Provisional text

OPINION OF ADVOCATE GENERAL
KOKOTT
delivered on 15 October 2020 (1)

Case C-562/19 P

European Commission
v
Republic of Poland

(Appeal – State aid – Tax on the retail sector – Article 107(1) TFEU – Advantage and selectivity – Standard of review in creating the reference system – Consistency of the reference system – Advantage in respect of the progressive rate – Difference in treatment – Justifications for differences in treatment – Annulment of the negative decision and concurrent review of the decision to initiate the procedure and a suspension injunction)

I. Introduction

1. This appeal gives the Court an opportunity once again (2) to review a recently introduced tax law in the light of the rules on State aid. Following the international trend, Poland based a direct business tax on turnover rather than profit and opted for a progressive rate structure. It was intended, in a similar way to the EU digital services tax proposed by the Commission, (3) to cover and tax primarily undertakings with high turnovers (that is to say, large undertakings).

2. Because the average tax rate increases with the volume of turnover, there is a degree of relief or redistribution of the tax burden in favour of 'smaller' undertakings. Even though the planned digital services tax at EU level and the tax on the retail sector in Poland are similar in this respect, the Commission considers the Polish tax to constitute State aid for smaller undertakings, which are 'taxed at too low a level'. The Commission had therefore barred the implementation of that law in advance, pending the conclusion of the investigation procedure, which Poland – like Hungary in a parallel case (4) – considers to be an infringement of its fiscal autonomy.

3. The appeal thus not only raises the question whether a progressive business tax can actually constitute a selective advantage for the purposes of Article 107(1) TFEU. The General Court rejected such an advantage in its judgment at first instance. (5) The question also arises whether the rules on State aid are the proper instrument for reviewing national tax legislation in this depth and, as happened here, for blocking it for years. A related question is whether or not the standard of review for entire (general) tax laws should be different in the rules on State aid than for individual grants.

4. It should also be borne in mind that an intensive check on discrimination is already made through the fundamental freedoms. In this context, the Court has already held two similar turnover-based direct business taxes in Hungary to be compatible with the fundamental freedoms in their redistributive purpose. (6) It is true that the comparison groups are different, as the Commission rightly pointed out at the hearing. In tax law the fundamental freedoms prohibit foreign undertakings being placed at a disadvantage, while the prohibition of State aid prevents the favouring of 'certain undertakings'. However, both prohibitions of discrimination serve the completion of the internal market. If a measure is compatible with the prohibition of discrimination under the fundamental freedoms, it would probably not, as a rule, be aid which is incompatible with the internal market.

II. Legal framework

5. The legal framework is provided by Article 107 et seq. TFEU. The procedure regarding unlawful aid is regulated in Chapter III of Regulation (EU) 2015/1589 laying down detailed rules for the application of Article 108 TFEU (7) ('Regulation 2015/1589').

6. Article 13(1) of the regulation states:

'The Commission may, after giving the Member State concerned the opportunity to submit its comments, adopt a decision requiring the Member State to suspend any unlawful aid until the Commission has taken a decision on the compatibility of the aid with the internal market ("suspension injunction").'

III. Background to the dispute

7. In early 2016, the Polish Government planned to introduce a new tax on the retail sector. Its basis of assessment would be turnover and it would be progressive in nature. When the Commission learned of that plan, it sent a request for information to the Polish authorities and stated as follows:

8. 'The rates of progressive turnover taxes paid by undertakings are in fact linked to the size of the undertaking and not to its profitability or solvency. They cause discrimination between undertakings and may seriously disrupt the market. In so far as they introduce a difference in treatment between undertakings, they have been found to be selective. Since all the conditions set out in Article 107(1) TFEU are met', they give rise to State aid under that article.

9. On 6 July 2016, Poland adopted the Law on the tax on the retail sector. The tax is levied on the retail sale of goods to consumers who are natural persons. All retailers, regardless of their legal status, must pay the tax. The basis of assessment is monthly turnover above 17 million Polish zlotys (PLN), which is approximately EUR 4 million. The tax rates are 0.8% for the portion of monthly turnover between PLN 17 million and PLN 170 million and 1.4% for the portion of monthly turnover above that. The law in question entered into force on 1 September 2016.

10. After some discussion between the Polish authorities and the Commission, the latter initiated the procedure laid down in Article 108(2) TFEU in respect of the measure at issue by Decision of 19 September 2016 on the State aid SA.44351 (2016/C) (ex 2016/NN) ('the decision to initiate the procedure'). (8) In that decision, the Commission not only invited interested parties to submit their comments, but also ordered the Polish authorities, pursuant to Article 13(1) of Regulation 2015/1589, to suspend immediately 'the application of progressive rates to its tax, until the Commission has taken a decision on the compatibility of [the Law on the tax on the retail sector] with the internal market'. Poland thereupon suspended the introduction of the planned tax.

11. At the same time as continuing discussions with the Commission, on 30 November 2016 the Polish Government applied to the General Court to have the decision to initiate the procedure annulled (Case

T-836/16). By decision of the President of the Ninth Chamber of the General Court of 27 April 2017, Hungary was granted leave to intervene in support of the Republic of Poland.

12. The Commission closed the State aid procedure by adopting Decision (EU) 2018/160 of 30 June 2017 on the State aid SA.44351 (2016/C) (ex 2016/NN) implemented by Poland for the tax on the retail sector ('the negative decision'). (9)

13. The Commission stated in that decision that the measure at issue constituted State aid which was incompatible with the internal market and that it had been unlawfully put into effect. The Polish authorities had to cancel permanently all payments suspended pursuant to the decision to initiate the procedure. Since the measure at issue had not in actual fact been implemented, the Commission considered that there was no need to recover aid from beneficiaries.

14. On 13 September 2017, the Polish Government also requested the General Court to annul the negative decision (Case T-624/17). By decision of the President of the Ninth Chamber of the General Court of 12 January 2018, Hungary was granted leave to intervene in support of the Republic of Poland.

