Provisional text

OPINION OF ADVOCATE GENERAL

KOKOTT

delivered on 9 November 2017 (1)

Joined Cases C?236/16 and C?237/16

Asociación Nacional de Grandes Empresas de Distribución (ANGED)

v

Diputación General de Aragón

(Request for a preliminary ruling from the Tribunal Supremo (Supreme Court, Spain))

(Reference for a preliminary ruling — Freedom of establishment — Regional tax for large retail establishments — Indirect prejudice because, statistically, foreign retail chains are affected in the majority of cases — Non-taxation and exemptions as unlawful aid)

I. Introduction

1. In the present case the Court is once again called on to address the question of the extent to which differentiations made in tax law constitute an indirect infringement of the fundamental freedoms and/or unlawful aid. This case is connected with two other cases currently before the Court (2) and, like them, it gives the Court an opportunity to clarify the scope of the prohibition on State aid under EU law.

2. By its action, the Asociación Nacional de Grandes Empresas de Distribución (National Association of Large Distribution Companies, ANGED) is challenging a special tax on environmental damage caused by large sales areas (IDMGAV) in Aragon.

3. ANGED and the Commission consider the tax to constitute a restriction of the freedom of establishment and unlawful aid for small retail establishments in particular, as such establishments are not subject to the tax. The point at issue is essentially to what extent differentiations in tax law are relevant for the purposes of the rules on State aid.

II. Legislative framework

A. EU law

4. The framework for the case in EU law is provided by Article 49 in conjunction with Article 54 TFEU and Article 107 et seq. TFEU.

B. **Spanish law**

5. The tax on environmental damage caused by large sales areas (Impuesto sobre el Daño Medioambiental causado por las Grandes Áreas de Venta) which is at issue in the main proceedings was introduced on 1 January 2006 by Title II of Ley de las Cortes de Aragón 13/2005, de 30 de diciembre, de medidas fiscales y administrativas en materia de tributos cedidos y tributos propios de la Comunidad Autónoma de Aragón (Law 13/2005 of the Parliament of Aragon of 30 December 2005 on fiscal and administrative measures concerning assigned and own taxes in the Autonomous Community of Aragon).

6. The IDMGAV is currently set out in Chapter III of Annex II ('TRIMCA') to Ley (de las Cortes de Aragón) 10/2015, de 28 de diciembre, de medidas para el mantenimiento de los servicios públicos en la Comunidad Autónoma de Aragón (Law 10/2015 of 28 December 2015 on measures for the maintenance of public services of the Autonomous Community of Aragon).

7. According to the preamble to Law 13/2005, the chargeable event was defined by reference to the environmental damage caused by the trade carried on in establishments which, on account of their large public sales areas, act as a magnet for consumption and encourage the mass movement of private vehicles. The tax is levied on the owners of the business causing the environmental damage, that is to say, not the owner of the facility, but the person operating the facility.

8. In that regard, the area — in terms of surface or storey area — is the most appropriate parameter for objective identification of the advantage obtained as a result of not bearing the environmental and land costs incurred. The sales area indicates an increased capacity to offer goods for sale and, therefore, a greater influx of consumers; the area set aside for other uses (for example, storage) reveals greater opportunities for restocking goods; and the parking area demonstrates the capacity for attracting motor vehicle traffic.

9. Under Article 15 of the TRIMCA, the IDMGAV is levied on 'the specific economic capacity apparent in the business and trade carried on in retail establishments which, on account of their attractiveness to consumers, encourage the mass movement of vehicles and, consequently, have adverse effects on the natural and land environment of the Autonomous Community of Aragon'.

10. The IDMGAV is a non-fiscal tax of an *in rem* nature, the revenue from which is assigned to a specific use (Article 3 of the TRIMCA). Under Article 5 of the TRIMCA, the revenue actually obtained from the collection of this tax is to be used, after deducting management and collaboration costs, to finance measures preventing or repairing damage caused to the environment.

11. A retail establishment has a large sales area under Article 16(2) of the TRIMCA if its public sales area exceeds 500 m2.

12. Under Article 20 of the TRIMCA, retail establishments whose principal business is the exclusive sale of the following products are exempted: (a) machinery, vehicles, tools and industrial supplies; (b) construction materials, plumbing materials, doors and windows, for sale only to professionals; (c) nurseries for gardening and cultivation; (d) fittings for individual, conventional and specialist establishments; (e) motor vehicles, in dealerships and repair workshops; and, (f) motor fuel.

13. The basis of assessment is the total area of every retail establishment with a large sales area, obtained by the sum of the following figures: (a) the sales area; (b) the area set aside for other uses (up to a maximum of 25% of the public sales area); (c) the parking area (up to a maximum of 25% of the public sales area).

