| Chapter 8 |

The Policies of the European Union from an East-Central European Perspective Tax Policy

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ABSTRACT

This chapter concerns the reflections of selected Central European Member States on the Tax Policy of the European Union. The legislation and case law of courts in these states constantly reflect upon the CJEU case law and initiatives of other European Union institutions on one side, but also upon the legislative and juridical movements in each other. Three particular areas are discussed where this recurrent process is illustrated, namely the concept of General Anti-Abuse Rules (GAARs), the issue of VAT fraud and particularly of third-party liability and, finally, the area of special (sectoral) levies. The GAARs eventually became harmonized through the ATAD directive, but up to that moment, very different approaches could be observed between the Central European Member States, with some being early adopters even before accession to the European Union either through legislative enactment (Hungary) or through development of judicial doctrines (Czech Republic) but also with others that have enacted their GAARs only relatively recently (Slovak Republic, Poland). The issue of VAT fraud and third-party liability shows that referrals from Central European Member States (especially Hungary) have been a strong driver of the CJEU case law in this area. Finally, the special levies enacted by Central European Member States and CJEU proceedings they have triggered have provided very useful insight to testing the compatibility of sectoral levies with European Union law but also to the recent discussions on the digital services taxes.

KEYWORDS

corporate income tax, general anti-abuse rule (GAAR), VAT fraud, third-party liability, equalization levy, special review

1. Introduction

As to the distribution of competences between the Union and the Member States the field of taxation falls under the Art. 4 of TFEU being the shared competence with pre-emption, i.e., 'whenever the Union exercises its competence, the Member States lose their competence in the field on which the Union has exercised its competence.'[1]

1 Wattel, Szudoczsky and Weber, 2019, p. 11.

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In particular, it falls under the internal market principal area under Art. 4(2)(a) of TFEU, since 'taxation affects intra-Union cross-border trade, investment, service provision, and employment.'[2] From s broader perspective, the only exemption is the field of customs duties falling under the exclusive competences of the Union under Art. 3(1)(a) of TFEU.

> 'Nevertheless, it is apparent from TFEU that different emphasis is placed on the indirect taxes on one hand and on direct taxes on the other. Art. 113 of TFEU directly incites the Union to 'adopt provisions for the harmonization of legislation concerning turnover taxes, excise duties and other forms of indirect taxation to the extent that such harmonization is necessary to ensure the establishment and the functioning of the internal market and to avoid distortion of competition'[3] and, indeed, the Union 'has done so extensively in respect of customs duties, excise duties and turnover tax.'[4]

However, such a clear mandate is absent in the TFEU with respect to direct taxation and therefore any positive harmonization could be based on the '*general harmonization provision aimed at establishing and ensuring the functioning of the internal market,*'[5] i.e., Arts. 114 and 115 of the TFEU. Nevertheless, Art. 114(2) of TFEU expressly states that harmonization under Art. 114(1) of TFEU through a qualified majority voting by the Council shall not apply to 'fiscal provisions' and, further, the CJEU has already ruled that

> 'the words 'fiscal provisions' contained in Art. 95(2), EC must be interpreted as covering not only the provisions determining taxable persons, taxable transactions, the basis of imposition, and rates of and exemptions from direct and indirect taxes, but also those relating to arrangements for the collection of such taxes.'[6]

Thus, the only available route for positive harmonization is through directives passed by a unanimous voting under the Art. 115 of TFEU, which explains 'why by far the most integration of direct taxes is negative integration, notably on the basis of the free movement rights prohibiting hindrances to the functioning of the internal market and of the State aid prohibition.'[7]

The state then opens a door for a constant dialogue between the Union and Member States in which individual concepts formulated by Member States

2 Ibid, p. 12.
3 Art. 113 of TFEU.
4 Wattel, Szudoczsky and Weber, 2019, p. 12.
5 Ibid, p. 34.
6 Judgment of the CJEU (Sixth Chamber) of 29 April 2004, Commission of the European Communities v. Council of the European Union, Case C-338/01, ECLI:EU:C:2004:253, para. 67.
7 Wattel, Szudoczsky and Weber, 2019, p. 34.

legislatures and courts are being tested against the EU law either through infringement procedures and preliminary ruling proceedings, thereby developing new principles:

> 'Like a sound wave, the reverberation of principle development progressively spreads outward throughout the EU and the national legal orders. And like the motion of a wave, there is not only radiating movement, but multi-directional movement back and forth, which for our purposes, means movement both between the EU judicial arm and the courts and legislatures of the Member States (vertically), and movement between courts and legislatures of different Member States amongst themselves (horizontally)'.[8]

Further, this opens the opportunity to coordinate national laws through soft law measures such as recommendations, opinions, communications, and codes of conduct.[9] The aim of this chapter is to describe how the Central European Member States have contributed to the process of development of EU tax law principles and EU tax law in general and, at the same time, how they have been affected by the process.

