Provisional text

JUDGMENT OF THE GENERAL COURT (Ninth Chamber)

27 June 2019 (*)

(State aid — Hungarian tax on the turnover from the broadcasting or publication of advertisements — Progressivity of tax rates — Deduction from the basis of assessment of the tax of 50% of the losses carried forward for companies not generating a profit in 2013 — Decision characterising the measures as aid incompatible with the internal market and ordering its recovery — Concept of State aid — Condition relating to selectivity)

In Case T‑20/17,

Hungary, represented by M.-Z. Fehér, G. Koós and E.-Zs. Tóth, acting as Agents,

applicant,

supported by

Republic of Poland, represented by B. Majczyna, M. Rzotkiewicz and A. Kramarczyk-Szaładzińska, acting as Agents,

intervener,

v

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

defendant,

APPLICATION pursuant to Article 263 TFEU seeking annulment of Commission Decision (EU) 2017/329 of 4 November 2016 on the measure SA.39235 (2015/C) (ex 2015/NN) implemented by Hungary on the taxation of advertisement turnover (OJ 2017 L 49, p. 36),

THE GENERAL COURT (Ninth Chamber),

composed of S. Gervasoni, President, L. Madise (Rapporteur) and R. da Silva Passos, Judges,

Registrar: N. Schall, Administrator,

having regard to the written part of the procedure and further to the hearing on 10 January 2019,

gives the following

Judgment

Background to the dispute

1 On 11 June 2014, the Hungarian National Assembly enacted Law No XXII of 2014 on Advertisement Tax ('the Law on Advertisement Tax'). That law entered into force on 15 August 2014 and introduced a new special tax, applied progressively by bands, on turnover derived from the broadcasting or publication of advertisements in Hungary ('the advertisement tax'), applied in addition to existing business taxes, in particular corporation tax. During the examination of the Law on Advertisement Tax carried out by the European Commission as part of the monitoring of State aid, the Hungarian authorities stated that the purpose of that tax was to promote the principle of public burden sharing.

2 According to the Law on Advertisement Tax, whoever broadcasts or publishes advertisements is subject to the advertisement tax. Those who make advertisements public (newspapers, audiovisual media, billposters) are, therefore, taxable persons, but not advertisers (for whom the advertising is produced) or advertising agencies who are intermediaries between advertisers and broadcasters or publishers. The taxable amount to which the tax is applied is the net turnover for the financial year generated by the broadcasting or publication of advertisements. The territorial scope of the tax is Hungary.

3 The scale of progressive rates was defined as follows:

– 0% for the part of the taxable amount below 0.5 billion Hungarian forint (HUF) (approximately EUR 1 562 000);

– 1% for the part of the taxable amount between HUF 0.5 billion and HUF 5 billion (approximately EUR 15 620 000);

– 10% for the part of the taxable amount between HUF 5 billion and HUF 10 billion (approximately EUR 31 240 000);

– 20% for the part of the taxable amount between HUF 10 billion and HUF 15 billion (approximately EUR 47 000 000);

– 30% for the part of the taxable amount between HUF 15 billion and HUF 20 billion (approximately EUR 62 500 000);

– 40% for the part of the taxable amount above HUF 20 billion (approximately EUR 94 000 000). (That rate was increased to 50% from 1 January 2015).

4 Taxable persons whose pre-tax profits for the financial year 2013 were zero or negative could deduct from their 2014 taxable amount 50% of the losses carried forward from the earlier financial years.

5 By decision of 12 March 2015, after corresponding with the Hungarian authorities, the Commission initiated the formal investigation procedure for State aid, provided for in Article 108(2) TFEU, in relation to the Law on Advertisement Tax, taking the view that the progressive nature of the tax rate and the provisions on the deduction from the taxable amount of losses carried forward gave rise to State aid. In that decision, the Commission considered that the progressive tax rate differentiated between undertakings with high advertisement revenues (and thus large undertakings) and undertakings with low advertisement revenues (and thus small undertakings), and a selective advantage was thereby granted to the latter based on their size. The Commission was also of the view that the 50% deductibility of losses for undertakings that were not profit making in 2013

granted a selective advantage constituting State aid.

6 In the context of that same decision, the Commission issued a suspension injunction in respect of the measure at issue on the basis of Article 11(1) of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 108 [TFEU] (OJ 1999 L 83, p. 1).

7 Subsequently, Hungary amended the advertisement tax of its own initiative, without prior notification to, or approval by, the Commission, by Law No LXII of 2015, enacted on 4 June 2015, replacing the scale of six progressive rates from 0 to 50% by the following scale comprising two rates of taxation:

– 0% for the part of the taxable amount below HUF 100 million (approximately EUR 312 000);

– 5.3% for the part of the taxable amount above HUF 100 million.

8 Law No LXII of 2015 also introduced an optional retroactive application back to the entry into force of the Law on Advertisement Tax in 2014. Consequently, a taxable person could decide whether he wished to be subject to the previous rates or the new rates, for his turnover for the previous tax year.

9 The Commission closed the formal investigation procedure by Decision (EU) 2017/329 of 4 November 2016 on the measure SA.39235 (2015/C) (ex 2015/NN) implemented by Hungary on the taxation of advertisement turnover (OJ 2017 L 49, p. 36, 'the contested decision'). In Article 1 of the contested decision, the Commission concluded that the tax system composed of progressive tax rates and provisions prescribing a reduction in the amount of the tax liability in the form of deduction of losses carried forward for undertakings that were not profit making in 2013, established by Law No XXII of 2014 on Advertisement Tax, including the version of that law as amended on 4 June 2015, constituted State aid, unlawfully put into effect by Hungary, in breach of Article 108(3) TFEU, and was also incompatible with the internal market in the light of Article 107 TFEU.

10 In Articles 2 and 3 of the contested decision, the Commission stated nonetheless that if it met various criteria, certain individual aid granted under that system did not constitute State aid incompatible with the internal market.

11 In Article 4 of the contested decision, the Commission ordered Hungary to recover from the beneficiaries the aid declared incompatible with the internal market.

12 In that regard, the Hungarian authorities had to recover from the undertakings with advertisement turnover in the period from the entry into force of the advertisement tax in 2014 to either the date of its abolishment or replacement by a system which would be fully in line with State aid rules, the difference between: the amount of tax (1) that those undertakings should have paid under the application of a reference system in line with State aid rules (with a single tax rate of 5.3% unless another value was chosen by the Hungarian authorities, without the deduction of any losses carried forward), and the amount of tax (2) that the undertakings were liable to pay or had already paid. Consequently, if the difference between amount of tax (1) and amount of tax (2) was positive, the amount of aid had to be recovered including interest as of the date the tax was due. The Commission stated, however, that there would be no need for recovery if Hungary abolished the tax system at issue with retroactive effect from the date of its entry into force in 2014. This should not prevent Hungary from introducing for the future, for example from 2017, a tax system which was not

progressive and did not differentiate between economic operators subject to the tax.

13 In essence, in the contested decision, the Commission for the most part justified characterising the system at issue as State aid in the following manner, in the light of the definition in Article 107(1) TFEU.

14 First of all, as regards whether the measure at issued may be imputed to the State and is financed through State resources, the Commission considered that since the Law on Advertisement Tax was enacted by the Hungarian Parliament, Hungary waived resources it would have had to collect from undertakings with a lower level of turnover (and thus smaller undertakings), if they had been subject to the same level of tax as undertakings with a higher turnover (that is to say larger undertakings).