15. In the decision to initiate the procedure and in the negative decision (collectively, 'the contested decisions') – but with its line of argument being augmented in certain regards in the negative decision – the Commission essentially justified the classification of the measure at issue as State aid, in the light of the definition contained in Article 107(1) TFEU, as follows.

16. First, undertakings with a low turnover were granted favourable tax treatment by the Law on the tax on the retail sector in comparison with other undertakings required to pay that tax. The waiver by the State of the financial resources which it would have collected if all undertakings were subject to the same average effective tax rate entailed a transfer of resources from the State to the favoured undertakings. Average tax rates at zero or at a lower level for undertakings with a low turnover in comparison with higher average tax rates for undertakings with a higher turnover gave the former an advantage.

17. Furthermore, the Commission considered that the relevant reference system for determining a selective advantage was the tax on the retail sector, including in respect of undertakings with a turnover of less than PLN 17 million, but that the progressive structure of the tax did not form part of that reference system. The progressive structure of the tax, 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 which was considered to be applied with a single tax rate.

18. The derogation from the reference system entailed by the progressive structure of the tax was not justified by the nature or general scheme of the system. In the decision to initiate the procedure, the Commission stated that sectoral policy objectives, such as regional policy, environmental or industrial policy, could not be taken into account in that respect. The Polish authorities had emphasised the redistributive purpose of the progressive tax structure. They justified this by the fact that undertakings with higher turnovers enjoy economies of scale, better conditions of supply and tax strategies that are not available to smaller undertakings.

19. In the view of the Commission, such a redistributive purpose was not compatible with a turnover-based tax which was only levied on undertakings relative to their volume of activity and not relative to their charges, profitability, ability to pay or facilities which, according to the Polish authorities, only large undertakings can use. For the Commission, a progressive tax levied on turnover could be justified in order to offset or deter the occurrence of certain negative effects likely to be generated by the activity concerned (negative externalities), which were more significant the larger the turnover, but such a situation had in no way been established in the present case. The Commission viewed the assertion by the Polish authorities that the progressive structure of the tax allowed small-scale retailers to be preserved against large format retail as evidence that those authorities were seeking to influence the structure of competition in the market.

20. By decision of 4 July 2018, the General Court joined Cases T-836/16 and T-624/17 for the purposes of the oral part of the procedure.

21. By the judgment under appeal of 16 May 2019, the General Court upheld the two actions brought by Poland against the contested decisions and annulled both the decision to initiate the procedure and the negative decision by the Commission.

IV. Procedure before the Court

22. On 24 July 2019, the Commission lodged the present appeal against the judgment of the General Court. The Commission claims that the Court should:

– set aside the judgment under appeal;

– reject the pleas raised by the Republic of Poland against the contested decisions and order it to pay the costs of the proceedings;

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

23. The Republic of Poland, supported by Hungary, contends that the Court should:

– dismiss the appeal as unfounded;

– order the Commission to pay the costs of the proceedings.

24. Poland, Hungary and the Commission submitted written observations on the appeal before the Court and presented oral argument on 1 September 2020.

V. The grounds of appeal

25. The Commission relies on two grounds of appeal. By the first ground of appeal, the Commission alleges that the General Court misapplied Article 107(1) TFEU in so far as it rejected a selective advantage arising from the Polish tax on the retail sector for lower-turnover undertakings. According to the second ground of appeal, the General Court misinterpreted Article 108(2) TFEU and Article 13(1) of Regulation 2015/1589 in so far as it also annulled the decision to initiate the procedure, which contained a provisional suspension injunction.

A. First ground of appeal: incorrect interpretation of Article 107(1) TFEU

26. By its first ground of appeal, the Commission alleges that the General Court erred in law in interpreting Article 107(1) TFEU. In essence, it complains that the General Court wrongly rejected a selective advantage and thus aid. As grounds, it argues in three parts that the General Court chose an incorrect reference framework (see V.A.1.a), examined the comparability of the undertakings in the light of a non-fiscal objective (see V.A.2.a) and, in examining selectivity, took into consideration an objective that was not necessarily connected with the tax on the retail sector (see V.A.2.b).

27. The Court of Justice has consistently held – as was also asserted by the General Court – that classification as ‘State aid’ within the meaning of Article 107(1) TFEU requires that, first, there must be intervention by the State or through State resources. Second, the intervention must be liable to affect trade between Member States. Third, it must confer a selective advantage on the recipient. Fourth, it must distort or threaten to distort competition. (10) In this instance it is necessary only to review the General Court’s legal opinion on the criterion of the selective advantage.

28. According to the normal standard of review, the decisive factor is whether, in accordance with the criteria laid down by the national tax system, the conditions governing the tax advantage have been selected in a non-discriminatory manner. (11) To answer that question, it is necessary to begin by identifying the ordinary or 'normal' tax system applicable in the Member State concerned (the 'reference framework'). It is in relation to that ordinary or 'normal' tax regime that it is necessary, secondly, to assess whether the advantage granted by the tax measure in question is an unjustified exception and therefore selective. (12)

1. Existence of a selective advantage or incorrect choice of reference framework (first part of the first ground of appeal)

29. The Commission complains in particular that, in reviewing whether a selective advantage existed, the General Court chose the wrong reference framework. While the Commission assumed a turnover-based tax with a single (proportional) rate (at an unknown level), the General Court erroneously had regard to the progressive rate chosen by the Polish legislature.

(a) Selective advantage arising from a general tax law: the approach to examination in creating a reference framework

30. Because Article 107(1) TFEU does not contain any of the constituent elements of a reference framework and its review consistently gives rise to significant difficulties – I refer to the concerns now being raised by several Advocates General (13) – it must be examined in some depth.

