COMMISSION DECISION (EU) 2018/160

of 30 June 2017

on the State aid SA.44351 (2016/C) (ex 2016/NN) implemented by Poland for the tax on the retail sector

(notified under document C(2017) 4449)

(Only the Polish text is authentic)

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union, and in particular the first subparagraph of Article 108(2) thereof,

Having regard to the Agreement on the European Economic Area, and in particular Article 62(1)(a) thereof,

Having called on interested parties to submit their comments pursuant to the provision(s) cited above ([1]),

Whereas:

1. PROCEDURE

(1) By press articles published in February 2016, the Commission became aware that Poland was considering to adopt a law that would introduce a turnover tax on the retail sector featuring a progressive rate structure.

(2) On 11 February and 30 May 2016, the Commission services sent letters to the Polish authorities by which they requested more information on the planned law and invited Poland to consult with them before the adoption of that law. Those letters also emphasised the similarities of that law with the Hungarian food chain inspection fee, on which the Commission had opened a formal State aid investigation, and explained the preliminary State aid assessment of that fee by the Commission in its opening decision ([2]). Finally, they informed Poland that if a measure entailing State aid is put into effect without prior Commission approval, the Commission might issue a suspension injunction.

(3) The Polish authorities replied to those letters on 2 March and 27 June 2016 respectively. By letter of 2 March 2016, the Polish authorities committed to communicate to the Commission the draft law once finalised. By letter of 27 June 2016, the Polish authorities informed the Commission that the draft law had already been submitted to the Polish Parliament and that its adoption was imminent. They also provided the Commission services with the text of the draft law.

(4) On 6 July 2016, the Polish Parliament adopted the Act on retail sales tax (USTAWA z dnia 6 lipca 2016 r. o podatku od sprzedaży detalicznej ([3]), hereinafter: 'the Act'). The Act entered into force on 1 September 2016.

(5) By letter of 8 July 2016, the Commission informed Poland of its preliminary view that the retail tax under the Act (hereinafter: the 'retail tax') constituted State aid and requested the Polish authorities to express their views on the possibility of the Commission issuing a suspension injunction. A reply was received on 22 July 2016.

(6) On 4 August 2016, the Commission received a State aid complaint against the same measure.

([1]) OJ C 406, 4.11.2016, p. 76.
([2]) See Commission Decision in case Amendment to the Hungarian food chain inspection fee (OJ C 277, 21.8.2015, p. 12); see also Commission Decisions in the following cases: SA.39235 — Hungarian advertisement tax (OJ C 136, 24.4.2015, p. 7); and SA.41187 — Hungarian health contribution of tobacco industry businesses (OJ C 277, 21.8.2015, p. 24).
([3]) See Journal of Laws of 2016, item 1155.

(7) By letter of 19 September 2016, the Commission informed Poland that it had decided to initiate the procedure laid down in Article 108(2) of the Treaty on the Functioning of the European Union (hereinafter: 'the Treaty') in respect of the aid measure (the 'Opening Decision'). The Commission also required the immediate suspension of the measure in accordance with Article 13(1) of Council Regulation (EU) 2015/1589 ([4]).

(8) The Opening Decision was published in the *Official Journal of the European Union* ([5]). The Commission invited interested parties to submit their comments on the aid measure.

(9) Poland submitted its observations to the Opening Decision by letter of 7 November 2016. The Commission did not receive comments from interested parties.

(10) By regulation of the Polish Minister for Development and Finance, which entered into force on 19 October 2016, Poland suspended the collection of the retail tax applicable to turnover generated from 1 September 2016 until 31 December 2016 ([6]). On 15 November 2016, the Polish Parliament adopted a law, which entered into force on 22 December 2016 ([7]), which suspends the application of the retail sales tax until 1 January 2018.

(11) By letter of 11 January 2017 the Commission informed Poland that no comments from interested parties had been received and invited the Polish authorities to discuss with the Commission services their own comments as well as any amendments to the Act possibly envisaged. A video-conference meeting was held on 14 March 2017.

2. DETAILED DESCRIPTION OF THE AID MEASURE

(12) The Act lays down a tax on the retail sector in Poland.

(13) Article 5 of the Act subjects to tax turnover received from the sale of goods to natural persons not carrying out any economic activity (consumers). In accordance with Article 4 of the Act, the taxable person is the retailer being a natural person, company of civil law (*spółka cywilna*), organisational unit without legal personality and moral person, such as personal companies (spółki osobowe) and other companies regulated under kodeks spolek handlowych (companies with limited responsibility (z.o.o.) and joint-stock companies (S.A.) ([8]).

(14) In accordance with Article 8 of the Act, the obligation to pay the turnover tax arises when the taxable person achieves a monthly turnover in excess of PLN 17 million. According to Article 6(1) of the Act, the taxable base is the amount of turnover exceeding PLN 17 million from retail sales conducted during one month. The retail tax is payable on a monthly basis by the twenty-fifth day of the month following the month in which the taxed revenue was generated.

