Provisional text

OPINION OF ADVOCATE GENERAL

KOKOTT

delivered on 13 June 2019 (1)

Case C?75/18

Vodafone Magyarország Mobil Távközlési Zrt.

v

Nemzeti Adó- és Vámhivatal Fellebbviteli Igazgatósága

(Request for a preliminary ruling from the F?városi Közigazgatási és Munkaügyi Bíróság (Budapest Administrative and Labour Court, Hungary))

(Request for a preliminary ruling — Freedom of establishment — Aid — System of value added tax — Turnover-based tax for telecommunications undertakings — Disadvantage for foreign undertakings arising from tax rate with progressive effect — Indirect discrimination — Justification of tax with progressive effect based on turnover — Unlawful favouring of small undertakings through a progressive tax rate — Character as a turnover tax within the meaning of Article 401 of the VAT Directive)

I. Introduction

1. In these proceedings the Court is concerned with questions relating to tax law and the rules on State aid which at the same time have particular importance for the turnover-based digital services tax currently being proposed by the European Commission. (2) The question thus also arises in this case whether the taxation of a company's revenue according to its turnover constitutes a turnover tax or whether such a tax is a direct income tax.

2. In addition, the Court must once again (3) consider the question of indirect discrimination arising from a tax regime, where in this case the discrimination can be inferred solely from its progressive rate. Lastly, the Court must address the question whether progressive taxation of economically stronger undertakings also constitutes unjustified aid in favour of other undertakings.

3. The redistributive effect which is generally pursued with a progressive tax rate means per se that economically stronger persons are subject to higher taxation and thus disadvantaged in comparison with economically weaker persons. As economically stronger persons tend to engage in cross-border business, this could be seen as indirect discrimination against them, in particular where the progressive scale is specifically employed to catch economically stronger foreign

undertakings.

4. The Court must therefore rule on the compatibility with EU law of a progressive tax rate and a basic allowance, (4) which has developed historically in many Member States, is considered necessary from the point of view of the welfare state and is, therefore, also applied to taxation of income in the Member States. Furthermore, a progressive tax rate and a basic allowance also form the basis for the digital services taxes which are planned EU-wide and have already been introduced in various Member States.

II. **Legal framework**

A. **EU law**

5. Article 401 of Directive 2006/112/EC (5) ('the VAT Directive') states:

'Without prejudice to other provisions of Community law, this Directive shall not prevent a Member State from maintaining or introducing taxes on insurance contracts, taxes on betting and gambling, excise duties, stamp duties or, more generally, any taxes, duties or charges which cannot be characterised as turnover taxes, provided that the collecting of those taxes, duties or charges does not give rise, in trade between Member States, to formalities connected with the crossing of frontiers.'

B. **National law**

6. The main proceedings are taking place against the background of the Az egyes ágazatokat terhel? különadóról szóló 2010. évi XCIV. törvény (Law No XCIV of 2010 on the special tax charged in certain sectors, 'the Law on the special tax'), which established a turnover-based special tax for undertakings operating in certain sectors from 2010 to 2012.

7. The preamble to the Law on the special tax provides:

'In the context of the adjustment of the budgetary balance, the Parliament introduces this law on the establishment of a special tax imposed on taxpayers whose capacity to bear public burdens surpasses the general obligation to pay tax.'

8. Paragraph 1 of the Law on the special tax contains the following explanatory provisions:

'For the purposes of the present law: …

2. "telecommunications activities" means the provision of electronic communication services in accordance with the Az elektronikus hírközlésr?l szóló 2003. évi C. törvény (Law No C of 2003 on electronic communications) …'

9. Under Paragraph 2 of the Law on the special tax:

'Tax shall be chargeable on:

(a) store retail trade,

(b) telecommunications activities, and

(c) supply of energy.'

10. Paragraph 3 of the Law on the special tax defines taxable persons as follows:

‘(1) Taxable persons are legal persons, other organisations within the meaning of the general tax code and self-employed persons who pursue an activity subject to tax within the meaning of Paragraph 2.

(2) Non-resident organisations and individuals shall also be subject to the tax with respect to the activities subject to the tax, referred to in Paragraph 2, where they pursue those activities in the internal market through subsidiaries.’

11. The taxable amount under Paragraph 4(1) of the Law on the special tax is

‘the net turnover of the taxable person resulting from the activities referred to in Paragraph 2 during the tax year.’

12. The special tax has a progressive tax rate structure. Under Paragraph 5(b) of the Law on the special tax, the tax rate for

‘the performance of an activity referred to in Paragraph 2(b) shall be set at 0% on a taxable amount not exceeding 500 million forint [HUF], 4.5% on a taxable amount in excess of HUF 500 million but not exceeding HUF 5 000 million, and 6.5% on a taxable amount in excess of HUF 5 000 million …’

13. Paragraph 7 of the Law defines the circumstances in which the tax is applicable to ‘linked undertakings’:

‘The tax levied on taxable persons classified as linked undertakings within the meaning of Law [No LXXXI of 1996] concerning tax on companies and dividends shall be calculated by aggregating the net turnovers from the activities referred to in Paragraph 2(a) and (b), pursued by taxable persons acting as linked undertakings, and the amount obtained by applying the rate defined in Paragraph 5 to that total shall be divided between the taxable persons in proportion with their respective net turnovers from the activities referred to in Paragraph 2(a) and (b) compared with the total net turnover from the activities referred to in Paragraph 2(a) and (b) earned by all the linked taxable persons.’

III. **Main proceedings**

14. The applicant in the main proceedings, Vodafone Magyarország Mobil Távközlési Zrt. (‘Vodafone’), is a public limited company governed by Hungarian law. The sole shareholder is Vodafone Europe B.V., registered in the Netherlands.

15. The applicant’s principal activity is on the telecommunications market. According to the referring court, it was the third largest undertaking on the Hungarian telecommunications market in the years at issue.

16. In an *ex post* tax inspection of the applicant for the period from 1 April 2011 to 31 March 2015, the tax authority found a tax discrepancy of HUF 8 371 000 to be paid by the applicant and, in addition, imposed tax surcharges and fines. After an appeal against that decision which had been only partially successful, the applicant brought an action before the referring court.

17. The referring court has doubts regarding the special tax in view of the characteristics of the Hungarian telecommunications market. Those doubts reside in the fact that — according to the referring court — ‘in essence, only the turnover of Hungarian-owned taxable persons as a whole is subject to the lowest tax rate, whereas only Hungarian subsidiaries of foreign parent companies pay the tax rate set for the highest band of turnover tax, and accordingly, the main share of the

special tax paid by taxable persons included in the highest turnover band is paid on the basis of that higher rate'.

18. However, the documents submitted to the Court by the Commission and Hungary do not confirm entirely the referring court's statement. According to those documents, in the first year (2010), of 16 undertakings concerned, 6 non-foreign-controlled undertakings still fall within the highest tax rate. Other statistics show that, in any case, foreign-owned undertakings are not the only ones concerned. The statistics also show that undertakings owned by foreign shareholders also fall within the middle tax rate.

19. The referring court further points out that in 2012 the Commission had brought infringement proceedings against Hungary, which were nevertheless terminated in 2013. The Commission stated that the reason for this was that the Law on the special tax was already no longer in force and was not therefore applicable for 2013.

IV. **Request for a preliminary ruling and procedure before the Court**

20. By decision of 23 November 2017, received on 6 February 2018, the referring court decided to make an order for reference pursuant to Article 267 TFEU and referred the following questions to the Court for a preliminary ruling:

'(1) Must the provisions of Articles 49, 54, 107 and 108 TFEU be interpreted as precluding a national measure pursuant to which a Member State's legislation (Law establishing liability to a special tax on telecommunications) has the effect that the actual tax burden falls on foreign-owned taxable persons? Is that effect indirectly discriminatory?

(2) Do Articles 107 and 108 TFEU preclude a Member State's legislation imposing a tax liability on turnover calculated on the basis of a progressive tax rate? If the effect of that legislation is that the actual tax burden, for the highest tax band, falls mainly on foreign-owned taxable persons, is that legislation indirectly discriminatory? Does that effect amount to prohibited State aid?

(3) Must Article 401 of the VAT Directive be interpreted as precluding legislation of a Member State that gives rise to a distinction between foreign-owned taxable persons and national taxable persons? Must the special tax be considered a tax on turnover? In other words, is this tax compatible or not with the VAT Directive?'

21. In the proceedings before the Court, Vodafone, Hungary, the Republic of Poland, the Czech Republic and the European Commission submitted written observations on these questions. Apart from the Czech Republic, those interested parties as well as the Federal Republic of Germany took part in the hearing on 18 March 2019.

V. **Legal assessment**

22. The request for a preliminary ruling concerns the compatibility of the Hungarian Law on the special tax with EU law.

23. The question of conformity with EU law arises in the light of the specific structure of the special tax. First, it does not base the taxable amount on profit, but on the net turnover of the taxable undertakings. Second, it has a staggered progressive tax rate structure. A distinction is drawn between three different bands which are subject to three different tax rates: a tax rate of 0% is levied for an amount of net turnover not exceeding HUF 500 million; a tax rate of 4.5% for an amount of net turnover in excess of HUF 500 million but not exceeding HUF 5 000 million; and a tax rate of 6.5% for an amount of net turnover in excess of HUF 5 000 million.

24. The referring court raises the question whether a tax of that nature infringes Articles 49 and 54 TFEU (see B.), Articles 107 and 108 TFEU (see C.) and Article 401 of the VAT Directive (see A.). In this regard, the third question referred for a preliminary ruling should be answered first in order to clarify the character of the turnover-based tax at issue. If that tax were covered by the prohibition in Article 401 of the VAT Directive, it would no longer be necessary to answer the other two questions.

A. **Third question: infringement of Article 401 of the VAT Directive**

25. Article 401 of the VAT Directive makes clear that Member States are not prevented from introducing new taxes if they cannot be characterised as turnover taxes. The referring court wishes to know in this connection whether the turnover-based special tax for telecommunications undertakings is to be regarded as a tax which can be characterised as a turnover tax. In that case, Hungary would be prevented from introducing it under Article 401 of the VAT Directive.

26. The Court has held in settled case-law that in order to interpret Article 401 of the VAT Directive it must be viewed against its legislative background. (6)

27. According to the preamble to First Council Directive 67/227/EEC of 11 April 1967 on the harmonisation of legislation of Member States concerning turnover taxes, (7) harmonisation of legislation concerning turnover taxes should make it possible to establish a common market within which there is healthy competition and whose characteristics are similar to those of a domestic market, by eliminating tax differences liable to distort competition and hinder trade. (8) By the VAT Directive, (9) such a common system of value added tax was introduced.

28. The principle of the common system of VAT involves the application to goods and services, up to and including the retail trade stage, of a general tax on consumption exactly proportional to the price of the goods and services, whatever the number of transactions which take place in the production and distribution process before the stage at which tax is charged. (10) As the Court states, that tax is to be finally borne by the ultimate consumer alone. (11)

29. In order to attain the objective of ensuring equal conditions of taxation for the same transaction, no matter in which Member State it is carried out, the common system of VAT was intended to replace the turnover taxes in force in the various Member States. For these same reasons, Article 401 of the VAT Directive allows the maintenance or introduction of taxes, duties or charges on the supply of goods or services and imports by a Member State only if they cannot be characterised as turnover taxes.

30. The Court has ruled in this regard that taxes must in any event be regarded as being imposed on the movement of goods and services in a way comparable to VAT if they exhibit the essential characteristics of VAT, even if they are not identical to it in every way. (12)

31. It appears from case-law that there are four essential characteristics of VAT: (1) it applies generally to transactions relating to goods or services; (2) it is proportional to the price charged by

the taxable person in return for the goods and services which he has supplied; (3) it is charged at each stage of the production and distribution process, including that of retail sale, irrespective of the number of transactions which have previously taken place; (4) the amounts paid during the preceding stages of the process are deducted from the tax payable by a taxable person, with the result that the tax applies, at any given stage, only to the value added at that stage and the final burden of the tax rests ultimately on the consumer. (13)

32. First of all, the Hungarian special tax does not cover any transaction, but only specific transactions of telecommunications undertakings. It is not therefore a (general) turnover tax in accordance with the first criterion, but would be at best a special excise duty, which the Member States would not be permitted at present, however, only under the conditions laid down in Article 1(2) and (3) of Directive 2008/118/EC. (14)

33. Second, it is not designed to be passed on to the consumer (fourth criterion). This cannot be taken to be the case simply because a tax has been reflected arithmetically in the price of the goods or services. That is more or less the case with any tax charge on an undertaking. Rather, if the consumer — as with the Hungarian special tax for telecommunications undertakings at issue — is not the person liable for payment, the tax must be designed to be passed on to the consumer specifically.

34. This would require the amount of tax to be established at the time when the transaction is carried out (at the time of the supply to the consumer), as is the case with VAT. However, as that amount cannot be calculated until the end of the year and depends on the volume of annual turnover, the supplying telecommunications undertaking does not yet know any tax charge which may have to be passed on at the time when the supply is made or at least its precise amount. (15) For example, if the lower threshold is not reached at the year end, there is no tax at all to be passed on to the consumer. It is not therefore a tax *designed to be passed on*.

35. Rather, the Hungarian special tax for telecommunications undertakings is conceived such that those undertakings are intended to be taxed directly, as Hungary rightly points out. According to the preamble, their capacity to bear public burdens is purported to surpass the general obligation to pay tax (presumably meaning the general capacity to pay tax). The intention is therefore to tax the particular financial capacity of those undertakings and not the financial capacity of recipients of telecommunications services. The Hungarian special tax is similar in this regard to a special (direct) corporate tax for certain undertakings, in this case telecommunications undertakings.