15 As regards the existence of an advantage, the Commission noted that, just like positive benefits, measures which mitigated the charges normally borne by the undertakings provided an advantage. In the present case, being taxed at a substantially lower tax rate mitigated the charges that undertakings with a low turnover must bear as compared to undertakings with a high turnover and therefore provided an advantage to the benefit of smaller undertakings over larger undertakings. The Commission added that the possibility under the Law on Advertisement Tax for those undertakings that were not profit making in 2013 to deduct from the taxable amount 50% of the losses carried forward also constituted an advantage, since it reduced their tax burden compared to undertakings that could not benefit from that deduction.

16 As to whether the advantages identified favoured certain undertakings (selectivity criterion), the Commission stated that since a tax advantage was at issue, the assessment had to be carried out in several stages. First of all, the reference tax system had to be identified, then it had to be determined whether the measure at issue constituted a derogation from that system, in the sense that it differentiated between undertakings which, in light of the objectives intrinsic to the system, were in a comparable factual and legal situation, and lastly, if the answer was in the affirmative, it had to be established whether that derogation was justified by the nature or general scheme of the reference tax system. A negative answer at the second stage or, as the case may be, a positive answer at the third stage would preclude a selective advantage in favour of certain undertakings, whereas a positive answer at the second stage and negative answer at the third stage would, on the other hand, enable it to be concluded that there was a selective advantage.

17 In the present case, the Commission stated, first, that the reference system was that of a special tax on turnover derived from the provision of advertising services. But, according to the Commission, the progressive rate structure of the advertisement turnover tax could not form part of that reference system. In order for the reference system itself to be free from State aid, the Commission stated that it had to fulfil two conditions:

– advertisement turnovers must be subject to the same (single) tax rate,

– there must be no element that would provide a selective advantage to certain undertakings.

18 To that extent, the Commission considered, next, that the progressive structure of the taxation, in that it entailed not only marginal tax rates, but also average tax rates, which differed between undertakings, constituted a derogation from the reference system composed of a single-rate advertisement tax applied to all economic operators broadcasting or publishing advertisements in Hungary.

19 In addition, the Commission considered that the possibility only for undertakings that were not

profit making in 2013 to deduct from the 2014 taxable amount 50% of losses carried forward also constituted a derogation from the reference system, namely the rule that operators are to be taxed on the basis of their turnover from advertisements. According to the Commission, since the advertisement tax relates to turnover, costs were not to be deductible from the taxable amount, contrary to what might be the case for profit-based taxes.

20 The Commission also took the view that the derogation from the reference system entailed by the progressive structure of the taxation was not justified by the nature or general scheme of the system. While the Hungarian authorities argued that the purpose of the advertisement tax was redistributive and the turnover and size of an undertaking reflected its ability to pay, so that an undertaking with higher advertising turnover has a greater ability to pay than an undertaking with lower advertising turnover, the Commission considered that the information provided by Hungary established neither that an undertaking's turnover is a good proxy for its ability to pay nor that the pattern of progressivity of the tax is justified by the nature and general scheme of the tax system. For the Commission, a progressive tax levied on turnover could be justified only in order to offset or deter the occurrence of certain negative effects likely to be generated by the activity concerned, which are more significant the larger the turnover, but such a situation has in no way been established in the present case.

21 In addition, the Commission denied that the 50% deductibility of the losses carried forward can be justified as a measure to prevent tax avoidance and the circumvention of tax obligations, as the Hungarian authorities argued. According to the Commission, the measure introduced an arbitrary distinction between two groups of undertakings that are in a comparable legal and factual situation, namely, on the one hand, undertakings that had losses carried forward, and were not profit making in 2013 and, on the other, undertakings that were profit making in 2013, but would have been able to benefit from losses carried forward from earlier years.

22 In addition, the provision does not limit the losses that may be deducted to those incurred in 2013, but allows an undertaking that was not profit making in 2013 to use accumulated losses carried forward from earlier years as well. The deduction of losses already existing at the time of the enactment of the Law on Advertisement Tax could entail selectivity because the allowance of that deduction could favour certain undertakings with substantial losses carried forward.

23 The differences in treatment are, therefore, arbitrary and not in line with the nature of a turnover tax, and cannot be considered as participating in the fight against fraud and tax avoidance which could justify a difference in treatment.

24 In the light of the foregoing, the Commission concluded that the nature and general scheme of the tax system did not justify the measures at issue which conferred selective advantages, on the one hand, on undertakings with a low turnover (and thus smaller undertakings) and, on the other, on undertakings which, since they were not profit-making in 2013, could deduct from the 2014 taxable amount 50% of their losses carried forward.

25 Lastly, the Commission considered that the measure at issue distorted or threatened to distort competition and affected trade between Member States. In that regard, it found, in particular, that the Hungarian advertisement market was open to competition, that operators from other Member States participated in that market and that undertakings benefiting from the lowest tax rates benefited, therefore, from operating aid.

26 As regards the 2015 amended version of the advertisement tax, the Commission stated that that version was based on the same principles and features as those chosen for the 2014 advertisement

tax.

27 First, the Commission emphasised that the new tax rates structure still provided for an exemption for undertakings with a turnover below HUF 100 million (0% rate), those undertakings with a higher turnover having to pay 5.3% advertisement tax. The Commission gave Hungary the opportunity to justify the application of a 0% tax rate to advertisement turnover below HUF 100 million by the purpose of the tax system (having regard to administrative burden for example). However, Hungary did not bring forward arguments to demonstrate that the cost of collection of the tax (administrative burden) outweighed the amounts of tax collected (up to around EUR 17 000 of tax per year).

28 Secondly, according to the Commission, the optional retroactive effect of the amended advertisement tax allowed undertakings to avoid payment of the tax imposed by that retroactivity, and provided an economic advantage to the undertakings who therefore avoided the 5.3% rate, retaining the former rates of 0% or 1%.

29 Thirdly, the Commission considered, as regards the possibility of deducting from the 2014 taxable amount 50% of earlier losses carried forward, limited to companies that had not made a profit in 2013, which was not removed by the 2015 amendment, that the new system did not effect any change.

30 In the light of the foregoing, the Commission concluded that the Law on Advertisement Tax as amended in 2015 featured the same elements that the Commission regarded as entailing State aid in respect of the 2014 system.

31 On 16 May 2017, the Hungarian Parliament enacted Law No XLVII of 2017, amending the Law on Advertisement Tax. In essence, that law repealed the advertisement tax with retroactive effect.

32 The Commission states in that regard in its pleadings before the Court that Hungary did not use the possibility envisaged in recital 91 of the contested decision, which allowed a single fixed rate, applicable retroactively, to be set within 2 months from the date on which the contested decision was adopted. Noting, however, that Hungary abolished, with retroactive effect, the advertisement tax paid previously ('considered an overpayment') and that that provision was adopted expressly in order to implement the decision, the Commission states that the obligation to recover the aid previously identified has lapsed.

Procedure and forms of order sought

33 By document lodged at the Court on 16 January 2017, Hungary brought the present action.

34 By separate document lodged the same day, Hungary brought an application for suspension of operation of the contested decision (Case T‑20/17 R).

