C-417/10, EU:C:2012:184, paragraph 42).

87 See inter alia judgments of 9 October 2014, *Ministerio de Defensa and Navantia* (C-522/13, EU:C:2014:2262, paragraph 23); of 15 November 2011, *Commission and Spain* v *Government of Gibraltar and United Kingdom* (C-106/09 P and C-107/09 P, EU:C:2011:732, paragraph 72); and of 15 March 1994, *Banco Exterior de España* (C-387/92, EU:C:1994:100, paragraph 14).

88 See also to that effect judgments of 21 December 2016, *Commission* v *World Duty Free Group and Others* (C-20/15 P and C-21/15 P, EU:C:2016:981, paragraph 54), and of 14 January 2015, *Eventech* (C-518/13, EU:C:2015:9, paragraph 53); expressly also, outside the field of tax law, judgment of 21 December 2016, *Commission* v *Hansestadt Lübeck* (C-524/14 P, EU:C:2016:971, paragraphs 53 and 55).

89 See inter alia judgment of 19 December 2018, *A-Brauerei* (C-374/17, EU:C:2018:1024, paragraph 36).

90 Judgment of 21 December 2016, *Commission* v *World Duty Free Group and Others* (C-20/15 P and C-21/15 P, EU:C:2016:981, paragraph 58); see to that effect judgments of 29 March 2012, *3M Italia* (C-417/10, EU:C:2012:184, paragraph 40); of 8 September 2011, *Paint Graphos* (C-78/08 to C-80/08, EU:C:2011:550, paragraphs 64 and 65); and of 29 April 2004, *Netherlands* v *Commission* (C-159/01, EU:C:2004:246, paragraphs 42 and 43).

91 Opinion of Advocate General Bobek in *Belgium* v *Commission* (C-270/15 P, EU:C:2016:289, point 29).

150. A measure which constitutes an exception to the application of the general tax system may be justified if the Member State concerned can show that that measure results directly from the basic or guiding principles of its tax system. [92] General differentiations within the framework of a consistent tax system can hardly therefore constitute a selective advantage.

151. Various Advocates General [93] have raised concerns, in particular regarding the determination of the correct reference framework and a general equality test for all national tax legislation with the concurrent fiscal autonomy of the Member States. These can be addressed by a softer standard of review in respect of the fiscal consistency of general tax legislation. Accordingly, general differentiations constitute selective measures, where the reference system is created, only if they have no rational basis in the light of the objective of the legislation. This lower standard of review applies in particular where, as in this case, it is a matter of newly introduced tax legislation.

152. Consequently, a selective advantage is possible only where, first, that measure (here the progressive tax rate) differentiates between economic operators who, in the light of the objective attributed to the tax system of the Member State concerned, are in a comparable factual and legal situation. [94]

153. Even if that condition is fulfilled, second, the favouring can be justified, according to settled case-law, by the nature or general scheme of the system of which it is part. This must be considered in particular if a tax regime results directly from the basic or guiding principles of the national tax system, [95] which simply have to be plausible. Furthermore, plausible non-fiscal reasons can also justify a differentiation, as was acknowledged for example in *ANGED* with regard to environment and town and country planning reasons in connection with a tax on retail sales area. [96]

154. On closer inspection, this idea also underlies the fundamental decision in *Gibraltar*, [97] on which Tesco [98] and the Commission [99] rely in essence in their written pleadings. In that case too, the reference framework was created for the first time and had the de facto consequence that offshore undertakings were not taxed, even though the newly introduced income tax legislation was intended to tax all undertakings equally (also, it would seem, based on their financial capacity). In that instance, the legislature opted for criteria such as employment and business property occupation in order to implement profit-oriented taxation of income. In this regard, and in view of the fact that the United

92 Judgment of 18 July 2013, *P* (C-6/12, EU:C:2013:525, paragraph 22), and of 8 September 2011, *Paint Graphos* (C-78/08 to C-80/08, EU:C:2011:550, paragraph 65 and the case-law cited).

93 See Opinion of Advocate General Saugmandsgaard Øe in *A-Brauerei* (C-374/17, EU:C:2018:741); Opinion of Advocate General Wahl in *Andres* v *Commission* (C-203/16 P, EU:C:2017:1017); and my Opinions in *ANGED* (C-233/16, EU:C:2017:852), *ANGED* (C-234/16 and C-235/16, EU:C:2017:853), and *ANGED* (C-236/16 and C-237/16, EU:C:2017:854).