There are three particular areas where the contribution of the Central European Member States or effect on them seems to be particularly profound. In the field of direct taxes one notable example concerns the formulation of the general anti-abuse principle in judicial doctrines and/or its incorporation into national laws through a General Anti-Abuse Rule (GAAR). Further, in the field of indirect taxes, the Central European Member States have been drivers of a significant number of CJEU case laws concerning VAT fraud, particularly regarding third-party liability. Finally, again in the field of direct taxes, CJEU case law concerning special sectoral levies in the Central European Member States (particularly in Hungary) have provided useful hints to the design of EU digital equalization levy (though not all issues were already resolved, particularly its relationship with double tax treaties).

All three topics introduced above will be discussed in detail in the following sections of this chapter.

2. General Anti-Abuse Rules

In the period pre-accession to the Union, the position of Central European Member States with respect to GAARs or similar judicial doctrines was rather heterogeneous, which makes their individual paths up to the harmonization of GAARs through the

8 de La Feria and Foy, 2016.
9 Ibid, pp. 27 et seq.

ATAD directive[10] even more interesting. In the Slovak and Czech Republics, such rules and doctrines were practically nonexistent. In Hungary, the first GAAR was already legislatively enacted in 1990, though it seems that it is not being relied upon very often by the tax authorities.[11] In Poland a GAAR was enacted in 2002 with effect from 2003, only to be struck down as unconstitutional in 2004 and re-enacted again in 2016.[12]

The Slovak and Czech approaches seem particularly noteworthy, as the countries have shared a common legal system in the Czechoslovak Republic for several decades prior to 1992. Despite this, their methods of harmonizing GAARs in line with the ATAD directive were significantly different.

From an EU law perspective, the anti-abuse principle is not a legislative rule, but a general principle of EU law formulated by CJEU in its case law.[13] First time the relatively rigorous test for identification of abuse of law was in the CJEU decision *Emsland-Stärke*,[14] where it stated that

> '[a] finding of an abuse requires, first, a combination of objective circumstances in which, despite formal observance of the conditions decided by the Community rules, the purpose of those rules has not been achieved. It requires, second, a subjective element consisting of the intention to obtain an advantage from the Community rules by creating artificially the conditions decided for obtaining it'.[15]

The penalty in the above decision was in the rejection of right arising out of the EU law (in the particular case essentially through its *contra legem* interpretation).

Afterward, in respect to tax matters, the anti-abuse principle was invoked in the *Halifax*[16] decision regarding VAT. Though a similar conclusion was formulated by CJEU in the *Fini*[17] case, it was the *Halifax* decision where a two-prong test for identification of abusive practice was formulated by CJEU as follows:

> 'First, the transactions concerned, notwithstanding formal application of the conditions decided by the relevant provisions of the Sixth Directive

10 Council Directive (EU) 2016/1164 of 12 July 2016 laying down rules against tax avoidance practices that directly affect the functioning of the internal market, OJ L 193, 19.7.2016, pp. 1–14.
11 Kolozs and Krever, 2016.
12 Olesinska, 2017.
13 de la Feria, 2020.
14 Judgment of the CJEU of 14 December 2000, Emsland-Stärke GmbH v. Hauptzollamt Hamburg-Jonas, Case C-110/99, ECLI:EU:C:2000:695.
15 Ibid, paras. 52 and 53.
16 Judgment of the CJEU (Grand Chamber) of 21 February 2006, Halifax plc, Leeds Permanent Development Services Ltd and County Wide Property Investments Ltd v. Commissioners of Customs & Excise, Case C-255/02, ECLI:EU:C:2006:121.
17 Judgment of the CJEU (Third Chamber) of 3 March 2005, I/S Fini H v. Skatteministeriet, Case C-32/03, ECLI:EU:C:2005:128.

