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CJEU: Polish tax on retail sales does not infringe EU law

On 16 March 2021, the Court of Justice of the European Union rendered a judgment in the case C-562/19 P (Commission v Poland), in which it found that the Polish retail sales tax does not infringe EU law.

Decision of the European Commission

The ruling was issued in relation to the Polish Act of 6 July 2016 on the tax on retail sales, levied on sales revenue (turnover) generated by retailers. Introduction of the new tax, however, was postponed several times.

This is because, by way of decision issued in November 2016, European 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.

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.

In consequence, the Commission appealed against the judgment of the General Court to the Court of Justice of the European Union.

Yet, 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.

Following the Advocate-General's opinion, Polish authorities decided that the entry into force of the new provisions should be no longer delayed. As a result, the new tax **began to be collected on 1 January 2021.**

CJEU's ruling

On 16 March 2021, CJEU issued judgments in cases C-562/19 P (Commission v Poland) and C-596/19 P (Commission v Hungary) in which it dismissed the appeals brought by the Commission and upheld that the Polish tax on the retail sector and the Hungarian tax on advertisements do not infringe EU law on State aid.

CJEU shared the General Court's opinion and reminded that taking into account the fiscal autonomy which the Member States are recognized as having outside the fields subject to harmonization under EU law, they are free to establish the system of taxation which they deem most appropriate and to adopt, as required, progressive taxation.

In particular, 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, while nor does it require Member States to reserve the application of progressive rates only to taxes based on profits, to the exclusion of those based on turnover.

It is for the Commission, where necessary, to demonstrate that the characteristics of a national tax measure were designed in a way that is manifestly discriminatory, with the result that they should be excluded from the reference system, which could in particular reveal a choice of taxation criteria in the light of the objective pursued by that measure.

In that regard, CJEU found, however, that the Commission had not established that the characteristics of the measures adopted by the Polish and Hungarian legislatures respectively had been designed in a manifestly discriminatory manner, with the aim of circumventing the requirements of EU law on State aid.

Furthermore, in CJEU's opinion, establishment of a progressive tax on turnover generated by the retail sale of goods would not lead to a selective advantage. Considering the above, CJEU dismissed the appeal brought by the Commission.

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

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