31. According to settled case-law of the Court, measures which, whatever their form, are likely directly or indirectly to favour certain undertakings, or which fall to be regarded as an economic advantage that the recipient undertaking would not have obtained under normal market conditions, are regarded as State aid. (14)

32. This case-law has been applied to tax law. A tax measure which, although not involving the transfer of State resources, places the recipients in a financial position more favourable than that of other taxpayers can also fall under Article 107(1) TFEU. (15) Thus, measures which mitigate the charges that are *normally* included in the budget of an undertaking and which therefore, without being subsidies in the strict meaning of the word, are similar in character and have the same effect are considered to constitute aid. (16)

33. This case-law was developed against the background of fiscal exceptions that exempted or relieved an individual undertaking from the tax burden actually applicable. (17) Because in the present case all undertakings 'profit' from the allowance (up to PLN 17 million) and all undertakings also 'profit' from the reduced rate of 0.8% for the portion of monthly turnover between PLN 17 million and PLN 170 million, this cannot be the selective advantage. At most, the different average rate resulting from the progressive rate structure might constitute a selective advantage favouring taxable persons with lower turnover.

(1) Principle: determination of 'normal' taxation by the Commission or the Member State?

34. In essence, the first ground of appeal relied on by the Commission raises the question of competence as to who determines the tax burden that is normally to be borne by an undertaking, such that non-taxation of others would be to their advantage. In the Commission's view, 'normal' taxation is a turnover-based income tax with a proportional rate (at an unknown level). In the view of the Polish legislature, 'normal' taxation is a turnover-based income tax with a progressive rate from 0% to just below 1.4%. The different average rates resulting from the progressive scale are the inevitable consequence and thus constitute normal taxation. Poland relies on its fiscal sovereignty in this regard.

35. The Court's case-law also repeatedly affirms and takes into consideration the fiscal autonomy of Member States. For example, only recently, in the Grand Chamber, the Court has again ruled that the Member States are free, given the current state of harmonisation of EU tax law, to establish the system of taxation that they deem the most appropriate, and consequently the application of progressive taxation falls

within the discretion of each Member State. (18) In that context, in the view of the Grand Chamber, 'contrary to what is maintained by the Commission, progressive taxation may be based on turnover, since, on the one hand, the amount of turnover constitutes a criterion of differentiation that is neutral and, on the other, turnover constitutes a relevant indicator of a taxable person's ability to pay'. (19)

36. The principles laid down in these rulings, which were delivered in connection with the fundamental freedoms, apply equally to the rules on State aid. In this field too, the Court has ruled that, in the absence of European Union rules governing the matter, it falls within the tax competence of the Member States to designate bases of assessment and to spread the tax burden across the various factors of production and economic sectors. (20) Therefore, in principle, only an exception to this autonomously designed tax system can be assessed on the basis of the rules on State aid, not the creation of the tax system itself.

37. This is acknowledged as a matter of principle by the Commission in paragraph 156 of its Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union, (21) where it states that 'Member States are free to decide on the economic policy which they consider most appropriate [in accordance with Union law] and, in particular, to spread the tax burden as they see fit across the various factors of production …'.

38. Furthermore, I am not aware of any provision of EU law that prescribes a specific structure for the national taxes of the Member States, except for harmonised taxes. It is not therefore possible to infer 'normal' taxation from EU law. The basis can only ever be the decision by the national legislature in question as to what it deems to be normal taxation. In the present case this is an income tax for retailers which is progressive in nature and the basis of assessment of which is turnover.

39. The national legislature is thus able to determine above all the object of taxation, the basis of assessment and the rate structure. Poland availed itself of that power in this instance by establishing a turnover-based income tax for retailers with a progressive average rate from 0% to just below 1.4% (which stems from the allowance and two tax bands). This is not precluded, in principle, by the rules on State aid.

(2) Exception: review of consistency by the Court in the Gibraltar judgment

40. Nor does anything to the contrary follow from the Court's ruling in the *Gibraltar* judgment, which is repeatedly cited by the Commission. In that ruling, the Court did examine Gibraltar's system of corporate taxation on the basis of the rules on State aid and accepted the existence of aid. However, it did not substitute its own view of general normal taxation for that of the Member State.

41. The Court certainly did not find in that case that the rules on State aid prescribe a certain form of taxation. It 'merely' reviewed the internal logic of the law at issue. Under the proposed tax reform at that time, uniform profit-based income taxation of all companies established in Gibraltar was to be introduced. (22) However, the factors chosen by the legislature, such as number of employees, business property and registration fee, clearly had nothing to do with uniform income taxation of all undertakings. Nor had the United Kingdom made any attempt to explain those factors. (23)

42. In this regard, that judgment of the Court of Justice does represent an exception (24) to the principle set out above, according to which Member States have autonomy in determining the reference framework, because the Court in fact reviewed the creation of a reference framework in respect of the existence of aid. However, the Court did nothing more than carry out a kind of review of possible abuse in the exercise of national fiscal sovereignty. In essence, it merely verified whether the Member State acted consistently (and not abusively) in the exercise of its fiscal sovereignty.

43. In that instance, it rightly found this not to be the case. The Gibraltar law on tax was intended solely to circumvent the rules on State aid by using purportedly general profit-based income taxation to establish very low taxation of certain companies which were intended to generate income (offshore companies). The Commission and the Court rightly considered this to constitute aid. The selective advantage resided in the internal inconsistency between the reasons for or objective of the law and the design of the law. Even

though it was aimed at general profit-based income taxation of all undertakings established in Gibraltar, specific undertakings were intentionally made subject to only very low taxation. (25)

44. In that judgment, contrary to the assertion made by the Commission in the present case, the Court did not therefore substitute its own view of general normal taxation for that of the Member State. Nor did it rule that EU law prescribes a certain tax rate structure. It merely ruled that correctly general income taxation of all resident undertakings cannot be based on extrinsic factors, the objective of which is simply to favour certain undertakings that, as a rule, manage without large premises and without many staff, as was the case with offshore companies. (26)

45. In essence, the Court thus prevented Member States from abusing their general tax law in order to grant advantages to individual undertakings in circumvention of the rules on State aid. That abuse of fiscal autonomy resulted from a manifestly inconsistent design of the tax law for Gibraltar.

