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Subject: **State Aid SA.44351(2016/C) (ex 2016/NN) – Poland – Polish tax on the retail sector**

Sir/Madam,

The Commission wishes to inform Poland that, having examined the information supplied by your authorities on the measure referred to above, it has decided to initiate the procedure laid down in Article 108(2) of the Treaty on the Functioning of the European Union (hereinafter "the Treaty").

1. PROCEDURE

(1) From press reports published in February 2016, the Commission became aware that Poland is considering to adopt a law that would introduce a turnover tax on the retail sector featuring progressive rates.

(2) On 11 February and 30 May 2016, the Commission services sent two letters to the Polish authorities by which they requested more information on the planned law, invited Poland to consult them before the adoption of that law, emphasised the similarities of that law with the Hungarian food chain inspection fee and drew the attention of the Polish authorities on the preliminary State aid assessment of that fee by the Commission[1]; and informed Poland that if a measure which entails

[1] See Commission Decision in case Amendment to the Hungarian food chain inspection fee, OJ C 277, 21.08.2015; See also Commission Decisions in the following cases: SA.39235 – Hungarian advertisement tax, OJ C 136, 24.04.2015; and SA.41187 - Hungarian health contribution of tobacco industry businesses, OJ C 277, 21.08.2015.

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State aid is put into effect without prior Commission approval, the Commission might have to 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 it was 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[2], 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 on the Act and requested the Polish authorities to express their views on the possibility of the Commission issuing a suspension injunction. Their reply was received on 22 July.

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

2. DESCRIPTION OF THE MEASURE

(7) The Act lays down a new tax on the retail sector in Poland (hereinafter: the "retail tax"). The stated purpose of the retail tax is to increase the tax revenues of the State budget. According to Poland, the additional resources collected from the retail tax are necessary to finance the so-called "Family 500+" child benefit social programme. All undertakings engaged in the retail sale of all sorts of goods in Poland are subject to the retail tax. The taxable base upon which the retail tax is levied is the monthly turnover generated by an undertaking from retail sales.

(8) The Act lays down a progressive rate structure for the retail tax with three different brackets and tax rates:

- A 0% tax is levied on the part of the undertaking's monthly turnover from retail sales below PLN 17 million (approximately EUR 3,84 million),
- A 0,8% tax is levied on the part of the undertaking's monthly turnover from retail sales between PLN 17 million and PLN 170 million and
- A 1,4% tax is levied on the part of the undertaking's monthly turnover from retail sales above PLN 170 million.

The retail tax is payable on a monthly basis by the twenty-fifth day of the month following the month to which the tax relates.

3. POSITION OF THE POLISH AUTHORITIES

(9) The Polish authorities argue that since the retail tax is a direct tax on the sale of goods to consumers, it falls within its fiscal autonomy and Poland is autonomous

[2] Dz. U. z 2016 r. poz. 1155

in deciding upon its design so as to ensure the most effective way to achieve the desired objective of the measure. Poland claims that the tax will be implemented in such a way so as to ensure its easy application based on objective criteria, the latter being the size of an undertaking's turnover. Furthermore, Poland considers that the retail tax does not discriminate between sectors, legal entities, organisational structures, level of profits and origin of capital.

(10) The Polish authorities are of the opinion that the Hungarian cases mentioned by the Commission services in their letters (see Recital (2) above) are not applicable to the case at hand, because the retail tax is characterised by a milder progressive rate structure than the fee examined in the Hungarian cases (the latter foreseeing 4 to 8 steeply progressive rates[3]), it does not lead to discrimination between foreign and national companies in light of the Polish market structure, it does not differentiate on the basis of shareholding/capital structure, and it pursues a different objective (the revenue from the Polish tax will go to the general budget and, according to Poland, is needed to cover the expenses of the Family 500+ child benefit programme). Finally, Poland claims that the progressive nature of the tax is in line with the logic of the overall tax system in the country.

