Opinion Statement ECJ-TF 2/2020 on the CJEU decision of 3 March 2020 in Case C-75/18, *Vodafone Magyarország Mobil Távközlési Zrt*., on progressive turnover taxes

Prepared by the CFE ECJ Task Force
Submitted to the EU Institutions on 29 September 2020

The CFE Tax Advisers Europe notes that the Court's decision in *Vodafone* provides clarifications for ascertaining the compatibility of domestic turnover taxes with the fundamental freedoms and with Article 401 of the VAT Directive. This is particularly relevant in the current context, in which some Member States have adopted or plan to adopt turnover-based digital services taxes.

Although provided with the opportunity, the Court has avoided to explicitly address AG J. Kokott's arguments relating to the correlation between the chosen distinguishing criterion (i.e., turnover) and the seat of the undertakings and the question whether indirect discrimination is to be taken to exist in any case if the distinguishing criterion was intentionally chosen with a discriminatory objective. Rather, the Court straightforwardly found that the distribution of the burden of a turnover tax between domestic and foreign or foreign-owned taxpayers is not an indicator of covert discrimination, unless the features of such tax "inherently" create a discrimination; the mere fact that most of the taxpayers are non-residents or owned by non-residents or that most of the tax raised is paid by them is just a "fortuitous" effect.

The CFE Tax Advisers Europe notes that this decision should not be seen as giving Member States carte blanche for all technical features of domestic digital services taxes, e.g., the choice of thresholds, the earmarking of revenues, or consolidation rules. One should also not forget other non-EU law concerns, given the structural inefficiencies that this type of taxes presents (e.g., economic effects, trade law, domestic constitutional law, double taxation, etc).

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This is an Opinion Statement prepared by the CFE ECJ Task Force[1] on the *Vodafone* case, in which the Grand Chamber of the Court of Justice of the EU (ECJ) delivered its decision on 3 March 2020,[2] following AG J. Kokott's Opinion of 13 June 2019.[3] The Court held that the imposition of the Hungarian progressive turnover-based tax on the telecommunication sector did not infringe on the EU fundamental freedoms or Article 401 of the VAT Directive, and that the question regarding the prohibition of state aid was inadmissible.[4] *Vodafone* is especially important as it addresses a number of issues that are pertinent for the current debate about turnover-based digital services taxes.

I. Background and Issues

1. In recent years, the Court of Justice has frequently dealt with the EU law aspects of various elements of turnover-based taxes, e.g., in *ANGED*[5] and *Hervis*.[6] Moreover, a recent batch of cases – *Poland v. Commission*,[7] *Hungary v. Commission*,[8] *Vodafone*,[9] and *Tesco*[10] – concerns EU objections to progressive turnover-based taxes from several angles:[11] First, the state aid rules of Articles 107 and 108 TFEU with regard to the question whether progressive taxation of economically stronger undertakings also constitutes unjustified aid in favour of other undertakings. Second, the fundamental freedoms, especially the freedom of establishment under Articles 49 and 54 TFEU, with regard to a potential covert discrimination of foreign-owned taxpayers. And finally, Article 401 of the VAT Directive,[12] which prohibits domestic taxes that can "be characterised as turnover taxes".

2. While the General Court in *Poland v. Commission* and *Hungary* v. *Commission* dealt with the substantive state aid issues of progressive turnover-based taxes on certain sectors of the economy (and annulled the Commission's decisions), *Vodafone* and *Tesco* shed light on the assessment of indirect discrimination under the fundamental freedoms and the compatibility of sector-specific turnover taxes with Article 401 of the VAT Directive. As AG Kokott had succinctly pointed out, the questions raised in *Vodafone* "at the same time have particular importance for the turnover-based digital services tax currently being proposed by the European Commission,"[13] i.e., the Commission's 2018 DST proposal.[14] Moreover, *Vodafone* might have

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[2] ECJ (Grand Chamber), 3 March 2020 Case C-75/18, *Vodafone Magyarország Mobil Távközlési Zrt*., EU:C:2020:139.

[3] Opinion of AG Kokott, 13 June 2019, Case C-75/18, *Vodafone Magyarország Mobil Távközlési Zrt*., EU:C:2019:492.

[4] Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, [2006] OJ L 347, p. 1–118.

[5] ECJ, 26 April 2018, C-233/16, *ANGED*, EU:C:2018:280.

[6] ECJ (Grand Chamber), 5 February 2014, C-385/12, *Hervis*, EU:C:2014:47.

[7] General Court, 16 May 2019, Cases T-836/16 and T-624/17, *Poland v. Commission*, EU:T:2019:338 (pending before the ECJ as C-562/19 P, following the Commission's appeal of 2 July 2019, [2019] OJ C 328/29).

[8] General Court, 27 June 2019, Case T-20/17, *Hungary v. Commission*, EU:T:2019:448 (pending before the ECJ as C-596/19 P, following the Commission's appeal of 6 August 2019, [2019] OJ C 348/10).

[9] *Vodafone* (C-75/18).

[10] ECJ (Grand Chamber), 3 March 2020, Case C-323/18, *Tesco-Global Áruházak Zrt*., EU:C:2020:140; see also the Opinion of AG Kokott, 4 July 2019, Case C-323/18, *Tesco-Global Áruházak Zrt*., EU:C:2019:567.

[11] See also ECJ (Grand Chamber), 3 March 2020, Case C-482/18, *Google Ireland Limited*, EU:C:2020:141 (concerning obligations relating to registration with the Hungarian tax authority with regard to a tax on advertising activities based on turnover).

[12] Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, [2006] OJ L 347/1.

[13] Opinion of AG Kokott (C-75/18, *Vodafone*), para. 1. Indeed, AG Kokott mentions digital services taxes at several points in her opinion and hence made a clear connection between *Vodafone* and the digital tax debate (see paras. 1, 4, 71, 96, 101, 119, 123, 184 of the Opinion).

[14] Proposal for a Council Directive on the common system of a digital services tax on revenues resulting from the provision of certain digital services, COM(2018)148. It should be noted that no agreement on that proposal was reached in Council in December 2019 (see Doc. 14885/18 FISC 510 ECOFIN 1148 [29 November 2018] and Doc. 14886/18 FISC 511 ECOFIN 1149 [29 November 2018]), and that the proposal was subsequently "downsized" to digital advertising services in March 2019 ("DAT"; Doc. 6873/19 FISC 135 ECOFIN 242 [1 March 2019]) and finally postponed in March 2019 (Doc. 7368/19 PRESSE 12 [12 March 2019]). However, the Council also agreed that work on

immediate relevance for the unilateral digital services taxes implemented by a number of EU Member States in recent years.[15] In light of these developments, and its own flat-rate turnover-based DST proposal, it should be pointed out that the Commission's main objections to national progressive turnover-based taxes on certain sectors or services might be not so much against such taxes *per se*, but rather their progressivity and the corresponding benefits for smaller companies.[16] However, the arguments made in *Vodafone* also exemplify that the Commission might have shifted policy positions: While the Commission had argued before the Court that "turnover is an indication only of an undertaking's size and market position, but not its financial capacity" ,as "[a]n increase in turnover does not automatically mean an increase in profit", it gave opposite reasons for its 2018 proposal for a turnover-based digital services tax at EU level.[17] Indeed, "the Commission itself shows with the proposal for a digital services tax", that "turnover can also be seen as a (slightly rougher) indicator of greater economic power, and thus greater financial capacity."[18]

3. Three of these cases before the Court concerned the same Hungarian "law on the special tax on certain sectors", as applied to store retail trade (*Hervis* and *Tesco*) and telecommunications activities (*Vodafone*), which introduced a turnover-based tax with a progressive rate structure on certain sectors of the economy.[19] In 2014, the Court had already found in *Hervis*[20] that this special tax, as applied in that case, infringed on the freedom of establishment. The Court squarely based this conclusion on the effects of the so-called "aggregation rule" under Hungarian law, according to which for members of a group the progressive tax was calculated based on the consolidated Hungarian turnover of all the "linked" taxable persons of the group (before division of the total tax in proportion to the turnover of each taxable person); according to the Court that form of group-based reservation of progressivity meant "that the taxable persons belonging to a group of companies are taxed on the basis of a fictitious turnover".[21] The 2020 judgments in *Vodafone* and *Tesco*, however, had to address the core issue directly and irrespective of "aggregation": Can a progressive rate structure of a turnover-based tax *per se* give rise to covert discrimination?[22] Both decisions concerned Hungarian subsidiaries of companies of another EU Member

a DST or DAT might be taken up again if no OECD consensus on the taxation of the digitalized economy is reached (see Doc. 9773/19 FISC 281 ECOFIN 528 [7 June 2019]).

[15] Indeed, as AG Kokott (in para. 1 of her Opinion) made the reference to the EU digital services tax in the context of state aid, it seems to us that she had the more general discussion also about unilateral turnover-based digital services taxes in mind. This is because state aid would be no issue if a DST were mandated by an EU Directive, as any aid would then not be imputable to a Member State and hence not fall under the prohibition of Articles 107, 108 TFEU (see, e.g., Court of First Instance, 5 April 2006, Case T-351/02, *Deutsche Bahn*, EU:T:2006:104, paras. 101-103; ECJ, 23 April 2009, Case C-460/07, *Sandra Puffer*, EU:C:2009:254, para. 70).

