

## The Hungarian Retail Sales Tax in the Changing EU Context

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### Keywords:

retail sales tax,  
crisis,  
Hungary,  
European Union,  
special taxes

**Abstract:** In the last twenty years, Hungary has had three periods of special taxes (introduced as a result of the crises), but before and after 2010, and after the recession following the COVID-19 epidemic and the Russian-Ukrainian war, there were different legal policy reasons behind special taxes (including the retail sales tax). This raises questions as to whether the regulatory solutions implemented to address market failures during the first period are playing the same role today as they did in the past, and how their role has changed over the years. The introduced taxes often remain part of the general tax system, i.e. they are applied on a permanent basis (rather than on a temporary basis, as is usual with special taxes), and in 2023 they already accounted for almost 14% of total tax revenue (a higher proportion than, for example, corporate tax), which puts their role in the tax system in a different light. The Court of Justice of the European Union (CJEU) has repeatedly examined the EU framework, but it appears that the control has been weakened, mainly due to the impact of the current crises. At the same time, the Hungarian Constitutional Court is bound by the limits of the debt brake when examining the constitutional framework. The study explores the regulation of the Hungarian retail sales tax and its EU context, in particular with regard to the changes triggered by the crises.

### 1. Introduction

The regulation and practical application of the Hungarian retail sales tax have been referred to the Court of Justice of the European Union in several cases. The difficulty in deciding the issue is mostly attributable to the fact

that while tax policy is a national competence and raises sensitive sovereignty issues, the assessment of the compatibility of aid measures with EU law falls within the exclusive competence of the European Commission. The cases brought before the CJEU concerning the Hungarian retail tax show that the issue is far from straightforward. It is already difficult to determine whether the issue is within the realm of tax or state aid policy and, if state aid is involved, its permissibility may also be open to debate.

Therefore, after presenting the background of the Hungarian retail sales tax, this paper will analyze two retail sales tax decisions before the Court of Justice of the European Union (CJEU), as they may shed light on new trends in the context of the crisis.

The cases before the CJEU have been examined under the preliminary ruling procedure, which will presumably show that the Court of Justice is taking account of changing Community policy trends in its rulings and that the crisis has led it to adopt more lenient rulings for Member States and to make less consistent efforts to adapt to its previous case law. Thus, the change in the legal policy behind the special taxes in the wake of the crises has been coupled with a permissive attitude on the part of the European Union.

## 2. Taxes on the Retail Sector: Special or Extraordinary Tax?

It is argued here that the term “special tax” is more appropriate than “extraordinary tax,” because it is precisely the temporal scope of the extraordinary nature of this tax that may be in question. The term special tax is an apt description of the difference between these special taxes and the traditional main taxes. At present, the special retail tax in a way complements the traditional tax system, and it is therefore necessary to examine how it can be integrated into the tax system. This study uses the term sectoral special tax because the burden on the retail sector is specific as it applies to this sector in a variety of ways. The lesson of the three special tax reform periods of the past decades is that it is difficult to define the exceptional and temporary nature of special tax.<sup>1</sup> On the one hand, since it is a crisis tax, the legislator often does not know in advance how long special tax will be in force. Even

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<sup>1</sup> Péter Darák and Dóra Lovas, “Az adórendszer deszantosai: a különadók,” *Jogtudományi Közlöny*, no. 11 (2023): 481–91.

if the law contains an expiry date, it is often extended in the meantime. This suggests that special tax is adapted to the duration of the budgetary revenue squeeze. One can never know in advance how long a special tax will last.<sup>2</sup> The specific time limits of the statutory scope of special tax overshadow the fact that it is justified to maintain special tax for as long as the circumstance giving rise to it exists. It raises questions as to whether, once the triggering event has ceased to exist, the special tax must necessarily also cease to exist or whether it can remain part of the tax system. It is also unclear whether its abolition can be enforced under public law. These questions are not yet answered by jurisprudence.

Even if the special tax is a specific form of public revenue, its principles cannot be radically different from those of taxes in general. It must be fair, neutral and proportionate, it must fulfil a redistributive and behavioral function, it must help to mitigate market failures and foster economic development, but it must not seriously distort the market, it must not threaten stability and it must not be confiscatory. The introduction of special taxes is characterized by at least one aspect of cautious care on the part of the legislator, namely that it selects the taxable subject and, in most cases, the taxable person to match it, with great care. This caution is fully justified in light of the delicate competitive situation in the market. It can also be observed that the legislator often corrects ex post excessive tax rates that have a detrimental effect on market conditions.<sup>3</sup>

### 3. History of the Retail Sales Tax between 2010 and 2020

#### 3.1. Theoretical Issues

The early 2000s saw a rapid expansion of discount chains around the world, changing the balance of power in the market and reorganizing the structure of traditional retailing.<sup>4</sup> However, in the Hungarian context, these

<sup>2</sup> Gabriella Csűrös, “Tax System in Hungary and Its Changes Due to the Crisis – Pioneer or Hazardous Method of Sectoral Taxation?,” in *Tax Authorities in the Visegrad Group Countries: Common Experience after Accession to the European Union*, eds. Marcin Burzec and Paweł Smoleń (Lublin: Katolicki Uniwersytet Lubelski Jana Pawła II, 2016), 85–113.