14. The taxable amount under Article 22 of the TRIMCA increases progressively from EUR 10.20 as from 2 000?3000 m² to EUR 14.70 as from 5 000?10 000 m² and then falls to EUR 13.50 as from 10 000 m². The first 2 000 m² are not taxed, however.

15. Depending on the type of land on which the large retail establishment is situated, different coefficients apply. Under Articles 45 and 46 of the TRIMCA, the full taxable amount may be reduced, in certain circumstances, up to the limit of 30% of that amount, when investments are made aimed at the adoption of measures preventing or making good the adverse effects of pollution in the natural and land environment of the Autonomous Community of Aragon.

III. **The main proceedings**

16. On 18 March 2007, ANGED — a national association of large retail establishments — brought an administrative action before the Sala de lo Contencioso-Administrativo del Tribunal Superior de Justicia de Aragón (Administrative Division of the High Court of Justice, Aragon, Spain) ultimately directed against the IDMGAV, namely against Decreto legislativo 1/2007 del Gobierno de Aragón, de 18 de septiembre, por el que se aprueba el texto refundido de la legislación sobre los impuestos medioambientales de la Comunidad Autónoma de Aragón (Legislative Decree 1/2007 of the Government of Aragon of 18 September 2007 approving the new version of the provisions on the environmental taxes of the Autonomous Community of Aragon).

17. By judgment of 24 January 2014, the Sala de lo Contencioso-Administrativo, Sección Segunda, del Tribunal Superior de Justicia de Aragón (Second Chamber of the Administrative Division of the High Court of Justice, Aragon) dismissed the administrative action brought by ANGED.

18. On 14 April 2014, ANGED lodged an appeal on a point of law against that judgment, claiming, inter alia, infringement of EU law, on the grounds that Law 13/2005 (Legislative Decree 1/2007) was contrary to the freedom of establishment as enshrined in Article 49 TFEU.

19. In February and May 2013, ANGED lodged a complaint against the Kingdom of Spain with the Commission, claiming that the rules governing the tax on large retail establishments in six autonomous communities infringed EU law. By letter dated 28 November 2014 to the Kingdom of Spain, the Commission then stated that it was minded to regard the non-taxation of small retailers and the exemptions granted to certain specialist establishments as incompatible State aid. They appeared to give a selective advantage to certain undertakings because they were an exception to the normal tax regime.

20. The Tribunal Supremo (Supreme Court, Spain) has now decided to request a preliminary

ruling.

IV. Procedure before the Court of Justice

21. It has referred the following questions to the Court:

‘(1) Must Articles 49 and 54 TFEU be interpreted as precluding a regional tax stated to be levied on the environmental damage caused by the use of facilities and amenities attached to the business and trade carried on in retail establishments with large sales and parking areas for their customers, provided that the public sales area exceeds 500 m2, but that applies regardless of whether the retail establishments are actually situated outside or inside the consolidated urban area and is borne in most cases by undertakings of other Member States, bearing in mind that the tax (i) is not actually levied on traders who own several retail establishments, irrespective of their total public sales area, if none of them has a public sales area exceeding 500 m2, even if one or more of them exceeds that threshold but the basis of assessment does not exceed 2 000 m2, while it does apply to traders who own a single retail establishment with a public sales area exceeding those thresholds; and (ii) is not levied on retail establishments engaged in the exclusive sale of machinery, vehicles, tools and industrial supplies; construction materials, plumbing materials, doors and windows, for sale only to professionals; fittings for individual, conventional and specialist establishments; motor vehicles, in dealerships and repair workshops; nurseries for gardening and cultivation; and motor fuel, irrespective of their total public sales area?

(2) Must Article 107(1) TFEU be interpreted as meaning that the following constitutes State aid prohibited under that provision: the fact that the IDMGAV is not actually levied on retail establishments with a public sales area not exceeding 500 m2 or on those exceeding that threshold provided that the basis of assessment does not exceed 2 000 m2, or on retail establishments engaged in the exclusive sale of machinery, vehicles, tools and industrial supplies; construction materials, plumbing materials, doors and windows, for sale only to professionals; fittings for individual, conventional and specialist establishments; motor vehicles, in dealerships and repair workshops; nurseries for gardening and cultivation, and motor fuel?’

22. In the proceedings before the Court, ANGED, Aragon and the European Commission submitted written observations on these questions and took part in the hearing on 6 July 2017.

V. Legal assessment

A. Restriction of the fundamental freedoms

23. By its first question, the referring court asks whether the freedom of establishment precludes a tax like the IDMGAV. It must therefore be decided whether (1) there is a restriction of the freedom of establishment which (2) is not justified.

