Reports of Cases

JUDGMENT OF THE GENERAL COURT (Ninth Chamber)

25 April 2018 *

(State aid — Aid granted under the Hungarian Law No XCIV of 2014 on the health contribution of tobacco companies — Aid resulting from a 2014 amendment to the Hungarian Food Chain Act 2008 and the official control thereof — Taxes with progressive annual turnover rates — Decision to open the procedure provided for in Article 108(2) TFEU — Simultaneous adoption of a suspension order — Action for annulment — Severable nature of the suspension order — Interest in bringing proceedings — Admissibility — Obligation to state reasons — Proportionality — Equal treatment — Rights of the defence — Principle of sincere cooperation — Article 11(1) of Regulation (EC) No 659/1999)

In Cases T-554/15 and T-555/15,

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

applicant,

v

European Commission, represented by L. Flynn, P.-J. Loewenthal and K. Talabér-Ritz, acting as Agents,

defendant,

APPLICATION based on Article 263 TFEU and seeking the annulment, in part, of, first, Commission Decision C(2015) 4805 final of 15 July 2015 on State aid SA.41187 (2015/NN) — Hungary — Health contribution of tobacco industry businesses (OJ 2015 C 277, p. 24), and, second, of Commission Decision C(2015) 4808 final of 15 July 2015 on State aid SA. 40018 (2015/C) (ex 2014/NN) — 2014 Amendment to the Hungarian food chain inspection fee (OJ 2015 C 277, p. 12),

THE GENERAL COURT (Ninth Chamber),

composed of S. Gervasoni, President, L. Madise and K. Kowalik-Bańczyk (Rapporteur), Judges,

Registrar: N. Schall, Administrator,

having regard to the written procedure and further to the hearing on 12 October 2017,

gives the following

* Language of the case: Hungarian.

Judgment

Background to the dispute

1 In December 2014, the Hungarian Parliament, first, adopted Law No XCIV of 2014 on the health contribution of tobacco companies and, secondly, introduced amendments to Law No XLVI of 2008 on the food chain and the official control thereof. Those measures entered into force on 1 February 2015 and 1 January 2015 respectively.

2 Law No XCIV of 2014 on the health contribution of tobacco companies introduced a new tax, applicable to authorised warehouse keepers, importers, or registered traders of tobacco products deriving at least 50% of their total annual turnover from the production or trade of those products ('the health contribution'). The health contribution was to be levied on the annual turnover of taxable persons at a progressive rate set out as follows:

– 0% on the part of the turnover not exceeding 30 million Hungarian forint (HUF) (approximately EUR 96 500);

– 0.2% on the part of the turnover exceeding HUF 30 million but not exceeding HUF 30 billion (approximately EUR 96.5 million);

– 2.5% on the part of the turnover exceeding HUF 30 billion but not exceeding HUF 60 billion (approximately EUR 193 million);

– 4.5% on the part of the turnover exceeding HUF 60 billion.

3 The aforementioned law also provided for a reduction of the tax liability resulting from the health contribution by up to 80% of the payable contribution, where the undertaking made eligible investments in tangible assets ('the reduction of the health contribution in the case of investments').

4 The amendment to Law No XLVI on the food chain and the official control thereof sought, for its part, to restructure the food chain inspection fee applicable, under that law, to all food chain operators. Prior to that amendment, food chain operators had to pay the food chain inspection fee calculated using a single flat rate of 0.1% of pre-tax turnover achieved over the preceding year. The amendment at issue introduced a progressive rate for that fee applicable specifically to stores selling everyday consumer goods ('the amended food chain inspection fee'). That new progressive rate was set out as follows:

– 0% on the part of the turnover not exceeding HUF 500 million (approximately EUR 1.6 million);

– 0.1% on the part of the turnover exceeding HUF 500 million but not exceeding HUF 50 billion (approximately EUR 160.6 million);

– 1% on the part of the turnover exceeding HUF 50 billion but not exceeding HUF 100 billion (approximately EUR 321.2 million);

– 2% on the part of the turnover exceeding HUF 100 billion but not exceeding HUF 150 billion (approximately EUR 481.8 million);

– 3% on the part of the turnover exceeding HUF 150 billion but not exceeding HUF 200 billion (approximately EUR 642.4 million);

– 4% on the part of the turnover exceeding HUF 200 billion but not exceeding HUF 250 billion (approximately EUR 803 million);

– 5% on the part of the turnover exceeding HUF 250 billion but not exceeding HUF 300 billion (approximately EUR 963.5 million);

– 6% on the part of the turnover exceeding HUF 300 billion.

5 In December 2014, the European Commission became aware of the amendment to Law No XLVI on the food chain and the official control thereof. In March 2015, it received a complaint relating to that amendment. At the same time, the Commission received a complaint relating to the introduction of the health contribution. By letters, respectively, of 17 March 2015 and of 13 April 2015 ('the information letters of 17 March and 13 April 2015'), the Commission forwarded those complaints to the Hungarian authorities, asking them to submit their comments and requesting that they provide information. In those letters, worded in essentially similar terms, the Commission informed the Hungarian authorities that, in its view, the differentiation between undertakings in a comparable situation that results, first, from the progressive rate of the amended food chain inspection fee and, secondly, from the progressive rate of the health contribution, and the reduction of the health contribution in the case of investments, could involve State aid that is not compatible with the internal market. The Commission referred, in both letters, to the possibility of issuing a suspension order against Hungary, within the meaning 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), and asked Hungary to submit its comments on the possible imposition of such an order within 20 working days.

6 The Hungarian authorities replied by letters of 16 April and 12 May 2015 respectively.

7 On 15 July 2015, the Commission adopted, first, Decision C(2015) 4805 final, on State aid No SA.41187 (2015/NN) — Hungary — Health contribution of tobacco industry businesses (OJ 2015 C 277, p. 24, 'the health contribution decision'), and, secondly, Decision C(2015) 4808 final, on State aid No SA.40018 (2015/C) (ex 2015/NN) — 2014 Amendment to the Hungarian food chain inspection fee (OJ 2015 C 277, p. 12, 'the decision on the amendment to the food chain inspection fee' (together 'the contested decisions').

8 In the first place, by the contested decisions, the Commission considered that the progressive tax rate of the amended food chain inspection fee, of the one part, and the progressive tax rate of the health contribution and the reduction of the health contribution in the case of investments, of the other part, ('the national measures at issue'), contained an element of State aid within the meaning of Article 107(1) TFEU and expressed its doubts as to whether that State aid was compatible with the internal market. Given those doubts, the Commission initiated, by the contested decisions, two formal investigation procedures under Article 108(2) TFEU and asked Hungary, and the interested parties, to submit their comments.

9 In the second place, as regards the application of Article 108(3) TFEU, the Commission considered that the national measures at issue constituted unlawful aid, since it had not been notified of them, and, at the time of adoption of the contested decisions, those measures were still being applied. The Commission pointed out that the aforementioned measures could have a substantial impact on market competition, and, given their continued application, it adopted suspension orders, within the meaning of Article 11(1) of Regulation No 659/1999, requiring Hungary to suspend, first, the application of the progressive tax rate of the amended food chain inspection fee and, secondly, the application of the progressive tax rate of the health contribution, and the reduction of the health contribution in the case of investments, until such time as the Commission decides whether those measures are compatible with the internal market ('the contested orders').

10 On 4 July 2016, the Commission adopted two decisions closing the formal investigation procedures initiated by the contested decisions, namely Decision (EU) 2016/1846 on the measure SA.41187 (2015/C) (ex 2015/NN) implemented by Hungary on the health contribution of tobacco industry businesses (OJ 2016 L 282, p. 43), and Decision (EU) 2016/1848 on the measure SA.40018 (2015/C) (ex 2015/NN) implemented by Hungary on the 2014 Amendment to the Hungarian food chain inspection fee (OJ 2016 L 282, p. 63) (together, 'the final decisions').

Procedure and forms of order sought

11 By applications lodged at the Registry of the General Court on 25 September 2015, Hungary brought the present actions against the health contribution decision (T-554/15) and the decision on the amendment to the food chain inspection fee (T-555/15).

