Reports of Cases

OPINION OF ADVOCATE GENERAL
KOKOTT
delivered on 15 October 2020[1]

Case C-596/19 P

European Commission
v

Hungary

(Appeal – State aid – Article 107(1) TFEU – Turnover-based advertisement tax – Advantage and selectivity – Standard of review in establishing the reference system – Consistency of the reference system – Advantage in respect of a progressive rate – Standard of review in the case of an exception to the reference system – Advantage arising from the possibility of using losses in the first tax year – Difference in treatment – Justifications for differences in treatment – Transitional regime as aid)

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, Hungary 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). For the first tax year, as a transitional measure, the law provided for the apportionment of any losses from the previous year.

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 advertisement tax in Hungary are similar in this respect, the Commission considers the Hungarian tax to constitute State aid for smaller undertakings, which are 'taxed at too low a level'. In addition, the possibility of using losses in the year in which the tax was introduced favours undertakings which were loss-making in the previous year compared with undertakings which were not loss-making. The Commission therefore requested Hungary to recover the connected aid and, by subsequent assessment, to levy the tax at a rate of 5.3%. Hungary thereupon abolished the advertisement tax with retroactive effect but, like Poland in a parallel case,[4] considers the Commission's action to be an infringement of its fiscal autonomy.

1 Original language: German.

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).

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.

4 The proceedings are pending before the Court as Case C-562/19 P.

3. The present appeal proceedings thus not only raise the question whether a progressive business tax can actually constitute a selective advantage for the purposes of Article 107(1) TFEU. 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 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.[5] 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.

5. The General Court[6] did not consider the general Hungarian tax law to be selective advantage for other undertakings, either in the progressive rate or in the possibility of using losses. This is contested by the Commission in its appeal and the Court of Justice must now examine whether it constitutes aid.

II. Legal framework

6. 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').

III. Background to the dispute

7. On 11 June 2014, Hungary 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'). That tax was applied in addition to existing business taxes, in particular corporation tax. During the examination of the Law on advertisement tax carried out by the Commission as part of the monitoring of State aid, the Hungarian authorities stated that the purpose of that tax was to promote the principle of public burden sharing.

8. 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 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.

5 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).

6 Judgment of 27 June 2019, *Hungary* v *Commission* (T-20/17, EU:T:2019:448).

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).

9. 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).

10. 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 (hereinafter referred to as 'the possibility of using losses').

11. By decision of 12 March 2015, 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 possibility of using losses gave rise to State aid. In that decision, the Commission considered that the progressive tax rate differentiated between undertakings with high advertisement revenues (large undertakings) and undertakings with low advertisement revenues (small undertakings). A selective advantage was thereby granted to the latter based on their size. The Commission was also of the view that the possibility of using losses for undertakings that were not profit-making in 2013 granted a selective advantage constituting State aid.

12. In the context of that same decision, the Commission issued a suspension injunction in respect of the measure at issue. Subsequently, Hungary amended the advertisement tax by Law No LXII of 2015, enacted on 4 June 2015. The scale of six progressive rates from 0 to 50% was replaced 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.

13. 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 [8] ('the negative decision').

8 OJ 2017 L 49, p. 36.

14. In Article 1 of the contested decision, the Commission concluded that the tax system composed of progressive tax rates and provisions prescribing a possibility of using losses 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. This had been unlawfully put into effect by Hungary in breach of Article 108(3) TFEU. It was also incompatible with the internal market in the light of Article 107 TFEU. In Article 4 of the negative decision, the Commission ordered Hungary to recover from the beneficiaries the aid declared incompatible with the internal market.

15. In that regard, the Hungarian authorities were to recover from the undertakings with advertisement turnover in the period from the entry into force of the advertisement tax in 2014 to the date of either 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.

16. 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. For the future, for example from 2017, Hungary would then be able to introduce a tax system which was not progressive and did not differentiate between economic operators subject to the tax.

17. In essence, the Commission justified characterising the system at issue as State aid in the following manner:

18. Since the Law on advertisement tax was enacted, Hungary waived resources it would have had to collect from undertakings with a lower level of turnover (smaller undertakings) if they had been subject to the same level of tax as undertakings with a higher turnover (larger undertakings).