(3) Consistency of the Polish tax on the retail sector

46. There is no need for a more extensive examination in the case of generally applicable tax laws. If EU law respects the fiscal sovereignty of the Member States and if the rules on State aid do not prescribe any specific design for national tax systems, a generally applicable tax law – which just creates the reference framework – can constitute aid only if its design was manifestly inconsistent. (27)

47. The examination of the selective advantage in the case of a generally applicable tax law is then reduced to just this one stage. The remaining – and still contestable – stages (how the correct reference framework is determined, are there exceptions or a counter-exception, are the differentiations specifically justified and who bears the burden of proof for what) can be omitted.

48. Such inconsistency in the Polish tax on the retail sector was rightly found by the General Court not to exist. Thus, it asserts in paragraph 67 et seq. of the judgment under appeal that the normal system was the Polish law in its specific progressive structure, which resulted in heavier taxation of undertakings with a higher turnover and lower taxation of undertakings with a smaller turnover (paragraph 75). This followed from the redistributive purpose associated with a progressive rate (paragraph 83). Consequently, a selective advantage could not be inferred solely from the progressive structure (paragraph 93). Because the Commission did not assert or demonstrate any other inconsistency (paragraph 94 et seq.), the law in question could not be regarded as State aid.

49. I am not convinced by the arguments against this view put forward by the Commission in the appeal. (28)

(i) Turnover-based income tax

50. It is not inconsistent to create a turnover-based income tax. The Commission's arguments are ultimately all based on the idea that, in the taxation of financial capacity, regard should be had solely to profit (or efficiency, that is to say, profit margin). Only this properly reflects taxable capacity. At the hearing the Commission also repeatedly submitted that only profit-based income taxation is capable of correctly taxing ability to pay.

51. The Commission fails to recognise that profit too is only a (notional) parameter for the uniform taxation of ability to pay. It says something about real ability to pay only to a limited extent, as is shown by the BEPS debate. (29) This worldwide debate arises because undertakings with high profits clearly do not pay the corresponding taxes as they are able to reduce the assessment bases significantly ('base erosion') or shift profits to low-tax countries ('profit shifting').

52. Profit-based income taxation, like turnover-based income taxation, has its advantages and disadvantages. However, these must be weighed up and accounted for not by an authority or a court, but by a democratically mandated legislature. When drafting tax legislation, the legislature (here the Polish

legislature) can decide which tax is, in its view, appropriate. In any case, the rules on State aid do not require the tax which is, in the Commission's view, most appropriate to be introduced.

53. The calculations and statistics provided by the Commission in the appeal are therefore also ineffective as they work with a profit margin. If the Polish legislature takes turnover as the basis in order to avoid the problems of profit taxation, a profit margin, which is in turn based on such easily influenced profit, cannot be used to show that turnover-based taxation is 'inappropriate'.

54. Contrary to the submission made by the Commission, a profit-based income tax is also not unquestionably preferable (in the words of the Commission 'appropriate'). On the contrary, around the world turnover-based income taxes are on the rise, as is shown by the Commission's proposed digital services tax. (30) This uses annual turnover as the basis for the taxation of undertakings. The Polish tax on the retail sector and the planned EU digital services tax are no different in this respect.

(ii) Progressive rate

55. In addition, a progressive rate does not constitute an inconsistency per se. Progressive rates are a perfectly common means in income taxation of achieving taxation according to financial capacity. This holds both for profit-based income taxation and for turnover-based income taxation. Here too, the Commission's proposed digital services tax shows that a progressive rate structure is a common fiscal method of taxing particularly efficient undertakings.

56. When, in its written pleadings, the Commission disputes that the proposed EU digital services tax has a progressive rate, this is correct only at first sight. Under Article 8 of the proposal, the rate is in fact 3% uniformly and is thus proportional. However, the Commission fails to recognise that any allowance in a proportional tax produces different average tax rates and thus a progressive rate curve. (31) It is similar with an exemption limit. The rate curve of the proposed turnover-based EU digital services tax, with its (two average) tax rates, ranges from 0% to 3%, while the average rate increases from 0% to 3% as turnover rises once the thresholds are exceeded. It is thus also progressive.

57. Furthermore, the Commission's argument that a progressive rate structure is appropriate only for taxation of natural persons because it is only for them, according to the theory of marginal utility, that the individual utility gain is reduced as income increases, is also ineffective. Progressive rates would therefore be used only for taxation of natural persons.

58. The Commission fails to understand that the theory of marginal utility is an economic theory and not a rule of law. Because 'utility' cannot be measured, it has not been possible thus far to infer from that theory any definitive (legal) statements regarding the correct tax rate. (32) In the past, conversely, even proportional rates were considered discriminatory. (33)

59. The reason why, as the Commission rightly asserts, progressive rates tend to be used for taxation of natural persons would therefore seem to be that legal persons are able to evade the progressive effect arbitrarily through spin-offs or larger group structures. Nevertheless, this problem does not make progressive corporate taxation covering both natural and legal persons inconsistent.

60. Moreover, the examples of taxation which the Commission cites and regards as unfair do not demonstrate any inconsistency. Thus, the Commission maintains that the Polish progressive rate is not an appropriate means because taxation is 30 times higher where turnover is 10 times higher. This example merely shows, however, the logical consequences of a progressive tax curve. The EU digital services tax proposed by the Commission, with its exemption limits, produces even more extreme results. (34)

61. Aside from this, the criterion of appropriateness is in any case the wrong criterion. As was stated above (point 52), the appropriateness of a national tax must be assessed by the national legislature. The rules on State aid, in a case where the reference framework is only just determined, can merely eliminate

inconsistencies. The Polish tax on the retail sector nevertheless implements the progressive tax structure consistently.

