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**Subject: State Aid SA.52194 (2018/FC) – Slovak Republic
Slovak Retail Turnover Tax**

Sir, /Madam

The Commission wishes to inform the Slovak Republic that, having examined the information supplied by your authorities on the matter 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.

1. PROCEDURE

- (1) On 13 December 2018, the Slovak Parliament adopted the Act on the Special Levy on Retail Chains (the “Retail Tax Act”)¹, which introduces a tax on the turnover of retailers selling food to end consumers (the “retail tax”).
- (2) The Commission became aware of the retail tax based on market information it received from October 2018 onwards. On 21 December 2018, the Commission received a complaint that alleged that exemptions from the tax under the Retail Tax Act amount to State aid to certain retailers.

¹ Act No. 385/2018 Coll. of 13 December 2018 on Special Levy on Retail Chains and on amendments to Act No. 595/2003 Coll. on income tax, as subsequently amended.

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- (3) On 11 January 2019, the Commission services sent a letter to the Slovak authorities by which they requested information on the retail tax. On 22 January 2019, the Commission services forwarded the complaint to the Slovak authorities for possible comments.
- (4) On 7 February 2019, the Commission received the reply of the Slovak authorities to the Commission's letter of 11 January 2019, as well as their comments on the complaint.
- (5) On 13 February 2019, the Commission services sent a letter to the Slovak authorities setting out their preliminary views on the matter, informing the Slovak authorities that the Commission considered issuing a suspension injunction in accordance with Article 13(1) of Council Regulation (EU) No 2015/1589² and giving them the opportunity to submit their comments.
- (6) On 5 March 2019, the Slovak authorities submitted their reply to the Commission letter of 13 February 2019.

2. DESCRIPTION OF THE RETAIL TAX

- (7) On 28 September 2018, a draft act establishing a retail tax was introduced in the Slovak Parliament. This initial draft provided for a 2.5% tax on the turnover of retailers if:
 - they operate in at least two Slovak administrative districts;
 - at least 10% of their turnover is generated by the sale of food to end consumers; and
 - the tax due exceeds EUR 5 000 per quarter, which equates to a taxable turnover exceeding EUR 200 000 per quarter.
- (8) Under the initial draft of the Retail Tax Act, franchises and trading alliances were treated as retailers who were subject to the retail tax if they fulfilled certain conditions.³ Thus, it was sufficient for a grouping of commercial establishments to use the same or interchangeable branding or trade name, which can be described as a franchise, to qualify as a merchandise retailer under the draft Retail Tax Act. In addition, trading alliances were explicitly included in the definition of merchandise retailer, so long as their members were “*associated for the purpose of joint purchasing of goods or otherwise benefiting from a concerted practice in relation to a supplier of goods.*”

² 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.

³ In particular, under Section 2, paragraph 1, letter (a) of the draft Retail Tax Act, “*merchandise retailer means a grouping of commercial establishments which use the same or interchangeable branding of trade name **or** which are operated by the same entrepreneur or by entrepreneurs being the proprietary or personally affiliated entrepreneurs, **or a trading alliance** [...]*”. (Emphasis added). In addition, according to Section 2, paragraph 1, letter (e) of the draft Retail Tax Act, “*trading alliance means a grouping of the commercial establishments operated by a number of natural persons or legal entities with separate legal personality which are not proprietary or personally affiliated entrepreneurs, associated for the purpose of joint purchasing of goods or otherwise benefiting from a concerted practice in relation to a supplier of goods.*”

- (9) In the course of the legislative procedure, a number of amendments were introduced to the initial draft, resulting in the following main features of the definitive retail tax:
- a 2.5% tax applies on the entire turnover of retailers selling food (including turnover derived from non-food sales);
 - if at least 25% of their turnover is generated by the sale of food to end consumers;
 - if they operate in at least 15% of all Slovak administrative districts (i.e. 12 out of 79 districts);
 - the members/affiliates of franchises⁴ and trading alliances⁵ are treated as distinct taxpayers for the fulfilment of the conditions for the application of the retail tax;
 - the following retailers are exempted from the tax:
 - o small and medium-sized enterprises (SMEs) as defined in Regulation (EU) No 651/2014⁶,
 - o mass catering facilities,
 - o retailers that are food producers (or affiliated to food producers) with at least 80% of their net turnover coming from the sale of food they produce to end consumers (“producer’s shops”),
 - o retailers where at least 80% of their turnover originates from the sale of food of one class (“specialised retailers”),
 - o retailers for which the tax due does not exceed EUR 5 000 per quarter;
 - the tax base does not include the net turnover of the retail outlets located in:
 - o the least developed districts in Slovakia and having a maximum of 10 employees,
 - o municipalities where there are not more than three commercial establishments selling food to end consumers.
- (10) According to the Retail Tax Act, the Ministry of Agriculture shall use the net proceeds from the retail tax, in particular, to support the agriculture and food sectors. The net proceeds are the difference between (a) the retail tax revenue and

⁴ In the version of the Retail Tax Act adopted by the Slovak parliament, Section 2, paragraph 1, letter (a) has been amended as follows: “*merchandise retailer means a grouping of commercial establishments which use the same or interchangeable branding of trade name **and** which are operated by the same entrepreneur or by entrepreneurs being the property-related or person-related entrepreneurs [...]*”. (Emphasis added).

