*Michael Lang**

Taxation and State Aid – Recent Case Law on Progressive Turnover Taxes

In this article, the author, in light of the 60th anniversary of *European Taxation*, reflects on 60 years of State aid case law. In particular, he highlights the two ECJ decisions of 16 March 2021 in *Commission v. Poland* and *Commission v. Hungary*, wherein the ECJ determined that the Polish and Hungarian taxes at issue, which apply a progressive tax rate on turnover, do not contradict the EU State aid rules.

1. State Aid and Freedoms

Some 60 years ago, when *European Taxation* was first established, a landmark ruling was delivered in connection with State aid rules. The decision in *De Gezamenlijke Steenkolenmijnen* (Case 30/59) was the first to make it clear that the rules on State aid also have an impact on tax law.[1] The ECJ ruled that a:[2]

> subsidy is normally defined as a payment in cash or in kind made in support of an undertaking other than the payment by the purchaser or consumer for the goods or services which it produces. An aid is a very similar concept, which, however, places emphasis on its purpose and seems especially devised for a particular objective which cannot normally be achieved without outside help. The concept of aid is nevertheless wider than that of a subsidy because it embraces not only positive benefits, such as subsidies themselves, but also interventions which, in various forms, mitigate the charges which are normally included in the budget of an undertaking and which, without, therefore, being subsidies in the strict meaning of the word, are similar in character and have the same effect.

In this decision, the ECJ also held that "the miner's bonus, financed out of public funds, constitutes a subsidy or aid granted by the Government of the Federal Republic to the German coal-mining industry".[3] This proved very early on that indirect aid is also subject to the State aid regime.

The case law on fundamental freedoms in the field of tax law, on the other hand, was not established until later.[4] Nonetheless, the number of tax decisions on fundamental freedoms by far exceeds that of State aid rules.[5] While ECJ decisions relating to State aid rules in tax cases initially remained few, in the 1990s and early 2000s, the ECJ was literally swamped with tax cases on fundamental freedoms. It was only around 2005, when the tax case law on the fundamental freedoms gradually became more aligned again with the budgetary interests of the Member States,[6] that the interest of taxpayers in referring national judicial proceedings to the ECJ subsided. At the same time, however, case law on State aid in tax cases acquired greater significance. The Commission, upon "discovering" this Union legislation as an instrument to take a closer look at the tax legislation of EU Member States, has sought for several years now to explore the tax policy for room for manoeuvre that the State aid rules allow the Member States. Understandably, such cases often end up before the ECJ. An example of this is two decisions given on 16 March 2021 on a Polish and a Hungarian turnover-based tax that applies a progressive tax rate structure.[7] In the present article, the author attempts to provide a more detailed analysis of these – by and large similarly reasoned – decisions.

With regard to ECJ case law, what links the fundamental freedoms and the prohibition of State aid is not just the fact that, in the last 60 years, they took turns coming to the fore. The ECJ has, in fact, had to address the interplay between the two legal areas in some of its decisions.[8] This is also the case in the decisions discussed herein. Even before these cases, the ECJ had to rule on the compatibility of turnover-based taxes with progressive tax rates in light of the standard of the fundamental freedoms.[9] The

* **Prof. Dr. DDr. h.c.; Head of the Institute for Austrian and International Tax Law of WU (Wirtschaftsuniversität Wien) and Academic Director of both the LLM Program in International Tax Law and of the Doctoral Program in International Business Taxation (DIBT) of this university.** **The author would like to thank Balazs Karolyi for his valuable support.**

1. NL: ECJ, 23 Feb. 1961, Case 30/59, *De Gezamenlijke Steenkolenmijnen v. High Authority of the European Coal and Steel Community*, p. 19, ECLI:EU:C:1961:2. Although the official name of the Court has changed over the years, in this contribution the abbreviation ECJ is used consistently in order to avoid confusion.
2. Id., p. 19.
3. Id., p. 30.
4. With regard to the field of direct taxation: FR: ECJ, 28 Jan. 1986, Case 270/83, *European Commission v. French Republic (Avoir Fiscal)*, ECLI:EU:C:1986:37, Case Law IBFD.
5. Based on the thematic research in the ECJ database, available at https://curia.europa.eu (accessed 1 Sept. 2021).
6. M. Lang, *Recent Case Law of the ECJ in Direct Taxation: Trends, Tensions and Contradictions*, 18 EC Tax Rev. 3, p. 112 (2009).
7. HU: ECJ, 16 Mar. 2021, Case C-596/19 P, *European Commission v. Hungary, Republic of Poland*, ECLI:EU:C:2021:202, Case Law IBFD and PL: ECJ, 16 Mar. 2021, Case C-562/19 P, *European Commission v. Republic of Poland, Hungary*, ECLI:EU:C:2021:201, Case Law IBFD.
8. *See* AT: ECJ, 6 Oct. 2015, Case C-66/14, *Finanzamt Linz v. Bundesfinanzgericht*, ECLI:EU:C:2015:661, Case Law IBFD, wherein the State aid question was ultimately found to be inadmissible and the ECJ ruled on compatibility with the fundamental freedoms, in substance, even though Advocate General Kokott delivered her analysis in respect of the substance of the State aid question as well. *See* IT: ECJ, 17 Nov. 2009, Case C-169/08, *Presidente del Consiglio dei Ministri v. Regione Sardegna*, ECLI:EU:C:2009:709, Case Law IBFD, wherein the ECJ pointed out that the Italian measure could equally violate both the fundamental freedoms and State aid rules and left it to the referring national court to decide upon the application of legal consequences. For a detailed analysis in respect of the overlap between the application of the State aid rules and the fundamental freedoms in the context of the *Regione Sardegna* case, *see* M. Lang, *Seminar J: Steuerrecht, Grundfreiheiten und Beihilfeverbot*, IStR 15 (2010).
9. HU: ECJ, 3 Mar. 2020, Case C-75/18, *Vodafone Magyarország Mobil Távközlési Zrt. v. Nemzeti Adó- és Vámhivatal Fellebbviteli Igazgatósága*,

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ECJ has pointed to these decisions in its State aid decisions. This article will also examine the extent to which these references are convincing.