(b) Conclusion

62. Consequently, the General Court was right to reject the existence of aid within the meaning of Article 107(1) TFEU. The first part of the first ground of appeal is unfounded and must therefore be rejected.

(c) In the alternative: normal standard of review of a selective advantage

63. Even if, in examining a general tax law like the one at issue, the Court were not to confine itself to a review of consistency, it is not evident that the General Court erred in law in rejecting the existence of aid.

64. According to the normal standard of review, it is necessary to begin by identifying the ordinary or 'normal' tax system applicable in the Member State concerned. It is in relation to that ordinary or 'normal' tax regime that it is necessary, secondly, to assess whether the advantage granted by the tax measure in question is an unjustified exception and therefore selective. (35)

65. The latter point requires there to be unequal treatment of undertakings in a comparable situation which cannot be justified. (36) A measure which constitutes an exception to the application of the general tax system may be justified if the Member State concerned can show that that measure results directly from the basic or guiding principles of its tax system. (37) In essence, this selectivity test is a discrimination test. (38)

66. The General Court rightly found that the Commission chose the incorrect reference framework. The relevant reference framework can only be the prevailing national law and not hypothetical or notional law. Anything else would permit the Commission to replace the respective national legislature and to determine its favoured tax system as the reference framework.

67. In so far as the Commission relies in this regard on the Court's ruling in the Gibraltar judgment, as has already been stated above in point 40 et seq., it misunderstands the statements made there. In that judgment the Court certainly did not create a notional reference framework itself.

68. The choice of the incorrect reference framework by the Commission, as the Court has ruled, (39) necessarily 'vitiates the whole of the analysis of the condition relating to selectivity'. For this reason, the contested negative decision should be annulled. The first part of the first ground of appeal is therefore also unfounded on application of the normal standard of review.

2. The other two parts of the first ground of appeal

69. By the other two parts of the first ground of appeal, the Commission objects to the additional considerations put forward by the General Court and alleges that there too it wrongly rejected the existence of aid. Since, according to paragraphs 69 and 70 of the judgment under appeal, the additional considerations put forward by the General Court only examine whether a different conclusion follows from the Court's ruling in the Gibraltar judgment, which has already been found not to be the case above (point 40 et seq.), no further examination of the other parts of the first ground of appeal is necessary.

70. The General Court did, however, further examine whether aid nevertheless exists. The Court possibly assumed in paragraphs 69 and 70, to the benefit of the Commission, that in the contested decisions the Commission also used the correct reference framework (a progressive turnover-based business tax) and affirmed the existence of aid on that basis. Otherwise, the further examination of the comparability of the situations and the justification of a difference in treatment would not make any sense. The General Court also rejected the existence of aid in this respect. This point is contested by the Commission with the other two parts of the first ground of appeal. At the hearing it became clear that the

Commission alleges in particular that the General Court rejected the comparability of undertakings with high and low turnovers.

(a) In the alternative: second part of the first ground of appeal – comparability of higher-turnover and lower-turnover undertakings

71. Consequently – and because there was a lengthy discussion on the subject between the parties at the hearing – it will be examined in the alternative whether also on this premiss (assumption of the correct reference framework by the Commission) the General Court did not err in law by rejecting a selective advantage. The Commission considers it an error in law that the Court rejected the comparability of lower-turnover and higher-turnover undertakings in so far as it had regard to the wrong legislative objective (second part of the first ground of appeal).

72. This part of the first ground of appeal is also unfounded. If the progressive turnover-based income tax is the actual reference framework, the consistent implementation of that reference framework is not an exception that should somehow be justified, but the rule.

73. Furthermore, within that reference framework there is no discernible unjustifiable difference in treatment of undertakings in a comparable situation. Larger and smaller retailers differ in that reference system precisely on account of their turnover and resulting financial capacity. In the view of the Member State – which is not manifestly incorrect here (with regard to consistency see above, point 46 et seq.) – they are not in a legally and factually comparable situation.

74. The Commission, on the other hand, clearly considers that it follows from the objective of a tax of generating revenue for the national budget that each taxable person should be taxed at the same (relative) level. Accordingly, the General Court should have had regard, in relation to comparability, only to the objective of generating tax revenue. The volume of turnover is irrelevant to that objective and, for that reason, lower taxation of undertakings with low turnovers cannot be justified.

75. This line of argument cannot be accepted. In the context of a review of State aid, the objective of a tax cannot be limited to the generation of revenue. Rather, the crucial factor is the specific taxation objective pursued by the legislature in drafting taxation legislation, (40) which is evident by way of interpretation from the nature of the tax and its design. An intrinsic objective of a progressive tax is absolute and relatively higher taxation of taxable persons with a higher ability to pay. This should therefore also be taken into consideration in examining comparability, as the General Court rightly did.

76. The General Court stated in this regard in paragraph 75 of the judgment under appeal that it may reasonably be presumed that an undertaking which achieves a high turnover may, because of various economies of scale, have proportionately lower costs than an undertaking with a smaller turnover and is therefore capable of paying more in terms of tax. This too cannot be criticised from a legal point of view. As the Court has already held, (41) the level of turnover can certainly represent a relevant indicator of taxable capacity.

77. This is suggested, first, by the fact that high profits are not actually possible without high turnover and, second, by the fact that as a rule the profit from additional turnover (marginal profit) increases with falling fixed unit costs. It would not therefore appear unreasonable to regard turnover, as a reflection of an undertaking's size or market position and potential profits, *also* as a reflection of its financial capacity and to tax it on that basis. (42)

78. As emerged at the hearing, the Commission has deliberated a great deal about the correct taxation of ability to pay. In this exercise the disadvantages of a turnover-based income tax have rightly been highlighted and potentially more sensible alternatives demonstrated. It is unclear, however, what bearing these very profound fiscal considerations have on the rules on State aid. Nor did the Commission answer an enquiry made by the Court in this regard at the hearing. It may be that a profit calculation by means of a balance sheet comparison is more precise than linking to net turnover. Contrary to the view taken by the

Commission, however, the rules on State aid do not inquire about a more sensible or a more precise tax system, but the selective favouring of certain undertakings over others in the same situation.