24. The context is the mode of operation of the IDMGAV. The IDMGAV links the chargeable event to the existence of a large retail establishment. These are establishments which nominally have a sales area equal to or exceeding 500 m². However, parking areas and other areas each up to a maximum of 25% of the sales area are added to that area. The first 2 000 m² of this total area are not taxed (‘allowance’). (3)

25. The tax would amount to between EUR 10.20 per m² and EUR 14.70 per m². Up to a total area of 10 000 m² there is a certain progressive effect for the tax. Consequently, larger retail establishments are subject to a higher tax burden, in absolute terms, than retail establishments with a smaller area, all retail establishments being granted an ‘allowance’ of 2 000 m².

1. *Restriction of the freedom of establishment*

26. Under Article 49 in conjunction with Article 54 TFEU, the freedom of establishment includes the right for nationals of a Member State on the territory of another Member State to take up and pursue activities as self-employed persons. (4) It is also settled case-law that all measures which prohibit, impede or render less attractive the exercise of the freedom of establishment are restrictions on that freedom. (5)

27. This is the case with taxes per se. The relevant factor in examining the fundamental freedoms in respect of such prejudice, in my view, (6) is therefore that a cross-border situation is treated less favourably than a domestic situation. (7)

(a) *No discriminatory restriction*

28. In the present case, however, there is no *difference* in treatment. For a total area between 1 m² and 2 000 m² there is no different treatment of small and large, Spanish or foreign retail establishments. All establishments are not subject to the tax on that area. The threshold acts as a basic allowance which benefits all retailers. Smaller retail establishments (with a sales area below 500 m²) are not subject to the tax, while larger establishments are subject, but the tax is not levied in respect of the total area up to 2 000 m². As these ‘basic allowances’ apply to large and small retail establishments, there is no unfavourable treatment of any retail establishment. An infringement of the freedom of establishment in this respect can thus be ruled out.

29. Only if a different view were taken does the question actually arise whether the non-taxation of small retail establishments constitutes overt or covert discrimination.

(b) *In the alternative: overt or covert discrimination against foreign undertakings*

30. No overt discrimination against foreign undertakings is evident in this case. Rather, the tax is levied on any owner of a ‘large retail establishment’ with a total area exceeding the ‘allowance’ of 2 000 m². As the Court has already ruled, (8) the fact that foreign investors prefer to open larger retail establishments in order to achieve the economies of scale necessary to penetrate a new territory relates to entry into a new market, rather than to the nationality of the operator. (9)

31. However, all covert forms of discrimination which, by the application of other criteria of differentiation, lead in fact to the same result are also prohibited (10) (‘covert’ or ‘indirect’ discrimination).

32. In *Hervis Sport* the Court ruled that where a tax assessment is based on an undertaking’s level of turnover there can possibly be a de facto disadvantage for undertakings which have their registered offices in other Member States. (11) That case specifically concerned a special tax on retail undertakings, the rate of which was steeply progressive based on turnover. Furthermore, for undertakings belonging to a group the consolidated turnover was used as the basis for classification in a tax band, rather than the turnover of the individual undertaking. The Court held that indirect discrimination can exist where *themajority* of undertakings which are adversely affected by the steeply progressive scale of the tax, on account of their high turnover, belong to a group with a link in another Member State. (12)

(1) *Not sufficient in itself that the majority are affected*

33. The present case is not comparable with that case, however. Neither is the IDMGAV steeply progressive, nor are consolidated results aggregated. Instead, regard is had to the size of the on-site sales area in question.

34. In my view, it cannot be sufficient to have regard solely to whether foreign undertakings are affected *in the majority of cases* in order to be able to accept the existence of covert discrimination in the context of the fundamental freedoms, (13) which is the approach taken by the Commission and ANGED. This would, for example, prevent a Member State from introducing a corporation tax if, because of historical developments in the Member State, more than 50% of active undertakings were foreign undertakings. The fact that — more or less by chance — persons affected by the introduction of a tax originate to a large extent or even in their majority from other Member States cannot therefore constitute covert discrimination as such.

(2) *Conditions for covert discrimination*

35. The precise conditions for covert discrimination must therefore be clarified. On the one hand, the question arises how strong the correlation between the chosen distinguishing criterion and the place in which a company has its seat must be in order for there to be unequal treatment based on the seat. Thus far, the Court has had in view both a correspondence in the majority of cases (14) and a mere preponderance of non-residents being affected, (15) or even mentioned a mere risk of disadvantage. (16) It would appear to have been established thus far only that a 100% correspondence between the criterion and the place in which the company has its seat is not required. (17)

36. On the other hand, not only is the necessary degree of correlation uncertain according to case-law, but also the question whether that correlation must typically (18) exist or must be inherent in the distinguishing criterion, as is indicated in a number of judgments, (19) or can also be based on more incidental factual circumstances. (20)

37. In my view, stricter conditions are necessary for the existence of covert discrimination in tax law. It is intended only to include cases which do not constitute discrimination from a purely formal perspective, but have the same effect. (21) I consider that a provision which entails covert discrimination must therefore affect foreign undertakings in particular intrinsically (22) or in the vast majority of cases, as was possibly the situation in *Hervis Sport*. (23)

38. However, this cannot be accepted where a link is made to a certain sales area, the threshold for which merely has the consequence that, according to a 2004 letter from the Commission, in one year (out of 15 possible years) in another region (with very different thresholds) (24) around 61.5% of the retailers concerned are operated by undertakings from other Member States (or have shareholders from other Member States).