[16] See, e.g., Commission Decision (EU) 2017/329 of 4 November 2016 on the measure SA.39235 (2015/C) (ex 2015/NN) implemented by Hungary on the taxation of advertisement turnover, C(2016) 6929), [2017] OJ L 49/36, explaining in para. 44 that the "advantage" lies in the fact that the "progressive character" of the rates of taxation that apply to the annual turnover derived from the publication of advertisements in Hungary "has the effect that the percentage of tax levied on an undertaking's turnover increases progressively depending on the number of brackets within which that turnover falls. This has the result that undertakings with low turnover (smaller undertakings) are taxed at a substantially lower average rate than undertakings with high turnover (larger undertakings). Being taxed at this substantially lower average tax rate mitigates the charges that undertakings with low turnover have to bear as compared to undertakings with high turnover and therefore constitutes an advantage to the benefit of smaller undertakings over larger undertakings for the purposes of Article 107(1) of the Treaty."

[17] See the Opinion of AG Kokott (C-75/18, *Vodafone*), para. 119.

[18] See the Opinion of AG Kokott (C-75/18, *Vodafone*), para. 184.

[19] Law No XCIV of 2010 on the special tax on certain sectors ("egyes ágazatokat terhelő különadóról szóló 2010. évi XCIV. törvény"). The pending case of *Commission v. Hungary* (C-596/19 P, following the decision of the General Court, 27 June 2019, Case T-20/17, *Hungary v. Commission*, EU:T:2019:448) concerns the similarly structured Hungarian Act XXII of 2014 on Advertisement Tax.

[20] *Hervis* (C-385/12).

[21] *Hervis* (C-385/12), para. 36.

[22] See, e.g., Opinion of AG Kokott (Case C-75/18, *Vodafone*), paras 48, 49-53; Opinion of AG Kokott (Case C-323/18, *Tesco*), paras 46-49. See also *Vodafone* (C-75/18), para. 36, noting that the referring court added that the tax at issue in *Hervis* "is, in essence, equivalent to the special tax at issue in the present case. However, the referring court considers that it is necessary, in order to resolve the dispute in the main proceedings, to determine whether the progressive scale, using bands, of the special tax may constitute, in itself, irrespective of the application of that consolidation rule, indirect discrimination vis-à-vis taxable persons that are controlled by natural persons or legal persons of other Member States, who bear the actual tax burden, and, therefore, be contrary to Articles 49 and 54 TFEU".

State, the same Hungarian tax and the same legal claims. In both cases, and contrary to what had happened in *Hervis*, the Grand Chamber of the Court upheld the Hungarian law.

4. Focusing on *Vodafone*, the facts and legal issues can be presented rather quickly: The complainant, Vodafone Magyarország Mobil Távközlési Zrt., was a Hungarian company wholly owned by Vodafone BV, a company of the Netherlands, itself part of the Vodafone Group plc with registered office in the United Kingdom (which, at the time of the proceedings, was still a Member State of the EU). Following an inspection, tax authorities considered that Vodafone was liable to pay an additional amount of tax, in the framework of the law on the special tax on certain sectors, including the telecommunications sector in which Vodafone was active.

5. According to its preamble, the Hungarian tax at issue was a "special tax imposed on taxpayers whose ability to contribute to the costs of public expenditure exceeds the general obligation to pay tax".[23] According to its provisions, Hungarian companies are liable to a progressive tax based on net turnover and the tax rate is structured in three bands (each band applying for the proportion of the taxable amount that does not exceed it[24]). Moreover, and that lies at the root of the case, the taxpayers that fell in the highest band were "predominantly taxable persons owned by natural personals or legal persons of other Member States".[25] Accordingly, most of the tax was borne by companies owned by non-residents.[26] The structure of the Hungarian tax bands (roughly translated into Euros) and the affected taxpayers with a total turnover in the relevant band can be summarized as follows:[27]

Amount of turnover	Tax rate	Percentage of foreign-owned taxpayers
Under HUF 500 million (€ 1,5 million)	0%	0%
Between HUF 500 million (€ 1,5 million) and HUF 5 billion (€ 15 million)	4,5%	50%
Above HUF 5 billion (€ 15 million)	6,5%	Predominantly EU-owned.

6. Vodafone disagreed with the assessment and appealed to the Fővárosi Közigazgatási és Munkaügyi Bíróság (Administrative and Labour Court, Budapest). This court decided to stay the proceedings and refer the following questions to the ECJ:

> "(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 on the special tax on certain sectors]) has the effect that the actual tax burden falls on foreign-owned taxable persons? Is that effect indirectly discriminatory?
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> (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 measure amount to prohibited State aid?
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> (3) Must Article 401 of the VAT Directive be interpreted as precluding legislation of a Member State that gives rise to discrimination between foreign-owned taxable persons and national taxable persons?

[23] See *Vodafone* (C-75/18), para. 4, reproducing the preamble of the Hungarian law.

[24] See, e.g., *Vodafone* (C-75/18), para. 52, where the Court noted "that the basic band of tax charged at 0% does not exclusively affect taxable persons owned by Hungarian natural persons or legal persons, since, as in any system of progressive taxation, any undertaking operating on the market concerned has the benefit of the reduction for the proportion of its turnover that does not exceed the maximum amount of that band".

[25] *Vodafone* (C-75/18), para. 47.

[26] *Vodafone* (C-75/18), para. 48.

[27] *Vodafone* (C-75/18), paras 46-47; for more statistical information see Opinion of AG Kokott (C-75/18, *Vodafone*), paras 17-18 and 94.

Must the special tax be considered a tax on turnover? In other words, is this tax compatible or not with the VAT Directive?"[28]

II. The Judgment of the Court of Justice

II.1 Introduction

7. In its judgment in *Vodafone*, the Grand Chamber of the Court reached the same results as AG J. Kokott in her Opinion and decided that (1) the state aid question was inadmissible as Vodafone could not rely on the state aid rules to challenge a potential unlawfulness of an exemption in order to avoid payment of that tax or to obtain repayment of tax paid; (2) that the Hungarian tax is not precluded by the freedom of establishment under Articles 49 and 54 TFEU for lack of covert discrimination (even though the actual burden of the tax is mainly borne by EU-owned undertakings); and (3) that it is likewise not prohibited by Article 401 VAT Directive because it is levied periodically (and not at each stage of the production and distribution process) and without the right of input tax deduction at an earlier stage of that process.

8. AG J. Kokott's Opinion went beyond the issues addressed by the Court: First, and unlike the Court, AG J. Kokott entered into an extensive inquiry regarding the criteria for ascertaining indirect (*de facto*) discrimination within direct taxation, i.e., "what requirements are to be applied to the correlation between the chosen distinguishing criterion — here turnover — and the seat of the undertakings" and "whether indirect discrimination is to be taken to exist in any case if the distinguishing criterion was intentionally chosen with a discriminatory objective".[29] Second, and just like the ECJ,[30] AG J. Kokott concluded that the state aid questions were inadmissible, but nevertheless delivered an extensive *in eventu* analysis of the substantive state aid issues raised in *Vodafone* (and concluded that the lower average taxation inevitably connected with a progressive tax rate for lower-turnover undertakings does not constitute a selective advantage for such undertakings),[31] Third, and finally, AG J. Kokott extensively linked the issues in *Vodafone* to the current discussion of EU or unilateral digital services taxes,[32] while the Court refrained from such statements.

II.2 State Aid

9. As is often the case, *Vodafone* presented a challenge to a tax payment by *one* taxable undertaking on the grounds that a statutory exemption from or lower rate of the tax involves state aid for *other* undertakings. While the substantive state aid issues regarding progressive turnover taxes are (and will be) at issue in *Poland v. Commission*[33] and *Hungary v. Commission*[34] (and were addressed by AG J. Kokott in *Vodafone*[35] and *Tesco*[36]), the Grand Chamber in *Vodafone* (and *Tesco*) merely addressed (and denied) the question of admissibility.

10. Referring to established case law, the Court first noted that in an application to be exempted from the contested tax (rather than in a case concerning the abstract legality of the rules relating to the tax) the unlawfulness of an exemption under state aid criteria is generally "not capable of affecting the lawfulness

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[28] *Vodafone* (C-75/18), para 17.

[29] See the extensive analysis in the Opinion of AG Kokott (Case C-75/18, *Vodafone*), paras 57-103.

[30] *Vodafone* (C-75/18), paras 18-32 (for the same result see also Kokott paras 135-147)

[31] Opinion of AG Kokott (Case C-75/18, *Vodafone*), paras 148-188.

[32] See Opinion of AG Kokott (Case C-75/18, *Vodafone*), para 1.

[33] General Court, 16 May 2019, Cases T-836/16 and T-624/17, *Poland v. Commission*, EU:T:2019:338 (pending before the ECJ as C-562/19 P, following the Commission's appeal of 2 July 2019, [2019] OJ C 328/29).