> and the national legislation transposing it, result in the accrual of a tax advantage the grant of which would be contrary to the purpose of those provisions.
> Second, it must also be apparent from a number of objective factors that the essential aim of the transactions concerned is to obtain a tax advantage [where] it is the responsibility of the national court to determine the real substance and significance of the transactions concerned. In so doing, it may take account of the purely artificial nature of those transactions and the links of a legal, economic and/or personal nature between the operators involved in the scheme for reduction of the tax burden'.[18]

With the Halifax decision, the principle of the prohibition of abuse of law in tax matters was settled in the CJEU case law, and subsequent decisions were only fine-tuning minor issues.[19] Nevertheless, this applies particularly for VAT due to it being thoroughly harmonized and CJEU has in this respect stated that the anti-abuse principle should apply 'regardless of a national measure giving effect to it in the domestic legal order…and the principles of legal certainty and of the protection of legitimate expectations do not preclude this.'[20] It is also of particular relevance that the CJEU (in line with the proposals of Advocate General Bobek) ruled that the anti-abuse principle also applies to transactions that were effected long before the Halifax decision.

The situation was different with respect to direct taxes in the pre-ATAD period, where the CJEU case law dealt with assessment of measures aiming at protection of domestic tax base (*Cadburry-Schweppes;*[21] *X GmbH*[22]); and interpretation of rights conferred upon by secondary EU law in the partially harmonized fields (*Argenta Spaarbank*,[23] *N Luxembourg 1*,[24] *T Danmark*[25]).

18 Judgment of the Court (Grand Chamber) of 21 February 2006, Halifax plc, Leeds Permanent Development Services Ltd and County Wide Property Investments Ltd v. Commissioners of Customs & Excise, Case C-255/02, ECLI:EU:C:2006:121, paras. 74, 75 and 81.
19 de la Feria, 2020.
20 Judgment of the CJEU (Fourth Chamber) of 22 November 2017, Edward Cussens and Others v. T. G. Brosman, Case C-251/16, ECLI:EU:C:2017:881, para. 1 of the operative part.
21 Judgment of the CJEU (Grand Chamber) of 12 September 2006, Cadbury Schweppes plc and Cadbury Schweppes Overseas Ltd v. Commissioners of Inland Revenue, Case C-196/04, ECLI:EU:C:2006:544.
22 Judgment of the CJEU (Grand Chamber) of 26 February 2019, X-GmbH v. Finanzamt Stuttgart–Körperschaften, Case C-135/17, ECLI:EU:C:2019:136.
23 Judgment of the CJEU (Fifth Chamber) of 26 October 2017, Argenta Spaarbank NV. v. Belgische Staat, Case C-39/16, ECLI:EU:C:2017:813.
24 Judgment of the CJEU (Grand Chamber) of 26 February 2019, N Luxembourg 1 and Others v. Skatteministeriet, Case C-115/16, ECLI:EU:C:2019:134, discussed in Slovak literature by Bonk, 2019a.
25 Judgment of the CJEU (Grand Chamber) of 26 February 2019, Skatteministeriet v. T Danmark and Y Denmark Aps, Joined Cases C-116/16 and C-116/17, ECLI:EU:C:2019:135, discussed in Slovak literature by Bonk, 2019b.

In the above situations, CJEU did not formulate any specific test for identification of abusive practice, and thus the *Halifax* test should remain valid. Nevertheless, in the pre-ATAD period, CJEU concluded with respect to direct tax matters that 'no general principle exists in European Union law which might entail an obligation of the Member States to combat abusive practices in the field of direct taxation.'[26]

Despite the above, the EU law did influence the anti-abuse laws and doctrines in the Central European Member States, which may be illustrated using examples from the Czech Republic and the Slovak Republic.