19. The Commission noted that, just like positive benefits, measures which mitigated the charges normally borne by 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.

20. The possibility of using losses under the Law on advertisement tax for undertakings that were not profit-making in 2013 also constituted an advantage. It reduced their tax burden compared to undertakings that could not benefit from that deduction.

21. In examining selectivity, 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 (1) and there must be no element that would provide a selective advantage to certain undertakings (2).

22. 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.

23. In addition, the Commission considered that the possibility of using losses only for undertakings that were not profit-making in 2013 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. The measure introduced an arbitrary distinction between two groups of undertakings that are in a comparable legal and factual situation, namely undertakings that had losses carried forward, and were not profit-making in 2013 and undertakings that were profit-making in 2013. The deduction of losses already existing at the time of the enactment of the Law on advertisement tax entailed selectivity because the allowance of that deduction favoured certain undertakings with substantial losses carried forward.

24. 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. Accordingly, 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.

25. On 16 January 2017, Hungary brought an action against the negative decision. The application for suspension of operation of the negative decision made by Hungary on the same date was dismissed by order of 23 March 2017.[9]

26. On 16 May 2017, Hungary enacted Law No XLVII of 2017 amending the Law on advertisement tax. In essence, that law repealed the advertisement tax with retroactive effect.

27. By decision of 30 May 2017, the President of the Ninth Chamber of the Court granted the Republic of Poland leave to intervene in support of Hungary.

28. In the action brought by Hungary, the General Court annulled the negative decision by the Commission by the judgment under appeal of 27 June 2019.

IV. Procedure before the Court

29. On 6 August 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 second and third pleas raised by Hungary 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.

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

– dismiss the appeal as unfounded;

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

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

9 Order of 23 March 2017, *Hungary* v *Commission* (T-20/17 R, not published, EU:T:2017:203).

V. The grounds of appeal

32. 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 Hungarian advertisement tax for lower-turnover undertakings. According to the second ground of appeal, the General Court misinterpreted Article 107(1) TFEU because, contrary to the view taken by the General Court, the possibility of using losses constitutes a selective advantage.

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

33. 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 1.a), examined the comparability of the undertakings in the light of a non-fiscal objective (see 2.a) and, in examining selectivity, took into consideration an objective that was not necessarily connected with the advertisement tax (see 2.b).

34. 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.

35. 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)

36. 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 (evidently at a level of 5.3%), the General Court erroneously had regard to the progressive rate chosen by the Hungarian legislature.

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).

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).

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

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

37. 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.

38. 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]

39. 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]

40. 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 HUF 0.5 billion or, in the amended version, HUF 100 million) and all undertakings also 'profit' from the reduced rates of 1% to 30% for the portion of annual turnover between HUF 0.5 billion and HUF 20 billion, 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?

41. 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 or at a level of 5.3%). In the view of the Hungarian legislature, 'normal' taxation is a turnover-based income tax with a progressive rate from 0% to just below 5.3% in the amended version. The different average rates resulting from the progressive scale are the inevitable consequence and thus constitute normal taxation. Hungary relies on its fiscal sovereignty in this regard.

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.).

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').

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).

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).

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).

42. 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]

43. 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.

44. 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 …'.

45. 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 advertising undertakings which is progressive in nature and the basis of assessment of which is turnover.

46. The national legislature is thus able to determine above all the object of taxation, the basis of assessment and the rate structure. Hungary availed itself of that power in this instance by establishing a turnover-based income tax for advertising undertakings with a progressive average rate from 0% to just below 5.3% (which stems, in the amended version, from the allowance and a proportional rate). This is not precluded, in principle, by the rules on State aid.

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

47. 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.

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).

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).

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).

21 OJ 2016 C 262, p. 1.

48. 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]

49. 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.

50. 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]

51. 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 correctly that 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]

52. 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 Hungarian advertisement tax

53. 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]

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).

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).

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.

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).

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).

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.).

54. 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.