2. Selectivity

In *Commission v. Hungary* (Case C-596/19 P), the ECJ was asked to rule on the Hungarian advertisement tax.[10] According to the decision, the tax is designed as follows:[11] any person who broadcasts or publishes advertisements is subject to the tax measure at issue. Thus, economic operators that broadcast or publish advertisements, such as print media, audiovisual media or billposters, with the exception of advertisers, that is to say those responsible for making advertisements, and advertising agencies, which are intermediaries between advertisers and broadcasters, are thus subject to the measure. The taxable amount to which the tax measure at issue is applied is the net turnover for a financial year generated by the broadcasting or publication of advertisements. The tax is levied in addition to existing business taxes, in particular corporation tax. Its territorial scope covers Hungary.[12] The progressive scale of the tax measure at issue originally comprised six bands ranging from 0% to 50%, and was later replaced by a scale comprising only two tax rates, namely 0% on that part of the taxable amount below HUF 100 million (approximately EUR 280,000) and 5.3% on that part of the taxable amount above the latter amount.[13] The Law on Advertisement Tax also provided that taxable persons whose pre-tax profits for the 2013 financial year were zero or negative could deduct from their 2014 taxable amount 50% of any losses carried forward from earlier financial years ("the mechanism for the partial deductibility of losses carried forward").[14]

In *Commission v. Poland* (Case C-562/19 P), the issue was the Polish tax on the retail sector, the emergence and content of which are described in the ECJ decision as follows:[15] On 6 July 2016, the Republic of Poland adopted the Law on Tax on the Retail Sector, which concerns the retail sale of goods to consumers who are natural persons and that entered into force on 1 September 2016 ("the tax measure at issue"). All retailers are liable to pay the tax, irrespective of their legal status, and the basis of assessment is monthly turnover to the extent that it exceeds PLN 17 million (approximately EUR 3,750,000). The rate is zero below a monthly turnover equivalent to that amount, 0.8% for the portion of turnover between PLN 17 million and PLN 170 million (approximately EUR 37,500,000) and 1.4% for the portion of monthly turnover above that threshold.

The reasoning behind the two decisions, which in essence established that there was no violation of the prohibition of State aid, was practically identical. The ECJ first pointed to the definition of State aid developed by the Court itself,[16] emphasizing that the determining factor is selectivity:[17]

> […], it follows from equally settled case-law of the Court of Justice that that condition requires a determination as to whether, under a particular legal regime, the national measure at issue is such as to favour 'certain undertakings or the production of certain goods' over other undertakings which, in the light of the objective pursued by that regime, are in a comparable factual and legal situation and which accordingly suffer different treatment that can, in essence, be classified as discriminatory ([…]).
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> […] Further, where the measure at issue is conceived as an aid scheme and not as individual aid, it is for the Commission to establish that that measure, although it provides for an advantage that is of general application, confers the benefit of that advantage exclusively on certain undertakings or certain sectors of activity ([…]).
>
> […] a measure that mitigates the financial burdens which are normally borne by the budget of an undertaking and which thus, without being a subsidy in the strict sense of the word, is similar in character and has the same effect is also regarded as State aid ([…]). On the other hand, a tax advantage resulting from a general measure applicable without distinction to all economic operators does not constitute such aid ([…]).
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> […] In that context, in order to classify a national tax measure as 'selective', the Commission must begin by identifying the reference system, or 'normal' tax system applicable in the Member State concerned, and thereafter demonstrate that the tax measure at issue is a derogation from that reference system, in so far as it differentiates between operators who, in the light of the objective pursued by that system, are in a comparable factual and legal situation ([…]).
>
> […] The concept of 'State aid' does not, however, cover measures that differentiate between undertakings which, in the light of the objective pursued by the legal regime concerned, are in a comparable factual and legal situation, and are, therefore, a priori selective, where the Member State concerned is able to demonstrate that that differentiation is justified in that it flows from the nature or general structure of the system of which the measures form part ([…]).

3. Progressivity

Ultimately, the choice of the reference system was crucial for the ECJ:[18]

> Therefore, the question arises first of all whether, as the Commission maintains, the progressivity of rates provided for by the tax measure at issue was to be excluded from the reference system in the light of which it was appropriate to assess whether the existence of a selective advantage could be established, or whether, as the General Court held in paragraphs 63 to 67 of the judgment under appeal, it is, on the contrary, an integral part of that system.

The ECJ first pointed to its own case law on fundamental freedoms, which allows national legislatures extensive room for manoeuvre in deciding whether to enact proportionate or also progressive tax rates for, in particular, turnover-based taxes. The Court held that this case law

ECLI:EU:C:2020:139, Case Law IBFD and HU: ECJ, 3 Mar. 2020, Case C-323/18, *Tesco-Global Áruházak Zrt. v. Nemzeti Adó- és Vámhivatal Fellebbviteli Igazgatósága*, ECLI:EU:C:2020:140, Case Law IBFD.

10. HU: Act XXII of 2014 on Advertisement Tax (*Reklámadóról szóló* 2014. évi XXII. Törvény) (amended in 2020).
11. *Commission v. Hungary* (C-596/19 P), para. 4.
12. Id.
13. Id., para. 5.
14. Id., para 6.
15. *Commission v. Poland* (C-562/19 P), para. 5
16. *Commission v. Hungary* (C-596/19 P), para. 33; *Commission v. Poland* (C-562/19 P), para. 27.
17. *Commission v. Hungary* (C-596/19 P), paras. 34-38; *Commission v. Poland* (C-562/19 P), paras. 28-32.
18. *Commission v. Hungary* (C-596/19 P), para. 42; *Commission v. Poland* (C-562/19 P), para. 36.

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was, in itself, equally relevant to State aid rules, essentially without any explanation:[19]

> As regards the fundamental freedoms of the internal market, the Court of Justice has held that, given the current state of harmonisation of EU tax law, the Member States are free to establish the system of taxation which they deem most appropriate, meaning that the application of progressive taxation falls within the discretion of each Member State (see, to that effect, judgments of 3 March 2020, *Vodafone Magyarország*, C-75/18, EU:C:2020:139, paragraph 49, and *Tesco-Global Áruházak*, C-323/18, EU:C:2020:140, paragraph 69 and the case-law cited). The same is true in the field of State aid (see, to that effect, inter alia, judgment of 26 April 2018, *ANGED*, C-233/16, EU:C:2018:280, paragraph 50 and the case-law cited).