⁵ Section 2, paragraph 1, letter (e) from the draft Retail Tax Act is not included in the final version of the adopted legislation.

⁶ Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty Text with EEA relevance. OJ L 187, 26.6.2014, p. 1–78.

(b) the amount of corporate income tax reduction due to the deduction of the retail tax.

- (11) The Retail Tax Act entered into force on 1 January 2019. The first period by which the tax will accrue is January to March 2019, with the payment of the tax due by the end of April 2019.

3. THE COMPLAINT

- (12) According to the complainant, the retail tax results in State aid being granted to retailers that are fully or partially exempted from the tax. In addition, the complainant submits that foreign-owned retailers, which have a 45% share of the retail market, will pay 99% of the retail tax.
- (13) According to data from 2017 submitted by the complainant⁷, 42 retail chains are identified in the Slovak Republic with annual turnover ranging from EUR 3 million to EUR 1.45 billion, but only the seven biggest retailers (with annual turnovers ranging from EUR 134 million to EUR 1.45 billion) will be subject to the retail tax. Out of those seven retailers, the two with the lowest turnover will benefit from partial exemptions. The remaining 35 retail chains, with annual turnovers of up to EUR 100 million, will be fully exempted from the tax because they operate in less than 12 districts.
- (14) Lastly, 25 of the 35 exempted retail chains with individual turnovers ranging from EUR 9 million to EUR 100 million are members of a single trading alliance with a combined annual turnover of more than EUR 1 billion.

4. POSITION OF THE SLOVAK AUTHORITIES

- (15) According to the Slovak authorities, several retail chains (those which meet the conditions for the application of the retail tax) dominate the food market of the Slovak Republic. While this is not an instance of a dominant position as defined by the competition rules, the existence of a distorted market situation is undeniable. Those retail chains use unfair practices, abuse their market power, unevenly distribute margins and, by dictating prices, exert pressure on local producers. As a result, those retail chains draw profits that are disproportionate to those of other participants in the food supply chain. The objective of the retail tax is to ensure that retail chains contribute to a fair redistribution of profits within the food supply chain by transferring a proportion of their profits to the State. The State will subsequently invest the tax revenue in food production and processing, in compliance with the State aid rules.
- (16) The Slovak authorities further submit that the exemption of certain companies from the tax does not amount to State aid because the exempted retailers do not cause a distortion in the food supply chain and are therefore in a different situation to retailers liable to pay tax. More specifically, the Slovak authorities submit that:
- *Trading alliances* do not necessarily have a legal personality, which could lead to difficulties with the implementation of the legislation. Furthermore, trading alliances derive no direct profit from the food supply chain. Therefore, the

⁷ Annex 6 to the complaint: *Turnover and market shares information on retail merchandisers*

retail tax applies to their individual members if they fulfil the conditions for its imposition.

- *Businesses operating in less than 15% of the districts* do not have the economic power to create imbalances in the food supply chain. Moreover, they are active in areas that are not economically viable and therefore have importance of social interest.
 - The economic power of *SMEs* is not as important as that of larger businesses and they do not extract disproportionate profits from the food supply chain. In addition, they perform socially important functions such as operating in poor or remote regions.
 - Under the objective of the reference system, *shops that are owned by food producers* should be beneficiaries of the redistribution of profits rather than contributors.
 - *Specialised retailers* are of regional significance only and do not create imbalances in the food supply chain.
 - The reason for the exemption of the *retail turnover from the least developed districts and from small municipalities* is to ensure the security of food supply for the citizens of those districts and municipalities. The exemption applies to the turnover of commercial establishments, rather than to concrete business entities. Therefore, the exemption cannot be considered as conferring an advantage to a specific company or type of goods. Furthermore, the exemption is in line with the objective to correct imbalances in the food supply chain. There are currently 20 least developed districts (out of 79) identified based on unemployment rate criteria.
 - The objective of the reference system is to address imbalances in the food supply chain. Therefore, it does not apply to entities that are not primarily food retailers, i.e. those that *generate less than 25% of their turnover from the sale of food*.
- (17) The Slovak authorities also submit that the retail tax cannot involve State aid because it has no effect on trade between Member States. In particular, foreign-owned retailers may enter the Slovak market under the same conditions as Slovak-owned retailers and will be exempted from the retail tax subject to the fulfilment of the same conditions as those applicable to Slovak-owned retailers. Furthermore, businesses exempted from the retail tax supply goods only in a limited part of the Slovak Republic and it is unlikely that those businesses would attract customers from abroad. The retail tax does not have any effect on the conditions for cross-border investment or establishment either.
- (18) Since the position of the Slovak authorities is that the retail tax does not involve State aid, they believe that there is no need to examine its compatibility with the internal market.

5. EXISTENCE OF AID

- (19) 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.”

- (20) 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.

5.1. State resources and imputability to the State

- (21) To constitute State aid, a measure must both be imputable to the State and financed through State resources.
- (22) Since the retail tax results from an Act of the Slovak Parliament, it is clearly imputable to the Slovak Republic.
- (23) 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 collect from an undertaking in normal circumstances, that condition is also fulfilled.⁸ In the present case, the Commission takes the provisional view that by providing for exemptions from the retail tax, the Slovak Republic waives resources it would otherwise have been entitled to collect from undertakings that are fully or partially exempted from that tax.

