Reports of Cases

JUDGMENT OF THE COURT (Grand Chamber)

16 March 2021 *

(Appeal – Article 107(1) TFEU – State aid – Hungarian tax on turnover linked to advertisements – Information used to determine the reference system – Progressivity of tax rates – Transitional measure for the partial deductibility of losses carried forward – Existence of a selective advantage – Burden of proof)

In Case C-596/19 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 6 August 2019,

European Commission, represented by V. Bottka and P.-J. Loewenthal and by K. Herrmann, acting as Agents,

applicant,

the other parties to the proceedings being:

Hungary, represented by M.Z. Fehér and G. Koós, acting as Agents,

applicant at first instance,

Republic of Poland, represented by B. Majczyna, acting as Agent,

intervener at first instance,

THE COURT (Grand Chamber),

composed of K. Lenaerts, President, R. Silva de Lapuerta, Vice-President, J.-C. Bonichot (Rapporteur), A. Arabadjiev, E. Regan, A. Kumin and N. Wahl, Presidents of Chambers, M. Safjan, D. Šváby, S. Rodin, F. Biltgen, K. Jürimäe, C. Lycourgos, P.G. Xuereb and N. Jääskinen, Judges,

Advocate General: J. Kokott,

Registrar: R. Şereş, Administrator,

having regard to the written procedure and further to the hearing on 1 September 2020,

* Language of the case: Hungarian.

after hearing the Opinion of the Advocate General at the sitting on 15 October 2020,

gives the following

Judgment

1 By its appeal, the European Commission seeks to have set aside the judgment of the General Court of the European Union of 27 June 2019, *Hungary* v *Commission* (T-20/17, EU:T:2019:448; 'the judgment under appeal'), by which the General Court annulled Commission Decision (EU) 2017/329 of 4 November 2016 on the measure SA.39235 (2015/C) (ex 2015/NN) implemented by Hungary on the taxation of advertisement turnover (OJ 2017 L 49, p. 36; 'the decision at issue').

Background to the dispute

2 The background to the dispute was set out by the General Court in paragraphs 1 to 32 of the judgment under appeal. It can be summarised as follows.

3 On 11 June 2014, Hungary adopted Law No XXII of 2014 on advertisement tax ('the Law on advertisement tax'). That law entered into force on 15 August 2014 and introduced a new special tax, applied progressively by bands, on turnover derived from the broadcasting or publication of advertisements in Hungary ('the tax measure at issue'). During the examination of the Law on advertisement tax carried out by the Commission as part of the monitoring of State aid, the Hungarian authorities stated that the purpose of that tax was to promote the principle that the tax burden should be shared proportionately.

4 Under that law, any person who broadcasts or publishes advertisements is subject to the tax measure at issue. Thus, economic operators which broadcast or publish advertisements, such as print media, audiovisual media or billposters, with the exception of advertisers, that is to say, those responsible for making advertisements, and advertising agencies, which are intermediaries between advertisers and broadcasters, are thus subject to that measure. The taxable amount to which the tax measure at issue is applied is the net turnover for a financial year generated by the broadcasting or publication of advertisements. That tax is levied in addition to existing business taxes, in particular corporation tax. Its territorial scope covers Hungary.

5 The scale of the rates imposed by the tax measure at issue was defined as follows:

– 0% for the part of the taxable amount below 0.5 billion forint (HUF) (approximately EUR 1 400 000);

– 1% for the part of the taxable amount between HUF 0.5 billion and HUF 5 billion (approximately EUR 14 000 000);

– 10% for the part of the taxable amount between HUF 5 billion and HUF 10 billion (approximately EUR 28 000 000);

– 20% for the part of the taxable amount between HUF 10 billion and HUF 15 billion (approximately EUR 42 000 000);

– 30% for the part of the taxable amount between HUF 15 billion and HUF 20 billion (approximately EUR 56 000 000), and

– 40% for the part of the taxable amount above the latter amount, increased to 50% as from 1 January 2015.