39. In addition, it is unclear how the ‘origin’ of those undertakings (25) was determined. In particular, in tax law the origin of an undertaking is determined, as a rule, according to its registered office (place of establishment) and not, for example, according to the nationality of the shareholders. As ANGED is a *national* association of large distribution establishments in Spain, its members might also be understood to be Spanish undertakings. In addition, even if regard were had to a company’s shareholders, the available figures show the same picture, although this is to be assessed by the national court. (26) The figures do not indicate that in this instance undertakings from other Member States are disadvantaged intrinsically or in the vast majority of cases in comparison with Spanish undertakings.

2. *In the alternative: justification*

40. If, contrary to the above statements, covert discrimination were nevertheless taken to exist, it would have to be examined whether it is justified. However, that examination covers only the non-taxation of smaller retail establishments. It is not apparent from the request for a preliminary ruling that Spanish undertakings benefit from the exemptions within the scope of the IDMGAV (Article 20 of the TRIMCA) in the majority of cases.

41. A restriction of fundamental freedoms may be justified for overriding reasons relating to the general interest, provided it is appropriate for securing the attainment of the objective pursued and does not go beyond what is necessary for attaining that objective. (27)

(a) *Overriding reasons relating to the general interest*

42. The IDMGAV serves purposes of town and country planning and environmental protection (see point 7 above). It is levied on establishments which, on account of their attractiveness to consumers, encourage the mass movement of vehicles and, consequently, have adverse effects on the natural and land environment of Aragon. Objectives relating to town and country planning (28) and environmental protection (29) have been recognised as justifications in the Court's case-law.

43. Furthermore, the intention is to make a link to, and to skim off, the specific economic capacity apparent in 'in the business and trade carried on in retail establishments'. In my opinion, the Court has not yet been required to decide whether a difference in economic capacity (and thus a different ability to bear financial burdens) can be regarded as a justification for a restriction of a fundamental freedom. I would not, however, like to rule out that, as with a progressive rate for example, a difference in economic capacity could also justify a difference in treatment for tax purposes. (30)

(b) *Proportionality of the restriction*

44. The restriction must also be appropriate for ensuring the attainment of the objective and may not go beyond what is necessary for attaining that objective, in this case compensating for effects on the territory and the environment that may be connected with setting up large retail establishments. (31)

(1) *Appropriateness of the tax*

45. According to the Court's case-law, national legislation is appropriate for ensuring attainment of the objective pursued only if it genuinely reflects a concern to attain it in a consistent and systematic manner. (32)

46. In this regard, the EU legislature must be allowed a broad discretion in an area which entails political, economic and social choices on its part and in which it is called upon to undertake complex assessments. Consequently, the legality of a measure adopted in that sphere can be affected only if the measure is manifestly inappropriate having regard to the objective which the competent institutions are seeking to pursue. (33)

47. Furthermore, the Court also respects the discretion enjoyed by the Member States in laying down general laws. (34) In particular, political, economic and social choices are entailed on the part of the legislature when drafting tax legislation. It is also (35) called upon to undertake complex assessments. In the absence of Community harmonisation, the national legislature has a certain discretion in the field of tax law in fixing a tax for retail establishments. The requirement of

consistency is therefore satisfied if the IDMGAV is not manifestly inappropriate having regard to the objective.

48. The IDMGAV places a particular burden on retail establishments with a large area. This is clearly based on the assumption that they generate a higher volume of customer and goods traffic. It is plausible that this higher volume of customer and goods traffic may cause higher noise and air emissions, and thus higher environmental impacts. Consequently, a law under which businesses with higher noise and air emissions are taxed more heavily is appropriate for creating an incentive to operate smaller retail undertakings which — each in themselves — cause lower emissions.

49. Because smaller undertakings are also easier to integrate in terms of town and country planning, this is also beneficial from the point of view of a sensible and fair distribution of limited space. The law is thus also appropriate for serving purposes of environmental protection and attaining objectives relating to town and country planning in a consistent and systematic manner. (36)

50. It is immaterial in this regard that the IDMGAV does not differentiate between establishing a retail undertaking in an urban or a rural area. Regardless of their location, large retail establishments attract a higher volume of goods and customer traffic than smaller retail establishments. The same holds for the non-aggregation of more than one sales establishment owned by a single owner.