35 The President of the Court, by order of 23 March 2017, *Hungary* v *Commission* (T‑20/17 R, not published, EU:T:2017:203), dismissed the application for interim measures and reserved the costs.

36 The Commission lodged its defence on 27 March 2017.

37 By document lodged at the Court Registry on 19 May 2017, the Republic of Poland sought leave to intervene in the present proceedings in support of the form of order sought by Hungary. By decision of 30 May 2017, the President of the Second Chamber of the Court granted leave to intervene.

38 Hungary, the Commission and the Republic of Poland lodged a reply, a rejoinder and a statement in intervention on 15 May, 28 June and 26 July 2017, respectively.

39 Hungary and the Commission both lodged observations on the Republic of Poland's statement in intervention on 7 November 2017.

40 By letter of 15 December 2017, Hungary requested a hearing, stating the reasons for its request.

41 Acting on a proposal from the Judge-Rapporteur, the Court (Ninth Chamber) decided to open the oral part of the procedure. The Court also decided to put three questions to Hungary to be answered at the hearing.

42 The parties presented oral argument and answered the questions put by the Court at the hearing of 10 January 2019.

43 Hungary, supported by the Republic of Poland, claims that the Court should:

– annul the contested decision;

– in the alternative, annul the contested decision in part inasmuch as it also characterises as prohibited State aid the changes made by the amendment of the legislation in 2015;

– order the Commission to pay the costs.

44 The Commission contends that the Court should:

– dismiss the action as unfounded;

– order Hungary and the Republic of Poland to pay the costs of the proceedings.

Law

45 Hungary raises three pleas in law in support of its action, the first alleging an error in the legal characterisation of the measures at issue as State aid, within the meaning of Article 107(1) TFEU, the second alleging the failure to comply with the obligation to state reasons and the third alleging a misuse of powers.

46 In the present case, the Court considers it appropriate to examine, first, the plea in law alleging an error in the legal characterisation of the measures at issue as State aid, within the meaning of Article 107(1) TFEU.

47 First of all, it must be found that while in the grounds of the contested decision the Commission considered that the optional retroactive effect of the advertisement tax in the 2015 amended version provided an advantage to certain undertakings, as set out in paragraph 28 above, that assessment was not reflected in the operative part of the contested decision and therefore, as confirmed by the Commission's representative at the hearing, that factor was not identified as a component of State aid. Consequently, there is no need to examine the arguments put forward against that assessment of the Commission.

48 As to the remainder, Hungary submits that the Commission wrongly found that the advertisement tax involved selective measures to the advantage of certain undertakings. According to Hungary,

neither the progressive structure of the tax nor the reduction in the basis of assessment for loss-making undertakings in 2013 constitute State aid.

The progressive structure of the tax

49 Hungary submits, first of all, that there is no obligation to justify as such a structure for the progressive taxation of turnover to prevent its being characterised as State aid. There is no difference between, on the one hand, taxes on profit for which the Commission accepts progressivity and, on the other, taxes which are dependent on turnover, because both types of taxation have the same features in the light of the criteria for the categorisation as State aid if they are characterised by a scale of progressive rates. Tax diversity enables the national legislature to have numerous instruments at its disposal to ensure an optimal allocation of public burdens. According to Hungary, since the Member State's competence to determine direct taxation rates still exists under the current state of EU law, there was, therefore, no need to justify by special reasons the rules on advertisement tax, in particular the recourse to a scale of progressive rates. The analysis of whether a tax includes State aid does not depend on the reasons which justified the basic structure underlying it.

50 Hungary refers to the judgments of 9 May 1985, *Humblot* (112/84, EU:C:1985:185); of 17 September 1987, *Feldain* (433/85, EU:C:1987:371); of 27 October 2005, *Distribution Casino France and Others* (C‑266/04 to C‑270/04, C‑276/04 and C‑321/04 to C‑325/04, EU:C:2005:657), and of 5 February 2014, *Hervis Sport- és Divatkereskedelmi Kft*. (C‑385/12, EU:C:2014:47), for the purposes of illustrating its argument, and states that in none of the cases concerning Member States' tax systems characterised by a scale of progressive rates on successive bands, examined by the Court, has it been held that the system concerned gave rise itself to State aid or infringed EU law on the ground that the scale of rates was progressive on successive bands. Consequently, the Court's case-law allows Member States to have recourse to progressive taxation in the case of a tax with a basis of assessment other than profits, without that giving rise as a matter of principle to State aid.

51 Hungary submits that if, on the contrary, it had to be found that the Commission rightly characterised the advertisement tax as State aid, that institution would be in a position to challenge any system of progressive taxation from the perspective of State aid, which would lead to an arbitrary prohibition on having recourse to such a tax measure.

52 More specifically, in the light of the criteria for State aid, within the meaning of Article 107(1) TFEU, Hungary puts forward the arguments set out as follows.

53 As regards the criteria for the commitment of State resources and the existence of an advantage, Hungary disputes the Commission's statement in recital 42 of the contested decision, that 'Hungary waives resources it would otherwise have to collect from undertakings with a lower level of relevant turnover (and thus smaller undertakings), if they had been subject to the same level of tax as undertakings with a higher turnover (and thus larger undertakings).' The advertisement tax does not exempt 'undertakings with a lower level of relevant turnover' from any tax burden, because their taxable amount does not reach the brackets from which the higher levels of tax are applicable. As a consequence, those undertakings pay on the 'lower' bracket of their taxable amount tax in the same amount as that paid by 'undertakings with a higher turnover' on the same bracket of taxable amount.

54 As regards the comparison of different rates carried out in the contested decision (recitals 50 to 59 of the contested decision), Hungary submits that the Commission cannot create a notional reference system with a single tax rate or with an average tax rate found, nor examine the lawfulness of a

Member State's tax system by comparing it to such a notional system. The Court's case-law does not allow a derogation from the reference system to be found by relying on another reference system, arbitrarily defined in order to identify an advantage.

55 It was not, therefore, properly shown that the progressive structure of the advertisement tax grants selective advantages. As the Polish Government also states, that structure, which in the Commission's view causes it to be selective, does not derogate from the reference system to which it belongs, because it is a component of that system.

56 Hungary states that there is no differentiation as regards the taxable amount of the advertisement tax and that it is the same average rate which, in a progressive taxation system involving successive bands, applies to anybody with the same taxable amount, so that the tax calculated on that amount is the same. There is, therefore, no derogation from the reference system.

57 Hungary further states that unlike the tax system concerned by 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), which had been designed to favour a specific group of undertakings, in that case offshore companies (which, in the absence of employees and business premises, were de facto exempt from tax), advertisement tax is paid by each taxpayer according to his turnover on the basis of the rates uniformly applicable on each of the brackets. The two cases are not, therefore, comparable.

58 Hungary adds that nor is the situation in the present case one in which a tax may be regarded as forming an integral part of a State aid measure, as is identified in the judgment of 27 October 2005, *Distribution Casino France and Others* (C‑266/04 to C‑270/04, C‑276/04 and C‑321/04 to C‑325/04, EU:C:2005:657), when the revenue from that tax is necessarily allocated to financing aid. It notes in that regard that since the revenue from the advertisement tax was entered in the general State budget, it was impossible to determine any specific expenditure financed by that revenue.