5.2. Advantage

- (24) Whenever a measure adopted by the State improves the net financial position of an undertaking, an advantage is present for the purposes of Article 107(1) TFEU.⁹ In establishing the existence of an advantage, reference is to be made to the effect of the measure itself.¹⁰ As regards fiscal measures, an advantage may be granted through different types of reduction in a company’s tax burden and, in particular, through an exemption or through a reduction in the applicable tax rate, taxable base or in the amount of tax due.¹¹ Although a measure that entails an exemption from or 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

⁸ Judgment of the Court of Justice of 16 May 2000, *France v Ladbroke Racing Ltd and Commission*, C-83/98 P, EU:C:2000:248, 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 Judgment of the Court of Justice of 8 September 2011, *Paint Graphos and Others*, Joined Cases C-78/08 to C-80/08, EU:C:2011:550, paragraph 46.

⁹ Case C-417/10 *3M Italia* EU:C:2012:184, paragraph 38.

¹⁰ Case 173/73 *Italy v. Commission* EU:C:1974:71, paragraph 13.

¹¹ Judgment of the Court of Justice of 15 December 2005, *Italy v Commission*, C-66/02, EU:C:2005:768, paragraph 78; Judgment of the Court of Justice of 10 January 2006, *Cassa di Risparmio di Firenze and Others*, C-222/04, EU:C:2006:8, paragraph 132; Judgment of the Court of Justice of 9 October 2014, *Ministerio de Defensa and Navantia*, C-522/13, EU:C:2014:2262, paragraphs 21 to 31.

which it applies in a more favourable financial position than other taxpayers and results in a loss of income to the State.¹²

- (25) The Retail Tax Act introduces a tax on the turnover of retailers selling food to end consumers. As set out in recital (9), the Act provides exemptions from taxation for certain categories of retailers and for turnover from certain retail outlets. Thus, the provisions of the Retail Tax Act fully or partially relieve certain undertakings from the payment of the retail tax. Such an exemption confers an advantage on those undertakings insofar as they are relieved of a financial burden, namely the tax on turnover from the sale of food to end consumers.
- (26) The Commission therefore takes the provisional view that the Retail Tax Act confers an economic advantage for the purposes of Article 107(1) TFEU to retailers selling food to end consumers that are fully or partially exempted from the payment of the retail tax.

5.3. Selectivity

- (27) According to the case-law, the assessment of the condition relating to the selectivity of the advantage concerned requires a determination, in the first place, of whether, under a given legal regime, a national measure is such as to favour “certain undertakings or the production of certain goods” over other undertakings which, in the light of the objective pursued by that regime, are in a comparable factual and legal situation and which accordingly suffer different treatment that can essentially be classified as discriminatory.¹³

5.3.1. Does the measure discriminate between comparable undertakings?

- (28) In order to classify a national tax measure as selective, the Commission must begin by identifying the ordinary or ‘normal’ tax system applicable in the Member State concerned, i.e. the “reference system” and thereafter demonstrate that the tax measure at issue is a derogation from that system, in so far as it differentiates between operators who, in the light of the objective pursued by that system, are in a comparable factual and legal situation.¹⁴
- (29) A 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. In the present case, the Commission considers the reference system to be the retail tax applicable to undertakings engaged in the sale of food to the end consumer in the Slovak Republic.
- (30) According to Section 4, paragraph 1 of the Retail Tax Act, the retail tax is levied on the entire turnover of retailers selling food, including turnover derived from non-food sales. The fiscal objective of the tax is thus to tax the turnover of retailers selling food, which is the subject matter and chargeable event covered by that tax.¹⁵

¹² Judgment of the Court of Justice of 15 June 2006, *Air Liquide Industries Belgium*, C-393/04 and C-41/05, EU:C:2006:403, paragraph 30 and Judgment of the Court of 15 March 1994, *Banco Exterior de España*, C-387/92, EU:C:1994:100, paragraph 14.

¹³ Case C-374/17 *A Brauerei* EU:C:2018:1024, paragraph 35 and the case-law cited

¹⁴ Case C-374/17 *A Brauerei* EU:C:2018:1024, paragraph 36 and the case-law cited.

¹⁵ Case C-374/17 *A Brauerei* EU:C:2018:1024, paragraph 39.

In light of that objective, all retailers selling food are in a comparable factual and legal situation.