[34] General Court, 27 June 2019, Case T-20/17, *Hungary v. Commission*, EU:T:2019:448 (pending before the ECJ as C-596/19 P, following the Commission's appeal of 6 August 2019, [2019] OJ C 348/10).

[35] Opinion of AG Kokott (Case C-75/18, *Vodafone*), paras 148-188.

[36] Opinion of AG Kokott (Case C-323/18, *Tesco*), paras 141-173.

of the actual charging of that tax, so that a person liable to pay that tax cannot rely on the argument that the exemption enjoyed by other persons constitutes State aid in order to avoid payment of that tax".[37] This would only be different if the tax is a means of financing aid, so that it would be an integral part of that aid measure.[38] However, "if a tax is not hypothecated to an aid measure, the possible unlawfulness of the aid measure contested under EU law is not capable of affecting the lawfulness of the tax itself, and consequently the undertakings who are liable to pay that tax cannot rely on the argument that the tax measure for which other persons qualify constitutes State aid in order to avoid payment of that tax or to obtain a repayment of tax paid".[39]

11. As the revenue from the special Hungarian tax is neither allocated for the financing of aid nor has it a direct impact on the amount of that aid (because the tax borne by Vodafone is transferred to the general State budget), Vodafone could not rely on that argument, rendering the question inadmissible:

> "It follows that any illegality under EU law of the de facto exemption from the special tax for which some taxable persons qualify is not capable of affecting the legality of that tax itself, so that Vodafone cannot rely, before the national courts, on the unlawfulness of that exemption in order to avoid payment of that tax or to obtain repayment of tax paid. […] It follows from all the foregoing that the second question is inadmissible."[40]

II.3 Fundamental Freedoms

12. The domestic court put the question as to the compatibility of the Hungarian tax with the freedom of establishment under Articles 49 and 54 TFEU succinctly: "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?" Hence, the Court had to ascertain whether a net turnover tax which was "steeply progressive" and whose application resulted on the fact that most of the tax was borne by companies owned by non-residents was incompatible with the freedom of establishment.

13. Confirming that a company (i.e., a Hungarian subsidiary such as Vodafone) may rely on a restriction on the freedom of establishment of another company (i.e., Vodafone Europe in the Netherlands, its parent company) which is linked to it in so far as that restriction affects its own taxation,[41] the Court set out the notions of overt and covert discrimination: As the tax established no distinction between companies based on their registered office (as all the undertakings operating in Hungary in the telecommunications sector are subject to that tax, and so is the progressive tax rate), it did not amount to direct or overt discrimination;[42] however, the Court also noted that the TFEU also prohibited covert discrimination, i.e. "the application of other criteria of differentiation [that] lead in fact to the same result".[43]

14. Covert discrimination is what both Vodafone and the Commission argued, claiming that progressivity of the special tax is, in itself, to the advantage of taxable persons owned by Hungarian natural persons or legal persons and to the disadvantage of taxable persons owned by natural or legal persons of other Member States. While AG J. Kokott went through considerable lengths to determine the criteria for a factual discrimination to exist and what role a legislature's intent in choosing distinguishing criterions may have,[44] the Court was not at all moved by the statistical data presented to it. It merely acknowledged that all

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[37] *Vodafone* (C-75/18), para. 24.

[38] *Vodafone* (C-75/18), paras 26-27.

[39] *Vodafone* (C-75/18), para. 28.

[40] *Vodafone* (C-75/18), paras 30-31.

[41] *Vodafone* (C-75/18), paras 40-41, referring to ECJ,1 April 2014, Case C-80/12, *Felixstowe Dock and Railway Company and Others*, EU:C:2014:200, para. 23.

[42] *Vodafone* (C-75/18), paras. 42 and 44.

[43] *Vodafone* (C-75/18), para 43, referring to ECJ, 5 February 2014, Case C-385/12, *Hervis*, EU:C:2014:47, para. 30, and ECJ, 26 April 2018, Cases C-236/16 and C-237/16, *ANGED*, EU:C:2018:291, para. 17.

[44] See the extensive analysis in the Opinion of AG Kokott (Case C-75/18, *Vodafone*), paras 57-103.

companies in the highest rate-band are predominantly EU-owned (and none in the lowest band are)[45] and that the greater part of the special tax was borne by companies that are EU-owned.[46] The Court also avoided dealing with the AG Kokott's analysis on the relevance of the legislature's intent when setting the tax rate structure.[47] It rather pointed at the Member States' discretion to establish their tax systems and consequently the application of progressive taxation,[48] and established a clear link between a taxpayer's turnover and its ability to pay:

> "In that context, and contrary to what is maintained by the Commission, progressive taxation may be based on turnover, since, on the one hand, the amount of turnover constitutes a criterion of differentiation that is neutral and, on the other, turnover constitutes a relevant indicator of a taxable person's ability to pay."[49]

15. Having established that turnover is a neutral criterion as well as an indicator of ability to pay, the Court moreover sanctioned the progressive rate structure by referring to the preamble of the Hungarian law and noted "that, by means of the application of a progressive scale based on turnover, the aim of that law is to impose a tax on taxable persons who have an ability to pay 'that exceeds the general obligation to pay tax'."[50] This, so the Court, is not discriminatory and discrimination is also not implied by the fact alone that "the greater part of such a special tax is borne by taxable persons owned by natural persons or legal persons of other Member States".[51] This effect is merely "due to the fact that the Hungarian telecommunications market is dominated by such taxable persons, who achieve the highest turnover in the market",[52] and, in the eyes of the Court, would arise similarly under progressive and proportional rate structures:

> "Accordingly, that situation is an indicator that is fortuitous, if not a matter of chance, and which may arise, even in a system of proportional taxation, whenever the market concerned is dominated by undertakings of other Member States or of non-Member States or by national undertakings owned by natural persons or legal persons of other Member States or of non-Member States."[53]

Moreover, the exemption granted by the first band of the tax benefitted both foreign- and domestic-owned companies equally.[54] Hence, the "progressive rates of the special tax do no, inherently, create any discrimination".[55]

16. Finally, the Court distinguished its holding in *Vodafone* from its prior decision in *Hervis*,[56] in which it had concluded that the special tax amounted to indirect discrimination.[57] *Hervis*, however, concerned "the combined application of both very progressive rates of taxation of turnover and a rule for the consolidation of turnover of linked undertakings" which lead to Hungarian companies being liable on the basis of a "fictitious turnover".[58] There would be indirect discrimination insofar as it was possible to establish a

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[45] *Vodafone* (C-75/18), para 47.

[46] *Vodafone* (C-75/18), para 48.

[47] For a discussion of the statements made in the relevant parliamentary debate and in government documents in Hungary see Opinion of AG Kokott (Case C-75/18, *Vodafone*), paras 93-102.

[48] *Vodafone* (C-75/18), para. 49, referring to ECJ, 22 June 1976, Case 127/75, *Bobie Getränkevertrieb*, EU:C:1976:95, para. 9, and ECJ, 6 December 2007, Case C-298/05, *Columbus Container Services*, EU:C:2007:754, paras 51 and 53.

[49] *Vodafone* (C-75/18), para. 49.

[50] *Vodafone* (C-75/18), para. 51.

[51] *Vodafone* (C-75/18), para. 52.

[52] *Vodafone* (C-75/18), para 52.

[53] *Vodafone* (C-75/18), para. 52.

[54] *Vodafone* (C-75/18), para 53.

[55] *Vodafone* (C-75/18), para 54.

[56] *Hervis* (C-385/12).

[57] For the difference between *Hervis* on the one hand and *Vodafone* and *Tesco* on the other see also, e.g., Opinion of AG Kokott (Case C-75/18, *Vodafone*), paras 48, 49-53; Opinion of AG Kokott (Case C-323/18, *Tesco*), paras 46-49.

[58] *Vodafone* (C-75/18), para. 55.

connection between the application of the steeply progressive scale of the special tax to a consolidated tax base consisting of turnover and the foreign ownership of these Hungarian companies.[59]

17. With regard to the challenges against the Hungarian special tax based on the freedom of establishment under Articles 49 and 54 TFEU, the Court therefore concluded:

> "Articles 49 and 54 TFEU must be interpreted as not precluding the legislation of a Member State that establishes a progressive tax on turnover, the actual burden of which is mainly borne by undertakings controlled directly or indirectly by nationals of other Member States or by companies that have their registered office in another Member State, due to the fact that those undertakings achieve the highest turnover in the market concerned."