55. Such inconsistency in the Hungarian advertisement tax was rightly found by the General Court not to exist. Thus, it asserts in paragraph 78 et seq. of the judgment under appeal that the normal system was the Hungarian 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 89). This followed from the redistributive purpose associated with a progressive rate (paragraph 88). Consequently, a selective advantage could not be inferred solely from the progressive structure (paragraph 105). Because the Commission did not assert or demonstrate any other inconsistency (paragraph 106 et seq.), the law in question could not be regarded as State aid.

56. I am not convinced by the arguments against this view put forward by the Commission in the appeal. [28]

(i) Turnover-based income tax

57. 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.

58. 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').

59. 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 Hungarian 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.

60. 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 Hungarian advertisement tax and the planned EU digital services tax are no different in this respect.

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).

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.'

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.

(ii) Progressive rate

61. 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.

62. 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.

63. 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.

64. 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]

65. 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.

66. Moreover, the examples of taxation which the Commission cites and regards as unfair do not demonstrate any inconsistency. Thus, the Commission maintains that the Hungarian progressive rate is not an appropriate means because taxation is 155 times higher where turnover is 10 times higher. This example – which would seem to refer to the initial version of the Hungarian advertisement tax – 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]

67. Aside from this, the criterion of appropriateness is in any case the wrong criterion. As was stated above (point 59), 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 Hungarian advertisement tax nevertheless implements the progressive tax structure consistently.

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).

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

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.'

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 450 million pays EUR 15 million in tax. Turnover that is 10 times higher within the EU (EUR 500 million rather than EUR 50 million) results in an infinitely higher tax burden.

(b) Conclusion

68. 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

69. 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.

70. 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]

71. 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]

72. 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.

73. 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 47 et seq., it misunderstands the statements made there. In that judgment the Court certainly did not create a notional reference framework itself.

74. 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.

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

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).

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).

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

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

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

75. 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 84 and 85 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 47 et seq.), no further examination of the other parts of the first ground of appeal is necessary.

76. The General Court did, however, further examine whether aid nevertheless exists. The Court possibly assumed in paragraphs 84 and 85, 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

77. 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).

78. 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.

79. 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 53 et seq.) – they are not in a legally and factually comparable situation.

80. 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.

81. 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.

82. The General Court stated in this regard in paragraph 89 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.

83. 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]

84. 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.

85. 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

86. 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.

87. 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/HUF 50 000 and a retailer with a monthly net turnover of, for example, EUR/HUF 200 million to be in a comparable situation.

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 et seq. – 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).

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).

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).

88. 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]

89. In the present case, the General Court did not take into consideration any incorrect justifications. In paragraphs 89 and 90 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.

90. This cannot be criticised from a legal point of view. Nor can it be stated that the progressive tax scale of the Hungarian advertisement tax 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.

91. 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.

92. The Commission's criticism that in paragraph 106 of the judgment under appeal the General Court disregarded the burden of proof is also ineffective. It is based on the incorrect view that turnover-based progressive taxes are per se aid requiring justification.

3. Conclusion

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

B. Second ground of appeal: misinterpretation of Article 107(1) TFEU in respect of the possibility of using losses in the first year

94. By the second ground of appeal, an error in law in the application of Article 107(1) TFEU is alleged on the ground that the General Court wrongly did not consider the possibility of using losses in the first year to be a selective advantage.

95. The General Court held in paragraph 118 of the judgment under appeal that certain tax variations, taking into account specific situations, must not be analysed as constituting a selective advantage. This applies even if they do not stem from the actual nature of the reference tax system, that is from its objective, if those provisions do not contravene the objective of the tax in question and are not discriminatory.

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.).

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

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.

96. This is essentially consistent with the case-law of the Court of Justice, according to which, in substance, a tax regime is not selective if it is applicable without distinction to all economic operators.[46] Nor can the selectivity of the tax regime be inferred from the fact that it grants an advantage only to undertakings satisfying its conditions, in this case the existence of losses in the previous year.[47]

97. Rather, taking the correct reference framework as the basis, there must be unequal treatment of undertakings in a comparable situation which cannot be justified.[48] 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,[49] while plausible non-fiscal reasons can also justify a corresponding fiscal differentiation.[50]

1. Part of or exception to the reference system?

98. In so far as a general tax law is at issue, difficulties arise above all in determining the reference framework (often also referred to as the reference system), as the tax in question has only just been created by the law to be reviewed. In the Commission's view, turnover-based taxation without the possibility of using losses must be regarded as the reference system. By contrast, Hungary and also, it would appear, the General Court regard the newly introduced law itself as the reference system, which thus consists in a turnover-based tax with the possibility of using losses in the first year of the newly introduced tax.