Though the ECJ did cite the *ANGED* (C-233/16) decision, a closer look at this case reveals that it did not deal directly with the question of the progressive tax rate, but with a tax that was only applicable to retail establishments whose sales areas exceed a certain threshold. Even the cited paragraph of the decision does not refer to progressivity:[20]

> In the context of that analysis, account must be taken of the fact that, in the absence of EU rules governing the matter, it falls within the competence of the Member States, or of infra-State bodies having fiscal autonomy, to designate bases of assessment and to spread the tax burden across the various factors of production and economic sectors ([…]).

Moreover, a closer examination of the ANGED decision makes it clear that the ECJ does not infer therefrom extensive room for manoeuvre in terms of a legislature's freedom to enact taxes without conflicting with the State aid regime. Instead, the ECJ focused on the reason why the criterion of selectivity was not met *in that particular case*:[21]

> As regards the tax at issue in the main proceedings, the information provided by the referring court shows that the purpose of that tax is to contribute towards environmental protection and town and country planning. Its purpose is to correct and counteract the environmental and territorial consequences of the activities of these large retail establishments, deriving, inter alia, from the ensuing rise in traffic flows, by having those establishments contribute to the financing of environmental action plans and making improvements to infrastructure networks. […] In that regard, it is not disputed that the environmental impact of retail establishments is largely dependent on their size. The larger the sales area, the higher the attendance of the public, which results in greater adverse effects on the environment. Consequently, a condition relating to sales area thresholds, such as that adopted by the national legislation at issue in the main proceedings, in order to distinguish between undertakings with a greater or lesser environmental impact, is consistent with the objectives pursued. […] It is also clear that the setting up of such establishments is of particular significance for town and country planning policies, wherever those establishments may be situated ([…]). […] In those circumstances, a condition under which the imposition of a tax is based on the sales area of an undertaking, such as that in the case in the main proceedings, differentiates between categories of establishments that are not in a comparable situation in the light of the objectives pursued by the legislation that imposed that condition. […] Therefore, the tax exemption received by the retail establishments whose sales area is less than 2 500 m^2 cannot be regarded as conferring a selective advantage on those establishments and, therefore, is not capable of constituting State aid within the meaning of Article 107(1) TFEU.

As a result, the decisions in *Commission v. Hungary* and *Commission v. Poland* do not contain an explanation as to why the case law on fundamental freedoms, which accepts turnover-based taxes with progressive rates, is also applicable to the prohibition of State aid. The fundamental freedoms and the selectivity test under State aid rules do, however, share common roots: ultimately, the tests applicable under both sets of provisions are manifestations of the principle of equality.[22] The objective of the decisions in *Vodafone* (Case C-75/18) and *Tesco* (Case C-323/18) cited by the ECJ was to establish whether or not there was a case of covert discrimination:[23] "Not only overt discrimination based on the location of the seat of companies, but also all covert forms of discrimination which, by the application of other criteria of differentiation, lead in fact to the same result are, in that regard, prohibited".[24] In *Vodafone* and *Tesco*, the ECJ rejected a purely quantitative assessment and stated that it was in favour of a qualitative assessment, thus adopting the line followed by Advocate General *Kokott* in her Opinion in *Google* (Case C-482/18):[25]

> As I have already stated in my Opinions in *Vodafone* and *Tesco*, […] strict criteria must be applied to the existence of covert discrimination. This is because covert discrimination is not intended to extend the scope of the definition of discrimination, but only to include cases which do not constitute discrimination from a purely formal perspective, but have the same effect. […] Therefore, in quantitative terms, under no circumstances can a mere preponderance — meaning more than 50% of undertakings being affected — be sufficient; instead, the correlation between the distinguishing criterion and the place in which the company has its seat must be identifiable in the vast majority of cases. […] It would, however, seem that more important than this purely quantitative element is the qualitative criterion now used more frequently by the Court, according to which the distinguishing criterion must *intrinsically* or *typically* affect foreign companies. […] A merely incidental link, even if it is sufficiently high in quantitative terms, cannot therefore be sufficient, in principle, to establish indirect discrimination.

Again, the latter formulations demonstrate the parallels that can be drawn between the case law on the fundamental freedoms and on the prohibition of State aid. It is stated therein that even where measures "differentiate between undertakings which, in the light of the objective pursued by the legal regime concerned, are in a comparable factual and legal situation, and are, therefore, a priori selective",[26] the Member States can demonstrate "that that

19. *Commission v. Hungary* (C-596/19 P), para. 43; *Commission v. Poland* (C-562/19 P), para. 37.
20. ES: ECJ, 26 Apr. 2018, Case C-233/16, *Asociación Nacional de Grandes Empresas de Distribución (ANGED) v. Generalitat de Catalunya*, para. 50, EU:C:2018:280, Case Law IBFD.
21. *ANGED* (C-233/16), paras. 52-56.
22. In respect of the State aid rules, *see* M. Lang, *Die Auswirkungen des gemeinschaftsrechtlichen Beihilferechts auf das Steuerrecht*, Gutachten zum 17. Österreichischen Juristentag, IV/1, p. 26 (2009). Regarding the similarities between the equality test under the State aid rules and the fundamental freedoms, *see* Lang, *supra* n. 8, at p. 577.
23. For further details, *see* M. Lang, *Versteckte Diskriminierung und Grundfreiheiten*, in *Besteuerung im Wandel, Festschrift für Wolfgang Kessler zum 65.Geburtstag* p. 143 (N. Herzig et al. eds., C.H. Beck 2021).
24. *Vodafone Magyarország* (C-75/18), para. 42 and *Tesco-Global Áruházak* (C-323/18), para. 62.
25. HU: Opinion of Advocate General Kokott, 12 Sept. 2019, Case C-482/18, *Google Ireland Limited v. Nemzeti Adó- és Vámhivatal Kiemelt Adó- és Vámigazgatósága*, paras. 71-73, ECLI:EU:C:2019:728, Case Law IBFD.
26. *Commission v. Poland* (C-562/19 P), para. 32. Likewise: *Commission v. Hungary* (C-596/19 P), para. 38.