79. The second part of the first ground of appeal is therefore also unfounded.

(b) In the alternative: third part of the first ground of appeal: justification of a differentiation

80. By the third part of the first ground of appeal, the Commission alleges that the General Court erred in law because it took external reasons into consideration in connection with the justification of a difference in treatment.

81. This part of the appeal is based on the misassumption that there is a difference in treatment of comparable taxable persons, as only then does the question of a justification arise. Because that is not the case, as has been explained above, this part of the appeal is examined only in the alternative in the event that, against expectations, the Court considers a retailer with a monthly net turnover of, for example, EUR/PLN 50 000 and a retailer with a monthly net turnover of, for example, EUR/PLN 200 million to be in a comparable situation.

82. It would then have to be assessed whether the General Court was wrong to consider the difference in treatment connected with the different average rate of a progressive tax to be justified. Contrary to the Commission's view, justifications other than purely fiscal reasons are conceivable justifications for a difference in treatment. In this respect, plausible non-fiscal reasons can also justify a differentiation, as was acknowledged, for example, in *ANGED* with regard to environmental and town and country planning reasons in connection with a tax on retail sales area. (43)

83. In the present case, the General Court did not take into consideration any incorrect justifications. In paragraphs 75 and 76 of the judgment under appeal, the Court considered the different average rate to be justified in the light of the principle of taxation according to ability to pay and the objective thereby pursued of the redistribution of the tax burden between taxable persons with higher capacity and taxable persons with less capacity.

84. This cannot be criticised from a legal point of view. Nor can it be stated that the progressive tax scale of the Polish tax on the retail sector is not based in the specific tax legislation itself, but pursues purposes which are extrinsic to it and extraneous. (44) The volume of turnover indicates (without manifest error at least) a certain financial capacity. Accordingly, as the Commission itself shows with the proposal for a digital services tax, (45) turnover can also be seen as a (slightly rougher) indicator of greater economic power, and thus greater financial capacity.

85. Furthermore, the principle of the welfare state – which the European Union recognises in Article 3(3) TEU – also justifies a progressive tax rate which imposes a heavier burden, even in relative terms, on those with greater financial capacity than on taxable persons with not quite so much financial capacity. This applies at least in the case of a tax which also covers natural persons, which is the situation here.

86. The Commission's criticism that in paragraph 94 of the judgment under appeal the General Court disregarded the burden of proof is also ineffective. It is based the incorrect view that turnover-based progressive taxes are per se aid requiring justification.

3. Conclusion

87. The first ground of appeal raised by the Commission is therefore unfounded in its entirety.

B. Second ground of appeal: misinterpretation of Article 108(2) TFEU and Article 13 of Regulation 2015/1589

88. By the second ground of appeal, the Commission asserts that the General Court failed to recognise, with regard to the annulment of the decision to initiate the procedure and of the suspension injunction, that the conditions under Article 108(2) TFEU and the conditions under Article 13 of Regulation 2015/1589 were met. Consequently, the decision to initiate the procedure and the suspension injunction were still lawful and could not be revoked solely because the negative decision was annulled.

89. It follows from the case-law of the Court of Justice, which was taken into consideration by the General Court, that doubts as to the existence of aid are sufficient for the initiation of a State aid procedure pursuant to Article 108(2) TFEU. (46) It is therefore possible successfully to challenge the decision to initiate the procedure *in isolation* only if the Commission has committed manifest errors of assessment. (47) This also applies to the provisional suspension injunction under Article 13 of Regulation 2015/1589. Such an injunction is possible, in principle, regardless of whether, in the final analysis, the measure in question actually constitutes aid. (48)

90. The Commission thus relies on a less rigorous standard of review in respect of the decision to initiate the procedure, which the Court has developed for cases where the decision to initiate the procedure or the suspension injunction is challenged in isolation. (49)

91. This special standard of review (point 89) is intended to enable the Commission to conduct the relevant State aid procedure on any reasonable grounds for suspicion of aid and to identify the necessary factors, even if it is not yet certain whether aid actually exists. This is the basis and the spirit and purpose of the less rigorous standard of review from the time when the State aid procedure is initiated until the final decision is adopted.

92. The uncertainty taken into consideration by the special standard of review tends, first of all, to be factual uncertainty rather than legal uncertainty. Legal uncertainty cannot really be dispelled by the further State aid procedure carried out by the Commission. This can be clearly seen in this case. Either the progressive rate of a turnover-based income tax is a selective advantage per se or it is not. This legal assessment was the same at the time of the decision to initiate the procedure as at the time of the negative decision, since the overall legal conditions did not change in the interim. In the judicial review of its action, the Commission thus bears the risk, as always, that its legal assessment might prove to be incorrect.

93. Second, there is no reason for the special (less rigorous) standard of review if, as in this case, the contested negative decision is reviewed concurrently with the decision to initiate the procedure and the suspension injunction and it is established that in substantive terms aid never existed. There is no longer any need for the uninterrupted implementation of a State aid procedure where it has already been concluded and, in the absence of aid, cannot be initiated again.