II.4 VAT Directive

18. Finally, the Grand Chamber of the Court had to ascertain whether the Hungarian special tax on certain sectors infringed on Article 401 of the VAT Directive, which prohibits domestic taxes that can "be characterised as turnover taxes". For that determination, the expression "turnover tax" has to be understood in the context of the VAT Directive, i.e., whether a certain tax "has the effect of jeopardising the functioning of the common system of value added tax (VAT) by being levied on the movement of goods and services and on commercial transactions in a way comparable to VAT".[60]

19. Referring to *Banca popolare di Cremona*,[61] the Court confirmed that a national tax is prohibited by Article 401 of the VAT Directive if it exhibits "the essential characteristics of VAT, even if they are not identical to it in every way", but that, conversely, Article 401 of the VAT Directive – just as its predecessor in Article 33 of the 6th VAT Directive – does not preclude "the maintenance or introduction of a tax which does not display one of the essential characteristics of VAT".[62] Those essential characteristics of a VAT are (1) the application to goods and services; (2) the proportionality between the amount of the tax and the price of the good and service; (3) the application in every stage of the production and distribution process, regardless of the number of transactions; and (4) the possibility of deducting the previously paid amounts on the tax due for a specific transaction ("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").[63]

20. In applying these criteria in *Vodafone*, the Court focused on the third and fourth essential characteristics of VAT, namely the charging of the tax at each stage of the production and distribution process and the existence of a right to deduction of the tax paid during the preceding stages of the process, and concluded that those are not met:

> "Unlike VAT, this tax, which is based on the net turnover of the taxable person concerned, is not charged at each stage of that process, does not contain a mechanism comparable to that of the right to deduction of VAT, and is not based on the value added at the various stages of that process."[64]

This alone was sufficient for the Court to find that the Hungarian special tax does not display all the essential characteristics of VAT and is, consequently, not subject to the prohibition laid down in Article 401 of the VAT Directive:[65]

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[59] *Vodafone* (C-75/18), para 55.

[60] *Vodafone* (C-75/18), para. 59, referring to ECJ, 11 October 2007, Cases C-283/06 and C-312/06, *KÖGÁZ and Others*, EU:C:2007:598, para. 34.

[61] ECJ, 3 October 2006, Case C-475/03, *Banca popolare di Cremona* ("IRAP"), EU:C:2006:629, para. 26.

[62] *Vodafone* (C-75/18), paras 60-61.

[63] *Vodafone* (C-75/18), para. 62, referring to *Banca popolare di Cremona* (C-475/03), para. 28.

[64] *Vodafone* (C-75/18), para. 64.

[65] *Vodafone* (C-75/18), para. 65.

"Article 401 of [the VAT Directive] tax must be interpreted as not precluding the introduction of a tax which is based on the overall turnover of the taxable person and which is levied periodically, and not at each stage of the production and distribution process, there being no right to deduct tax paid at an earlier stage of that process."

21. It might be noted in passing that AG J. Kokott had reached the same result in her Opinion, but had put additional emphasis on the fact that the Hungarian special tax does not cover all, but only specific transactions (first essential characteristic)[66] and that – due to the progressive rate structure and the annual (and not transactional) assessment – the Hungarian tax is not designed to be passed on to the consumer (fourth essential characteristic).[67] Moreover, AG J. Kokott concluded that "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" and not a VAT-like "turnover tax seeking to tax the consumer".[68]

III. Comments

III.1. Introduction

22. *Vodafone* sheds light on a substantial number of matters, and we will deal with those in the following sections of this Opinion Statement. Its immediate relevance, however, exceeds the impact that it has for ascertaining the compatibility of the Hungarian special tax with EU law. This is because many of the features of the Hungarian tax are quite similar to the features of unilateral digital services tax adopted or proposed by several Member States (such as, in addition to Hungary's advertisement tax, in Austria, the Czech Republic, France, Italy, and Spain) and with the Commission's 2018 DST proposal.[69] Although the Court avoided any references to that broader impact, it was undoubtedly aware of it given the many references to it in AG J. Kokott's Opinion.[70] The final section of this Opinion Statement will address that impact.

III.2. Progressive Turnover Taxes and the VAT Directive

23. The Court's VAT analysis in *Vodafone* follows closely the established case law, e.g., in *Banca popolare di Cremona* ("IRAP")[71] and *Viking Motors*:[72] If a domestic levy "does not display all the essential characteristics of VAT" it is, "consequently, not subject to the prohibition laid down in Article 401 of the VAT Directive".[73] One should recall that this provision states that

"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."

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[66] See Opinion of AG Kokott (Case C-75/18, *Vodafone*), para. 32, noting that the Hungarian special tax "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."

[67] Opinion of AG Kokott (Case C-75/18, *Vodafone*), paras 33-36.

[68] Opinion of AG Kokott (Case C-75/18, *Vodafone*), para. 37 (see also para. 35, where AG J. Kokott describes the tax as being similar "to a special (direct) corporate tax for certain undertakings, in this case telecommunications undertakings").

[69] Proposal for a Council Directive on the common system of a digital services tax on revenues resulting from the provision of certain digital services, COM(2018)148.

[70] AG Kokott mentioned digital services taxes at several points in her opinion and hence made a clear connection between *Vodafone* and the digital tax debate (see paras. 1, 4, 71, 96, 101, 119, 123, 184 of the Opinion in C-75/18, *Vodafone*).

[71] *Banca popolare di Cremona* (C-475/03).

[72] ECJ, 12 June 2018, C-475/17, *Viking Motors and Others*, EU:C:2018:636.

[73] *Vodafone* (C-75/18), para. 65.

While the *a contrario* prohibition of "any taxes, duties or charges" which can "be characterised as turnover taxes" could be given a broad literal meaning, barring all national turnover taxes altogether, the Court's traditional inquiry is based on whether a certain national turnover tax "has the effect of jeopardising the functioning of the common system of value added tax (VAT) by being levied on the movement of goods and services and on commercial transactions in a way comparable to VAT".[74] And that potential of a turnover tax to interfere with VAT is only present if that tax meets the four essential characteristics of VAT:

> "VAT applies generally to transactions relating to goods or services; it is proportional to the price charged by the taxable person in return for the goods and services which he has supplied; 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; the amounts paid during the preceding stages of the process are deducted from the VAT 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."[75]

24. This reading also paves the way for Member States to introduce any type of taxes (including turnover taxes) insofar as they "twist" their design, ensuring that it does not exhibit all of the four essential characteristics of VAT. Thus, a national turnover tax would likely not be incompatible with Article 401 of the VAT Directive insofar as, for instance (1) it applies a fixed amount of tax per each transaction which bears no relation with the price of the transacted good or service; (2) it applies to only one stage (or to a limited number of stages) of the production and distribution process; (3) it does not cover any, but only specific transactions; and (4) it does not allow for the deduction of taxes previously paid amounts, which can be the result of having different taxes levied on different stages of the production and distribution process, with no possible credit of one into another. More generally, and irrespective of economic incidence, if the tax is not designed to be passed on to the consumers, it would typically also not be prohibited by Article 401 of the VAT Directive.[76] The design features of a turnover tax such as a progressive rate structure or the annual (and not transactional) assessment imply, according to AG J. Kokott, that such tax is not (legally) *meant to* be passed on to the consumer,[77] whatever its economic incidence may be. Additionally, for a progressive tax one may wonder if it is even "proportional to the price charged", i.e., if it could fulfill the second essential characteristic of a VAT.

III.3. Prohibition of State Aid

25. Both AG J. Kokott and the Court found the state aid-related questions in *Vodafone* inadmissible. This is not surprising and follows the stable line of reasoning of the Court in this field, concluding that taxpayers cannot challenge a tax based on the argument that a statutory exemption from or lower rate of the tax involves state aid for *other* taxpayers, unless the tax itself is allocated for the financing of aid and has a direct impact on the amount of that aid (neither of which was the case with the Hungarian special tax in *Vodafone*).[78] It should be noted that the party to be targeted by State aid rules in these cases is the party benefitting from

[74] *Vodafone* (C-75/18), para. 59, referring to ECJ, 11 October 2007, Cases C-283/06 and C-312/06, *KÖGÁZ and Others*, EU:C:2007:598, para. 34.

[75] *Vodafone* (C-75/18), para. 62, referring to *Banca popolare di Cremona* (C-475/03), para. 28.

[76] See for that discussion, e.g., *Viking Motors and Others*, (C-475/17), paras. 45-47, where the Court pointed out "that the legislation governing the sales tax at issue in the main proceedings did not require taxpayers to add the amount of that tax to the sale price or to indicate separately on the invoice delivered to the purchaser the amount of the tax to be paid. Thus, the passing-on of that tax to the final consumer was a possibility and not an obligation for the retailers who could at any time choose to bear that tax themselves, without increasing the prices of the goods and services provided. […] Therefore, it cannot be certain that the burden of the sales tax at issue in the main proceedings was ultimately borne by the final consumer in a way similar to a tax on consumption such as VAT. […] The Court has already held that a tax levied on production in such a way that it is not certain that it will be borne, like a tax on consumption such as VAT, by the final consumer is likely to fall outside the scope of Article 401 of the VAT Directive […]."

[77] Opinion of AG Kokott (Case C-75/18, *Vodafone*), paras 33-36.