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differentiation is justified in that it flows from the nature or general structure of the system of which the measures form part".[27] In the area of the fundamental freedoms, the term used is "intrinsically",[28] whereas in the area of the prohibition of State aid, the ECJ speaks of "the nature or general structure of the system of which the measures form part".[29] The two phrases in the case law may actually be based on similar considerations.

The ECJ then addresses the specific regulations – again by reference to the case law on fundamental freedoms:[30]

> In that regard, it must be stated that EU law on State aid does not preclude, in principle, Member States from deciding to opt for progressive tax rates intended to take account of the ability to pay of taxable persons. The fact that recourse to progressive taxation is, in practice, more common in the taxation of natural persons does not mean that they are prohibited from using it in order also to take account of the ability to pay of legal persons, in particular undertakings. […] EU law thus does not preclude progressive taxation from being based on turnover, including where such taxation is not intended to offset the negative effects likely to be caused by the activity being taxed. Contrary to what the Commission maintains, the amount of turnover constitutes, in general, a criterion of differentiation that is neutral and a relevant indicator of the taxable person's ability to pay (see, to that effect, judgments of 3 March 2020, *Vodafone Magyarország*, C-75/18, EU:C:2020:139, paragraph 50, and *Tesco-Global Áruházak*, C-323/18, EU:C:2020:140, paragraph 70). It does not follow from any rule or principle of EU law, including in the field of State aid, that progressive rates may apply only to taxes on profits. Moreover, like turnover, profit in itself is merely a relative indicator of ability to pay. The fact that it may constitute, as the Commission contends, a more relevant or more precise indicator than turnover is irrelevant in matters of State aid, since EU law on that matter seeks only to remove the selective advantages from which certain undertakings might benefit to the detriment of others which are placed in a comparable situation. The same is true of the possibility of economic double taxation, linked to the combined taxation on turnover and taxation of profits.

The ECJ, however, is, in essence, treading on thin ice here: the Court obviously carries out only a rough check to establish whether or not the design of the tax can be justified on the basis of its "nature" or the "general structure of the system of which the measures form part". This is in contrast to earlier case law in which the Court applied more rigorous standards, especially in respect of the justification of regulations on the basis of the "nature" of a tax.[31] In essence, the ECJ now seems to follow the same line as Advocate General Kokott, who described the standard as follows:[32]

> 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.

This is the only plausible explanation for the fact that the ECJ relies on the vague "ability to pay" principle and then even goes so far as to consider turnover as a relative indicator of ability to pay. Whether or not "ability to pay" can be considered an appropriate tax principle and what can be gleaned from it, are highly controversial issues.[33] This principle is so vague that different tax experts often derive diametrically opposed hypotheses from it.[34] Though one must agree with the ECJ that it is not its role to substitute for the respective national legislature and determine itself what can be a more relevant or more precise indicator of ability to pay,[35] when the Court limits itself to only engaging in a closer examination of taxes the design of which – in the words of the Advocate General herself[36] – is "manifestly inconsistent" or – using the terminology of the ECJ itself[37] – contains a "manifestly discriminatory element", it is essentially withdrawing itself almost completely from a review of tax provisions on the basis of State aid rules.[38]

This is particularly evident in the decision in *Commission v. Hungary*.[39] The ECJ approved the mechanism for the partial deductibility of losses carried forward, allowing undertakings whose pre-tax profits for the 2013 financial year were zero or negative to deduct 50% of their losses carried forward from the basis of assessment of the tax measure at issue in respect of 2014. The ECJ did not deem it inconsistent to deduct losses from turnover:[40]

> The choice of a basis of assessment expressed according to turnover does not render inconsistent, in relation to that objective, the adoption of a transitional measure taking profit into account, since the latter also constitutes, as the Commission indeed also maintains in another part of its argument, an indicator which is both neutral and relevant, even though it is relative, of undertakings' ability to pay. […] the criterion relating to the lack of profits in respect of the 2013 financial year is in that regard objective, since the undertakings concerned, from that point of view, have a lesser ability to pay than others on the date of entry into force of the Law on advertisement tax, during the

27. Id.
28. In respect of the freedom of establishment, *see*: ES: ECJ, 1 June 2010, Joined Cases C-570/07 and C-571/07, *Blanco Pérez and Chao Gómez*, para. 119, EU:C:2010:300, Case Law IBFD. In respect of the free movement of workers, *see* DE: ECJ, 10 Sept. 2009, Case C-269/07, *Commission v. Germany*, para. 54, EU:C:2009:527, Case Law IBFD. The ECJ used the term "inherent discrimination" in the Tesco and Vodafone decisions. *See Vodafone Magyarország* (C-75/18), para. 54 and *Tesco-Global Áruházak* (C-323/18), para. 74.
29. *Commission v. Poland* (C-562/19 P), para. 32 and *Commission v. Hungary* (C-596/19 P), para. 38, and the case law referred to therein.
30. *Commission v. Poland* (C-562/19 P), paras. 40-41; *Commission v. Hungary* (C-596/19 P), paras. 46-47.
31. *See* in detail Lang, *supra* n. 22, at p. 28.
32. PL: Opinion of Advocate General Kokott, 15 Oct. 2020, Case C-562/19 P, *European Commission v. Republic of Poland, Hungary*, para. 46, ECLI:EU:C:2020:834, Case Law IBFD and HU: Opinion of Advocate General Kokott, 15 Oct. 2020, Case C-596/19 P, *European Commission v. Hungary, Republic of Poland*, para. 53, ECLI:EU:C:2020:835, Case Law IBFD.
33. W. Gassner & M. Lang, *Das Leistungsfähigkeitsprinzip im Einkommen- und Körperschaftsteuerrecht, Gutachten zum 14. Österreichischen Juristentag* pp. 58 and 66 et seq. (Manz 2000). *See also* P. Nicolaides, *Multi-rate Turnover Taxes and State Aid, A Prelude to Taxes on Company Size?*, 18 EStAL 3, p. 237 (2019).
34. W. Gassner & M. Lang, *Die mangelnde Leistungsfähigkeit des Leistungsfähigkeitsprinzips*, 1045 ÖStZ 22, p. 643 (2000).
35. *Commission v. Poland* (C-562/19 P), para. 41 and *Commission v. Hungary* (C-596/19 P), para. 47.
36. AG Opinion in *Commission v. Poland* (C-562/19 P), para. 46 and AG Opinion in *Commission v. Hungary* (C-596/19 P), para. 53.
37. *Commission v. Poland* (C-562/19 P), para. 42 and *Commission v. Hungary* (C-596/19 P), para. 48.
38. For a similarly critical view of the manifest inconsistency test, *see* R. Szudoczky & B. Károlyi, *Progressive Turnover Taxes under the Prism of State Aid*, 19 EStAL 3 (2020) and B. Károlyi, *Hungary: Case C-596/19 P European Commission v Hungary – Opinion of Advocate General Kokott*, in *CJEU Recent Developments in Direct Taxation 2020* (G. Kofler et al. eds., Linde, forthcoming).
39. *Commission v. Hungary* (C-596/19 P), para. 68.
40. Id., paras. 62-64.