94. It is not therefore necessary to determine whether the Commission's misappraisal was also manifest for the purposes of the special standard of review, a view to which I would be inclined in the light of the above statements (point 26 et seq.). (50)

95. An automatic annulment of the decision to initiate the procedure is conceivable in this case even if the Court were not to affirm that there was manifestly no aid at the time of the decision to initiate the procedure. The rules which enable the Commission to adopt a decision to initiate the procedure (Article 108(2) TFEU) and to adopt a suspension injunction (Article 13 of Regulation 2015/1589) on any doubts as to the existence of aid are evidently based on the presumption that aid *possibly* exists. (51) If, however, this possibility is *definitively* ruled out on account of the legally binding annulment of the final decision, there is no longer any reason not to link the fate of those decisions to the fate of the annulment of the negative decision. That holds at least if all the decisions are challenged together and are vitiated by the same material error in law, namely that aid does not exist.

96. In the case of a joint examination, both decisions (the decision to initiate the procedure and the suspension injunction) – which are definitively settled either with the binding force of the negative decision (52) or, as in this case, with the annulment of the negative decision – also share the material fate

of the decision to conclude the relevant procedure for reasons of procedural economy. The annulment of the contested decision to initiate the procedure and of the suspension injunction contained therein is thus merely a declaratory revocation, which saves the EU Courts from making a declaration of the settlement of the decision to initiate the procedure and the connected legal consequences.

97. Accordingly, the second ground of appeal and thus the appeal brought by the Commission in its entirety are unfounded.

VI. Costs

98. Under Article 184(2) of the Rules of Procedure of the Court of Justice, where the appeal is unfounded, the Court is to make a decision as to costs. Under Article 138(1), which applies to the procedure on appeal in accordance with Article 184(1) thereof, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Because the Commission has been unsuccessful, it must be ordered to pay the costs.

99. Under Article 184(1) in conjunction with Article 140(1), Hungary, as intervener, must bear its own costs.

VII. Conclusion

100. In the light of the foregoing, I propose that the Court should:

1. dismiss the appeal brought by the Commission;

2. order the European Commission to bear its own costs and to pay the costs of the Republic of Poland;

3. order Hungary to bear its own costs.

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1 Original language: German.

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2 The first time it did so was in 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), where the Commission brought proceedings against the new corporate tax law for Gibraltar. The situation was similar in the judgments of 26 April 2018, *ANGED* (C-233/16, EU:C:2018:280), of 26 April 2018, *ANGED* (C-234/16 and C-235/16, EU:C:2018:281), and of 26 April 2018, *ANGED* (C-236/16 and C-237/16, EU:C:2018:291).

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

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4 The proceedings are pending before the Court as Case C-596/19.

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5 Judgment of 16 May 2019, *Poland* v *Commission* (T-836/16 and T-624/17, EU:T:2019:338, 'the judgment under appeal').

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6 Judgments of 3 March 2020, *Tesco-Global Áruházak* (C-323/18, EU:C:2020:140), and of 3 March 2020, *Vodafone Magyarország* (C-75/18, EU:C:2020:139).

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7 Council Regulation of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (OJ 2015 L 248, p. 9).

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8 OJ 2016 C 406, p. 76.

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9 OJ 2018 L 29, p. 38.

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

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

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

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13 See Opinion of Advocate General Saugmandsgaard Øe in *A-Brauerei* (C-374/17, EU:C:2018:741, point 61 et seq.); Opinion of Advocate General Wahl in *Andres* v *Commission* (C-203/16 P, EU:C:2017:1017, point 88 et seq.); and my Opinions in *Tesco-Global Áruházak* (C-323/18, EU:C:2019:567, point 151 et seq.); in *Vodafone Magyarország* (C-75/18, EU:C:2019:492, point 163 et seq.); in *ANGED* (C-233/16, EU:C:2017:852, point 76 et seq.); in *ANGED* (C-234/16 and C-235/16, EU:C:2017:853, point 74 et seq.); and in *ANGED* (C-236/16 and C-237/16, EU:C:2017:854, point 76 et seq.).

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14 Judgments of 27 June 2017, *Congregación de Escuelas Pías Provincia Betania* (C-74/16, EU:C:2017:496, paragraph 65), and of 9 October 2014, *Ministerio de Defensa and Navantia* (C-522/13, EU:C:2014:2262, paragraph 21); similarly, 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 71 – ‘normally included in the budget’).

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

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16 Judgments of 27 June 2017, *Congregación de Escuelas Pías Provincia Betania* (C-74/16, EU:C:2017:496, paragraph 66); of 19 March 2013, *Bouygues and Bouygues Télécom* v *Commission* (C-399/10 P and C-401/10 P, EU:C:2013:175, paragraph 101); 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 71); and of 15 March 1994, *Banco Exterior de España* (C-387/92, EU:C:1994:100, paragraph 13).

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17 See judgments of 19 December 2018, *A-Brauerei* (C-374/17, EU:C:2018:1024, paragraph 28); of 28 June 2018, *Andres (Insolvenz Heitkamp BauHolding)* v *Commission* (C-203/16 P, EU:C:2018:505, paragraph 97); 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 68); of 8 September 2011, *Paint Graphos* (C-78/08 to C-80/08, EU:C:2011:550); and of 10 January 2006, *Cassa di Risparmio di Firenze and Others* (C-222/04, EU:C:2006:8, paragraph 132).

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18 Judgment of 3 March 2020, *Tesco-Global Áruházak* (C-323/18, EU:C:2020:140, paragraph 69), and of 3 March 2020, *Vodafone Magyarország* (C-75/18, EU:C:2020:139, paragraph 49).

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19 Judgment of 3 March 2020, *Tesco-Global Áruházak* (C-323/18, EU:C:2020:140, paragraph 70), and of 3 March 2020, *Vodafone Magyarország* (C-75/18, EU:C:2020:139, paragraph 50).

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20 Judgments of 26 April 2018, *ANGED* (C-233/16, EU:C:2018:280, paragraph 50), 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, paragraph 97).

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21 OJ 2016 C 262, p. 1.

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22 See 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 12).

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23 See 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, paragraphs 149 and 150).