[78] See the discussion in the Opinion of AG Kokott (Case C-75/18, *Vodafone*), paras 136-147, and in *Vodafone* (C-75/18), paras 18-32 and 37.

the exemption or the lower rate, because that party is receiving a selective advantage which must be repaid if the domestic rule constitutes incompatible aid.This also means that in such situations the effective protection of competition within the Internal Market cannot be achieved by an application to be exempted from the contested tax, even if that tax would amount to state aid under Article 107 TFEU and the respective State had infringed its obligations under Article 108 TFEU. Accordingly, the only remedy from a state aid perspective would be "to seek an abstract review of the legislation before a national court", which is "then able to make a request for a preliminary ruling as appropriate".[79]

26. The Grand Chamber in *Vodafone* did not enter into a substantive state aid analysis of the progressive turnover-based Hungarian tax, as it simply reject the admissibility of the respective questions.[80] However, state aid issues regarding progressive turnover taxes were already at issue in the 2019 General Court's judgments in *Poland v. Commission*[81] and *Hungary v. Commission*,[82] and the Commission's analysis was rejected in both cases. In *Commission v. Hungary*, for example, the Commission has challenged the steeply progressive, turnover-based Hungarian advertisement tax. Simplified, the Commission argued that the progressive tax rates differentiated between undertakings with high advertisement revenues (and thus large undertakings) and undertakings with low advertisement revenues (and thus small undertakings), and that a selective advantage was granted to the latter based on their size.[83] The General Court rejected that conclusion and annulled the Commission's decision based on four prongs of argumentation:

   a. First, the Commission chose an incomplete (without any tax rate) or hypothetical (with a single tax rate) "normal" reference system in order to ascertain whether certain undertakings benefited from selective advantages, with the correct reference system being the Hungarian advertisement tax itself, including its progressive rate structure.[84]

   b. Second, the Commission erred in considering that the Hungarian tax with its progressive rate structure was not consistent with its stated objective, i.e., establishing sectoral taxation on turnover in accordance with a redistributive purpose.[85] The General Court rejected that only progressive income taxes could serve such purpose[86] by holding that

      > "the scheme of the advertisement tax, characterised by a progressive tax structure, was a priori consistent with the Hungarian authorities' objective, even though the tax at issue was a turnover tax. It may reasonably be presumed that an undertaking which achieves a high turnover may, because of various economies of scale, have proportionately lower costs than an undertaking with a smaller turnover — because fixed unit costs (buildings, property taxes, plant, staff costs for example) and variable unit costs (raw material supplies for example) decrease with levels of activity — and that it may, therefore, have proportionately greater disposable revenue which makes it capable of paying proportionately more in terms of turnover tax."[87]

   c. Third, in the light of the objective of the Hungarian tax, the Commission has failed to show that the tax variation selected entailed selective advantages.[88] Following an extensive analysis of prior case-law,

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[79] Opinion of AG Kokott (Case C-75/18, *Vodafone*), para. 146.

[80] *Vodafone* (C-75/18), paras 18-32 (for the same result see also Kokott paras 135-147).

[81] General Court, 16 May 2019, Cases T-836/16 and T-624/17, *Poland v. Commission*, EU:T:2019:338 (pending before the ECJ as C-562/19 P, following the Commission's appeal of 2 July 2019, [2019] OJ C 328/29).

[82] General Court, 27 June 2019, Case T-20/17, *Hungary v. Commission*, EU:T:2019:448 (pending before the ECJ as C-596/19 P, following the Commission's appeal of 6 August 2019, [2019] OJ C 348/10).

[83] See the Commission's Decision (EU) 2017/329 of 4 November 2016 on the measure SA.39235 (2015/C) (ex 2015/NN) implemented by Hungary on the taxation of advertisement turnover, [2017] OJ 2017 L 49/36.

[84] *Hungary v. Commission* (T-20/17), paras 78-83.

[85] *Hungary v. Commission* (T-20/17), paras 83-90.

[86] See for that argument recitals 68 and 69 of the Commission's Decision (EU) 2017/329 of 4 November 2016 on the measure SA.39235 (2015/C) (ex 2015/NN) implemented by Hungary on the taxation of advertisement turnover, [2017] OJ 2017 L 49/36.

[87] *Hungary v. Commission* (T-20/17), para. 89.

[88] *Hungary v. Commission* (T-20/17), paras 91-104.

the General Court concluded that there is no basis to limit the redistributive objective of progressive taxation to income taxation and that, consequently,

> "as regards a turnover tax, a variation criterion taking the form of progressive taxation above a certain threshold — even if that threshold is a high one — which may reflect the wish to tax an undertaking's activity only when that activity reaches a certain level, does not in itself imply the existence of a selective advantage".[89]

d. Fourth, and finally, the Commission has also failed to demonstrate that the progressive taxation structure actually chosen by Hungary had been adopted in a manner which largely deprived the objective of the tax in question of its substance.[90] Here, the General Court rejected the Commission's (statistical) arguments that (1) the two highest brackets of the Hungarian tax applied only to one undertaking in 2014 and that that undertaking paid approximately 80% of the tax advances and that (2) that the undertakings' average effective rate and in the marginal rate of tax had to vary according to their turnover and size. Indeed, as the General Court noted,

> "variation in the average effective rate and marginal rate according to the size of the taxable amount is an integral part of any taxation system with a progressive structure and such a system is not […] as such and by virtue of that fact alone, such as to give rise to selective advantages. Moreover, when a tax's progressive taxation structure reflects the objective pursued by that tax, it cannot be considered that two undertakings with a different taxable amount are in a comparable factual situation in the light of that objective."[91]

27. AG J. Kokott reached the same result as the General Court in her *in eventu* analysis of the substantive state aid issues raised in *Vodafone* and concluded that the lower average taxation inevitably connected with a progressive tax rate for lower-turnover undertakings does not constitute a selective advantage for such undertakings.[92] Two core points of AG J. Kokott's detailed substantive state aid analysis should be pointed out:

a. First, AG J. Kokott found no "selective" advantage in the progressive rate structure Hungarian special tax as there was no unequal treatment of undertakings in a comparable situation. In her words: "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".[93] Moreover, "[t]he same holds for the possibilities for larger undertakings to minimise profit-based taxation on income by means of tax arrangements", and "[i]t is likewise not manifestly unreasonable that such a possibility increases with the size of an undertaking."[94]

b. Second, even if the undertakings were comparable, the Hungarian special tax would still be justified: AG J. Kokott stressed that – contrary to the view apparently taken by the Commission – "income taxation based on profit is not the only correct form of taxation", "but merely a *technique* for mathematically determining and taxing the taxable capacity of the taxable person in a uniform manner",[95] and that the "volume of turnover indicates (without manifest error at least) a certain financial capacity".[96] Also, "there can be no objection from the point of view of administrative

[89] *Hungary v. Commission* (T-20/17), para. 104.

[90] *Hungary v. Commission* (T-20/17), paras 106-111.

[91] *Hungary v. Commission* (T-20/17), para. 110.

[92] Opinion of AG Kokott (Case C-75/18, *Vodafone*), paras 148-188.

[93] Opinion of AG Kokott (Case C-75/18, *Vodafone*), para. 174.

[94] Opinion of AG Kokott (Case C-75/18, *Vodafone*), para. 175.

[95] Opinion of AG Kokott (Case C-75/18, *Vodafone*), para. 182.

[96] Opinion of AG Kokott (Case C-75/18, *Vodafone*), para. 184. Moreover, as AG J. Kokott pointed out in para. 184, "that the Commission itself shows with the proposal for a digital services tax, turnover can also be seen as a (slightly rougher) indicator of greater economic power, and thus greater financial capacity."

procedure if the number of retail establishments covered, and thus to be checked, is reduced by means of a threshold", as, e.g., the exemption for small undertakings in EU VAT law demonstrates.[97] Finally, in view of the legislative objectives pursued, AG J. Kokott concluded that it "is also understandable to have regard to turnover rather than profit, as the former is easily ascertainable […] and less prone to circumvention than profit […]."[98]

28. Although the ECJ did not address the substantive state aid issues with regard to progressive turnover taxes in *Vodafone* (but rather found the corresponding questions inadmissible), it will have an opportunity to provide clear guidance in the pending appeals in *Commission v. Hungary*[99] on the Hungarian advertisement tax and in *Commission v. Poland*[100] regarding the Polish tax on the retail sector.

III.3. Indirect Discrimination

29. At the core of *Vodafone* was the argument that the progressive rate structure amounted to covert discrimination as it, in fact, targeted largely foreign-owned taxpayers. Indeed, similar EU law concerns are raised against unilateral digital services taxes with its thresholds for taxability, and it is clear that the Commission was aware of these issues when it tabled its flat-rate DST proposal in 2018,[101] which is limited to certain digital services and employs a two-prong threshold for taxability, i.e., € 750 million of global revenues and € 50 million taxable EU revenues, both at a consolidated level. Broadly, those objections are also underlying the US trade investigations into the digital services taxes in France[102] and other EU Member States (Austria, the Czech Republic, Italy, and Spain),[103] where it is argued, e.g., that the French DST "is intended to, and by its structure and operation does, discriminate against U.S. digital companies, including due to the selection of services covered and the revenue thresholds".[104]

30. From the perspective of the EU fundamental freedoms, it needs to be remembered that neither the freedom of establishment nor the freedom to provide services protects third-country undertakings in their capacity as parent companies or service providers. That situation is different inside the EU: Both freedoms allow resident subsidiaries to rely on a restriction on a freedom of an EU parent company which is linked to it in so far as that restriction affects its own taxation.[105] Against that background, a long-established case law of the Court shows that the fundamental freedoms prohibit not only overt nationality discrimination, but also all covert or indirect forms of discrimination which, by the application of other criteria of differentiation, lead to the same result.[106] This includes criteria which do not constitute nationality discrimination from a purely formal perspective, but have the same effect, such as residency-based discrimination or differences in taxation based on unlimited or limited taxation of the taxpayer's parent

[97] Opinion of AG Kokott (Case C-75/18, *Vodafone*), para. 185.