59 The Hungarian Government concludes that since, under the initial rules governing advertisement tax and under those introduced by the 2015 amendment, the amount of the advertisement tax was the same for the same taxable amount, the progressive scale by successive band for that tax entailed neither selectivity nor pecuniary advantage.

60 The Polish Government, for its part, adds that, even if the progressive tax rates did not form part of the reference system specific to the advertisement tax, they do not favour undertakings which, in the light of the tax's main objective, are in a comparable factual and legal situation to that of other undertakings. Inasmuch as the structure of those rates is based on progressivity by successive bands, not on overall progressivity, it observes the principle of equality. In the same bracket of turnover, all undertakings are treated in exactly the same way, being subject to the same rate of tax and no category of undertakings can be identified as privileged.

61 To those arguments that the advertisement tax's progressivity does not give rise to State aid, the Commission responds that the situations giving rise to the judgments 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), and 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), reflect that of the advertisement tax.

62 It is apparent, in particular, from 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), that

it is not sufficient, in order to determine whether a tax measure is selective to the advantage of some undertakings, to examine whether there is a derogation from the reference system's rules as defined by the Member State concerned itself, but that it must also be ascertained whether the limits or structure of that reference system were defined consistently or, on the contrary, in a clearly arbitrary or biased manner so as to favour those undertakings in the light of the normal objective of that system, which is the case here. The Commission states that, in the judgment referred to, the Court held that the selective advantage from which some undertakings that were exempt from tax benefited, stemmed from the very design of the tax concerned, while its objective was to put in place generalised taxation.

63 A similar situation is the basis, in recitals 50 to 54 of the contested decision, for the conclusion that Hungary deliberately designed, from the outset, the system of progressive taxation by successive bands applied to the advertisement tax, as a selective reference system, in such a way as to favour some undertakings over others.

64 The Commission adds the judgment of 27 October 2005, *Distribution Casino France and Others* (C‑266/04 to C‑270/04, C‑276/04 and C‑321/04 to C‑325/04, EU:C:2005:657), on the basis of which Hungary seeks to show that lack of hypothecation between the advertisement tax and the financing of specific measures precludes the existence of State aid, is irrelevant because, in the present case, what is in issue is not an aid measure financed by the tax, but the aid which that tax itself provides given its design.

65 The Commission further contends that a uniform tax rate in each band of the scale does not entail equal treatment of taxable persons, since only those with higher turnovers come within the higher bands, subject to the higher rates. What matters for a taxable person is the average effective rate and total amount of taxation, not whether or not, in a given band, the rate is uniform. Compared with a single-rate tax on the turnover affecting all taxable persons in the same proportion, the progressive advertisement tax imposes overall a higher tax burden on undertakings reaching the highest taxation bands.

66 The Commission adds that, contrary to Hungary's submissions, it did not define a new reference system 'based on an average rate'. The average rate to which it referred is specific to each undertaking, but it described, in recitals 48 and 56 of the contested decision, a single-rate advertisement tax to be used as the reference system, for which there are neither bands nor a progressive rate, which is the only system which, in its view, may avoid discrimination between undertakings which, in the light of the objective pursued by the advertisement tax, are in comparable situations. This reasoning follows that developed by the Court 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). The Commission states that while it referred, in the contested decision, to a single-rate advertisement tax not entailing State aid, it left Hungary to decide the level of that rate. This reflected the fact that it did not limit Hungary's fiscal sovereignty, but only applied the State aid rules.

67 Referring to recitals 46 to 71 of the contested decision, the Commission recalls more specifically the three-stage analysis that it followed in order to assess the selective nature of the advertisement tax.

68 As regards the selective nature of the advantage granted, the Commission showed, in the contested decision, that the progressive rates of taxation created a distinction between undertakings with high advertising turnover (namely, large undertakings such as Magyar RTL) and those with low advertising turnover (namely, the smaller undertakings) and therefore resulted in a selective

advantage being granted to the latter on the basis of their size (recitals 49 to 56). A non-discriminatory, single-rate turnover tax would mean that an undertaking must pay more the greater its turnover, with all parts of its turnover being subject to a uniform rate. As opposed to taxes based on profit, a turnover-based tax is not intended to take into account — and indeed does not take into account — any of the costs incurred in the generation of that turnover. This is due to the fact that a high turnover does not necessarily entail a high profit and that turnover in itself does not reflect ability to pay.

69 The Commission recalls that, in its view, in the case of turnover taxes, the existence of several bands and the application of progressive rates of taxation accompanying those bands are justified by the nature of the system only in exceptional cases, that is when the specific objective pursued by a tax requires progressive rates. Progressive turnover taxes would, for example, be justified if the negative externalities created by an activity, which the tax is supposed to tackle, also increase progressively — that is to say, more than proportionately — with turnover. However, Hungary did not provide any justification of the progressivity of the advertisement tax by negative externalities arising from advertisements.

70 The applicant's arguments summarised above must be examined.

71 Article 107(1) TFEU provides that, 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 is, in so far as it affects trade between Member States, incompatible with the internal market.

72 It is apparent from settled case-law that the aid referred to in Article 107(1) TFEU is not limited to subsidies, given that it includes not only positive benefits, such as subsidies themselves, but also State measures which, in various forms, mitigate the charges which are normally included in the budget of an undertaking and which thus, without being subsidies in the strict sense of the word, are similar in character and have the same effects (see, to that effect, judgments of 23 February 1961, *De Gezamenlijke Steenkolenmijnen in Limburg* v *High Authority*, 30/59, EU:C:1961:2, p. 39; of 2 July 1974, *Italy* v *Commission*, 173/73, EU:C:1974:71, paragraph 33; of 15 March 1994, *Banco Exterior de España*, C‑387/92, EU:C:1994:100, paragraph 13; 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 71).

73 Consequently, in tax matters, a measure by which the public authorities grant certain undertakings favourable tax treatment which, although not involving the transfer of State resources, places the recipients in a more favourable financial position than other taxpayers amounts to State aid within the meaning of Article 107(1) TFEU (see, to that effect, judgments of 15 March 1994, *Banco Exterior de España*, C‑387/92, EU:C:1994:100, paragraph 14; 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 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 56).

74 In order to demonstrate the existence of favourable tax treatment reserved for certain undertakings, or in other words characterising the measure at issue as selective, requires assessment of whether, under a particular legal regime, that measure is such as to favour certain undertakings in comparison with others which, in the light of the objective pursued by that regime, are in a comparable factual and legal situation (see, to that effect and by analogy, judgment of 2 July 1974, *Italy* v *Commission*, 173/73, EU:C:1974:71, paragraph 33; see also 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 75 and the case-law cited).

75 More specifically, according to the method of analysis upheld in the case-law, in order to characterise a favourable tax measure as 'selective', it is necessary to begin by identifying and examining the common or 'normal' tax system applicable (see, 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 57, and of 28 June 2018, *Andres (insolvency of Heitkamp BauHolding)* v *Commission*, C‑203/16 P, EU:C:2018:505, paragraph 88 and the case-law cited).