36. Tax is also not levied on each individual transaction according to its price but, according to Paragraphs 1 and 2 of the Law on the special tax, on the (net) total turnover from the supply of electronic communication services in the tax year from the threshold of HUF 500 million at an initial rate of 4.5% and from HUF 5 000 million at 6.5%. In this way too, the special corporate tax is similar in character to a special direct income tax. Unlike ‘normal’ direct income taxes, however, the taxable amount is not the profit generated — as the difference between two operating assets within a certain period — but the turnover generated within a certain period. Nevertheless, contrary to the view evidently taken by the Commission at the hearing, this does not affect its character as a *direct* tax.

37. Consequently, the Hungarian special tax constitutes a turnover-based special (direct) income tax which is intended to skim off the particular financial capacity of telecommunications undertakings. Therefore, as the Commission rightly states, it cannot be characterised as a turnover tax seeking to tax the consumer. Accordingly, Article 401 of the VAT Directive does not prevent Hungary from introducing that tax in addition to VAT.

B. First question: infringement of freedom of establishment

38. The first question asks whether freedom of establishment under Articles 49 and 54 TFEU precludes the Hungarian special tax for the telecommunications sector. On the other hand, Articles 107 and 108 TFEU, which are also mentioned in the question referred, will be dealt with comprehensively in connection with the second question.

39. It should be stated, first of all, that, although direct taxation — as which the special tax at issue should be classified (see above, point 35 et seq.) — does not as such fall within the purview of the Union, the powers retained by the Member States must nevertheless be exercised consistently with EU law, in particular the fundamental freedoms. (16)

40. Freedom of establishment, which Article 49 TFEU grants to European Union nationals, includes, in accordance with Article 54 TFEU, for companies formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the European Union, the right to exercise their activity in other Member States through a subsidiary, branch or agency. (17)

41. Freedom of establishment is applicable in the present case only if there is a cross-border situation (1.). If so, it must then be asked whether the special tax constitutes a restriction of freedom of establishment (2.) and whether that restriction might be justified by overriding reasons in the public interest (3.).

1. Cross-border situation

42. The Hungarian Government expresses doubts as to the circumstances in which companies can be regarded as ‘domestic’ or ‘foreign’. In this connection it should be stated that, according to established case-law, it is the corporate seat of a company that serves as the connecting factor with the legal system of a particular State, like nationality in the case of natural persons. (18) As the applicant in the main proceedings has its seat in Hungary, it is therefore to be regarded as a Hungarian company with the result that there is not a cross-border situation.

43. However, the applicant’s parent company is a company which has its seat in the Netherlands. In so far as that foreign company pursues its activity through a subsidiary — the applicant in the main proceedings — on the Hungarian market, the freedom of establishment of the parent company is affected.

44. The Court has already held in this regard that a company may, for tax purposes, rely on a restriction of the freedom of establishment of another company which is linked to it in so far as such a restriction affects its own taxation. (19) The applicant in the main proceedings may therefore rely on a possible restriction of the freedom of establishment of its parent company, Vodafone Europe B.V.

2. Restriction of freedom of establishment

45. It is settled case-law that all measures which prohibit, impede or render less attractive the exercise of freedom of establishment are restrictions on that freedom. (20) In principle this covers cases of discrimination, but also non-discriminatory restrictions. However, in the case of taxes and duties it must be borne in mind that they constitute a burden per se and thereby reduce the attractiveness of establishment in another Member State. An examination based on non-discriminatory restrictions would therefore make all national taxable events subject to EU law and thereby seriously call into question the sovereignty of the Member States in tax matters. (21)

46. The Court has thus ruled on a number of occasions that Member States' rules on the conditions and the level of taxation are subject to fiscal autonomy, provided the treatment of the cross-border situation is not discriminatory compared with the domestic situation. (22)

47. Accordingly, a restriction of freedom of establishment requires, first, that two or more comparison groups are actually treated differently (see (b)). If that is the case, the further question arises whether that unequal treatment of cross-border situations compared with purely domestic situations disadvantages the former, consideration being given to both overt and covert discrimination (see (c)). It is sometimes examined as an additional element whether the unequal treatment relates to situations which are objectively comparable (see (d)).

48. Lastly, in the present case, it must first be briefly explained that a relevant unequal treatment — unlike in *Hervis Sport* (23) — cannot be based on the 'aggregation rule' in Paragraph 7 of the Law on the special tax, but solely on the progressively structured tax rate (see (a)).

(a) **Irrelevance of the aggregation rule in the present context**

49. In so far as the Commission considers that an infringement of freedom of establishment follows directly from the judgment in *Hervis Sport*, that view must be rejected.

50. The situation in that case was distinguished by the interaction of a progressive turnover-based income tax for the retail trade with an 'aggregation rule' for groups of companies. Under that rule, in essence, classification in bands was not based on the turnover of the individual company, but on the consolidated turnover of the overall group of companies. The rule was introduced against the background of the application of a tax with progressive effect also to legal persons, which is fairly uncommon in taxation law. Such an aggregation rule is necessary in principle to prevent the possibility of the progressive effect being circumvented by an entity being split into multiple legal persons.

51. The Court nevertheless expressed concerns regarding the aggregation rule from the point of view of EU law. (24) As the same aggregation rule in Paragraph 7 of the Law on the special tax is also applicable to the special tax for the telecommunications market at issue in this case, the Commission considers this to constitute an infringement of EU law for that reason.

52. Even if, however, the aggregation rule did infringe EU law in the present case — which cannot be readily inferred from the abovementioned judgment — this would not be relevant to the decision in this case, nor would it answer the question asked by the referring court. It would merely mean that the aggregation rule would have to be disapplied. Nevertheless, because, according to the findings of the referring court, it is not applicable in any event to the applicant in the main proceedings, as it does not appear to be connected with other telecommunications undertakings represented on the Hungarian market, it would have no impact on the main proceedings.

53. Accordingly, the Court must consider in this case whether the structure of the special tax as such — irrespective of the aggregation rule — has a discriminatory effect. This question was not

answered in the judgment in *Hervis Sport*, in particular, as Vodafone rightly underlines, to the effect that, as claimed by the Hungarian Government, the progressive character in itself cannot be sufficient for discrimination. In that case the Court only considered the combination of the progressive tax rate and the aggregation rule, but did not rule out that the progressive rate alone could also give grounds for discrimination. (25)

(b) **Different treatment**

54. It must therefore be asked, first of all, whether the Law on the special tax actually treats different undertakings unequally. A point militating against this would appear to be that it does not, for example, fix different tax rates for different undertakings. Instead, it merely defines certain turnover bands which can, in principle, cover all undertakings. The respective tax rates associated with those turnover bands apply uniformly to every undertaking. Against this background, the Hungarian Government takes the view that there is no unequal treatment.

55. It cannot be objected in this regard that unequal treatment resides in the fact that higher-turnover undertakings have to pay more special tax in absolute terms than lower-turnover undertakings. This does not in itself constitute unequal treatment, but this different taxation is consistent with the generally recognised principle of taxation according to ability to pay. Provided the taxable amount and the tax liability are proportionate to one another, as is the case with a proportional tax rate (‘flat tax’), for example, unequal treatment can be rejected.

56. With a progressive tax rate, however, the taxable amount and the tax liability are not proportionate in the case of all taxable persons. This is illustrated very clearly in the present case if a comparison is made of the average tax rates to which taxable persons are subject in respect of their total turnover, and not only in respect of the individual bands. That average tax rate increases as the turnover bands are reached, with the result that, on the whole, higher-turnover undertakings are also subject to a higher average tax rate than lower-turnover undertakings. They thus pay higher tax both in absolute and in relative terms. This constitutes unequal treatment of the undertakings concerned. (26)

(c) **Disadvantage for the cross-border situation**

57. The question therefore arises whether this different treatment disadvantages foreign undertakings compared with domestic undertakings.

58. No overt or direct discrimination against foreign undertakings is evident in this regard. This is because the rules governing the levying of the special tax make no distinction according to an undertaking’s seat or ‘origin’. The Law on the special tax does not therefore treat foreign undertakings differently from domestic undertakings.

59. However, the fundamental freedoms prohibit not only overt discrimination, but also all covert or indirect forms of discrimination which, by the application of other criteria of differentiation, lead to the same result. (27) A crucial factor in discriminatory character for the purposes of Articles 49 and 54 TFEU is therefore whether the different treatment of telecommunications undertakings in respect of the criterion of annual net turnover amounts to unequal treatment according to the origin or seat of the undertakings.

60. In this connection it must be clarified, first of all, what requirements are to be applied to the correlation between the chosen distinguishing criterion — here turnover — and the seat of the undertakings (see point 61 et seq.). Second, it must be examined whether indirect discrimination is to be taken to exist in any case if the distinguishing criterion was intentionally chosen with a discriminatory objective (see point 83 et seq.).

(1) *Relevant correlation*

61. Existing case-law does not provide a consistent picture with regard to either the extent or the character of the abovementioned correlation. As regards the quantitative extent, the Court has had account of both a correspondence in the majority of cases (28) and a mere preponderance of non-residents being affected; (29) in some instances it even mentions a mere risk of disadvantage. (30) In qualitative terms it is uncertain whether the correlation must typically (31) exist or must be inherent in the distinguishing criterion, as is indicated in a number of judgments, (32) or can also be based on more incidental factual circumstances. (33) In addition, it is not clear whether the quantitative and the qualitative correlation must exist cumulatively or might also be sufficient in themselves.

62. As I have already stated elsewhere, 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. (34)

(i) *Quantitative criterion*

63. 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. (35)

64. However, this quantitative element can cause considerable difficulties in applying the law, as the result of the examination depends on the comparative figures chosen in the case at issue. Thus, the Court asked in *Hervis Sport* whether the majority of linked companies *in the highest band of the special tax* were linked to foreign parent companies. (36)

65. It can hardly be justified, however, to single out only the highest band as a general criterion. It is not clear why only that one band should be relevant in establishing discriminatory character. In that case, this could possibly be explained by the fact that the other bands appear to be negligibly low in comparison with the highest. (37) In the present case, however, the middle band with a tax rate of 4.5% is hardly negligible. In addition, an examination with reference to the highest band alone becomes more questionable the more progressive bands are provided for in a tax. This approach fails entirely where there is a sliding progression curve that does not have any bands at all, as is commonly the case, for example, with the taxation of income.

66. The Commission’s suggestion that it must be asked whether the majority of the total revenue from the special tax falls to foreign undertakings is also not convincing. This is not a reliable indicator for a correlation, but only an incidental one. First of all, as Hungary points out, this would probably also be the case in this instance with a proportional tax, against which the Commission also rightly does not raise any objection. This characteristic would also be fulfilled wherever the market is dominated preponderantly by foreign undertakings.

67. Second, cases would not be covered, for example, where individual foreign undertakings

are subject to quite significant tax rates, whilst many smaller domestic undertakings with low tax rates nevertheless contribute so much to the total revenue from the special tax that the correlation would have to be rejected. To make discriminatory character dependent on that contribution made by smaller domestic undertakings would thus produce incidental results and it is not therefore reasonable.

68. The same applies to the consideration of the average tax rate. Because unequal treatment in respect of progressive taxes resides in the application of different *average* tax rates, it could be asked at most whether in the vast majority of cases all foreign undertakings are disadvantaged in relation to that rate. This would be the case only if in the vast majority of cases that average tax rate far exceeds the average rates to which domestic undertakings are subject. It is not clear either from the request for a preliminary ruling or from the figures submitted by the parties whether that is the case here.

69. Nevertheless, here too, discriminatory character would ultimately depend on the average tax rate for smaller domestic undertakings. This would also produce incidental results and is not therefore reasonable. Member States which are specifically seeking to attract foreign investors would suddenly be unable to levy progressive income tax if and because, on account of their economic success, the new investors would — as is intended — be responsible for the majority of the tax revenue (either in absolute terms or though their higher average tax rates). This would be an absurd result, showing that a quantitative approach is not appropriate.

70. In addition to the abovementioned difficulties with calculation (see above, point 63 et seq.), a purely quantitative examination would also have the disadvantage of causing considerable legal uncertainty in so far as regard is not had to a specific threshold. (38) However, a specific threshold would also entail resulting problems, such as differences between contradictory statistics which are difficult to resolve and fluctuations in figures occurring over time.

71. For example, according to press reports, the ‘digital services tax’ just concluded in France currently covers approximately 26 undertakings, only 4 of which are resident in France. If a change in these figures in the next year led to a different legal assessment, the existence of a restriction of the fundamental freedoms (assuming the other 22 undertakings are able to rely on the fundamental freedoms) would always depend on those statistics, which are available only years later.

72. In addition, focusing on the shareholders in the case of free float companies (public limited companies with thousands of shareholders) in order to determine a quantitative criterion causes considerable problems. It is also unclear, moreover, how a company with two shareholders is to be assessed where one shareholder is resident abroad and the other is resident in national territory.

73. If regard is had — as advocated by the Commission and the referring court — to the shareholders, then should regard be had, in the case of larger group structures, not just to the group head (the group parent company) and its shareholders in order to determine whether an undertaking from another EU country, an undertaking from a non-member country or a domestic undertaking is affected? In the present case, the Court is unaware of the shareholder structure of the parent company Vodafone Europe B.V. or of the actual group parent company. This case shows very clearly the futility of a quantitative approach which is also based on the way in which a company’s shareholder structure is organised.