<sup>3</sup> Csűrös, “Tax System in Hungary and Its Changes Due to the Crisis,” 85–113.

<sup>4</sup> Noémi Hajdú, “Mi az Aldi kereskedelmi titka, amivel meghódította a magyarok szívét? A választ itt találja,” in *Marketingkaleidoszkóp 2017. Tanulmányok a Marketing és Turizmus Intézet kutatási eredményeiből*, ed. István Piskóti (Miskolc: Miskolci Egyetem Marketing Intézet, 2017), 112–9.

discounters were mainly foreign-owned, while the Hungarian chains were large in number, but they were cooperative and most of the members had only independent, spontaneously organized small shops. Their cooperation is also inadequate, as they are often limited to certain sub-regions and thus operate in a highly decentralized manner. Hungarian franchised chains (e.g. CBA) could not compete with large international chains in terms of price and product range.<sup>5</sup>

In Hungary, the shop retail sector tax<sup>6</sup> was first introduced for a limited period (2010–2012). The aim was to improve the balance of public finances, which had been disrupted following the 2008 global economic crisis, taking into account the ability of retailers to bear the burden.<sup>7</sup> The special tax was based on turnover rather than profit and was applied progressively to individual taxpayers. It was later criticized most for these features. On the one hand, the use of turnover instead of profit was misleading, as the retail sector was also loss-making after the 2008 global economic crisis, and on the other hand, the progressivity of the tax was controversial, as it hit large commercial companies – mainly foreign ones – harder than legally independent companies<sup>8</sup> – mainly Hungarian ones.

When the retail sales tax is introduced, it can be considered a crisis tax, as most of this type of tax was introduced in Hungary as a result of the global economic crisis in 2008. The main reason for introducing a special tax is its flexibility, as it can quickly resolve or mitigate crises and ensure the stability of public finances. The Hungarian government quickly realised the benefits of such a special tax, as it can generate significant fiscal revenues and strengthen domestic companies.<sup>9</sup> Between 2010 and 2012, there

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<sup>5</sup> Charles S. Mayer and Reza M. Bakhshandeh, “Global Vs. Local-The Hungarian Retail Wars,” *Journal of Business & Retail Management Research* 10, no. 1 (2015): 149–58; Tamás T. Sikos and József Kovács Csaba, “Az élelmiszerdiszkontok helyzete, különös tekintettel a Coop-üzletlánccal Észak-Magyarországon folytatott versenyükre,” *Területi Statisztika* 60, no. 6 (2020): 688–713.

<sup>6</sup> Special tax on retail trade: 0.1% (between HUF 0.5 and 30 billion), 0.4% (between HUF 30 and 100 billion), 2.5% (above HUF 100 billion).

<sup>7</sup> Act XCIV of 2010 on the special tax on certain sectors.

<sup>8</sup> The Hungarian retail companies concerned are mainly franchised.

<sup>9</sup> Dániel Deák, “Szankcionálható-e az árbevételre vetített progresszív adó?” *Jogi Melléklet*, no. 9 (2020): 91–2.

were more than 150,000 operators in the retail sector.<sup>10</sup> The data also show that the number of retail outlets increased from 2010 to 2012 and then steadily declined from 2013, driven by the introduction of the special tax, the creation of national tobacconists, the development of an online check-out system and the ban on Sunday opening for one year in 2015. However, it is also clear that, despite the high number of retail outlets, the market is concentrated, with only a few large, typically foreign-owned multinationals concentrating the vast majority of profits.<sup>11</sup>

New rules were introduced in 2012, partly because the transitional special tax was planned to apply until the end of that year. In addition, under the EU's excessive deficit procedure, the Council of the European Union<sup>12</sup> decided in the summer of 2012 to suspend part of the EU's cohesion funds from January 2013 unless Hungary took meaningful fiscal adjustment measures to bring its public deficit below 3%.<sup>13</sup> At the same time, however, the special tax was subject to an EU procedure which called into question its legality in several respects. Therefore, the sector-specific tax on shop retailing was abolished. There have been other small attempts to intervene in the sector, but it was only reintroduced in 2020.<sup>14</sup> From 2012, a public health product tax<sup>15</sup> would apply, which, in addition to raising tax revenue for the state, was introduced to reduce the consumption of products that are harmful to health. It is also worth mentioning, as a burden on the retail sector, that VAT was increased to 27% for most products in 2012.