76 It is in relation to that tax system that it must, secondly, be assessed and, where appropriate, determined whether any advantage granted by the tax measure at issue may be selective, by showing that the measure derogates from the 'normal' system in that it differentiates between economic operators who, in light of the objective assigned to the common or 'normal' tax system applicable, are in a comparable factual and legal situation (see, to that effect, judgments of 8 September 2011, *Paint Graphos and Others*, C‑78/08 to C‑80/08, EU:C:2011:550, paragraph 49, and 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 57). On the other hand, if it is apparent that the tax advantage, in other words the differentiation, is justified by the nature or general structure of the system of which it forms part, it cannot constitute a selective advantage (see, to that effect, judgments of 8 November 2001, A*dria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke*, C‑143/99, EU:C:2001:598, paragraph 42; of 15 December 2005, *Unicredito Italiano*, C‑148/04, EU:C:2005:774, paragraphs 51 and 52; of 6 September 2006, *Portugal* v *Commission*, C‑88/03, EU:C:2006:511, paragraph 52; of 22 December 2008, *British Aggregates* v *Commission*, C‑487/06 P, EU:C:2008:757, paragraph 83; and 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, paragraphs 58 and 60).

77 It is apparent from the case-law that when reference is made to the nature of the 'normal' system, it is the objective attributed to that system which is being referred to, whereas when the general structure of the 'normal' system is mentioned, reference is being made to its rules of taxation (see, to that effect, judgments of 6 September 2006, *Portugal* v *Commission*, C‑88/03, EU:C:2006:511, paragraph 81, and of 7 March 2012, *British Aggregates* v *Commission*, T‑210/02 RENV, EU:T:2012:110, paragraph 84). It must be noted that the concept of objective or nature of the 'normal' tax system mentioned above refers to the basic or guiding principles of that tax system and refers neither to the policies which may, as the case may be, be financed by resources which it provides, nor to the aims which might be sought by establishing derogations from that tax system.

78 In the present case, the Court must consider, first, the issue of the determination of the 'normal' tax system against which the existence of a selective advantage must as a rule be examined.

79 The Court points out, in so far as the Commission refers in particular in the contested decision to 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), that the three taxes the subject of the cases giving rise to that judgment constituted together the general taxation scheme for all companies established in Gibraltar, whereas, in the present case, the measure described by the Commission as State aid is part of the framework of a specific sectoral tax concerning the broadcasting or publication of advertisements. The 'normal' tax system cannot, therefore, in any event, exceed that sector (see, to that effect and by analogy, judgment of 21 December 2016, *Commission* v *Hansestadt Lübeck*, C‑524/14 P, EU:C:2016:971, paragraphs 54 to 63).

80 Hungary correctly maintains that rates of taxation cannot be excluded from the content of a tax

system, as the Commission did (see recital 48 of the contested decision). Whether tax is levied at a single rate or at a progressive rate, the tax rate forms part of the fundamental characteristics of a tax levy's legal regime, just as the basis of assessment, the taxable event and the group of taxable persons do. As the Polish Government argues, the Commission itself states, in point 134 of the Notice on the notion of State aid as referred to in Article 107(1) [TFUE] (OJ 2016 C 262, p. 1), that, 'in the case of taxes, the reference system is based on such elements as the tax base, the taxable persons, the taxable event and the tax rates'. In the absence of the tax rate enabling the structure of the 'normal' system to be determined, it is indeed impossible to examine whether there is a favourable derogation to the advantage of certain undertakings (see, to that effect, judgments of 6 September 2006, *Portugal* v *Commission*, C‑88/03, EU:C:2006:511, paragraph 56, and of 7 March 2012, *British Aggregates* v *Commission*, T‑210/02 RENV, EU:T:2012:110, paragraph 52). That is why if, in the context of the same tax, certain undertakings are subject to different tax rates, including different exemptions, from other undertakings, it is necessary to determine the 'normal' situation relevant, which forms part of the 'normal' system, without whose identification the method referred to in paragraphs 75 and 76 above cannot be applied.

81 It is apparent moreover from the contested decision and the Commission's arguments in defence that the latter sought to identify a 'normal' system involving a tax structure, which it could refer to. It is apparent, in particular, from recitals 52 and 53 of the contested decision that, for the Commission, that system had to be one in which the undertakings' turnover is taxed at a single rate, regardless of its amount. The Commission shows indeed that it regretted that the Hungarian authorities failed to indicate a value for that single rate to it (recital 52 of the contested decision) and it even suggested that the 5.3% rate be chosen for all advertisement turnovers (recitals 91 and 93 of the contested decision). It must, however, be stated that the 'normal' single-rate system referred to by the Commission in some passages of the contested decision is a hypothetical system which could not be sustained. The analysis of whether a tax advantage is selective, which occurs at the second stage of the method referred to in paragraphs 75 and 76 above, must be carried out in the light of the actual features of the 'normal' tax system of which it forms part, identified during the first stage of that method, not in the light of assumptions not sustained by the competent authority.

82 Consequently, the Commission identified, in the contested decision, a 'normal' system which was either incomplete, without any tax rate, or hypothetical, with a single tax rate, which constitutes an error of law.

83 Having regard to the progressive nature of the tax at issue and the absence of differentiated scales of rates for certain undertakings, the only 'normal' system which could be chosen in the present case was, as the Hungarian Government maintains, the advertisement tax in itself, with its structure including its single scale of progressive rates and successive bands.

84 However, even though the Commission erred in the identification of the relevant 'normal' tax system, it must be ascertained whether the conclusion it reached is justified by other grounds in the contested decision which would enable the existence of a selective advantage in favour of certain undertakings to be identified.

85 The Commission did not simply consider that the progressive structure of the taxation at issue derogated from a 'normal' system, in this case identified incompletely or hypothetically, but it also, in essence, based the existence of a selective advantage in favour of undertakings with a low level of turnover on 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), which concerned a tax system in itself discriminatory in the light of the objective it was supposed to pursue, that is to say in the light of its nature. In the present case, the Commission considered that the structure of the

advertisement tax, with its progressive rates and successive bands, was contrary to the objective pursued by that tax and produced in that regard discriminatory effects between undertakings in that sector. The Court must, therefore, examine whether that assessment is well founded.

86 Accordingly, in paragraph 49 of the contested decision, the Commission stated that 'it [wa]s also necessary to evaluate whether the boundaries of that system have been designed by the Member State in a consistent manner or, conversely, in a clearly arbitrary or biased way, so as to favour certain undertakings over others'. In recital 51 of the contested decision, it stated that 'the effect of the progressive rate structure introduced by the Act [wa]s therefore that different undertakings [we]re subject to different levels of taxation (expressed as a proportion of their overall annual advertisement turnover) depending on their size, since the amount of advertisement turnover achieved by an undertaking correlate[d] to a certain extent with the size of that undertaking'. In recital 54 of the contested decision, the Commission also stated that 'the reference system [wa]s therefore [from the outset] selective by design in a way that [wa]s not justified in light of the objective of the advertisement tax, which [wa]s to promote the principle of public burden sharing and collect funds for the State budget'.

87 However, the objective of collecting funds for the budget, mentioned by the Commission, is common to all unallocated taxes, which account for the bulk of the taxation systems, and is insufficient, in itself, to determine the nature of the various taxes, for example according to the type of taxable person concerned, whether the taxes are general or sectoral, or according to a specific objective they may pursue, for example as regards taxes seeking to reduce certain damage to the environment (ecotaxes). Moreover, the progressive structure of a tax rate cannot as such be contrary to the objective of collecting budgetary revenue. Similarly, the objective of promoting public burden sharing is very general and could be put forward for most taxes. It cannot, therefore, be the specific objective of a tax.