In the Czech Republic, the anti-abuse doctrine was first formulated by the Supreme Administrative Court on November 10, 2005,[27] even before the *Halifax* decision was issued by CJEU. Nevertheless, the decision was challenged with the Czech Constitutional Court, which upheld the decision of the Supreme Administrative Court and in its reasoning expressly referred to the *Halifax* decision issued in the meantime.[28]

In the decisions that followed, the Czech Supreme Administrative Court was refining its reasoning in matters concerning abuse of tax law, and eventually referred to the *Halifax* test, however with a remark that this may be merely an inspiration due to direct taxes not being harmonized.[29]

Thereafter, in the public discussions as to the means of transposition of the ATAD GAAR, the Czech legislature expressly stated in the explanatory report to transposing legislation that the legislative GAAR does not represent any new rules on top of existing judicial doctrines.[30]

In contrast with the above is the Slovak experience,[31] where, save for one exception concerning VAT, the law and the courts were silent with respect to an abuse of law until a legislative GAAR was introduced with effect from January 1, 2014.[32] In this respect, the explanatory report to the draft law expressly states that the GAAR was introduced in response to the Commission recommendation on December 6, 2012.[33]

This then resulted in discussions whether the GAAR is a continuation of existing case law,[34] of whether it is new institution, which would essentially mean that it may not have retroactive effect. The Slovak Supreme Court essentially resolved this issue,[35] which suggested that retroactive application would be in breach of Slovak

26 Judgment of the CJEU (Fourth Chamber), 29 March 2012, Ministero dell'Economia e delle Finanze and Agenzia delle Entrate v. 3M Italia SpA, Case C-417/10, ECLI:EU:C:2012:184, para. 32.
27 See further Morávek, 2016; Kamínková, 2018.
28 Kamínková, 2018, p. 35.
29 Ibid, p. 66.
30 Explanatory report to the GAAR proposal in Tax package presented by the Czech Ministry of Finance, p. 132. https://www.mfcr.cz/assets/cs/media/Dane_2019_Danovy-balicek-2019-zakon-c-80-2019-Sb.pdf.
31 See further Kačaljak, 2021.
32 Discussed in Slovak literature by Prievozníková, 2015; Sábo, 2015; Bonk, 2018a; Bonk, 2018b.
33 I.e. it was a soft law instrument that triggered the harmonisation effort in Slovakia. According to Filipczyk and Olesinska, 2016, p. 487. this was also the trigger for re-enactment of GAAR in Poland in 2016.
34 Prievozníková, 2015.
35 Decision No. 3Sžfk/8/2019 from 25 February 2020.

constitutional principles. Nevertheless, the facts of the case implied that the neither application of (then nonexistent) GAAR or of a judicial anti-abuse principle was necessary, as the matter could have been decided through application of already existing substance over form rule.

Nevertheless, there is still one case pending that might result in a different decision. However, the case concerns also the application of a double tax treaty, which adds to the complexity of the matter.[36] In this case, the Slovak Supreme Court even tried to consult CJEU, but as the facts of the case occurred before the accession of Slovakia to EU, CJEU ruled[37] that the matter does not concern the application of EU law.[38]

The enactment of ATAD GAAR by the Member States should now result in a harmonized approach to testing and tackling abusive arrangements, though it is still too early to draw any conclusions.

3. Third-Party Liability in VAT Fraud

The CJEU case law phenomenon of third-party liability in VAT fraud dates back to the CJEU *Optigen*[39] judgment on January 12, 2006. In this judgment, CJEU seemingly rejected the notion of third-party liability in VAT matters but in the following *Kittel and Recolta Recycling*[40] decision this has been severely qualified and the so called 'Axel Kittel test' was introduced according to which 'third-party liability for VAT fraud is possible where 'the recipient tax payer knew, or should have known, that the goods were connected with the fraudulent evasion of VAT.'[41] The above cases concerned 'new domestic legislation and administrative practices [that] were purportedly aimed at strengthening anti-fraud policy in the context of organized fraud, yet [by their design they could not] tackle fraud per se but merely minimize its revenue costs.'[42] This gave rise to a significant number of cases being referred to CJEU, with several Member States being the sources of referrals repeatedly.[43] Out of the Central European Member States, Hungary seems to be the most prominent one with cases such as *Mahagében*

36 See further Kačaljak and Koroncziová, 2017.
37 Order of the Court (Sixth Chamber) of 1 October 2020, Slovenský plynárenský priemysel, a.s. v. Finančné riaditeľstvo Slovenskej republiky, Case C-113/20, ECLI:EU:C:2020:772.
38 Kačaljak, 2021.
39 Judgment of the CJEU (Third Chamber) of 12 January 2006, Optigen Ltd (C-354/03), Fulcrum Electronics Ltd (C-355/03) and Bond House Systems Ltd (C-484/03) v. Commissioners of Customs & Excise, Joined cases C-354/03, C-355/03 and C-484/03, ECLI:EU:C:2006:16.
40 Judgment of the CJEU (Third Chamber) of 6 July 2006, Axel Kittel v. Belgian State (C-439/04) and Belgian State v. Recolta Recycling SPRL (C-440/04), Joined cases C-439/04 and C-440/04, ECLI:EU:C:2006:446.
41 de la Feria and Foy, 2016, p. 264.
42 de la Feria, 2020, p. 19.
43 Ibid.