6 The Law on advertisement tax also provided that taxable persons whose pre-tax profits for the 2013 financial year were zero or negative could deduct from their 2014 taxable amount 50% of the losses carried forward from the earlier financial years ('the mechanism for the partial deductibility of losses carried forward').

7 By decision of 12 March 2015, the Commission initiated the formal investigation procedure provided for in Article 108(2) TFEU, taking the view that the progressive nature of the tax measure at issue and the mechanism for the partial deductibility of losses carried forward gave rise to State aid. In that decision, the Commission considered that the progressivity of the rates differentiated between undertakings with high advertisement turnover (large undertakings) and undertakings with lower advertisement turnover (small undertakings). According to the Commission, the tax measure at issue gave rise to a selective advantage in favour of the latter. The Commission also considered that the mechanism for the partial deductibility of losses carried forward entailed a selective advantage constituting State aid.

8 By the same decision, the Commission required the Hungarian authorities to suspend the tax measure at issue on the basis of Article 11(1) of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article [108 TFEU] (OJ 1999 L 83, p. 1).

9 Subsequently, Hungary amended that measure by Law No LXII of 2015, adopted on 4 June 2015 ('the 2015 Law'). The progressive scale of the tax measure at issue, comprising six bands from 0% to 50%, was replaced by the following scale, comprising two tax rates:

– 0% for the part of the taxable amount below HUF 100 million (approximately EUR 280 000) and

– 5.3% for the part of the taxable amount above the latter amount.

10 On 4 November 2016, the Commission closed the formal investigation procedure by adopting the decision at issue.

11 In Article 1 of that decision, the Commission found that the progressive nature of the tax measure at issue, including in the version resulting from the 2015 Law, and the mechanism for the partial deductibility of losses carried forward constituted State aid. According to the Commission, that aid had been introduced unlawfully, in breach of Article 108(3) TFEU and was, moreover, incompatible with the internal market in the light of Article 107(1) TFEU. In Article 4 of the decision at issue, the Commission ordered Hungary to recover from the beneficiaries the aid declared incompatible with the internal market.

12 Accordingly, the Hungarian authorities were to recover from the undertakings that had registered advertising turnover in the period from the date of entry into force of the Law on advertisement tax to either the date of abolishment of the tax measure at issue or of its replacement by a system fully in line with State-aid rules, the amounts corresponding to the difference between: (i) the amount of tax that those undertakings should have paid under the reference system consisting of a

flat-rate tax scheme of 5.3%, unless another rate was chosen by the Hungarian authorities, and (ii) the amount of tax that those undertakings had already paid or were liable to pay. If the difference between those two amounts was positive, the corresponding sum was to be recovered, together with interest calculated from the date when the tax was due.

13 The Commission stated, however, that there would be no need for recovery if Hungary abolished the tax measure at issue with retroactive effect to the date of its entry into force. For the future, for example from 2017, Hungary would be able to introduce a tax system which was not progressive and did not differentiate between economic operators subject to the tax.

14 In essence, the Commission considered that the tax measure at issue had to be classified as 'State aid', within the meaning of Article 107(1) TFEU, for the following reasons.

15 As regards the imputability of the tax measure at issue to the State and its financing through State resources, the Commission stated that, as a result of the adoption of the Law on advertisement tax, Hungary had waived resources it would have had to collect from undertakings with a low level of turnover linked to the receipt of advertising revenue, that is to say, small undertakings, if they had been subject to the same tax obligation as undertakings whose turnover relating to the receipt of advertising revenue is higher, that is to say, larger undertakings.

16 As regards the existence of an advantage, the Commission noted that, just like positive benefits, measures which mitigate the charges normally borne by undertakings provide an advantage. In the present case, taxation at a considerably lower rate mitigated the charges borne by undertakings with a low turnover by comparison with the costs borne by undertakings with a higher turnover, thus conferring an advantage on smaller undertakings over larger undertakings.