- (31) As explained in recital (25), the Retail Tax Act introduces certain conditions for the application of the retail tax, as well as certain exemptions for certain types of undertakings or for turnover from certain retail outlets depending on their location. As a result, the Commission takes the provisional view that the following categories of retailers, which benefit from a full or partial exemption from the retail tax, are in a comparable legal and factual situation to retailers that are subject to the retail tax:
- Members of trading alliances and franchises;
 - Retailers operating in less than 15% of all districts;
 - Small and medium-sized enterprises;
 - Producers' shops
 - Retailers where at least 80% of their turnover originates from the sale of food of one class;
 - Mass catering facilities;
 - Retailers that generate turnover from shops with less than 10 employees in the least developed districts;
 - Retailers that generate turnover from shops in municipalities with no more than three shops selling food;
 - Retailers that generate less than 25% of their turnover from the sale of food to the end consumer; and
 - Retailers for which the tax amount does not exceed EUR 5 000 per quarter.
- (32) As regards the first category of exempted undertakings, data provided by the complainant in relation to 2017¹⁶ shows that while one member of a trading alliance (with an individual turnover of EUR 136 million) fulfils the conditions for the application of the retail tax at individual level, 25 retailers with individual turnovers ranging from EUR 9 million to EUR 100 million (which are members of one trading alliance with combined annual turnover of more than EUR 1 billion) do not, because each of them operates in less than 15% of the districts in the Slovak Republic.
- (33) As regards the second category of exempted undertakings, according to the information provided by the Slovak authorities, there are 79 districts, which means that a retailer should operate in at least 12 districts in order to fall within the scope of the retail tax. According to a study provided by the complainant¹⁷, with the exception of large international retailers, it is typical for the Slovak retail market that domestic retailers do not operate nationally but rather within one or a few

¹⁶ Annex 6 to the complaint: *Turnover and market shares information on retail merchandisers*

¹⁷ Annex 2 to the complaint: *INESS study on the special levy on merchandise retailers – what was introduced in the final version (taking into consideration the amendments of 6 December 2018).*

regions only. Typically, those retailers are members of trading alliances. Certain retailers also seem to focus their presence on the wider region of Bratislava. As a result, the introduction of the condition for operation in at least 15% of the districts means that only 7 of the identified 42 retail chains in the Slovak Republic will be subject to the retail tax.

- (34) As regards the exemption provided for SMEs, according to information provided by the complainant¹⁸, 26 out of the 42 retail chains identified on the Slovak market had turnover lower than EUR 50 million in 2017. Depending on the number of their employees or on their balance sheet total, many of those retailers would probably fulfil the definition of an SME.¹⁹
- (35) Consequently, the Commission provisionally concludes that the full or partial tax exemption available to the categories of retailers listed in recital (31) above constitutes a derogation from the reference system and, therefore, is *prima facie* discriminatory.

5.3.2. Is the measure justified by the nature and general scheme of the reference system?

- (36) A measure that creates an exception to the application of a general rule may be justified if the Member State concerned can show that that measure results directly from the basic or guiding principles of the reference system. In that connection, a distinction must be drawn between, on the one hand, the objectives attributed to a particular reference system which are extrinsic to it and, on the other, the mechanisms inherent in the system itself which are necessary for the achievement of such objectives.²⁰ It is also necessary to ensure that the measures is proportionate and it does not go beyond what is necessary to achieve the legitimate objective being pursued, in that the objective could not be attained by less far-reaching measures.²¹
- (37) According to Slovakia, the retail tax has as its objective the redistribution of disproportionate profits within the food supply chain that retail chains with significant market power are able to extract by dictating prices and exerting pressure on local producers. At this stage, the Commission has doubts that the retail tax attains that objective in an appropriate and proportionate manner.
- (38) It is only in relation to producers' shops and retailers for which the tax amount does not exceed EUR 5 000 per quarter that it can be concluded that those retailers are unable to derive disproportionate profits by dictating prices and exerting pressure on producers. Retailers that sell food primarily (at least 80%) produced by the same or an affiliated company have no commercial incentive to exert unfair trade practices on that affiliated company and only marginally deal with third party food suppliers. As regards the exemption for retailers for which the tax amount does not

¹⁸ Annex 6 to the complaint: *Turnover and market shares information on retail merchandisers*

¹⁹ Retailers are exempted from the retail tax if they fulfil the definition in Article 2 paragraph 1 of Annex I to Regulation No 651/2014, which provides that: "*The category of micro, small and medium-sized enterprises ('SMEs') is made up of enterprises which employ fewer than 250 persons and which have an annual turnover not exceeding EUR 50 million, and/or an annual balance sheet total not exceeding EUR 43 million*".

²⁰ Case C-374/17 *A Brauerei* EU:C:2018:1024, paragraph 48 and the case-law cited.

²¹ Joined Cases C-78/08 to C-80/08, *Paint Graphos* EU:C:2011:550, paragraphs 73 and 75.

exceed EUR 5 000 per quarter, it includes retailers with turnover of up to EUR 200 000 per quarter. Such small retailers are unlikely to enjoy market power allowing them to dictate prices or exert pressure on producers. Consequently, in relation to these two categories of exempted retailers the Commission provisionally considers the exemptions from the retail tax to be justified.

