Reports of Cases

JUDGMENT OF THE COURT (Grand Chamber)

3 March 2020*

(Reference for a preliminary ruling — Freedom of establishment — Turnover tax in the store retail trade sector — Progressive tax having a greater impact on undertakings owned by natural or legal persons of other Member States than on national undertakings — Progressive tax bands applicable to all taxable persons — Neutrality of the amount of turnover as a criterion of differentiation — Ability to pay of taxable persons)

In Case C-323/18,

REQUEST for a preliminary ruling under Article 267 TFEU from the Fővárosi Közigazgatási és Munkaügyi Bíróság (Administrative and Labour Court, Budapest, Hungary), made by decision of 19 March 2018, received at the Court on 16 May 2018, in the proceedings

Tesco-Global Áruházak Zrt.

v

Nemzeti Adó- és Vámhivatal Fellebbviteli Igazgatósága,

THE COURT (Grand Chamber),

composed of K. Lenaerts, President, R. Silva de Lapuerta, Vice-President, J.-C. Bonichot (Rapporteur) and E. Regan, Presidents of Chambers, P.G. Xuereb, L.S. Rossi, I. Jarukaitis, E. Juhász, M. Ilešič, J. Malenovský, L. Bay Larsen, K. Jürimäe and N. Piçarra, Judges,

Advocate General: J. Kokott,

Registrar: R. Şereş, administrator,

having regard to the written procedure and further to the hearing on 29 April 2019,

after considering the observations submitted on behalf of:

– Tesco-Global Áruházak Zrt., by Sz. Vámosi-Nagy, ügyvéd,

– the Hungarian Government, by M.Z. Fehér, G. Koós and D.R. Gesztelyi, acting as Agents,

– the Polish Government, by B. Majczyna, M. Rzotkiewicz and A. Kramarczyk, acting as Agents,

– the European Commission, by W. Roels, V. Bottka, P.-J. Loewenthal, R. Lyal and A. Armenia, acting as Agents,

* Language of the case: Hungarian.

after hearing the Opinion of the Advocate General at the sitting on 4 July 2019,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Articles 18, 26, 49, 54 to 56, 63, 65, 107, 108 and 110 TFEU and of the principles of the effectiveness and primacy of EU law, and of the principle of procedural equivalence.

2 The request has been made in proceedings between Tesco-Global Áruházak Zrt. ('Tesco') and the Nemzeti Adó- és Vámhivatal Fellebbviteli Igazgatósága (Resources Directorate of the National Tax and Customs Administration, Hungary; 'the Resources Directorate') concerning payment of a turnover tax in the store retail trade sector ('the special tax').

Hungarian law

3 The preamble of the egyes ágazatokat terhelő különadóról szóló 2010. évi XCIV. törvény (Law No XCIV of 2010 on the special tax on certain sectors; 'the law on the special tax on certain sectors') states:

'In the context of the correction of budgetary balance, the Parliament enacts this law on the establishment of a special tax imposed on taxpayers whose ability to contribute to the costs of public expenditure exceeds the general obligation to pay tax.'

4 Paragraph 1 of the law on the special tax on certain sectors provides:

'For the purposes of the present law, the following definitions shall apply:

1. store retail trade: in accordance with the 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,

…

5. net turnover: in the case of a taxable person subject to the law on accounting, the net turnover from sales within the meaning of the law on accounting; in the case of a taxable person subject to the simplified corporation tax and not covered by the law on accounting, turnover exclusive of value added tax in accordance with the law on the tax regime; in the case of a taxable person subject to the law on personal income tax, income exclusive of value added tax in accordance with the law on personal income tax.'

5 Paragraph 2 of the law on the special tax on certain sectors provides:

'Tax shall be chargeable on:

(a) store retail trade

…'

6 Paragraph 3 of that law 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.

(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.’