(ii) *Qualitative criterion*

74. It would therefore 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. (39) A merely incidental link, even if it is sufficiently high in quantitative terms, cannot therefore be sufficient, in principle, to establish indirect discrimination.

75. However, the criterion of an intrinsic correlation must be defined more precisely in order to avoid nebulous application. The Court has accepted an intrinsic correlation, for example, in a case where pharmacists who had already pursued their activities in the national territory were given preferential treatment in connection with the issue of licences to open pharmacies. (40) This was based on the correct idea that a correlation between an undertaking's seat and its place of activity follows a certain internal logic or typicality and is not merely based on the incidental characteristics of a certain market or economic sector.

76. The same holds, as Advocate General Wahl (41) has recently stated, for owners of vehicles registered in a Member State who are, for the vast majority, nationals of that State because registration of vehicles is linked to the residence of the vehicle owner. The choice of a criterion which only vehicles manufactured abroad can satisfy, because no such vehicles are manufactured in national territory, is also such a case. (42)

77. Furthermore, an intrinsic correlation is also to be accepted in the case of the criterion of generation of taxable revenue. This is because company tax law is characterised by the dualism of revenue which is generated and is taxable domestically and revenue which is generated abroad and not therefore taxable domestically. If an advantage is thus linked to concurrent generation of taxable revenue, it is intrinsically correlated to an advantage for domestic undertakings. (43)

78. The important factor is therefore a connection intrinsic to the distinguishing criterion which, on an abstract analysis, clearly suggests the likelihood of a correlation in the vast majority of cases.

79. If these principles are applied to the present case, the key question is whether the volume of an undertaking's turnover is intrinsically correlated to an undertaking's (foreign) seat or its controlling shareholders. I have already stated in this regard in my Opinion in *Hervis Sport* that, as a rule, high-turnover undertakings tend to operate across national borders within the internal market and there may therefore be a certain likelihood that such undertakings are also active in other Member States. (44)

80. However, as the Federal Republic of Germany asserted at the hearing, that is not sufficient in itself. High-turnover undertakings can be operated just as well by residents. (45) This applies to the retail trade which was relevant in *Hervis Sport* just as much as to the telecommunications sector at issue in this case. It applies in particular if, as in this case — see Article 3(2) of the Law on the special tax — regard is had to turnover generated in national territory and not to worldwide turnover. There is no clear reason why it should be generally considered that foreign undertakings operating in Hungary will generate a higher turnover based on telecommunications services *in Hungary* than domestic undertakings.

81. In other words, the criterion of turnover is not an intrinsically cross-border distinguishing criterion, but — as rightly noted by the Czech Republic in its written observations and the Federal Republic of Germany at the hearing — a neutral distinguishing criterion. Turnover is just as neutral as a basis of assessment for calculating a direct tax as, for example, profit (or wealth). The fundamental freedoms favour neither one nor the other. In this regard, there is a historical 'randomness' in the Hungarian telecommunications market, which was possibly exploited intentionally by the Hungarian legislature (on this point, see below, point 83 et seq.).

82. This is also confirmed by the statistics submitted to the Court. According to one statistic, of the 10 highest corporate taxpayers in Hungary in 2010, just 3 undertakings were not owned by

foreign shareholders. It is evident that the Hungarian economy as a whole has a high proportion of successful undertakings owned by foreign shareholders. Nevertheless, this clearly historically determined fact does not mean that any additional tax which imposes a higher burden on undertakings that are particularly successful on the market has an indirectly discriminatory effect.

(2) *Effects of an intentional and specific disadvantage*

83. However, the Commission also claims that the Hungarian legislature intentionally and specifically brought about the discriminatory effect of the special tax.

84. In this regard, the question arises whether a restriction of a fundamental freedom is also to be taken to exist where a distinguishing criterion — that is intrinsically not disadvantageous — was, in subjective terms, intentionally chosen to effect a high degree of disadvantage, in quantitative terms, for undertakings with generally foreign shareholders. To that end, such an intention must be legally relevant (see (i)) and have been accordingly proven (see (ii)).

(i) *Relevance of a political intention for the assessment of indirect discrimination*

85. I can see certain risks in a subjective analysis of indirect discrimination which is actually to be determined objectively. (46) In particular, the uncertainties connected with a finding of a Member State's subjective intent to discriminate raise concerns (47) and give rise to ensuing problems (such as demonstrability).

86. Nevertheless, in the light of the spirit and purpose of the qualitative criterion in the context of indirect discrimination (see above, point 59 and point 74 et seq.) and the prohibition of abuse of rights (or the principle of *venire contra factum proprium*) recognised in EU law, this question should, in my view, be answered in the affirmative in principle, but only subject to very strict conditions.

87. The purpose of the qualitative criterion is to exclude purely incidental quantitative correlations from the scope of indirect discrimination. In a sense, this criterion protects the Member States' fiscal sovereignty against restrictions imposed by EU law which might, on a purely quantitative analysis, result simply from an incidental preponderance of foreign taxable persons in a certain area. If, however, the correlation is chosen intentionally and solely in this form in order to disadvantage foreign taxable persons specifically, the circumstances are not incidental and the Member State does not therefore warrant protection.

88. This approach can be based on the general legal principle of the prohibition of abuse of rights, (48) which applies throughout the European Union not only to taxable persons (see now at EU level Article 6 of Directive 2016/1164 (49)). Like Advocate General Campos Sánchez-Bordona, (50) I consider that the Member States are also subject to this general legal principle by virtue of Article 4(3) TEU.

89. The Court has thus ruled that EU law is based on the fundamental premiss that each Member State shares with all the other Member States, and recognises that they share with it, a set of common values on which, as stated in Article 2 TEU, the EU is founded. It is precisely in that context that the Member States are obliged, by reason inter alia of the principle of sincere cooperation set out in the first subparagraph of Article 4(3) TEU, to ensure in their respective territories the application of and respect for EU law and to take for those purposes any appropriate measure, whether general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the EU. (51)

90. In particular, the third subparagraph of Article 4(3) TEU requires the Member States to

refrain from any measure which could jeopardise the attainment of the Union's objectives. If, however, powers existing at national level (in this case the introduction of an additional income tax) are chosen intentionally and solely in a certain form in order to disadvantage foreign undertakings alone and thus to restrict the fundamental freedoms conferred on them by EU law (and thereby to circumvent EU law), this is contrary to the principles underlying Article 4(3) TEU and under certain circumstances can certainly be regarded as an abuse of rights. Under these circumstances, it can also be seen as indirect discrimination.

91. It also follows from the abovementioned concerns, however, that, having regard to the autonomy of the Member States, this must be a very limited exception which must be dealt with restrictively and requires concrete proof. A case of abuse of rights by a Member State may not under any circumstances be taken to exist flippantly based on mere speculation, inadequately proven statistics, individual statements (52) or other conjecture.

92. There must be clear evidence that disadvantaging foreign companies was the primary objective of the measure which was perceived and endorsed as such by the Member State (and not merely individuals involved), and there also cannot be any other evident objective reason for the option chosen.

(ii) *Proof of a relevant intention to discriminate*

93. There are serious doubts in this regard. The Commission states as grounds for the existence of an intention to discriminate, on the one hand, its observation that the line that divides the upper turnover band (in excess of HUF 5 000 million) from the middle band (between HUF 500 million and HUF 5 000 million) is almost precisely the dividing line between domestic and foreign companies.

94. However, this cannot be inferred entirely from the statistical information supplied. According to the Commission, in the first year of the tax 16 undertakings were in the upper progression band, 6 of which were not controlled by nationals from other EU countries and the 2 largest were owned 'only' 70.5% or 75% by nationals from other EU countries. In the next progression band there were also, according to the Commission, of the 30 or so undertakings concerned, 9 undertakings in which the majority of shares were held by nationals from other EU countries. It is not therefore possible to talk of a clear dividing line.

95. On the other hand, the Commission refers to statements made in the relevant parliamentary debate and to extracts from government documents which purportedly show the discriminatory objective of the tax. However, the choice of words in that parliamentary debate, which concerned the introduction of a 'crisis tax' (Hungary was seeking to restore compliance with the EU's budget deficit criteria), is very similar to the current BEPS (53) debate. In both cases it was or is not a question of heavier taxation of *foreign* undertakings, but of heavier taxation of *multinational* undertakings.

96. In broad terms, the parliamentary debate concerned the problem whereby large multinational groups are able to minimise their profits in Hungary with the result that the tax burden falls mainly to small and medium-sized undertakings, a situation which the Law on the special tax is intended to prevent to some extent. The primary focus was on multinational undertakings whose tax practices were also one of the main reasons for the BEPS debate. (54) As is shown by a further statistic provided to the Court, in 2010, of the 10 undertakings in Hungary with the highest turnovers, only half paid corporate tax. Undertakings owned both by Hungarian nationals and by nationals from other EU countries are affected. Making a link to turnover could certainly attempt to remedy this situation. This is also consistent with the approach taken by the Commission in the planned EU-wide digital services tax. (55) That tax too is an attempt to obtain a greater

contribution to public costs from multinational undertakings (in that case primarily from certain non-member countries) if they generate profits within the EU which are not, however, subject to income tax there. This cannot form a basis for an allegation of an abuse of rights against Hungary

97. 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 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.

98. 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. (56) It is not clear from the former, however, that that tax was aimed primarily at imposing taxation on nationals from other EU countries.

99. Furthermore, the limit of HUF 500 million for the first tax band does not cover only foreign undertakings. Any new domestic or foreign undertaking operating on the Hungarian telecommunications market would also benefit from the allowance. In this regard, the chosen tax rate structure primarily favours smaller undertakings, in particular start-ups, compared with larger undertakings that are already firmly established on the market. (57) Whether the limit of HUF 5 000 million turnover is the 'best' limit or another amount would not have been 'better' is a decision for the national legislature which cannot be reviewed by either the Court or the Commission, unless there is abuse.

100. I do not therefore consider to be correct the argument put forward at the hearing by Vodafone and, to some degree, by the Commission that only profit-based income taxation is consistent with the principle of taxation according to ability to pay. Even though turnover is not a compelling indicator for financial capacity, the general presumption evidently made by the Hungarian legislature that, as a rule, larger (higher-turnover) undertakings also have more financial capacity than smaller undertakings (see also the preamble to the Law on the special tax) is in any case not accurate. (58) As Poland rightly observed at the hearing, the (private) banking sector, for example, also differentiates in lending operations according to the volume of turnover of the borrower.

101. In addition, focusing on turnover gives less scope for organisational models of multinational undertakings, which has been one of the main points of the BEPS debate over the last decade and was also a key element of the Hungarian parliamentary debate. The Commission is also proposing a turnover-based digital services tax for certain high-turnover undertakings in the digital sector. In recital 23 (59) this taxation technique is expressly explained by the fact that 'the opportunity of engaging in aggressive tax planning lies with larger companies'.

102. If the Commission considers a turnover-based progressive tax for certain undertakings to be necessary in order to ensure fair taxation between larger, globally operating undertakings and smaller undertakings operating (only) throughout Europe, a comparable national tax which seeks to obtain a greater contribution to the public burden from larger undertakings than from smaller undertakings can hardly, in principle, constitute an abuse of rights.

(d) **Interim conclusion**

103. There is no indirect restriction of the fundamental freedoms arising from the introduction of the turnover-based income tax with progressive effect for telecommunications undertakings. First, the criterion of turnover chosen by the Hungarian legislature does not intrinsically disadvantage

the cross-border situation. Second, in the absence of sufficiently substantiated evidence and in the light of an objective reason for the structure, Hungary as a Member State cannot be criticised in this regard for any conduct constituting an abuse of rights.

(e) **Objectively comparable situation**

104. If it were assumed that (indirect) discrimination nevertheless existed, it is sometimes examined as an additional requirement for discrimination in the Court's case-law whether the two differently treated groups are in an objectively comparable situation. (60)

105. As I have stated a number of times in my Opinions, (61) this is a criterion which does not permit any workable definitions. Rather, in that examination individual justifications — which are ultimately uncertain in extent (62) — are brought forward and thereby excluded from a proportionality test. In some cases, therefore, the Court also rightly refrains from examining objective comparability. (63) The criterion should therefore be abandoned.

106. If, however, the criterion of an objectively comparable situation was adhered to, the question would arise in particular whether higher-turnover and lower-turnover undertakings are not in an objectively different situation because they have a different ability to pay tax. I will consider this question below in the context of the examination of justification, which is likewise carried out in the alternative.

3. **In the alternative: justification for indirect discrimination**

107. In the event that the Court should consider that there is indirect discrimination on account of the link to the volume of turnover, it should be asked, in the alternative, whether the resulting different average tax rate is justified. A restriction of fundamental freedoms may be justified by overriding reasons in the public interest, provided it is appropriate for ensuring the attainment of the objective pursued and does not go beyond what is necessary to attain that objective. (64)

(a) **Overriding reasons in the public interest**

108. According to the preamble to the Law on the special tax, the special tax seeks to restore budgetary balance at the expense of taxable persons whose capacity to bear public burdens surpasses the general obligation to pay tax. The Court has made clear that the restoration of budgetary balance by increasing fiscal receipts cannot justify a tax system like the one at issue. (65) The particular mechanism of the tax should not be justified by mere fiscal interests, but by making a link to the different economic strength of the taxable persons, that is to say, on the basis of an equitable sharing of burdens in society.