- (39) By contrast, it is not excluded that the other categories of retailers exempted from the retail tax could dictate prices and exert pressure on local producers due to their market size.
- (40) As regards trading alliances and franchises, because they practice joint purchasing of goods or other concerted practices in relation to suppliers, their market power relative to their suppliers must be assessed at collective rather than at individual level. The Slovak authorities do not argue that franchises and trading alliances – and their members collectively – do not have market power and indeed included them in the scope of the retail tax in the draft initially introduced to the Slovak Parliament.
- (41) In the case of one trading alliance²², the Commission observes that one of its members will be subject to the tax, while the other members of the same alliance will be exempted, even if they benefit from concerted purchasing practices. According to data from 2017 provided by the complainant²³, while three retailers with annual turnover ranging between EUR 134 million and EUR 148 million would be subject to the retail tax, the members of a trading alliance²⁴ with individual turnover of up to EUR 100 million and a combined annual turnover of more than EUR 1 billion would not be subject to the tax. Data from the database of *Euromonitor International* show that in 2018 the same retail alliance had a market share of 7.7%, making it the third biggest retail chain in Slovakia, with a significantly bigger market share than some of the retailers that would be subject to the tax, such as the fourth biggest retailer²⁵ with market share of 3.8% and another retailer²⁶ with market share of only 0.4%. Two other trading alliances²⁷ rank among the biggest retail chains in the Slovak Republic and also have significantly higher market share (2% and 2.4%) than some of the retailers that are subject to the tax. However, only one of their members is subject to the tax, all other members being exempted.
- (42) Consequently, even if individually retailers grouped in trading alliance or franchise are too small to dictate prices and exert pressure on producers, if they benefit from concerted practices towards suppliers their economic power at collective level does not justify the exemption provided for those undertakings under the Retail Tax Act. As regards the argument of the Slovak authorities that trading alliances may not have legal personality or derive revenue directly from retail, so long the franchise or trading alliance to which it belongs fulfils the conditions for the application of the tax at collective level, each of their members could be requested to declare and pay the tax as an individual undertaking. In any event, the absence of a joint

22 CBA Kereskedelmi Kft.

23 Annex 6 to the complaint: *Turnover and market shares information on retail merchandisers*

24 Coop Jednota Slovensko, spotrebné družstvo.

25 Billa (Rewe Group).

26 Milk-Agro, spol. s r.o.

27 Potraviný FRESH s.r.o and CBA Kereskedelmi Kft.

ownership for the members of the grouping of establishments does not exclude the existence of a selective treatment.

- (43) As regards retailers operating in less than 15% of all districts, the geographical scope of a retailer's activities does not seem to be a relevant proxy to establish its market power. If, as assumed by the Slovak authorities, the turnover of a retailer is a reasonable proxy for market power, the Commission observes that a retailer with a strong presence (and a high turnover) in only a few districts can still have significant market power over local food suppliers, while a retailer with a more limited presence (and a lower turnover) in many districts may not have such power.
- (44) In addition, the geographical scope of activities of a retailer does not necessarily reveal the potential reach by this retailer of customers (possibly reflecting its market power). In fact, while the most populous district in Slovakia has a population of more than 174 thousand, the least populous has population of around 12 thousand²⁸. Therefore, a retailer with operations in less than 11 districts with a large population may reach significantly more customers than a retailer with operations in more than 11 (less populous) districts. In sum, retailers operating in less than 12 districts can have comparable market power to retailers with similar turnovers operating in more districts.
- (45) The argument of the Slovak authorities that retailers operating in less than 15% of the districts are active in areas that are not economically viable and therefore have importance of social interest is not supported by any studies or data. By contrast, according to a study²⁹ submitted by the complainant, certain retailers focus on a wealthier clientele within the wider region of Bratislava. The Slovak authorities have also not explained how that argument is relevant to the purported objective of the retail tax.
- (46) As regards SMEs, the Slovak authorities have not submitted any data or studies explaining why retail chains with turnover of up to EUR 50 million do not have sufficient market power to extract disproportionate profits from the food supply chain in the same way as larger retailers. In their submission, the Slovak authorities referred to the Commission proposal for a Directive on Unfair Trading Practices Directive (UTP Directive).³⁰ Leaving aside the fact that that proposal does not lay down a turnover tax, but prohibits certain forms of unfair trading practices, its scope of application covers a much broader category of undertakings than that exempted by the retail tax. Under Article 1(2) of the draft UTP Directive currently discussed in the legislative adoption procedure, the “*Directive applies to certain*

²⁸ See the data published by the Statistical Office of the Slovak Republic for the Prešov region and the Medzilaborce region:
<https://slovak.statistics.sk/wps/portal/ext/themes/demography/population/indicators/>

²⁹ Annex 2 to the complaint: *INESS study on the special levy on merchandise retailers – what was introduced in the final version (taking into consideration the amendments of 6 December 2018)*.

³⁰ Proposal for a Directive of the European Parliament and of the Council on unfair trading practices in business-to-business relationships in the food supply chain COM(2018) 173 final - 2018/082 (COD). See also the European Parliament legislative resolution of 12 March 2019 on the proposal for a directive of the European Parliament and of the Council on unfair trading practices in business-to-business relationships in the food supply chain (COM(2018)0173 – C8-0139/2018 – 2018/0082(COD)) published on the European Parliament’s website: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P8-TA-2019-0152+0+DOC+PDF+V0/EN>

unfair trading practices which occur in relation to the sales of agricultural and food products by suppliers which have an annual turnover not exceeding EUR 2 000 000 to buyers which have an annual turnover of more than EUR 2 000 000 (...)”. This implies that even SMEs with turnover far below EUR 50 million can impose unfair trading conditions on their smaller suppliers.