<sup>10</sup> Food retail outlets account for less than 30% of the more than 150,000 shops. "Number of retail outlets by type of outlet," KSH, accessed March 9, 2024, [https://www.ksh.hu/stadat\\_files/bel/hu/bel0002.html](https://www.ksh.hu/stadat_files/bel/hu/bel0002.html).

<sup>11</sup> Gabriella Csűrös and Dóra Lovas, "The Boomerang Effect: Sectoral Extraordinary Taxes in Hungary (2006–2024)," *International Tax Law Review*, no. 2 (2023): 189–217.

<sup>12</sup> 2012/156/EU: Council Implementing Decision of 13 March 2012 suspending commitments from the Cohesion Fund for Hungary with effect from 1 January 2013 (O.J.E.C. L78, 17 March 2012), 19–20.

<sup>13</sup> CJEU Judgment of 5 February 2014, *Hervis Sport- és Divatkereskedelmi Kft. V. NTC*, Case C385/12, ECLI:EU:C:2014:47.

<sup>14</sup> For more on the context in which the special tax was introduced, see: Csűrös and Lovas, "The Boomerang Effect," 189–217.

<sup>15</sup> Introduced by Act CIII of 2011 on the Public Health Product Tax, a turnover type tax. Its scope has been extended and increased over time, before being re-regulated as an extra-profit tax from 2022.

### 3.2. Analysis of Relevant Decisions of the CJEU

The special tax on the retail sector was introduced in 2010. This tax became part of the Hungarian tax system as a progressive type of tax, by taxing retail companies differently based on turnover. The compatibility of the tax with EU law was twice referred to the CJEU and, although similar issues were raised, different rulings were given.

As a starting point for the analysis of the cases, the TFEU draws a distinction between the rules on state aid<sup>16</sup> and the rules on tax<sup>17</sup> provisions of the Member States.<sup>18</sup> One of the reasons for this is that while the former is an EU competence, the latter is a Member State competence. Member State courts may have difficulties in deciding which category of national provision should be included and may even refer the matter to the CJEU for a preliminary ruling to determine compatibility with EU law. It should be noted that in both of the cases analyzed – the Hervis case and the Tesco case – the applicant invoked the existence of State aid, but only in the latter case did the CJEU address the issue.

In the Hervis case,<sup>19</sup> the CJEU examined for the first time the compatibility with EU law of the special sectoral retail tax rules introduced in 2010. At the heart of the problem was the fact that, when determining the retail tax base, affiliated companies – mostly foreign – were obliged to add up their turnover and pay the progressive rate on that basis.

In comparison, businesses operating in franchise form – mainly with Hungarian ownership – did not have to do the same. According to the Advocate General's Opinion in the case, it can be assumed that the Hungarian legislation does not discriminate and therefore does not infringe on the freedom of establishment,<sup>20</sup> but it would be worth examining whether it is compatible with the VAT Directive, which the CJEU cannot do without

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<sup>16</sup> Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union (TFEU), 107–109.

<sup>17</sup> TFEU 116 and 117.

<sup>18</sup> CJEU Judgement of 11 July 2014, *Distribuidora de Televisión Digital, SA*, Case T-533/10, ECLI:EU:T:2014:629.

<sup>19</sup> CJEU Judgment of 5 February 2014, *Hervis Sport- és Divatkereskedelmi Kft. V. NTC*, Case C385/12, ECLI:EU:C:2014:47.

<sup>20</sup> Here, the Advocate General argues that the special retail tax is a turnover tax, but in the Tesco case it is a direct tax. See: Opinion of advocate general Juliane Kokott, Case C 323/18, para. 33.

the national court submitting a new request for a preliminary ruling on the interpretation of that act.<sup>21</sup>