12 On 14 and 15 January 2016, the Commission lodged its defences in each of the cases.

13 By letter of 11 November 2016, the General Court, on the basis of Article 131(1) of the Rules of Procedure of the General Court, asked the parties to respond to the written questions on whether the present actions retained a purpose. The parties responded to those questions within the prescribed period.

14 By decision of the President of the Ninth Chamber of the General Court of 24 May 2017, after hearing the parties, Cases T-554/15 and T-555/15 were joined for the purposes of the oral procedure, in accordance with Article 68(2) of the Rules of Procedure.

15 At the hearing on 12 October 2017, after hearing the parties, the President of the Ninth Chamber of the General Court decided that Cases T-554/15 and T-555/15 would be joined also for the purposes of the decision closing the proceedings.

16 In Case T-554/15, Hungary claims that the Court should:

– annul, in part, the health contribution decision, in so far as it orders the suspension of the application of the progressive tax rate of the health contribution and the reduction of the health contribution in the case of investment;

– order the Commission to pay the costs.

17 In Case T-555/15, Hungary claims that the Court should:

– annul, in part, the decision on the amendment to the food chain inspection fee, in so far as it orders the suspension of the application of the progressive tax rate of the amended food chain inspection fee;

– order the Commission to pay the costs.

18 In both cases, the Commission contends that the Court should:

– dismiss the action;

– order Hungary to pay the costs.

Law

Preliminary observations

19 In accordance with Article 107(1) TFEU, save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market.

20 Article 108 TFEU organises the procedure for reviewing aid granted by Member States, in order to prevent distortion of competition caused by aid that is incompatible with the internal market.

21 First, Article 108(2) TFEU provides that if, after giving notice to the parties concerned to submit their comments, the Commission finds that aid granted by a State or through State resources is not compatible with the internal market having regard to Article 107 TFEU, it is to decide that the State concerned must abolish or alter such aid within a period of time to be determined by the Commission.

22 Secondly, Article 108(3) TFEU provides that Member States must inform the Commission, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid. If the Commission considers that any such plan is not compatible with the internal market having regard to Article 107 TFEU, it must without delay initiate the procedure provided for in Article 108(2) TFEU. The Member State concerned must not put its proposed measures into effect until this procedure has resulted in a final decision.

23 The extensive case-law of the Court of Justice and of the General Court that specifies the provisions of Article 108 TFEU was largely reproduced in Regulation No 659/1999, repealed and replaced with effect from 14 October 2015 by Council Regulation (EU) 2015/1589 of 13 July 2015, laying down detailed rules for the application of Article 108 [TFEU] (OJ 2015 L 248, p. 9).

24 Under Article 4(4) of Regulation No 659/1999, the Commission is to initiate the procedure provided for in Article 108(2) TFEU where, after a preliminary examination, it finds that doubts are raised as to the compatibility with the internal market of a notified measure. The decision taken on the basis of that article is referred to as a decision to initiate the formal investigation procedure.

25 Initiation of a formal investigation procedure is possible not only where the Commission examines a notified measure, but also, under Article 13 of Regulation No 659/1999, where it examines possible unlawful aid, that is to say, in accordance with Article 1(f) of that regulation, a measure which the Commission considers, at that stage of the procedure, to be new aid put into effect in contravention of Article 108(3) TFEU.

26 The adoption of a decision to initiate the formal investigation procedure in relation to a national measure in the situation provided for in Article 13 of Regulation No 659/1999 alters the legal position of that measure, in the light of the Commission's provisional conclusion as to its State aid status within the meaning of Article 107(1) TFEU and as to its unlawful nature, arising from the possible infringement of the requirement to notify any new aid plans, established in Article 108(3) TFEU. Until the adoption of such a decision, the Member State from which the measure originated, the beneficiary undertakings and other economic operators may believe that the measure is being lawfully implemented, for example as a general measure not falling within the scope of Article 107(1) TFEU or as existing aid within the meaning of Article 108(1) TFEU and within the meaning of Article 1(b) of Regulation No 659/1999, the continued implementation of which remains lawful at that stage. On the other hand, after its adoption there is at the very least a significant element of doubt as to the legality of the measure at issue, which, without prejudice to the possibility of seeking interim relief from the

judge hearing the application for interim measures, must lead the Member State to suspend its application, since the initiation of the formal investigation procedure excludes the possibility of an immediate decision that the measure is compatible with the internal market, which would enable it to continue to be lawfully implemented (see, to that effect, judgment of 16 October 2014, *Alro* v *Commission*, T-517/12, EU:T:2014:890, paragraph 28 and the case-law cited).

27 The classification as unlawful State aid of a national measure that forms the subject matter of a decision to initiate the formal investigation procedure therefore requires the Member State to which that decision is addressed immediately to suspend the implementation of that measure (see, to that effect, judgments of 10 May 2005, *Italy* v *Commission*, C-400/99, EU:C:2005:275, paragraph 39, and of 16 October 2014, *Alro* v *Commission*, T-517/12, EU:T:2014:890, paragraph 27 and the case-law cited).

28 The obligation to suspend the implementation of a non-notified national measure that is classified as unlawful State aid is based on Article 108(3) TFEU, which establishes a prior control of plans to grant new aid, the aim of which is to ensure that only aid that is compatible with the internal market is implemented. In order to achieve that aim, the implementation of such planned aid must therefore be suspended until the doubt as to its compatibility is resolved by the Commission's final decision (see, to that effect, judgment of 21 November 2013, *Deutsche Lufthansa*, C-284/12, EU:C:2013:755, paragraphs 25 and 26 and the case-law cited).

29 The obligation to suspend the implementation of a national measure classified as unlawful State aid by the decision initiating the formal investigation procedure follows automatically from that decision, in that the Member State is required itself to draw all the appropriate conclusions from that decision (see, to that effect, judgment of 9 October 2001, *Italy* v *Commission*, C-400/99, EU:C:2001:528, paragraph 60).

30 In order to enable the Commission to counteract any infringement of the rules laid down in Article 108(3) TFEU, the Court of Justice also conferred on it the power to require the Member State concerned to suspend immediately the payment of any aid which it considers to be unlawful, after giving that Member State an opportunity to submit its comments on the matter (judgments of 14 February 1990, *France* v *Commission*, C-301/87, EU:C:1990:67, paragraphs 18 to 20; of 21 March 1990, *Belgium* v *Commission*, C-142/87, EU:C:1990:125, paragraphs 14 to 16 and 19; and of 21 March 1991, *Italy* v *Commission*, C-303/88, EU:C:1991:136, paragraphs 46 to 48).

31 It does not follow from that case-law, or from Article 11(1) of Regulation No 659/1999 which reproduced it, that the Commission is obliged to require automatically the Member State concerned to suspend payment of aid which has not been notified in accordance with Article 108(3) TFEU. The opposite outcome would render nugatory the legal obligation imposed on the Member State by Article 108(3) TFEU not to implement planned aid before the Commission's final decision and would have the consequence of reversing the roles of the Member States and the Commission (see, to that effect, judgment of 17 June 1999, *Belgium* v *Commission*, C-75/97, EU:C:1999:311, paragraph 74 and the case-law cited).

32 There are procedural differences between, on the one hand, the suspension of a measure in the process of being implemented arising from the decision to initiate the formal investigation procedure classifying that measure as unlawful State aid and, on the other hand, a suspension order issued in relation to that measure. In particular, under Article 12 of Regulation No 659/1999, in the event of non-compliance with a suspension order, the Commission is entitled to refer the matter directly to the Court of Justice of the European Union without further notice and apply for a declaration that the failure to comply constitutes an infringement of the Treaty on the Functioning of the European Union.

33 Those procedural differences do not, however, affect the principal legal effect of both the decision to initiate a formal investigation procedure and the suspension order, that is to say the obligation, imposed on the Member State, to suspend the implementation of the measure which forms the subject matter of those decisions, based on Article 108(3) TFEU (see, to that effect, judgment of 9 October 2001, *Italy* v *Commission*, C-400/99, EU:C:2001:528, paragraph 60).

The admissibility of the action

34 By its actions, Hungary seeks the annulment only of the suspension orders set out in the contested decisions. Accordingly, the actions brought by Hungary do not seek annulment of the contested decisions in that, by those decisions, the Commission initiated formal investigation procedures. Hungary considers that such partial annulment is possible in the present case, since the contested orders are severable from the contested decisions in the light of the criterion of severability laid down in the case-law.