51. The failure to differentiate between establishments in urban and rural areas (and possibly also non-aggregation) only shows that the tax could potentially be *better* designed from an environmental point of view in order to attain the abovementioned objectives more purposefully. This does not mean, however, that the contested tax is manifestly inappropriate for achieving those objectives.

(2) *Necessity of the tax*

52. It must therefore be clarified whether the tax — which is linked to a total area of 2 000 m² — is also necessary for attaining those objectives.

53. In examining necessity in connection with proportionality, according to the Court’s case-law, when there is a choice between several appropriate measures, recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued. (37)

54. In that regard, it should be recalled that it is for the Member State relying on an overriding reason in the public interest as justification for a restriction on one of the fundamental freedoms to demonstrate that its legislation is appropriate and necessary to attain the legitimate objective pursued. However, that burden of proof cannot be so extensive — in the context of treaty infringement proceedings — as to require the Member State to prove, positively, that no other conceivable measure could enable that objective to be attained under the same conditions. (38) This principle must apply a fortiori in preliminary ruling proceedings.

55. A feature of thresholds is that the question can always be asked why, for example, 1 000 m2 or 3 000 m2 was not adopted in the law rather than the chosen 2 000 m2. However, this question arises with any threshold and, in my view, can only be answered by the democratically mandated legislature. Contrary to the view taken by the Commission, the legislature is not required to prove empirically how it fixed the threshold and it also does not matter whether, in the Commission’s view, the threshold is credible or even ‘right’, as long as it is not manifestly erroneous. That is not the case here.

56. A higher threshold would perhaps be a less onerous measure, but would not be equally appropriate from the point of view of the Member State. It must be recognised that larger retailers face greater challenges with regard to urban planning and consideration of environmental concerns and that the size of retail establishments is an indicator of a larger turnover, and thus also of a larger economic capacity (and greater financial strength). Nor can it be deemed manifestly incorrect that larger retailers also benefit to a greater degree from urban infrastructure than smaller retailers. Accordingly, the sales area of retail establishments is a relevant factor with respect to attaining the legislative objectives.

57. There can also be no objection to the non-aggregation of more than one retail establishment owned by the same owner. If the legislative objective has in view the effects of the individual retail establishment, the appropriate method — from the perspective of the legislature — is also to have regard to the size of that specific local retail establishment.

58. Lastly, contrary to the view taken by the Commission and ANGED, requirements under building law governing the setting up of a retail establishment are not equally capable of providing a financial incentive to open smaller retail establishments.

(3) *Proportionality of the tax*

59. Furthermore, restrictions of a fundamental freedom must also be appropriate to the objective pursued. (39) This means that the restriction and its consequences must not be disproportionate to the aims pursued (which are worthy of protection). (40) This therefore requires the specific consequences to be weighed, taking into consideration the abstract importance of the protected legal interests (environmental protection and town and country planning) and the affected legal interest (41) (hypothetically the exercise of a fundamental freedom).

60. In this instance the tax is not disproportionate to the purposes pursued. The burden is not so high that economic activity would no longer be possible (‘choking effect’). In particular, the first 2 000 m² are not taxed at all and, according to the authorities, the tax is deductible from the basis of assessment for Spanish income tax. In addition, reliefs are offered where the retail establishment makes investments aimed at the adoption of measures preventing or making good the adverse effects of pollution in the natural and land environment (see Articles 45 and 46 of the TRIMCA). Furthermore, environmental protection and town and country planning are legal interests of high importance for the co-existence of a society, and of very high importance in the case of environmental protection (which is expressly mentioned in Article 11 TFEU, Article 3(3) TEU and Article 37 of the Charter of Fundamental Rights of the European Union). (42) Consequently, even a (covert) restriction of the freedom of establishment would be justified.

B. **Existence of aid**

61. With regard to the second question, it must be examined whether the rules of the TRIMCA constitute unlawful aid under Article 107(1) TFEU.

1. *Reliance on the existence of aid in order to avoid a tax liability*

62. It should be pointed out, first of all, that the Court has held on a number of occasions that businesses liable to pay a tax cannot rely on the argument that the exemption enjoyed by other businesses constitutes State aid in order to avoid payment of that tax. (43)

63. It would be otherwise, however, if the tax and the envisaged exemption were *an integral part of an aid measure*. For that to be so, it must be hypothecated to the aid measure under the

relevant national rules, in the sense that the revenue from the tax is necessarily allocated for the financing of the aid and has a direct impact on the amount thereof and, consequently, on the assessment of the compatibility of that aid with the internal market. (44)

64. In this regard it can be stated that revenue from this tax is not used for specific aid for businesses. Instead, it is used to finance measures preventing or repairing damage caused to the environment (see Article 5 of the TRIMCA). Accordingly, it can be ruled out that the revenue obtained favours a specific undertaking or a particular sector, as it pursues an objective in the general interest and benefits society as a whole.