17 The Commission added that the mechanism for the partial deductibility of losses carried forward also constituted an advantage, since it was tantamount to reducing the tax burden of undertakings with losses carried forward which had not generated profits in 2013 compared with the burden on other undertakings, which could not benefit from that mechanism.

18 In its examination of the selective nature of the tax measure at issue, the Commission stated, first, that the reference system on the basis of which it was appropriate to reason was that of a special tax on turnover derived from the publication or broadcasting of advertisements. However, according to the Commission, the progressive structure of the rates of the tax on advertising turnover could not form part of that reference system. In order for the latter itself not to be regarded as constituting State aid, it stated that it had to meet two conditions, namely, first, that it should be based on a flat rate for all advertising turnover and, second, that it should not contain any element liable to confer a selective advantage on certain undertakings.

19 The Commission then considered that, in the present case, the progressivity of the taxation, in so far as it entailed not only marginal tax rates but also average tax rates which differed between undertakings, constituted a derogation from the reference system comprising a flat-rate advertisement tax applied to all economic operators broadcasting or publishing advertisements in Hungary.

20 In addition, that institution considered that the mechanism for the partial deductibility of losses carried forward, restricted to undertakings which did not make a profit in 2013, also constituted a derogation from the reference system, which is characterised by taxation based on turnover. In that context, according to the Commission, the costs borne by undertakings cannot be deducted

from the taxable amount, contrary to the practice in relation to taxation of profits. That mechanism therefore introduces an arbitrary distinction between two groups of undertakings that are nevertheless in a comparable legal and factual situation, that is to say, on the one hand, undertakings that had losses carried forward in previous financial years and did not make a profit in the 2013 financial year, and, on the other hand, undertakings that were profit-making in that financial year. The possibility of partial deduction of losses existing at the time of adoption of the Law on advertisement tax is necessarily selective in so far as it favours undertakings with significant losses carried forward, in particular on account of their accumulation in previous years.

21 Finally, the Commission considered that the Law on advertisement tax, as amended by the 2015 Law, introduced taxation based on the same principles and having the same features as the original version of that law. It concluded that the taxation resulting from that amended law had characteristics identical to those which initially led to the identification of State aid.

22 On 16 May 2017, Hungary enacted Law No XLVII of 2017 amending the Law on advertisement tax. In essence, that law retroactively repealed the tax measure at issue.

The procedure before the General Court and the judgment under appeal

23 On 16 January 2017, Hungary brought an action against the decision at issue. By a separate document, lodged on the same day, it introduced an application for suspension of operation of a measure, which was dismissed by order of the President of the General Court of 23 March 2017, *Hungary* v *Commission* (T-20/17 R, not published, EU:T:2017:203).

24 By decision of 30 May 2017, the President of the Ninth Chamber of the General Court granted the Republic of Poland leave to intervene in support of the form of order sought by Hungary.

25 In support of its action, Hungary raised three pleas in law, alleging, first, that the tax measure at issue was wrongly classified as 'State aid' within the meaning of Article 107(1) TFEU, second, infringement of the obligation to state reasons and, third, misuse of powers.

26 By the judgment under appeal, the General Court upheld the first of those pleas, holding that the Commission had erred in finding that the tax measure at issue and the mechanism for the partial deductibility of losses carried forward constituted selective advantages. On that ground, it annulled the decision at issue, without ruling on the other pleas in law.

Procedure before the Court and forms of order sought

27 By its appeal, the Commission claims that the Court should:

– set aside the judgment under appeal;

– give final judgment in the matter, by rejecting the second and third pleas raised by Hungary against the decisions at issue, and order it to pay the costs; and

– in the alternative, refer the case back to the General Court for a ruling on the pleas that have not yet been examined.