35 Partial annulment of an EU act is possible only if the elements the annulment of which is sought may be severed from the remainder of the act. The Court of Justice has repeatedly ruled that that requirement of severability is not satisfied where the partial annulment of an act would have the effect of altering its substance (see judgment of 18 March 2014, *Commission* v *Parliament and Council*, C-427/12, EU:C:2014:170, paragraph 16 and the case-law cited).

36 The order provided for in Article 11(1) of Regulation No 659/1999 ordering the suspension of a measure likely to constitute State aid may take place at the same time as the decision to initiate the procedure provided for in Article 108(2) TFEU, or may be subsequent thereto (judgment of 9 October 2001, *Italy* v *Commission*, C-400/99, EU:C:2001:528, paragraph 47).

37 Even where they take place at the same time, as in the present case, the decision to initiate a formal investigation procedure and the suspension order are two distinct measures governed by different provisions of Regulation No 659/1999, namely, first, Article 4(4) thereof, and, secondly, Article 11(1) and Article 12 thereof.

38 It is clear, furthermore, from the wording of Article 11(1) of Regulation No 659/1999, that the EU legislature sought to give the suspension order the form of a 'decision' within the meaning of Article 288 TFEU. According to the case-law, such a measure must be regarded as a measure which produces binding legal effects and which, therefore, is capable of forming the subject matter of an action (judgment of 13 October 2011, *Deutsche Post and Germany* v *Commission*, C-463/10 P and C-475/10 P, EU:C:2011:656, paragraphs 43 to 46).

39 It follows that, where, as in the present case, the Commission decides, by a single measure, to initiate a formal investigation procedure and adopt a suspension order, that order is severable from the remainder of the measure and may therefore, in itself, be the subject of an action for annulment.

40 Furthermore, as is clear from the observations made as a preliminary point in paragraphs 26 to 33 above, the legal effects of initiating the formal investigation procedure and those of adopting the suspension order overlap in part.

41 In the present actions, Hungary does not seek annulment of the contested decisions in so far as, by those decisions, the Commission initiated the formal investigation procedures. It should also be noted that the applications lodged by Hungary do not contain any pleas relating to a possible erroneous classification of the national measures at issue as State aid or new aid, unlawfully implemented. Accordingly, even assuming that the pleas put forward in support of the present actions are well founded, Hungary would not be relieved of its obligation to suspend the implementation of the national measures at issue.

42 In that regard, it is sufficient, however, to note that Member States are not required to show their legal interest in bringing proceedings when bringing an action based on Article 263 TFEU (see judgments of 13 October 2011, *Deutsche Post and Germany* v *Commission*, C-463/10 P and C-475/10 P, EU:C:2011:656, paragraph 36 and the case-law cited, and of 3 October 2013, *Inuit Tapiriit Kanatami and Others* v *Parliament and Council*, C-583/11 P, EU:C:2013:625, paragraph 53 and the case-law cited).

43 In the light of the foregoing, the present actions must be declared admissible.

Continued interest in bringing proceedings

44 On 4 July 2016, the Commission closed the formal investigation procedures initiated by the contested decisions by adopting the final decisions. In those decisions, it confirmed the provisional assessment made in the contested decisions, concluding that the national measures at issue constituted unlawful State aid that is incompatible with the internal market. Hungary did not contest the final decisions within the time limit for bringing an action. As those decisions were also not the subject of an action brought by a third party following their publication in the *Official Journal of the European Union* on 19 October 2016 (OJ 2016 L 282, pp. 43 and 63), they have become final.

45 In those circumstances, and in the light of the pleas put forward in support of the present actions, the General Court decided to hear the parties on the issue of whether those actions still retained their purpose.

46 The parties answered the General Court's questions in the affirmative. They put forward, inter alia, reasons relating to the legal uncertainty surrounding the circumstances in which the Commission is authorised to apply the suspension order, the differences between the legal effects of the contested decisions and the final decisions, the need to ensure judicial review of any illegalities which may vitiate the contested orders, and the privileged status of Member States in the context of actions brought on the basis of Article 263 TFEU.

47 It is clear from the case-law of the General Court that, where actions are brought, first, against a decision to initiate a formal investigation procedure in relation to a national measure, and, secondly, against a final decision closing that procedure and declaring that the national measure under investigation constitutes State aid that is incompatible with the internal market, dismissal of the action against that latter decision results in the action brought against the decision initiating a formal investigation procedure becoming devoid of purpose (see, to that effect, judgments of 13 June 2000, *EPAC* v *Commission*, T-204/97 and T-270/97, EU:T:2000:148, paragraphs 153 to 159; of 6 March 2002, *Diputación Foral de Álava* v *Commission*, T-168/99, EU:T:2002:60, paragraph 22 to 26; and of 9 September 2009, *Diputación Foral de Álava and Others* v *Commission*, T-30/01 to T-32/01 and T-86/02 to T-88/02, EU:T:2009:314, paragraphs 345 to 363). According to that case-law, where the Commission's assessment contained in a final decision is upheld by the EU Courts, including in relation to the classification of the national measure under investigation as new State aid, that measure must be abolished and the aid recovered *ab initio*. Therefore, in such a case, there is no longer any need to rule on whether or not it was right that that measure, which was to be suspended following the decision to initiate the formal investigation procedure, be suspended (see, to that effect, judgment of 9 September 2009, *Diputación Foral de Álava and Others* v *Commission*, T-30/01 to T-32/01 and T-86/02 to T-88/02, EU:T:2009:314, paragraph 358).

48 That case-law cannot be transposed to the present actions.

49 First, it is clear from the judgments cited in paragraph 47 above (see, inter alia, judgments of 13 June 2000, *EPAC* v *Commission*, T-204/97 and T-270/97, EU:T:2000:148, paragraphs 154 to 158; and of 9 September 2009 *Diputación Foral de Álava and Others* v *Commission*, T-30/01 to T-32/01 and

T-86/02 to T-88/02, EU:T:2009:314, paragraphs 345, 348 and 355) that, in a situation such as that set out in paragraph 47 above, the issue of whether the action has become devoid of purpose is in reality confused with that of whether the applicant no longer has any legal interest in bringing proceedings. As was pointed out in paragraph 42 above, however, the Member States are not required to demonstrate their legal interest in bringing proceedings when bringing an action based on Article 263 TFEU.

50 Secondly, it cannot be ruled out that a suspension order may be vitiated by illegalities other than those linked to the erroneous classification of the measure examined by the Commission as unlawful State aid. If the adoption of a decision closing the formal investigation procedure were to result in the action brought against the suspension order becoming devoid of purpose, the judicial review of such illegalities would be impeded. In a community based on the rule of law, such as the Union, neither the Member States nor the institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty on the Functioning of the European Union (see, to that effect, judgment of 23 April 1986, *Les Verts* v *Parliament*, 294/83, EU:C:1986:166, paragraph 23).

51 In the light of the foregoing, it is necessary to assess the substance of the present actions.

Substance

52 In support of each of its actions, Hungary puts forward four essentially identical pleas in law, alleging, first, 'misuse of discretion' and a manifest error of assessment when applying Article 11(1) of Regulation No 659/1999, and an infringement of the principle of proportionality; secondly, infringement of the principles of non-discrimination and equal treatment; thirdly, infringement of the obligation to state reasons and of Hungary's rights of the defence and, fourthly, infringement of the requirement of sincere cooperation, of the principle of sound administration and of the right to an effective legal remedy.

53 Furthermore, at the hearing, Hungary devoted a significant part of its oral pleadings to setting out of a line of argument according to which the Commission wrongly identified the framework from which the national measures at issue derogated. In its view, the Commission's error prevents an acknowledgement that those measures were selective and, therefore, that they could be classified as State aid for the purposes of Article 107(1) TFEU.

54 In putting forward that argument, Hungary raises, in essence, a plea alleging infringement of Article 107(1) TFEU resulting from an erroneous classification of the national measures at issue as State aid.

