Provisional text

JUDGMENT OF THE COURT (Grand Chamber)

16 March 2021 (*)

(Appeal – Article 107(1) TFEU – State aid – Polish tax on the retail sector – Article 108(2) TFEU – Decision to initiate the formal investigation procedure – Information used to determine the reference system – Progressivity of rates – Existence of a selective advantage – Burden of proof)

In Case C?562/19 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 24 July 2019,

European Commission, represented by K. Herrmann and by P.?J. Loewenthal and V. Bottka, acting as Agents,

appellant,

the other parties to the proceedings being:

Republic of Poland, represented by B. Majczyna, M. Rzotkiewicz and M. Szyd?o and by K. Soko?owska, acting as Agents,

applicant at first instance,

Hungary, represented by M.Z. Fehér and G. Koós, acting as Agents,

intervener at first instance,

THE COURT (Grand Chamber),

composed of K. Lenaerts, President, R. Silva de Lapuerta, Vice-President, J.?C. Bonichot (Rapporteur), A. Arabadjiev, E. Regan, A. Kumin and N. Wahl, Presidents of Chambers, M. Safjan, D. Šváby, S. Rodin, F. Biltgen, K. Jürimäe, C. Lycourgos, P.G. Xuereb and N. Jääskinen, Judges,

Advocate General: J. Kokott,

Registrar: R. ?ere?, Administrator,

having regard to the written procedure and further to the hearing on 1 September 2020,

after hearing the Opinion of the Advocate General at the sitting on 15 October 2020,

gives the following

Judgment

1 By its appeal, the European Commission seeks to have set aside the judgment of the General Court of the European Union of 16 May 2019, *Poland* v *Commission* (T?836/16 and T?624/17, EU:T:2019:338; ‘the judgment under appeal’), by which the General Court annulled,

first, Commission Decision C(2016) 5596 final of 19 September 2016 on the State Aid SA.44351 (2016/C) (ex 2016/NN) – Poland – Polish tax on the retail sector, initiating the formal investigation procedure provided for in Article 108(2) TFEU with regard to that measure and requiring the Republic of Poland to suspend progressive tax rates in the retail sector ('the decision opening the formal investigation procedure'), and, second, Commission Decision (EU) 2018/160 of 30 June 2017 on the State aid SA.44351 (2016/C) (ex 2016/NN) implemented by Poland for the tax on the retail sector (OJ 2018 L 29, p. 38; 'the negative decision') (together 'the decisions at issue').

Background to the dispute

2 The background to the dispute was set out by the General Court in paragraphs 1 to 16 of the judgment under appeal. It can be summarised as follows.

3 In early 2016, the Polish Government planned to introduce a new tax on the retail sector, whose basis of assessment would be turnover and which would be progressive in nature.

4 When the Commission learned of that plan, it sent a request for information to the Polish authorities noting that the rates of the progressive turnover tax were, in fact, linked to the size of the undertaking and not to its profitability, with the result that they would cause discrimination between undertakings and would be liable seriously to disrupt the market. According to that institution, those rates would introduce a difference in treatment between undertakings, and should therefore be regarded as selective. Considering that all the conditions set out in Article 107(1) TFEU were fulfilled, it concluded that those rates would give rise to 'State aid', within the meaning of that provision.

5 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 which entered into force on 1 September 2016 ('the tax measure at issue'). All retailers are liable to pay that tax, irrespective of their legal status, and the basis of assessment is monthly turnover to the extent that it exceeds 17 million zlotys (PLN) (approximately EUR 3 750 000 million). The rate is zero below a monthly turnover equivalent to that amount, then stands at 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.

6 On 19 September 2016, the Commission adopted the decision to initiate the formal investigation procedure. In that decision, it not only requested the Polish authorities to submit their comments, but also required them, pursuant to Article 13(1) of Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 [TFEU] (OJ 2015 L 248, p. 9), to suspend immediately 'the application of progressive rates to [the tax measure at issue] until the Commission [adopted] a decision on the compatibility of [the Law on the tax on the retail sector] with the internal market'. Having regard to that decision, the Republic of Poland suspended the application of the tax measure at issue.