28 Hungary, supported in its form of order sought by the Republic of Poland, contends that the Court should:

– dismiss the appeal as unfounded and

– order the Commission to pay the costs.

The appeal

29 The Commission relies on two grounds of appeal.

The first ground of appeal, alleging infringement of Article 107(1) TFEU, in that the General Court held that the progressive nature of the tax measure at issue did not give rise to a selective advantage

30 By its first ground of appeal, the Commission submits that, by finding that the progressive nature of the tax measure at issue did not give rise to a selective advantage in favour of undertakings with a low level of turnover linked to the broadcasting or publication of advertisements, the General Court infringed Article 107(1) TFEU. According to that institution, the General Court erred in law in the interpretation and application of each of the three stages of the analysis of the selectivity of that measure. In that regard, the Commission maintains, first, that the General Court was wrong to consider that the progressivity of the rates was part of the reference system in the light of which it was necessary to assess the selectivity of the tax measure at issue. Next, it submits that the General Court was not entitled to examine the comparability of the undertakings subject to that measure in the light of an objective other than the fiscal objective of that measure. Finally, the Commission submits that, in the context of the analysis of the justification for that measure, the General Court pursued an objective, namely the objective of redistribution, which is not intrinsically linked to that measure.

31 Hungary and the Republic of Poland dispute those arguments.

32 First of all, it should be noted that, according to the settled case-law of the Court of Justice, action by Member States in areas that are not subject to harmonisation by EU law are not excluded from the scope of the provisions of the FEU Treaty on monitoring State aid (see, to that effect, judgment of 22 June 2006, *Belgium and Forum 187* v *Commission*, C-182/03 and C-217/03, EU:C:2006:416, paragraph 81). The Member States must thus refrain from adopting any tax measure liable to constitute State aid that is incompatible with the internal market.

33 In that regard, it also follows from the settled case-law of the Court of Justice that the classification of a national measure as 'State aid', within the meaning of Article 107(1) TFEU, requires all the following conditions to be fulfilled. First, there must be an intervention by the State or through State resources. Second, the intervention must be liable to affect trade between the Member States. Third, it must confer a selective advantage on the recipient. Fourth, it must distort or threaten to distort competition (see, inter alia, 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 53 and the case-law cited).

34 So far as concerns the condition relating to the selectivity of the advantage, inherent in the concept of a 'State aid' measure, within the meaning of Article 107(1) TFEU, which alone is the subject of the objection made by the Commission in the context of the present appeal, it follows from equally settled case-law of the Court of Justice that that condition requires a determination as to whether, under a particular legal regime, the national measure at issue is such as to favour 'certain undertakings or the production of certain goods' over other undertakings which, in the light of the objective pursued by that regime, are in a comparable factual and legal situation and which accordingly suffer different treatment that can, in essence, be classified as discriminatory (judgment of 19 December 2018, *A-Brauerei*, C-374/17, EU:C:2018:1024, paragraph 35 and the case-law cited).

35 Further, where the measure at issue is conceived as an aid scheme and not as individual aid, it is for the Commission to establish that that measure, although it provides for an advantage that is of general application, confers the benefit of that advantage exclusively on certain undertakings or certain sectors of activity (see, to that effect, inter alia, judgment of 30 June 2016, *Belgium* v *Commission*, C-270/15 P, EU:C:2016:489, paragraph 49).

36 As regards, in particular, national measures that confer a tax advantage, it must be recalled that a measure of that nature which, although not involving the transfer of State resources, places the recipients in a more favourable position than other taxpayers is capable of procuring a selective advantage for the recipients and, consequently, constitutes 'State aid', within the meaning of Article 107(1) TFEU. Accordingly, a measure that mitigates the financial burdens which are normally borne by the budget of an undertaking and which thus, without being a subsidy in the strict sense of the word, is similar in character and has the same effect is also regarded as State aid (see, to that effect, judgment of 15 March 1994, *Banco Exterior de España*, C-387/92, EU:C:1994:100, paragraphs 13 and 14, and 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, paragraphs 71 and 72). On the other hand, a tax advantage resulting from a general measure applicable without distinction to all economic operators does not constitute such aid (see, to that effect, inter alia, judgment of 19 December 2018, *A-Brauerei*, C-374/17, EU:C:2018:1024, paragraph 23 and the case-law cited).