55 In that regard, it must be noted, first, that the applications lodged by Hungary contain no such plea. Moreover, in the arguments developed in those applications, Hungary refers only to the contested orders and does not call into question the reasons that led the Commission, in the present case, to initiate the formal investigation procedures. It is true that, in the context of the first plea raised in its actions, Hungary notes that, in the contested decisions, the Commission did not define the circle of exclusive beneficiaries of the national measures at issue, whereas, according to the case-law, identifying such a category of undertakings is a necessary condition for recognising the selective nature of those measures. However, that argument must be seen in the context of that plea, by which Hungary does not dispute the classification of the national measures at issue as State aid, but submits, in essence, that for the purposes of adopting a suspension order, that classification should be more certain than when initiating a formal investigation procedure not accompanied by such an order, and must rely on the Commission's established practice and the case-law. In those circumstances, the argument put forward at the hearing cannot be regarded as an amplification of the first plea in law.

56 Secondly, the comments made by Hungary at the hearing are not based on matters of law or of fact which came to light in the course of the procedure.

57 Consequently, under Article 84 of the Rules of Procedure which prohibits the introduction of any new plea in law in the course of proceedings, the argument put forward by Hungary at the hearing must be considered to be inadmissible.

The first plea in law

58 The first plea in law is divided into two parts, the first alleging infringement of Article 11(1) of Regulation No 659/1999, resulting from a 'misuse of discretion' and a manifest error of assessment in the application of that provision, and the second, alleging infringement of the principle of proportionality.

– *The first part*

59 By the first part of the present plea, Hungary submits, in essence, that, in order to be able to adopt a suspension order in accordance with Article 11(1) of Regulation No 695/1999, the Commission must demonstrate that, as well as the conditions set out in that provision, additional conditions have been met.

60 In that regard, it points out that under EU law, the application of interim measures is subject to three general conditions of urgency, a serious risk of substantial and irreparable damage and a prima facie case, that is to say the probable unlawful nature of the measure in respect of which suspension is sought. Those three conditions are applicable, inter alia, to suspension and other interim measures that the EU Courts may order in accordance with Articles 278 and 279 TFEU, to interim measures applicable in competition matters under Articles 101 and 102 TFEU, to measures that the national courts may apply under Article 108(3) TFEU and, lastly, to the recovery orders that the Commission may order under Article 11(2) of Regulation No 659/1999.

61 According to Hungary, although Article 11(1) of Regulation No 659/1999 does not provide for those three conditions, they are necessary for the adoption of the suspension order, as, without them, the Commission's discretion to adopt those orders would not be subject to any restrictions. It cannot, furthermore, be accepted that the EU legislature intentionally failed to make the adoption of suspension orders subject to those three conditions, or that, as a result of that failure, the EU Courts cannot set limits on the Commission's discretion by laying down conditions for the application of suspension orders. Hungary states, in that regard, that, by the present part of the first plea, it does not seek to rely on the inapplicability of Article 11(1) of Regulation No 659/1999, under Article 277 TFEU.

62 Hungary claims, as regards the condition of a prima facie case, that, in order to be able to adopt a suspension order, the State aid status of the national measure concerned should not be in any doubt in the light of the established practice of the Commission or the case-law of the EU Courts. In the present case, there is no Commission practice or case-law that is able to confirm unequivocally that a progressive tax rate such as rate of the health contribution or that of the amended food chain inspection fee should be classified as State aid. Moreover, it is clear from the case-law that, in order to be able to classify a tax measure as State aid, the Commission should identify a category of undertakings that are the only undertakings favoured by such a measure. The contested decisions define neither the undertakings favoured by, nor those penalised by, the national measures at issue.

63 As regards the other two conditions, Hungary submits that the adoption of the contested orders is not necessary, since, in their absence, the national measures at issue do not risk, immediately, bringing about any serious and irreparable financial damage, and as such the contested decisions contrast with Commission Decision (2007) 4313 of 27 September 2007 concerning State aid C 41/2007 (ex NN

49/2007) — Romania — Privatisation of Tractorul (OJ 2007 C 249, p. 21), in which the Commission invoked such a risk as a basis for a suspension order against Romania. Hungary goes on to state that in order to establish the existence of a risk of serious and irreparable financial damage in the present case, the Commission should have furnished evidence that, in the absence of the contested orders, before the end of the formal investigation procedure, the undertakings penalised by the national measures at issue were likely to find themselves in a situation liable to endanger their financial sustainability. Not only did the Commission fail to furnish such evidence, but it is clear from the contested decisions that any damage could be corrected by a requirement to recover any unlawfully paid aid in the final decisions.

64 Lastly, according to Hungary, the fact that the Commission is able to order the suspension of a national tax measure solely on the ground that that measure constitutes State aid, without it having to demonstrate that the three conditions required for the adoption of interim measures have been met, interferes with the division of roles defined by the case-law of the Court of Justice as between the national courts and the Commission. It is for the national courts alone to draw the appropriate conclusions from an infringement of the suspension obligation provided for in Article 108(3) TFEU. The clear division of roles between the Commission and the national courts confirms the exceptional nature of suspension orders and prevents the Commission from adopting such orders solely on the ground that aid continues to be paid during the formal investigation procedure. It also means that the Commission may order the suspension of a national measure only in cases where the interim measures adopted by the national courts under Article 108(3) TFEU are found to be insufficient.

65 The Commission disputes those arguments.

66 It is clear from the summary of the procedural rules set out in paragraphs 24 to 29 above that, where the Commission decides to initiate a formal investigation procedure within the meaning of Article 4(4) of Regulation No 659/1999 against a national measure of which it has not been notified, the Member State is required immediately to suspend the implementation of that measure. The fact that the classification of the national measure at issue as unlawful State aid is a provisional classification does not affect that suspension obligation in any way.

67 Contrary to Hungary's submissions, under the case-law of the Court of Justice, which recognised, very early on, the direct effect of the obligation to suspend the payment of State aid before its compatibility with the internal market has been examined by the Commission (judgments of 15 July 1964, *Costa*, 6/64, EU:C:1964:66, p. 596, and of 11 December 1973, *Lorenz*, 120/73, EU:C:1973:152, paragraph 8), it is not for the national courts alone to draw the appropriate conclusions from an infringement of the suspension obligation provided for in Article 108(3) TFEU.

68 According to the case-law, Articles 107 and 108 TFEU confer on the Commission the principal and exclusive role of holding aid to be incompatible with the internal market where this is appropriate, the role of national courts being to safeguard rights which individuals enjoy as a result of the direct effect of the prohibition laid down in the last sentence of Article 108(3) TFEU (see, to that effect, judgment of 21 November 1991, *Fédération nationale du commerce extérieur des produits alimentaires and Syndicat national des négociants et transformateurs de saumon*, C-354/90, EU:C:1991:440, paragraph 14). The powers granted to the national courts in the area of State aid control cannot therefore limit the powers of the Commission in this area. On the contrary, according to the case-law, it is the power of the national courts which is limited where the Commission adopts a decision initiating the formal examination procedure (see, to that effect, judgment of 21 November 2013, *Deutsche Lufthansa*, C-284/12, EU:C:2013:755, paragraphs 41 and 42).

69 As noted in paragraph 30 above, in order to enable the Commission to ensure that the rules of Article 108(3) TFEU are complied with, the Commission was granted the power to require the Member State concerned to suspend immediately the payment of any aid which it considers to be unlawful, after giving that Member State the opportunity to submit its comments.

70 The conditions for the adoption of such an order, laid down in Article 11(1) of Regulation No 659/1999, are restricted to a substantive condition, namely the classification by the Commission, at that stage of the procedure, of the national measure concerned as unlawful State aid, and a procedural condition, namely giving the Member State concerned the possibility to submit its comments.

71 No other condition needs to be satisfied in order for the Commission to be authorised to adopt an order under Article 11(1) of Regulation No 659/1999, and it should be pointed out that this is as a result of the legislature's intention, and not, as submitted by Hungary, its oversight. The wording of that article, which reflects the legal arrangements covered by the settled case-law cited in paragraph 30 above, was not altered by the amendments introduced in Regulation No 659/1999 and was reproduced, in its original form, in the new Regulation 2015/1589.

72 In particular, contrary to what Hungary submits, the adoption of a suspension order cannot be subject to the conditions laid down for the adoption of a recovery order within the meaning of Article 11(2) of Regulation No 659/1999, or to any conditions otherwise inspired by that provision.

