



# EU Direct Tax Newsalert

## **CJEU finds that the Hungarian advertisement tax and the Polish tax on the retail sector do not infringe EU State aid rules**

On 16 March 2021, the Court of Justice of the European Union (CJEU) issued its judgments in two cases relating to the Hungarian Advertisement tax (C-596/19 P) and to the Polish retail tax (C-562/19 P).

### **Background**

Hungary and Poland introduced very similar levies that were both assessed on the turnover of the taxpayers at progressive rates. In the case of Hungary, there was also the ability of utilizing tax losses from previous years in the year in which the tax was introduced, serving as a transitional measure

The European Commission found these taxes constituted violations of State aid rules, due to the lower tax level on smaller taxpayers (and the utilization of tax losses in Hungary). The EC further found that the rules could not be justified as turnover (unlike profits) is not a measure of ability to pay tax. Hungary and Poland challenged the Commission's decisions in front of the General Court, which in turn annulled the Commission's decisions in 2019, stating in essence that no selective advantage could be assessed. The Commission appealed against the judgments of the General Court.

### **Judgement of the CJEU**

In its judgements issued on 16 March 2021, the Court of Justice dismissed the Commission's appeals and upheld the judgments of the General Court.

The CJEU ruled that considering the fiscal autonomy which the Member States have outside the fields subject to harmonisation, they are free to establish the system of taxation and adopt progressive taxation provided that the characteristics of the measure at issue do not entail any manifestly discriminatory element.

In particular, EU law on State aid does not preclude, in principle, Member States from opting for progressive tax rates, intended to take account of the ability to pay of taxable persons, nor does it require Member States to reserve the application of progressive rates only to taxes based on profits, to the exclusion of those based on turnover.

The CJEU considered that the Commission had not established that the characteristics of the measures adopted by the Hungarian and Polish legislatures had been designed in a manifestly discriminatory manner, with the aim of circumventing the requirements of EU law. In the view of the Court, the Commission had incorrectly relied on an incomplete and notional system in considering that the progressive scale of tax measures at issue did not form part of the reference system in the light of which the selective nature of those measures had to be assessed.

As for the utilization of tax losses in Hungary, the CJEU emphasized that the General Court did not err in considering that the transitional measure of the partial deductibility of losses carried forward did not lead to a selective advantage. The establishment of a transitional measure taking into account losses is not inconsistent in the light of the redistribution objective pursued by the legislature, when establishing the tax on turnover. The Court of Justice highlighted in that regard that the criteria concerning the lack of profits recorded in the financial year preceding the entry into force of that tax was objective in nature, since the undertakings benefiting from the transitional measure of partial deductibility of the losses had, from that point of view, a lesser ability to pay than others.

### **Takeaway**

The identification of the reference system is the first and indeed crucial step in the three-stage selectivity analysis developed by the Courts. Accordingly, these judgments are important in so far as they confirm that certain choices (including those regarding rate and base) made by EU Member States when designing their tax systems provided they are not manifestly discriminatory, have to be respected when determining a reference system for any state aid analysis.

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For more detailed information, please do not hesitate to contact:

Gergely Juhász  
PwC Hungary  
+36 1 461 9359  
[gergely.juhasz@hu.pwc.com](mailto:gergely.juhasz@hu.pwc.com)

Bálint Gombkötő  
PwC Hungary  
+36 70 370 1675  
[balint.gombkoto@pwc.com](mailto:balint.gombkoto@pwc.com)

Agata Oktawiec  
PwC Poland  
+ 48 502 184864  
[agata.oktawiec@pwc.com](mailto:agata.oktawiec@pwc.com)

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