and David,[44] *Mecsek-Gabona,*[45] *Tóth,*[46] *Signum Alpha Sped,*[47] *Glencore,*[48] and most recently *Vikingó*.[49]

All these essentially concern either '(1) cases concerning the burden of proof for establishing liability, [or] (2) cases concerning the scope of that liability.'[50] As to the latter group of cases, *Mecsek-Gabona* stands out as the case marking a significant step in expanding the scope of third-party liability also to cases of fraud that are only about to occur in the future (and yet it is possible to establish that the seller of the concerned goods known or should have known that he is involved in a chain of fraudulent transactions).[51] The reasoning indicated in *Mecsek-Gabona* was later confirmed in the landmark *Italmoda*[52] decision 'in which [CJEU] established that the liability for VAT fraud can arise in the absence of national legislation providing for it, which in essence transformed third-party liability for VAT fraud from a rule into a principle.'[53]

Nevertheless, almost equally interesting is the former group of cases concerning the burden of proof for establishing third-party liability. CJEU remains consistent in these cases in referring to the knowledge test, i.e., a third-party could be established only if the business has known or should have known of its involvement in a fraudulent transaction. This, however, seemingly clashed with judicial doctrines and practices in several Member States,[54] including the Central European Member States.

44 Judgment of the CJEU (Third Chamber), 21 June 2012, Mahagében Kft v. Nemzeti Adó- és Vámhivatal Dél-dunántúli Regionális Adó Főigazgatósága (C-80/11) and Péter Dávid v. Nemzeti Adó- és Vámhivatal Észak-alföldi Regionális Adó Főigazgatósága, (C-142/11), Joined Cases C-80/11 and C-142/11, ECLI:EU:C:2012:373.

45 Judgment of the CJEU (Second Chamber), 6 September 2012, Mecsek-Gabona Kft v. Nemzeti Adó- és Vámhivatal Dél-dunántúli Regionális Adó Főigazgatósága, Reference for a preliminary ruling from the Baranya Megyei Bíróság, Case C-273/11, ECLI:EU:C:2012:547.

46 Judgment of the CJEU (Third Chamber), 6 September 2012, Gábor Tóth v. Nemzeti Adó- és Vámhivatal Észak-magyarországi Regionális Adó Főigazgatósága, Reference for a preliminary ruling from the Legfelsőbb Bíróság, Case C-324/11, ECLI:EU:C:2012:549.

47 Order of the CJEU (Ninth Chamber) of 10 November 2016, Signum Alfa Sped Kft. v. Nemzeti Adó- és Vámhivatal Kiemelt Adó- és Vám Főigazgatóság, Case C-446/15, ECLI:EU:C:2016:869.

48 Judgment of the CJEU (Fifth Chamber) of 16 October 2019, Glencore Agriculture Hungary Kft. v. Nemzeti Adó- és Vámhivatal Fellebbviteli Igazgatósága, Case C-189/18, ECLI:EU:C:2019:861.

49 Order of the CJEU (Tenth Chamber) of 3 September 2020, Vikingo Fővállalkozó Kft. v. Nemzeti Adó- és Vámhivatal Fellebbviteli Igazgatósága, Case C-610/19, ECLI:EU:C:2020:673.

50 de la Feria, 2020, p. 21.

51 Ibid.

52 Judgment of the CJEU (First Chamber), 18 December 2014, Staatssecretaris van Financiën v. Schoenimport "Italmoda" Mariano Previti vof and Turbu.com BV. and Turbu.com Mobile Phone's BV. v. Staatssecretaris van Financiën, Joined Cases C-131/13, C-163/13 and C-164/13, ECLI:EU:C:2014:2455.

53 de la Feria, 2020, p. 22.

54 de la Feria, 2020, p. 19 indicates that even the current amount of litigation with CJEU concerning third-party liability represents only 'a small fraction of total litigation in the EU' as there are indications that many of the cases do not even reach the CJEU.