The CJEU, however, considers that a national legislation that imposes a progressive flat-rate charge on turnover by requiring taxable persons that are affiliated to each other in a group of companies to aggregate their turnover (while they are mostly affiliated to companies established in other Member States) infringes the freedom of establishment. Thus, if there is discrimination, the Hungarian legislation is not compatible with European Union law.<sup>22</sup> In the *Hervis* case, the CJEU voted in favor of the progressive sector-specific tax being State aid, without making any specific statement to that effect. However, the CJEU cannot decide for the national court, so the Hungarian courts have been given the task of examining whether there is discrimination in that particular case (i.e. whether the taxpayers in the group of companies in the retail shop market of the Member State concerned and falling within the top tax bracket of the special tax are mostly companies established in another Member State). In 2014, the Hungarian court found, on the basis of the CJEU's interpretation of EU law, that the Hungarian legislation constitutes indirect discrimination. However, following an application for review by the defendant, the case was referred to the Hungarian Supreme Court, which had to rule on the discriminatory nature of the Hungarian legislation.<sup>23</sup> In its judgment, the Supreme Court held that the distinction between taxpayers belonging to a group of retail businesses and those not belonging to a group of retail businesses is clearly not direct discrimination, but indirect discrimination since it has the effect of placing legal entities linked to other companies within a group at a disadvantage. This statement stems from two specific features of the sectoral retail tax: firstly, the highly progressive tax rate at the top bracket and, secondly, the fact that the tax is based on the consolidated, i.e. notional turnover of all companies affiliated with the group.<sup>24</sup> Thus, the decision of the Hungarian court of first instance, taking into account the result of

<sup>21</sup> Opinion of advocate general Juliane Kokott, Case C385/12, ECLI:EU:C:2013:531.

<sup>22</sup> Group taxpayers were taxed on the basis of "fictitious turnover".

<sup>23</sup> EH 2016.01.K3 The procedure to be followed on the grounds of the EU incompatibility of the tax base aggregation rule in Section 7 of the Special Tax Act [Különadó tv. 7. §; 2003. évi XCII. tv. 124/B. §].

<sup>24</sup> Act XCIV of 2010 on the special tax on certain sectors 7. §.

the preliminary ruling procedure, is correct, as the Hungarian legislation was more disadvantageous for Hungarian subsidiaries of international companies. The Hungarian Supreme Court also rejected the defendant's request for a new preliminary ruling, on the grounds that, first, it is not obliged to refer every case to the CJEU and, second, the most important limitation on the questions to be asked is that they cannot search for an answer which the CJEU does not have jurisdiction to give.

Of note, in a subsequent case, *Portugal v. Commission*, the CJEU also established that the entire territory of a Member State should not always be taken as a benchmark when assessing selectivity.<sup>25</sup> The latter decision confirmed the fiscal sovereignty of the Member States and autonomous regions.

After the *Hervis* case, several foreign affiliates tried to take advantage of the ruling, but some of them were disappointed, as there were cases where the Hungarian Supreme Court did not find that there was discrimination.<sup>26</sup> In one case, the Hungarian court found that there was no discrimination against a Hungarian subsidiary of an Australian company. This is because the legislation does not generally require the net turnover of affiliated companies to be aggregated unless the affiliated company is also subject to the sectoral special tax. The performance of the foreign parent companies involved in the case was outside the scope of the special tax. Therefore, in this case, it was irrelevant whether each special taxable entity had a foreign parent company which could not be considered a special taxable entity. The CJEU did not say in general that the Hungarian special tax law is contrary to EU law, but that indirect discrimination may occur if the existence of a foreign affiliated taxpayer increases the tax base and consequently the tax burden of the taxpayer. The latter is always a matter for the national court to decide.

There was also a case pending before the Hungarian Supreme Court concerning a special tax on the telecommunications market, in which the institution rejected the reference to the *Hervis* case because it concerned

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<sup>25</sup> CJEU Judgment of 6 September 2006, February 2014, *Portuguese Republic v. Commission of the European Communities*, Case C-88/03, ECLI:EU:C:2006:511.

<sup>26</sup> The Hungarian Supreme Court Kfv.35.010/2018/11.

the regulation of a special tax on retail sales in shops, which is a different type of taxation, a banded tax burden based on turnover.<sup>27</sup>

A few years later, however, another Hungarian decision was brought before the CJEU, requesting a discriminatory assessment of the retail sales tax. Some retail businesses (e.g. Tesco, Lidl, Penny Market) typically operate through a foreign-owned domestic company carrying out its retail activities through a number of branches scattered throughout the country. While these companies are not covered by the *Hervis* ruling (as they are not affiliated companies), they are disadvantaged compared to the franchise companies operating in Hungary (e.g. Coop, Reál) as a result of the Hungarian special tax law. Tesco's case was referred to the CJEU for a preliminary ruling, in which the commercial company challenged the compatibility with EU law of the sectoral special tax imposed on it for the financial years 2010–2012 before the Administrative and Labour Court of Budapest.<sup>28</sup> Tesco raised the issue of state aid, as companies operating in franchise form – mainly Hungarian – received a significant discount, which distorts competition. It argued that the tax legislation infringes the freedom of establishment, the principle of equality, constitutes prohibited state aid and is contrary to Article 401 of the VAT Directive.<sup>29</sup> On the latter claim, the national court did not ask the CJEU a question.