109. As I have explained a number of times in my Opinions, I share the Commission's view (66) that, in principle, the different ability to pay of a taxable person may justify a different treatment of taxable persons. (67) The Court has also recognised the principle of taxation according to ability to pay, at least in the context of the justification for the coherence of the tax system. (68)

110. The background to this would appear to be the fact that in many Member States the principle of taxation according to ability to pay is even a constitutional principle, which in some cases is expressly enshrined in the constitutions (69) and in others has been derived from the principle of equal treatment by the highest courts. (70) Since volume of turnover can also be regarded as an indicator for a certain ability to pay (see above, point 100), this justification does apply here.

111. Furthermore, it is recognised in tax law that in principle the State has a legitimate interest in applying progressive tax rates. It is also widespread within Member States, for non-profit-based

taxes at least, for persons with greater financial capacity to be able to contribute disproportionately to public expenditure. Even the European Union has recourse to a progressive rate for the taxation of its officials and other employees. (71)

112. The underlying reason is generally, in a welfare state at least, to relieve the burden on the weaker parts of society and thus partially to redistribute the to some extent unequally distributed funds by means of taxation law. In principle, this welfare state objective also justifies a certain degree of unequal treatment based on a progressive tax rate.

113. As under the second subparagraph of Article 3(3), the Union is not only to establish an internal market, but also to promote social justice, these reasons relating to the welfare state, as Poland argued at the hearing, may also justify a progressive tax rate in EU law. This holds in any case for a tax covering not only undertakings, but also natural persons, as is the case under Paragraph 3(1) and (2) of the Law on the special tax.

114. Consequently, the justification of taxation according to financial capacity in conjunction with the principle of the welfare state can justify a restriction of the fundamental freedoms.

(b) **Proportionality of the restriction**

115. The restriction of the fundamental freedom must also be appropriate for ensuring the attainment of the objective and may not go beyond what is necessary for attaining that objective. (72)

(1) *Appropriateness*

116. According to the Court's case-law, national legislation is appropriate for ensuring attainment of the objective pursued only if it genuinely reflects a concern to attain it in a consistent and systematic manner. (73)

117. In this regard, the Court takes into consideration the discretion enjoyed by the Member States in laying down general laws. (74) In particular, political, economic and social choices are entailed on the part of the legislature. It is also called upon to undertake complex assessments. (75) In the absence of EU harmonisation, the national legislature has a certain discretion in the field of tax law in fixing a tax. The abovementioned requirement of consistency is therefore satisfied if the special tax is not manifestly inappropriate having regard to the objective. (76)

118. In so far as the special tax at issue takes account of the economic capacity of taxable undertakings, it is clearly based, as was explained above, on the assumption that undertakings with a higher turnover have a greater financial capacity than undertakings with a lower turnover.

119. The Commission raises the objection against this assumption in these proceedings that turnover is an indication only of an undertaking's size and market position, but not its financial capacity. An increase in turnover does not automatically mean an increase in profit. There is therefore no direct connection between an undertaking's turnover and its financial capacity. This argument made by the Commission is surprising as, ultimately, the opposite reasons are given for the planned turnover-related digital services tax at EU level. (77)

120. In essence, the Commission overlooks the fact in the present case that a *direct* connection between the object of taxation (here turnover) and the aim of the tax (here taxation of ability to pay), as required by the Commission, is not necessary to justify the appropriateness of the measure. Such strict requirements would run counter to the abovementioned discretion enjoyed by the Member States. The measure is to be considered inappropriate only if no connection at all is

evident.

121. In the present case, however, an *indirect* connection between the annual turnover generated and financial capacity is certainly identifiable. As I have already stated in my Opinion in *Hervis Sport*, the level of turnover can certainly represent a standardising indicator of taxable capacity. This is suggested, first, by the fact that high profits are not actually possible without high turnover and, second, by the fact that as a rule the profit from additional turnover (marginal profit) increases with falling fixed unit costs. (78) It would therefore appear by no means unreasonable to regard turnover, as a reflection of an undertaking's size or market position and potential profits, also as a reflection of its financial capacity and to tax it on that basis.

122. Contrary to the view expressed by the Commission at the hearing, unequal treatment does not depend on whether the progressive rate is applied in the context of a profit-based or a turnover-based tax. An undertaking's profit too is merely a technical figure which shows a notional (taxable) ability to pay and does not always correspond to the real ability to pay. This is illustrated in the case of high special depreciation, which reduces profit only notionally, but not in real terms ('hidden reserves'), or in the case of 'restructuring gains' (a waiver of a claim by a creditor of an insolvent undertaking results in a profit for accounting purposes in its balance sheet).

123. In addition, turnover is in some ways even more appropriate than profit for representing an undertaking's financial capacity. Unlike profit, turnover is much less amenable to reduction by decreasing the taxable amount or shifting profits, for example using transfer prices. Focusing on turnover can therefore also be an effective means of countering aggressive tax planning, as the Commission rightly stresses in connection with its proposed turnover-based digital services tax. (79)

124. The Hungarian special tax is therefore not manifestly inappropriate for attaining the abovementioned objectives.

(2) *Necessity*

125. In examining necessity in connection with proportionality, according to the Court's case-law, when there is a choice between several appropriate measures, recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued. (80)

126. The question arises in this regard whether taxation of turnover, in comparison with taxation of profit, might possibly be a less onerous but equally appropriate means. It could be considered whether income taxation based on profit constitutes a less onerous, equally appropriate means in so far as cases are avoided where the special tax is levied on undertakings despite high losses.

127. A profit-based income tax is not a less onerous, equally appropriate means, however, but an *aliud* to a turnover-based income tax. The method of taxing income (turnover-based or profit-based) does not offer any indication as to whether taxes are also payable in the event of a genuine loss. A profit-based income tax too can give rise to taxation even though the undertaking makes losses. This is the case, for example, where certain operating expenditure — or even transfer prices — are not recognised or a creditor waives a claim in the event of a crisis ('restructuring gain'). The general problem of taxation notwithstanding the absence of genuine (real) financial capacity under national income tax legislation is primarily a matter of national law and national fundamental rights, and in the absence of harmonisation fundamentally not a matter of EU law.

128. Furthermore, a profit-based income tax is also not equally appropriate for achieving efficient and fairly rigid taxation. The link to turnover as the basis for assessment has the crucial advantage that it is easier to determine and it does not allow circumvention strategies, or does so only to a

lesser extent.

129. There is therefore also no doubt as to the necessity of the specific structure of the special tax having regard to the objective pursued.

(3) *Proportionality*

130. Furthermore, restrictions of a fundamental freedom must also be appropriate to the objective pursued. (81) This means that the restriction and its consequences must not be disproportionate. (82) This is also not the case here, as far as can be seen.

131. It should be stated, on the one hand, that the objective of equitable burden sharing in a society is certainly very important to the legislature when drafting tax legislation. The same applies to the objective of once more meeting the EU stability criteria. A disproportionate contribution made by those with disproportionate capacity in order to relieve the burden on those with not quite so much capacity is also not inappropriate as such. The situation might be different as soon as a tax has a choking effect and is thus tantamount to a prohibition on the taxed activity.

132. On the other hand, the effects of the measure do not appear to be that severe. In particular, the special tax clearly does not render an economically viable activity on the Hungarian telecommunications market impossible. It does not appear to have a choking effect, as the last few years have shown. Furthermore, according to information provided by Hungary at the hearing, the special tax also reduces profit, such that there is also a reduction in profit-based income tax, where income taxes are paid. In addition, it was levied from the outset as a ‘crisis tax’ for just 3 years and is thus merely temporary in nature.

133. Accordingly, a restriction of freedom of establishment arising from a turnover-based progressive income tax to the detriment of high-turnover telecommunications undertakings would be justified.

4. **Conclusion on the first question referred**

134. Articles 49 and 54 TFEU do not preclude the Hungarian special tax for the telecommunications market.

C. **Second question: infringement of the prohibition of State aid**

135. It is thus further necessary to consider whether the progressively structured Hungarian special tax for the telecommunications market can be characterised as State aid. The referring court considers this to be the case given that the highest tax rate of 6.5% applies only when certain turnover limits are reached.

1. **The admissibility of the second question**

136. It must be first clarified, however, whether the request for a preliminary ruling is actually admissible in so far as the second question is concerned. This is against the background of the Court’s settled case-law according to which a business liable to pay a tax cannot rely on the argument that the exemption enjoyed by other businesses constitutes State aid in order to avoid payment of that tax. (83)

137. Because, however, the tax is used for specific purposes, in particular to favour other businesses, it must be examined whether the revenue from the tax is used in a manner compatible with the rules on State aid. (84) In such a case, the relevant business liable to pay tax can also challenge its own burden, which is necessarily accompanied by the favouring of third parties.

138. That is not the situation here, however. In this instance, the burden is imposed on the applicant in the main proceedings by a general tax, which is paid into the general public budget and does not therefore specifically favour any third party. Accordingly, in the present case the applicant is challenging only a tax notice addressed to it, which it considers to be unlawful because other taxable persons are not taxed to the same extent.

139. Vodafone cannot therefore rely before the national courts on the unlawfulness of the exemption granted to other undertakings in order to avoid payment of that tax.

140. Only the Court's decision in *Air Liquide Industries Belgium* (85) appears to contradict this view. According to that judgment, it should be sufficient for the admissibility of some questions referred that the taxable person's 'claims' sought 'also [to] call in question the validity of the legal instruments'. There is no need to ascertain whether this is actually the case in proceedings concerning the lawfulness of a tax notice, as in this instance, because even in that decision the Court then correctly stated that the business 'liable to pay a tax cannot rely on the argument that the exemption enjoyed by other businesses constitutes State aid in order to avoid payment of that tax'.(86) If that is the case, however, then in proceedings relating solely to a business' own tax liability — as in the present case — the question of State aid to a third party is not relevant to the decision and is not therefore admissible.

141. It must also be borne in mind in this regard that it is for the Commission, in principle, to make provision for the *recovery* of unlawfully granted aid, as the Court reaffirmed only recently. (87) However, not taxing Vodafone would not amount to recovery, but would extend the State aid to a further person (here Vodafone) and thus not eliminate the distortion of competition, but intensify it.

142. On the other hand, it is consistent with that case-law if a court which is required to decide on the grant of an exemption — as was the case in *A-Brauerei* (88) — is able to refer that question to the Court. Contrary to the view expressed by the Commission at the hearing, that case is not comparable with the present one, as such a case concerns the grant of aid to the recipient and not the cancellation of a tax notice for the benefit of a third party (here Vodafone) which wishes to extend the aid to itself.

143. The objection also cannot be raised in this regard that recovery is not possible by way of subsequent taxation of smaller undertakings, as Vodafone argued at the hearing. If recovery of aid by the Member State is exceptionally not possible, it may also not be recovered according to Article 14(1) of Regulation (EC) No 659/1999. (89) As the Court has ruled, the principle that 'no one is obliged to do the impossible' is among the general principles of EU law. (90) Even in such a case, neither Articles 107 and 108 TFEU nor the rules of that regulation thus provide, in respect of the past, for an *extension* of aid to other persons.

144. Nor can the admissibility of the question referred be inferred — contrary to the view taken by the Commission at the hearing — from the Court's recent decision in *ANGED* (91) regarding a Spanish (area-based) retail tax. Those proceedings before the national court concerned a review of the legislation itself (with *erga omnes* effect) and not just a review of an individual tax notice. Further statements regarding Article 107 TFEU were therefore at least useful for the referring court and, for that reason, the Court rightly accepted the admissibility of the question referred.

145. If, however, the effect of the judgment extends solely to the party which — as the parties to the present proceedings have confirmed — contests its tax notice alone, then the idea developed by the Court in *ANGED* does not apply and the abovementioned principle still holds. In accordance with the Court's settled case-law — which is even cited by the Court's decision in *Air Liquide Industries Belgium* (92) — the second question in the present case is therefore inadmissible. (93)

146. The applicant is entitled to seek an abstract review of the legislation before a national court. That court is then able to make a request for a preliminary ruling as appropriate.

147. In the light of the above statements, there is neither a reason nor a need to depart from the Court's previous case-law, according to which a business liable to pay a tax cannot rely on the argument that the exemption enjoyed by other businesses constitutes State aid in order to avoid payment of that tax. (94) The request for a preliminary ruling is therefore inadmissible in respect of the second question.

2. **In the alternative: legal assessment**

148. If the Court were nevertheless to accept the admissibility of the second question, it would then have to examine whether the reduced taxation of medium-sized undertakings or the exemption for smaller undertakings (in relation to turnover) constitutes aid within the meaning of Article 107(1) TFEU.

149. The Court has consistently held that classification as 'State aid' within the meaning of Article 107(1) TFEU requires that, first, there must be intervention by the State or through State resources. Second, the intervention must be liable to affect trade between Member States. Third, it must confer a selective advantage on the recipient. Fourth, it must distort or threaten to distort competition. (95)

150. The decisive criterion here is that of selective advantage. In other words, the question arises whether a progressive tax rate is a justifiable selective advantage for those who, on account of the progression, pay less tax, in both absolute and relative terms, than other taxable persons. Not too long ago, this question would have been answered clearly and unequivocally in the negative. Now this very question is raised in this case.