(15) Article 9 of the Act lays down two tax rates:

— the tax is levied at a rate of 0,8 % on the part of the undertaking's monthly turnover from retail sales over PLN 17 million (≈ EUR 4 million ([9])) but not exceeding PLN 170 million (≈ EUR 40 million) and;

— the tax is levied at a rate of 1,4 % on the part of the undertaking's monthly turnover from retail sales above PLN 170 million.

(16) In light of Articles 6(1) and 8 of the Act, which exclude the part of the undertaking's monthly turnover from retails sales not exceeding PLN 17 million, the retail tax scheme can therefore be said to be based on a progressive rate structure comprising three different monthly turnover brackets subject to three different tax rates: a tax rate of 0 % on the amount of monthly turnover from retail sales not exceeding PLN 17 million; a tax rate of 0,8 % on the amount of monthly turnover over PLN 17 million but not exceeding PLN 170 million; and a tax rate of 1,4 % on the amount of monthly turnover from retail sales above PLN 170 million.

([4]) Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (OJ L 248, 24.9.2015, p. 9).
([5]) Cf. footnote [1].
([6]) See Journal of Laws of 2016, item 1723.
([7]) See Journal of Laws of 2016, item 2099.
([8]) Article 3(4) of the Act provides the definition of retailers.
([9]) At a rate of 1 PLN ≈ EUR 0,238.

3. FORMAL INVESTIGATION PROCEDURE

3.1. Grounds for initiating the formal investigation procedure

(17) The Commission opened the formal investigation procedure because it considered at that stage that the progressive rate structure of the Polish tax on the retail sector constituted unlawful and incompatible State aid.

(18) In particular, the Commission considered that the Act differentiates between undertakings engaged in the retail trade based on their turnover and therefore on their size and grants a selective advantage to undertakings with low turnover and thus smaller undertakings. Poland had advanced no convincing explanation why larger and smaller retail operators are in a different factual and legal situation when it comes to levying the tax on retail sales. Poland had therefore not demonstrated that the measure was justified by the nature or general scheme of the tax system. Therefore, the Commission provisionally considered that the Act gave rise to State aid, since all the other conditions laid down by Article 107(1) of the Treaty appeared to have been met.

(19) Finally, the Commission raised doubts as to the compatibility of the Act with the internal market. The Commission observed that none of the exceptions laid down in Article 107(2) or (3) of the Treaty seemed to apply, nor did Poland advance any argument why the retail tax would be compatible with the internal market. It further recalled that it cannot declare compatible a State aid measure which entails an indissoluble breach of other rules of Union law, such as the fundamental freedoms established by the Treaty or the provisions of Union regulations and directives. At that stage, the Commission could not exclude that the measure predominantly targeted foreign-owned undertakings, which could entail a breach of Article 49 of the Treaty establishing the fundamental freedom of establishment.

3.2. Comments from Poland

(20) The Polish authorities consider that the description of the retail tax in the opening decision as involving three different brackets and rates is incorrect. In the view of the Polish authorities, the retail tax has only two rates, given that revenues not exceeding PLN 17 million are not subject to the tax at all, regardless of the type of enterprise generating the revenue and of the total amount of revenues generated in the month concerned. In their opinion, a tax exemption is different from a zero tax rate and the thresholds apply to all taxable persons 'on equal and objective terms'.

(21) Regarding the purpose of the tax, the Polish authorities stress that the revenues to be generated by the retail tax would be assigned to financing the 500+ child benefit programme. However, given the estimated budget of this programme (*i.e.* approx. PLN 16 billion in 2016 and approx. PLN 22 billion in subsequent years), its financing would be achieved only in part through the retail tax (*i.e.* expected proceeds on a full year basis of approx. PLN 1,6 billion in 2017). Poland also argues that, besides representing an expenditure, the 500+ child benefit programme would also have a positive effect on the economy, by increasing consumption and, thus, having a direct impact on retailers' revenues.

(22) As far as the measure's financing through State resources is concerned, Poland argues that the design of the tax does not imply foregoing revenues which in normal circumstances would have been collected from the retailers. In particular, the Polish authorities assert that the tax-free amount and the reduced tax rate of 0,8 % apply to all companies and that the Polish State is foregoing resources which it could otherwise obtain from all enterprises and not just smaller ones.

(23) Poland also considers that a difference must be made between 'global progressivity', where different rates are applied to the whole turnover of undertakings depending of the size of such turnover, and 'bracketed progressivity' where different rates are applied to different parts (brackets) of the turnover of all undertakings. Bracketed progressivity would not entail, in Poland's view, any selective advantage because the same rate schedule applies to all retail undertakings. In particular, Poland argues that the progressive nature of the tax does not entail an advantage for smaller enterprises, given that the tax free amount and the reduced tax rate of 0,8 % reduce operational costs for both higher and lower revenue enterprises. For Poland, the higher revenues an undertaking generates, the more aid that undertaking receives.