88 It is apparent from the documents in the case that the Law on Advertisement Tax established a tax on the turnover of broadcasters or publishers of advertisements, which the Hungarian authorities wished to associate with a redistributive aim, as stated in recital 33 of the contested decision. Since no other specific aim, for example seeking to offset or deter the occurrence of negative effects likely to be caused by the activity at issue was put forward, it must be found that that was the national legislature's objective. In the contested decision, the Commission specifically took the view that a redistributive purpose taking the form of a progressive taxation structure was incompatible with a turnover tax, so as to find that that objective could not be chosen in order to examine whether there were selective advantages.

89 However, contrary to the Commission's submissions, the scheme of the advertisement tax, characterised by a progressive tax structure, was a priori consistent with the Hungarian authorities' objective, even though the tax at issue was a turnover tax. 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 — because fixed unit costs (buildings, property taxes, plant, staff costs for example) and variable unit costs (raw material supplies for example) decrease with levels of activity — and that it may, therefore, have proportionately greater disposable revenue which makes it capable of paying proportionately more in terms of turnover tax.

90 Consequently, the Commission made a further error as regards identifying the advertisement tax's objective, which was indeed to establish sectoral taxation on turnover in accordance with a redistributive purpose, as set out by the Hungarian authorities.

91 At the present stage of the analysis, the issue is whether the Commission was still able, notwithstanding the two errors identified above as regards the definition of the reference system and its objective, to discern correctly elements showing the existence of selective advantages in the advertisement tax taking into account the reference system and that tax's objective mentioned in paragraphs 83 and 88 above, as resulting from the Law on Advertisement Tax. More specifically, the issue is whether the Commission has shown that the tax structure chosen by the Hungarian authorities was contrary to that system's objective.

92 It must be borne in mind that the EU Courts have on numerous occasions ruled on whether there are selective advantages within tax systems, or more generally compulsory contribution systems, which were characterised by rules varying those contributions according to the situation of the person liable. In that regard, the fact that a tax is characterised by a progressive tax structure, deductions, ceilings or other variation mechanisms and different effective levels of taxation result therefrom, depending on the size of the taxpayer's taxable amount or the parameters of the variation mechanisms invoked, does not necessarily convey the existence of a selective advantage in favour of certain undertakings, as is apparent from the case-law referred to in paragraphs 73 to 77 above.

93 That statement may be illustrated in particular by various specific examples related to the question formulated in paragraph 91 above, which show the circumstances in which the existence of a derogation from the application of the 'normal' system may be identified because a measure varying the tax at issue fails to have regard to the nature of that regime, that is to say its objective.

94 Consequently, such a derogation has been identified in the judgments of 8 November 2001, *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke* (C‑143/99, EU:C:2001:598, paragraphs 49 to 55); of 22 December 2008, *British Aggregates* v *Commission* (C‑487/06 P, EU:C:2008:757, paragraphs 86 and 87); of 26 April 2018, *ANGED* (C‑233/16, EU:C:2018:280); 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 85 to 108); and 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, paragraphs 58 to 94, read in conjunction with paragraph 123 thereof), with the first judgment concerning a limitation, the following three judgments exemptions and the last of the judgments reductions in the taxable amount. The Court has thereby held, in the light of the objectives of the taxes concerned — which sought (i) to combat negative externalities, in particular environmental ones, as regards the first three judgments, (ii) the establishment of a general taxation system for all undertakings as regards the following judgment and (iii) the amortisation, for the purpose of corporation tax, of the goodwill resulting from the acquisition of company assets in certain circumstances as regards the last of the judgments — that the advantages which were reserved to some of the undertakings, but not others, in a similar situation in relation to those objectives, were, therefore, selective.

95 It is apparent from those judgments that, regardless of whether the objective of the tax includes a purpose linked to the impact of the activity of the undertakings liable to tax, or the advantage concerns a specific economic sector in relation to the other undertakings subject to tax or a specific form of operating companies, or even whether the advantage is potentially open to any undertaking subject to tax, if that advantage leads to differences in treatment which are contrary to the objective of the tax, it is selective. However, the objective of a tax may itself include a variation seeking to apportion the tax effort or limit its impact. Specific situations which distinguish certain taxable persons from others may also be taken into account without the tax's objective being disregarded.

96 In that respect, in the judgment of 8 November 2001, *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke* (C‑143/99, EU:C:2001:598, paragraphs 33 to 36), referred to in

paragraph 94 above, the Court stated that the partial rebate of taxes on the energy consumed by undertakings, applicable when those taxes exceeded a certain threshold of the net value of what those enterprises produced, did not constitute State aid if it benefited all undertakings subject to those taxes regardless of their activity, while it could lead to different levels of taxation between undertakings consuming the same amount of energy.

97 Similarly, 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, paragraphs 77 to 83), referred to in paragraph 94 above, the Court held that the advantages which could arise from a generalised capping of two taxes on undertakings, not based on profit, to 15% of profit, leading to undertakings with the same tax base potentially paying different tax, were established on the basis of objective criteria irrespective of the choices of the undertakings concerned and were not, therefore, selective.

98 In the judgment of 8 September 2011, *Paint Graphos and Others* (C‑78/08 to C‑80/08, EU:C:2011:550, paragraphs 48 to 62), the Court ruled that, in the context of the tax on company profits, which constituted the 'normal' system in that case, the total exemption enjoyed by cooperative societies did not constitute a selective advantage because they were not in a comparable factual and legal situation to that of commercial companies, provided that it was verified that they did indeed act under the conditions inherent to being a cooperative, implying, in particular, a profit margin considerably lower than that of capital companies.

99 In the judgment of 29 March 2012, *3M Italia* (C‑417/10, EU:C:2012:184, paragraphs 37 to 44), the Court held, taking into account also the specific situation of certain undertakings, that a mechanism for concluding at a standard rate old tax proceedings, available to undertakings meeting objective criteria not placing them in a factual and legal situation comparable to that of other undertakings, did not entail a selective advantage, even if it could lead to the beneficiaries of that mechanism paying less tax, all other things being equal moreover, than other undertakings.

100 Similarly, in the judgment of 26 April 2018, *ANGED* (C‑233/16, EU:C:2018:280), referred to in paragraph 94 above, the Court stated that, in the context of a tax on retail establishments, whose basis of assessment was essentially constituted by the sales area and which sought to offset negative externalities for the environment and town and country planning, the 60% reduction or total exemption enjoyed by establishments carrying on certain activities and those whose sales surface was below a given threshold did not constitute State aid if it was verified that those various establishments were indeed in a different situation from those of the other establishments subject to tax, having regard to the impacts which the tax at issue sought to correct and offset, that is to say in the light of the objectives of that tax.