[98] Opinion of AG Kokott (Case C-75/18, *Vodafone*), para. 186.

[99] Pending as Case C-596/19 P, *Commission v. Hungary* (following the decision of the General Court, 27 June 2019, Case T-20/17, *Hungary v. Commission*, EU:T:2019:448, and the Commission's appeal of 6 August 2019, [2019] OJ C 348/10).

[100] Pending as Case C-562/19 P, Commission v. Poland (following the decision of the General Court, 16 May 2019, Cases T-836/16 and T-624/17, *Poland v. Commission*, EU:T:2019:338, and the Commission's appeal of 2 July 2019, [2019] OJ C 328/29).

[101] See the Commission Staff Working Document Impact Assessment, COM(2018)147 final (21 March 2018), p. 67-69.

[102] See the Investigation by the US Trade Representative (USTR) under § 301 of the Trade Act of 1974, where the USTR has determined that „France's Digital Services Tax is unreasonable or discriminatory and burdens or restricts U.S. commerce" (see 84 Fed. Reg. No. 235, 66956 [6 December 2019], based on an extensive report of 2 December 2019), noting, *inter alia*, that for advertising 8 of 9 covered companies are US, and for digital interfaces 12 of 21 covered companies are US (and none France-based).

[103] The US Trade Representative (USTR) has recently opened investigations with respect to DSTs adopted or under consideration by Austria, Brazil, the Czech Republic, the European Union, India, Indonesia, Italy, Spain, Turkey, and the United Kingdom (see 85 Fed. Reg. No. 109, 34709 [5 June 2020]).

[104] See 84 Fed. Reg. No. 235, 66956 (6 December 2019).

[105] See, with regard to the freedom of establishment, e.g., *Vodafone* (C-75/18), paras 40-41, referring to ECJ,1 April 2014, Case C-80/12, *Felixstowe Dock and Railway Company and Others*, EU:C:2014:200, para. 23.

[106] See, e.g., ECJ, 14 February 1995, Case C-279/93, *Schumacker*, EU:C:1995:31, para. 26; ECJ, 22 March 2007, Case C-383/05, *Talotta*, EU:C:2007:181, para. 17; ECJ, 8 July 1999, Case C-254/97, *Baxter*, EU:C:1999:368, para. 13; ECJ, 12 December 2002, Case C-324/00, *Lankhorst-Hohorst GmbH*, EU:C:2002:749, paras 27-30; ECJ, 18 March 2010, Case C-440/08, *Gielen*, EU:C:2010:148, para. 37; *Hervis* (C-385/12), para. 30; *ANGED* (C-233/16), para. 30.

company. Until *Vodafone* and *Tesco* the Court had never assessed whether a progressive rate structure of a turnover-based tax can *per se* amount to covert discrimination of *foreign-owned* taxpayers.[107]

31. In *Vodafone*, the Court's reasoning was focused on the progressivity of the tax,[108] which, in the Court's view, did not amount to any discrimination since it was (facially) neutral and applied equally to domestic- and foreign-owned companies. This conclusion was not affected by the fact that the higher-band covered only foreign-owned companies and that most of the tax was borne by foreign-owned companies. In focusing on the progressivity as distinguishing criterion and the consequential distribution of the tax burden as a "fortuitous" indicator, The Court also did not deal with the section of AG J. Kokott's Opinion in which she discussed the legal relevance of "discriminatory intent" of the legislature when setting the tax rate structure.[109]

32. It is, however, not easy to reconcile the two Grand Chamber decisions in *Hervis* and *Vodafone*.[110] The distinctive elements in *Hervis* seems to be the fact that the special tax took into account the full Hungarian turnover of the worldwide group ("linked undertakings") before allocating turnover to each single Hungarian company and taxing it at steeply progressive rates.[111] Accordingly, elements of the economic activity of the group were made relevant for computing the tax liability of a Hungarian resident. However, the Court in *Hervis* accepted the existence of covert discrimination of such system if "the taxable persons covered by the highest band of the special tax are 'linked', in the majority of cases, to companies which have their registered office in another Member State",[112] while it did not even ask that question in *Vodafone*. More generally, one might ask if even reliance on the turnover of the worldwide group would lead to indirect discrimination as well. Nothing prevents a domestic group from having a higher turnover than foreign group (particularly when considering that the turnover of the Hungarian group can include turnover of wholly-owned subsidiaries located in other Member States). Of course, it is possible that, numerically, foreign-owned groups have higher turnovers than domestic-owned groups. However, would this not also be, in the Court's words, a situation arising "whenever the market concerned is dominated by undertakings of other Member States or of non-Member States or by national undertakings owned by natural persons or legal persons of other Member States or of non-Member States"[113]?

33. While the Grand Chamber of the Court accepted, without hesitation, that a criterion of annual net turnover of that specific undertaking did not amount to indirect discrimination since the criterion itself was not inherently discriminatory (and hence did not even entertain the question whether the Hungarian rate structure was intentionally set to disproportionately affect foreign-owned taxpayers), AG J. Kokott had taken a more nuanced approach:

    a. First, AG J. Kokott analyzed the correlation between the use of turnover as a distinguishing criterion and the seat of the undertakings. Departing from the fact that high-revenue taxpayers in a progressive rate system pay higher tax both in absolute and – unlike in a proportional rate system– also in relative terms, she concluded that "[t]his constitutes unequal treatment of the undertakings concerned".[114] However, finding covert discrimination requires a linking correlation between the chosen distinguishing criterion (e.g., turnover) and the (foreign) seat of the undertakings. AG J. Kokott rejected a mere quantitative approach, such as a mere preponderance of non-residents being affected, but rather concluded that "the correlation between the distinguishing criterion and the place in which the

[107] See, e.g., Opinion of AG Kokott (Case C-75/18, *Vodafone*), paras 48, 49-53; Opinion of AG Kokott (Case C-323/18, *Tesco*), paras 46-49.

[108] *Vodafone* (C-75/18), para. 54.

[109] For a discussion of the statements made in the relevant parliamentary debate and in government documents in Hungary see Opinion of AG Kokott (Case C-75/18, *Vodafone*), paras 93-102.

[110] For an argument based on ability to pay see infra Chapter III.4. of this Opinion Statement.

[111] See for that distinguishing feature also *Vodafone* (C-75/18), para. 55.

[112] *Hervis* (C-385/12), para 45.

[113] *Vodafone* (C-75/18), para. 52.

[114] Opinion of AG Kokott (Case C-75/18, *Vodafone*), paras 57-60.

company has its seat must be identifiable in the vast majority of cases".[115] Using a "vast majority"-criterion instead of a "majority"-criterion, however, would merely shift the scale and would not address the concern that disproportionate impacts may result from innocent classifications that just so happen to correlate with foreign ownership of a taxpayer and would also face numerous technical problems, e.g., differences between contradictory statistics which are difficult to resolve and fluctuations in figures occurring over time.[116] AG J. Kokott therefore puts more emphasis on a "qualitative criterion, according to which the distinguishing criterion must *intrinsically* or *typically* affect foreign companies", meaning that a "merely incidental link, even if it is sufficiently high in quantitative terms, cannot therefore be sufficient, in principle, to establish indirect discrimination."[117] The criterion of turnover, however, is in AG J. Kokott's view not an intrinsically cross-border distinguishing criterion, but rather a neutral distinguishing criterion (and just as neutral as a basis of assessment for calculating a direct tax as, for example, profit or wealth).

b. Second, AG J. Kokott addressed the Commission's argument that the Hungarian legislature intentionally and specifically brought about the discriminatory effect of the special tax. Put differently: Is a restriction of a fundamental freedom 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?[118] AG J. Kokott established two prongs for that determination:[119] First, as for the legal relevance of intent, AG J. Kokott relied on the principle of prohibition of abuse of rights recognized in EU law, which also applies to the conduct of Member States, and concluded that intent might be legally relevant in principle, "but only subject to very strict conditions":[120] Facially neutral classifications that only incidentally, not intrinsically, correlate with foreign ownership would enjoy a presumption of legality in light of 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 a facially neutral "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".[121] Second, as for the proof of a relevant intention to discriminate, the standard for that assessment has to be strict, as "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 or other conjecture".[122] This requires that 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". Mere (and not entirely conclusive) statements in the parliamentary debate and in government documents in Hungary were not enough to meet that burden of proof,[123] and it remains unclear what type of proof would suffice to show that "the Member State (and not merely individuals involved)" had discriminatory intent.