(24) In addition, Poland claims that the Commission incorrectly identified the beneficiaries of the advantage, because it would not always be true that enterprises with lower revenues are smaller enterprises and enterprises generating higher revenues are larger enterprises. In fact, according to Poland, enterprises' revenues are not directly, or at least not exclusively, related to their size.

(25) Regarding the selectivity of the measure, Poland contests the reference system identified by the Commission and claims that only taxation on revenues in the retail sector exceeding PLN 17 million a month should be regarded as the system of reference. It then argues that the reason for this is the fact that revenues not exceeding PLN 17 million are not subject to the retail tax. It further claims that the design of the system is neither arbitrary nor biased and that the tax exemption applies to all taxable persons. It also argues, with reference to recital 26 of the Opening Decision, that it could not be concluded that the measure constitutes State aid without determining the single reference rate which serves as a reference point.

(26) Second, in response to recital 32 of the Opening Decision, Poland argues that the average rate of the retail tax as determined by the Commission is an artificial construction. It claims that the structure of the retail tax is based on specific rates assigned *ex ante* to two specific brackets that apply equally to all taxable persons. Furthermore, 'bracketed progressivity' is not selective since the reduced rates are applied on the same terms to all undertakings, regardless of their size. As a consequence, in Poland's view, there is no differential treatment of enterprises which find themselves in a comparable factual and legal situation.

(27) In light of the above, Poland argues that there is no need to present a justification by the nature or overall structure of the system. Nevertheless, the Polish authorities claim that the progressive structure of the retail tax and the progressive structure of the income tax should benefit from the same treatment and be considered justified for redistribution purposes. However, Poland does not provide any further arguments supporting this alleged justification.

(28) Concerning the effect on trade and the distortion of competition, Poland presented the structure of its retail sector, and notes that stores generating the highest revenues (in shopping centres) are usually located in towns which ensures higher customer frequency than those located outside towns, where customers must bear travel costs. Small stores, in turn, are located mainly in small towns and in the countryside, where the opposite is the case (stores are less accessible and frequency and turnover are lower). It further observed that tax optimisation practices are commonly used in the group of sellers with the highest revenues, which leads them to pay no corporate income, tax and that sellers with high turnover benefit from economies of scale (the more they sell, the less the unit costs are) and tend to exert their influence to reduce producers and suppliers' margins to their own benefit. Finally, it noted that the development of modern trade in Poland has significantly weakened the segment of independent retailers (51 % of the market in 2008 and 37 % in 2015).

(29) Poland concludes that: (i) even if it were to be considered that the retail tax is selective, competition would not be distorted because large-scale sellers already have a significant competitive advantage over small retailers and (ii) the progression in the tax rates of the retail tax limits adverse changes in the pattern of trade (the disappearance of small-scale trade coupled with the increase in large-format trade), which are currently distorting competition.

(30) Finally, Poland argues that the Opening Decision unjustifiably limits Member States' autonomy in developing their fiscal policy. According to Poland, it is up to a State to develop the structure of a tax being introduced, i.e. the subject, tax base and rates, which is optimal from the point of view of the fiscal policy pursued.

3.3. **Comments from interested parties**

(31) The Commission has not received any comments from interested parties.

4. **ASSESSMENT OF THE AID**

(32) As a preliminary matter, and in response to the claim made by Poland in response to the Opening Decision that the retail tax concerns a measure of direct taxation and that therefore the Commission exercising its State aid competence constitutes an unjustifiable limits on its autonomy in developing its fiscal policy, the Commission recalls that, while the Member States are considered to enjoy fiscal autonomy in the field of direct taxation, any fiscal measure a Member State adopts must comply with Article 107 of the Treaty ([10]).

([10]) See Joined Cases C-182/03 and C-217/03, *Belgium and Forum 187 ASBL v. Commission*, EU:C:2006:416, para. 81; Joined Cases C-106/09 P and C-107/09 P, *Commission v Government of Gibraltar and United Kingdom*, EU:C:2011:732; Case C-417/10 *3M Italia*, EU:C:2012:184, para. 25, and Order in Case C-529/10, *Safilo*, EU:C:2012:188, para. 18; See also Case T-538/11, *Belgium v. Commission*, EU:T:2015:188, para. 66.

4.1. **Existence of aid**

(33) According to Article 107(1) of the Treaty, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the provision of certain goods is incompatible with the internal market, in so far as it affects trade between Member States. For a measure to be categorised as aid within the meaning of Article 107(1), all the conditions set out in that provision must be fulfilled ([11]). It is thus well-established that, for a measure to be categorised as State aid, there must, first, be an 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 an undertaking and, fourth, it must distort or threaten to distort competition ([12]).

4.1.1. *State resources and imputability to the State*

(34) To constitute State aid, a measure must both be imputable to the State and financed through State resources.

(35) Since the retail tax results from an Act of the Polish Parliament, it is clearly imputable to the Polish State.