101 Those examples confirm that there are taxes whose nature does not preclude them from being accompanied by variation mechanisms, which may extend as far as exemptions, without those mechanisms leading, however, to selective advantages being granted. In short, there is no selectivity if those differences in taxation and the advantages which may flow therefrom, even if justified only by the purpose governing the apportionment of tax between taxpayers, stem from the straightforward application, without derogation, of the 'normal' system, if comparable situations are treated comparably and if those variation mechanisms do not misconstrue the objective of the tax concerned. Similarly, special provisions laid down for certain undertakings by reason of situations specific to them, causing them to benefit from a variation in, or even an exemption from, tax, must not be analysed as constituting a selective advantage if those provisions do not contravene the objective of the tax in question. In that regard, the fact that only taxpayers meeting the conditions for the application of a measure can benefit from the measure cannot, in itself, make it into a

selective measure (see judgment of 21 December 2016, *Commission* v *World Duty Free Group and Others*, C‑20/15 P and C‑21/15 P, EU:C:2016:981, paragraph 59 and the case-law cited). Such mechanisms fulfil the condition of complying with the nature and general structure of the system of which they form part, referred to in paragraph 76 above.

102 On the other hand, if undertakings in a comparable situation in the light of the objective of the tax or the purpose justifying a variation thereof are not treated equally in that regard, that discrimination gives rise to a selective advantage which may constitute State aid if the other conditions laid down in Article 107(1) TFEU are met.

103 Accordingly, in particular, progressive tax structures, including significant reductions to the basis of assessment, which are not exceptional in the Member States' tax systems, do not in themselves imply the existence of State aid. In its Notice on the notion of State aid (see paragraph 80 above), the Commission states in that regard, in point 139, that the progressive nature of income tax may be justified by its redistributive purpose. However, there is no basis for limiting that type of assessment, as the Commission did in recitals 68 and 69 of the contested decision, to taxes on income or those seeking to offset and deter certain negative effects likely to be caused by the activity concerned, and to exclude that assessment for taxes applying to the undertakings' activity, not their net revenue or profit. It is not apparent from the case-law referred to in paragraphs 73 to 77 above that, in order for a measure varying a tax not to be characterised as a selective advantage, a Member State could have recourse only to variation criteria limited to certain aims, such as the redistribution of wealth or the offsetting or deterrence of negative externalities. What is necessary to that end is that the variation wished must not be arbitrary, contrary to what occurred in the case giving rise to the judgment of 22 December 2008, *British Aggregates* v *Commission* (C‑487/06 P, EU:C:2008:757), mentioned in paragraph 94 above, that it must be applied in a non-discriminatory manner and must remain consistent with the objective of the tax concerned. For example, the variation mechanisms referred to in paragraphs 96, 97 and 99 above, which were not held to be selective by the Court, did not reflect a taxation purpose proportional to negative externalities, nor indeed a redistributive purpose, but other aims. In addition, as pointed out in paragraph 89 above, it cannot be excluded that a redistributive purpose may also justify the progressivity of a turnover tax, as the Government of Hungary rightly maintains in the present case. A redistributive purpose may indeed even justify a total exemption for some undertakings as shown by the case mentioned in paragraph 98 above.

104 Consequently, as regards a turnover tax, a variation criterion taking the form of progressive taxation above a certain threshold — even if that threshold is a high one — which may reflect the wish to tax an undertaking's activity only when that activity reaches a certain level, does not in itself imply the existence of a selective advantage.

105 It follows, therefore, from paragraphs 91 to 104 above that the Commission was not entitled to infer the existence of selective advantages accompanying the advertisement tax solely from the progressive structure of that new tax.

106 However, if it were proven by the Commission in the contested decision that the progressive taxation structure actually chosen was adopted in a manner which largely deprives the objective of the tax in question of its substance, it could be considered that the advantage which may be derived by undertakings benefiting from zero or low taxation compared with other undertakings is selective.

107 It must, therefore, be further ascertained whether the Commission provided such proof in the contested decision.

108 In that regard, in recital 60 of the contested decision, the Commission stated that the data on the tax advance payments submitted by the Hungarian authorities on 17 February 2015 showed that the two highest tax brackets, 30% and 40% applied only to one undertaking in 2014 and that that undertaking paid approximately 80% of the tax advances. It found that those figures demonstrated the concrete effects of the difference in treatment of undertakings under the Law on Advertisement Tax and the selective nature of its progressive rates.

109 However, that finding of fact was not accompanied by reasoning other than that directed at the very principle of progressive taxation and is therefore, in any event, insufficient to amount to reasoning capable of establishing that the progressive structure chosen in the present case for the tax concerned was incompatible with its objective.

110 In addition, the Commission did indeed state in the contested decision that the progressive taxation structure of the advertisement tax led to undertakings in a comparable factual and legal situation being treated differently, in other words that it led to discriminatory treatment. However, it relied principally in that regard only on the fact that the undertakings' average effective rate and in the marginal rate of tax had to vary according to their turnover and size (recitals 50, 51, 58 and 59 of the contested decision). That variation in the average effective rate and marginal rate according to the size of the taxable amount is an integral part of any taxation system with a progressive structure and such a system is not, as set out in paragraph 104 above, as such and by virtue of that fact alone, such as to give rise to selective advantages. Moreover, when a tax's progressive taxation structure reflects the objective pursued by that tax, it cannot be considered that two undertakings with a different taxable amount are in a comparable factual situation in the light of that objective.

111 Consequently, having regard to the Commission's errors as regards (i) the definition of the 'normal' tax system, (ii) its objective and (iii) the inherent existence, in its view, of selective advantages in a structure of progressive taxation on turnover, the Commission failed to prove, in the contested decision, that there were selective advantages, and thus State aid, on the basis of the progressive structure of the advertisement tax, whether in relation to its initial version or that resulting from the 2015 amendment.

The reduction of the taxable amount as a result of the deductibility in 2014 of 50% of the losses carried forward for loss-making undertakings in 2013

112 According to Hungary, the reduction of the taxable amount in question does not entail a selective advantage for any undertaking. It is the equivalent of the reduction for losses over earlier years from the taxable amount of the corporation tax to which profit-making companies in 2013 could resort in any event. Consequently, the reduction of the taxable amount for losses existed without distinction for any person subject to the advertisement tax, whether profit making or not in 2013. The possibility of reducing the taxable amount of the new advertisement tax reflected the concern to limit for the first year of taxation the burden of undertakings already loss making, as explained by the Hungarian authorities at the stage of the Commission's preliminary assessment of that tax, as stated in recital 33 of the contested decision. In that regard, Hungary submits that the loss-making undertakings in 2013 were not in a comparable situation to that of profit-making undertakings in 2013, as regards their tax obligations for the 2014 financial year.

113 In addition, Hungary submits that the cases giving rise to the judgments 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), and of 21 May 2015, *Pazdziej* (C‑349/14, EU:C:2015:338), vindicate its position. In the second judgment, the Court held that legislation which, in the context of a tax having a basis of assessment other than income, implemented taxation which nonetheless

took income into account, was acceptable in the light of EU law. Hungary infers from this that it cannot be precluded that a rule may be established allowing an advantage based on criteria not linked to the taxable amount of the tax concerned to be conferred, without, however, granting State aid. The first judgment also illustrates the possibility of varying a tax on the basis of criteria not linked to the taxable amount and thus enables it to be argued that the reduction in the taxable amount at issue amounts to a general tax measure, because it applies without distinction to all undertakings according to an objective criterion linked to their profitability.