65. Consequently, undertakings which are required to pay that tax cannot rely on the unlawfulness of the 'exemption' granted before national courts in order to avoid payment of that tax or to obtain its refund. If they cannot rely on it, however, there is no need for any further statements regarding the possible existence of aid. The review of the lawfulness of the aid in the form of non-taxation of smaller retailers is then reserved for the Commission in a normal State aid procedure under Article 108 TFEU.

66. Nevertheless, as the referring court is not reviewing the tax notices, but the underlying law, which could also have significance for persons other than ANGED, further statements regarding Article 107 TFEU would appear to be useful for the referring court at least.

2. *Definition of aid*

67. Assuming this to be the case, it must be examined whether (1) the non-taxation of owners of smaller retailers or (2) the exemption for certain larger retailers constitute aid within the meaning of Article 107(1) TFEU.

68. According to the Court's settled case-law, classification as 'State aid' within the meaning of Article 107(1) TFEU requires, first, that there is an intervention by the State or through State resources. Second, the intervention must be liable to affect trade between the Member States. Third, it must confer a selective advantage on the recipient. Fourth, it must distort or threaten to distort competition. (45)

(a) *The concept of advantage*

69. With regard to the question whether the rules at issue in the main proceedings grant the recipient an advantage, it should be noted that, according to the Court's settled case-law, measures which, whatever their form, are likely directly or indirectly to favour certain undertakings or which fall to be regarded as an economic advantage that the recipient undertaking would not have obtained under normal market conditions are regarded as State aid. (46)

70. Favourable tax treatment which, although not involving the transfer of State resources, places the recipients in a financial position more favourable than that of other taxpayers can also come under Article 107(1) TFEU. (47)

71. In particular, measures which, in various forms, mitigate the burdens *normally* included in the budget of an undertaking, and which therefore, without being subsidies in the strict meaning of the word, are similar in character and have the same effect, are considered to be aid. (48)

72. As regards the non-taxation of smaller retail establishments, it should be stated that under the TRIMCA only retail establishments from an area of 2 000 m² (with regard to this threshold see point 24 above) are to be taxed. The background to this is that a certain economic capacity is presumed (on a highly generalised basis) as from this size (see Article 15 of the TRIMCA). Under

normal market conditions and in accordance with the will of the Spanish regional legislature, smaller retail establishments (below the threshold of 2 000 m² in total area under Article 22 of the TRIMCA) are not taxed. Therefore, for them no burdens are mitigated which are *normally* included in the budget of smaller retail establishments. Even larger retail establishments are not subject to taxation in respect of the first 2 000 m² of their sales area. There is thus again no unequal treatment (see point 28 et seq. above) and no economic advantage which smaller retail establishments would not have obtained under normal market conditions.

73. The non-taxation of small retail establishments cannot therefore constitute aid. At most, the exemption for certain larger retail establishments from the intrinsically relevant tax (under Article 20 of the TRIMCA it applies, inter alia, to those selling machinery, construction materials or fittings, etc.) can be construed as such an advantage. It would then also have to be selective.

(b) *Selectivity of the advantage*

74. It must thus be examined whether (1) the exemption for certain larger retailers amounts to 'favouring certain undertakings or the production of certain goods' within the meaning of Article 107(1) TFEU and there is therefore a 'selective advantage' for the purposes of the Court's case-law.

75. In the alternative — should the Court also consider the non-taxation of smaller retail establishments to be an advantage which they would not have obtained under normal market conditions — it must also be examined whether (2) the non-taxation of owners of smaller retailers constitutes such a 'selective advantage'.

(1) *Selectivity in tax law*

76. The examination of such selectivity in the tax legislation of the Member States presents considerable difficulties. (49)

77. Case-law repeatedly takes as its starting point the premiss that a tax regime is not selective if it is applicable without distinction to all economic operators. (50) According to case-law, however, the mere fact that a tax regime grants an advantage only to those undertakings which satisfy its conditions is not in itself capable of establishing its selectivity. (51)

78. As far as tax advantages are concerned, therefore, the Court has made any finding as to their selectivity subject to special conditions. According to that case-law, the ultimately decisive factor is whether, in accordance with the criteria laid down by the national tax system, the conditions governing the tax advantage are selected in a non-discriminatory manner. (52) To answer that question, it is necessary to begin by identifying the ordinary or 'normal' tax regime applicable in the Member State concerned. It is in relation to that ordinary or 'normal' tax regime that it is necessary, secondly, to assess whether the advantage granted by the tax measure in question is selective.