(36) As regards the measure's financing through State resources, the Court of Justice has consistently held that a measure by which the public authorities grant certain undertakings a tax exemption which, although not involving a positive transfer of State resources, places the persons to whom it applies in a more favourable financial situation than other taxpayers constitutes State aid ([13]). In recitals 37 to 60, the Commission will demonstrate that the progressive rate structure of the retail tax, described in recitals 15 and 16, results in Poland waiving tax revenue it would otherwise have been entitled to collect from retail operators with a lower level of turnover (and thus smaller retailers), if they had been subject to the same average effective retail tax rate as retail operators with a higher level of turnover (and thus larger retailers). The progressive rate structure's discrimination between retailers based on their size notably results in Poland waiving tax revenue it would otherwise have been entitled to collect from retail undertakings that operate under a franchise model as compared to retail undertaking that operate under a holding company model ([14]). By renouncing those revenues, the retail tax gives rise to a loss of State resources within the meaning of Article 107(1) of the Treaty ([15]).

4.1.2. *Advantage*

(37) According to the case law of the Union Courts, the notion of aid embraces not only positive benefits, but also measures which, in various forms, mitigate the charges which are normally included in the budget of an undertaking. ([16]) An advantage may be granted through different types of reduction in a company's tax burden and, in particular, through a reduction in the applicable tax rate, taxable base or in the amount of tax due ([17]). A measure that entails a reduction of a tax or a levy gives rise to an advantage because it places the undertakings to which it applies in a more favourable financial position than other taxpayers and results in a loss of income to the State ([18]).

(38) The Act lays down a progressive rate structure that applies to all undertakings subject to the retail tax and the tax burden carried by each retailer depends on the brackets into which its turnover falls.

(39) The progressive character of the tax has the effect that not only the amount of tax but also the average percentage of the tax levied on a retailer's turnover from retail sales increases when its turnover increases and reaches the next upper bracket ([19]). As a result, retailers with low turnover are either not subject to the retail tax or subject to the tax at substantially lower average effective rates than retailers with high turnover, thereby

([11]) See Case C-399/08 P *Commission v Deutsche Post* EU:C:2010:481, paragraph 38 and the case-law cited.
([12]) See Case C-399/08 P *Commission v Deutsche Post* EU:C:2010:481, paragraph 39 and the case-law cited.
([13]) See Joined Cases C-106/09 P and C-107/09 P *Commission v. Government of Gibraltar and United Kingdom* EU:C:2011:732, paragraph 72 and the case-law cited therein.
([14]) Retail undertakings that own and operate several shops of a retail chain and are, for the purpose of the retail tax, regarded as one single taxable person.
([15]) See Case C-169/08 *Presidente del Consiglio dei Ministri* EU:C:2009:709, paragraph 58.
([16]) Case C-143/99 *Adria-Wien Pipeline* EU:C:2001:598, paragraph 38.
([17]) See Case C-66/02 *Italy v Commission* EU:C:2005:768, paragraph 78; Case C-222/04 *Cassa di Risparmio di Firenze and Others* EU:C:2006:8, paragraph 132; Case C-522/13 *Ministerio de Defensa and Navantia* EU:C:2014:2262, paragraphs 21 to 31.
([18]) Joined Cases C-393/04 and C-41/05 *Air Liquide Industries Belgium* EU:C:2006:403, paragraph 30 and Case C-387/92 *Banco Exterior de España* EU:C:1994:100, paragraph 14.
([19]) Calculated as amount of tax due by a taxpayer in a particular month divided by the turnover of that taxpayer in that month.

reducing the charges that undertakings with low turnover have to bear as compared to undertakings with high turnover. Since the amount of turnover achieved by an undertaking correlates to a certain extent with the size of that undertaking, the progressive rate structure under the Act can be said to confer an economic advantage on smaller retailers to the detriment of larger retailers in the form of a reduction of their tax burden and a reduction in the average effective tax rate to which those undertakings are subject. Indeed, the cost represented by the tax at the end of the month for each PLN 100 turnover will be zero for undertakings with total turnovers not exceeding PLN 17 million; will progressively increase towards 0,8 % for retailers with total turnovers above PLN 17 million but not exceeding PLN 170 million; and further increase towards 1,4 % for retailers with total turnovers in excess of PLN 170 million as illustrated in the table below:

Turnover (PLN)	Marginal rate (%)	Tax (PLN)	Tax/Turnover (%)
500 000 000	1,4	5 844 000	1,2
100 000 000	0,8	664 000	0,7
20 000 000	0,8	24 000	0,1
15 000 000	0	0	0,0

(40) The progressive rate structure's discrimination between retailers based on their size also means that individual retailers operating as franchisees under a franchise model are granted an advantage, since their tax burden is determined on the basis of their individual stores' monthly turnover from retail sales, rather than on the basis of the entire chain's monthly turnover from retail sales as is the case for retail chains operating under a holding company model ([20]).