(11) Furthermore, Poland makes a distinction between bracketed progressive taxation and global progressive taxation. In the case of bracketed progression (*'progresja szczeblowa'*) the higher rate applies only to the excess tax base above the threshold which triggers a new rate, whereas in the global progression (*'progresja globalna'*), the higher rates apply to the entire revenue. They claim that the Polish tax system is characterised by bracketed progression, which is also the case for the measure under scrutiny. They argue that the bracketed progression does not lead to differentiated taxation between entities that are in a comparable situation, hence the measure is not selective. They further claim that the bracketed progression of the measure under scrutiny is justified on redistributive grounds and the better ability to pay of undertakings with large revenues. They add that such undertakings often use optimisation strategies and enjoy economies of scale (the more they sell, the lower the unit costs).

(12) The Polish authorities disagree with the conclusions presented by the Commission in its decisions on the Hungarian progressive tax cases. They do not believe that progressive taxes discriminate between taxpayers in a comparable situation (there is *de facto* no difference in applying a progressive or linear turnover tax, as neither of them take into account the cost intensive nature of an activity). Any discrimination is also eliminated by the design of the tax which incorporates a tax free amount. Higher tax rates are *de facto* applicable to undertakings which have greater opportunities for development. It is therefore the opinion of the Polish authorities that the retail tax does not lead to differentiated treatment of undertakings in a similar situation. The retail tax is therefore not selective in nature and does not amount to State aid.

4. ASSESSMENT

(13) This decision relates to the progressive rate structure of the measure without prejudice to the Commission investigation of the compliance of other elements of the measure with the State aid rules.

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3 From 0.1% to 6% (x60) in Hungary and 0.8% to 1.4% (x1.75)

4.1. Presence of State aid within the meaning of Article 107(1) of the Treaty

(14) 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 production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market*."

(15) The qualification of a measure as aid within the meaning of this provision therefore requires the following cumulative conditions to be met: (i) the measure must be imputable to the State and financed through State resources;; (ii) it must confer an advantage to an undertaking; (iii) that advantage must be selective; and (iv) the measure must distort or threaten to distort competition and affect trade between Member States.

4.1.1. State resources and imputability to the State

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

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

(18) As regards the measure's financing through State resources, where the result of a measure is that the State forgoes revenues which it would otherwise have to collect from an undertaking in normal circumstances, that condition is also fulfilled.[4] In the present case, the Commission takes the preliminary view that by imposing a progressive turnover tax on the retail sales of undertakings in Poland, the Polish State waives resources it would otherwise have been entitled to collect from undertakings with a lower level of turnover (and thus smaller undertakings), if they had been subject to the same overall retail tax rate as undertakings with a higher level of turnover (and thus larger undertakings).

4.1.2. Advantage

(19) 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.[5] 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.[6] Although a measure that entails a reduction to a tax or a levy does not involve a positive transfer of resources from the State, it gives rise to an advantage because it places the undertakings to which it applies in

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4 Case C-83/98 P *France v Ladbroke Racing Ltd and Commission* EU:C:2000:248 and EU:C:1999:577, paragraphs 48 to 51. Likewise, a measure allowing certain undertakings a tax reduction or to postpone payments of tax normally due can amount to State aid, see Joined Cases C-78/08 to C-80/08 *Paint Graphos and Others*, paragraph 46.

5 Case C-143/99 *Adria-Wien Pipeline* EU:C:2001:598, paragraph 38.

6 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. See also point 9 of the Commission notice on the application of the State aid rules to measures relating to direct business taxation OJ C 384, of 10.12.98, p. 3.

a more favourable financial position than other taxpayers and results in a loss of income to the State.[7]

(20) The Act lays down a progressive rate structure that applies to all undertakings subject to the retail tax depending on the brackets into which those undertakings' turnover falls. The progressive character of the tax has the effect that the average percentage of the tax levied on an undertaking's turnover from retail sales increases when its turnover increases and reaches the next upper brackets. This has the result that undertakings with low turnover (smaller undertakings) are either not subject to the retail tax or subject to the tax at substantially lower average rates than undertakings with high turnover (larger undertakings), thereby mitigating the charges that undertakings with low turnover have to bear as compared to undertakings with high turnover. The Commission therefore takes the preliminary view that the Act confers an economic advantage on smaller undertakings to the detriment of larger undertakings for the purposes of Article 107(1) of the Treaty.