73 In the first place, the suspension order is a tool intended to prevent the continued infringement of the obligation, laid down in Article 108(3) TFEU, not to implement plans seeking to grant or alter aid. Since, in the case of non-notified aid, that obligation occurs at the moment of initiation of the formal investigation procedure and provisional classification of the national measure at issue as unlawful State aid, making the adoption of the suspension order subject to additional substantive conditions would weaken the effectiveness of that mechanism which is designed to ensure full compliance with the legal obligation imposed on the Member State by Article 108(3) TFEU.

74 In the second place, the conditions laid down for the adoption of a recovery order are justified by the nature of that order and its place in the system of prior control of new aid plans established by Article 108 TFEU.

75 Pursuant to Article 108(2) TFEU, only incompatible aid must be abolished by Member States, which implies an obligation to recover incompatible aid which has already been paid. However, according to the case-law, EU law does not impose an obligation of full recovery of any unlawful aid (see, to that effect, judgment of 12 February 2008, *CELF and ministre de la Culture et de la Communication*, C-199/06, EU:C:2008:79, paragraphs 46 and 52).

76 According to the case-law, aid paid by Member States cannot be considered to be incompatible solely on the ground that it was put into effect in breach of the notification and suspension obligations provided for in Article 108(3) TFEU (see, to that effect, judgment of 14 February 1990, *France* v *Commission*, C-301/87, EU:C:1990:67, paragraphs 9 to 11, 16 and 17). That is why, even though the initiation of the formal investigation procedure in relation to a national measure in the situation provided for in Article 13 of Regulation No 659/1999 requires the Member State concerned immediately to suspend the payment of aid, it does not, however, require it to recover that aid.

77 The fact remains that EU law does not preclude the possibility of recovering aid paid unlawfully before the Commission has taken a decision on its compatibility.

78 First, in order to give full effect to the provisions of Article 108(3) TFEU, it is for the national courts, in cases of infringement of that provision, to draw the appropriate conclusions, in accordance with their national law, with regard to both the validity of the acts giving effect to the aid and the recovery

of financial support granted in disregard of that provision (see judgment of 21 July 2005, *Xunta de Galicia*, C-71/04, EU:C:2005:493, paragraph 49 and the case-law cited). In particular, a finding that aid has been granted in breach of the last sentence of Article 108(3) TFEU may, depending on the circumstances, lead to its reimbursement in accordance with the internal rules of procedure, even if that aid is subsequently declared to be compatible with the internal market (see, to that effect, judgment of 12 February 2008, *CELF and ministre de la Culture et de la Communication*, C-199/06, EU:C:2008:79, paragraphs 52 and 53).

79 Secondly, the EU legislature provided for the possibility for the Commission to adopt orders seeking to recover aid paid unlawfully before the end of the formal investigation procedure. However, as a result of the effect of such an order on the beneficiary's situation, it made their adoption subject to strict conditions, set out in Article 11(2) of Regulation No 659/1999.

80 It is clear from the foregoing that, first, the Commission was not required, in the contested decisions, to refer to established practice or case-law in the light of which the State aid status of the national measures at issue cannot be in any doubt.

81 Nevertheless, it is clear from the file that, several months before the adoption of the contested decisions, by Decision C(2015) 1520 of 12 March 2015 on State aid SA.39235 (2015/C) (ex 2015/NN) — Hungary — Advertisement tax (OJ 2015 C 136, p. 7), the Commission initiated a formal investigation procedure in relation to a tax introduced by Hungary in the advertising sector, a tax which was characterised by a progressive tax rate applicable to the turnover achieved from advertising services by media undertakings and which therefore resembled the health contribution and the amended food chain inspection fee. Before and after the adoption of that decision, exchanges took place between the Commission and the Hungarian authorities, in the light of which Hungary cannot legitimately argue that it was not aware of the Commission's practice of classifying as State aid national tax measures involving such a progressive tax rate for the purposes of Article 107(1) TFEU.

82 Furthermore, Hungary cannot criticise the Commission for not having defined, in the contested decisions, a category of undertakings that were the only undertakings favoured by the national measures at issue. The Commission is not required to define a category of undertakings that are the only undertakings favoured by a tax measure in order to be able to classify that measure as State aid (see, to that effect, judgment of 21 December 2016, *Commission* v *World Duty Free Group SA and Others* C-20/15 P and C-21/15 P, EU:C:2016:981, paragraph 93).

83 Secondly, the Commission was, likewise, not required to demonstrate in the contested decisions that, in the absence of the contested orders, the national measures at issue risked resulting, immediately, in considerable and irreparable financial damage or that the undertakings penalised by those measures were likely to find themselves in a situation liable to endanger their financial sustainability.

84 In that regard, in connection with the argument based on Commission Decision (2007) 4313 (see paragraph 63 above), it is sufficient to point out that the validity of the contested orders must be examined only in the light of Article 11(1) of Regulation No 659/1999 and not in the light of the earlier practice of the Commission (see, by analogy, judgment of 21 July 2011, *Freistaat Sachsen and Land Sachsen-Anhalt* v *Commission*, C-459/10 P, not published, EU:C:2011:515, paragraph 38 and the case-law cited).

85 Thirdly, contrary to Hungary's submissions, the fact that the three conditions to which it refers in its arguments are not required by Article 11(1) of Regulation No 659/1999 does not mean that the discretion granted to the Commission by the case-law and the EU legislature as regards the adoption of suspension orders is unlimited or that it is not subject to any control.

86 First, the limits within which the Commission may apply suspension orders are defined by Article 11(1) of Regulation No 659/1999, from which it is clear that the Commission must explain why it considers that the national measure being implemented constitutes new State aid and consult the Member State concerned with regard to the planned order. The Commission's compliance with those procedural and substantive conditions for the adoption of a suspension order may be made subject to a review by the EU judicature by the Member State concerned. Secondly, as was pointed out in paragraph 50 above, the review by the EU judicature is not limited only to the conditions provided for in Article 11(1) of Regulation No 659/1999 and may extend, inter alia, to the compatibility of the suspension order with the Treaty on the Functioning of the European Union and the general principles of law (see, to that effect, judgment of 29 June 2010, *E and F*, C-550/09, EU:C:2010:382, paragraph 44 and the case-law cited).

87 It follows from all of the foregoing considerations that, in adopting the contested orders, the Commission did not infringe Article 11(1) of Regulation No 659/1999. The first part of the first plea in law must therefore be rejected.

– *The second part*

88 By the second part of the first plea, Hungary submits, in essence, that the inclusion of conditions additional to those already laid down in Article 11(1) of Regulation No 695/1999 is necessary in the light of the principle of proportionality.

89 In Hungary's view, the suspension order provided for in Article 11(1) of Regulation No 659/1999 is not the only means of correcting the effects of a national tax measure likely to be classified as State aid following a formal investigation procedure. Moreover, such an order constitutes interference in the internal regulatory order of such magnitude that it should be implemented only in the absence of other less radical instruments.

90 In the present case, first of all, the principle of proportionality is infringed as a result of the fact that, in the contested decisions, the Commission appears to accept that the only criteria required for the adoption of the contested orders are the existence of a distortion of competition resulting from the national measures at issue, and the fact that they continued to be applied at the time of adoption of the contested orders. The Commission should also examine whether the distortion of competition resulting from the national measures at issue was long term and irreversible. Hungary notes, in that regard, that in several decisions adopted in recent years, the Commission did not adopt suspension orders, even if, since the start of the procedure, it was clear that the national measure concerned resembled State aid that was incompatible with the internal market.

91 Next, the principle of proportionality is infringed by the fact that, in the information letters of 17 March and 13 April 2015 sent to the Hungarian authorities prior to the adoption of the contested orders (see paragraph 5 above), the Commission merely informed those authorities very vaguely and briefly of its intention to adopt an order where the information provided by those authorities as part of the formal investigation procedure should prove to be insufficient to dispel its doubts as regards the compatibility of the national measures at issue with the internal market. That wording implies that the Commission's doubts as to the compatibility of a measure alone provide a sufficient basis for a suspension order.