4.1.3. *Selectivity*

(41) A measure is selective if it favours certain undertakings or the production of certain goods within the meaning of Article 107(1) of the Treaty. For aid schemes, the Court of Justice has established that the selectivity of the measure should in principle be assessed by means of a three-step analysis ([21]). First, the common or normal tax regime applicable in the Member State is identified: 'the reference system'. Second, it should be determined whether a given measure constitutes a derogation from that system insofar as it differentiates between economic operators who, in light of the objectives intrinsic to the system, are in a comparable factual and legal situation. If the measure in question does not constitute a derogation from the reference system, it is not selective. If it does (and therefore is *prima facie* selective), it must be established, in the third step of the analysis, whether the derogatory measure is justified by the nature or the general scheme of the reference tax system ([22]). If a *prima facie* selective measure is justified by the nature or the general scheme of the system, it will not be considered selective and it will thus fall outside the scope of Article 107(1) of the Treaty.

4.1.3.1. System of reference

(42) The reference system is composed of a consistent set of rules that generally apply on the basis of objective criteria to all undertakings falling within its scope as defined by its objective.

([20]) In a franchise model, each franchisee is a different taxable person. In the likely situation where the franchisee only owns and operates one shops, the turnover tax applies on the turnover of that single shop. In the holding company model the single store is not a taxable person. The tax and its progressive rate schedule apply on the aggregated turnover of all the shops of the holding company.

([21]) See, for example, Case C-279/08 P *Commission v Netherlands (NOx)* EU:C:2011:551; Case C-143/99 *Adria-Wien Pipeline* EU: C:2001:598, Joined Cases C-78/08 to C-80/08, *Paint Graphos and others* EU:C:2011;550 and EU:C:2010:411, Case C-308/01 *GIL Insurance* EU: C:2004:252 and EU:C:2003;481

([22]) Commission Notice on the application of the State aid rules to measures relating to direct business taxation (OJ C 384, 10.12.1998, p. 3).

(43) Contrary to what Poland claims, the objective of the retail tax cannot be said to be to finance budget expenditure under the Family 500+ child benefit programme. Poland confirmed that tax revenues cannot be allocated wholly and exclusively to finance a predetermined type of expenditure, so that an alleged link between child care and the retail sector has not been established, nor an alleged link between the cost of the child care programme and the size of the turnover of retail operators. The financing of the Family 500+ child benefit programme cannot be regarded as an objective intrinsic to the retail tax.

(44) Rather, the objective of the retail tax is to tax the turnover of all economic operators involved in the sale of goods to natural person consumers. In the light of that objective, all undertakings deriving turnover from the sale of goods to natural persons should be considered to be in a similar factual and legal situation. The Commission therefore considers the reference system to be the retail tax applicable to the turnover of undertakings engaged in the retail sale of all sorts of goods in Poland.

(45) Contrary to what Poland claims ([23]), the reference system should not be limited only to undertakings with turnover above PLN 17 million on account of the fact that the monthly turnover from retail sales generated by undertakings not exceeding PLN 17 million is not subject to tax under the Act. That exclusion is applied to all undertakings that derive turnover from the sale of retail goods regardless of whether they achieve a turnover exceeding or not exceeding PLN 17 million.

(46) The Commission also does not consider that the progressive tax rate structure laid down by the Act forms a part of the reference system. The Court of Justice has specified that it is not always sufficient to confine the selectivity analysis to whether the measure derogates from the reference system as defined by the Member State ([24]). It is also necessary to evaluate whether the boundaries of that system have been designed by the Member State in a consistent manner or, conversely, in a clearly arbitrary or biased way, so as to favour certain undertakings over others. Otherwise, instead of laying down general rules applying to all undertakings from which a derogation is made for certain undertakings, the Member State could achieve the same result, side stepping the State aid rules, by adjusting and combining its rules in such a way that their very application results in a different burden for different undertakings ([25]). It is particularly important to recall in that respect that the Court of Justice has consistently held that Article 107(1) of the Treaty does not distinguish between measures of State intervention by reference to their causes or their aims, but defines them in relation to their effects, and thus independently of the techniques used ([26]).

(47) The result of the progressive rate structure laid down by the Act is that undertakings with low turnover from retail sales are either not subject to the retail tax or subject to the tax at substantially lower average effective rates – i.e. for each zloty of monthly turnover generated – than undertakings with high turnover, thereby reducing the charges that undertakings with low turnover have to bear as compared to undertakings with high turnover. Because each company is taxed at a different average effective tax rate, it is not possible for the Commission to identify one single reference rate. Poland has also not presented any specific rate as the reference rate or 'normal' rate and also did not explain why a higher rate would be justified by exceptional circumstances for retail operators with a high level of turnover, or why lower rates should apply to operators with lower levels of turnovers. The effect of the progressive rate structure of the tax is therefore that different undertakings pay different effective taxation rates depending on their monthly turnover and, consequently, on their size and the operating model. Consequently, the progressive tax rate structure introduced by the Act can be said to be specifically designed to favour smaller retailers over larger ones by applying different tax rates to the monthly turnover generated by undertakings involved in the sale of goods to natural person consumers and thereby subjecting undertakings with lower turnover to a lower average effective tax rate than undertakings with a higher turnover, which also tend to be foreign-owned ([27]), although both types of undertaking are engaged in the same activity.