37 In that context, in order to classify a national tax measure as 'selective', the Commission must begin by identifying the reference system, or 'normal' tax system applicable in the Member State concerned, and thereafter demonstrate that the tax measure at issue is a derogation from that reference system, in so far as it differentiates between operators who, in the light of the objective pursued by that system, are in a comparable factual and legal situation (see, to that effect, judgment of 19 December 2018, *A-Brauerei*, C-374/17, EU:C:2018:1024, paragraph 36 and the case-law cited).

38 The concept of 'State aid' does not, however, cover measures that differentiate between undertakings which, in the light of the objective pursued by the national legislation in question, are in a comparable factual and legal situation, and are, therefore, a priori selective, where the Member State concerned is able to demonstrate that that differentiation is justified in that it flows from the nature or general structure of the system of which the measures form part (see, to that effect, inter alia, judgments of 29 April 2004, *Netherlands* v *Commission*, C-159/01, EU:C:2004:246, paragraphs 42 and 43; of 29 March 2012, *3M Italia*, C-417/10, EU:C:2012:184, paragraph 40; and of 19 December 2018, *A-Brauerei*, C-374/17, EU:C:2018:1024, paragraph 44).

39 It is in the light of those considerations that it is necessary to examine whether, in this case, the General Court misconstrued Article 107(1) TFEU, as interpreted by the Court of Justice, by holding, in essence, that the Commission had not, in the decisions at issue, demonstrated that the measure at issue conferred a selective advantage on 'certain undertakings or the production of certain goods'.

40 By the first part of its ground of appeal, the Commission submits that, by criticising it for having assessed the possible existence of a selective advantage in the light of an incorrect reference system and by considering that the progressive tax rates applied by the Hungarian legislature formed an integral part of that reference system, the General Court erred in law.

41 According to the Commission, the selective advantage resulting from the tax measure at issue does not lie in the existence of an exemption in respect of the portion of turnover below a certain amount, since all the undertakings concerned benefit from that exemption in respect of the part of their turnover which does not exceed the ceiling corresponding to the exempted band, but in the difference in the average tax rate resulting from the progressive nature of the rates. That difference favours undertakings with a low turnover by unjustifiably alleviating the tax burden on them compared with that borne by other undertakings in the context of the reference system, which, according to the Commission, consists of a flat-rate turnover tax of 5.3%. Thus, it is contended that taxation at progressive rates does not differ from the situation in which one group of taxable persons is taxed at a given rate and another group of taxable persons at another rate, which amounts to different treatment of comparable undertakings.

42 Therefore, the question arises first of all whether, as the Commission maintains, the progressivity of rates provided for by the tax measure at issue was to be excluded from the reference system in the light of which it was appropriate to assess whether the existence of a selective advantage could be established or whether, as the General Court held in paragraphs 78 to 83 of the judgment under appeal, it is, on the contrary, an integral part of that system.

43 As regards the fundamental freedoms of the internal market, the Court of Justice has held that, given the current state of harmonisation of EU tax law, the Member States are free to establish the system of taxation which they deem most appropriate, meaning that the application of progressive taxation falls within the discretion of each Member State (see, to that effect, judgments of 3 March 2020, *Vodafone Magyarország*, C-75/18, EU:C:2020:139, paragraph 49, and *Tesco-Global Áruházak*, C-323/18, EU:C:2020:140, paragraph 69 and the case-law cited). The same is true in the field of State aid (see, to that effect, inter alia, judgment of 26 April 2018, *ANGED*, C-233/16, EU:C:2018:280, paragraph 50 and the case-law cited).