114 In response to those arguments, the Commission states that the examination of selectivity in relation to the reference system must be carried out in relation to the advertisement tax, not in the light of the Hungarian tax system as a whole taking into account corporation tax. The measure at issue confers a selective advantage, because it enables the taxable amount of the advertisement tax to be reduced and, thus, the tax burden of the undertakings concerned compared with those which are unable to benefit from that reduction. In that regard, the Commission contends that the deduction of pre-existing losses as at the time of enactment of the Law on Advertisement Tax gives rise to selectivity, first, because it cannot be considered an integral part of the reference system, as set out in recital 55 of the contested decision and, secondly, because it may favour certain undertakings having considerable losses carried forward, in derogation from the reference system, as set out in recitals 62 to 64 of the contested decision. The introduction of the advertisement tax during the course of the year, which Hungary, with a concern for tax moderation the first year, also relies on in order to justify the measure, did not only affect the financial plans of loss-making taxable persons in 2013, but also the plans of those that were profit making that year. Both groups of undertakings are in a comparable situation in the light of the tax's objective. In addition, the Commission states that, contrary to profit-based taxes, the advertisement tax is based on the taxation of turnover. Costs, and therefore losses, are not generally deductible from such a basis of assessment, as is set out in recital 62 of the contested decision.

115 According to the Commission, the judgments relied on by Hungary do not support the latter's arguments. In particular, the Commission explains that the Hungarian advertisement tax system is not similar to the French residence tax system at issue in the judgment of 21 May 2015, *Pazdziej* (C‑349/14, EU:C:2015:338), which, in the Commission's view, was a wealth tax. Since the basis of assessment of the advertisement tax is turnover, the deduction of losses carried forward is not linked to that basis of assessment but to a factor totally extraneous to it, profit. The internal logic of the tax does not, therefore, justify the deductibility of losses.

116 The Commission adds that, in any event, the selectivity of that measure is shown by the fact that the deduction of the losses was limited, in terms of time, to the tax payable in 2014, and notes that it was restricted, in terms of persons, solely to loss-making undertakings in 2013.

117 The Court must reject, first of all, Hungary's arguments which refer to the possibility in parallel to that at issue, for profit-making undertakings in 2013 to deduct their earlier losses from the taxable amount of the tax on profits. Those arguments are ineffective for the purposes of determining whether there is a selective advantage within the only reference system to be taken into account, namely the advertisement tax with its successive bands (see, to that effect, judgment of 21 December 2016, *Commission* v *Hansestadt Lübeck*, C‑524/14 P, EU:C:2016:971, paragraphs 54 and 55). The question is solely whether the reduction in the taxable amount for non-profitmaking undertakings in 2013 introduces into that system an element contrary to its objective and discriminatory, conferring a selective advantage, as the Commission maintains following its analysis in recitals 62 to 65 of the contested decision.

118 In that regard, in the light of what has been stated in paragraphs 95 and 101 above, it must be borne

in mind that even if not stemming from the actual nature of the reference tax system, that is from its objective, certain tax variations, taking into account specific situations, must not be analysed as constituting a selective advantage if those provisions do not contravene the objective of the tax in question and are not discriminatory.

119 In the present case, first, it is incorrect to consider, as the Commission essentially does in recital 62 of the contested decision, that the reduction in the taxable amount could as a matter of principle confer a selective advantage on the ground that, since taxation of turnover is concerned, 'costs are normally not deductible from the tax base of a turnover tax'.

120 As noted in paragraph 97 above, the Court held 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, paragraphs 77 to 83), that the capping of taxation established on the basis of objective criteria irrespective of the choices of the undertakings concerned, in other words of random events, was not selective, including where those criteria were unconnected with the basis of assessment in question, as is apparent in particular from paragraphs 81 and 83 of that judgment. It may be observed that one of the criteria conferring entitlement to the cap on the tax examined and held not to be selective in that judgment was precisely not having generated any profit, while the basis of assessment for the tax concerned was different. The same should logically apply in the case not of a cap, but of a reduction in the basis of assessment, as in the present case. In addition, the concern which the Hungarian legislature sought to address, which the Commission described in the contested decision and is referred to in paragraph 112 above, cannot be considered contrary to the advertisement tax's objective mentioned in paragraph 90 above. The latter includes a redistributive purpose with which the reduction in the basis of assessment chosen in order to reduce the tax burden on undertakings that were loss making the tax year preceding the year of taxation is consistent.

121 Secondly, it is apparent also from 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, paragraphs 77 to 83), that the Commission incorrectly maintains, in recital 63 of the contested decision, that the measure introduces in the present case an arbitrary differentiation between different groups of undertakings in a comparable legal and factual situation in so far as the possibility of deducting from the taxable amount of the advertisement tax for 2014 50% of the losses carried forward was restricted to undertakings not having generated profits in 2013.

122 The distinguishing criterion chosen by the Hungarian authorities of not having generated profits in 2013 is objective. It is whether the undertakings concerned met that criterion which is random. Lastly, in the light of the Hungarian legislature's objective of introducing sectoral taxation with a redistributive purpose, that criterion, which is intended to ensure in the first year of the advertisement tax's introduction a moderate tax burden for taxable persons in an unfavourable situation, establishes a difference in treatment between undertakings not in a similar situation: the profit-making undertakings in 2013 and undertakings not having made profits that year. It may indeed be found that the distinguishing criterion chosen by the Hungarian legislature can, in the light of certain specific situations of undertakings with losses of the same order for 2013 and the preceding years, result in the existence of 'threshold' effects if they were also close to equilibrium in 2013, but such effects are inherent in numerous variation mechanisms which necessarily involve limits, and it cannot be inferred from that fact alone that such mechanisms confer selective advantages.

123 Lastly, the fact that the advantage at issue was laid down only for the tax for the first tax year in which the tax at issue was applied, not the following tax years, cannot support the finding that undertakings which benefited from that advantage that first year were assisted compared with

undertakings which could have benefited from the same advantage had it been retained for the following years. The legislature is not required to prolong a tax advantage and, in that regard, the situations between two different tax years cannot be compared. Moreover, the Commission did not defend that idea in the contested decision, but only advanced it in the rejoinder.

124 It must, therefore, be concluded that the Commission was not correct to identify a discriminatory element contrary to the advertisement tax's objective, constituting a selective advantage characterising State aid, in the deduction from the basis of assessment — for the first tax year of the advertisement tax's application — of 50% of the losses carried forward for undertakings not making a profit in 2013.

125 It is apparent from all the foregoing that the contested decision must be annulled in its entirety, and there is no need to examine the Hungarian Government's other pleas in law and arguments.

Costs

126 Under Article 134(1) of the Rules of Procedure of the General Court, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has been unsuccessful, it must be ordered to pay Hungary's costs, in accordance with the form of order sought by the latter, including those relating to the proceedings for interim measures.

127 Under Article 138(1) of the Rules of Procedure, the Member States which have intervened in the proceedings are to bear their own costs. The Republic of Poland must, therefore, bear its own costs.

On those grounds,

THE GENERAL COURT (Ninth Chamber)

hereby:

1. **Annuls Commission Decision (EU) 2017/329 of 4 November 2016 on the measure SA.39235 (2015/C) (ex 2015/NN) implemented by Hungary on the taxation of advertisement turnover;**

2. **Orders the European Commission to bear its own costs and to pay those incurred by Hungary, including those relating to the proceedings for interim measures;**

3. **Orders the Republic of Poland to bear its own costs.**

Gervasoni Madise da Silva Passos

Delivered in open court in Luxembourg on 27 June 2019.

[Signatures]

* Language of the case: Hungarian.