([23]) See recital 25.
([24]) Joined Cases C-106/09 P and C-107/09 P *Commission and Spain v Government of Gibraltar and United Kingdom* EU:C:2011:732.
([25]) *Ibid*, paragraph 92.
([26]) Case C-487/06 P *British Aggregates v Commission* EU:C:2008:757, paragraphs 85 and 89 and the case-law cited, and Case C-279/08 P *Commission v Netherlands (NOx)* EU:C:2011:551, paragraph 51
([27]) Joined Cases C-106/09 P and C-107/09 P *Commission and Spain v Government of Gibraltar and United Kingdom* EU:C:2011:732.

(48) The progressive rate structure's discrimination of retailers based on their size can also be said to favour retailers operating under a franchise model or independently (as company of civil law for instance) as compared to those operating under a holding company model.

(49) Since Poland has designed the tax in such a manner so as to favour certain undertakings (namely retailers with low levels of turnover – smaller retailers – and retailers operating under a franchise model or independently (not within a chain)), and disadvantage others (namely retailers with high levels of turnover – larger retailers – and retail chains operating under a holding company model), the reference system is selective by design in a way that is not justified in light of the objective of the tax, which is to tax the turnover of all retail operators. Consequently, the Commission considers the appropriate reference system in the present case to be the imposition of a single (flat) rate tax on the monthly turnover generated from retail sales, without the progressive tax structure being a part of that system.

4.1.3.2. Derogation from the system of reference

(50) As a second step, it is necessary to determine whether the measure derogates from the application of the rules of reference in favour of certain undertakings which are in a similar factual and legal situation in light of the intrinsic objective of the system of reference.

(51) Under Article 6(1) the Act, no tax is levied on the part of the retailer's monthly turnover from retail sales not exceeding PLN 17 million. For a significant number of retailers, notably in the grocery subsector, that exemption means that they are entirely exempt from any taxation on the turnover they derive from their retail sales, since their monthly turnover derived from that activity falls below PLN 17 million. According to publically available data ([28]), 109 tax declarations establishing the amount of tax due on the retail sales were emitted for the month of September 2016, whereas according to estimates of the Polish Ministry of Finance there are approximately 200 000 retail operators operating in Poland. Consequently, the vast majority of undertakings operating on the grocery subsector of the retail sector in Poland fall below the threshold established by Article 6(1) and pay no retail tax.

(52) As regards retailers that achieve a monthly turnover in excess of PLN 17 million: their monthly turnover below that threshold is exempted from taxation; their monthly turnover above PLN 17 million but not exceeding PLN 170 million is subject to a tax rate of 0,8 %; and the part of their turnover that exceeds PLN 170 million is taxed at a rate of 1,4 %.

(53) Poland makes a distinction between 'bracketed progressivity' and 'global progressivity' and claims that, since all tax rates (i.e. the tax exemption equivalent to a 0 % rate, and the 1,4 % and 0,8 % rates) are applied on the same terms to all undertakings, there is no derogation from the reference system. However, both types of progressive taxation lead to different average effective rates being applied to different companies based on their turnover – which is the object of taxation – and ultimately their size. As the following example of three retailers (taxable persons) generating monthly turnovers of respectively PLN 10 million, PLN 100 million and PLN 750 million illustrates, although all retailers are subjected to the same tax rates and although the same portion of their income falls within the same three brackets, their effective average tax rates differ considerably. Indeed for each PLN 100 of turnover generated, Retailer 1 bears no tax, Retailer 2 bears an amount of tax of around PLN 0,7 and Retailer 3 an amount of tax of around PLN 1,2.

Monthly revenue from retail sales	Retailer 1 PLN 10 million	Retailer 2 PLN 100 million	Retailer 3 PLN 750 million
Tax due on portion of revenue not exceeding PLN 17 million	0	0	0

([28]) See https://www.wiadomoscihandlowe.pl/artykuly/podatek-handlowy-w-praktyce-wiemy-ile-firm-zlozylo,9669/5. The amount of retail tax owed declared by all taxpayers was PLN 114 million for that month. Approximately 70 % of that amount, that is PLN 78,9 million, is due by the 10 largest retailers operating in Poland and only 12 retail operators were subjected to the highest tax rate of 1,4 %. See also '*Rynek detalicznego handlu spożywczego w Polsce*', Fundacja Republikańska, Varsovie 2016 on the number of retail operators in Poland.