92 Lastly, the principle of proportionality is infringed by the fact that the Commission stated in the contested decisions that only the steeply progressive nature of the national measures at issue could have a negative effect on competition. However, the contested orders refer not only to the steeply progressive rate, but to the 'progressive system' as a whole, which is clearly disproportionate.

93 The Commission disputes those arguments.

94 The principle of proportionality, which is one of the general principles of EU law, requires that measures adopted by EU institutions do not exceed the limits of what is appropriate and necessary in order to attain the objectives legitimately pursued by the legislation in question; when there is a choice between several appropriate measures, recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued (judgment of 24 May 2007, *Maatschap Schonewille-Prins*, C-45/05, EU:C:2007:296, paragraph 45).

95 In that regard, in the first place, it should be noted that the argument put forward by Hungary in the present part is based on the same idea as that submitted in the first part, according to which, to adopt a suspension order, the Commission should demonstrate the existence of conditions which are not expressly provided for in Article 11(1) of Regulation No 659/1999. That argument cannot succeed for the reasons set out in paragraphs 70 to 86 above.

96 In the second place, although the argument put forward in its written pleadings is ambiguous in this regard, Hungary appears to argue that, despite the initiation of formal investigation procedures relating to the national measures at issue, the Hungarian authorities are still authorised to apply those measures and that it is the contested orders that prevent them from doing so. It is therefore clear from Hungary's written pleadings that suspension of the national measures at issue results not from the initiation of the formal investigation procedures but from the contested orders only. The fact remains that such an argument, based on an erroneous understanding of the effects of the decision to initiate the formal investigation procedure and, more fundamentally, of the obligations imposed on the Member States by Article 108(3) TFEU, must be rejected.

97 However, at the hearing, Hungary stated, in response to a question from the General Court, that the initiation of the formal investigation procedures in the present case implied an obligation to suspend the national measures at issue, with which it had to comply. Hungary noted, nevertheless, that this was not relevant for assessing the merits of the present part of the first plea.

98 It is clear from the contested decisions (recital 45 of the health contribution decision and recital 54 of the decision on the amendment to the food chain inspection fee), which are not contested in that respect by Hungary, that, in response to the information letters of 17 March and 13 April 2015, in which the Commission expressed doubts as to the compatibility with the internal market of the national measures at issue, and raised the possibility of applying the suspension orders, the Hungarian authorities did not submit any comments in relation to those orders. Furthermore, it is clear from the decision on the amendment to the food chain inspection fee (recital 54) that the Hungarian authorities confined themselves to stating that, in their view, the progressive tax rate of the amended food chain inspection fee did not constitute State aid. In the light of the foregoing, which the Commission rightly interpreted as a refusal to comply with the suspension obligation, adoption of the contested orders must be regarded as appropriate and necessary for attainment of the legitimate objectives pursued by the legislation at issue, namely, in the present case, Articles 107 and 108 TFEU.

99 Furthermore, although it is true that a suspension order is more binding than the initiation of the formal investigation procedure (see paragraph 32 above), both of those measures have, in essence, the same legal effect, namely the requirement immediately to suspend payment of the State aid concerned. Accordingly, the disadvantages caused to the Member State by a suspension order are not disproportionate to the aim pursued by Articles 107 and 108 TFEU.

100 In the third place, Hungary's argument that the Commission required it to suspend the 'progressive system' as a whole has no factual basis. In recital 53 of the health contribution decision and recital 62 of the decision on the amendment to the food chain inspection fee, the Commission did not require the suspension of any measures other than those which it had provisionally analysed as constituting State aid, within the meaning of Article 107(1) TFEU, in Section 4.1 of those decisions, as is clearly confirmed in recitals 46 and 48 of the former, and recitals 55 and 57 of the latter, which appear in the sections relating to the statement of reasons for the contested orders.

101 Lastly, the argument based on the earlier practice of the Commission cannot succeed for the reasons already set out in paragraph 84 above. In any event, it should be pointed out that, in each of the cases cited by Hungary, the Member States concerned were required to suspend the implementation of the tax measures concerned as soon as the Commission had initiated the formal investigation procedures in relation to those measures.

102 It is clear from the foregoing that the Commission did not infringe the principle of proportionality in adopting the contested orders. The second part of the present plea must therefore be rejected.

103 It follows that the first plea must be dismissed.

The second plea

104 The second plea alleges infringement of the principles of non-discrimination and equal treatment.

105 First, the infringement of those principles arises from the fact that the Commission decided to use the suspension orders vis-à-vis Hungary whereas it did not use that measure in relation to other Member States, including in decisions concerning tax measures, such as airport taxes, or measures known under the generic title of tax rulings. Furthermore, whereas, in the past, the Commission has only sporadically adopted suspension measures, it adopted three orders in relation to Hungary, including the two contested orders, in 2015 alone.

106 Hungary points out, in that regard, that the Commission has already examined tax measures, adopted in Hungary, based on the same system of progressive taxation of turnover, in the context of proceedings brought under Article 258 TFEU. It submits that the suspension orders adopted against it reflect the Commission's intention to circumvent those proceedings and bring about an immediate effect in the national legal system.

107 Furthermore, the infringement of the principles referred to above, and an infringement of the obligation to state reasons, follow from the fact that, in the rare cases where the Commission has issued suspension orders, it has done so on the basis of legal criteria different from those applied in the present case. In particular, in previous decisions, it assessed the irreparable nature of the damage that could result from the national measure concerned in the absence of a suspension order.

108 The Commission disputes those arguments.

109 In the first place, it should be noted that the principle of non-discrimination or of equal treatment requires, according to settled case-law, that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified (see judgment of 26 September 2013, *IBV & Cie*, C-195/12, EU:C:2013:598, paragraph 50 and the case-law cited).

110 In the present case, Hungary relies on the first part of that principle, according to which comparable situations must not be treated differently. Therefore, in order to establish whether there is any discrimination, it will be necessary, first, to examine whether the situations relied on by Hungary are actually comparable.

111 In that regard, it should be noted that, in its written pleadings, Hungary confines itself to referring to a certain number of decisions taken by the Commission in recent years, identified only by their title. For some of those decisions, it is not even clear whether they are decisions to initiate formal investigation procedures or final decisions, closing those procedures. The only criterion that connects those decisions, beyond the fact that they all relate to State aid, is the fact that they all concern tax measures. Hungary does not clarify, however, whether those tax measures were similar to the national

measures at issue, and if so, how. Likewise, it does not clarify whether the decisions on which it relies relate to measures which were notified to the Commission and whether the Member States which were addressees of those decisions complied with the suspension obligation. In those circumstances, Hungary cannot be considered to have successfully demonstrated that the situations on which it relies were indeed comparable to its own situation.

112 Moreover, it should be noted that the Commission's power to issue suspension orders does not mean that the Commission is obliged to require automatically the Member State concerned to suspend payment of aid which has not been notified in accordance with Article 108(3) TFEU (see judgment of 17 June 1999, *Belgium* v *Commission*, C-75/97, EU:C:1999:311, paragraph 74 and the case-law cited). Contrary to Hungary's submissions, the Commission rightly concludes, on the basis of that case-law, that it is not required to state the reasons for its choice not to adopt a suspension order in any given case.

113 Therefore, the mere fact that the Commission initiated formal investigation procedures concerning tax measures in some Member States without adopting suspension orders, whereas, when initiating formal investigation procedures concerning tax measures in other Member States, it did adopt such orders, cannot be sufficient to establish an infringement of the principles of non-discrimination and equal treatment.

114 In the second place, as regards infringement proceedings brought by the Commission against Hungary relating to public charges based on a system of progressive taxation of turnover, it should be pointed out that the Court of Justice has already been called upon to hear and determine situations in which measures taken by a Member State fell both within the provisions of the TFEU on State aid review and the provisions of the TFEU on other aspects of the functioning of the internal market.

115 The Court of Justice at that time took the view that the differences between the conditions for applying those provisions, of the one part, and the scope of the Commission's powers in their implementation, of the other part, do not preclude a national measure from being governed both by the provisions of the first paragraph of Article 110 TFEU and by those relating to State aid, and from being the subject, on that basis, of two distinct proceedings, one brought under Article 258 TFEU and the other under the second paragraph of Article 108(2) TFEU (see, to that effect, judgment of 21 May 1980, *Commission* v *Italy*, 73/79, EU:C:1980:129, paragraphs 6 to 10).