According to the Advocate General in the case, there was no overt or direct discrimination, since it is true that the progressive tax treats businesses with higher turnover differently from those with lower turnover, but the rules for levying the special tax do not discriminate according to the place of establishment or origin of the business. Furthermore, there was no obstacle to Tesco adapting its organizational structure to the changed tax circumstances. The Hungarian sectoral special tax is not targeted at foreign companies, but at multinational companies that operate internationally and across borders and seek to ensure that profits are taxed as little

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<sup>27</sup> The Hungarian Supreme Court Kfv.35.250/2016/7.

<sup>28</sup> CJEU Judgment of 3 March 2020, *Tesco-Global Áruházak Zrt. v. NTC*, Case C-323/18, ECLI:EU:C:2020:140.

<sup>29</sup> Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (O.J.E.C. L347, 11 December 2006), 1–118.

as possible. Fundamental freedoms do not require Member States to tax independently of the legal form.<sup>30</sup>

The CJEU is not bound by what is stated in the Advocate General's Opinion, but in this case, it has also followed the arguments set out in the Opinion. In a departure from the *Hervis* case, the Court held that the principle of freedom of establishment was not infringed because there was no discrimination simply because foreign companies were more heavily penalized.<sup>31</sup> Furthermore, there is no indirect discrimination and therefore no prohibited state aid. Also, according to the CJEU, persons subject to compulsory payment cannot rely on the fact that the exemption granted to other persons constitutes state aid in order to exempt themselves from payment.<sup>32</sup>

However, there is a case law of the CJEU where it has been held that there is a possibility that the same state intervention may constitute both a tax and an aid measure. In such cases, taxpayers may – if that is proven – be able to obtain a refund of the tax that constitutes (prohibited) state aid.<sup>33</sup> If the measure is presumed to be state aid, the national court is obliged to grant “legal certainty” to the legal entities.<sup>34</sup>

The *Hervis* and *Tesco* cases also show that the practice of the CJEU is not consistent and that the crises have led to a wider intervention of Member States in the market, coupled with a permissive attitude of the EU.

It is interesting to note that, in essentially similar circumstances, the *Hervis* case violates Hungarian law, while the *Tesco* case does not. The fact is that the greatest difficulty in the EU's examination of Member State rules on progressive special taxes is that tax policy is a Member State competence, in which it cannot directly intervene. If, however, a Member State's measure is deemed to constitute prohibited state aid, this also means that

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<sup>30</sup> Opinion of Advocate General Juliane Kokott in Case C 323/18. [ECLI:EU:C:2019:567.].

<sup>31</sup> Case C-323/18, 72 and 76.

<sup>32</sup> CJEU Judgment of 29 April 2021, *I.W. and R.W. v. Bank BPH S.A.*, Case C-390/98, ECLI:EU:C:2001:456, 80.

<sup>33</sup> CJEU Judgment of 7 September 2006, *Laboratoires Boiron SA.*, Case C-526/04, ECLI:EU:C:2006:528.

<sup>34</sup> CJEU Judgment of 21 November 2013, *Deutsche Lufthansa AG v. Flughafen Frankfurt-Hahn GmbH*, Case C-248/12, ECLI: EU:C:2013:755, 30 and 45.

a broader interpretation of the concept of state aid prevails, while the principle of fiscal sovereignty is pushed to the background.<sup>35</sup>

It is also important for the distinction between state aid and tax provisions that the assessment of the compatibility of aid measures with EU law (the internal market) is the exclusive competence of the European Commission,<sup>36</sup> while tax policy is the competence of the Member States. In the latter case, the EU institutions only have competence if a measure is both aid and a tax measure.

### 3.3. Tax or State Aid?

In the Hervis case, the CJEU did not deal with the separation of the state aid and tax issue (as it was not part of the reference for a preliminary ruling), whereas in the Tesco case, the CJEU only dealt with the tax and state aid issues in a tangential manner. But the question arises: what if the state intervention is both tax and state aid?<sup>37</sup>

In one of the cases before the Hungarian Supreme Court, the plaintiff sought an injunction against the application of the Hungarian special tax law<sup>38</sup> on the ground that it constituted State aid under Article 107 TFEU. According to the facts of the main case, the applicant submitted a self-assessment to the National Tax and Customs Office (NTC) in 2011, in which it stated that it had not incurred a special tax on retail trade in 2010.

Following the NTC's refusal and the decision of the Supreme Court in a similar case,<sup>39</sup> the plaintiff initiated an administrative lawsuit. It claimed that the special shop-retail tax is, *inter alia*, discriminatory, contrary to Articles 49 and 54 TFEU and constitutes prohibited State aid.