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course of 2014. […] Consequently, the Hungarian legislature was entitled, without infringing EU law on State aid, to combine, in respect of the first year of application of that law, the measurement of ability to pay resulting from the amount of turnover with a measure enabling losses carried forward by undertakings that did not make a profit in 2013 to be taken into account.

Where not even a regulation, according to which losses are deducted from turnover, is inconsistent,[41] the prohibition of State aid is rendered almost completely meaningless.[42]

4. Can the Recent Decisions Be Reconciled with the *Gibraltar* Decision?

Both Advocate General Kokott and the ECJ itself considered it necessary to explain why their assessment of the Polish and Hungarian taxes does not contradict the Court's previous decision in *Gibraltar* (Joined Cases C-106/09 P and C-107/09 P).[43] The Advocate General's explanation reads as follows:[44]

> 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. […] 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. […] 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.

One may argue against this interpretation of the *Gibraltar* decision, however, that the ECJ even confirmed therein that the Member States are free to choose the criteria for taxation:[45] "It is true that, in the absence of European Union rules governing the matter, it falls within the competence of the Member States, or of infra-State bodies having fiscal autonomy, to designate bases of assessment and to spread the tax burden across the different factors of production and economic sectors". At the time, the ECJ found the following circumstances more disturbing:[46]

> The features of that regime are, first, a combination of the payroll tax and BPOT as the sole bases of assessment, together with the requirement to make a profit, the tax on which is capped at 15%, and second, the absence of a generally applicable basis of assessment providing for the taxation of all companies covered by that regime. […] In view of the features of that regime, outlined in the preceding paragraph, it is apparent that the regime at issue, by combining those bases, even though they are founded on criteria that are in themselves of a general nature, in practice discriminates between companies which are in a comparable situation with regard to the objective of the proposed tax reform, namely to introduce a general system of taxation for all companies established in Gibraltar. […] Combining those bases of assessment not only results in taxation according to the number of employees and the size of the business premises occupied, but also, due to the absence of other bases of assessment, excludes from the outset any taxation of offshore companies, since they have no employees and also do not occupy business property.

The following was also crucial for the ECJ:[47]

> In that regard, it should be observed that the fact that offshore companies are not taxed is not a random consequence of the regime at issue, but the inevitable consequence of the fact that the bases of assessment are specifically designed so that offshore companies, which by their nature have no employees and do not occupy business premises, have no tax base under the bases of assessment adopted in the proposed tax reform.

This was preceded by the observation[48] that the case law:

> does not make the classification of a tax system as 'selective' conditional upon that system being designed in such a way that undertakings which might enjoy a selective advantage are, in general, liable to the same tax burden as other undertakings but benefit from derogating provisions, so that the selective advantage may be identified as being the difference between the normal tax burden and that borne by those former undertakings. […] Such an interpretation of the selectivity criterion would require […] that in order for a tax system to be classifiable as 'selective' it must be designed in accordance with a certain regulatory technique; the consequence of this would be that national tax rules fall from the outset outside the scope of control of State aid merely because they were adopted under a different regulatory technique although they produce the same effects in law and/or in fact. […] Those considerations apply particularly with regard to a tax system which, as in the present case, instead of laying down general rules applying to all undertakings from which a derogation is made for certain undertakings, achieves the same result by adjusting and combining the tax rules in such a way that their very application results in a different tax burden for different undertakings.

In other words, the ECJ does not merely examine differentiations resulting from the fact that the tax obligation is initially broadly defined and then limited again by way of an exception. Even when the legislature opts for a regulatory technique that manages without exceptions, it will nonetheless examine whether differentiations occur.[49] The ECJ did not shy away from carrying out an assessment[50] as to:

> whether, under a particular legal regime, a national measure is such as to favour 'certain undertakings or the production of certain goods' in comparison with others which, in the light of the objective pursued by that regime, are in a comparable factual and legal situation([…]).

One can only speculate how the ECJ would have ruled in the *Gibraltar* case if, at the time, it had already laid down the standards it has now developed in the two decisions in *Commission v. Hungary* and *Commission v. Poland*. One can by no means rule out that it would have allowed the national legislature to choose the criteria for taxation and to also freely combine them, not taking into consideration

41. Károlyi, *supra* n. 38.
42. Similar to this critical view, *see* Nicolaides, *supra* n. 33, at p. 236.
43. UK: ECJ, 15 Nov. 2011, Joined Cases C-106/09 P and C-107/09 P, *Commission v. Government of Gibraltar and United Kingdom*, ECLI:EU:C:2011:732, Case Law IBFD.
44. AG Opinion in *Commission v. Poland* (C-562/19 P), paras. 40-41 and AG Opinion in *Commission v. Hungary* (C-596/19 P), paras. 47-48.
45. *Gibraltar* (C-106/09 P and C-107/09 P), para. 97.
46. Id., paras. 100-102.
47. Id., para. 106.
48. Id., paras. 91-93.
49. For further details, *see* M. Lang, *Das Gibraltar-Urteil des EuGH: Neue beihilferechtlichen Vorgaben für das Steuerrecht?*, 1070 ÖStZ 24, pp. 598-599 (2011).
50. *Gibraltar* (C-106/09 P and C-107/09 P), para. 75.