7 Paragraph 4(1) of that law states:

‘the taxable amount is the net turnover of the taxable person resulting from the activities referred to in Paragraph 2, …’

8 Paragraph 5 of that law provides:

‘The applicable tax rate:

(a) on activities referred to in Paragraph 2(a), shall be set at 0% on the proportion of the taxable amount not exceeding 500 million [Hungarian forint (HUF)]; 0.1% on the proportion of the taxable amount in excess of HUF 500 million but not exceeding HUF 30 billion; 0.4% on the proportion of the taxable amount in excess of HUF 30 billion but not exceeding HUF 100 billion, and 2.5% on the proportion of the taxable amount in excess of HUF 100 billion,

…’

9 Paragraph 124/B of the adózás rendjéről szóló 2003. évi XCII. törvény (Law No XCII of 2003 on General Taxation) provides:

‘The tax authority shall give a decision on a supplementary return within 15 days of the filing date of that return, without carrying out any inspection, 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 any other legal provision, provided that the Alkotmánybíróság [Constitutional Court, Hungary] the Kúria [Supreme Court, Hungary] 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.’

10 Paragraph 128(2) of that law provides:

‘No tax adjustment should be made where taxes or public subsidies are not required to be adjusted by means of a supplementary return.’

The dispute in the main proceedings and the questions referred for a preliminary ruling

11 Tesco is a public limited company governed by Hungarian law which is engaged in store wholesale and retail trade. As a member of a group that has its registered office in the United Kingdom, it is the retail chain that achieved the highest turnover in the Hungarian market in the period between 1 March 2010 and 28 February 2013.

12 Tesco was the subject of a tax inspection carried out by the Nemzeti Adó- és Vámhivatal Kiemelt Adózók Adóigazgatósága (National Tax and Customs Administration, Large Taxpayers Directorate, Hungary; 'the first-tier tax authority') concerning all the taxes paid and budget subsidies received in that period.

13 Following that inspection, the first-tier tax authority imposed on Tesco an adjustment of, inter alia, the special tax amounting to HUF 1 396 684 000 (approximately EUR 4 198 852), and found that Tesco had had the benefit of a surplus of HUF 17 900 000 (approximately EUR 53 811) with respect to that same tax. In total, there was held to be a tax shortfall of HUF 4 634 131 000 (approximately EUR 13 931 233), which gave rise to a tax penalty of HUF 873 760 000 (approximately EUR 2 626 260) and a late-payment surcharge of HUF 956 812 000 (approximately EUR 2 875 889).

14 The Resources Directorate, before which an administrative appeal was brought against the decision of the first-tier tax authority, upheld that decision in relation to the special tax. However, that decision was varied with respect to the tax surplus of which Tesco was held to have had the benefit, which was set at HUF 249 254 000 (approximately EUR 749 144), and the adjustment imposed on Tesco, which was set at HUF 3 058 090 000 (approximately EUR 9 191 226), of which HUF 3 013 077 000 (approximately EUR 9 070 000) was held to be the tax shortfall. In addition to that tax liability, the Resources Directorate ordered Tesco to pay HUF 1 396 684 000 (approximately EUR 4 198 378) with respect to the special tax and to pay a tax penalty of HUF 468 497 000 (approximately EUR 1 408 284), and a late-payment surcharge of HUF 644 890 000 (approximately EUR 1 938 416).

15 Tesco brought an action before the Fővárosi Közigazgatási és Munkaügyi Bíróság (Administrative and Labour Court, Budapest, Hungary) contesting the decision of the Resources Directorate. Tesco submits that the obligation to pay the special tax imposed on it has no legal basis, arguing that the legislation relating to that tax adversely affects freedom of establishment, the freedom to provide services and the free movement of capital. Further, that legislation is contrary to the principle of equal treatment, constitutes prohibited State aid and is contrary to Article 401 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1).

16 Tesco claims in particular that, because of the steeply progressive scale of the special tax and the structure of the Hungarian retail trade market, all the companies that fall within the lower bands are companies which are owned by Hungarian natural persons or legal persons, and which operate within franchise systems. Conversely, the companies that fall within the highest band are, with one exception, undertakings linked to companies that have their registered office in another Member State. Accordingly, the companies owned by foreign natural persons or legal persons bear a disproportionate share of the burden of that tax.