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24 The judgment of 19 December 2018, *A-Brauerei* (C-374/17, EU:C:2018:1024, paragraph 32) would also seem to be along similar lines.

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25 See expressly 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, paragraphs 99, 102 and 106).

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26 See expressly 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 106).

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27 See also, in that sense, my Opinions in *Tesco-Global Áruházak* (C-323/18, EU:C:2019:567, point 151 et seq.); *Vodafone Magyarország* (C-75/18, EU:C:2019:492, point 170 et seq.); and *ANGED* (C-233/16, EU:C:2017:852, point 81 et seq.).

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28 These are more or less the same arguments as were made during the proceedings in *Tesco-Global Áruházak* (C-323/18, EU:C:2020:140) and *Vodafone Magyarország* (C-75/18, EU:C:2020:139).

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29 See, inter alia, the OECD ‘Action Plan on Base Erosion and Profit shifting’ – available at https://www.oecd.org/ctp/BEPSActionPlan.pdf – p. 13: ‘Fundamental changes are needed to effectively prevent double non-taxation, as well as cases of no or low taxation associated with practices that artificially segregate taxable income from the activities that generate it’.

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

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31 See my comments in the Opinions in *Tesco-Global Áruházak* (C-323/18, EU:C:2019:567, point 1, footnote 3), and *Vodafone Magyarország* (C-75/18, EU:C:2019:492, point 3, footnote 4).

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32 See, inter alia and very succinctly, Birk/Desens/Tappe (ed.), *Steuerrecht*, 22nd edition 2019, paragraph 38.

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33 For example, back in 1958, Bundesverfassungsgericht (Federal Constitutional Court), judgment of 24 June 1958 – 2 BvF 1/57 Az., BVerfGE 8, 51 (68 and 69): 'Fairness dictates here that, in the spirit of proportional equality, the economically stronger should pay a higher percentage of their income as tax than the economically weaker'.

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34 Under the Commission's proposal, an undertaking with a worldwide turnover above EUR 750 million that does not exceed the limit of EUR 50 million within the EU (turnover precisely EUR 50 million) pays exactly EUR 0 in tax. Another undertaking with a worldwide turnover above EUR 750 million that exceeds the exemption limit of EUR 50 million within the EU by EUR 50 million pays EUR 3 million in tax. Doubling that turnover within the EU (EUR 100 million rather than EUR 50 million) results in an infinitely higher tax burden.

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

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

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

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

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39 Judgment of 28 June 2018, *Andres (Insolvenz Heitkamp BauHolding)* v *Commission* (C-203/16 P, EU:C:2018:505, paragraph 107).

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40 As was also held by the Court in its judgments of 19 December 2018, *A-Brauerei* (C-374/17, EU:C:2018:1024, paragraph 48 and 49 – objectives attributed to a particular tax scheme); of 26 April 2018, *ANGED* (C-233/16, EU:C:2018:280, paragraph 55 – in the light of the objectives pursued by the legislation); 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 85); 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, paragraph 95 – in the light of the tax regime at issue).

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41 Judgments of 3 March 2020, *Tesco-Global Áruházak* (C-323/18, EU:C:2020:140, paragraph 70), and of 3 March 2020, *Vodafone Magyarország* (C-75/18, EU:C:2020:139, paragraph 50).

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42 See my Opinions in *Tesco-Global Áruházak* (C-323/18, EU:C:2019:567, point 101); in *Vodafone Magyarország* (C-75/18, EU:C:2019:492, point 121 et seq.); and in *Hervis Sport- és Divatkereskedelmi* (C-385/12, EU:C:2013:531, point 61).

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

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

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

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46 See judgments of 24 January 2013, *3F* v *Commission* (C-646/11 P, not published, EU:C:2013:36, paragraph 27); of 21 July 2011, *Alcoa Trasformazioni* v *Commission* (C-194/09 P, EU:C:2011:497, paragraph 60); and of 10 May 2005, *Italy* v *Commission* (C-400/99, EU:C:2005:275, paragraph 47).

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47 Judgments of 21 December 2016, *Commission* v *Hansestadt Lübeck* (C-524/14 P, EU:C:2016:971, paragraph 78); and of 21 July 2011, *Alcoa Trasformazioni* v *Commission* (C-194/09 P, EU:C:2011:497, paragraph 61); and judgment of the General Court of 9 September 2014, *Hansestadt Lübeck* v *Commission* (T-461/12, EU:T:2014:758, paragraph 12).

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48 See Opinion of Advocate General Mengozzi in *Deutsche Lufthansa* (C-284/12, EU:C:2013:442, point 27) and my Opinion in *Hungary* v *Commission* (C-456/18 P, EU:C:2020:8, points 36 and 69).

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49 See the circumstances in the judgment of 21 December 2016, *Commission* v *Hansestadt Lübeck* (C-524/14 P, EU:C:2016:971) – decision to initiate the formal investigation procedure, and, similarly, the situation in the judgments of 24 January 2013, *3F* v *Commission* (C-646/11 P, not published, EU:C:2013:36, paragraphs 28 and 29), and of 10 May 2005, *Italy* v *Commission* (C-400/99, EU:C:2005:275, paragraph 47 – initiation of the procedure).

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50 As the judgment of 21 December 2016, *Commission* v *Hansestadt Lübeck* (C-524/14 P, EU:C:2016:971, paragraph 50) shows, the fact that there has not yet been a judicial decision on the specific point of law is not sufficient to rule out a manifest error by the Commission.

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51 See, to that effect, judgment of 21 November 2013, *Deutsche Lufthansa* (C-284/12, EU:C:2013:755, paragraph 35): ‘The obligation to notify and the prohibition of implementation laid down in Article 108(3) TFEU apply to plans which may be classified as State aid within the meaning of Article 107(1) TFEU’.

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52 See, with regard to this particular situation, my Opinion in *Hungary* v *Commission* (C-456/18 P, EU:C:2020:8, point 32).