94 See judgments of 21 December 2016, *Commission* v *Aer Lingus and Ryanair Designated Activity* (C-164/15 P and C-165/15 P, EU:C:2016:990, paragraph 51); of 21 December 2016, *Commission* v *World Duty Free Group and Others* (C-20/15 P and C-21/15 P, EU:C:2016:981, paragraph 54); of 21 December 2016, *Commission* v *Hansestadt Lübeck* (C-524/14 P, EU:C:2016:971, paragraphs 49 and 58); of 9 October 2014, *Ministerio de Defensa and Navantia* (C-522/13, EU:C:2014:2262, paragraph 35); of 18 July 2013, *P* (C-6/12, EU:C:2013:525, paragraph 19); of 29 March 2012, *3M Italia* (C-417/10, EU:C:2012:184, paragraph 42); and of 8 September 2011, *Paint Graphos* (C-78/08 to C-80/08, EU:C:2011:550, paragraph 49).

95 See judgments of 18 July 2013, *P* (C-6/12, EU:C:2013:525, paragraph 22), and of 8 September 2011, *Paint Graphos* (C-78/08 to C-80/08, EU:C:2011:550, paragraphs 65 and 69); see also to that effect, inter alia, judgments of 9 October 2014, *Ministerio de Defensa and Navantia* (C-522/13, EU:C:2014:2262, paragraphs 42 and 43); of 15 November 2011, *Commission and Spain* v *Government of Gibraltar and United Kingdom* (C-106/09 P and C-107/09 P, EU:C:2011:732, paragraph 145); of 8 November 2001, *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke* (C-143/99, EU:C:2001:598, paragraph 42); and of 2 July 1974, *Italy* v *Commission* (173/73, EU:C:1974:71, paragraph 33).

96 Judgments of 26 April 2018, *ANGED* (C-236/16 and C-237/16, EU:C:2018:291, paragraph 40 et seq.); of 26 April 2018, *ANGED* (C-234/16 and C-235/16, EU:C:2018:281, paragraph 45 et seq.); and of 26 April 2018, ANGED (C-233/16, EU:C:2018:280, paragraph 52 et seq.).

97 Judgment of 15 November 2011, *Commission and Spain* v *Government of Gibraltar and United Kingdom* (C-106/09 P and C-107/09 P, EU:C:2011:732).

98 See paragraph 135 of the written observations of Tesco.

99 See paragraph 79 et seq. of the written observations of the Commission.

Kingdom had not adduced any justifications in the aid procedure, the Court accepted the finding of inconsistency by the Commission.[100] This is because neither employment nor business property occupation are plausible factors for general, equal taxation on income, which was the stated objective of the national legislation.

155. Inconsistency can ultimately indicate abuse of tax law. With this in mind, the taxable person in this case has not selected abusive arrangements in order to avoid tax. Rather, on an objective analysis, the Member State has 'abused' its tax law in order to make subsidies to individual undertakings in circumvention of the rules on State aid.

(2) Application to the present case

156. The newly introduced, progressive, turnover-based special income tax for retail undertakings is to be assessed by applying this standard of review. The question thus arises whether it is inconsistent to levy more tax (in both absolute and relative terms) on a retail undertaking with a high turnover than on a retail undertaking with a low turnover. The question also arises whether it is inconsistent that a taxable person with just one retail establishment (operating as a franchise) is subject to a lower average tax rate than a taxable person with hundreds of retail establishments.

157. In this connection, it must be examined, first of all, whether there is unequal treatment of undertakings in a comparable situation which cannot be justified in the context of the national tax system.

(i) Unequal treatment of undertakings in a comparable situation

158. That is not the case with a tax like the one at issue, however. Larger and smaller retail undertakings differ precisely on account of their turnover and the resulting financial capacity. In the view of the Member State — which is not manifestly incorrect here — they are not in a legally and factually comparable situation.[101]

159. The same holds for the possibilities for larger undertakings to minimise profit-based taxation on income by means of tax arrangements. It is likewise not manifestly unreasonable that such a possibility increases with the size of an undertaking.