79. This is conceivable where that measure is a derogation from that ordinary system, in so far as it differentiates between operators who, in the light of the objective pursued by the tax system of that Member State, are in a comparable factual and legal situation. (53) Even if those conditions are satisfied, the favourable treatment may be justified by the nature or general purposes of the system of which it is a part, in particular where a tax regime results directly from the basic or guiding principles of the national tax system. (54)

80. Such a special test to establish whether or not tax regimes are selective is necessary because — unlike subsidies in the narrow sense in the form of cash benefits — tax advantages

are granted in the context of a tax system to which, as a general rule, undertakings are permanently and inevitably subject. Tax systems include differentiations in many different ways, the purpose of those differentiations being, as a rule, simply to ensure that the tax achieves the precise objective it pursues. That said, according to case-law, such ‘favourable’ differentiations, which are not subsidies in the narrow sense, are classified as aid only if they are similar in character and have the same effect. (55)

81. Thus, it is only where a Member State also uses its existing tax system as a means of distributing cash benefits for purposes other than those of that tax system that there are grounds for treating such tax advantages as subsidies in the narrow sense. (56)

82. The Court undertakes a consistency test, where inconsistency ultimately indicates abuse. Only this time it is not asked whether the taxable person selects abusive arrangements in order to avoid tax. Rather, it is asked whether, on an objective analysis, the Member State ‘abuses’ its tax law in order to make subsidies to individual undertakings in circumvention of the rules on State aid.

83. It follows from this finding, first, that an unjustifiable difference in treatment operated in the tax system of the Member State is necessary to support the conclusion that a tax advantage is selective within the meaning of Article 107(1) TFEU. The crucial factor in this regard is whether that differentiation arises from the nature or the overall structure of the system of which it is part. (57)

84. Furthermore, in accordance with the wording of Article 107(1) TFEU, that unjustified difference in treatment would have to be based on a differentiation for the benefit of either ‘certain undertakings’ or ‘the production of certain goods’. It is for that reason that the Court, in particular in the judgment in *Gibraltar*, has held that a tax system must characterise the recipient undertakings, by virtue of the properties which are specific to them, as a privileged category. (58)

85. In *World Duty Free Group* (59) this finding seems at first sight to have been qualified slightly. (60) In that case, a tax scheme which provided tax advantages (short amortisation period) for all taxable persons which acquired foreign undertakings with goodwill was regarded as selective because other taxable persons which acquired domestic undertakings were able to amortise goodwill only over a longer period. As taxable persons do not per se constitute specific undertakings or the production of specific goods, the criteria laid down in Article 107(1) TFEU did not apply. (61) However, that ruling concerned a special case of ‘export promotion’ for domestic undertakings in respect of investments abroad to the detriment of foreign undertakings, which runs counter to the legal principle laid down in Article 111 TFEU. Accordingly, specific export subsidies can satisfy the selectivity criterion even where they apply to all taxable persons.

(2) *The selective nature of the various differences in treatment*

86. The referring court considers that the scheme at issue may grant a selective advantage on a number of counts, namely through the different treatment of retail establishments depending on their size and the exemption for certain retail establishments.

87. The referring court has therefore selected various ‘normal’ tax regimes as the basis for its examination. In so far as it suspects that the non-taxation of smaller retail establishments is selective, it uses a reference framework under which all retail establishments would be covered. In so far as exempt larger retail establishments are addressed, the reference framework would be all largerretail establishments.

88. The reference framework therefore varies according to the difference in treatment under consideration. This makes apparent the fact — as the Court, too, found in the judgment in *Gibraltar*

(62) — that the determination of a ‘normal’ tax system cannot be decisive. As the Court reiterated in *World Duty Free,* (63) the examination of the difference in treatment in question in the light of the objective pursued by the law alone is decisive.

89. It must therefore be clarified, in accordance with the Court’s case-law, whether the rules of the TRIMCA result in differences in treatment which are not based in the specific tax legislation itself, but pursue purposes which are extrinsic to it — that is to say, extraneous purposes. (64)

(i) *Analysis of the legislative objectives*

90. This entails a closer analysis of the legislative objectives. As was stated above in point 42, the aim of the law is environmental protection, town and country planning and contribution to costs by undertakings which are presumed, based on a generalised approach, to have a particular economic capacity because they use large sales areas. There is also a certain ‘redistributive function’ when economically stronger actors are subject to a heavier financial burden than economically weaker actors.

(ii) *Exemption for retail establishments which require large areas*

91. As regards the exemption under Article 20 of the TRIMCA, it should be borne in mind that those selling machinery, construction materials, fittings, doors and windows and motor vehicles, as well as nurseries for gardening and cultivation, generally require a larger sales and storage area on account of their product range. In comparison with large retail establishments with a smaller range, the generalised presumption of stronger economic capacity in the case of a larger sales area is not entirely accurate.

92. In addition, such retail establishments are especially reliant on a larger area, with the result that they in particular are affected by the tax. As special regard must be had to the principle of proportionality in tax law, it is perfectly understandable, (65) and not manifestly extraneous in the light of the objective of taxing particular economic capacity, that the national legislature takes this particular burden into consideration.