This might be illustrated by the preliminary questions posed by the Czech Supreme Administrative Court in the case *Kemwater ProChemie*:[55]

> 'Is it compatible with Directive 2006/112/EC for exercise of the right to deduct input value added tax to be conditional on the taxable person fulfilling the obligation to prove that the taxable supply received was made by another specific taxable person?
> If the first question is answered in the affirmative and the taxable person fails to fulfil that evidentiary obligation, can the right to deduct input tax be refused without it being established that that taxable person knew or could have known that by acquiring the goods or services in question he was participating in tax fraud?'

The above questions correspond to the doctrine of 'declared supplier', applied quite extensively in Slovakia and Czech Republic (and most likely also in other Central European Member States) under which the Tax Authorities avoided the application of the knowledge test and rather refused the right to deduction of input tax if the business failed to prove that the supply was actually made by the supplier who issued the invoice. The usual process for this was based on the Tax Authority pointing out that the supplier did not have own capacities for the performance of the supply and, subsequently, on the conclusion that the business was not able to produce sufficient evidence of the supply.[56]

Quite remarkably, even recent research[57] shows that the declared supplier doctrine still represents major line of reasoning in the decisions of Slovak Supreme Court despite growing number of CJEU cases in which CJEU keeps repeating that the knowledge test is the key component for invoking third-party liability in VAT fraud cases.

This indicates that there exists quite a strong pushback in the Central European Member States against the knowledge test doctrine applied by CJEU. Nevertheless, it seems clear that irrespective of the formulation of the preliminary question by the national court, CJEU seems to stand firmly on the requirement to perform the knowledge test by the Tax Authorities to invoke the third-party liability in VAT fraud cases. Simply said, the national courts keep asking CJEU whether there could be any simpler way to invoke third-party liability in VAT fraud than application of the knowledge test and CJEU keeps responding in the same (negative) manner, each time tailoring

55 Judgment of the CJEU (Tenth Chamber) of 9 December 2021, Kemwater ProChemie s. r. o. v. Odvolací finanční ředitelství, Case C-154/20, ECLI:EU:C:2021:989.
56 This particular issue was subject of another CJEU decision with question originating from Romania (See Judgment of the Court (Sixth Chamber) of 4 June 2020, SC C.F. SRL v. A.J.F.P.M. and D.G.R.F.P.C, Case C-430/19, ECLI:EU:C:2020:429). Unsurprisingly, CJEU ruled that such practice is not in line with the principles governing the common system of VAT, as such practice would essentially render the knowledge test virtually obsolete.
57 Kačaljak, 2020, p. 34.

the response to the question of the national court and, thus, expanding the catalogue of reasons that are not sufficient for rejection of right to deduction/exemption on a standalone basis.

It is difficult to assess which of the CJEU cases could be considered final, though at this time, the *Vikingó*[58] decision seems a rather promising candidate, as it is issued in the form of an order of the court[59] and rather extensively summarizes the conclusions in the CJEU decisions to date.

Nevertheless, a response by CJEU to the questions posed in *Kemwater ProChemie*[60] added further complexity to the matter, and it seems that further decisions might eventually be needed to steer the national courts (at least in Czech Republic and Slovakia) away from the "declared supplier" doctrine.

4. Special Levies

With the advent of proposals for digital services taxes worldwide[61] and in the Union,[62] it is interesting to compare the alternative routes the Central European Member States have taken. First, to date no true digital services tax was imposed by the Czech Republic, Poland, or the Slovak Republic. Both the Czech Republic[63] and Poland have introduced legislative proposals to introduce such taxes, but the legislative process in Poland has not yet concluded,[64] and in Czech Republic the proposal was unsuccessful in the parliament and its future is uncertain.[65]

The Slovak Republic never introduced any proposal for a digital services tax, and it has been assumed that it is waiting for coordinated solution at the OECD or Union level. Nevertheless, with effect from 2018, a digital permanent establishment concept was introduced into Slovak law. This, however, proved to be ineffective vis-à-vis businesses established in jurisdictions with which there exists a double tax treaty.[66]

Hungary, by contrast, introduced an advertisement tax in 2014,[67] which resulted in European Commission initiating formal investigation procedure provided for in Art.