17 The referring court considers that the law on the special tax on certain sectors may be contrary to Articles 18, 26, 49, 54 to 56, 63, 65, 107, 108 and 110 TFEU since, in particular, the actual tax burden of that tax is borne primarily by taxable persons whose share capital is foreign-owned. The referring court states that the Court, in its judgment of 5 February 2014, *Hervis Sport- és Divatkereskedelmi* (C-385/12, EU:C:2014:47), examined the rule of consolidation applied in that context and concluded that there was indirect discrimination.

18 Further, the referring court has doubts as to whether Law No XCII of 2003 on general taxation is compatible with the principle of procedural equivalence, and the principles of the primacy and effectiveness of EU law.

19 In those circumstances, the Fővárosi Közigazgatási és Munkaügyi Bíróság (Administrative and Labour Court, Budapest) decided to stay proceedings and refer 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 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 and 65 TFEU) and equality of taxation of companies (Article 110 TFEU)?

(2) Is the fact that taxable persons which operate a number of stores 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 one and the same sign — 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 an intrinsic part of which is a tax exemption (constituting State aid) financed by means of the tax receipts generated by the tax measure, where the legislature has, before the introduction of the special tax on retail trade, predetermined (on the basis of the turnover of market operators) the amount of budgetary revenue, through the application of progressive tax rates based on turnover and not through the introduction of a generally applicable tax rate, so that the legislature has deliberately ensured that a category of market operators qualify for a tax exemption?

(4) Is a practice of a Member State, 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 examines the issue of incompatibility with EU law only in special proceedings commenced on application by a party and only 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 the effectiveness and primacy of EU law?'

The request to have the oral procedure reopened

20 Following the delivery of the Opinion of the Advocate General, Tesco, by a document lodged at the Court's Registry on 2 September 2019, applied for the oral part of the procedure to be reopened, pursuant to Article 83 of the Rules of Procedure of the Court.

21 In support of its request, Tesco expressed its disagreement with that Opinion, more particularly with certain factual details relating to the procedure set out in the Opinion.

22 It must however be recalled that, first, the Statute of the Court of Justice of the European Union and the Rules of Procedure of the Court make no provision for the interested parties referred to in Article 23 of the Statute to submit observations in response to the Advocate General's Opinion (judgment of 6 March 2018, *Achmea*, C-284/16, EU:C:2018:158, paragraph 26).

23 Second, under the second paragraph of Article 252 TFEU, the Advocate General, acting with complete impartiality and independence, is to make, in open court, reasoned submissions on cases which, in accordance with the Statute of the Court of Justice of the European Union, require the Advocate General's involvement. The Court is not bound either by the Advocate General's submissions or by the reasoning which led to those submissions. Consequently, a party's disagreement with the Opinion of the Advocate General, irrespective of the questions that he or she examines in the Opinion, cannot in itself constitute grounds justifying the reopening of the oral procedure (judgment of 6 March 2018, *Achmea*, C-284/16, EU:C:2018:158, paragraph 27).

24 Nevertheless, the Court may at any time, after hearing the Advocate General, order the reopening of the oral part of the procedure, in accordance with Article 83 of its Rules of Procedure, in particular if it considers that it lacks sufficient information or where the case must be decided on the basis of an argument which has not been debated between the interested persons (judgment of 6 March 2018, *Achmea*, C-284/16, EU:C:2018:158, paragraph 28).

25 In this case, since Tesco confines itself to setting out its observations on the Opinion of the Advocate General and does not mention any new argument on the basis of which the present case should be decided, the Court considers, after hearing the Advocate General, that it has before it all the necessary material to give judgment and that that material has been debated between the interested persons.