7 On 30 June 2017, the Commission closed the formal investigation procedure with the adoption of the negative decision. It considered, in essence, that the tax measure at issue constituted State aid which was incompatible with the internal market and that it had been unlawfully put into effect, with the result that the Polish authorities had to cancel definitively all payments of aid suspended under the decision to initiate the formal investigation procedure. Since the tax measure at issue had not been practically implemented, the Commission took the view that it was not necessary to recover any amounts of aid from recipients.

8 In the decisions at issue, the Commission essentially justified the classification of the tax measure at issue as ‘State aid’, within the meaning of Article 107(1) TFEU, as follows.

9 As regards the imputability of that measure to the State and its financing through State resources, the Commission took the view that, by opting for a progressive tax based on turnover, the Republic of Poland had waived some of the financial resources that it would have collected if all undertakings were subject to the same average effective rate. The tax measure at issue would thus entail a transfer of State resources in favour of certain undertakings.

10 As regards the existence of an advantage, the Commission noted that, just like positive benefits, measures mitigating the charges normally borne by undertakings provide an advantage. It stated that undertakings with a low turnover would be granted favourable tax treatment by the application of the tax measure at issue in comparison with other undertakings required to pay that tax. Average tax rates at zero or at a lower level for undertakings with a low turnover in comparison with higher average tax rates for undertakings with a higher turnover would favour the former.

11 In respect of the examination of the condition relating to selectivity, seeking to determine whether the tax measure at issue is such as to favour unduly certain undertakings, the Commission considered that the relevant reference tax system was the tax on the retail sector, including for undertakings with a turnover below PLN 17 million (approximately EUR 3 750 000), but that the progressive structure of the tax did not form part of that reference system. That progressivity, in so far as it entailed not only marginal tax rates but also average tax rates which differed between undertakings, was said to constitute a derogation from the reference system which deemed to apply a single tax rate.

12 That derogation was found not to be justified by the nature or general scheme of that reference system. In the view of the Commission, the redistributive purpose put forward by Polish authorities is not compatible with a turnover-based tax, since it is levied on undertakings on the basis of their volume of activity and on the basis of their charges, profitability, ability to pay or facilities which, according to those authorities, only large undertakings can use.

13 Finally, the Commission viewed the assertion by the Polish authorities that the progressive nature of the tax allows small-scale retailers to be preserved as against large-format retail as evidence that those authorities were seeking to influence the structure of competition in the market.

The procedure before the General Court and the judgment under appeal

14 On 30 November 2016, the Republic of Poland brought an action before the General Court for annulment of the decision to initiate the formal investigation procedure (Case T?836/16). By decision of the President of the Ninth Chamber of the General Court of 27 April 2017, Hungary was granted leave to intervene in support of the form of order sought by the Republic of Poland.

15 On 13 September 2017, the Republic of Poland brought a second action before the General Court for annulment of the negative decision (Case T?624/17). By decision of 12 January 2018, the President of the Ninth Chamber of the General Court also granted Hungary leave to intervene in support of the form of order sought by the Republic of Poland in the context of the second action.

16 By decision of 4 July 2018, the General Court joined Cases T?836/16 and T?624/17 for the purposes of the oral part of the procedure, in accordance with Article 68 of its Rules of Procedure.

17 In support of its action against the decision to initiate the formal investigation procedure

(Case T?836/16), the Republic of Poland raised four pleas in law. The first plea alleged that the tax measure at issue had been wrongly classified as ‘State aid’, within the meaning of Article 107(1) TFEU, the second and third that the suspension injunction adopted by the Commission infringed Article 13(1) of Regulation 2015/1589 and the principle of proportionality, and the fourth that the statement of reasons for the decision to initiate the formal investigation procedure was both erroneous and inadequate.