4.1.3. Selectivity

(21) 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 fiscal schemes the Court of Justice has established that the selectivity of the measures should in principle be assessed by means of a three-step analysis.[8] First, the common or normal tax regime applicable in the Member State must be identified: "the system of reference". 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. Second, it should be determined whether a given measure involves 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. 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.

a) System of reference

(22) In the present case, the Commission considers the reference system to be the retail tax applicable to undertakings engaged in the retail sale of all sorts of goods in Poland. The Commission does not consider, however, that the progressive tax rate structure laid down by the Act forms a part of that reference system.

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7 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.

8 See, for example, Case C-279/08 P *Commission v Netherlands (NOx)* [2011] ECR I-7671; Case C-143/99 *Adria-Wien Pipeline* [2001] ECR I-8365; Joined Cases C-78/08 to C-80/08, *Paint Graphos and others* [2011] ECR I-7611*;* Case C-308/01 *GIL Insurance* [2004] ECR I-4777.

(23) As the Court of Justice has specified[9], 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. 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.[10] 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.[11]

(24) The progressive tax rate structure introduced by the Act appears deliberately designed to favour smaller undertakings over larger ones, although they are both engaged in the same activity. In addition, according to information submitted by the complainant or collected by the Commission from public sources, it appears that the biggest share of the tax would be paid by foreign companies[12] and that such contribution would be out of proportion with their market share[13]. At the same time, several thousands of local retail shops will be entirely exempt from any taxation on their retail sale of goods since their monthly turnover derived from that activity falls below PLN 17 million.

(25) As mentioned in Recital (8) above, undertakings subject to the tax are potentially subject to three different tax rates depending on the size of their monthly turnover (0%, 0,8% and 1.4%) . Consequently, as the marginal tax rate increases for higher turnovers, the average tax rate of the undertakings subject to the tax also increases with their turnover.

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9 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.

10 *Ibid*, paragraph 92.

11 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

12 For instance, on the Polish market for "fast moving consumer goods", it appears that 9 out of the 10 biggest undertakings (according to their turnover in 2014) are undertakings from other Member States, namely Denmark, France, Germany, Portugal and UK. See presentation by a journalist from the specialized magazine *dla handle* in the context of the 2015 World Food Warsaw Fair: http://polen.nlambassade.org/binaries/content/assets/postenweb/p/polen/nederlandse-ambassade-in-warschau/import/nieuws/dlahandlu.pdf

See also relevant press articles: Financial Times, May 29, 2016, http://www.ft.com/cms/s/0/5e7e224c-23fe-11e6-9d4d-c11776a5124d.html#axzz4H1coRlhf; Bloomberg, January 25, 2016 http://www.bloomberg.com/news/articles/2016-01-25/poland-to-help-local-shops-as-new-tax-targets-bigger-retailers. .

13 According to the complainant, 79% of the tax of the total of expected PLN 1.9 billion will be paid by 20 international companies (holding a 67% market share) active in the Polish retail sector. In the groceries retail sector, the complainant submits that approximately 94% of the tax will be paid by the international grocery store chains, while only about 6% of the tax will be paid by the domestic grocery stores (holding a 22% market share).

(26) Because each company is taxed at a different average rate, it is not possible for the Commission to identify one single reference rate in the retail sales tax. 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.

(27) The effect of the progressive rate structure of the tax is therefore that different undertakings pay different levels of taxation depending on their monthly turnover and on their size, since the amount of turnover achieved by an undertaking correlates to a certain extent with the size of that undertaking.