99. In the latter case there would be only a review of the consistency of the national tax law (for details, see above under point 53 et seq.). In the former case it is crucial whether loss-making taxable persons and non-loss-making taxable persons are in a comparable situation and, if so, whether the Member State concerned can show that the exception is justified. In the Commission's view, only certain reasons are available to it as possible justifications.

100. However, the question whether the possibility of using losses is to be considered as part of the taxation system or as an exception to it cannot be answered sufficiently clearly. In a profit-based income tax system, a possibility of using losses would seem to be considered unquestionably as part of the taxation system. In turnover-based income taxation, as the Commission argues, it could certainly be regarded as an exception to the system. On the other hand, the Hungarian legislature took that 'exception' as the basis for the first year of its turnover-based income tax system. It is thus a priori also a part of the system.

46 See, inter alia, 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 53 et seq.); of 9 October 2014, *Ministerio de Defensa and Navantia* (C-522/13, EU:C:2014:2262, paragraph 23); of 29 March 2012, *3M Italia* (C-417/10, EU:C:2012:184, paragraph 39); 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 73); and of 8 November 2001, *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke* (C-143/99, EU:C:2001:598, paragraph 35).

47 See to that effect, in particular, judgments of 19 December 2018, *A-Brauerei* (C-374/17, EU:C:2018:1024, paragraph 24); of 28 June 2018, *Andres (Insolvenz Heitkamp BauHolding)* v *Commission* (C-203/16 P, EU:C:2018:505, paragraph 94); 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 of 29 March 2012, *3M Italia* (C-417/10, EU:C:2012:184, paragraph 42).

48 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, 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).

49 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).

50 See 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.), where this was acknowledged with regard to environmental and town and country planning reasons in connection with a tax on retail sales area.

101. The underlying reason for the national regime at issue is ultimately to alleviate the effects of a turnover-based income tax for undertakings which, despite high turnovers in the year in which the tax was introduced, were loss-making in the previous year and are now confronted in the current year with a new non-profit-related tax. As Hungary also asserts, this is nothing more than a transitional measure to alleviate the particular effects of the advertisement tax for the first tax year, for reasons of proportionality, in particular because the advertisement tax was introduced in the current year.

102. Upon closer inspection, this transitional measure even takes the Commission's concerns into account to some extent. The Commission consistently puts forward the argument, in connection with the first ground of appeal (progressive rate), that a turnover-based tax is inappropriate for taxing taxable persons according to financial capacity because even undertakings with high turnovers might have only small profits and still be required to pay taxes. A lack of capacity in the previous year is taken into consideration proportionally in the first year of the tax.

103. In essence, a possibility of using losses which is confined to the first tax year achieves coordination, for a limited period of time (transitionally), between two tax systems, namely the profit-based corporate/income tax and the turnover-based (non-profit-related) advertisement tax. However, I find it hard to describe coordination, provided for in law, between two tax systems as an exception to a reference system. Rather, it is part of the (coordinated) reference system.

104. Such coordination also exists in the corporate tax system in Hungary. As Hungary has asserted, the advertisement tax can be deducted from the corporate tax base. Naturally, only profit-making undertakings 'profit' from this. It is obviously not correct, however, to understand this as an exception in the corporate tax system requiring justification. It is unclear to me why the situation should be different for a coordinating measure in the system of the advertisement tax, even if it has effect for only one year. In addition, as Hungary asserts, the possibility of using losses is intended to compensate for the 'disadvantage' suffered by loss-making undertakings which, in the absence of profit, could not avail themselves of the advertisement tax to offset profits in the context of corporate tax or income tax.

105. Because the decision whether the possibility of using losses is now to be considered as part of the reference system or as an exception to the reference system depends crucially on the understanding of national law and also to a large extent on which level is taken as the basis, the scope of the review of a selective advantage should not be contingent on that classification. Rather, the review should be carried out in a uniform manner so as to leave this distinction open.