34. While AG J. Kokott accepted that, in principle, the legislature's intent to discriminate could be potentially relevant, the Grand Chamber of the Court – though clearly alerted to that issue – refrained from addressing it directly. One might therefore argue that the Court endorsed a narrow approach by considering the

[115] Opinion of AG Kokott (Case C-75/18, *Vodafone*), paras 63.
[116] Opinion of AG Kokott (Case C-75/18, *Vodafone*), paras 63-73.
[117] Opinion of AG Kokott (Case C-75/18, *Vodafone*), para 74.
[118] Opinion of AG Kokott (Case C-75/18, *Vodafone*), para 84.
[119] Opinion of AG Kokott (Case C-75/18, *Vodafone*), paras 83-102.
[120] Opinion of AG Kokott (Case C-75/18, *Vodafone*), paras 85-91.
[121] Opinion of AG Kokott (Case C-75/18, *Vodafone*), para 87.
[122] Opinion of AG Kokott (Case C-75/18, *Vodafone*), para. 91.
[123] Opinion of AG Kokott (Case C-75/18, *Vodafone*), paras 93-102.

distribution of the tax burden as “fortuitous”[124] and noting that the domestic criterion did not “inherently” create any discrimination.[125] Both approaches have merits: The Court’s narrow approach and judicial restraint certainly avoid interference with market forces: The fact that a tax is borne in the majority of cases, in the vast majority of cases or exclusively, by non-residents or foreign-owned residents should not necessarily be seen, in itself, as indirect discrimination. In the context of the Internal Market and of highly integrated economies, it is to be expected that States and companies specialize in the goods and services in which they have a comparative advantage. Therefore, it might be seen as a necessary consequence of a smoothly operating Internal Market that, at a certain point, national economic operators of one State might even decide to stop offering a certain good or service which starts to be offered by economic operators of another Member State. From that it follows that the mere fact that goods and services are (vastly or exclusively) provided by non-residents cannot mean that a State should be prevented, by EU law, to levy a tax on those products or services, or even on the economic operator offering them. However, AG J. Kokott’s approach would avoid that Member States establish seemingly neutral criteria but nevertheless set those criteria acting in “bad faith” by intentionally targeting foreign enterprises. This certainly requires the drawing of lines, and establishing reliable criteria is undoubtedly a hard task. It remains to be seen how the Court will further develop its case in light of seemingly contradictory judgments, e.g., in *Jacquier*[126] and *Hervis* on the one hand and *Vodafone* on the other.

III.4. Turnover Taxes, Ability to Pay and Resilience against Profit Shifting

35. On a general level, one main objection against turnover-based taxes is that they – by design – do not take into account any expenses, costs or losses incurred by the taxpayer. So even if they are levied at a relatively low rate, their impact in relation to the taxpayer’s profits depends on the respective profit margin, which may differ from sector to sector and taxpayer to taxpayer. Even more, turnover has traditionally been viewed as a poor indicator of ability to pay and hence progressivity as anathematic to the level of turnover. Indeed, turnover taxes allow for effective collection even in cases the taxpayer has genuine losses or has a reduced intervention in the global chain, as it operates as a limited-risk manufacturer. In both cases, a comparison with a profit-making company or with a full-fledged manufacturer shows that companies with very different abilities to pay (from a net income perspective) might have comparable turnovers. This was also the outspoken position of the Commission with respect to state aid, which views progressivity as a potential justification for taxes on profits or net income in light of a redistributive purpose,[127] but not for taxes on turnover.[128]

36. However, AG J. Kokott’s Opinion as well as the Grand Chamber’s judgment in *Vodafone* took the position that the notion of ability to pay (and hence the permitted different treatment of taxpayers with different

[124] *Vodafone* (C-75/18), para. 52.

[125] *Vodafone* (C-75/18), para. 54.

[126] ECJ, 30 November 1995 C-113/94, *Elisabeth Jacquier*, EU:C:1995:413.

[127] See para. 24 of the (old) Commission Notice on the application of the State aid rules to measures relating to direct business taxation, [1998] OJ C 384/3, and para. 139 of the (current) 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, [2016] OJ C 262/1.

[128] See, e.g., paras 68-69 of the Commission Decision (EU) 2017/329 of 4 November 2016 on the measure SA.39235 (2015/C) (ex 2015/NN) implemented by Hungary on the taxation of advertisement turnover, C(2016) 6929), [2017] OJ L 49/36: “It is a natural consequence of (single-rate) turnover taxes that the bigger the turnover of a company is, the more tax it pays. As opposed to taxes based on profit […], a turnover-based tax is however not intended to take into account — and indeed does not take into account — any of the costs incurred in the generation of that turnover. Therefore, in the absence of specific evidence to the contrary, the level of turnover generated cannot automatically be considered as reflecting the ability to pay of the undertaking. Hungary has not demonstrated the existence of the alleged relationship between turnover and ability to pay nor that such relationship would be correctly mirrored in the pattern of progressivity (from 0 % to 50 % of turnover) of the advertisement tax. […] The Commission considers that progressive rates for taxes on turnover could only be justified exceptionally, that is if the specific objective pursued by a tax indeed requires progressive rates. Progressive turnover taxes could, for example, be justified if the externalities created by an activity that the tax is supposed to tackle also increase progressively — i.e. more than proportionately — with its turnover. However, Hungary did not provide any justification of the progressivity of the tax by the externalities possibly created by advertisement.”

ability to pay[129]) is not limited to income taxes, and that a turnover-base does not out rule a progressive rate. Quite to the contrary, and in light with the stated *ratio essendi* of the Hungarian tax, "the amount of turnover constitutes a criterion of differentiation that is neutral and, on the other, turnover constitutes a relevant indicator of a taxable person's ability to pay."[130] This clearly rejects the view that, from an EU law perspective, only progressive taxation of net income is consistent with the principle of taxation according to ability to pay. The underlying assumption seems to be that large profits require large turnovers (even if the latter does not necessarily imply the former), and there is no fundamental objection against 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", "[e]ven though turnover is not a compelling indicator for financial capacity".[131] However, while ability to pay is relevant for determining the comparability of taxpayers or for ascertaining a possible justification (not only for income, but also for turnover taxation), the Court's reference to ability to pay should not be understood that it is a general principle of EU direct taxation. And insofar as there is no direct EU tax, there is no need for that either. And, of course, the Court's finding is limited to EU law; it might therefore be the case that domestic (constitutional) courts consider that turnover-based taxes, due to their design, infringe the respective national ability to pay principle.

37. Ability to pay might also be a relevant factor in distinguishing *Hervis* from *Vodafone*: Under the "aggregation rule" at issue *Hervis*, the group's entire turnover was taken into consideration for the purposes of the application of the progressive tax rate, so that Hervis as member of such group was subject to a much higher average rate of tax than would have been the case if only its own transactions were taken as the basis for the calculation of tax. So, progressivity in *Hervis* was determined in relation to the turnover of all "linked entities" and hence did not relate to the taxpayer's stand-alone "ability to pay". In this sense, the special tax levied in *Hervis* infringed ability to pay. By contrast, and by only taking into account the effective turnover of the taxpayer, *Vodafone* was in line with the Court's notion of ability to pay.

38. AG J. Kokott also linked turnover-based taxes with the OECD's BEPS project: Both, in the BEPS debate and the discussion that led to the Hungarian sectoral tax, "it was or is not a question of heavier taxation of *foreign* undertakings, but of heavier taxation of *multinational* undertakings".[132] Moreover, "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".[133] AG J. Kokott went all the way in that line of argument and even concluded that

> "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."[134]

In that, AG J. Kokott also seems to implicitly sanction the underlying idea of the Commission's proposal for a turnover-based digital services tax for certain high-turnover undertakings in the digital sector, noting that "this taxation technique is expressly explained by the fact that 'the opportunity of engaging in aggressive

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[129] See Opinion of AG Kokott (Case C-75/18, *Vodafone*), paras. 109-110, with further references.

[130] *Vodafone* (C-75/18), para. 49.

[131] See Opinion of AG Kokott (Case C-75/18, *Vodafone*), para. 100. It should be noted that the English translation of that paragraph of the Opinion (with the original language being German) is not correct. It states that the Hungarian presumption that larger (higher-turnover) undertakings also have more financial capacity than smaller undertakings "is in any case not accurate", but should read "not inaccurate" or "not inappropriate". The original German version reads "jedenfalls nicht sachfremd" and the French version uses "semble en tout état de cause raisonnable".

[132] Opinion of AG Kokott (Case C-75/18, *Vodafone*), para. 95.

[133] Opinion of AG Kokott (Case C-75/18, *Vodafone*), para. 101.