(28) However, the stated objective of the tax is to collect revenue for the general budget. In light of that objective, the Commission considers all retail operators to be in a comparable legal and factual situation, regardless of their activities or their level of turnover. Poland has 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. With regard to the distinction that the Polish authorities make between bracketed progressivity and global progressivity, the Commission notes that both type of progressive taxation would appear to lead to different average rates being applied to different companies based on their turnover and size. It should further be underlined that the objective of the tax given by the Polish authorities, which is to cover the expenses of the Family 500+ child benefit programme, cannot be regarded as an objective intrinsic to the tax. Indeed, Poland has not demonstrated that the revenues from the tax were hypothecated to the financing of that programme and, even if they were, the link between child care and the retail sector has not been established, even less the link between the cost of the child care programme and the size of the turnover of retail operators.

(29) It therefore appears that Poland has deliberately designed the tax in such a manner so as to arbitrarily favour certain undertakings, namely operators with a lower level of turnover (and thus smaller undertakings), and disadvantage others, namely larger undertakings, which also tend to be foreign-owned.[14] The reference system is therefore selective by design in a way that is not justified in light of the objective of the tax, which is to collect money for the general budget. Consequently, at this stage the Commission considers the appropriate reference system in the present case to be the imposition of a tax on the monthly turnover generated from retail sales, without the progressive tax structure being a part of that system.

b) Derogation from the system of reference

(30) 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.

(31) As explained in recitals (28) and (29) above, the intrinsic objective of the tax is to collect revenue for the general budget. As further explained above, all retail

[14] 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.

operators in Poland should be considered to be in a comparable legal and factual situation in light of that objective, regardless of their activities or their level of turnover.

(32) The progressivity of the tax rate structure creates a differentiation between undertakings engaged in the retail trade, which are in a comparable legal and factual situation as regards the objective of the retail tax, based on their size. Indeed, 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 undertakings with lower turnover (and thus smaller undertakings).

(33) Therefore, at this stage, the Commission considers that the measure is *prima facie* selective.

c) Justification

(34) 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[15].

(35) It is for the Member State, i.e. for the Polish authorities, to provide such justification. For this purpose, external policy objectives – such as regional, environmental or industrial policy objectives – cannot be relied upon by the Member States to justify the differentiated treatment of undertakings under a certain regime.

(36) The Polish authorities have argued that the progressive tax structure of the measure is justified on the grounds of its redistributive purposes and the greater ability to pay of undertakings with large revenues. They also argue that undertakings with large revenues often use optimisation strategies and enjoy economies of scale (the more they sell, the lower the unit costs).

(37) The progressive tax rate structure introduced by the Act differentiates between undertakings based on the size of their turnover and grants a selective advantage to undertakings with low turnover that are either totally tax exempted or pay significantly less tax in proportion of their turnover, than undertakings with a higher turnover. In the absence of specific evidence to the contrary, turnover taxes disregard the cost structure of the operator and its profitability. Progressive turnover taxes hit companies in respect of their size rather than their profitability or ability to pay. They lead to discrimination between companies on the basis of their turnover and can have important distortive effects on the market.

(38) 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

15 See for example Joined Cases C-78/08 to C-80/08 *Paint Graphos and others* [2011] ECR I-7611, paragraph 69.

requires progressive rates. For example, a certain level of progressivity could be justified if it was shown that the externalities created by the activities subject to the tax, and assuming that the tax is supposed to address such externalities, also increase progressively when the turnover (or size) of the taxpayer increases. No such justification has been provided by the Polish authorities. Moreover, Poland did not demonstrate the existence of economies of scale, nor their magnitude, nor that such economies of scale would necessarily lead to a higher profitability or ability to pay. In addition the Polish authorities have not provided any detailed arguments on the alleged optimising strategies put in place by larger or multinational companies, nor the link between such alleged behaviour and the design of the tax.

(39) Therefore, at this stage the Commission does not consider that the measure is justified by the nature and general scheme of the reference system.

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

(40) 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. The measure 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. Therefore, any aid in favour of certain industry operators is liable to affect intra-EU trade.