26 Having regard to the foregoing, the request for the oral procedure to be reopened must be rejected.

Admissibility of the request for a preliminary ruling

27 The Hungarian Government submits that the referring court does not specify either the provisions of the law on the special tax on certain sectors which may be contrary to EU law or the reasons why it has doubts concerning the interpretation of the provisions of the Treaty and of the fundamental principles of EU law referred to in the order for reference.

28 However, it is clear that the information provided by the referring court makes it possible to determine the scope of the request for a preliminary ruling and the context, in particular the legal context, of its being made. Thus, the order for reference, which sets out the doubts of that court in relation to the compatibility with EU law of the law on the special tax on certain sectors, states sufficiently clearly the reasons which led the referring court to take the view that an interpretation of EU law was necessary to enable it to give judgment on the dispute in the main proceedings.

29 The request for a preliminary ruling is therefore admissible.

Consideration of the questions referred

The second and third questions

30 The Hungarian Government and the European Commission argue that those liable to pay a tax cannot rely on the argument that the exemption enjoyed by other persons constitutes unlawful State aid in order to avoid payment of that tax, and consequently that the second and third questions are inadmissible.

31 In that regard, it must, at the outset, be recalled that Article 108(3) TFEU establishes a prior control of plans to grant new aid. The aim of that system of prior control is therefore that only compatible aid may be implemented. In order to achieve that aim, the implementation of planned aid is to be deferred until doubt as to its compatibility is resolved by the Commission's final decision (judgments of 21 November 2013, *Deutsche Lufthansa*, C-284/12, EU:C:2013:755, paragraphs 25 and 26, and of 5 March 2019, *Eesti Pagar*, C-349/17, EU:C:2019:172, paragraph 84).

32 The implementation of that system of control is a task for both the Commission and the national courts, their respective roles being complementary but separate (judgment of 21 November 2013, *Deutsche Lufthansa*, C-284/12, EU:C:2013:755, paragraph 27 and the case-law cited).

33 While an assessment of the compatibility of aid measures with the internal market falls within the exclusive competence of the Commission, subject to review by the Courts of the European Union, it is for the national courts to ensure the safeguarding, until the final decision of the Commission, of the rights of individuals faced with a possible breach by State authorities of the prohibition laid down by Article 108(3) TFEU (judgment of 21 November 2013, *Deutsche Lufthansa*, C-284/12, EU:C:2013:755, paragraph 28).

34 The involvement of national courts is the result of the fact that the prohibition on implementation of planned aid laid down in that provision has been held to have direct effect. The immediate enforceability of that prohibition extends to all aid which has been implemented without being notified (judgments of 21 November 2013, *Deutsche Lufthansa*, C-284/12, EU:C:2013:755, paragraph 29, and of 5 March 2019, *Eesti Pagar*, C-349/17, EU:C:2019:172, paragraph 88).

35 National courts must offer to individuals the certainty that all appropriate action will be taken, in accordance with their national law, to address the consequences of an infringement of the last sentence of Article 108(3) TFEU, as regards both the validity of measures giving effect to the aid and the recovery of financial support granted in disregard of that provision and any interim measures (judgments of 21 November 2013, *Deutsche Lufthansa*, C-284/12, EU:C:2013:755, paragraph 30, and of 5 March 2019, *Eesti Pagar*, C-349/17, EU:C:2019:172, paragraph 89).

36 The Court has, however, also held that if, having regard to the rules of EU law in relation to State aid, an exemption from a tax is unlawful, that is not capable of affecting the lawfulness of the actual charging of that tax, and consequently a person liable to pay that tax cannot rely on the argument that the exemption enjoyed by other persons constitutes State aid in order to avoid payment of that tax (see, to that effect, judgments 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 44; of 15 June 2006, *Air Liquide Industries Belgium*, C-393/04 and C-41/05, EU:C:2006:403, paragraph 43; and of 26 April 2018, *ANGED*, C-233/16, EU:C:2018:280, paragraph 26).

37 The position is however different where the dispute in the main proceedings concerns not an application to be exempted from the contested tax, but the legality of the rules relating to that tax as a matter of EU law (judgment of 26 April 2018, *ANGED*, C-233/16, EU:C:2018:280, paragraph 26).