151. This fact led Advocate General Saugmandsgaard Øe to consider that the Court's previous pattern of examination was fundamentally questionable. He thus expressly stated: (96)

'To take an extreme example, a measure providing for progressive rates of taxation, defined according to the level of income, is indisputably a general measure under the traditional method of analysis, since any undertaking may benefit from the more favourable rates. By contrast, under the reference framework method, the more favourable rates constitute a differentiation which must be validated either by the lack of comparability (second stage) or by the existence of a justification based on the nature or overall structure of the system at issue (third stage). To be completely clear, I am clearly not claiming that the reference framework method would automatically result in the classification of progressive rates of taxation as "selective", [(97)] but rather that it does carry with it that possibility since it prompts consideration of the legitimacy of measures previously excluded by the traditional method of analysis. This risk of extending the rules on State aid could concern, inter alia, measures similar to those which the Court has classified as "general" in the past.'

152. I share these concerns, but consider that they can also be addressed within the reference

framework method. Accordingly, it must be first examined what might constitute the advantage (see point 153 et seq.), which could be regarded as selective (see point 157 et seq.).

(a) **The notion of advantage**

153. Concerning the question whether the rules at issue in the main proceedings must be regarded as conferring an advantage on its beneficiary, it should be recalled that, according to settled case-law of the Court, measures which, whatever their form, are likely directly or indirectly to favour certain undertakings, or which fall to be regarded as an economic advantage that the recipient undertaking would not have obtained under normal market conditions, are regarded as State aid. (98)

154. Favourable tax treatment, which, although not involving the transfer of State resources, places the recipients in a financial position more favourable than that of other taxpayers can also fall under Article 107(1) TFEU. (99) Thus, measures which, in various forms, mitigate the charges that are *normally* included in the budget of an undertaking and which therefore, without being subsidies in the strict meaning of the word, are similar in character and have the same effect are considered to constitute aid. (100)

155. There is no advantage in relation to the exemption and the reduced taxation. All undertakings — both large and small —with a turnover of up to HUF 500 million are not taxed and are taxed at a reduced rate from HUF 500 million to HUF 5 000 million. This also holds for Vodafone.

156. At most, the different average tax rate resulting from the progression — which is underlined by both Vodafone and the Commission — constitutes an advantage which favours lower-turnover taxable persons.

(b) **Selectivity of the advantage in tax law**

157. It must therefore be examined whether the lower average tax rate in the case of lower turnover constitutes ‘favouring certain undertakings or the production of certain goods’ within the meaning of Article 107(1) TFEU and there is thus a ‘selective’ advantage for the purposes of the Court’s case-law.

158. The examination of such selectivity in the tax legislation of the Member States always presents considerable difficulties. (101) Case-law repeatedly takes as its starting point the premiss that a tax regime is not selective if it is applicable without distinction to all economic operators. (102) Selectivity would have to be rejected on that basis. No other conclusion can be drawn from the decision in *World Duty Free Group and Others*. (103) That decision concerned a special case of ‘export promotion’ for domestic undertakings for investments abroad to the detriment of foreign undertakings, which is contrary to the legal principle enshrined in Article 111 TFEU. Specific export subsidies can therefore satisfy the selectivity criterion even if they apply to all taxable persons.

159. The fact that a tax regime grants an advantage only to those undertakings which satisfy its conditions — here not reaching certain turnover limits — is also not in itself capable of establishing its selectivity. (104) Accordingly, selectivity would also have to be rejected on that basis.

160. At the same time, however, it is clear that general tax legislation is also to be assessed having regard to the prohibition of State aid under Article 107 TFEU. (105) As far as tax advantages are concerned, therefore, the Court has made any finding as to their selectivity subject to special conditions. It is not important in this regard whether this is described as a two-step or three-step arrangement. (106) The decisive factor is always whether, in accordance with the criteria laid down by the national tax system, the conditions governing the tax advantage have

been selected in a non-discriminatory manner. (107)

161. To answer that question, it is necessary to begin by identifying the ordinary or ‘normal’ tax system applicable in the Member State concerned. It is in relation to that ordinary or ‘normal’ tax regime that it is necessary, secondly, to assess whether the advantage granted by the tax measure in question is selective. (108) The latter point requires there to be unequal treatment of undertakings in a comparable situation which cannot be justified. In this regard, at least in the context of a State aid procedure, the Commission is to bear the burden of proof for the unequal treatment and the Member State the burden of proof for the justification. (109)

162. I concur with Advocate General Bobek (110) that in essence the selectivity test is ‘merely’ a discrimination test. Accordingly, I will examine first the existence of unequal treatment (see below, point 173 et seq.) and then a justification for that unequal treatment (see below, point 176 et seq.). Before that, I will explain why the normal pattern of examination requires slight modification where a reference framework is created for the first time (see point 164).

(1) *Modification where a reference framework is created for the first time*

163. In the case of general tax regimes, in particular those which create the reference framework for the first time, a modified examination must be applied to establish its selectivity. This is because the tax differentiation — unlike a subsidy in the narrow sense in the form of cash benefits — inevitably occurs in a generally applicable tax system and applies to everyone equally, and the taxable person is inevitably subject to these potentially advantageous differentiations in a general manner without his own participation. In this regard this situation is very different from that of a ‘normal’ individual aid.

164. A modified examination of this kind was also applied by the Court in the *ANGED* cases, (111) in which there was also no reference framework from which the regime derogated, but rather the regime in question was itself the reference framework. That is also the case here. The progressive tax rate is not an exception for certain undertakings to a ‘normal’ (proportional?) tax rate, but is itself the rule. Under that rule, all taxable persons are subject to different average tax rates.

165. That said, according to case-law, such ‘favourable’ general differentiations, which are not subsidies in the narrow sense, are classified as aid only if they *are similar in character and have the same effect*. (112) This applies in particular with regard to the fiscal autonomy of the Member States where they define the reference framework for the first time.

166. It is only where a Member State uses the definition of the reference framework as a means of distributing advantages for purposes other than those of that tax system that there are grounds for treating such tax advantages as subsidies in the narrow sense. (113) Thus, a measure which constitutes an exception to the application of the general tax system may be justified if the Member State concerned can show that that measure results directly from the basic or guiding principles of its tax system. (114) General differentiations within the framework of a consistent tax system can hardly therefore constitute a selective advantage.

167. On closer inspection, this idea also underlies the fundamental decision in *Gibraltar*, (115) on which the Commission relies in essence in its written pleadings. In that case too, the reference framework was created for the first time and had the de facto consequence that offshore undertakings were not taxed, even though the newly introduced income tax legislation was intended to tax all undertakings equally (also, it would seem, based on their financial capacity). In that instance, the legislature opted for criteria such as employment and business property occupation in order to implement profit-oriented taxation of income. In this regard, and in view of the fact that the United Kingdom had not adduced any justifications in the aid procedure, the Court

accepted the finding of inconsistency by the Commission. (116)

168. The inconsistency of tax law can, in fact, ultimately indicate abuse of tax law. This time, the taxable person has not selected abusive arrangements in order to avoid tax. Rather, on an objective analysis, the Member State has ‘abused’ its tax law in order to make subsidies to individual undertakings in circumvention of the rules on State aid. In this regard, the selectivity test is limited, where the reference system is created, to a consistency test for the system created.

169. The Court thus rightly rejected consistency in the *Gibraltar* case. Neither employment nor business property occupation are plausible factors for general, equal taxation on income, which was the objective of the national legislation. But does that also apply to a progressive, turnover-based special income tax? Is it really inconsistent to levy more tax (in both absolute and relative terms) on a telecommunications undertaking with a high turnover than a telecommunications undertaking with a low turnover?

(2) *Standard of review for a consistency test*

170. The concerns raised by various Advocates General (117) (in particular regarding the problem in determining the correct reference framework and a general equality test for all national tax legislation with the concurrent fiscal autonomy of the Member States) can be addressed by a softer standard of review in respect of the fiscal consistency of general tax legislation. Accordingly, general differentiations constitute selective measures, where the reference system is created, only if they have no rational basis in the light of the objective of the legislation. With such a softer standard of review, the Court would, in essence, have to assess any differentiation in any national tax legislation, as it inevitably favours one taxable person and disadvantages another.

171. Consequently, a selective advantage is possible only where, first, that measure (here the progressive tax rate) differentiates between economic operators who, in the light of the objective attributed to the tax system of the Member State concerned, are in a comparable factual and legal situation, (118) which is manifest.

172. Even if that condition is fulfilled, second, the favouring can be justified by the nature or general scheme of the system of which it is part, in particular if a tax regime results directly from the basic or guiding principles of the national tax system, (119) which simply have to be plausible, however. Furthermore, plausible non-fiscal reasons can also justify a differentiation, as was acknowledged for example in *ANGED* with regard to environmental and town and country planning reasons in connection with a tax on retail sales area. (120)

(i) *Unequal treatment of undertakings in a comparable situation*

173. In this connection, it must be examined, first of all, whether there is unequal treatment which cannot be justified in the context of the national tax system. Furthermore, in accordance with the wording of Article 107(1) TFEU, that unjustified difference in treatment would have to be based on a differentiation for the benefit of either ‘certain undertakings’ or ‘the production of certain goods’. It is for that reason that the Court, in particular in the judgment in *Gibraltar*, has held that a tax system must characterise the recipient undertakings, by virtue of the properties which are specific to them, as a privileged category. (121)

174. That is not the case with a tax like the one at issue, however. Larger and smaller telecommunications undertakings differ precisely on account of their turnover and the resulting financial capacity. In the view of the Member State — which is not manifestly incorrect here — they are not in a legally and factually comparable situation.

175. The same holds for the possibilities for larger undertakings to minimise profit-based taxation on income by means of tax arrangements. It is likewise not manifestly unreasonable that such a possibility increases with the size of an undertaking.

(ii) *In the alternative: justification of unequal treatment*

176. If the Court should nevertheless accept the existence of a comparable situation for an undertaking with, for example, an annual net turnover of HUF/EUR 10 000 and an undertaking with an annual net turnover of HUF/EUR 100 million, it must still be examined whether the unequal treatment arising from a progressive tax which accompanies the different average rate can be justified.

177. As the Court held in *World Duty Free*, (122) only the examination of the difference in treatment in question in the light of the objective pursued by the legislation is decisive, in particular where — as in this case — there is no derogation from a reference framework, but the legislation itself forms the reference framework.

178. Consideration must be given not only to the objectives expressly mentioned in the national legislation, but also to the objectives which can be inferred from the national legislation by way of interpretation. (123) Otherwise, regard would be had solely to the legislative technique. The Court has consistently held in its case-law, however, that, in the rules on State aid, State interventions are to be assessed on the basis of their effects, independently of the techniques used. (124)

179. It must therefore be clarified whether the progressive tax scale of the Hungarian special tax is not based in the specific tax legislation itself, but pursues purposes which are extrinsic to it — that is to say, extraneous purposes. (125)

180. That is clearly not the case here. As was stated above (point 108 et seq.), the objective of the law, as expressly mentioned in the preamble, is taxation of financial capacity, which is inferred in this case from volume of turnover. Furthermore — this is per se characteristic of a progressive tax rate and thus inherent in the system — a certain ‘redistribution function’ is pursued if a heavier financial burden is placed on economically stronger actors than economically weaker actors (expression of the principle of the welfare state). The Commission also recognises the ‘redistributive purpose’ as a justification in respect of the progressive nature of income tax in its Notice of 19 July 2016 on the ‘notion of State aid as referred to in Article 107(1) TFEU’ (‘the Notice’). (126)

181. In addition, it is apparent from the legislative process of which the Court was informed that it was also intended to avoid non-taxation of high-turnover undertakings which did not contribute to corporate tax revenue in Hungary or did so only very little. None of these are, from the point of view of tax law, extraneous purposes.

182. Contrary to the view apparently taken by the Commission, income taxation based on profit is not the only correct form of taxation, as the Court has recently held in this regard, (127) but merely a *technique* for mathematically determining and taxing the taxable capacity of the taxable person in a uniform manner (see above, point 100).

183. It may be, as the Commission stressed at the hearing, that a profit calculation by means of a balance sheet comparison is more precise than linking to net turnover. However, the rules on State aid do not inquire about the more precise tax system, but an effect of a distortion of competition between two competitors. If the same tax is payable for identical turnover, that is not the case. If a higher tax is payable for higher turnover, the same ‘unequal treatment’ exists as

where higher tax is payable for higher profit. This would appear to apply unquestionably in respect of a proportional tax rate (here higher tax is paid in absolute terms) and occurs in the case of a progressive tax rate (here higher tax is paid in both absolute and relative terms) for the abovementioned reasons relating to the tax system.

184. The volume of turnover indicates (without manifest error at least) a certain financial capacity (see above, point 118 et seq.). Accordingly, as the Commission itself shows with the proposal for a digital services tax, (128) turnover can also be seen as a (slightly rougher) indicator of greater economic power, and thus greater financial capacity.

185. In addition, there can be no objection from the point of view of administrative procedure if the number of retail establishments covered, and thus to be checked, is reduced by means of a threshold. For example, in EU VAT law, small undertakings (undertakings whose turnover does not exceed a certain ‘allowance’) are also not taxed (see Article 282 et seq. of the VAT Directive).

186. In view of the legislative objectives pursued, it is also understandable to have regard to turnover rather than profit, as the former is easily ascertainable (simple and effective administration (129)) and less prone to circumvention than profit, for example (see above, point 123). The prevention of abuse in tax law may also constitute a justification in the rules on State aid, as the Court has ruled. (130)

187. In my view, the principle of the welfare state — which the European Union recognises in Article 3(3) TEU — also justifies a progressive tax rate which imposes a heavier burden, even in relative terms, on those with greater financial capacity than on taxable persons with not quite so much financial capacity. This applies at least in the case of a tax which also covers natural persons (see Article 3(1) and (2) of the Law on the special tax).