58 Order of the Court (Tenth Chamber) of 3 September 2020, Vikingo Fővállalkozó Kft. v. Nemzeti Adó- és Vámhivatal Fellebbviteli Igazgatósága, Case C-610/19, ECLI:EU:C:2020:673.
59 Which indicates the posed question does not cover any new issues on top of those already decided by the CJEU.
60 Judgment of the Court (Tenth Chamber) of 9 December 2021, Kemwater ProChemie s. r. o. v. Odvolací finanční ředitelství, Case C-154/20, ECLI:EU:C:2021:989.
61 KPMG, 2021a.
62 Geringer, 2021.
63 KPMG, 2021b.
64 Orbitax, 2021.
65 KPMG, 2021b.
66 Cibuľa and Kačaljak, 2018.
67 As a temporary measure its rate has been reduced to zero for period from 1 July 2019 to 31 December 2022; KPMG, 2021a, p. 30.

108(2) of TFEU, and eventually adopting a decision that the design of the tax constituted state aid.[68]

Hungary has challenged the decision with the CJEU, which eventually ruled that the tax does not constitute state aid.[69]

Nevertheless, the above decision is only the latest one in a chain of CJEU cases dealing with the nature of special levies imposed by Hungary, namely *Hervis Sport- és Divatkereskedelmi,*[70] *Vodafone Magyarország,*[71] and *Tesco-Global Áruházak*.[72] The principal issue dealt with by CJEU in the latter two was whether these special levies are to be regarded as direct taxes or indirect taxes, particularly in the light of the fact that they use turnover as the basis for assessment of the levy.

Similar discussions were ongoing also in Slovakia with respect to the (now abolished) special levy of financial institutions.[73]

CJEU has ruled that 'turnover constitutes, in general, a criterion of differentiation that is neutral and a relevant indicator of the taxable person's ability to pay,'[74] essentially stating that just because the assessment base of a tax or levy refers to turnover, this does not by itself make it an indirect tax and other elements must be considered. In particular, as the advocate general has pointed out, for a tax to be regarded an indirect tax, it must be designed to be passed on.[75]

> '[The tax in question] it is not designed to be passed on to the consumer.... This cannot be taken to be the case simply because a tax has been reflected arithmetically in the price of the goods or services. That is more or less the case with any tax charge on an undertaking. Rather, if the consumer...is not the person liable for payment, the tax must be designed to be passed on to the consumer specifically.

68 Judgment of the CJEU (Grand Chamber) of 16 March 2021, European Commission v. Hungary, Case C-596/19 P, ECLI:EU:C:2021:202, paras. 7–11.

69 Ibid.

70 Judgment of the CJEU (Grand Chamber), 5 February 2014, Hervis Sport- és Divatkereskedelmi Kft. v. Nemzeti Adó- és Vámhivatal Közép-dunántúli Regionális Adó Főigazgatósága, Case C-385/12, ECLI:EU:C:2014:47.

71 Judgment of the CJEU (Grand Chamber) of 3 March 2020, Vodafone Magyarország Mobil Távközlési Zrt. v. Nemzeti Adó- és Vámhivatal Fellebbviteli Igazgatósága, C-75/18, ECLI:EU:C:2020:139.

72 Judgment of the CJEU (Grand Chamber) of 3 March 2020, Tesco-Global Áruházak Zrt. v. Nemzeti Adó- és Vámhivatal Fellebbviteli Igazgatósága, Case C-323/18, ECLI:EU:C:2020:140.

73 Kubina and Kurillová, 2019a; Kubina and Kurillová, 2019b; Kačaljak, 2020.

74 Judgment of the CJEU (Grand Chamber) of 16 March 2021, European Commission v. Hungary, Case C-596/19 P, ECLI:EU:C:2021:202, para. 47.

75 Opinion of Advocate General Kokott delivered on 13 June 2019, Vodafone Magyarország Mobil Távközlési Zrt. v. Nemzeti Adó- és Vámhivatal Fellebbviteli Igazgatósága, C-75/18, ECLI:EU:C:2019:492, paras. 33–37 and Opinion of Advocate General Kokott delivered on 4 July 2019, Tesco-Global Áruházak Zrt. v. Nemzeti Adó- és Vámhivatal Fellebbviteli Igazgatósága, C-323/18, ECLI:EU:C:2019:567, paras. 31–34.