(ii) In the alternative: justification of unequal treatment

160. If the Court should nevertheless accept the existence of a comparable situation for a retail undertaking with, for example, an annual net turnover of HUF/EUR 500 000 and a retail undertaking with an annual net turnover of HUF/EUR 100 billion, it must still be examined whether the unequal treatment arising from a progressive tax which accompanies the different average rate can be justified.

161. As the Court held in *World Duty Free Group*,[102] only the examination of the difference in treatment in question in the light of the objective pursued by the legislation is decisive, in particular where — as in this case — there is no derogation from a reference framework, but the legislation itself forms the reference framework.

100 Judgment of 15 November 2011, *Commission and Spain* v *Government of Gibraltar and United Kingdom* (C-106/09 P and C-107/09 P, EU:C:2011:732, paragraph 149).

101 See apparently to that effect judgment of 16 May 2019, *Poland* v *Commission* (T-836/16 and T-624/17, EU:T:2019:338, paragraph 102).

102 Judgment of 21 December 2016, *Commission* v *World Duty Free Group and Others* (C-20/15 P and C-21/15 P, EU:C:2016:981, paragraphs 54, 67 and 74).

162. Consideration must be given not only to the objectives expressly mentioned in the national legislation, but also to the objectives which can be inferred from the national legislation by way of interpretation.[103] Otherwise, regard would be had solely to the legislative technique. The Court has consistently held in its case-law, however, that, in the rules on State aid, State interventions are to be assessed on the basis of their effects, independently of the techniques used.[104]

163. It must therefore be clarified whether the progressive tax scale of the Hungarian special tax is not based in the specific tax legislation itself, but pursues purposes which are extrinsic to it and extraneous.[105]

164. As was stated above (point 106 et seq.), the objective of the law, as expressly mentioned in the preamble, is taxation of financial capacity, which is inferred in this case from volume of turnover. Furthermore — this is per se characteristic of a progressive tax rate and thus inherent in the system — a certain 'redistribution function' is pursued if a heavier financial burden is placed on economically stronger actors than economically weaker actors. The Commission also recognises the 'redistributive purpose' as a justification in respect of the progressive nature of income tax in its Notice of 19 July 2016 on the 'notion of State aid as referred to in Article 107(1) TFEU'.[106]

165. In addition, it is apparent from the legislative process of which the Court was informed that it was also intended to avoid non-taxation of high-turnover undertakings, which did not contribute to corporate tax revenue in Hungary or did so only very little.

166. Contrary to the view apparently taken by the Commission, and as the General Court has also recently ruled,[107] proportional income taxation based on profit is not the only correct ('normal') form of taxation, but merely a *technique* for mathematically determining and taxing the taxable capacity of the taxable person in a uniform manner (see point 116).

167. It may be, as the Commission stressed at the hearing, that a profit calculation by means of a balance sheet comparison is more precise than linking to net turnover. I do not, however, consider the statement repeatedly made by the Commission that such a tax 'makes no sense' to be correct (see above, point 100 et seq.). In addition, the rules on State aid do not inquire about a more precise tax system, but an effect of a distortion of competition between two competitors.

168. If the same tax is payable for identical turnover, there is no distortion of competition. If a higher tax is payable for higher turnover, the same 'unequal treatment' exists as where higher tax is payable for higher profit. This applies in respect of a proportional tax rate (here higher tax is paid in absolute terms) and occurs in the case of a progressive tax rate (here higher tax is paid in both absolute and relative terms) for the abovementioned reasons relating to the tax system (see point 164 and point 106 et seq.).

103 See also judgment of 19 December 2018, *A-Brauerei* (C-374/17, EU:C:2018:1024, paragraph 45); a contrary view is taken in the judgment of 26 April 2018, *ANGED* (C-233/16, EU:C:2018:280, paragraphs 52, 59 and 61); although the tax was based on the principle of taxation according to the ability to pay, the Court examined only the non-fiscal reasons of 'environmental protection' and 'town and country planning' expressly mentioned in the preamble.