3. **Conclusion**

188. The lower average taxation inevitably connected with a progressive tax rate (here for lower-turnover undertakings) does not therefore constitute a selective advantage for such undertakings.

VI. **Proposed answer**

189. On those grounds, I propose that the questions referred by the F?városi Közigazgatási és Munkaügyi Bíróság (Administrative and Labour Court, Budapest, Hungary) be answered as follows:

(1) Different taxation arising from a progressive rate does not constitute an indirect restriction of freedom of establishment under Article 49 in conjunction with Article 54 TFEU. This applies even where, in the case of turnover-based income taxation, larger undertakings are taxed more heavily and they are owned de facto predominantly by foreign shareholders. The situation could be different only if conduct constituting an abuse of rights can be proven in respect of the Member State. That is not the case here.

(2) Different taxation arising from a progressive rate does not constitute a selective advantage for lower-turnover undertakings (and does not thus constitute State aid); nor can a higher-turnover undertaking rely on it in order to evade its own tax liability.

(3) The Hungarian special tax, as a turnover-based direct income tax, cannot be characterised as a turnover tax, with the result that it is not precluded by Article 401 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax.

1 Original language: German.

2 Proposal for a Council Directive on the common system of a digital services tax on revenues resulting from the provision of certain digital services, 21 March 2018, COM(2018) 148 final.

3 See inter alia judgments of 26 April 2018, *ANGED* (C?233/16, EU:C:2018:280); of 26 April 2018, *ANGED* (C?234/16 and C?235/16, EU:C:2018:281); of 26 April 2018, *ANGED* (C?236/16 and C?237/16, EU:C:2018:291); and of 5 February 2014, *Hervis Sport- és Divatkereskedelmi* (C?385/12, EU:C:2014:47).

4 A proportional tax rate combined with a basic allowance also produces a progressive effect for the tax. For example, the average tax rate in the case of a proportional tax of 10% and a basic allowance of 10 000 amounts to precisely 0% for an income of 10 000, precisely 5% for an income of 20 000 and precisely 9% for an income of 100 000.

5 Council Directive of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1).

6 Judgments of 7 August 2018, *Viking Motors and Others* (C?475/17, EU:C:2018:636, paragraph 29 et seq.); of 3 October 2006, *Banca popolare di Cremona* (C?475/03, EU:C:2006:629, paragraph 18); and of 8 June 1999, *Pelzl and Others* (C?338/97, C?344/97 and C?390/97, EU:C:1999:285, paragraphs 13 to 20).

7 OJ, English Special Edition 1967(I), p. 14, ‘the First Directive’.

8 Judgment of 3 October 2006, *Banca popolare di Cremona* (C?475/03, EU:C:2006:629, paragraph 19).

9 First by Second Council Directive 67/228/EEC of 11 April 1967 on the harmonisation of legislation of Member States concerning turnover taxes — Structure and procedures for application of the common system of value added tax (OJ, English Special Edition 1967, p. 16), subsequently by Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment (OJ 1977 L 145, p. 1).

10 Judgment of 3 October 2006, *Banca popolare di Cremona* (C?475/03, EU:C:2006:629, paragraph 21).

11 Judgment of 3 October 2006, *Banca popolare di Cremona* (C?475/03, EU:C:2006:629, end of paragraph 22).

12 Judgments of 7 August 2018, *Viking Motors and Others* (C?475/17, EU:C:2018:636, paragraph 37); of 3 October 2006, *Banca popolare di Cremona* (C?475/03, EU:C:2006:629, paragraph 26); of 29 April 2004, *GIL Insurance and Others* (C?308/01, EU:C:2004:252, paragraph 32); and of 31 March 1992, *Dansk Denkavit and Poulsen Trading* (C?200/90, EU:C:1992:152, paragraphs 11 and 14).

13 Judgments of 3 October 2006, *Banca popolare di Cremona* (C?475/03, EU:C:2006:629, paragraph 28); of 8 June 1999, *Pelzl and Others* (C?338/97, C?344/97 and C?390/97, EU:C:1999:285, paragraph 21); and of 7 May 1992, *Bozzi* (C?347/90, EU:C:1992:200, paragraph 12).

14 Council Directive of 16 December 2008 concerning the general arrangements for excise duty and repealing Directive 92/12/EEC (OJ 2009 L 9, p. 12).

15 See, with regard to this requirement, for example, judgments of 7 August 2018, *Viking Motors and Others* (C?475/17, EU:C:2018:636, paragraphs 46 and 47) — detrimental if passing on is uncertain — and of 3 October 2006, *Banca popolare di Cremona* (C?475/03, EU:C:2006:629, paragraph 33).

16 Judgments of 12 September 2006, *Cadbury Schweppes and Cadbury Schweppes Overseas* (C?196/04, EU:C:2006:544, paragraph 40); of 11 August 1995, *Wielockx* (C?80/94, EU:C:1995:271, paragraph 16); and of 14 February 1995, *Schumacker* (C?279/93, EU:C:1995:31, paragraph 21).

17 Judgments of 4 July 2018, *NN* (C?28/17, EU:C:2018:526, paragraph 17); of 1 April 2014, *Felixstowe Dock and Railway Company and Others* (C?80/12, EU:C:2014:200, paragraph 17); and of 12 September 2006, *Cadbury Schweppes and Cadbury Schweppes Overseas* (C?196/04, EU:C:2006:544, paragraph 41).

18 Judgments of 2 October 2008, *Heinrich Bauer Verlag* (C?360/06, EU:C:2008:531, paragraph 25), and of 14 December 2000, *AMID* (C?141/99, EU:C:2000:696, paragraph 20); see also my Opinion in *ANGED* (C?233/16, EU: 2017:852, point 40).

19 Judgments of 1 April 2014, *Felixstowe Dock and Railway Company and Others* (C?80/12, EU:C:2014:200, paragraph 23), and of 6 September 2012, *Philips Electronics* (C?18/11, EU:C:2012:532, paragraph 39); see also to that effect judgment of 12 April 1994, *Halliburton Services* (C?1/93, EU:C:1994:127, paragraph 18 et seq.).

20 Judgments of 21 May 2015, *Verder LabTec* (C?657/13, EU:C:2015:331, paragraph 34); of 16 April 2015, *Commission* v *Germany* (C?591/13, EU:C:2015:230, paragraph 56 and the case-law cited); and of 29 November 2011, *National Grid Indus* (C?371/10, EU:C:2011:785, paragraph 36).

21 See my Opinions in *X* (C?498/10, EU:C:2011:870, point 28); in *Hervis Sport- és Divatkereskedelmi* (C?385/12, EU:C:2013:531, point 82 et seq.); in *X* (C?686/13, EU:C:2015:31, point 40); in *C* (C?122/15, EU:C:2016:65, point 66); and in *ANGED* (C?233/16, EU:C:2017:852, point 28).

22 See judgment of 14 April 2016, *Sparkasse Allgäu* (C?522/14, EU:C:2016:253, paragraph 29); order of 4 June 2009, *KBC-bank* (C?439/07 and C?499/07, EU:C:2009:339, paragraph 80); and judgment of 6 December 2007, *Columbus Container Services* (C?298/05, EU:C:2007:754, paragraphs 51 and 53).

23 Judgment of 5 February 2014, *Hervis Sport- és Divatkereskedelmi* (C?385/12, EU:C:2014:47).

24 Judgment of 5 February 2014, *Hervis Sport- és Divatkereskedelmi* (C?385/12, EU:C:2014:47, paragraph 39 et seq.).

25 Judgment of 5 February 2014, *Hervis Sport- és Divatkereskedelmi* (C?385/12, EU:C:2014:47, paragraph 34).

26 See also to that effect my Opinion in *Hervis Sport- és Divatkereskedelmi* (C?385/12, EU:C:2013:531, point 49).

27 Judgments of 26 April 2018, *ANGED* (C?233/16, EU:C:2018:280, paragraph 30); of 5 February 2014, *Hervis Sport- és Divatkereskedelmi* (C?385/12, EU:C:2014:47, paragraph 30); of 8

July 1999, *Baxter and Others* (C?254/97, EU:C:1999:368, paragraph 13); and of 14 February 1995, *Schumacker* (C?279/93, EU:C:1995:31, paragraph 26).

28 See judgments of 26 April 2018, *ANGED* (C?233/16, EU:C:2018:280, paragraph 31); of 5 February 2014, *Hervis Sport- és Divatkereskedelmi* (C?385/12, EU:C:2014:47, paragraph 39); of 22 March 2007, *Talotta* (C?383/05, EU:C:2007:181, paragraph 32); of 8 July 1999, *Baxter and Others* (C?254/97, EU:C:1999:368, paragraph 13); of 13 July 1993, *Commerzbank* (C?330/91, EU:C:1993:303, paragraph 15); and of 7 July 1988, *Stanton and L'Étoile 1905* (143/87, EU:C:1988:378, paragraph 9); see also judgments of 26 October 2010, *Schmelz* (C?97/09, EU:C:2010:632, paragraph 48, with regard to freedom to provide services), and of 3 March 1988, *Bergandi* (252/86, EU:C:1988:112, paragraph 28, with regard to Article 95 of the EEC Treaty).

29 Judgment of 1 June 2010, *Blanco Pérez and Chao Gómez* (C?570/07 and C?571/07, EU:C:2010:300, paragraph 119).

30 Judgment of 22 March 2007, *Talotta* (C?383/05, EU:C:2007:181, paragraph 32); see also judgment of 1 June 2010, *Blanco Pérez and Chao Gómez* (C?570/07 and C?571/07, EU:C:2010:300; paragraph 119).

31 See judgment of 8 July 1999, *Baxter and Others* (C?254/97, EU:C:1999:368, paragraph 13).

32 See judgment of 1 June 2010, *Blanco Pérez and Chao Gómez* (C?570/07 and C?571/07, EU:C:2010:300, paragraph 119) with regard to freedom of establishment; see also, with regard to free movement of workers, judgments of 2 March 2017, *Eschenbrenner* (C?496/15, EU:C:2017:152, paragraph 36); of 5 December 2013, *Zentralbetriebsrat der gemeinnützigen Salzburger Landeskliniken Betriebs* (C?514/12, EU:C:2013:799, paragraph 26); of 28 June 2012, *Erny* (C?172/11, EU:C:2012:399, paragraph 41); and of 10 September 2009, *Commission* v *Germany* (C?269/07, EU:C:2009:527).

33 See judgments of 9 May 1985, *Humblot* (112/84, EU:C:1985:185, paragraph 14), and of 5 December 1989, *Commission* v *Italy* (C?3/88, EU:C:1989:606, paragraph 9, with regard to freedom of establishment).

34 See my Opinions in *Hervis Sport- és Divatkereskedelmi* (C?385/12, EU:C:2013:531, point 40); in *ANGED* (C?233/16, EU:C:2017:852, point 38); and in *Memira Holding* (C?607/17, EU:C:2019:8, point 36).

35 See my Opinion in *Hervis Sport- és Divatkereskedelmi* (C?385/12, EU:C:2013:531, point 41).

36 Judgment of 5 February 2014, *Hervis Sport- és Divatkereskedelmi* (C?385/12, EU:C:2014:47, paragraph 45).

37 The highest tax rate in that case was 2.4%, whilst the rates in the lower bands were 0%, 0.1% and 0.4%; see judgment of 5 February 2014, *Hervis Sport- és Divatkereskedelmi* (C?385/12, EU:C:2014:47, paragraph 8).

38 In the judgment of 26 April 2018, *ANGED* (C?233/16, EU:C:2018:280, paragraph 38), the Court evidently considered that 61.5% and 52% are not sufficient to find indirect discrimination, but did not examine what threshold would have had to be achieved.

39 See judgment of 2 March 2017, *Eschenbrenner* (C?496/15, EU:C:2017:152, paragraph 36); with regard to free movement of workers, of 5 December 2013, *Zentralbetriebsrat der gemeinnützigen Salzburger Landeskliniken Betriebs* (C?514/12, EU:C:2013:799, paragraph 26); of 28 June 2012, *Erny* (C?172/11, EU:C:2012:399, paragraph 41); of 1 June 2010, *Blanco Pérez and Chao Gómez*

(C?570/07 and C?571/07, EU:C:2010:300, paragraph 119); with regard to freedom of establishment, of 10 September 2009, *Commission* v *Germany* (C?269/07, EU:C:2009:527); and of 8 July 1999, *Baxter and Others* (C?254/97, EU:C:1999:368, paragraph 13).

See also my Opinions in *ANGED* (C?233/16, EU:C:2017:852, point 38), and in *Memira Holding* (C?607/17, EU:C:2019:8, point 36); to the opposite effect, my Opinion in *Hervis Sport- és Divatkereskedelmi* (C?385/12, EU:C:2013:531, point 42 et seq.).

40 Judgment of 1 June 2010, *Blanco Pérez and Chao Gómez* (C?570/07 and C?571/07, EU:C:2010:300, paragraph 122).

41 Opinion of Advocate General Wahl in *Austria* v *Germany* (C?591/17, EU:C:2019:99, point 47).

42 Judgment of 9 May 1985, *Humblot* (112/84, EU:C:1985:185, paragraphs 14 and 16).

43 See my Opinion in *Memira Holding* (C?607/17, EU:C:2019:8, point 38).

44 See my Opinion in *Hervis Sport- és Divatkereskedelmi* (C?385/12, EU:C:2013:531, point 51).

45 See my Opinion in *Hervis Sport- és Divatkereskedelmi* (C?385/12, EU:C:2013:531, point 51).

46 Opinion of Advocate General Wahl in *Austria* v *Germany* (C?591/17, EU:C:2019:99, point 71), which, with reference to the judgment of 16 September 2004, *Commission* v *Spain* (C?227/01, EU:C:2004:528, paragraph 56 et seq.), rightly states that in the context of infringement proceedings an objective assessment is made. The same must apply to a request for a preliminary ruling, as there is an assessment of discrimination in both cases.