(41) 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 a high level of turnover, the aid granted under those measures would constitute 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.

(42) Consequently, at this stage, the Commission considers the measure to distort or threaten to distort competition and to have an effect on intra-Union trade.

4.1.5. Conclusion

(43) In light of the foregoing, the Commission takes the preliminary view that the Act constitutes State aid within the meaning of Article 107(1) of the Treaty.

4.2. Compatibility of the aid with the internal market

(44) State aid measures can be considered compatible on the basis of the exceptions laid down in the Treaty, in particular in Article 107(2) and 107(3) and in Article 106(2) TFEU. 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.

(45) The Commission notes that the Polish authorities have not provided any arguments why the Act would be compatible with the internal market.

(46) The Commission considers, at this stage, that none of the exceptions provided for in those provisions apply, as the measure does not appear to aim at any of the objectives listed in those provisions.

(47) The Commission also recalls that it cannot declare compatible a State aid measure that breaches other rules of European law such as the fundamental freedoms established by the Treaty or secondary EU legislation. At this stage, the Commission cannot exclude that the measure predominantly targets foreign-owned undertakings, which could entail a breach of Article 49 of the Treaty establishing the fundamental freedom of establishment.[16]

(48) Therefore, the Commission has strong doubts that the measure can be declared compatible with the internal market.

5. UNLAWFUL CHARACTER OF THE AID AND POSSIBLE RECOVERY

(49) The Act was not notified to the Commission in accordance with Article 108(3) of the Treaty, nor has it been declared compatible with the internal market by the Commission. Based on the preliminary assessment conducted by the Commission, the Act should be considered to constitute State aid within the meaning of Article 107(1) of the Treaty and new aid within the meaning of Article 1(c) of Council Regulation (EU) No 2015/1589[17]. Since the measure has been put into effect in violation of the standstill obligation laid down in Article 108(3) of the Treaty, it also constitutes *prima facie* unlawful aid within the meaning of Article 1(f) of Regulation (EU) No 2015/1589.

(50) If the formal investigation procedure confirms that the measure constitutes unlawful and incompatible State aid, the consequence of this finding is that the aid has to be recovered from its recipients pursuant to Article 16 of Regulation (EU) 2015/1589.

(51) As regards the State aid nature of the progressivity of the tax rate, the amount of aid granted, if any, that would be liable to be recovered from the beneficiaries, would have to be determined for each individual beneficiary through a comparison between the amount of tax actually paid by an operator, if any, and the tax that the same operator should have paid by application of a single (flat) rate to its turnover from retail sales. In the absence of any better reference, the single rate to be used as reference could be the highest marginal rate (1.4%) or the highest average rate observed amongst operators subject to the tax. It falls within the competence of Poland to decide upon the level of this fixed rate, to be applied retroactively to the entry into force of the tax. Poland would then need to collect payments from those undertakings that have paid less than they would have had to pay with the fixed rate and to reimburse those undertakings that have paid more than they would have had to pay with the fixed rate. The amounts to be recovered

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16 See, by way of analogy, Case C-385/12 *Hervis Sport- és Divatkereskedelmi Kft.* EU:C:2014:47, by which the Court of Justice held: "*Articles 49 TFEU and 54 TFEU must be interpreted as precluding legislation of a Member State relating to tax on the turnover of store retail trade which obliges taxable legal persons constituting, within a group, 'linked undertakings' within the meaning of that legislation, to aggregate their turnover for the purpose of the application of a steeply progressive rate, and then to divide the resulting amount of tax among them in proportion to their actual turnover, if – and it is for the referring court to determine whether this is the case – 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.*"

17 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 (codification) (OJ L 248, 24.9.2015, p. 9).

from the beneficiaries of aid would include recovery interest calculated as from the date the aid was awarded.