44 It follows that, outside the spheres in which EU tax law has been harmonised, the determination of the characteristics constituting each tax falls within the discretion of the Member States, in accordance with their fiscal autonomy, that discretion having, in any event, to be exercised in accordance with EU law. This includes, in particular, the choice of tax rate, which may be proportional or progressive, and also the determination of the basis of assessment and the taxable event.

45 Those characteristics constituting the tax therefore, in principle, define the reference system or the 'normal' tax regime, from which it is necessary, in accordance with the case-law referred to in paragraph 37 of the present judgment, to analyse the condition relating to selectivity.

46 In that regard, it must be stated that EU law on State aid does not preclude, in principle, Member States from deciding to opt for progressive tax rates intended to take account of the ability to pay of taxable persons. The fact that recourse to progressive taxation is, in practice, more common in the taxation of natural persons does not mean that they are prohibited from using it in order also to take account of the ability to pay of legal persons, in particular undertakings.

47 EU law thus does not preclude progressive taxation from being based on turnover, including where such taxation is not intended to offset the negative effects likely to be caused by the activity being taxed. Contrary to what the Commission maintains, the amount of turnover constitutes, in general, a criterion of differentiation that is neutral and a relevant indicator of the taxable person's ability to pay (see, to that effect, judgments of 3 March 2020, *Vodafone Magyarország*, C-75/18, EU:C:2020:139, paragraph 50, and *Tesco-Global Áruházak*, C-323/18, EU:C:2020:140, paragraph 70). It does not follow from any rule or principle of EU law, including in the field of State aid, that progressive rates may apply only to taxes on profits. Moreover, like turnover, profit in itself is merely a relative indicator of ability to pay. The fact that it may constitute, as the Commission contends, a more relevant or more precise indicator than turnover is irrelevant in matters of State aid, since EU law on that matter seeks only to remove the selective advantages from which certain undertakings might benefit to the detriment of others which are placed in a comparable situation. The same is true of the possibility of economic double taxation, linked to combined taxation on turnover and taxation of profits.

48 It follows from the foregoing that the characteristics constituting the tax, which include progressive tax rates, form, in principle, the reference system or the 'normal' tax regime for the purposes of analysing the condition of selectivity. That said, it cannot be ruled out that those characteristics may, in certain cases, reveal a manifestly discriminatory element, which it is, however, for the Commission to demonstrate.

49 The 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), does not call into question the above findings. On the contrary, as the Advocate General observed, in essence, in points 47 to 52 of her Opinion, in the case which gave rise to that judgment, the tax system had been configured according to manifestly discriminatory parameters intended to circumvent EU law on State aid. That was apparent, in that case, from the choice of tax criteria favouring certain offshore companies, which appeared to be inconsistent in the light of the objective of creating a general tax, imposed on all undertakings, as set out by the legislature concerned.

50 In the present case, as is clear from paragraphs 3 to 6 and 9 of the present judgment, the Hungarian legislature, by the Law on advertisement tax, established the tax measure at issue, consisting of a special tax, applied progressively by bands, based on turnover derived from the broadcasting or publication of advertisements in Hungary, applicable to all undertakings. The scale of that charge, which, contrary to the Commission's assertion, is a direct tax, was amended by the 2015 Law, but its characteristics remained unchanged. The Commission has not established that those characteristics, adopted by the Hungarian legislature in the exercise of its discretion in the context of its fiscal autonomy, were designed in a manifestly discriminatory manner, with the aim of circumventing the requirements of EU law on State aid. In those circumstances, the progressivity of the rates of the tax measure at issue had to be regarded as inherent in the reference system or the 'normal' tax regime in the light of which the existence, in the present case, of a selective advantage had to be assessed.