47 See, for example, the concerns rightly raised in the Opinion of Advocate General Wahl in *Austria* v *Germany* (C?591/17, EU:C:2019:99, point 70 et seq.).

48 See, for example, judgment of 5 July 2007, *Kofoed* (C?321/05, EU:C:2007:408, paragraph 38).

49 Council Directive (EU) 2016/1164 of 12 July 2016 laying down rules against tax avoidance practices that directly affect the functioning of the internal market (OJ 2016 L 193, p. 1).

50 Opinion of Advocate General Campos Sánchez-Bordona in *Wightman and Others* (C?621/18, EU:C:2018:978, points 153 and 170).

51 Judgment of 6 March 2018, *Achmea* (C?284/16, EU:C:2018:158, paragraph 34); Opinion 2/13 (Accession of the EU to the ECHR) of 18 December 2014 (EU:C:2014:2454, paragraphs 168 and 173); Opinion 1/09 (Agreement on the creation of a unified patent litigation system) of 8 March 2011 (EU:C:2011:123, paragraph 68).

52 Statements made by politicians in particular during an electoral campaign are not sufficient in this regard, as is correctly stated in the Opinion of Advocate General Wahl in *Austria* v *Germany* (C?591/17, EU:C:2019:99, points 70 and 71). The same must apply to a public parliamentary debate.

53 In simple terms, this means the tax structure of multinational groups which have available (lawful) possibilities within the existing tax systems for minimising their assessment bases in high-tax countries and for shifting profits to low-tax countries (Base Erosion and Profit Shifting = BEPS).

54 See inter alia the OECD ‘Action Plan on Base Erosion and Profit Shifting’ — available at https://www.oecd.org/ctp/BEPSActionPlan.pdf — p. 13: ‘Fundamental changes are needed to effectively prevent double non-taxation, as well as cases of no or low taxation associated with practices that artificially segregate taxable income from the activities that generate it.’.

55 See inter alia recital 23 of the Proposal for a Council Directive on the common system of a digital services tax on revenues resulting from the provision of certain digital services, 21 March 2018, COM(2018) 148 final, and the reason given on p. 2 of the Proposal, according to which the current corporate tax rules are inadequate for the digital economy.

56 Advocate General Wahl also rightly points out in his Opinion in *Austria* v *Germany* (C?591/17, EU:C:2019:99, point 70): ‘I[n] this context, it is immaterial that some German politicians openly stated, during an electoral campaign, that they intended to introduce a charge for foreign travellers on German motorways. Those statements are arguably a manifestation of — paraphrasing a famous quote — a spectre that is haunting Europe in the last years: the spectre of populism and souverainism’.

57 Interestingly, the Commission justifies the graduated rate of the planned digital services tax on the ground that the threshold ‘excludes small enterprises and start-ups for which the compliance burdens of the new tax would be likely to have a disproportionate effect’ (recital 23 of the Proposal for a Council Directive on the common system of a digital services tax on revenues resulting from the provision of certain digital services, 21 March 2018, COM(2018) 148 final).

58 See also, in this regard, judgment of 16 May 2019, *Poland* v *Commission* (T?836/16 and T?624/17, EU:T:2019:338, paragraph 75 et seq.).

59 Proposal for a Council Directive on the common system of a digital services tax on revenues resulting from the provision of certain digital services, 21 March 2018, COM(2018) 148 final.

60 See, most recently, judgment of 4 July 2018, *NN* (C?28/17, EU:C:2018:526, paragraphs 31 to 38) and the extensive references from case-law in paragraph 31 of that judgment.

61 See my Opinions in *Nordea Bank* (C?48/13, EU:C:2014:153, points 21 to 28), and in *A* (C?123/11, EU:C:2012:488, points 40 and 41). See also my Opinions in *Inspecteur van de Belastingdienst/Noord/kantoor Groningen and Others* (C?39/13 to C?41/13, EU:C:2014:104, point 32); in *Hervis Sport- és Divatkereskedelmi* (C?385/12, EU:C:2013:531, point 59); in *Memira Holding* (C?607/17, EU:C:2019:8, point 46); and in *Holmen* (C?608/17, EU:C:2019:9, point 38).

62 See my Opinion in *Nordea Bank* (C?48/13, EU:C:2014:153, point 25 and the references there).

63 See judgments of 4 July 2013, *Argenta Spaarbank* (C?350/11, EU:C:2013:447, paragraphs 18 to 34); of 23 October 2008, *Krankenheim Ruhesitz am Wannsee-Seniorenheimstatt* (C?157/07, EU:C:2008:588, paragraphs 27 to 39); and of 15 May 2008, *Lidl Belgium* (C?414/06, EU:C:2008:278, paragraphs 18 to 26).

64 Judgments of 5 February 2014, *Hervis Sport- és Divatkereskedelmi* (C?385/12, EU:C:2014:47, paragraph 42); of 24 March 2011, *Commission* v *Spain* (C?400/08, EU:C:2011:172, paragraph 73); and of 5 October 2004, *CaixaBank France* (C?442/02, EU:C:2004:586, paragraph 17).

65 Judgment of 5 February 2014, *Hervis Sport- és Divatkereskedelmi* (C?385/12,

EU:C:2014:47, paragraph 44).

66 It is clear from paragraphs 30 and 71 of its observations that the Commission does recognise this justification in principle and only considers that it does not apply in the present case.

67 See my Opinion in *Hervis Sport- és Divatkereskedelmi* (C?385/12, EU:C:2013:531, point 60) and my Opinion in *ANGED* (C?233/16, EU:C:2017:852, point 44).

68 Judgment of 12 June 2018, *Bevola and Jens W. Trock* (C?650/16, EU:C:2018:424, paragraphs 49 and 50).

69 See, for example, Article 4(5) of the Constitution of Greece, Article 53(1) of the Constitution of Italy, Article 31(1) of the Constitution of Spain, Article 24(1) of the Constitution of Cyprus and, in particular, Article O and Article XXX of the Fundamental Law of Hungary.

70 By way of example, in Germany, inter alia: Bundesverfassungsgericht (Federal Constitutional Court), order of 15 January 2014 (1 BvR 1656/09, ECLI:DE:BVerfG:2014:rs20140115.1bvr165609, paragraph 55 et seq.).

71 See Article 4 of Regulation (EEC, Euratom, ECSC) No 260/68 of the Council of 29 February 1968 laying down the conditions and procedure for applying the tax for the benefit of the European Communities (OJ, English special edition, Series I Chapter 1968(I), p. 37) with a progressive tax rate between 8% and 45%.

72 Judgments of 17 July 2014, *Nordea Bank* (C?48/13, EU:C:2014:2087, paragraph 25); of 29 November 2011, *National Grid Indus* (C?371/10, EU:C:2011:785, paragraph 42); of 15 May 2008, *Lidl Belgium* (C?414/06, EU:C:2008:278, paragraph 27); of 12 September 2006, *Cadbury Schweppes and Cadbury Schweppes Overseas* (C?196/04, EU:C:2006:544, paragraph 47); of 13 December 2005, *SEVIC Systems* (C?411/03, EU:C:2005:762, paragraph 23); and of 13 December 2005, *Marks & Spencer* (C?446/03, EU:C:2005:763, paragraph 35).

73 Judgments of 11 June 2015, *Berlington Hungary and Others* (C?98/14, EU:C:2015:386, paragraph 64); of 12 July 2012, *HIT and HIT LARIX* (C?176/11, EU:C:2012:454, paragraph 22 and the case-law cited); and of 17 November 2009, *Presidente del Consiglio dei Ministri* (C?169/08, EU:C:2009:709, paragraph 42).

74 See judgments of 6 November 2003, *Gambelli and Others* (C?243/01, EU:C:2003:597, paragraph 63); of 21 September 1999, *Läärä and Others* (C?124/97, EU:C:1999:435, paragraphs 14 and 15); and of 24 March 1994, *Schindler* (C?275/92, EU:C:1994:119, paragraph 61), all concerning games of chance; and of 5 March 1996, *Brasserie du pêcheur and Factortame* (C?46/93 and C?48/93, EU:C:1996:79, paragraph 48 et seq.), concerning foodstuffs legislation.

75 For a comparable test for assessing acts of Union institutions and of the Member States, see also judgment of 5 March 1996, *Brasserie du pêcheur and Factortame* (C?46/93 and C?48/93, EU:C:1996:79, paragraph 47).

76 See, in this respect, my Opinion in *ANGED* (C?233/16, EU:C:2017:852, point 48) and the judgments of the Court of Justice of 4 May 2016, *Poland* v *Parliament and Council* (C?358/14, EU:C:2016:323, paragraph 79), and of 10 December 2002, *British American Tobacco (Investments) and Imperial Tobacco* (C?491/01, EU:C:2002:741, paragraph. 123 and the case-law cited) with regard to the discretion of the EU legislature, which is applicable to the situation of the national legislature; see also, with regard to the comparable criteria concerning the actions of EU institutions and Member States, judgment of 5 March 1996, *Brasserie du pêcheur and Factortame*

(C?46/93 and C?48/93, EU:C:1996:79, paragraph 47).

77 In the Explanatory Memorandum for the turnover-based digital services tax proposed by the Commission, on the other hand, it is stated in recital 23 that the turnover-based threshold should limit the application of the digital services tax to companies of a certain scale. These are undertakings which heavily rely on the exploitation of a strong market position. The threshold also excludes small enterprises and start-ups for which the compliance burdens of the new tax would be likely to have a disproportionate effect. In the justification of this (p. 12), the Commission explicitly states that these (higher-turnover) undertakings, because of their strong market position, are relatively more capable of benefiting from their business models than smaller undertakings. On the basis of this 'economic capacity' these undertakings are considered especially 'tax-worthy' and classified as taxable persons.

78 See my Opinion in *Hervis Sport- és Divatkereskedelmi* (C?385/12, EU:C:2013:531, point 61). See also to that effect my Opinion in *ANGED* (C?233/16, EU:C:2017:852, point 57).

79 Recital 23 of the Proposal for a Council Directive on the common system of a digital services tax on revenues resulting from the provision of certain digital services, 21 March 2018, COM(2018) 148 final.

80 See judgments of 30 June 2016, *Lidl* (C?134/15, EU:C:2016:498, paragraph 33); of 4 May 2016, *Pillbox 38* (C?477/14, EU:C:2016:324, paragraph 48); of 15 February 2016, *N.* (C?601/15 PPU, EU:C:2016:84, paragraph 54); of 22 January 2013, *Sky Österreich* (C?283/11, EU:C:2013:28, paragraph 50); of 8 July 2010, *Afton Chemical* (C?343/09, EU:C:2010:419, paragraph 45); and of 11 July 1989, *Schräder HS Kraftfutter* (265/87, EU:C:1989:303, paragraph 21).

81 Judgments of 21 December 2011, *Commission* v *Poland* (C?271/09, EU:C:2011:855, paragraph 58), and of 11 October 2007, *ELISA* (C?451/05, EU:C:2007:594, paragraph 82 and the case-law cited).

82 Judgments of 30 June 2016, *Lidl* (C?134/15, EU:C:2016:498, paragraph 33); of 22 January 2013, *Sky Österreich* (C?283/11, EU:C:2013:28, paragraph 50); of 9 November 2010, *Volker und Markus Schecke and Eifert* (C?92/09 and C?93/09, EU:C:2010:662, paragraph 76 et seq.); and of 12 July 2001, *Jippes and Others* (C?189/01, EU:C:2001:420, paragraph 81).

83 Judgments of 6 October 2015, *Finanzamt Linz* (C?66/14, EU:C:2015:661, paragraph 21); of 15 June 2006, *Air Liquide Industries Belgium* (C?393/04 and C?41/05, EU:C:2006:403, paragraph 43 et seq.); of 27 October 2005, *Distribution Casino France and Others* (C?266/04 to C?270/04, C?276/04 and C?321/04 to C?325/04, EU:C:2005:657, paragraph 42 et seq.); and of 20 September 2001, *Banks* (C?390/98, EU:C:2001:456, paragraph 80 and the case-law cited).

84 With regard to the relevance of this question, see inter alia judgment of 27 October 2005, *Distribution Casino France and Others* (C?266/04 to C?270/04, C?276/04 and C?321/04 to C?325/04, EU:C:2005:657, paragraphs 40, 41 and 45 et seq.).

85 Judgment of 15 June 2006 (C?393/04 and C?41/05, EU:C:2006:403, paragraphs 25 and 26).

86 Judgment of 15 June 2006, *Air Liquide Industries Belgium* (C?393/04 and C?41/05, EU:C:2006:403, paragraph 43).

87 Judgment of 6 November 2018, *Scuola Elementare Maria Montessori* v *Commission*, *Commission* v *Scuola Elementare Maria Montessori* and *Commission* v *Ferracci* (C?622/16 P to

C?624/16 P, EU:C:2018:873, paragraph 90 et seq.)

88 Judgment of 19 December 2018, *A-Brauerei* (C?374/17, EU:C:2018:1024)**.**

89 Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article [108 TFEU] (OJ 1999 L 83, p. 1).