The Administrative and Labour Court of Veszprém suspended the proceedings pending before the CJEU in the Tesco case C-323/18 until the final conclusion of the preliminary ruling proceedings. However, as a result of the aforementioned Tesco ruling, the Veszprém court dismissed

<sup>35</sup> Dóra Lovas, "Az Európai Unió Bíróságának energiaszektort érintő gyakorlata az EUMSZ 107. cikk (1) bekezdés fogalmi elemeinek vonatkozásában," *Kúriai Döntések-Bíróági Határozatok*, no. 11 (2021): 1743–50.

<sup>36</sup> Case C-248/12, 28.

<sup>37</sup> Case C-526/04.

<sup>38</sup> Act XCIV of 2010 on the special tax on certain sectors.

<sup>39</sup> The Hungarian Supreme Court Kfv.I.35.116/2015/8.

the plaintiff's claim, finding that the Hungarian legislation does not constitute prohibited state aid in the present case. As regards the nature of the prohibited State aid alleged by the applicant in relation to the special levy, the CJEU has already ruled on several occasions that taxes do not fall within the scope of its state aid provisions unless they form an integral part of them. In order for a tax to be considered an integral part of an aid measure, there must be a compulsory link between the tax and the aid under the relevant national legislation, that is to say, the tax revenue must be used to cover the aid, which thus directly affects the amount of the aid.<sup>40</sup>

The case was subsequently referred for review to the Supreme Court, which also rejected the plaintiff's request for a refund of the tax paid. The applicant relied on the Barion case, where the CJEU held that the same measure constituted both tax and aid and ordered the recovery of the subsidy. However, the Hungarian Supreme Court pointed out that the present case was fairly different since the French case did not concern a tax of general application, but the scope of the tax was determined for a category of undertakings (retailers) and the State aid resulted from the exemption of direct competitors from the payment of the tax.<sup>30</sup> In the Barion case, the obligation to pay contributions and the alleged aid measure were two inseparable parts of the same tax measure.<sup>31</sup> Thus, in cases such as the French one, it is possible to claim reimbursement of the amount paid if it is shown that it results in overcompensation of another category of undertakings.<sup>32</sup> The presented Hungarian case was different, as the retail tax is general and the payment obligation was imposed on competing businesses engaged in the same activity, namely retail sales in shops.

The Supreme Court also rejected the applicant's application for legal protection.<sup>33</sup> Here, the applicant referred to the Lufthansa judgment, where Lufthansa, as a competitor, brought an action to recover payments made to another competing airline, Ryanair, and to prohibit future payments, alleging that there was prohibited State aid.<sup>34</sup> In the German case, the state measure constituted aid as it was selective and it only had to be assessed whether it was permissible under the private investor principle. The procedure was suspended pending the judgment of the CJEU, which also took

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<sup>40</sup> CJEU Judgment of 15 June 2006, *Air Liquide Industries Belgium*, Case C 393/04 and C 41/05, EU:C:2006:403, 46; Case C 526/04, 44.

into account the formal investigation procedure opened before the European Commission and the fact that the case concerned aid measures already benefiting Ryanair. The German case focused on the preventive objective until a final Commission decision would remove the doubts.

It should also be stressed that the Supreme Court is not obliged to refer a case to the European Commission if it has doubts as to whether the case constitutes State aid and has the possibility to request a preliminary ruling from the CJEU. In the Hungarian case pending at that time, the court of first instance suspended the proceedings in view of the preliminary ruling procedures already initiated before the CJEU, awaited the outcome of those procedures and made its decision in the light of the C-323/18 judgment. The Hungarian Supreme Court, therefore, did not identify any procedural obligation similar to those in the *Bairon* or *Lufthansa* judgments and therefore did not have to take any action on recovery or preservation of rights.

Those cases have been highlighted because of the link between tax and state aid. However, as regards Hungarian special taxes, not many cases have reached the Hungarian Supreme Court, while the CJEU has on several occasions declared Hungarian special tax rules to be in conformity with the EU.<sup>41</sup>

#### 4. Retail Sales Tax from 2020 to Date

From 2020 to the present, two interlocking crises (the COVID-19 pandemic and the energy crisis caused by the Russian-Ukrainian war) have brought a new economic crisis for European countries.<sup>42</sup> This period has been characterized by shortages of supply in certain sectors, high inflation<sup>43</sup> and a fall in investment, with some market segments accumulating significant profits. To tackle the crisis, the Government has reintroduced special taxes on sectors and market players that have strengthened their position during

<sup>41</sup> Darák and Lovas, “Az adórendszer deszantosai: a különadók,” 481–91.

<sup>42</sup> From 2020 to the present, Hungary is in a state of emergency. During a state of emergency, the Fundamental Law provides the possibility for the Government to regulate by decree matters that would normally only be regulated by law by Parliament.