2. Review of consistency also for exceptions to the reference system

106. I therefore propose that the Court conduct a single review of consistency for general rules within a tax law in the light of the Member States' fiscal sovereignty in both cases (whether now as part of the just created reference system or as an exception within the reference system). General differentiations, which are applicable without distinction to all [51] and cover only taxable persons that also fulfil the factual preconditions [52] and are part of a consistent tax system cannot normally constitute a selective advantage. [53] In this respect, general differentiations in a tax law constitute selective measures only if they have no rational basis in the light of the objective of the law and are thus not explainable.

51 See 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 53 et seq.); of 9 October 2014, *Ministerio de Defensa and Navantia* (C-522/13, EU:C:2014:2262, paragraph 23); of 29 March 2012, *3M Italia* (C-417/10, EU:C:2012:184, paragraph 39); 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 73); and of 8 November 2001, *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke* (C-143/99, EU:C:2001:598, paragraph 35).

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

53 See my Opinion in *Tesco-Global Áruházak* (C-323/18, EU:C:2019:567, point 150).

107. On the basis of this lower standard of review, a selective advantage is possible only where, first, that measure (here the possibility of using losses) introduces differentiations between economic operators which are no longer plausible. That would be the case, for example, if the taxable persons, in the light of the objective attributed to the tax system of the Member State concerned, are in a comparable factual and legal situation. [54]

108. Even if that condition is fulfilled, second, the favouring can be justified, according to settled case-law, by the nature or general scheme of the system of which it is part. This must be considered in particular if a tax regime results directly from the basic or guiding principles of the national tax system, [55] which, on the basis of the fiscal autonomy of the Member State in the context of the review of consistency, simply have to be plausible. Furthermore, 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. [56]

109. The General Court ultimately carried out such a review of consistency. It correctly examined whether the regime is discriminatory or whether it is explainable in the light of the tax system (and not therefore contrary to the objective of the tax in question). Since the fact that losses existed in the previous year is an objective criterion and undertakings with losses and undertakings with profits in the previous year are different in terms of the ability to bear additional non-profit-related taxation, the General Court rightly rejected a selective advantage in paragraph 122 of the judgment under appeal.

110. On the other hand, in so far as the Commission seeks to infer the discriminatory effect solely from the fact that when the law was enacted in mid-2014 it was already clear which undertakings were loss-making in 2013, that approach is not convincing. First, it presupposes that the relevant tax returns had to be submitted by that date in Hungary, which depends on the national law of tax procedure and falls outside the scope of the knowledge of the Court. Second, the legislature would have had to have known those figures, which is fairly unlikely. There is nothing in the entire procedure to indicate that the regime was specifically intended to 'favour' certain undertakings.

111. The Commission's argument that a use of losses is incompatible with a non-profit-related, turnover-based tax is likewise unconvincing. A transitional measure which, for reasons of proportionality, alleviates the particular effects of the non-profit-related advertisement tax in respect of the first tax year for undertakings which were loss-making in the previous year is not incompatible. As has already been explained (see above, point 103 et seq.), it is a matter of plausible coordination of two taxation systems during a transitional period.

54 See judgments of 21 December 2016, *Commission* v *Aer Lingus and Ryanair Designated Activity* (C-164/15 P and C-165/15 P, EU:C:2016:990, paragraph 51); 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); of 21 December 2016, *Commission* v *Hansestadt Lübeck* (C-524/14 P, EU:C:2016:971, paragraphs 49 and 58); of 9 October 2014, *Ministerio de Defensa and Navantia* (C-522/13, EU:C:2014:2262, paragraph 35); of 18 July 2013, *P* (C-6/12, EU:C:2013:525, paragraph 19); of 29 March 2012, *3M Italia* (C-417/10, EU:C:2012:184, paragraph 42); and of 8 September 2011, *Paint Graphos* (C-78/08 to C-80/08, EU:C:2011:550, paragraph 49).