> This would require the amount of tax to be established at the time when the transaction is carried out (at the time of the supply to the consumer), as is the case with VAT. However, as that amount cannot be calculated until the end of the year and depends on the volume of annual turnover, the supplying... undertaking does not yet know any tax charge which may have to be passed on at the time when the supply is made or at least its precise amount. For example, if the lower threshold is not reached at the year end, there is no tax at all to be passed on to the consumer. It is not therefore a tax designed to be passed on....
> The intention is therefore to tax the particular financial capacity of those undertakings and not the financial capacity of recipients of [their] services. The Hungarian special tax is similar in this regard to a special (direct) corporate tax for certain undertakings....
> In this way too, the special corporate tax is similar in character to a special direct income tax. Unlike 'normal' direct income taxes, however, the taxable amount is not the profit generated—as the difference between two operating assets in a certain period—but the turnover generated in a certain period. Nevertheless...this does not affect its character as a direct tax.'[76]

These conclusions are especially relevant with respect to the discussion on compatibility of digital services taxes with double tax treaties.[77] This discussion might come alive again should the OECD two-pillar solution fail.[78]

Second, the *Hervis Sport- és Divatkereskedelmi* decision was relevant also with respect to discussions in Slovakia regarding the Retail Tax Act which was introduced with effect from January 1, 2019, and abolished very shortly afterwards in response to the initiation of an investigation by the European Commission.[79] The issue at hand concerned discriminatory treatment of food vendors where there were several indications in the act that the tax was specifically targeted at foreign retail chains.

The *Hervis Sport- és Divatkereskedelmi* decision was referred to in public discussions from the moment when the draft of the Retail Tax Act was disclosed to the public[80] and was also expressly referred to in the communication to Slovakia from the European Commission.[81]

76 Ibid.
77 See Kofler, 2021, p. 51 and Hohenwarter et al., 2019, pp. 143 et seq.
78 OECD, 2021.
79 European Commission State aid — Slovak Republic — State aid SA.52194 (2018/FC) — Slovak Retail Turnover Tax — Invitation to submit comments pursuant to Art. 108(2) of the Treaty on the Functioning of the European Union, OJ C 194, 7.6.2019, p. 15.; Commission Decision (EU) 2019/2140 of 21 October 2019 on State aid SA.52194 – 2019/C (ex 2018/FC) – Slovak Republic – Slovak Retail Turnover Tax (notified under document C(2019) 7474), C/2019/7474, OJ L 324, 13.12.2019.
80 Kačaljak, 2018.
81 European Commission State aid — Slovak Republic — State aid SA.52194 (2018/FC) — Slovak Retail Turnover Tax — Invitation to submit comments pursuant to Art. 108(2) of the Treaty on the Functioning of the European Union, OJ C 194, 7.6.2019, p. 15.

Thus, it might be concluded that particularly the steps of Hungary in respect to special sectoral levies were relevant not only to further development of CJEU case law, but also in respect to development of law in Slovakia as another Central European Member State.

5. Conclusions

The legislation and case law of courts in Central European States constantly reflect upon CJEU case law and initiatives of other European Union institutions, but also upon the legislative and juridical movements in each other's countries. It may be also concluded that the movement is not simply one-sided, but the dynamics of the Member States also affect development in the entire European Union.

First, the GAAR concept shows that the approach of individual Central European Member States varied greatly, and only through EU harmonization initiatives through the ATAD directive do they seem to eventually converge. It might be expected that the interpretation of national GAARs would converge even further through CJEU case law.

Further, the issue of VAT fraud and third-party liability shows that referrals from Central European Member States (especially Hungary) have been a strong driver of CJEU case law in this area. This recurrent topic seems to constantly raise new issues, and at the same time indicates that there remains a significant friction between the domestic judicial doctrines concerning the burden of proof in tax matters and the CJEU conclusion with respect to VAT matters in general.

Finally, the special levies enacted by Central European Member States, and the CJEU proceedings they have triggered, have provided very useful insights into testing the compatibility of sectoral levies with European Union law, but also to the recent discussions on digital services taxes (equalization levies). As a general observation, the special levies tend to have a character of direct tax, which brings about the issues of double taxation and their compatibility with double taxation treaties. This *inter alia* strengthens the arguments advocating a global, coordinated approach to taxation of digital economy (such as the currently discussed OECD Two-Pillar Solution) before a unilateral approach by the EU, or individual Member States.

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