38 Further, the Court has consistently held that taxes do not fall within the scope of the provisions of the FEU Treaty concerning State aid unless they constitute the means of financing an aid measure, so that they form an integral part of that measure. Where the method of financing aid by means of a tax forms an integral part of the aid measure, the consequences of a failure by national authorities to comply with the last sentence of Article 108(3) TFEU must also apply to that aspect of the aid, so that the national authorities are required, in principle, to repay taxes levied in breach of EU law (judgment of 20 September 2018, *Carrefour Hypermarchés and Others*, C-510/16, EU:C:2018:751, paragraph 14 and the case-law cited).

39 In that regard, it must be recalled that, for a tax to be regarded as forming an integral part of an aid measure, it must be hypothecated to the aid measure under the relevant national rules, in the sense that the revenue from the tax is necessarily allocated for the financing of the aid and has a direct impact on the amount of that aid (judgments of 15 June 2006, *Air Liquide Industries Belgium*, C-393/04 and C-41/05, EU:C:2006:403, paragraph 46, and of 7 September 2006, *Laboratoires Boiron*, C-526/04, EU:C:2006:528, paragraph 44).

40 Accordingly, if a tax is not hypothecated to an aid measure, the possible unlawfulness of the contested aid measure under EU law is not capable of affecting the lawfulness of the tax itself, and consequently the undertakings who are liable to pay that tax cannot rely on the argument that the tax measure for which other persons qualify constitutes State aid in order to avoid payment of that tax or to obtain repayment of tax paid (see, to that effect, judgments of 5 October 2006, *Transalpine Ölleitung in Österreich*, C-368/04, EU:C:2006:644, paragraph 51, and of 26 April 2018, *ANGED*, C-233/16, EU:C:2018:280, paragraph 26).

41 In this case, the dispute in the main proceedings concerns an application for exemption from the special tax submitted by Tesco to the Hungarian tax authorities. As stated, in essence, by the Advocate General in point 132 of her Opinion, the tax burden borne by Tesco is the result of a general tax, the revenue from which is transferred to the State budget, that tax not being specifically allocated to the funding of a tax advantage for which a particular category of taxable persons qualify.

42 It follows that, even if the de facto exemption from the special tax for which some taxable persons qualify may be classified as State aid, within the meaning of Article 107(1) TFEU, that tax is not hypothecated to the exemption measure at issue in the main proceedings.

43 It follows that any illegality under EU law of the exemption from the special tax for which some taxable persons qualify is not capable of affecting the legality of that tax itself, and consequently Tesco cannot rely, before the national courts, on the unlawfulness of that de facto exemption in order to avoid payment of that tax or to obtain repayment of tax paid.

44 It follows from all the foregoing that the second and third questions are inadmissible.

The first question

Admissibility

45 The Hungarian Government submits that an answer to the first question is not necessary in order to resolve the dispute in the main proceedings since the Court has already given a ruling, in its judgment of 5 February 2014, *Hervis Sport- és Divatkereskedelmi* (C-385/12, EU:C:2014:47), on the compatibility with EU law of the law on the special tax on certain sectors.

46 In that regard, it must be recalled that, even when there is case-law of the Court resolving the point of law at issue, national courts remain entirely at liberty to bring a matter before the Court if they consider it appropriate to do so, and the fact that the provisions whose interpretation is sought have already been interpreted by the Court does not deprive the Court of jurisdiction to give a further ruling (judgment of 6 November 2018, *Bauer and Willmeroth*, C-569/16 and C-570/16, EU:C:2018:871, paragraph 21 and the case-law cited).

47 It follows that the fact that the Court, in the judgment of 5 February 2014, *Hervis Sport- és Divatkereskedelmi* (C-385/12, EU:C:2014:47), has already interpreted EU law with regard to the same national legislation as that at issue in the main proceedings cannot in itself lead to the inadmissibility of the questions referred in the present case.