18 In support of its action against the negative decision (Case T?624/17), the Republic of Poland raised two pleas in law, alleging, first, that the tax measure at issue had been wrongly classified as ‘State aid’, within the meaning of Article 107(1) TFEU and, second, that the statement of reasons given by the Commission to justify that decision was both erroneous and inadequate.

19 By the judgment under appeal, the General Court upheld the first plea raised by the Republic of Poland in Case T?624/17, finding that the Commission had erred in considering that the imposition of a progressive tax on the turnover generated by the retail sale of goods gave rise to a selective advantage. It also upheld the Republic of Poland’s fourth plea in Case T?836/16, finding that the Commission could not provisionally classify the tax measure at issue as new aid without relying on the existence of legitimate doubts on that point, contained in the evidence in the file. Consequently, it annulled the decisions at issue, including the injunction to suspend the tax measure at issue accompanying the decision to initiate the formal investigation procedure, without ruling on the other pleas before it.

Procedure before the Court and forms of order sought

20 By its appeal, the Commission claims that the Court should:

– set aside the judgment under appeal;

– give final judgment in the matter, by rejecting the pleas raised at first instance by the Republic of Poland against the decisions at issue, and order the Republic of Poland to pay the costs; and

– in the alternative, refer the case back to the General Court for a ruling on the pleas that have not yet been examined.

21 The Republic of Poland contends that the Court should:

– dismiss the appeal as unfounded and

– order the Commission to pay the costs.

22 Hungary, intervening in support of the form of order sought by the Republic of Poland, contends that the Court should dismiss the appeal as unfounded.

The appeal

23 The Commission relies on two grounds of appeal.

First ground of appeal, alleging infringement of Article 107(1) TFEU

24 By its first ground of appeal, the Commission submits that, by finding that the progressive nature of the tax measure at issue did not give rise to a selective advantage in favour of undertakings with a low level of turnover linked to the retail sale of goods, the General Court infringed Article 107(1) TFEU. According to that institution, the General Court erred in law in the

interpretation and application of each of the three stages of the analysis of the selectivity of that measure. In that regard, the Commission maintains, first, that the General Court was wrong to consider that the progressivity of the tax was part of the reference system in the light of which it was necessary to assess the selectivity of the tax measure at issue. Next, it submits that the General Court was not entitled to examine the comparability of the undertakings subject to that measure in the light of an objective other than the fiscal objective of that measure. Finally, the Commission submits that, in the context of the analysis of the justification for that measure, the General Court pursued an objective, namely the objective of redistribution, which is not intrinsically linked to that measure.

25 The Republic of Poland and Hungary dispute those arguments.

26 First of all, it should be noted that, according to the settled case-law of the Court of Justice, action by Member States in areas that are not subject to harmonisation by EU law are not excluded from the scope of the provisions of the FEU Treaty on monitoring State aid (see, to that effect, judgment of 22 June 2006, *Belgium and Forum 187* v *Commission*, C?182/03 and C?217/03, EU:C:2006:416, paragraph 81). The Member States must thus refrain from adopting any tax measure liable to constitute State aid that is incompatible with the internal market.

27 In that regard, it also follows from the settled case-law of the Court of Justice that the classification of a national measure as ‘State aid’, within the meaning of Article 107(1) TFEU, requires all the following conditions to be fulfilled. First, there must be an intervention by the State or through State resources. Second, the intervention must be liable to affect trade between the Member States. Third, it must confer a selective advantage on the recipient. Fourth, it must distort, or threaten to distort, competition (see, in particular, 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 53 and the case-law cited).

28 So far as concerns the condition relating to the selectivity of the advantage, inherent in the concept of a ‘State aid’ measure, within the meaning of Article 107(1) TFEU, which alone is the subject of the objection made by the Commission in the context of the first ground of appeal of the present appeal, 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 (judgment of 19 December 2018, *A-Brauerei*, C?374/17, EU:C:2018:1024, paragraph 35 and the case-law cited).