90 Judgment of 6 November 2018, *Scuola Elementare Maria Montessori* v *Commission*, *Commission* v *Scuola Elementare Maria Montessori* and *Commission* v *Ferracci* (C?622/16 P to C?624/16 P, EU:C:2018:873, paragraph 79); see to that effect, albeit in a different context, judgment of 3 March 2016, *Daimler* (C?179/15, EU:C:2016:134, paragraph 42).

91 Judgments of 26 April 2018, *ANGED* (C?233/16, EU:C:2018:280); of 26 April 2018, *ANGED* (C?234/16 and C?235/16, EU:C:2018:281); and of 26 April 2018, *ANGED* (C?236/16 and C?237/16, EU:C:2018:291).

92 Judgment of 15 June 2006 (C?393/04 and C?41/05, EU:C:2006:403, paragraph 43 et seq.).

93 See expressly in a comparable case: judgment of 6 October 2015, *Finanzamt Linz* (C?66/14, EU:C:2015:661, paragraph 21 et seq.).

94 Judgments of 6 October 2015, *Finanzamt Linz* (C?66/14, EU:C:2015:661, paragraph 21); of 15 June 2006, *Air Liquide Industries Belgium* (C?393/04 and C?41/05, EU:C:2006:403, paragraph 43 et seq.); of 27 October 2005, *Distribution Casino France and Others* (C?266/04 to C?270/04, C?276/04 and C?321/04 to C?325/04, EU:C:2005:657, paragraph 42 et seq.); and of 20 September 2001, *Banks* (C?390/98, EU:C:2001:456, paragraph 80 and the case-law cited).

95 Judgments of 27 June 2017, *Congregación de Escuelas Pías Provincia Betania* (C?74/16, EU:C:2017:496, paragraph 38); of 21 December 2016, *Commission* v *World Duty Free Group and Others* (C?20/15 P and C?21/15 P, EU:C:2016:981, paragraph 53); and of 21 December 2016, *Commission* v *Hansestadt Lübeck* (C?524/14 P, EU:C:2016:971, paragraph 40).

96 Opinion of Advocate General Saugmandsgaard Øe in *A-Brauerei* (C?374/17, EU:C:2018:741, points 66 and 67).

97 ‘I observe, in this regard, that the Commission Notice on the notion of State aid states, in paragraph 139, that the progressive nature of income tax and its redistributive purpose may constitute justifications based on the nature or general scheme of the system in question.’

98 Judgment of 27 June 2017, *Congregación de Escuelas Pías Provincia Betania* (C?74/16, EU:C:2017:496, paragraph 65), and of 9 October 2014, *Ministerio de Defensa and Navantia* (C?522/13, EU:C:2014:2262, paragraph 21).

99 See inter alia judgments of 9 October 2014, *Ministerio de Defensa and Navantia* (C?522/13, EU:C:2014:2262, paragraph 23); of 15 November 2011, *Commission and Spain* v *Government of Gibraltar and United Kingdom* (C?106/09 P and C?107/09 P, EU:C:2011:732, paragraph 72); and of 15 March 1994, *Banco Exterior de España* (C?387/92, EU:C:1994:100, paragraph 14).

100 Judgments of 27 June 2017, *Congregación de Escuelas Pías Provincia Betania* (C?74/16, EU:C:2017:496, paragraph 66); of 14 January 2015, *Eventech* (C?518/13, EU:C:2015:9, paragraph 33); of 19 March 2013, *Bouygues and Bouygues Télécom* v *Commission* (C?399/10 P and C?401/10 P, EU:C:2013:175, paragraph 101); and of 15 March 1994, *Banco Exterior de España* (C?387/92, EU:C:1994:100, paragraph 13).

101 See inter alia the following recent decisions and the Opinions delivered in those cases:

Judgment of 19 December 2018, *A-Brauerei* (C?374/17, EU:C:2018:1024), and Opinion of Advocate General Saugmandsgaard Øe in *A-Brauerei* (C?374/17, EU:C:2018:741).

Judgment of 28 June 2018, *Andres (Insolvenz Heitkamp BauHolding)* v *Commission* (C?203/16 P, EU:C:2018:505), and Opinion of Advocate General Wahl in *Andres* v *Commission* (C?203/16 P, EU:C:2017:1017).

Judgments of 26 April 2018, *ANGED* (C?233/16, EU:C:2018:280); of 26 April 2018, *ANGED* (C?234/16 and C?235/16, EU:C:2018:281); and of 26 April 2018, *ANGED* (C?236/16 and C?237/16, EU:C:2018:291); with my Opinions in *ANGED* (C?233/16, EU:C:2017:852); in *ANGED* (C?234/16 and C?235/16, EU:C:2017:853); and in *ANGED* (C?236/16 and C?237/16, EU:C:2017:854).

102 See inter alia judgments of 21 December 2016, *Commission* v *World Duty Free Group and Others* (C?20/15 P and C?21/15 P, EU:C:2016:981, paragraph 53 et seq.); of 9 October 2014, *Ministerio de Defensa and Navantia* (C?522/13, EU:C:2014:2262, paragraph 23); of 29 March 2012, *3M Italia* (C?417/10, EU:C:2012:184, paragraph 39); of 15 November 2011, *Commission and Spain* v *Government of Gibraltar and United Kingdom* (C?106/09 P and C?107/09 P, EU:C:2011:732, paragraph 73); and of 8 November 2001, *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke* (C?143/99, EU:C:2001:598, paragraph 35).

103 Judgment of 21 December 2016 (C?20/15 P and C?21/15 P, EU:C:2016:981, paragraphs 73, 74 and 86 et seq.).

104 See to that effect, in particular, judgments of 19 December 2018, *A-Brauerei* (C?374/17, EU:C:2018:1024, paragraph 24); of 28 June 2018, *Andres (Insolvenz Heitkamp BauHolding)* v *Commission* (C?203/16 P, EU:C:2018:505, paragraph 94); of 21 December 2016, *Commission* v *World Duty Free Group and Others* (C?20/15 P and C?21/15 P, EU:C:2016:981, paragraph 59); and of 29 March 2012, *3M Italia* (C?417/10, EU:C:2012:184, paragraph 42).

105 See inter alia judgments of 9 October 2014, *Ministerio de Defensa and Navantia* (C?522/13, EU:C:2014:2262, paragraph 23); of 15 November 2011, *Commission and Spain* v *Government of Gibraltar and United Kingdom* (C?106/09 P and C?107/09 P, EU:C:2011:732, paragraph 72); and of 15 March 1994, *Banco Exterior de España* (C?387/92, EU:C:1994:100, paragraph 14).

106 See also Opinion of Advocate General Bobek in *Belgium* v *Commission* (C?270/15 P, EU:C:2016:289, point 28), which describes this question as ‘rather academic’.

107 See also to that effect judgments of 21 December 2016, *Commission* v *World Duty Free Group and Others* (C?20/15 P and C?21/15 P, EU:C:2016:981, paragraph 54); and of 14 January 2015, *Eventech* (C?518/13, EU:C:2015:9, paragraph 53); expressly also, outside the field of tax law, judgment of 21 December 2016, *Commission* v *Hansestadt Lübeck* (C?524/14 P, EU:C:2016:971, paragraphs 53 and 55).

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

109 Along these lines, Opinion of Advocate General Bobek in *Belgium* v *Commission* (C?270/15 P, EU:C:2016:289, point 27); with regard to the burden of proof on the Commission: judgment of 28 June 2018, *Andres (Insolvenz Heitkamp BauHolding)* v *Commission* (C?203/16 P,

EU:C:2018:505, paragraph 84); of 4 June 2015, *Commission* v *MOL* (C?15/14 P, EU:C:2015:362, paragraph 59); and of 8 September 2011, *Commission* v *Netherlands* (C?279/08 P, EU:C:2011:551, paragraph 62); with regard to the burden of proof on the Member State: judgment of 28 June 2018, *Andres (Insolvenz Heitkamp BauHolding)* v *Commission* (C?203/16 P, EU:C:2018:505, paragraph 87); of 15 November 2011, *Commission and Spain* v *Government of Gibraltar and United Kingdom* (C?106/09 P and C?107/09 P, EU:C:2011:732, paragraph 146); of 8 September 2011, *Commission* v Netherlands (C?279/08 P, EU:C:2011:551, paragraph 62); and of 29 April 2004, *Netherlands* v *Commission* (C?159/01, EU:C:2004:246, paragraph 43).

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

111 Judgments of 26 April 2018, *ANGED* (C?233/16, EU:C:2018:280, paragraph 50 et seq.); of 26 April 2018, *ANGED* (C?234/16 and C?235/16, EU:C:2018:281, paragraph 43 et seq.); and of 26 April 2018, *ANGED* (C?236/16 and C?237/16, EU:C:2018:291, paragraph 38 et seq.).

112 See inter alia judgments of 9 October 2014, *Ministerio de Defensa and Navantia* (C?522/13, EU:C:2014:2262, paragraph 22); of 19 March 2013, *Bouygues and Bouygues Télécom* v *Commission* (C?399/10 P and C?401/10 P, EU:C:2013:175, paragraph 101); of 15 June 2006, *Air Liquide Industries Belgium* (C?393/04 and C?41/05, EU:C:2006:403, paragraph 29); and of 23 February 1961, *De Gezamenlijke Steenkolenmijnen in Limburg* v *High Authority* (30/59, EU:C:1961:2, p. 43).

113 See to that effect judgment of 18 July 2013, *P* (C?6/12, EU:C:2013:525, paragraphs 22 to 27).

114 Judgment of 18 July 2013, *P* (C?6/12, EU:C:2013:525, paragraph 22), and of 8 September 2011, *Paint Graphos* (C?78/08 to C?80/08, EU:C:2011:550, paragraph 65 and the case-law cited).

115 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).

116 Judgment of 15 November 2011, *Commission and Spain* v *Government of Gibraltar and United Kingdom* (C?106/09 P and C?107/09 P, EU:C:2011:732, paragraph 149).

117 See Opinion of Advocate General Saugmandsgaard Øe in *A-Brauerei* (C?374/17, EU:C:2018:741); Opinion of Advocate General Wahl in *Andres* v *Commission* (C?203/16 P, EU:C:2017:1017); and my Opinions in *ANGED* (C?233/16, EU:C:2017:852); in *ANGED* (C?234/16 and C?235/16, EU:C:2017:853); and in *ANGED* (C?236/16 and C?237/16, EU:C:2017:854).

118 See judgments of 21 December 2016, *Commission* v *Aer Lingus and Ryanair Designated Activity* (C?164/15 P and C?165/15 P, EU:C:2016:990, paragraph 51); of 21 December 2016, *Commission* v *World Duty Free Group and Others* (C?20/15 P and C?21/15 P, EU:C:2016:981, paragraph 54); of 21 December 2016, *Commission* v *Hansestadt Lübeck* (C?524/14 P, EU:C:2016:971, paragraphs 49 and 58); of 9 October 2014, *Ministerio de Defensa and Navantia* (C?522/13, EU:C:2014:2262, paragraph 35); of 18 July 2013, *P* (C?6/12, EU:C:2013:525, paragraph 19); of 29 March 2012, *3M Italia* (C?417/10, EU:C:2012:184, paragraph 42); and of 8 September 2011, *Paint Graphos* (C?78/08 to C?80/08, EU:C:2011:550, paragraph 49).

119 See judgments of 18 July 2013, *P* (C?6/12, EU:C:2013:525, paragraph 22), and of 8 September 2011, *Paint Graphos* (C?78/08 to C?80/08, EU:C:2011:550, paragraphs 65 and 69); see also to that effect, inter alia, judgments of 9 October 2014, *Ministerio de Defensa and Navantia* (C?522/13, EU:C:2014:2262, paragraphs 42 and 43); of 15 November 2011, *Commission and Spain*

v *Government of Gibraltar and United Kingdom* (C?106/09 P and C?107/09 P, EU:C:2011:732, paragraph 145); of 8 November 2001, *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke* (C?143/99, EU:C:2001:598, paragraph 42); and of 2 July 1974, *Italy* v *Commission* (173/73, EU:C:1974:71, paragraph 33).

120 Judgments of 26 April 2018, *ANGED* (C?236/16 and C?237/16, EU:C:2018:291, paragraph 40 et seq.); of 26 April 2018, *ANGED* (C?234/16 and C?235/16, EU:C:2018:281, paragraph 45 et seq.); and of 26 April 2018, ANGED (C?233/16, EU:C:2018:280, paragraph 52 et seq.).

121 See judgment of 15 November 2011, *Commission and Spain* v *Government of Gibraltar and United Kingdom* (C?106/09 P and C?107/09 P, EU:C:2011:732, paragraph 104).

122 Judgment of 21 December 2016, *Commission* v *World Duty Free Group and Others* (C?20/15 P and C?21/15 P, EU:C:2016:981, paragraphs 54, 67 and 74).

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

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

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

126 Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union, OJ 2016 C 262, p. 1 (31), paragraph 139.

127 Judgment of 16 May 2019, *Poland* v *Commission* (T?836/16 and T?624/17, EU:T:2019:338, paragraph 65 et seq.).

128 Proposal for a Council Directive on the common system of a digital services tax on revenues resulting from the provision of certain digital services, 21 March 2018, COM(2018) 148 final.

129 Administrative manageability is also regarded as a justification by the Commission itself; see OJ 2016 C 262, p. 1 (31), paragraph 139.

130 Judgment of 19 December 2018, *A-Brauerei* (C?374/17, EU:C:2018:1024, paragraph 51); similarly, judgment of 29 April 2004, *GIL Insurance and Others* (C?308/01, EU:C:2004:252, paragraph 73 et seq.).