48 Moreover, the referring court states that, in the judgment of 5 February 2014, *Hervis Sport- és Divatkereskedelmi* (C-385/12, EU:C:2014:47), the Court examined, in relation to the special tax on retail trade, the effect produced by the rule on the consolidation of turnover achieved by linked undertakings, for the purposes of the law on the special tax on certain sectors. However, the referring court considers that it is necessary, in order to resolve the dispute in the main proceedings, to determine whether the progressive scale, using bands, of the special tax may constitute, in itself, irrespective of the application of that consolidation rule, indirect discrimination vis-à-vis taxable persons that are controlled by natural persons or legal persons of other Member States, who bear the actual tax burden, and, therefore, be contrary to Articles 49 and 54 TFEU.

49 In those circumstances, the first question is admissible.

Substance

50 Since the question referred for a preliminary ruling mentions a number of provisions of the Treaty, namely those relating to, respectively, freedom of establishment, the freedom to provide services and the free movement of capital, and the provisions of Articles 18, 26 and 110 TFEU, it is necessary, first, to clarify the scope of that question in accordance with the specific features of the dispute in the main proceedings.

51 In that regard, it is clear from settled case-law that the purpose of the legislation concerned must be taken into consideration (judgment of 5 February 2014, *Hervis Sport- és Divatkereskedelmi*, C-385/12, EU:C:2014:47, paragraph 21 and the case-law cited).

52 National legislation intended to apply only to those shareholdings which enable the holder to exert a definite influence on a company's decisions and to determine its activities falls within the scope of Article 49 TFEU on freedom of establishment (judgment of 5 February 2014, *Hervis Sport- és Divatkereskedelmi*, C-385/12, EU:C:2014:47, paragraph 22).

53 The dispute in the main proceedings concerns the allegedly discriminatory tax rate borne under the special tax by taxable persons that are controlled by individual citizens or companies of other Member States.

54 In those circumstances, the request for a preliminary ruling concerns the interpretation of the provisions of the Treaty relating to freedom of establishment. It is, therefore, not necessary to interpret Articles 56, 63 and 65 TFEU relating to the freedom to provide services and the free movement of capital.

55 It should, next, be recalled that Article 18 TFEU is intended to apply independently only to situations governed by EU law for which the Treaty lays down no specific prohibition of discrimination. In the field of freedom of establishment, the principle of the prohibition of discrimination is given specific expression in Article 49 TFEU (judgment of 5 February 2014, *Hervis Sport- és Divatkereskedelmi*, C-385/12, EU:C:2014:47, paragraph 25 and the case-law cited).

56 Consequently, there is also no need to interpret Article 18 TFEU and Article 26 TFEU.

57 Last, as is stated in paragraph 27 of the judgment of 5 February 2014, *Hervis Sport- és Divatkereskedelmi* (C-385/12, EU:C:2014:47), since it does not appear that the special tax has a greater impact on products from other Member States than on national products, the interpretation of Article 110 TFEU is of no relevance in the context of the main proceedings.

58 It follows from the foregoing that the first question must be regarded as concerning whether Articles 49 and 54 TFEU must be interpreted as precluding the legislation of a Member State in relation to a turnover tax where the consequence of the fact that that tax is steeply progressive is that undertakings controlled directly or indirectly by nationals of other Member States or by companies having their registered office in another Member State mainly bear the actual burden of that tax.

59 According to settled case-law, freedom of establishment aims to guarantee the benefit of national treatment in the host Member State to nationals of other Member States and to companies referred to in Article 54 TFEU by prohibiting any discrimination based on the place in which companies have their seat (judgment of 26 April 2018, *ANGED*, C-236/16 and C-237/16, EU:C:2018:291, paragraph 16 and the case-law cited).

60 In order to be effective, the scope of freedom of establishment must mean that a company may rely on a restriction on the freedom of establishment of another company which is linked to it in so far as that restriction affects its own taxation (see, to that effect, judgment of 1 April 2014, *Felixstowe Dock and Railway Company and Others*, C-80/12, EU:C:2014:200, paragraph 23).