[134] Opinion of AG Kokott (Case C-75/18, *Vodafone*), para. 123.

tax planning lies with larger companies'."[135] Finally, "it is also understandable to have regard to turnover rather than profit, as the former is easily ascertainable (simple and effective administration)",[136] and that "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".[137] All in all, AG J. Kokott's Opinion can reasonably be understood as a preemptive defense of the main structure of digital services taxes, as exemplified in the Commission's 2018 DST proposal.[138]

39. From the Member States' perspective, turnover taxes may be seen as a preferred way of increasing tax revenues. Some of the deficiencies of its design (namely in comparison with income taxation) could be viewed as an advantage by the Member States in what concerns the increase in tax revenues, prevention of tax planning, and administrability. Turnover taxes are indeed immune to most base-erosion and profit shifting techniques. However, and in the long-run, they may lead to unnecessary adjustments in corporate groups. Moreover, turnover is indeed a "bad proxy" for income in many cases (even if taxed at relatively low rates), e.g., in low-margin situations or in loss situations. Moreover, those taxes might lead to economic distortions and their tax and economic effects might amount to an obstacle to the strengthening of the Internal market, especially if they lead to economic double taxation (where ability to pay is targeted by a turnover-based tax and a profit-based tax at the same time) and revenue shifts between Member States (where, e.g., the turnover-based tax of one State is a deductible business expense in another State).[139] Also, the traditional divide between turnover and income taxation may have to be re-visited. Some elements of the design of turnover taxes may make them similar to income taxes; conversely, we can now find some simplified income tax systems (namely for small and medium taxpayers) that are based on turnover.

III.5. Impact of *Vodafone* on Digital Services Taxes (DSTs)

40. The special Hungarian tax at issue in *Vodafone* has some features similar to the ones presented by the so-called digital services taxes (DSTs), i.e., generally flat-rate turnover-based taxes on certain digital services (such as targeted advertising or intermediation services). DSTs were introduced or are discussed in some Member States (such as, in addition to Hungary's advertisement tax, in Austria, the Czech Republic, France, Italy, and Spain) and a DST Directive was proposed by the EU Commission in March 2018.[140] This has been noted by AG J. Kokott multiple times,[141] but was not mentioned at all by the Court.

41. *Vodafone* nevertheless provides some useful elements for the examination of the admissibility of national turnover-based taxes on digital services:

    a. First, using turnover as a tax base does not appear to be problematic from a fundamental freedoms perspective as such, regardless of whether the rate is proportional (such as the 3% rate in the Commission's 2018 DST proposal) or progressive (and even if steeply progressive); this follows, *inter alia*, from the Court's finding that the amount of turnover constitutes not only a criterion of

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[135] Opinion of AG Kokott (Case C-75/18, *Vodafone*), para. 101, referring to 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, COM(2018)148.

[136] Opinion of AG Kokott (Case C-75/18, *Vodafone*), para. 186.

[137] Opinion of AG Kokott (Case C-75/18, *Vodafone*), para. 185.

[138] Proposal for a Council Directive on the common system of a digital services tax on revenues resulting from the provision of certain digital services, COM(2018)148.

[139] If one assumes, e.g., that a typical turnover-based DST is not covered by bilateral tax treaties, the same activities might indeed be taxed both under a DST and a corporate income tax. Indeed, the Commission's 2018 DST proposal does not foresee a credit, but rather notes the expectation "that Member States will allow businesses to deduct the DST paid as a cost from the corporate income tax base in their territory, irrespective of whether both taxes are paid in the same Member State or in different ones" (Pt. 27 of the Preamble 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, COM(2018)148). This also means that the DST collected in one Member State might be a deductible business expense in another Member State, leading to revenue shifts outside the network of bilateral tax treaties.

[140] Proposal for a Council Directive on the common system of a digital services tax on revenues resulting from the provision of certain digital services, COM(2018)148.

[141] AG Kokott mentioned digital services taxes at several points in her opinion and hence made a clear connection between *Vodafone* and the digital tax debate (see paras 1, 4, 71, 96, 101, 119, 123, 184 of the Opinion in C-75/18, *Vodafone*).

differentiation that is neutral but at the same time also a relevant indicator of a taxable person's ability to pay.[142] As for state aid, the same conclusion was reached by AG J. Kokott in her Opinion[143] as well as by the General Court in *Hungary v. Commission*.[144]

b. Second, the distribution of the burden of a turnover tax between domestic and foreign or foreign-owned taxpayers is irrelevant, unless the features of such tax "inherently" create a discrimination;[145] such "inherent" discrimination, however, cannot be derived from the mere fact that most of the taxpayers are non-residents or owned by non-residents or that most of the tax raised is paid by them, as such distribution of the tax burden would generally be "fortuitous".[146] It remains to be seen, however, how the Court would approach (extreme) cases in light of the freedoms or state aid rules where, e.g., (1) a threshold is deliberately set so that exclusively foreign-owned or foreign taxpayers (but not a single domestic taxpayer) are covered by a digital services tax or (2) a certain amount of the revenues raised by the tax are earmarked to support the digital transformation of domestic taxpayers.

c. Third, and this can be derived implicitly from the Court's judgment and explicitly from AG J. Kokott's Opinion[147] and the General Court's decision in *Hungary v. Commission*,[148] thresholds for taxability – even if they are high – do not seem to face any objection because they are understandable based on administrative reasons and the wish to tax an undertaking's activity only when that activity reaches a certain level. Again, it is unclear how the Court would deal with thresholds that are deliberately set set to discriminate.

d. Fourth, Vodafone has not rejected the Court's finding in *Hervis* that the Hungarian "aggregation rule", which used the group's entire taxable Hungarian turnover to determine the progressive rate for each individual taxpayer in the respective group, violates EU law.[149] It is, however, unclear if and how that (prohibited) "aggregation rule" could be distinguished from the "consolidation features" of the Commission's 2018 DST proposal, which employs a two-prong threshold for taxability, i.e., € 750 million of global revenues and € 50 million taxable EU revenues, both at a consolidated level.[150]

42. That all said, and despite the broad criticism of digital services taxes both from a legal and an economic standpoint, one gets the clear impression that the Grand Chamber of the Court as well as AG J. Kokott in *Vodafone* wanted to give a signal validating the core features of digital services taxes; specifically, the many references by AG J. Kokott to the OECD BEPS project and countering aggressive tax planning might have set the tone for the future discussion. This is particularly relevant for Member States that have already introduced (or plan to introduce) such turnover-based taxes on certain digital services, although certain specific design features might still face scrutiny from the Court. It might finally be noted that for a DST based on an EU Directive some issues might automatically disappear or receive less scrutiny: For one, state aid would be no issue if a DST were mandated by an EU Directive, as any aid would then not be imputable to a Member State and consequently not fall under the prohibition of Articles 107, 108 TFEU.[151] Also, the EU legislature enjoys more leeway in light of the fundamental freedoms as the Court's general approach is to accept more easily the proportionality of a restriction that is applicable in the whole European Union.[152]

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[142] *Vodafone* (C-75/18), para. 49.

[143] Opinion of AG Kokott (Case C-75/18, *Vodafone*), paras 148-187.

[144] *Hungary v. Commission* (T-20/17).

[145] *Vodafone* (C-75/18), para. 54.

[146] *Vodafone* (C-75/18), para. 52.

[147] Opinion of AG Kokott (Case C-75/18, *Vodafone*), para. 185, referring to the exemption for small undertakings in EU VAT law.

[148] *Hungary v. Commission* (T-20/17), para. 104.

[149] See *Vodafone* (C-75/18), para. 55.

[150] See Art 4(1) and (6) of the Commission's 2018 DST proposal in COM(2018)148.

[151] See, e.g., Court of First Instance, 5 April 2006, Case T-351/02, *Deutsche Bahn*, EU:T:2006:104, paras 101-103; ECJ, 23 April 2009, Case C-460/07, *Sandra Puffer*, EU:C:2009:254, para. 70.

[152] For a brief analysis and further references see our "Opinion Statement ECJ-TF 2/2018 on the ECJ Decision of 7 September 2017 in *Eqiom* (Case C-6/16), Concerning the Compatibility of the French Anti-Abuse Rule Regarding Outbound Dividends with the EU Parent-Subsidiary Directive (2011/96) and the Fundamental Freedoms", 58 *European Taxation* (2018), 471 (474-475).

IV. The Statement

43. The CFE Tax Advisers Europe notes that the Court's decision in *Vodafone* provides clarifications for ascertaining the compatibility of domestic turnover taxes with the fundamental freedoms and with Article 401 of the VAT Directive. This is particularly relevant in the current context, in which some Member States have adopted or plan to adopt turnover-based digital services taxes.

44. Although provided with the opportunity, the Court has avoided to explicitly address AG J. Kokott's arguments relating to the correlation between the chosen distinguishing criterion (i.e., turnover) and the seat of the undertakings and the question whether indirect discrimination is to be taken to exist in any case if the distinguishing criterion was intentionally chosen with a discriminatory objective. Rather, the Court straightforwardly found that the distribution of the burden of a turnover tax between domestic and foreign or foreign-owned taxpayers is not an indicator of covert discrimination, unless the features of such tax "inherently" create a discrimination; the mere fact that most of the taxpayers are non-residents or owned by non-residents or that most of the tax raised is paid by them is just a "fortuitous" effect.

45. The CFE Tax Advisers Europe notes that this decision should not be seen as giving Member States carte blanche for all technical features of domestic digital services taxes, e.g., the choice of thresholds, the earmarking of revenues, or consolidation rules. One should also not forget other non-EU law concerns, given the structural inefficiencies that this type of taxes presents (e.g., economic effects, trade law, domestic constitutional law, double taxation, etc).