<sup>43</sup> According to the data of the Hungarian Central Statistical Office (KSH), it was 5.1% in 2021 and 14.5% in 2022. Source: “Factsheet,” KSH, accessed March 1, 2024, <https://www.ksh.hu/gyorstajekoztatok/#/hu/list/far>.

the crisis. The post-2020 period of special taxes has a number of specific features. First, they will burden many more sectors than in previous crises.<sup>44</sup>

Furthermore, according to the legislation, the new special taxes have been levied as an additional tax burden on top of the existing sectoral special taxes, for a transitional period, and most of them have been regulated as a special tax, so that they constitute the revenue of two financial funds, the Energy recycling fund and National Defence Fund (except for the retail tax and the advertising tax). As extra-profit taxes, these special taxes are intended to tax the excess profits above the average profits of companies resulting from the crisis but also serve other governmental objectives.

It is a legislative peculiarity that the Government could regulate these special taxes in a Government Decree, referring to the exceptional situation in force since 26 March 2020, so the Parliament did not regulate the special taxes at the statutory (guarantee) level.<sup>45</sup> Another common feature is that, with the exception of the additional retail sales tax, they were originally planned to be levied for two tax years (2022 and 2023), but the prolongation of the energy and economic crisis and the suspension of EU development and recovery aid made it necessary to extend the special taxes until the end of the 2024 tax year. These extra profit taxes were levied during the year, already on business profits for the tax year, raising the problem of the prohibition of retroactivity.<sup>46</sup>

The above taxes, in particular their temporary nature and their target tax regime, are in line with EU regulation 1854/2022/EU, but the question is whether they are indeed a charge on the extra profit attributable to the crisis. It can be concluded that these are basically sectors that have made profits as a result of the COVID-19 epidemic and/or the Russian-Ukrainian conflict. Although their profits mostly result from the crisis, the tax does

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<sup>44</sup> The Government introduced “extra-profit taxes” covering eight sectors (banking, insurance, energy, retail, telecommunications, air transport, pharmaceuticals and advertising) by Government Decree 197/2022 (4.VI.), as amended several times since then, which entered into force on July 1, 2022.

<sup>45</sup> “The legislative process,” European Parliament, accessed March 1, 2024, <https://www.parliament.hu/documents/10181/62157/T%C3%B6rv%C3%A9nyalkot%C3%A1si+folymat%C3%A1bra+0509javitott/1600b677-8e26-4362-b1a0-b3f8ea8d92de?version=1.0&inheritRedirect=true>.

<sup>46</sup> Act CXCV of 2011 on the Economic Stability of Hungary 31. § (1).

not necessarily tax the excess profits over netto or average returns. In most cases, the original legislation was based on annual turnover.<sup>47</sup>

The majority of the new special taxes are not entirely new, as for example, a special tax was already levied on shop retailing between 2010 and 2012.<sup>48</sup> After the transitional period from 2010 to 2012, a retail sales tax was introduced in 2020, essentially a counterpart of the previous special retail sales tax. The retail sales tax was the subject of considerable controversy between 2010 and 2012, but the changed, more permissive attitude of the CJEU in the Tesco case allowed its reintroduction (see above). The special levy introduced in response to the COVID-19 epidemic was triggered by the pandemic and became a tax targeted on one of the funds used to manage it between 2020 and 2021. However, it ceased to be a targeted tax in 2022 (when the pandemic ended).

Under the emergency legislation, it was first regulated by a Government Decree,<sup>49</sup> then enshrined in law, and tax revenue remained part of the tax system after the epidemic. The activities covered by the retail sales tax are the same as those covered by the 2010 special tax,<sup>50</sup> but with the restriction that only retail activities where the customer is the final consumer are taxable. In both cases, the tax is based on the net turnover of the retail activity and the tax rate is progressive in bands. However, between 2022 and 2024, Decree 197/2022 increased the retail tax rate for all taxable turnover bands, with higher rates for 2023 and 2024. In addition to introducing the retail sales tax in 2020 and its increase from 2022 onwards, a retail sales tax surcharge was introduced for the 2022 tax year only, which was 80% of the retail sales tax payable in 2021.

In 2024, however, the Spar supermarket took a new turn: it turned to the European Commission, claiming that the Hungarian retail tax (price freeze and other distortive measures) was making it impossible for

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<sup>47</sup> Except air transport contribution.

<sup>48</sup> Act XCIV of 2010 on the special tax on certain sectors.

<sup>49</sup> In order to implement the Economic Protection Action Plan, Government Decree 109/2020 (IV. 14.) on the retail sales tax to replenish the Epidemic Fund was in force from May 1, 2020 to June 9, 2020, and the rules of the retail sales tax were laid down in Act XLV of 2020 on the retail sales tax.