104 Judgments of 28 June 2018, *Andres (Insolvenz Heitkamp BauHolding)* v *Commission* (C-203/16 P, EU:C:2018:505, paragraph 91); of 26 April 2018, *ANGED* (C-233/16, EU:C:2018:280, paragraph 47); of 26 April 2018, *ANGED* (C-234/16 and C-235/16, EU:C:2018:281, paragraph 40); of 26 April 2018, *ANGED* (C-236/16 and C-237/16, EU:C:2018:291, paragraph 35); and of 22 December 2008, *British Aggregates* v *Commission* (C-487/06 P, EU:C:2008:757, paragraph 89).

105 See expressly judgment of 8 September 2011, *Paint Graphos* (C-78/08 to C-80/08, EU:C:2011:550, paragraph 70).

106 Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union, OJ 2016 C 262, p. 1 (31), paragraph 139.

107 Judgment of 16 May 2019, *Poland* v *Commission* (T-836/16 and T-624/17, EU:T:2019:338, paragraph 65 et seq.).

169. The volume of turnover indicates (without manifest error at least) a certain financial capacity (see above, point 113 et seq.). Accordingly, as the Commission itself shows with the proposal for a digital services tax,[108] turnover can also be seen as a (slightly rougher) indicator of greater economic power, and thus greater financial capacity.

170. In addition, there can be no objection from the point of view of administrative procedure if the number of retail establishments covered, and thus to be checked, is reduced by means of a threshold. For example, in EU VAT law, small undertakings (undertakings whose turnover does not exceed a certain 'allowance') are also not taxed (see Article 282 et seq. of the VAT Directive).

171. In view of the legislative objectives pursued, it is also understandable to have regard to turnover rather than profit, as turnover is easily ascertainable (simple and effective administration[109]) and less prone to circumvention than profit, for example (see above, point 118). The prevention of abuse in tax law may also constitute a justification in the rules on State aid, as the Court has ruled.[110]

172. In my view, the principle of the welfare state — which the European Union recognises in Article 3(3) TEU — also justifies a progressive tax rate which imposes a heavier burden, even in relative terms, on those with greater financial capacity than on taxable persons with not quite so much financial capacity. This applies at least in the case of a tax which also covers natural persons (see Article 3(1) and (2) of the Law on the special tax).

3. Conclusion

173. The lower average taxation inevitably connected with a progressive tax rate (here for lower-turnover undertakings) does not therefore constitute a selective advantage for such undertakings.

D. Restriction of changes to tax assessment notices in respect of taxes which are contrary to EU law

174. By its fourth question, the referring court wishes to know whether a practice based on Paragraph 124/B of the Law on Taxation whereby a refund of taxes contrary to EU law is more difficult than a refund of taxes which are merely contrary to national law is contrary to EU law. I consider this question to be inadmissible for two reasons.

175. It must be borne in mind that, according to the settled case-law of the Court, questions on the interpretation of EU law referred by a national court in the factual and legislative context which that court is responsible for defining, and the accuracy of which is not a matter for the Court to determine, enjoy a presumption of relevance. The Court may refuse to rule on a question referred by a national court only where it is quite obvious that the interpretation of EU law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it.[111]

108 Proposal for a Council Directive on the common system of a digital services tax on revenues resulting from the provision of certain digital services, 21 March 2018, COM(2018) 148 final.

109 Administrative manageability is also regarded as a justification by the Commission itself; see OJ 2016 C 262, p. 1 (31), paragraph 139.

110 Judgment of 19 December 2018, *A-Brauerei* (C-374/17, EU:C:2018:1024, paragraph 51); similarly, judgment of 29 April 2004, *GIL Insurance and Others* (C-308/01, EU:C:2004:252, paragraph 73 et seq.).

111 Judgments of 17 September 2014, *Cruz & Companhia* (C-341/13, EU:C:2014:2230, paragraph 32); of 30 April 2014, *Pfleger and Others* (C-390/12, EU:C:2014:281, paragraph 26); of 22 June 2010, *Melki and Abdeli* (C-188/10 and C-189/10, EU:C:2010:363, paragraph 27); and of 22 January 2002, *Canal Satélite Digital* (C-390/99, EU:C:2002:34, paragraph 19).