29 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 (see, to that effect, inter alia, judgment of 30 June 2016, *Belgium* v *Commission*, C?270/15 P, EU:C:2016:489, paragraph 49).

30 As regards, in particular, national measures that confer a tax advantage, it must be recalled that a measure of that nature which, although not involving the transfer of State resources, places the recipients in a more favourable position than other taxpayers is capable of procuring a selective advantage for the recipients and, consequently, constitutes ‘State aid’, within the meaning of Article 107(1) TFEU. Accordingly, 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 (see, to that effect, judgment of 15 March 1994, *Banco Exterior de España*, C?387/92,

EU:C:1994:100, paragraphs 13 and 14, 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, paragraphs 71 and 72). On the other hand, a tax advantage resulting from a general measure applicable without distinction to all economic operators does not constitute such aid (see, to that effect, inter alia, judgment of 19 December 2018, *A-Brauerei*, C?374/17, EU:C:2018:1024, paragraph 23 and the case-law cited).

31 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 (see, to that effect, inter alia, judgment of 19 December 2018, *A-Brauerei*, C?374/17, EU:C:2018:1024, paragraph 36 and the case-law cited).

32 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 (see, to that effect, inter alia, judgments of 29 April 2004, *Netherlands* v *Commission*, C?159/01, EU:C:2004:246, paragraphs 42 and 43; of 29 March 2012, *3M Italia*, C?417/10, EU:C:2012:184, paragraph 40; and of 19 December 2018, *A-Brauerei*, C?374/17, EU:C:2018:1024, paragraph 44).

33 It is in the light of those considerations that it is necessary to examine whether, in this case, the General Court misconstrued Article 107(1) TFEU, as interpreted by the Court of Justice, by holding, in essence, that the Commission had not, in the decisions at issue, demonstrated that the measure at issue conferred a selective advantage on ‘certain undertakings or the production of certain goods’.

34 By the first part of its first ground of appeal, the Commission submits that, by criticising it for having assessed the possible existence of a selective advantage in the light of an incorrect reference system and by considering that the progressive tax rates applied by the Polish legislature formed an integral part of that reference system, the General Court erred in law.

35 According to the Commission, the selective advantage resulting from the tax measure at issue does not lie in the existence of an exemption in respect of the portion of turnover below a certain amount, since all the undertakings concerned benefit from that exemption in respect of the part of their turnover which does not exceed the ceiling corresponding to the exempted band, but in the difference in the average tax rate resulting from the progressive nature of the rates. That difference favours undertakings with a low turnover by unjustifiably alleviating the tax burden on them compared with that borne by other undertakings in the context of the reference system, which, according to the Commission, consists of a flat-rate turnover tax. Thus, it is contended that taxation at progressive rates does not differ from the situation in which one group of taxable persons is taxed at a given rate and another group of taxable persons at another rate, which amounts to different treatment of comparable undertakings.

36 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.

37 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).

38 It follows that, outside the spheres in which EU tax law has been harmonised, the determination of the characteristics constituting each tax falls within the discretion of the Member States, in accordance with their fiscal autonomy, that discretion having, in any event, to be exercised in accordance with EU law. This includes, in particular, the choice of tax rate, which may be proportional or progressive, and also the determination of the basis of assessment and the taxable event.

39 Those characteristics constituting the tax therefore, in principle, define the reference system or the ‘normal’ tax regime, from which it is necessary, in accordance with the case-law referred to in paragraph 31 of the present judgment, to analyse the condition relating to selectivity.

40 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.

41 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.

42 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.

43 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.

44 In the present case, as is clear from paragraphs 3 to 5 of the present judgment, the Polish legislature, by the tax measure at issue, introduced a tax on the retail sector based on the monthly turnover generated by that activity, which, contrary to what the Commission maintains, is a direct tax. Its rate is zero up to PLN 17 million (approximately EUR 3 750 000), then 0.8% between PLN 17 and 170 million (approximately EUR 37 500 000) and 1.4% above that amount. 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.