116 It is clear from that case-law that the Commission cannot be criticised for having initiated a formal investigation procedure, under Article 108(2) TFEU, with regard to a national measure which it is examining at the same time in the context of a procedure provided for in Article 258 TFEU.

117 In the third place, as regards Hungary's argument based on the comparison of the contested orders with a previous decision in which the Commission assessed the irreparable nature of the damage that could result from the national measure concerned prior to adopting the suspension order, it is sufficient to point out, as was done in paragraph 84 above, that the validity of the contested orders must be assessed only in the light of Article 11(1) of Regulation No 659/1999, and not in the light of the earlier practice of the Commission.

118 It is clear from the foregoing that, in adopting the contested orders, the Commission did not infringe the principles of non-discrimination and equal treatment.

119 The second plea must therefore be dismissed.

The third plea

120 The third plea alleges an infringement of Article 296(2) TFEU, Article 41(2)(c) of the Charter of Fundamental Rights of the European Union, and the rights of the defence.

121 According to Hungary, first of all, the contested decisions are vitiated by a failure to state reasons, in so far as the Commission has not explained why it was necessary to adopt the contested orders in the present case. Hungary submits that the standard of reasoning required when adopting a suspension order should be stricter than when initiating a formal investigation procedure. In the contested decisions, the Commission merely noted that the national measures at issue constituted State aid, that they were in the process of being implemented and that the steeply progressive nature of the rates of the health contribution and the amended food chain inspection fee could have a negative effect on competition.

122 Next, the contested decisions are vitiated by a failure to state reasons in that the Commission did not set out the reasons why, in the present case, it based its suspension orders on criteria different from those which it had applied in other cases in which it adopted such orders. What is more, unlike its earlier practice and the approach taken in other cases, in the present case the Commission did not give the Hungarian authorities the opportunity to express their views on the contested orders.

123 Moreover, the Commission merely established the categories of undertakings with a considerable turnover, and, disregarding the requirements of the case-law, failed to define the circle of exclusive beneficiaries of the national measures at issue.

124 Lastly, the Commission confined itself to stating that the national measures at issue could have a significant impact on competition within the market, without specifying which market was involved, the economic actors present on that market and how the national measures at issue might affect it.

125 Furthermore, in the context of the action in Case T-554/15, Hungary submits that the Commission infringed its obligation to state reasons in so far as the reasons for the decision on the health contribution, in particular recitals 48 and 53 thereof, are contradictory and insufficiently precise. It is not possible to determine, on the basis of that decision, which provisions of the law introducing the health contribution should be suspended.

126 The Commission disputes those arguments.

127 As a preliminary point, without there being any need to rule on the question raised by the Commission as to whether the provisions of the Charter of Fundamental Rights may be applied to a Member State, it should be noted, of the one part, that the requirement to provide reasons for the legal acts adopted by the institutions is laid down in the FEU Treaty and, of the other part, that observance of the rights of the defence is, in all proceedings initiated against a person which are liable to culminate in a measure adversely affecting that person, a fundamental principle of EU law which must be guaranteed even in the absence of any rules governing the procedure in question. Observance of the rights of the defence of Member States must be guaranteed also in the context of State aid review procedures (see, to that effect, judgments of 11 November 1987, *France* v *Commission*, 259/85, EU:C:1987:478, paragraph 12, and of 14 February 1990, *France* v *Commission*, C-301/87, EU:C:1990:67, paragraphs 29 to 31).

128 In accordance with settled case-law, although the statement of reasons required by Article 296(2) TFEU must show clearly and unequivocally the reasoning of the authority which adopted the contested measure, so as to enable the persons concerned to ascertain the reasons for the measure and to enable the General Court to exercise its power of review, it is not required to go into every relevant point of fact and law. The question whether the obligation to provide a statement of reasons has been satisfied must be assessed with reference not only to the wording of the measure but also to its context and the

whole body of legal rules governing the matter in question. In particular, the reasons given for a measure are sufficient if that measure was adopted in a context which was known to the Member State concerned, which enables it to understand the scope of the measure adopted (see, to that effect, judgment of 19 November 2013, *Commission* v *Council*, C-63/12, EU:C:2013:752, paragraphs 98 and 99 and the case-law cited).

129 As regards the standard of the statement of reasons for a suspension order, it should be noted that such an order is adopted before the Commission has made a final decision on the compatibility of the measure concerned with the internal market, irrespective of whether that order is implemented at the same time as the decision to initiate the formal investigation procedure, or after it. In those circumstances, in the light of the objective of the suspension orders (see paragraphs 30 and 69 above), it should be considered that, with regard to classification of the measure concerned as unlawful State aid, the standard of the statement of reasons for the suspension order must be consistent with that required by the case-law for decisions to initiate the formal investigation procedure. In that type of decision, it is permissible for the Commission merely to summarise the relevant issues of fact and law, include a preliminary assessment as to the aid character of the measure and set out its doubts as to the measure's compatibility with the internal market (judgment of 21 July 2011, *Alcoa Trasformazioni* v *Commission*, C-194/09 P, EU:C:2011:497, paragraphs 102 and 103).

130 Lastly, it should be noted that, when the Commission adopts a suspension order, it is required only to demonstrate that the requirements laid down in Article 11(1) of Regulation No 659/1999 have been satisfied (see paragraphs 71 and 80 to 84 above) and that it is not required to state the reasons for its choice not to adopt a suspension order in any given case (see paragraph 112 above).

131 In the present case, in the first place, as regards the statement of reasons relating to the substantive conditions for the adoption of the contested orders, it should be noted that, in recitals 10 to 37 of the health contribution decision and in recitals 20 to 42 of the decision on the amendment to the food chain inspection fee, the Commission set out the reasons justifying its provisional finding according to which the national measures at issue constituted State aid for the purposes of Article 107(1) TFEU. In recitals 42 and 51 of those decisions, respectively, it stated that those measures constituted new aid, which had not been notified to it, in breach of Article 108(3) TFEU, and that it should therefore be regarded as unlawful aid. That reasoning was reproduced, briefly, in recitals 46 and 55, respectively, of the decisions referred to above, appearing in the parts of those decisions relating to the contested orders.

132 Those reasons are sufficient for the purposes of the requirements laid down in the case-law cited in paragraphs 128 and 129 above. In that regard, first, Hungary's complaint concerning the definition of the category of undertakings that were the only undertakings favoured by the national measures at issue cannot succeed for the reasons set out in paragraph 82 above. Secondly, with regard to the inadequacy of the statement of reasons in the contested decisions as regards the definition of the market concerned, it should be noted that, contrary to what Hungary submits, the Commission adequately set out, in the context of a decision to initiate the procedure provided for in Article 108(3) TFEU, in recital 36 of the health contribution decision and recital 41 of the decision on the amendment to the food chain inspection fee, the consequences that the national measures at issue were likely to have on the market for the production and sale of tobacco products and on the retail market for everyday consumer goods.

133 In the second place, with regard to the statement of reasons relating to the procedural condition for adoption of the contested orders, it should be noted that, contrary to what Hungary submits, the Commission gave Hungary the opportunity to submit its comments on the contested orders prior to their adoption. The information letters of 17 March and 13 April 2015, attached by Hungary to its applications, clearly refer to the fact that the Commission is considering adopting the orders provided for in Article 11(1) of Regulation No 659/1999 and that, in accordance with that provision, it asks

Hungary to submits its comments within 20 working days. It is also clear from the contested decisions, and is not disputed by Hungary, that the Hungarian authorities did not submit their comments on the planned orders in due time.

134 In the third place, as regards the statement of reasons relating to the need to adopt the contested orders, it should be noted that, although it is clear from Article 11(1) of Regulation No 659/1999 that the Commission must present the reasons leading it to consider that the national measure being implemented constitutes new State aid, that provision does not, however, require the Commission to justify specifically the appropriateness of adopting an order in any given case. The appropriateness of that measure is justified by the existence of a proven infringement, by a Member State, of Article 108(3) TFEU.