51 The General Court did not therefore err in law in holding, in paragraphs 78 to 83 of the judgment under appeal, that, by considering that the progressive scale of the tax measure at issue was not part of the reference system in the light of which the selective nature of that measure had to be assessed, the Commission had incorrectly relied on an incomplete and notional reference system. It follows that the first part of the first ground of appeal must be rejected as unfounded.

52 Since an error in determining the reference system necessarily vitiates the entire analysis of the condition relating to selectivity (see, to that effect, judgment of 28 June 2018, *Andres (insolvency of Heitkamp BauHolding)* v *Commission*, C-203/16 P, EU:C:2018:505, paragraph 107), there is no need to rule on the second and third parts of the first ground of appeal.

53 It follows that the first ground of appeal must be dismissed in its entirety as manifestly unfounded.

The second ground of appeal, alleging an infringement of Article 107(1) TFEU, in that the General Court held that the mechanism for the partial deductibility of losses carried forward did not constitute a selective advantage

54 By its second ground of appeal, the Commission submits that the General Court erred in law in finding that the mechanism for the partial deductibility of losses carried forward, allowing undertakings whose pre-tax profits for the 2013 financial year were zero or negative to deduct 50% of their losses carried forward from the basis of assessment of the tax measure at issue in respect of 2014, was not a selective advantage. In so doing, it also failed to have regard to the scope of the 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 97).

55 Hungary and the Republic of Poland dispute those arguments.

56 It should be noted in that regard that, in principle, as is apparent from paragraph 36 of the present judgment, a tax advantage resulting from a general measure, applicable without distinction to all economic operators, does not constitute 'State aid', within the meaning of Article 107(1) TFEU.

57 As was set out in paragraphs 34 to 38 of the present judgment, it is necessary, in order to establish the selective nature of the measure concerned, to confirm, in the light of the tax regime identified as constituting the reference system or 'normal' tax regime, whether the measure introduces as between operators who, in the light of the objective pursued by that system, are in a comparable factual and legal situation, a distinction that is not justified by the nature and scheme of that regulation.

58 It follows, inter alia, that the fact that only taxpayers satisfying the conditions for the application of a measure can benefit from a measure cannot, in itself, make it into a selective measure (see, to that effect, inter alia, 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 59). Nor can the selective nature of a measure be inferred from the mere fact that it is of a transitional nature, since the decision to limit its application *ratione temporis*, with a view to ensuring a gradual transition between old and new tax rules, falls within the discretion of the Member States referred to in paragraph 44 above.

59 In the present case, by establishing the mechanism for the partial deductibility of losses carried forward, the Hungarian legislature sought to moderate the tax burden borne by the most economically vulnerable undertakings for the first year of their liability in respect of the tax measure at issue, particularly as that measure had been introduced during the year. Since, from

the outset, it was intended to be transitional, that mechanism cannot be regarded as part of the reference system or the 'normal' tax regime, in the light of which the analysis of its selective nature must be made, even if it were to resemble a basis-of-assessment rule.

60 It is therefore necessary to examine whether the mechanism for the partial deductibility of losses carried forward introduces a difference in treatment as between operators which are, in the light of the objective pursued by the Law on advertisement tax, in a comparable factual and legal situation.

61 As regards this point, that mechanism introduces a distinction between, on the one hand, undertakings with losses carried forward in respect of previous years, provided that they did not make a profit in 2013, and, on the other hand, undertakings that made a profit in that year, as only the former are entitled to deduct those losses carried forward when calculating the basis of assessment for the tax measure at issue in respect of 2014.

62 In the light of the objective of redistribution pursued by the Hungarian legislature in adopting the Law on advertisement tax, as evidenced by the progressivity of the tax measure at issue, those two categories of undertakings are not in a comparable factual and legal situation. The choice of a basis of assessment expressed according to turnover does not render inconsistent, in relation to that objective, the adoption of a transitional measure taking profit into account, since the latter also constitutes, as the Commission indeed also maintains in another part of its argument, an indicator which is both neutral and relevant, even though it is relative, of undertakings' ability to pay.