<sup>50</sup> Excluding wholesale of motor vehicles, trailers and semi-trailers and repair and sale of motorcycles.

the group to operate profitably in Hungary.<sup>51</sup> In addition to the European Commission's preliminary investigation into the retail sector, the European Parliament's Committee on Budgetary Control's examination of Hungary under the rule of law conditionality (a special retail tax scheme too) could lead to interesting results.

The retail sector has been under significant strain since the recession caused by the COVID-19 pandemic in 2020. One of these burdens (mostly on grocery stores) were price controls that were in force for more than a year. Price controls are a common form of public intervention, sometimes encouraged by the EU (e.g. for services of general economic interest important to society) or applied by it (e.g. roaming charges). However, the food and fuel price freeze introduced in Hungary is a unique and more drastic intervention in market conditions than its predecessors. This may be due to the increasingly rapid succession of crises and subsequent recessions, which encourage states to learn from each other in order to avoid their previous wrong decisions, allocating new solutions from the toolbox of state intervention. The price freeze has been lifted, but the crisis is still ongoing. As the state keeps corporate taxes extremely low, it tries to replace them with other sources of revenue. This is why special taxes have become an integral part of the tax system, but their phasing out is difficult, as the Hungarian budget deficit is increasing year on year, while the EU withholds funds on rule of law grounds.

## 5. Conclusion

The challenges of the last decade and a half have led to several extraordinary government interventions, whereby special taxes have become part of the tax system again. One of the major problems with the transitional sectoral special tax on shop retailing is that it is easy to introduce but difficult to supplement. The slow economic growth expected in the coming years will not provide sufficient resources to do this. However, if special taxes become permanent, they will have growing economic disadvantages over time, such

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<sup>51</sup> "Spar supermarket accuses Hungary's Viktor Orbán over retail tax," *Financial Times*, accessed March 15, 2024, <https://www.ft.com/content/32d0d2be-d530-4708-ad8f-dc02ea410504>; "Letter from spar to its employees in Hungary," Spar, accessed March 29, 2024, <https://www.penzcentrum.hu/vasarlas/20240326/megszereztek-a-spar-titkos-levelet-ezt-uzentek-a-kormany-haduzenete-utan-a-magyar-dolgozoknak-1148708>.

as a lack of investment. The disadvantages are compounded by the rapid introduction of taxes and frequent changes to tax rules, and an uncertain tax system also discourages foreign investment.

The crises (the economic crisis of 2008, the refugee crisis of 2015, the COVID-19 crisis of 2020 and the recession caused by the Russian-Ukrainian war) have led to an increase in the degree and extent of state intervention in EU Member States, coupled with a permissive attitude of the European Union.<sup>52</sup> This is supported by the divergent judgments in the two cases analyzed in the study, which are similar in many respects, since while in the *Hervis* case, the Court found that the retail sales tax infringed the freedom of establishment, in the *Tesco* case in 2019, it found that the national measure was likely to be compatible with EU law.<sup>53</sup> In the latter case, not only did it find no breach of the principle of freedom of establishment, but also no State aid problem, and thus no distortion of competition that would provide a significant advantage for competitors.

The extent to which special taxes contribute to the long-term sustainability of the budget raises interesting questions. The state has to deal not only with the current problems, but also with the consequences of the recession, which will increase budget expenditure, leading to an increasing need for special taxes. To compensate for the effects of the COVID-19 epidemic in 2020, Hungary has chosen not to raise existing headline taxes (the government not increase in corporation tax) but to intervene more in the market economy (by means of price freezes, special taxes etc.) through certain sectors. However, these interventions can only yield positive results temporarily, while in the long run, the results of the introduction of special taxes are difficult to estimate unless they are permanently incorporated into the tax system.

It also appears that the retail sales tax has other legal policy objectives besides crisis management (e.g. property reorganization), yet the CJEU has

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<sup>52</sup> M. Tamás Horváth, Ildikó Bartha, and Dóra Lovas, "Mikor kakukktójas? Állami vállalatlajdon az energia- és nyersanyagpiacon," *Közjogi Szemle* 15, no. 3 (2022): 22–34; M. Tamás Horváth, Ildikó Bartha, and Dóra Lovas, "A látható kéz -Támogatáselosztási jog válságok idején," *Magyar Jog*, no. 7–8 (2023): 459–70.

<sup>53</sup> The position taken in the *Tesco* case was confirmed by the Court of Justice in its judgment in 2021, where the case concerned the Polish retail tax. CJEU Judgment of 16 March 2021, *European Commission v. Republic of Poland*, Case C562/19, ECLI:EU:C:2021:201.

not been consistent in its approach to the issue. It would be worth considering aspects such as the fact that these sectoral taxes are not temporary and account for a significant share of tax revenues (they are higher than the revenues from the sectoral corporate tax).

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