135 Nevertheless, in a situation such as that in the present case, in which the suspension order is inserted into a decision to initiate the formal investigation procedure, having regard to the Commission's wide discretion under Article 11(1) of Regulation No 659/1999 and the specific legal effect produced by a suspension order under Article 12 of that regulation, the decision adopting such an order must make it clear why, according to the Commission, the Member State concerned was not going to comply with the obligation arising from Article 108(3) TFEU and suspend the implementation of the measures examined following initiation of the formal investigation procedure.

136 In the present case, it is clear from the contested decisions that, in response to the information letters of 17 March and 13 April 2015, the Hungarian authorities argued that the national measures at issue did not constitute State aid. Furthermore, as was pointed out in paragraph 133 above, it is also clear from the contested decisions that those authorities did not respond to the Commission's request to submit comments on the planned suspension orders. Those factors suffice to explain why the Commission took the view, in the light of the circumstances, that there was a risk that the national measures at issue would be implemented despite initiation of the formal investigation procedure.

137 Lastly, it is clear from the file that, a few months before the adoption of the contested orders, the Commission had initiated a formal investigation procedure against Hungarian tax measures based on the same system as the national measures at issue (see paragraph 81 above) and that those measures were not suspended, despite the initiation of that procedure. Although there was no reference to this information in the contested decisions, it forms part of the context of the adoption of the contested orders, and the Hungarian authorities must have been aware of this.

138 In that context, it is appropriate to conclude that the Hungarian authorities were able to understand why the Commission decided, in the contested decisions, to have recourse to the suspension orders, particularly since, in the absence of any specific comments by those authorities on the possible adoption of those orders, the Commission was not required, in those decisions, to respond to specific arguments.

139 In the fourth place, as regards the argument put forward by Hungary in the context of the action in Case T-554/15, it is sufficient to note that a reading of the health contribution decision leaves no doubt as to the scope of the suspension order. That scope is clarified, by way of conclusion, in recital 53 of that decision, by which the Commission asks Hungary to suspend the application of the progressive rates of the health contribution and the reduction of that tax applicable in the case of investments.

140 It is clear from the foregoing that, having regard to the requirements of case-law as regards compliance with the obligation to state reasons, recalled in paragraph 128 above, the Commission has provided a sufficient statement of reasons for the contested decisions.

141 Moreover, the plea alleging infringement of the rights of the defence must be dismissed, in so far as Hungary fails to put forward any argument in support of that plea. In any event, as was stated in paragraph 133 above, contrary to what Hungary submits, the Commission gave it the opportunity to submit comments on the contested orders before they were adopted.

142 The third plea must therefore be dismissed.

The fourth plea

143 The fourth plea alleges infringement of the obligation of sincere cooperation, provided for in Article 4(3) TEU, of the principle of sound administration and of the right to an effective legal remedy.

144 Hungary submits that, in the information letters of 17 March and 13 April 2015, the Commission merely referred to the possibility of adopting a suspension order, without stating, in essence, the reasons that would have justified the need to adopt that order. Compliance with the obligation of sincere cooperation requires the Commission and Hungary, together, to find a solution that makes it possible to eliminate the anticompetitive effects of the national measures at issue. Hungary adds, in that regard, that, in the present case, the Commission adopted the contested orders at the end of an extremely short procedure, confined to a single exchange of letters.

145 The circumstances set out above also demonstrate an infringement of the rights of the defence, and more specifically, of the right to be heard, and of the principle of sound administration, laid down in Articles 41, 47 and 48 of the Charter of Fundamental Rights. In so far as the Commission did not set out to the Hungarian authorities its basic position as regards the need for an order, those authorities were not given the opportunity to submit their arguments prior to the adoption of the contested decisions.

146 Moreover, Hungary submits that the contested orders required it to amend its legislation even before examination of the classification of the national measures at issue as unlawful State aid. If Hungary had abolished those measures to comply with the contested orders, the Commission would have closed the formal investigation procedure and would therefore have deprived it of the opportunity to contest the classification of those measures as unlawful aid before the EU Courts.

147 The Commission disputes those arguments.

148 Pursuant to the principle of sincere cooperation, laid down in Article 4(3) TEU, the Union and the Member States are to, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties. That principle requires the Member States to take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union. The Member States are also required to facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives.

149 Article 108(3) TFEU provides that Member States must inform the Commission, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid. The Member States are required not to put the notified aid into effect until such time as the Commission has given a decision on its compatibility with the internal market, including during the preliminary stage of the procedure, prior to the possible initiation of a procedure provided for in Article 108(2) TFEU (see, to that effect, judgment of 11 December 1973, *Lorenz*, 120/73, EU:C:1973:152, p. 8).

150 First, it must also be noted that, in order not to block the legislative action of Member States, Regulation No 659/1999 provides for a short period of two months in which the Commission must conclude the preliminary examination of the notification. Moreover, Article 4(6) of that regulation provides that, where the Commission does not adopt a decision concluding the preliminary stage of the procedure within the time limit of two months, the aid is deemed to have been authorised and the Member State concerned may implement it. Secondly, the Commission adopted regulations declaring certain categories of aid compatible with the internal market under Articles 107 and 108 TFEU, which determine the circumstances in which certain categories of aid no longer need to be notified and which therefore enable the Member States to assess the need for notification. The regulation applicable in the present case *ratione temporis* is Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 [TFEU] (OJ 2014 L 187, p. 1).

151 Lastly, as was pointed out in paragraphs 25 to 29 above, in accordance with Article 13 of Regulation No 659/1999, the examination of non-notified aid, in breach of the obligation under Article 108(3) TFEU, may give rise to a decision to initiate the formal investigation procedure which requires the Member State immediately to suspend the implementation of the aid at issue. If a Member State continues to implement non-notified State aid, the Commission is authorised to serve a suspension order on that State under Article 11(1) of Regulation No 659/1999. That order may also be inserted into the decision to initiate the formal investigation procedure, provided that the Member State concerned has been given an opportunity to submit its comments in that regard prior to adoption of that decision (see, to that effect, judgment of 9 October 2001, *Italy* v *Commission*, C-400/99, EU:C:2001:528, paragraph 47).

152 In the present case, as is clear from the contested decisions, which were not disputed by Hungary on this point, in responding to the information letters of 17 March and 13 April 2015, the Hungarian authorities confined themselves to stating that, in their view, the national measures at issue did not constitute State aid. They did not submit any comments on the adoption of the suspension orders announced by the Commission in its letters. It is clear that, in the light of those factors, which could be interpreted by the Commission as creating a risk of refusal by the Hungarian authorities to cooperate in the context of the procedure introduced by Article 108 TFEU by complying with the suspension obligation, the Commission was able, without infringing the principle of sincere cooperation, to use the means provided by the EU legislature to ensure compliance with Articles 107 and 108 TFEU.

153 Contrary to what Hungary submits, the use of those means by the Commission does not result in an infringement of the right to an effective legal remedy. According to the case-law, Member States are entitled to bring an action before the General Court, both against decisions to initiate the formal investigation procedure and against suspension orders (see paragraphs 39 and 50 above).

154 In the context of such an action, Member States may dispute both the classification of the national measure concerned as State aid and its classification as new aid subject to the suspension obligation, which enables them to demonstrate that that measure was not subject to the notification obligation or the suspension obligation.

155 Member States may also, as Hungary has done in the present case, refrain from criticising the classification of the measure concerned as unlawful State aid and merely challenge the defects of the suspension order. However, in such a case, even if such an action were upheld, it cannot result in the suspension obligation ceasing to exist, given that that obligation also relates to the decision to initiate the formal investigation procedure.

156 Furthermore, as regards the complaint alleging infringement of the principle of sound administration, it is sufficient to note that Hungary does not put forward any argument in support of that complaint. That complaint must therefore be rejected.

157 In the light of the foregoing, the fourth plea must be dismissed, and, therefore, the actions must be dismissed in their entirety.

Costs

158 Under Article 134(1) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

159 In the present case, since Hungary has been unsuccessful, both in Case T-554/15 and in Case T-555/15, it must be ordered to pay the costs incurred in each of those two cases, as applied for by the Commission.

On those grounds,

THE GENERAL COURT (Ninth Chamber),

hereby:

1. Dismisses the actions;

2. Orders Hungary to pay the costs.

Gervasoni Madise Kowalik-Bańczyk

Delivered in open court in Luxembourg on 25 April 2018.

[Signatures]