176. The administrative rules relating to procedural law fall within the procedural and institutional autonomy of the Member States, which is nevertheless limited by the principles of effectiveness and equivalence. [112]

177. Finality of an administrative decision, which is acquired upon expiry of the reasonable time limits for legal remedies or by exhaustion of those remedies, contributes to such legal certainty and it follows that EU law does not require that administrative bodies be placed under an obligation, in principle, to reopen an administrative decision which has become final in that way. [113] The Member States may, on the basis of the principle of legal certainty, require an application for review and withdrawal of an administrative decision that has become final and is contrary to EU law as interpreted subsequently by the Court to be made to the competent administrative authority within a reasonable period. [114] Accordingly, there is at most, in so far as there is an *ex post* amendment of a tax assessment notice that has become final, an infringement of the principle of equivalence. However, this requires unfavourable treatment of the situation under EU law.

178. In this regard, first of all, the Court does not have the necessary information regarding the actual source of such unequal treatment. Paragraph 124/B does not distinguish, according to its wording, between whether the legal basis (the underlying law) for the tax assessment notice is contrary to EU law or unconstitutional. It cannot therefore be understood why that law and the practice of the Hungarian Supreme Court based on it makes it more difficult to obtain only a refund of taxes contrary to EU law, but not a refund of unconstitutional taxes. The information regarding any possible practice of the Hungarian Supreme Court to the contrary is not explained sufficiently clearly in the request for a preliminary ruling. The statements made by the parties are contradictory in this regard and it is still unclear whether and how that practice affects the main proceedings. This also could not be clarified by the enquiries made by the Court at the hearing.

179. Second, the regulatory content of Paragraph 124/B in conjunction with Paragraph 128(2) of the Law on Taxation appears to relate to the amendment of tax already fixed with final effect. In its written observations too, Tesco merely stated that self-adjustment (that is to say, a correction of the self-assessment made) is rendered more difficult by those rules. The present case does not, however, concern a self-adjustment, rather the main proceedings relate to an action for annulment brought against an *ex post* tax assessment notice, and thus tax not yet fixed with final effect. An annulment and amendment of a contested tax assessment notice are not precluded by the abovementioned rules of Hungarian law.

180. That is also probably why the referring court simply mentions that Tesco has requested the court 'in *inter partes* proceedings' to calculate its tax liability as zero. It does not make clear whether this was done in the current proceedings in the context of the challenge of the tax assessment notice and is relevant in that regard, nor was this asserted by Tesco at the hearing. On the contrary, Hungary expressly confirmed, in response to the enquiries made by the Court at the hearing, that in the present case the referring court is not prevented from annulling the contested tax assessment notice if the Court finds that the Law on the special tax is contrary to EU law. The fourth question is not therefore relevant to the decision on Tesco's challenge of the tax assessment notice and is thus hypothetical.

112 See to that effect judgments of 17 January 2019, *Dzivev and Others* (C-310/16, EU:C:2019:30, paragraph 30), and of 2 May 2018, *Scialdone* (C-574/15, EU:C:2018:295, paragraph 29).

113 As is expressly stated in the judgment of 13 January 2004, *Kühne & Heitz* (C-453/00, EU:C:2004:17, paragraph 24).

114 Judgment of 12 February 2008, *Kempter* (C-2/06, EU:C:2008:78, paragraph 59), citing judgments of 24 September 2002, *Grundig Italiana* (C-255/00, EU:C:2002:525, paragraph 34); of 17 July 1997, *Haahr Petroleum* (C-90/94, EU:C:1997:368, paragraph 48); and of 16 December 1976, *Rewe-Zentralfinanz and Rewe-Zentral* (33/76, EU:C:1976:188, paragraph 5).

VI. Proposed answer

181. On those grounds, I propose that the Court answer the questions referred by the Fővárosi Közigazgatási és Munkaügyi Bíróság (Budapest Administrative and Labour Court, Hungary) as follows:

(1) Different taxation arising from a progressive rate does not constitute an indirect restriction of freedom of establishment under Article 49 in conjunction with Article 54 TFEU. This applies even where, in the case of turnover-based income taxation, undertakings with higher turnover are taxed more heavily and they are owned de facto predominantly by foreign shareholders, unless conduct constituting an abuse of rights can be proven in respect of the Member State. That is not the case here.

(2) Different taxation arising from a progressive rate does not constitute a selective advantage for lower-turnover undertakings (and does not thus constitute State aid); nor can a higher-turnover undertaking rely on it in order to evade its own tax liability.