61 In this case, Tesco has its registered office in Hungary but is part of a group of which the parent company has its registered office in the United Kingdom. As observed by the Advocate General in point 41 of her Opinion, in so far as that parent company pursues its activity on the Hungarian market through a subsidiary, its freedom of establishment may be affected by any restriction which applies to the subsidiary. Accordingly, contrary to what is submitted by the Hungarian Government, a restriction on the freedom of establishment of that parent company may legitimately be relied on in the main proceedings.

62 Not only overt discrimination based on the location of the seat of companies, but also all covert forms of discrimination which, by the application of other criteria of differentiation, lead in fact to the same result are, in that regard, prohibited (judgments of 5 February 2014, *Hervis Sport- és Divatkereskedelmi*, C-385/12, EU:C:2014:47, paragraph 30, and of 26 April 2018, *ANGED*, C-236/16 and C-237/16, EU:C:2018:291, paragraph 17).

63 Moreover, a compulsory levy which provides for a criterion of differentiation that is apparently objective but that disadvantages in most cases, given its features, companies that have their seat in other Member States and which are in a situation comparable to that of companies whose seat is situated in the Member State of taxation, constitutes indirect discrimination based on the location of the seat of the companies, which is prohibited under Articles 49 and 54 TFEU (judgment of 26 April 2018, *ANGED*, C-236/16 and C-237/16, EU:C:2018:291, paragraph 18).

64 In this case, the law on the special tax on certain sectors makes no distinction between undertakings according to where they have their registered office. All the undertakings operating in Hungary in the store retail trade sector are subject to that tax and the tax rates that are, respectively, applicable to the various bands of turnover defined by that law apply to all those undertakings. That law does not, therefore, establish any direct discrimination.

65 However, Tesco and the Commission maintain that the fact that the special tax is steeply progressive is, in itself, to the advantage of taxable persons owned by Hungarian natural persons or legal persons and to the disadvantage of taxable persons owned by natural persons or legal persons of other Member States, with the result that the special tax constitutes, taking into consideration its characteristics, indirect discrimination.

66 As was stated in paragraph 8 of the present judgment, the special tax, which is a progressive tax based on turnover, comprises, with respect to store retail trade, a first band of tax charged at 0% for the proportion of the taxable amount that does not exceed HUF 500 million (approximately EUR 1.5 million, currently), a second band of tax charged at 0.1% for the proportion of the taxable amount between HUF 500 million and HUF 30 billion (approximately between EUR 1.5 million and EUR 90 million, currently), a third band of tax charged at 0.4% for the proportion of the taxable amount between HUF 30 billion and HUF 100 billion (approximately between EUR 90 million and EUR 300 million, currently) and a fourth band of tax charged at 2.5% for the proportion of the taxable amount that exceeds HUF 100 billion (approximately EUR 300 million, currently).

67 It is clear from the Hungarian authorities' data in relation to the tax years at issue in this case, as disclosed by the Commission and Hungary, that, in the period at issue in the main proceedings, with respect to store retail trade, the taxable persons that fell only within the base band were all taxable persons owned by Hungarian natural persons or legal persons, whereas those who fell within the third and fourth bands were predominantly taxable persons owned by natural persons or legal persons of other Member States.

68 Further, it is clear from the observations of the Hungarian Government that, during that period, the greater part of the special tax was borne by taxable persons owned by natural persons or legal persons of other Member States. According to Tesco and the Commission, the tax burden borne by the latter was thus proportionately greater than that borne by taxable persons owned by Hungarian natural persons or legal persons as a ratio of their taxable turnover, the latter being in fact exempted from the special tax or being subject to it only at a marginal rate and at an effective rate that were substantially lower than taxable persons with a higher turnover.