- (47) As regards specialised retailers, under the Retail Tax Act such a retailer is a retailer that derives at least 80% of its turnover from the sale of one category of products (e.g. dairy or meat). A non-specialised retailer derives a much smaller part of its turnover from the same product category. This means that a specialised retailer with a turnover comparable to that of a non-specialised retailer will have significantly higher turnover in the specific product category and, therefore, is more likely to have economic power towards suppliers of the relevant product.
- (48) As regards mass catering facilities, they operate at the same stage as retailers in the food supply chain, selling food to end consumers. If mass catering facilities fulfil the other conditions for the application of the retail tax (e.g. the tax amount exceeds EUR 5 000 per quarter), then they may have the same economic power as retailers of the same size and can also contribute to the unfair distribution of profits within the food supply chain. Therefore, if the objective of the retail tax is to redistribute profits from all entities selling food to end consumers, there does not appear to be any justification to exempt mass catering facilities from that tax.
- (49) As regards the exemption provided for turnover derived by retailers in municipalities with no more than three shops selling food to end consumers and the exemption provided for turnover derived from shops with less than 10 employees in the least developed districts of the Slovak Republic, the Slovak authorities did not put forward arguments that those retailers cannot dictate prices or exert pressure on producers. Instead, they invoke the objective of those exemptions as ensuring security of food supply. The Commission has doubts that that objective constitutes an inherent objective of a retail tax based on turnover whose purported purpose is to redistribute disproportionate profits within the food supply chain. Indeed, it is doubtful that ensuring the security of food supply can be reconciled with that purported objective. If a retail chain is subject to the tax and is therefore considered to have significant market power and to generate disproportionate profits, such profits can be generated from all of its retail outlets, regardless of where they are located. In any event, the Slovak authorities have not provided any evidence or impact assessment on how those exemptions affect the security of the food supply. Nor have the Slovak authorities provided any evidence showing that there is a shortage of food supply in the relevant districts or that the application of the retail tax in those districts would cause such a shortage. Lastly, the Slovak authorities do not explain how the limitation of the exemption to shops with no more than 10 employees contributes to food security or the fulfilment of the objective of the retail tax.
- (50) Finally, as regards retailers that generate less than 25% of their turnover from the sale of food to end consumers, the share of food sales in the turnover of a retailer has no bearing on its ability to dictate prices or exert pressure on local producers. The food sales of a retailer with significant overall turnover, even if below 25%, may exceed in absolute terms the food sales of a retailer with smaller overall turnover, even above 25%. This would suggest that that retailer may have a greater

market power in the food supply chain, despite the smaller share of food sales in its turnover.

(51) In light of the foregoing, the Commission provisionally concludes that the *prima facie* discrimination caused by the retail tax is not justified as regards the following categories of retailers:

- The members of trading alliances and franchises;
- Retailers operating in less than 15% of all districts;
- Small and medium-sized enterprises;
- Retailers where at least 80% of their turnover originates from the sale of food of one class;
- Mass catering facilities;
- Retailers that generate turnover from shops with less than 10 employees in the least developed districts;
- Retailers that generate turnover from shops in municipalities with no more than three shops selling food: and
- Retailers that generate less than 25% of their turnover from the sale of food to the end consumer.

5.3.3. *Provisional conclusion on selectivity*

(52) At this stage, the Commission concludes that the retail tax is selective since it favours the categories of undertaking listed in recital (51) above as compared to undertakings liable to pay the retail tax.

(53) In their submission, the Slovak authorities appear to argue that the objective mentioned in the recital (37) above should be taken into account when assessing whether exempted retailers are in a comparable factual and legal situation to retailers liable to pay the retail tax in light of the objective of the reference system. The Commission disagrees, because it is the fiscal objective of the measure that is relevant to the purpose of the comparability assessment, whereas other intrinsic objectives of the measure can only be taken into account for the purposes of objectively justifying the discrimination caused by the measure. However, even if the objective mentioned in the recital (37) could be taken into account in the comparability assessment carried out in section 5.3.1., the same considerations presented in section 5.3.2. would apply. Thus, the retailers listed in recital (51) above would have been found to be in a comparable situation to the retailers that are subject to the retail tax. Consequently, the Commission would have provisionally concluded that the relevant tax exemptions create a discrimination between retailers in comparable situations and are *prima facie* selective with no justification by the nature and general scheme of the system.

5.4. Distortion of competition and effect on intra-Union trade

- (54) According to Article 107(1) of the Treaty, in order to constitute State aid, a measure must distort or threaten to distort competition, and it must affect intra-Union trade.
- (55) The retail trade in the Slovak Republic is open to competition. The measure relieves the exempted undertakings from a tax which they would otherwise have been obliged to pay from their budget. The aid granted under the measure therefore constitutes operating aid and is liable to improve the competitive position of the exempted undertakings compared to retail undertakings, which are subject to the tax. The Court of Justice has consistently held that operating aid distorts competition. Therefore, any aid granted to the undertakings exempted from the retail tax should be considered to distort or threaten to distort competition by strengthening the financial position of those undertakings on the Slovak retail market.
- (56) The retail market in Slovakia is characterised by the presence of both Slovak operators and operators from other Member States.³¹ The exemptions from the retail tax provide a selective advantage to certain retail undertakings while other, mainly foreign owned, retailers are subject to the retail tax.
- (57) The Court of Justice has consistently held that it is not necessary to establish that the aid has an actual effect on trade between Member States but only that it is liable to affect such trade.³² In particular, the Court of Justice has ruled that “*where State financial aid strengthens the position of an undertaking as compared with other undertakings competing in intra-[Union] trade, the latter must be regarded as affected by the aid.*”³³ Furthermore, public support can have an effect on trade between Member States even if the recipient is not directly involved in cross-border trade; the subsidy may for example make it more difficult for operators in other Member States to enter the market.³⁴ Even a subsidy provided to an undertaking, which provides only local or regional services, may have an effect on trade where undertakings from other Member States could provide such services (also through the right of establishment).³⁵
- (58) In the case at hand, the exemptions from the retail tax strengthen the position of the exempted undertakings compared to undertakings subject to the tax. Based on the information submitted by the complainant, six out of the seven retailers which will