45 The General Court did not therefore err in law in holding, in paragraphs 63 to 67 of the judgment under appeal, that, by considering that the progressive scale of the tax measure at issue was not part of the reference system in the light of which the selective nature of that measure had to be assessed, the Commission had incorrectly relied on an incomplete and fictitious reference system. It follows that the first part of the first ground of appeal must be rejected as unfounded.

46 Since an error in determining the reference system necessarily vitiates the entire analysis of the condition relating to selectivity (see, to that effect, judgment of 28 June 2018, *Andres (insolvency of Heitkamp BauHolding)* v *Commission*, C?203/16 P, EU:C:2018:505, paragraph 107), there is no need to rule on the second and third parts of the first ground of appeal.

47 It follows that the first ground of appeal must be rejected in its entirety as manifestly unfounded.

The second ground of appeal, alleging infringement of Article 108(2) and Article 13 of Regulation 2015/1589

48 By its second ground of appeal, the Commission claims that, by annulling the decision to initiate the formal investigation procedure, including the suspension injunction, the General Court infringed Article 108(2) TFEU and Article 13 of Regulation 2015/1589. More specifically, the Commission submits, first, that the General Court wrongly carried out a review of that decision to the same degree as in respect of the negative decision, whereas it should have confined itself to a review in respect of a manifest error of assessment, which was not established in the present case. Second, it criticises the General Court for having annulled the suspension injunction adopted by the Commission on the basis of Article 13(1) of Regulation 2015/1589 as a consequence of the annulment of the decision to initiate the formal investigation procedure, on the ground that its fate was not severable from that of that decision, even though it constituted a separate decision, the legality of which had to be assessed independently.

49 The Republic of Poland and Hungary dispute those arguments.

50 It must be borne in mind that the Commission is required to initiate the formal investigation procedure if, following the preliminary examination referred to in Article 4 of Regulation 2015/1589, it was unable to satisfy itself that the notified measure is compatible with the internal market. The same applies where the Commission entertains doubts as to the actual classification as 'aid', within the meaning of Article 107(1) TFEU of that measure (see, to that effect, inter alia, judgments of 10 May 2005, *Italy* v *Commission*, C?400/99, EU:C:2005:275, paragraph 47; of 21 July 2011, *Alcoa Trasformazioni*

v *Commission*, C?194/09 P, EU:C:2011:497, paragraph 60; and of 24 January 2013, *3F* v *Commission*, C?646/11 P, not published, EU:C:2013:36, paragraph 27).

51 Furthermore, under Article 13(1) of Regulation 2015/1589, the Commission has the option, after giving the Member State concerned the opportunity to submit its comments, to require it to suspend the payment of any unlawful aid until it takes a final decision on its compatibility with the internal market. Such an injunction is distinct from the decision to initiate the formal investigation procedure and can moreover be adopted at the same time as that decision or after it (see, to that effect, judgments of 9 October 2001, *Italy* v *Commission*, C?400/99, EU:C:2001:528, paragraph 47, and of 4 June 2020, *Hungary* v *Commission*, C?456/18 P, EU:C:2020:421, paragraph 35).

52 Taking into account the principles recalled in paragraph 50 of the present judgment, review by the EU judicature of the legality of a decision to initiate the formal investigation procedure, where the applicant challenges the Commission's assessment of the measure concerned as State aid, within the meaning of Article 107(1) TFEU, is limited to ascertaining whether or not the Commission, at the stage of the preliminary examination provided for in Article 4 of Regulation 2015/1589, has made a manifest error of assessment (see, to that effect, inter alia, judgments of 21 July 2011, *Alcoa Trasformazioni* v *Commission*, C?194/09 P, EU:C:2011:497, paragraph 61, and of 21 December 2016, *Commission* v *Hansestadt Lübeck*, C?524/14 P, EU:C:2016:971, paragraph 78). The same applies to the review of the legality of a suspension injunction made on the basis of Article 13(1) of that regulation, having regard to the provisional nature of the classification of the measure as State aid adopted at that stage by the Commission.