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the resulting impact on those undertakings not covered by the national rule.[51]

5. Is an Intention to Circumvent the State Aid Rules Relevant?

Advocate General Kokott presumably put forward an additional line of argument in her Opinion so as to demonstrate why the *Gibraltar* decision is compatible with her position expressed in her recent Opinions:[52]

> In this regard, that judgment of the Court of Justice does represent an exception […] 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. […] 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. […] 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.

The ECJ adopted this argumentation in the two decisions of 16 March 2021:[53]

> 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), does not call into question the above findings. On the contrary, as the Advocate General observed, in essence, in points 40 to 45 of her Opinion, in the case which gave rise to that judgment, the tax system had been configured according to manifestly discriminatory parameters intended to circumvent EU law on State aid. That was apparent, in that case, from the choice of tax criteria favouring certain offshore companies, which appeared to be inconsistent in the light of the objective of creating a general tax, imposed on all undertakings, as set out by the legislature concerned.

For the ECJ, the reason why there was no circumvention of the State aid rules in the case at hand was a question of the burden of proof:[54]

> The Commission has not established that that progressivity of the rates, adopted by the Polish legislature in the exercise of its discretion in the context of its fiscal autonomy, was designed in a manifestly discriminatory manner, with the aim of circumventing the requirements of EU law on State aid. In those circumstances, the progressivity of the rates of the tax measure at issue had to be regarded as inherent in the reference system or the 'normal' tax regime in the light of which the existence, in the present case, of a selective advantage had to be assessed.

An unbiased analysis of the *Gibraltar* decision does not necessarily lead to the interpretation attributed to it by Advocate General Kokott and the ECJ. In her Opinion, the Advocate General cites individual paragraphs of the Gibraltar decision to support her interpretation,[55] however, only paragraph 106 alludes to the decisive relevance of the motives for the assumption of abuse:[56]

> In that regard, it should be observed that the fact that offshore companies are not taxed is not a random consequence of the regime at issue, but the inevitable consequence of the fact that the bases of assessment are specifically designed so that offshore companies, which by their nature have no employees and do not occupy business premises, have no tax base under the bases of assessment adopted in the proposed tax reform.

At the time, not even this paragraph alleged abusive behaviour or circumvention of the State aid rules. Here and elsewhere, the ECJ based its argument on the impact of the regimes.[57] Although the suspicion that the regimes are a priori designed to provide benefits without falling under the State aid rules cannot be dismissed,[58] the strength of the *Gibraltar* decision lies precisely in the fact that the ECJ identifies the planned regimes on the basis of their impact, without treading on thin ice regarding allegations of abusive behaviour by the legislature, which would be very difficult or impossible to prove.[59]

If one bases the argument – as the ECJ now obviously does – on the abusive intention of the contracting states, the question inevitably arises as to which standards to apply to establish such abuse or such a circumvention by a Member State. In her Opinions in *Vodafone* and *Tesco*, in which she also – albeit unsuccessfully at the time – called for a sanctioning of the abuse by the national legislature in the area of fundamental freedoms, Advocate General Kokott attempted to find answers.[60] She based her argument for proof of intent of abuse on the reasons for the law.[61] In doing so, she opted for a restrictive approach:[62]

> In particular, the Commission relies only on statements made by three members of parliament in the parliamentary debate and on extracts from government documents. This too would appear to be an insufficient basis for an allegation of an abuse

51. For a similarly critical view, *see* Károlyi, *supra* n. 38.
52. AG Opinion in *Commission v. Poland* (C-562/19 P), paras. 42-45 and AG Opinion in *Commission v. Hungary* (Case C-596/19 P), paras. 49-52.
53. *Commission v. Poland* (Case C-562/19 P), para. 43 and *Commission v. Hungary* (Case C-596/19 P), para. 49.
54. *Commission v. Poland* (Case C-562/19 P), para. 44. For identical reasoning, *see Commission v. Hungary* (Case C-596/19 P), para. 50.
55. AG Opinion in *Commission v. Poland* (Case C-562/19 P), paras. 40-45 and AG Opinion in *Commission v. Hungary* (Case C-596/19 P), paras. 47-52, referring, in particular, to paras. 12, 99, 102, 106 and 149-150 of the *Gibraltar* decision.
56. *Gibraltar* (Joined Cases C-106/09 P and C-107/09 P), para. 106.
57. UK: ECJ, 22 Dec. 2008, Case C-487/06 P, *British Aggregates*, ECLI:EU:C:2008:757, para. 85, Case Law IBFD and *Gibraltar* (Joined Cases C-106/09 P and C-107/09 P), para. 87.
58. In this regard, *see* Lang, *supra* n. 49, at p. 599.
59. Id., p. 599.
60. *See* Lang, *supra* n. 23, at pp. 153-154.
61. In this regard, *see* M. Lang, *Rechtsmissbrauch und subjektives Element – Schlussanträge der Generalanwältin Kokott in der Rs Vodafone*, TPI 5, p. 232 (2019).
62. HU: Opinion of Advocate General Kokott, 4 July 2019, Case C-323/18, *Tesco-Global Áruházak Zrt. v. Nemzeti Adó- és Vámhivatal Fellebbviteli Igazgatósága*, ECLI:EU:C:2019:567, paras. 97-98, Case Law IBFD; and HU: Opinion of Advocate General Kokott, 13 June 2019, Case C-75/18, *Vodafone Magyarország Mobil Távközlési Zrt. V. Nemzeti Adó- és Vámhivatal Fellebbviteli Igazgatósága*, paras. 97-98, ECLI:EU:C:2019:492, Case Law IBFD.

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> of rights against a Member State. If statements made in a parliamentary debate were sufficient, it would be possible for the opposition (or even a single member of parliament) to thwart any decision by the legislature by making a suitable statement. […] Since the government is normally bound by the parliament's decision, and not vice versa, I also have reservations over having regard to individual government documents. Greater importance is attached to the official (legal) explanatory memorandum and not the merely political reasons given to voters for the content of legislation. […] It is not clear from the former, however, that that tax was aimed primarily at imposing taxation on nationals from other EU countries.