³¹ E.g. Tesco (UK), Lidl (Germany), Kaufland (Germany), Billa (Austria), Terno (Malta), CBA Slovakia (Luxembourg).

³² Judgment of the Court of Justice of 14 January 2015, *Eventech v The Parking Adjudicator*, C-518/13, EU:C:2015:9, paragraph 65; Judgment of the Court of Justice of 8 May 2013, *Libert and others*, Joined Cases C-197/11 and C-203/11, EU:C:2013:288, paragraph 76.

³³ Judgment of the Court of Justice of 14 January 2015, *Eventech v The Parking Adjudicator*, C-518/13, EU:C:2015:9, paragraph 66; Judgment of the Court of Justice of 8 May 2013, *Libert and others*, Joined Cases C-197/11 and C-203/11, EU:C:2013:288, paragraph 77; Judgment of the General Court of 4 April 2001, *Friulia Venezia Giulia*, T-288/97, EU:T:2001:115, paragraph 41.

³⁴ Judgment of the Court of Justice of 14 January 2015, *Eventech v The Parking Adjudicator*, C-518/13, EU:C:2015:9, paragraph 67; Judgment of the Court of Justice of 8 May 2013, *Libert and others*, Joined Cases C-197/11 and C-203/11, EU:C:2013:288, paragraph 78; Judgment of the Court of Justice of 24 July 2003, *Altmark Trans*, C-280/00, ECLI:EU:C:2003:415, paragraph 78.

³⁵ Judgment of the Court of Justice of 24 July 2003, *Altmark Trans*, C-280/00, EU:C:2003:415, paragraphs 77 and 78.

be subject to the retail tax are owned by undertakings based in other Member States. Therefore, the measure strengthens the position of the undertakings exempted from the tax compared to undertakings, which will be subject to the tax and which compete in the EU-market, and thereby the measure is liable to affect trade between Member States.

- (59) Furthermore, the measure could discourage new operators from other Member States to enter the Slovak market if such operators do not qualify for a tax exemption.
- (60) Consequently, at this stage, the Commission considers that the measure is liable to distort or threaten to distort competition and to have an effect on intra-Union trade.

5.5. Provisional conclusion on the existence of aid

- (61) In light of the foregoing, the Commission takes the provisional view that the retail tax constitutes State aid within the meaning of Article 107(1) TFEU.

6. COMPATIBILITY OF THE AID WITH THE INTERNAL MARKET

- (62) 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.³⁶
- (63) The Commission notes that the Slovak authorities have not provided any arguments why the measure would be compatible with the internal market.
- (64) The Commission considers, at this stage, that none of the exceptions provided for in those provisions apply, since the measure does not appear to be aimed at any of the objectives listed in those provisions.
- (65) The Commission also recalls that it cannot declare a State aid measure compatible with the internal market where the aspects of the aid contravene other provisions of the Treaty that are indissolubly linked to the object of the aid.³⁷ At this stage, the Commission cannot exclude that the retail tax predominantly targets foreign-owned undertakings, which could entail a breach of Article 49 and Article 54 TFEU, the provisions establishing the fundamental freedom of establishment.³⁸
- (66) Consequently, the Commission has strong doubts that the measure can be declared compatible with the internal market.

³⁶ Case T-68/03 *Olympiaki Aeroporia Ypiresies v Commission* EU:T:2007:253, paragraph 34.

³⁷ Case C-74/76 *Ianelli v Meroni* EU:C:1977:51, paragraph 14.

³⁸ See, by way of analogy, Judgment of the Court of Justice of 5 February 2014, *Hervis Sport- és Divatkereskedelmi Kft. C-385/12*, EU:C:2014:47, in 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.”

7. UNLAWFUL NATURE OF THE AID AND POSSIBLE RECOVERY

- (67) The measure was not notified to the Commission in accordance with Article 108(3) TFEU, nor has it been declared compatible with the internal market by the Commission. Based on the preliminary assessment conducted by the Commission, the measure introduced by the Retail Tax Act should be considered to involve State aid within the meaning of Article 107(1) TFEU and new aid within the meaning of Article 1(c) of Council Regulation (EU) No 2015/1589³⁹. Since the measure has been put into effect in violation of the standstill obligation laid down in Article 108(3) TFEU, it also constitutes *prima facie* unlawful aid within the meaning of Article 1(f) of Regulation (EU) No 2015/1589.
- (68) If the formal investigation procedure confirms that the measure constitutes unlawful and incompatible State aid, the consequence of this finding is that any aid granted has to be recovered from its recipients pursuant to Article 16 of Regulation (EU) 2015/1589. 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 by calculating the retail tax that the operator should have paid in the absence of the measure. The amounts to be recovered from the beneficiaries of aid would include recovery interest calculated as from the date the aid was awarded.
- (69) However, aid would not need to be recovered from any undertaking enjoying an exemption below the threshold for *de minimis* aid of EUR 200 000 laid down by Article 3, paragraph 2, of Regulation No 1407/2013⁴⁰, provided the other requirements laid down by that regulation are fulfilled.

