

October 2020

CJEU Advocate-General's opinion: Polish retail sales tax does not infringe EU law

In her opinion issued on 15 October 2020, Juliane Kokott, Advocate-General of the Court of Justice of the European Union, stated that the Polish tax on retail sales does not infringe the EU law.

The opinion delivered by the Advocate-General pertains to the Retail Sales Act of 6 July 2016 which imposed on retailers a tax collected on revenue from retail sales (turnover). However, the date of implementing the new tax has already been postponed several times, most recently to 1 January 2021.

This is because, by way of decision issued in November 2016, **the Commission found Polish provisions on the retail sales tax incompatible with the common market regulations**, since, in the Commission's assessment, the measure constituted unauthorized State aid for smaller businesses, less burdened with the retail sales tax. The Commission argued that the provisions would confer an unlawful advantage to "under-taxed" small businesses and therefore the new tax should be considered State aid. A similar stance was taken by the Commission in relation to the Hungarian advertisement tax targeted at the largest companies. Both countries challenged the Commission's decision and brought it before the European General Court.

General Court's ruling

In its judgment of 16 May 2019 delivered in joined Cases T-836/16 and T-624/17, the European General Court upheld the two actions for annulment brought by Poland and Hungary.

The Court emphasized that, the Commission may not, except where there is manifest inconsistency, define, in the place of the Member State in question, the nature and general scheme of that system, without potentially undermining that Member State's competence in the field of taxation. Furthermore, it noted that some taxes may contain adaption mechanisms, which may go so far as including exemptions, without those mechanisms leading to the granting of selective advantages. In this case, granting of selected advantages did not take place and therefore no State aid was handed out. In consequence, the Commission appealed against the judgment of the General Court to the Court of Justice of the European Union.

Opinion of the Advocate-General

In the opinion delivered on 15 October 2020, **Juliane Kokott, Advocate-General of CJEU, concluded that the appeal brought by the Commission should be dismissed and the General Court's judgment should be upheld by CJEU. In the Advocate-General's opinion, progressive taxation of corporate income is not contrary to the rules on State aid.** She noted that in the

recent years the rulings delivered by CJEU seem to support the thesis that progressive taxation may be based on turnover, since "the amount of turnover constitutes a criterion of differentiation that is neutral and (...) a relevant indicator of a taxable person's ability to pay". This applies equally to the rules on State aid. **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.

In the delivered opinion, the Advocate-General stressed that profit-based income taxation, like turnover-based income taxation, has its advantages and disadvantages, which must be weighed up and accounted for not by an authority or a court, but by a democratically mandated legislature. When drafting tax legislation, the legislature (here the Polish legislature) can decide which tax is, in its view, appropriate. In any case, the rules on State aid do not require the tax which is, in the Commission's view, most appropriate to be introduced.

CJEU's ruling

The opinion delivered by the Advocate-General opens pathway for the CJEU's ruling in this case. CJEU will take it into account when considering the case but may also deliver a different judgment.

If you would like to learn more about the issues discussed, please do not hesitate to contact us at:

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