One must agree with Advocate General Kokott that it would be peculiar to rely on statements of individual members of parliament.[63] It would be highly unsatisfactory if the conformity of a legal measure were to depend on whether a single member of the parliament presented a harmful motive for the law during the debate. If a mere contribution by a member of the opposition to the debate would suffice, the opposition might be compelled to do so to prepare the ground for later ECJ proceedings. They could thereby bring down a legal provision they previously failed to thwart in parliament because there was no majority against it. It is, however, equally frustrating when such conformity relies on how the official reason for the law is formulated.[64] According to this view, the prohibition of abuse of law does not apply when the author of such documents refrains from expressly mentioning an intentional discrimination of foreign undertakings.[65] Therefore, any more or less "well-advised" legislature will never expose itself to a potential accusation of abuse.[66] Vice versa, the application of the prohibition of abuse of law becomes a consequence of a lack of legislative "diligence". In applying these standards, an assessment of the same legal measure in two Member States, as to its conformity with EU law, may reach completely different conclusions. Ultimately, the assessment can also depend on the honesty of the legislature's announced intentions.

Mason and Parada (2019) criticize Advocate General Kokott for her restrictive approach.[67] The two authors believe it is problematic when Member States are able to shield themselves from an accusation of abuse without great effort. They see no reason why statements of individual members of parliament or government documents should not be used as evidence of a legislative intention to discriminate against foreign nationals. Another article by Parada (2019) clearly demonstrates how boundless the criterion of intent of abuse can become. He considers even using media statements by government politicians that a new tax does not primarily burden domestic undertakings as proof of a legislative intention to discriminate against foreign nationals.[68] Politicians who – perhaps against their better judgment – throw dust in their voters' eyes, fooling them into believing that a proposed regulation will hardly have any negative impact on them, may thus compromise the conformity of that provision with EU law.[69] Prima facie, this may seem tempting as a method to demand honesty and sanction dishonesty in political communications.[70] With regard to those taxes that actually do place the primary burden on foreign undertakings, however, it would lead to honesty being punished: politicians would feel compelled to hide the plain truth from their own population so as not to thereby incur any disadvantages for the state in later ECJ proceedings.[71] Above all, however, it would be going too far to automatically attribute populist statements of individual politicians in interviews to the state as a whole and to regard them as evidence of intent of abuse by the state.[72]

All these considerations clearly demonstrate that delivering proof of intent is almost always a problematic undertaking.[73] The formation of intentions is an inner process in respect of which no direct evidence exists.[74] Those who place onerous requirements on proof of such intent run the risk of rendering this criterion toothless. When only limited requirements are posed, however, the case-by-case assessment becomes discretionary.[75] Therefore, it is not advisable to link abuses to legislative intent, regardless of how the latter is identified. Instead, it seems more reasonable to thwart attempts at abuse through an interpretation of the actual or allegedly circumvented rule, based on the object and purpose of the respective law.[76] This is precisely what the ECJ does in *Tesco* and *Vodafone* when it outlines the criterion of covert discrimination exclusively on the basis of a qualitative examination.[77] Yet the ECJ takes a different approach in the field of State aid rules. This is a recipe for legal uncertainty.

That said, it is surprising to see that the ECJ did not readily use this new line of case law in assessing the Hungarian and Polish taxes under State aid rules. Instead, the Court decided to refrain from carrying out a substantive analysis by hiding behind a procedural obstacle. It held that the: "Commission has not established that that progressivity of the rates, adopted by the Polish legislature in the exercise of its discretion in the context of its fiscal autonomy, was designed in a manifestly discriminatory manner, with the aim of circumventing the requirements of EU law on State aid".[78] Therefore, in the proceeding on the Polish

63. For more detail, *see* Lang, *supra* n. 61, at pp. 232-233 and Lang, *supra* n. 23, at p. 155.
64. Lang, *supra* n. 61, at p. 233.
65. Lang, *supra* n. 23, at p. 155.
66. In this regard, *see* Lang, *supra* n. 23, at p. 155 and Lang, *supra* n. 61, at p. 233.
67. R. Mason & L. Parada, *Company Size Matters*, 5 British Tax Rev., p. 633 et seq. (2019).
68. L. Parada, *How the Vodafone Magyarország Opinion Affects EU Debate on Turnover-Based Digital Taxes*, 95 Tax Notes Int'l 5, p. 402 (2019).
69. Lang, *supra* n. 23, at p. 156.
70. Id., at p. 156.
71. Id.
72. Id.
73. For a description of the U.S. Supreme Court's vacillating case law on proving the legislative intent of violating constitutional provisions, *see* C. Nelson, *Judicial Review of Legislative Purpose*, NYU Law Rev. 185, p. 1859 et seq. (2008).
74. Lang, *supra* n. 23, at p. 157.
75. Id.
76. In this regard, *see* M. Lang, *Die Gründung der GmbH & Co KG als Missbrauch von Formen und Gestaltungsmöglichkeiten des bürgerlichen Rechts*, in *Die GmbH & Co KG, 2. A.*, p. 224 (W.D. Arnold et al. eds., Beck 2016).
77. Lang, *supra* n. 23, at p. 157.
78. *Commission v. Poland* (C-562/19 P), para. 44. Likewise, *see Commission v. Hungary* (C-596/19 P), para. 50.

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tax before the General Court the Commission demonstrated[79] that:

> almost all small and medium-sized independent retailers were in practice exempted or taxed at an average effective rate of less than 0.8% on their total turnover, while large format retailers, such as integrated chains of hypermarkets, were subject to an average effective rate closer to the maximum rate of 1.4%, which would significantly reduce their profits. Polish-owned retail undertakings generally benefit from the system while foreign-owned undertakings are taxed at a higher average rate. The Commission notes in this respect that according to various publicly available reports, out of nearly 200 000 shops or retail undertakings, only about one hundred would have been liable to the tax in September 2016, the proceeds of which would have been PLN 114 million, of which approximately PLN 80 million would have been owed by the 10 largest undertakings. Only 12 undertakings would have reached the 1.4% tax band. According to the Commission, various political declarations in Poland also clearly stated that the tax aimed to re-balance the terms on which small undertakings and international retail chains compete.