Monthly revenue from retail sales	Retailer 1 PLN 10 million	Retailer 2 PLN 100 million	Retailer 3 PLN 750 million
Tax due on portion of revenue above PLN 17 million but not exceeding PLN 170 million	—	PLN 664 000 (PLN 82 999 999 × 0,008)	PLN 1 224 000 (PLN 152 999 999 × 0,008)
Tax due on portion of revenue above PLN 170 million	—	—	PLN 8 120 000 (PLN 579 999 999 × 0,014)
Total tax due	**0**	**PLN 664 000**	**PLN 9 344 000**
Effective average tax rate	**0 %**	**0,664 %**	**1,246 %**

(54) As this table demonstrates, it is precisely the progressive rates and the brackets to which they apply that make the retail tax discriminatory between retailers (taxable person) depending on their level of turnover and thus on their size. Due to the progressive character of the rates laid down by the Act, undertakings with high levels of turnover are subject to both substantially higher marginal rates and to substantially higher average tax rates as compared to operators with low levels of turnover. Hence, the Commission considers that the progressive rate structure introduced by the Act derogates from the reference system – consisting of the imposition of a single (flat) rate tax on retail sales of all undertakings involved in the retail trade in Poland – in favour of retailers with lower turnover and thus smaller retailers.

(55) In light of the foregoing considerations, the Commission considers the measure to derogate from the reference system and that it is therefore *prima facie* selective.

4.1.3.3. Justification by the nature or general scheme of the system

(56) After the Commission has demonstrated that a State measure is *prima facie* selective since it discriminates between undertakings in a comparable factual and legal situation in light of the reference system, it is for the Member State to provide a justification based on the nature or general scheme of that system. A measure which derogates from the reference system is not selective if it is justified by the nature or general scheme of that system. This is the case where the selective treatment is the result of inherent mechanisms necessary for the functioning and effectiveness of the system ([29]).

(57) Poland argues that if the progressive tax structure of the Act is found to discriminate, which it disputes, it is justified on the grounds of its redistributive purposes, as is the case for profit-based taxes. Poland further claims that undertakings with high levels of turnover have a greater ability to pay, that such undertakings enjoy economies of scale, that such undertakings have the ability to exert pressure on producers' and suppliers' margins to their own benefit and that such undertakings often use tax optimisation strategies.

(58) The Commission recalls that the Act taxes undertakings on the level of their turnover. As opposed to taxes based on profit ([30]), a turnover-based tax does not take into account the costs incurred in the generation of sales. Hence, turnover taxes hit companies in respect of their size rather than their profitability or ability to pay, their ability to generate efficiencies resulting from economies of scale, their ability to influence producers' and

([29]) See for example Joined Cases C-78/08 to C-80/08 *Paint Graphos and others*, EU:C:2011:550, paragraph 69.
([30]) See Commission notice on the application of the State aid rules to measures relating to direct business taxation (OJ C 384, 10.12.1998, p. 3), para. 24. The statement on the redistributive purpose that can justify a progressive tax rate is explicitly only made as regards taxes on profits or (net) income, not as regards taxes on turnover

suppliers' margins to their own benefit ([31]), and their ability to exploit the tax optimisation strategies alleged by Poland. Consequently, none of those factors can constitute a justification for a progressive tax levied on an undertaking's turnover.

(59) Progressive turnover taxes can only be justified by the nature and general scheme, i.e. the internal logic, of the tax system if the specific objective pursued by the tax requires progressive rates. For example in the case of a turnover tax intended to address some negative externalities, a certain level of progressivity could be justified if it was shown that the externalities created by the activities subject to the tax also increase progressively when the turnover (or size) of the taxpayer increases. No such justification has been provided by the Polish authorities.

(60) Accordingly, the Commission does not consider the progressive tax rates of the retail tax to be justified by the nature and general scheme of the reference tax system. Therefore, the measure confers a selective advantage on retail undertakings with a lower level of turnover (and thus smaller undertakings).

4.1.4. *Potential distortion of competition and effect on intra-Union trade*

(61) According to Article 107(1) of the Treaty, a measure must distort or threaten to distort competition and have an effect on intra-Union trade to constitute State aid.

(62) The retail tax applies to all undertakings deriving turnover from certain retail sales in Poland. The retail trade in Poland is open to competition and is characterised by the presence of operators from other Member States. Similarly, retail operators established in Poland may have – or develop in the future – activities in other Member States. Therefore, any aid in favour of certain industry operators is liable to affect intra-EU trade.

(63) Indeed, the progressivity of the retail tax has an influence on the competitive situation of the undertakings subject to it. To the extent the measure relieves undertakings with lower levels of turnover from a tax liability they would otherwise have been obliged to pay, had they been subject to the same tax rate as undertakings with high levels of turnover, the selective advantage granted under those measures constitutes operating aid. The Court of Justice has consistently held that operating aid distorts competition, so that any aid granted to those undertakings should be considered to distort or threaten to distort competition by strengthening their financial position on the Polish retail market. Similarly, higher tax rates for larger (higher turnover) retailers may dissuade large retailer's sales and reduce their market share or force them to exit the market. Competition would be distorted as retailers would not compete only on the basis of their efficiency and competitiveness in the market place but would also face differential tax treatment depending on their turnover level which would not be justified by negative externalities they impose.