55 See 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, paragraphs 65 and 69); see also to that effect, inter alia, judgments of 9 October 2014, *Ministerio de Defensa and Navantia* (C-522/13, EU:C:2014:2262, paragraphs 42 and 43); 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 145); of 8 November 2001, *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke* (C-143/99, EU:C:2001:598, paragraph 42); and of 2 July 1974, *Italy* v *Commission* (173/73, EU:C:1974:71, paragraph 33).

56 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.).

112. To infer discrimination from the fact that losses were used only in the first year of the advertisement tax and not in further years, as the Commission attempts to do, represents a failure to understand the purpose of a transitional measure. A transitional measure is intended per se for a limited period. In addition, in paragraph 123 of the judgment under appeal the General Court rightly held that the principle of periodicity which applies in tax law certainly permits different regimes for different tax periods. The situations prevailing in different tax periods are thus not comparable with one another.

113. The Commission's view that undertakings with profits and undertakings with losses in the previous year are comparable in every respect in the light of the purpose of the advertisement tax is also unconvincing. As was explained above under point 55 et seq., the objective of the advertisement tax, which is progressive in nature, consists in a degree of redistribution of the tax burden according to financial capacity, which is determined on the basis of turnover. The presumption made by the Hungarian legislature that, because of a lower level of liquidity or less financial reserves, undertakings with losses in the previous year are more severely affected by a non-profit-related tax than undertakings with profits in the previous year is plausible. In the view of the Member State – which is not manifestly incorrect here – they are not in a legally and factually comparable situation.

3. In the alternative: justification of the possibility of using losses

114. Furthermore, a difference in treatment by reason of the different basic situation of the two comparison groups in the first year of the advertisement tax would also be justified.

115. As the Court held in *World Duty Free Group*,[57] only the examination of the difference in treatment in question in the light of the objective pursued by the legislation is decisive. However, consideration must be given not only to the objectives expressly mentioned in the national legislation, but also to the objectives which can be inferred from the national legislation by way of interpretation.[58] Otherwise, regard would be had solely to the legislative technique, even though, in the rules on State aid, State interventions are to be assessed on the basis of their effects, independently of the techniques used.[59]

116. The alleviation of the effects of the newly introduced non-profit-related tax on undertakings with no profits in the previous year is objectively justified in the light of the objectives of the advertisement tax. There is no need to determine whether this constitutes an internal fiscal purpose or an external purpose since that is immaterial, as was explained above in point 88 et seq. The intention is to mitigate hardships arising from an additional tax for undertakings with losses in the previous year. Account is thus taken of the diminished ability of the taxable person to pay an additional non-profit-related tax.

57 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, paragraphs 54, 67 and 74).

58 See also judgment of 19 December 2018, *A-Brauerei* (C-374/17, EU:C:2018:1024, paragraph 45); a contrary view is taken in the judgment of 26 April 2018, *ANGED* (C-233/16, EU:C:2018:280, paragraphs 52, 59 and 61); although the tax was based on the principle of taxation according to the ability to pay, the Court examined only the non-fiscal reasons of 'environmental protection' and 'town and country planning' expressly mentioned in the preamble.

59 Judgments of 28 June 2018, *Andres (Insolvenz Heitkamp BauHolding)* v *Commission* (C-203/16 P, EU:C:2018:505, paragraph 91); of 26 April 2018, *ANGED* (C-233/16, EU:C:2018:280, paragraph 47); of 26 April 2018, *ANGED* (C-234/16 and C-235/16, EU:C:2018:281, paragraph 40); of 26 April 2018, *ANGED* (C-236/16 and C-237/16, EU:C:2018:291 paragraph 35); and of 22 December 2008, *British Aggregates* v *Commission* (C-487/06 P, EU:C:2008:757, paragraph 89).

4. Conclusion

117. The possibility of using losses for the first tax year is plausible and not arbitrary. The associated difference in treatment of operators in the first year of the advertisement tax is not therefore a selective advantage. No error in law by the General Court can be established in this regard. Accordingly, the second ground of appeal raised by the Commission is also unfounded.

VI. Costs

118. 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.

119. Under Article 184(1) in conjunction with Article 140(1), the Republic of Poland, as intervener, must bear its own costs.

VII. Conclusion

120. 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 Hungary.

3. Order the Republic of Poland to bear its own costs.