8. SUSPENSION INJUNCTION

- (70) By letters of 11 January and 13 February 2019, the Slovak authorities were informed that the Commission considered issuing a suspension injunction in accordance with Article 13(1) of Council Regulation (EU) No 2015/1589⁴¹. The Slovak authorities were given the possibility to comment and submitted their comments by letter of 5 March 2019, in which they argue that the measure does not constitute State aid.
- (71) For the reasons set out in above, the Commission considers, at this stage, that the measure confers a selective advantage on certain undertakings, which is derived from State resources and is imputable to the Slovak Republic, and that it has a potential distortive effect on competition and on intra-Union trade. The Commission thus considers, at this stage, the measure to constitute State aid within the meaning of Article 107(1) TFEU. Moreover, for the reasons set out above, the Commission considers that aid to be unlawful, since it has not been notified to the Commission prior to its implementation by Slovakia as required by Article 108(3) of the Treaty.

³⁹ 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).

⁴⁰ Commission Regulation (EU) No 1407/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid. OJ L 352, 24.12.2013, p. 1–8.

⁴¹ 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.

- (72) The classification as unlawful State aid of a national measure that forms the subject matter of a decision to initiate the formal investigation procedure requires the Member State to which that decision is addressed to immediately suspend the implementation of that measure.⁴² In addition, in order to enable the Commission to counteract any infringement of the rules laid down in Article 108(3) TFEU, the Court of Justice and Article 13(1) of Council Regulation (EU) No 2015/1589 also conferred on the Commission the power to require the Member State concerned to suspend immediately the payment of any aid which it considers to be unlawful, after giving that Member State an opportunity to submit its comments on the matter.⁴³
- (73) A suspension injunction therefore constitutes an interim measure that the Commission may adopt, requiring a Member State to suspend any unlawful aid pending a final decision by the Commission. The conditions for the adoption of the suspension injunction, laid down in Article 13(1) of Council Regulation (EU) No 2015/1589, are twofold: a) a substantive condition, namely the classification by the Commission, at that stage of the procedure, of the national measure concerned as unlawful State aid, and b) a procedural condition, namely giving the Member State concerned the possibility to submit its comments.⁴⁴
- (74) The retail tax entered into force on 1 January 2019. The first period when the tax accrues is the first quarter of 2019 (January – March 2019) with the payment of the tax due by the end of April 2019. The Slovak authorities, when asked for their comments on the possibility of initiating the formal investigation procedure and the possibility of issuing a suspension injunction, limited their comments to the view that the measure does not constitute State aid. In light of those comments, the Commission considers that there is a risk that the measure, which has been implemented in breach of the notification and standstill obligations imposed by the Treaty, will not be suspended by the Slovak authorities on their own initiative despite the initiation of the formal investigation procedure.⁴⁵
- (75) In the light of the expected effects of the measure set out in the State aid assessment above, it is crucial to suspend immediately the application of the measure. 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.

9. CONCLUSION

In the light of the above considerations, the Commission has decided to initiate the formal investigation procedure provided for in Article 108(2) TFEU in respect of the measure introduced by the Retail Tax Act.

⁴² Judgment of the General Court of 25 April 2018, *Hungary v European Commission*, T-554/15, EU:T:2018:220, paragraph 27.

⁴³ Judgment of the General Court of 25 April 2018, *Hungary v European Commission*, T-554/15, EU:T:2018:220, paragraph 30.

⁴⁴ Judgment of the General Court of 25 April 2018, *Hungary v European Commission*, T-554/15, EU:T:2018:220, paragraph 70.

⁴⁵ Judgment of the General Court of 25 April 2018, *Hungary v European Commission*, T-554/15, EU:T:2018:220, paragraph 136.

The Slovak authorities and interested third parties are invited to provide in their comments to this letter 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) TFEU, requests the Slovak Republic to submit its comments and to provide all such information as may help to assess the measure, within one month of the date of receipt of this letter. The Commission requests the Slovak authorities to forward a copy of this letter to all (potential) beneficiaries of the aid immediately, or at least to proceed to inform them with appropriate means.

The Commission wishes to remind the Slovak Republic that Article 108(3) TFEU has suspensory effect (i.e. no undertaking should benefit from State aid under this scheme as long as the Commission has not closed the formal investigation), and would draw the attention of the Slovak authorities to Article 16 of Council Regulation (EU) No 2015/1589, 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 measures to recover the aid from the beneficiary.

The Commission requires the Slovak Republic, in accordance with Article 13(1) of Council Regulation (EU) No 2015/1589, to suspend the application of the measure, 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 the Slovak Republic 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.

Yours faithfully,
For the Commission

Margrethe VESTAGER
Member of the Commission