(64) Concerning the observations of Poland regarding the structure of the retail sector, the Commission notes that the fact that Poland argues ([32]) that the progressive tax rates limit adverse changes in the pattern of trade (the disappearance of small-scale trade coupled with the increase in large-format trade), which according to Poland are currently distorting competition constitutes nothing else but the confirmation that the measure has been adopted with the view to influence the competitive environment in the retail sector in the country.

(65) Consequently, the Commission considers that the measure distorts or threatens to distort competition and that it has an effect on intra-Union trade.

4.1.5. *Conclusion*

(66) Since all the conditions laid down by Article 107(1) of the Treaty are met, the Commission concludes that the retail tax with its progressive tax rates structure constitutes State aid within the meaning of that provision.

([31]) Moreover, a network of franchisees operating under the same brand may also collectively exert a similar influence on the on producers' and suppliers' margins as large integrated operators and possibly abuse it. Still, they are treated differently for the purpose of the retail tax.

([32]) See Poland's submission of 7 November 2016 to the Commission in response to the Opening Decision.

4.2. **Compatibility of the aid with the internal market**

(67) State aid shall be deemed compatible with the internal market if it falls within any of the categories listed in Article 107(2) of the Treaty ([33]) and it may be deemed compatible with the internal market if it is found by the Commission to fall within any of the categories listed in Article 107(3) of the Treaty. ([34]) However, it is the Member State granting the aid which bears the burden of proving that State aid granted by it is compatible with the internal market pursuant to Articles 107(2) or 107(3) of the Treaty ([35]).

(68) The Commission notes that the Polish authorities have not provided any arguments why the retail tax would be compatible with the internal market. Poland did not comment on the doubts expressed in the Opening Decision as regards the compatibility of the measure.

(69) The Commission considers that none of the exceptions referred to in the aforementioned provisions apply, since the measure does not appear to aim to achieve any of the objectives listed in those provisions. Consequently, the measure cannot be declared compatible with the internal market.

4.3. **Recovery of the aid**

(70) The Act was never notified nor declared compatible with the internal market by the Commission. Since it constitutes State aid within the meaning of Article 107(1) of the Treaty and new aid within the meaning of Article 1(c) of Regulation (EU) 2015/1589 that has been put into effect in violation of the standstill obligation laid down in Article 108(3) of the Treaty, that measure also constitutes unlawful aid within the meaning of Article 1(f) of Regulation (EU) 2015/1589.

(71) The consequence of the finding that the Act constitutes unlawful and incompatible State aid is that the aid has to be recovered from its recipients pursuant to Article 16 of Regulation (EU) 2015/1589.

(72) However, as a result of the suspension injunction issued by the Commission in its Opening Decision, Poland confirmed by letter of 7 November 2016 that it had suspended the payment of the retail tax under the Act.

(73) Therefore, no State aid has been effectively granted under the measure. For this reason, there is no need to require recovery.

5. **CONCLUSION**

(74) The Commission finds that Poland has unlawfully implemented the aid in question in breach of Article 108(3) of the Treaty.

(75) This decision does not prejudice possible proceedings pursuant to Article 258 TFUE on the compliance of the measure with the fundamental freedoms laid down in the Treaty, notably the freedom of establishment as guaranteed by Article 49 of the Treaty,

HAS ADOPTED THIS DECISION:

Article 1

The retail tax with the progressive tax rates structure as introduced by the Act of 6 July 2016 on retail sales tax constitutes State aid that is incompatible with the internal market within the meaning of Article 107(1) of the Treaty on the Functioning of the European Union which was unlawfully put into effect by Poland in breach of Article 108(3) of that Treaty.

Article 2

Poland shall cancel all outstanding payments of aid under the measure referred to in Article 1 with effect from the date of adoption of this decision.

([33]) The exceptions provided for in Article 107(2) of the Treaty concern: (a) aid of a social character granted to individual consumers; (b) aid to make good the damage caused by natural disasters or exceptional occurrences; and (c) aid granted to certain areas of the Federal Republic of Germany.

([34]) The exceptions provided for in Article 107(3) of the Treaty concern: (a) aid to promote the development of certain areas; (b) aid for certain important projects of common European interest or to remedy a serious disturbance in the economy of the Member State; (c) aid to develop certain economic activities or areas; (d) aid to promote culture and heritage conservation; and (e) aid specified by a Council decision.

([35]) Case T-68/03 *Olympiaki Aeroporia Ypiresies v Commission* EU:T:2007:253 paragraph 34.

Article 3

Poland shall ensure that this Decision is implemented within four months following the date of notification of this Decision.

Article 4

1. Within two months following notification of this Decision, Poland shall submit a detailed description of the measures already taken and planned to comply with this Decision;

2. Poland shall keep the Commission informed of the progress of the national measures taken to implement this Decision. It shall immediately submit, on simple request by the Commission, information on the measures already taken and planned to comply with this Decision.

Article 5

This Decision is addressed to the Republic of Poland.

Done at Brussels, 30 June 2017.

For the Commission
Margrethe VESTAGER
Member of the Commission