53 It must, however, be stated that, in view of the legal consequences of initiating the procedure provided for in Article 108(2) TFEU with regard to measures treated as new aid, where the Member State concerned contends that those measures do not constitute aid within the meaning of Article 107(1) TFEU, the Commission must undertake a sufficient examination of the question on the basis of the information notified to it at that stage by that Member State, even if the outcome of that examination is not definitive (judgment of 10 May 2005, *Italy* v *Commission*, C?400/99, EU:C:2005:275, paragraph 48). Therefore, if, in view of the evidence made available to the Commission at the time when the procedure was initiated, it appears that the classification of the measure at issue as new aid clearly had to be dismissed at that stage, the decision to initiate the procedure in respect of that measure must be annulled.

54 In the present case, the General Court held, in essence, in paragraph 108 of the judgment under appeal, that the Commission had based its provisional classification of the tax measure at issue as new aid on a manifestly incorrect analysis. More specifically, it criticised the Commission for having based its decision primarily on the idea that the introduction of a progressive tax on turnover constituted, in principle, State aid, whereas it should have carried out a detailed analysis intended to substantiate the existence, in its view, of legitimate doubts as to the classification as such of the tax measure at issue, taking into account the information in its possession. It concluded that both the decision to initiate the formal investigation procedure and the accompanying suspension injunction had to be annulled.

55 In so ruling, after recalling the principles set out in paragraph 52 of the present judgment, the General Court did no more than carry out in respect of the Commission's provisional classification as State aid in the decision to initiate the formal investigation procedure a review of the manifest error of assessment, as it was required to do. It is apparent from paragraph 108 of the judgment under appeal that it was the lack of detailed evidence substantiating the existence in the present case of legitimate doubts on the part of the Commission as to the classification of the tax measure at issue as State aid which justified the annulment, by the General Court, of the decision to initiate the formal investigation procedure, and not, in any event, a repetition of the reasoning

based on which it had previously held that the negative decision had to be annulled, to which it referred only incidentally.

56 Furthermore, contrary to what is claimed by the Commission, the General Court did not annul the decision to suspend the tax measure at issue simply as a consequence of the annulment of the decision to initiate the formal investigation procedure. It merely held, in paragraph 109 of the judgment under appeal, that the grounds justifying the annulment of the latter decision, concerning the manifest error of assessment by the Commission as to the provisional classification of the tax measure at issue as State aid, also justified in the present case the annulment of the decision to suspend that measure, whose adoption was also dependent on that provisional classification.

57 In those circumstances, the second ground of appeal must be rejected in its entirety as unfounded.

58 It follows from all the foregoing that the appeal must be dismissed in its entirety.

Costs

59 Under Article 138(1) of the Rules of Procedure of the Court of Justice, applicable to appeal proceedings by virtue of Article 184(1) of those rules, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Republic of Poland has applied for costs and the Commission has been unsuccessful, the latter must be ordered to pay the costs.

60 Article 184(4) of the Rules of Procedure of the Court of Justice provides that, where, without having brought the appeal itself, an intervener at first instance has participated in the written or oral part of the proceedings before the Court of Justice, the latter may decide that it is to bear its own costs. In the present case, Hungary, intervener at first instance, without being the appellant, participated in the oral procedure before the Court but has not applied for the Commission to be ordered to pay the costs. In those circumstances, it must be held that it is to bear its own costs relating to the appeal proceedings (see, to that effect, judgment of 28 June 2018, *Andres (insolvency of Heitkamp BauHolding)* v *Commission*, C?203/16 P, EU:C:2018:505, paragraphs 113 and 114).

On those grounds, the Court (Grand Chamber) hereby:

1. **Dismisses the appeal;**

2. **Orders the European Commission to pay the costs;**

3. **Orders Hungary to bear its own costs.**

[Signatures]

* Language of the case: Polish.