69 However, it must be recalled that the Member States are free, given the current state of harmonisation of EU tax law, to establish the system of taxation that they deem the most appropriate, and consequently the application of progressive taxation falls within the discretion of each Member State (see, to that effect, judgments of 22 June 1976, *Bobie Getränkevertrieb*, 127/75, EU:C:1976:95, paragraph 9, and of 6 December 2007, *Columbus Container Services*, C-298/05, EU:C:2007:754, paragraphs 51 and 53).

70 In that context, and contrary to what is maintained by the Commission, progressive taxation may be based on turnover, since, on the one hand, the amount of turnover constitutes a criterion of differentiation that is neutral and, on the other, turnover constitutes a relevant indicator of a taxable person's ability to pay.

71 In this case, it is apparent from the material available to the Court, in particular from the passage in the preamble of the law on the special tax on certain sectors quoted in paragraph 3 of the present judgment, that, by means of the application of a steeply progressive scale based on turnover, the aim of that law is to impose a tax on taxable persons who have an ability to pay 'that exceeds the general obligation to pay tax'.

72 The fact that the greater part of such a special tax is borne by taxable persons owned by natural persons or legal persons of other Member States cannot be such as to merit, by itself, categorisation as discrimination. As stated by the Advocate General, in particular, in points 62, 65 and 78 of her Opinion, that situation is due to the fact that the Hungarian store retail trade market is dominated by such taxable persons, who achieve the highest turnover in that market. Accordingly, that situation is an indicator that is fortuitous, if not a matter of chance, which may arise, even in a system of proportional taxation, whenever the market concerned is dominated by undertakings of other Member States or of non-Member States or by national undertakings owned by natural persons or legal persons of other Member States or of non-Member States.

73 It must be observed, moreover, that the basic band of tax charged at 0% does not exclusively affect taxable persons owned by Hungarian natural persons or legal persons, since, as in any system of progressive taxation, any undertaking operating on the market concerned has the benefit of the reduction for the proportion of its turnover that does not exceed the maximum amount of that band.

74 It follows from the foregoing that the steeply progressive rates of the special tax do not, inherently, create any discrimination, based on where companies have their registered office, between taxable persons owned by Hungarian natural persons or legal persons and taxable persons owned by natural persons or legal persons of other Member States.

75 It must further be stated that the present case can be distinguished from the case which led to the judgment of 5 February 2014, *Hervis Sport- és Divatkereskedelmi* (C-385/12, EU:C:2014:47). As is apparent from paragraphs 34 to 36 of that judgment, that case concerned the combined application of both very progressive rates of taxation of turnover and a rule for the consolidation of turnover of linked undertakings, the effect of which was that taxable persons belonging to a group of companies were taxed on the basis of 'fictitious' turnover. In that regard, the Court held, in essence, in paragraphs 39 to 41 of that judgment, that, if it were to be established that, in the store retail market in the Member State concerned, the taxable persons belonging to a group of companies and covered by the highest band of the special tax are, in the majority of cases, 'linked', within the meaning of the national legislation, to companies which have their registered offices in other Member States, 'the application of the steeply progressive scale of the special tax to a consolidated tax base consisting of turnover' is liable to disadvantage, in particular, taxable persons 'linked' to such companies and would, consequently, constitute indirect discrimination based on where companies have their registered office, within the meaning of Articles 49 and 54 TFEU.

76 In the light of all the foregoing, the answer to the first question is that Articles 49 and 54 TFEU must be interpreted as not precluding the legislation of a Member State that establishes a steeply progressive tax on turnover, the actual burden of which is mainly borne by undertakings controlled directly or indirectly by nationals of other Member States or by companies that have their registered office in another Member State, due to the fact that those undertakings achieve the highest turnover in the market concerned.

The fourth question

77 In the light of all the foregoing, there is no need to answer the fourth question.

Costs

78 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

Articles 49 and 54 TFEU must be interpreted as not precluding the legislation of a Member State that establishes a steeply progressive tax on turnover, the actual burden of which is mainly borne by undertakings controlled directly or indirectly by nationals of other Member States or by companies that have their registered office in another Member State, due to the fact that those undertakings achieve the highest turnover in the market concerned.

[Signatures]