6. SUSPENSION INJUNCTION

(52) By letter of 8 July 2016, the Polish authorities were informed that the Commission would consider issuing a suspension injunction decision in accordance with Article 13(1) of Council Regulation (EU) No 2015/1589.[18] The Polish authorities submitted their comments on that letter by letter of 22 July 2016, in which they make no specific comment on the issue of suspension injunction and they argue that the measure does not constitute State aid.

(53) For the reasons set out in section 4 above, the Commission considers, at this stage, that the measure confers a selective advantage on certain undertakings, derived from State resources and imputable to the Polish State, with a potential distortive effect on competition and an effect on intra-Union trade. The Commission thus considers, at this stage, the measure to constitute State aid within the meaning of Article 107(1) of the Treaty. Moreover, for the reasons set out in recital (49) above, the Commission considers that aid to be unlawful, since it has not been notified to the Commission prior to its implementation by Poland as required by Article 108(3) of the Treaty.

(54) A suspension injunction constitutes an interim measure that the Commission may adopt, on the basis of Article 13(1) of Council Regulation (EU) No 2015/1589, requiring a Member State to suspend any unlawful aid pending a final decision by the Commission. A suspension injunction is an appropriate instrument in particular when a Member State is still granting the unlawful aid and its impact on competition is important, like in the present case.

(55) As all retail undertakings are currently subject to the progressive tax rate by the Polish authorities at the date of this Decision, the Commission considers that – in the light of the effects explained in the State aid assessment above – it is crucial to suspend immediately the application of the progressive rate for the tax. The Commission therefore considers it is necessary to issue a suspension injunction in accordance with Article 13(1) of Council Regulation (EU) No 2015/1589.

7. CONCLUSION

In the light of the above considerations, the Commission has decided to initiate the formal investigation procedure provided for in Article 108(2) of the Treaty in respect of the measure in question.

The Polish authorities and interested third parties are therefore invited to provide in their comments to the opening decision all information necessary to carry out a full assessment and to submit to the Commission the appropriate information.

In light of the foregoing considerations, the Commission, acting under the procedure laid down in Article 108(2) of the Treaty, requests Poland to submit its comments and to provide all such information as may help to assess the aforementioned measure, within one month of the date of receipt of this letter. The Commission invites the Polish

[18] See 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. 19.

authorities to transmit immediately a copy of the present decision to all (potential) beneficiaries of the aid, or at least to proceed to inform them with appropriate means.

The Commission wishes to remind Poland that Article 108(3) of the Treaty has suspensory effect (i.e. no undertaking should benefit of State aid under this scheme as long as the Commission has not closed the formal investigation), and would draw the attention of the Polish authorities to Article 14 of Regulation (EC) No 659/1999, which provides that *'where negative decisions are taken in cases of unlawful aid, the Commission shall decide that the Member State concerned shall take all necessary measure to recover the aid from the beneficiary*'.

The Commission requires Poland, in accordance with Article 13(1) of Council Regulation (EU) No 2015/1589, to suspend the application of progressive rates to its tax, until the Commission has taken a decision on the compatibility of the Act with the internal market (suspension injunction).

The State aid investigation does not prejudice investigations on the compliance of the measures with the fundamental freedoms laid down in the Treaty.

The Commission warns Poland that it will inform interested parties by publishing this letter and a meaningful summary of it in the Official Journal of the European Union. It will also inform interested parties in the EFTA countries which are signatories to the EEA Agreement, by publication of a notice in the EEA Supplement to the Official Journal of the European Union and will inform the EFTA Surveillance Authority by sending a copy of this letter. All such interested parties will be invited to submit their comments within one month of the date of such publication.

If this letter contains confidential information which should not be published, please inform the Commission within fifteen working days of the date of receipt. If the Commission does not receive a reasoned request by that deadline, you will be deemed to agree to publication of the full text of this letter. Your request specifying the relevant information should be sent by registered letter or fax to:

European Commission
Directorate-General for Competition
State Aid Registry
B-1049 Brussels

Fax No: +32-2-296.12.42

Yours faithfully,

For the Commission

Margrethe VESTAGER

Member of the Commission