63 As the Advocate General highlighted in point 109 of her Opinion and as the General Court held in paragraph 122 of the judgment under appeal, the criterion relating to the lack of profits in respect of the 2013 financial year is in that regard objective, since the undertakings concerned, from that point of view, have a lesser ability to pay than others on the date of entry into force of the Law on advertisement tax, during the course of 2014.

64 Consequently, the Hungarian legislature was entitled, without infringing EU law on State aid, to combine, in respect of the first year of application of that law, the measurement of ability to pay resulting from the amount of turnover with a measure enabling losses carried forward by undertakings that did not make a profit in 2013 to be taken into account.

65 The fact that the undertakings liable to benefit from the mechanism for the partial deductibility of losses carried forward were already identifiable on the date on which the tax measure at issue was introduced is not, in itself, capable of calling that conclusion into question.

66 Nor is it possible to uphold the Commission's argument that the General Court, in paragraphs 119 to 122 of the judgment under appeal, failed to have regard to the scope of the 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), in holding that the Hungarian authorities, by adopting the mechanism for the partial deductibility of losses carried forward, introduced a distinction based on an objective and contingent criterion not leading to any selectivity.

67 It must be noted in that regard that, in paragraphs 77 to 83 of that judgment, the Court held inter alia that tax measures establishing a condition linked to the taking into account of profits made by a taxable person could not, on that account alone, be regarded as selective, such profits being the consequence of the contingent factor of the operator in question's being unprofitable or, on the

contrary, very profitable during the period of assessment. As the General Court held in essence in paragraph 120 of the judgment under appeal, if that reasoning was followed in the context of a case where the basis of assessment of the tax measures in question relied on criteria other than profits, such as the number of employees and the occupation of professional premises, it also applies where the tax advantage at issue is, as in the present case, based on a reduced tax base relating to turnover, taking into account the absence of profits in a given financial year as well as the existence of losses carried forward and, accordingly, falls within the very objective of redistribution pursued by the tax legislation of which that advantage forms part and which is structured around the ability to pay of the taxable undertakings.

68 It follows, as the General Court correctly held in paragraphs 117 to 123 of the judgment under appeal, that the Commission was wrong to consider that the mechanism for the partial deductibility of losses carried forward established a selective advantage, constituting State aid, in favour of undertakings whose pre-tax profits for the 2013 financial year were zero or negative and which had losses carried forward. Contrary to what the Commission claims, the General Court cannot be criticised for ruling *ultra petita* in that regard. The second ground of appeal must therefore be rejected as unfounded.

69 Since the two grounds of appeal put forward by the Commission in support of its appeal must be rejected, the appeal must be dismissed in its entirety.

Costs

70 Under Article 138(1) of the Rules of Procedure of the Court of Justice, applicable to appeal proceedings by virtue of Article 184(1) of those rules, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since Hungary has applied for costs and the Commission has been unsuccessful, the latter must be ordered to pay the costs.

71 Article 184(4) of the Rules of Procedure provides that, where, without having brought the appeal itself, an intervener at first instance has participated in the written or oral part of the proceedings before the Court of Justice, the latter may decide that it is to bear its own costs. In the present case, the Republic of Poland, intervener at first instance, without being the appellant, participated in the written and oral procedures before the Court. Since the Republic of Poland supported the form of order sought by Hungary and applied for the Commission be ordered to pay the costs, its costs must be borne by the latter (see, to that effect, judgment of 28 June 2018, *Andres (insolvency of Heitkamp BauHolding)* v *Commission*, C-203/16 P, EU:C:2018:505, paragraphs 113 and 114).

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

1. **Dismisses the appeal;**

2. **Orders the European Commission to pay the costs, including those incurred by the Republic of Poland.**

[Signatures]