As regards the Hungarian advertisement tax, the Commission noted[80] 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.

Both taxes hit large multinational companies the hardest.[81] According to the approach applied by the ECJ itself, all this could at least have prompted the Court to delve deeper into the question of whether this impact is accidental or there was an intention by the Member States to affect specific undertakings.[82] In view of the difficulties and uncertainties associated with the provision of such "evidence", one must welcome the fact that the ECJ did not follow this approach. It would have been much better, however, if the Court had not opened Pandora's Box at all; instead, it should have abandoned the assumption of a specifically sanctionable abuse by the Member States altogether.

6. The Importance of the Digital Service Tax

The Commission proposals for a digital service tax played a role in Advocate General Kokott's Opinion. During the proceedings, the Commission attempted to explain that the digital service tax it proposed is designed differently than the Polish and Hungarian tax, something that was disputed by the Advocate General:[83]

> 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. […] 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.

The Advocate General also included the proposed digital service tax in her consistency considerations:[84]

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

In footnote 34 of her Opinion, Advocate General Kokott explains in further detail that:[85]

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

The proceedings under consideration were conducted by the Commission, therefore it is understandable that the Advocate General would use the Commission's own proposal against it. Ultimately, however, it would be difficult to prevent the Commission from taking action against a tax of a Member State on the basis of what are obviously estoppel arguments.[86] The digital service tax is a proposal for a EU-wide tax, which would not be subject to the European Union's State aid rules at all.[87] The argument would only be of significance in view of the consistency considerations, which – according to the opinion of the Advocate General and the ECJ – are relevant also for State aid rules. In proposing a tax at the Union level, it can be assumed that the Commission believes the proposal is consistent in itself. It is therefore not very convincing when the Commission alleges that a similarly designed tax levied by a Member State lacks consistency.

In proceedings conducted by the Commission, the latter also has an important role to play in the provision of evidence. This also becomes evident in the formulations chosen by the ECJ:[88]

79. PL: GC, 16 May 2019, Cases T-836/16 and T-624/17, *Commission v. Poland*, para. 47, ECLI:EU:T:2019:338, Case Law IBFD.
80. HU: GC, 27 June 2019, Case T-20/17, *Commission v. Hungary*, para. 108, ECLI:EU:T:2019:448, Case Law IBFD.
81. Nicolaides, *supra* n. 33, at p. 238.
82. For a similarly critical view, *see* D. Deák, *Cloaking Member State Objectives Through Legislative Instruments*, 30 EC Tax Rev. 3, p. 115 et seq. (2021).
83. AG Opinion in *Commission v. Poland* (C-562/19 P), para. 56 and AG Opinion in *Commission v. Hungary* (C-596/19 P), para. 62.
84. AG Opinion in *Commission v. Poland* (C-562/19 P), para. 60; AG Opinion in *Commission v. Hungary* (C-596/19 P), para. 66.
85. AG Opinion in *Commission v. Poland* (C-562/19 P), footnote 34; AG Opinion in *Commission v. Hungary* (C-596/19 P), footnote 34.
86. Lang, *supra* n. 61, at p. 232.
87. The rule that EU measures cannot trigger State aid scrutiny, as they are not attributable to any Member State was laid down in the "Deutsche-Bahn" doctrine: DE: ECJ, 5 Apr. 2006, Case T-351/02, *Deutsche Bahn AG v. Commission*, paras. 101-102, ECLI:EU:T:2006:104, Case Law IBFD.
88. *Commission v. Poland* (C-562/19 P), para. 42; *Commission v. Hungary* (C-596/19 P), para. 48.

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> It follows from the foregoing that the characteristics constituting the tax, which include progressive tax rates, form, in principle, the reference system or the 'normal' tax regime for the purposes of analysing the condition of selectivity. That said, it cannot be ruled out that those characteristics may, in certain cases, reveal a manifestly discriminatory element, which it is, however, for the Commission to demonstrate.

Therefore, the burden of proof is on the Commission. This can have peculiar consequences, since the same legal question – i.e. whether the tax of the Member State contradicts State aid rules – could also be referred to the ECJ by a national court in a preliminary ruling procedure. Under such a procedure, it is not possible to impose a burden of proof on the Commission. Therefore, the ECJ itself will have to answer the question as to whether the tax contains a "manifestly discriminatory element"[89] and will not make its decision dependent on whether a party to the procedure has succeeded in demonstrating this. The fact that particularities of the procedure before the ECJ may have an impact on the substantive assessment of a tax is frustrating in itself. Yet a further amplification of these effects would be worrying, i.e. if the Commission had to allow the content of its own political proposals to be held against it. Therefore, the ECJ did well in not mentioning in its argumentation the fact that the Commission itself proposed a similarly structured digital services tax as an EU-wide tax.

89. *Commission v. Poland* (C-562/19 P), para. 42; *Commission v. Hungary* (C-596/19 P), para. 48.

7. Conclusion

In the two decisions of 16 March 2021 in *Commission v. Poland* and *Commission v. Hungary*, the ECJ came to the conclusion that the Polish and Hungarian taxes at issue, which apply a progressive tax rate structure on turnover, do not contradict the EU State aid rules. As has previously been the case in respect of the fundamental freedoms, the Court also stressed the extensive room for manoeuvre of national legislatures. In the field of State aid rules, in particular, however, the ECJ creates the impression that the review standard set by the Court itself is so generous that the test under State aid rules is deprived of almost any relevance in such cases.

The case law on State aid rules, however, differs from the previously delivered decisions on fundamental freedoms in that the ECJ creates the impression it applies much more stringent standards in the event of a proven circumvention of State aid rules. In contrast to the decisions in *Vodafone* and *Tesco*, the ECJ followed the proposals of Advocate General Kokott, which already pointed in this direction at the time. This development is regrettable: the attempt to furnish proof of the motives of a national legislature is problematic and results in legal uncertainty. If the ECJ is to breathe life into this line of case law in the future, its decisions will also need to depend on what type of procedure is at issue, since the burden of proof can be distributed differently depending on how a State aid case is referred to the ECJ. Considering how difficult it is to furnish evidence of motive, the question as to who must prove this intent is of considerable relevance to the outcome of a determination of intent of abuse.

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