93. It should also be taken into account, in the light of the objective of environmental protection — and contrary to what ANGED seems to think — that because of their product range the abovementioned taxable persons do not attract as high a volume of customers per m^2 as other retail establishments. As a rule, a store selling doors and windows is visited less often by a customer than a discount supermarket with the same area. These less frequent customer visits probably also contribute to a lower volume of goods traffic. The retail establishments mentioned in Article 20 of the TRIMCA generally sell to other undertakings which purchase in larger volumes but visit the sales areas less frequently. There is no need to determine whether this is actually the case. As the national legislature is required to take a decision based on forecasts in this regard, this can be reviewed only with respect to a manifest error (with regard to the test, see point 47 above). No such manifest error is evident in this instance, however.

94. With regard to the objective of town and country planning, it is not clear at first sight why construction materials stores should be exempt. However, this is immaterial, since it is sufficient if the difference in treatment can be justified by one of the legislative objectives. That is so in this case with regard to taxation based on economic capacity and consideration of negative environmental impacts.

95. Only the exemption for those selling fittings for individual, conventional and specialist establishments is not easy to explain at first sight in the light of the abovementioned legislative objectives. It is not immediately apparent why such retail establishments should attract a lower

volume of customer and goods traffic or have a lower economic capacity. However, it is for the referring court (66) to determine whether ‘normal’ fittings stores and the fittings stores mentioned in Article 20 of the TRIMCA are not therefore in a comparable situation.

96. If ‘normal’ fittings stores and the fittings stores mentioned in Article 20 of the TRIMCA are also factually and legally comparable in the light of the legislative objectives (adverse effects on the environment, town and country planning, linkage to economic capacity according to volume of customer and goods traffic per square metre) having regard to the latitude available for forecasting, the contested exemption constitutes favourable treatment of the exempt establishments engaged in the sale of fittings. That unequal treatment would not then be justified by basic or guiding principles of the tax system. The system would therefore be selective and be treated as a subsidy in the narrow sense (see point 80 above).

(iii) *In the alternative: non-taxation of smaller retail undertakings*

97. Furthermore, the referring court also criticises the complete non-taxation of retail establishments with a total area of less than 2 000 m². However, according to case-law, a selective advantage possibly exists only where the measure is a derogation from the ordinary system, in so far as it differentiates between operators who, in the light of the objective pursued by the tax system of that Member State, are in a comparable factual and legal situation. (67)

98. There is no unequal treatment of smaller and larger retail establishments in this respect because large retail establishments are also not taxed on their first 2 000 m² in total area (see point 72 above). All retail establishments thus obtain this ‘advantage’ of non-taxation. Even if small retail establishments were included within the scope of the tax, they would not be taxed in respect of their total area from 1 m² to 2 000 m², just like large retail undertakings. Furthermore, small and large retail establishments are not in a comparable situation (see point 100 et seq.). However, even if unequal treatment were assumed, this differentiation is justified (see point 102 et seq.).

– *Comparable factual and legal situation?*

99. In *World Duty Free Group* in particular, the Court stressed that the recipient must, in the light of the objective pursued by the regime in question, be in a comparable factual and legal situation and accordingly suffer different treatment that can, in essence, be classified as discriminatory. (68)

100. Therefore, the de facto non-taxation of owners of smaller retailers (whether individual or as part of a collective retail establishment) is not a selective advantage for them which satisfies the definition of aid under Article 107(1) TFEU, as that differentiation is intrinsic to the legislative objective, which is to reduce adverse effects on the environment and town and country planning caused by *larger* retail establishments, by creating an incentive to operate smaller retail establishments which are not taxed. Accordingly, the non-aggregation of more than one retail establishment owned by the same owner is also not only understandable, but logical and consistent with the legislative objective.

101. Larger and smaller retail establishments differ on account of their sales area, the resulting economic capacity and the volume of customer and goods traffic per square metre. In the view of the Member State — which is not manifestly incorrect — they are not in a legally and factually comparable situation.

– *In the alternative: justification of differentiation*

102. If, on the other hand, the Court accepts that small and larger retail establishments are

factually and legally comparable, it must then be examined whether the envisaged differentiation can be justified.

103. With regard to the size of the sales area, that is so, in my view. The size of the sales area indicates (without manifest error at least) a certain volume of products and customers, and thus a certain level of customer and goods traffic with the resulting noise and air emissions and other effects which are of particular detriment to the community. In addition, the size of a retail establishment can also be seen as a (rough) indicator of a larger turnover and a larger economic capacity, and thus greater economic strength.

104. In addition, there can be no objection from the point of view of administrative procedure if the number of retail establishments covered, and thus to be checked, is reduced by means of a threshold. Like the non-aggregation of the areas of different retail establishments, this also contributes to administrative simplification. Even in EU VAT law, small undertakings (undertakings whose turnover does not exceed a certain ‘allowance’) are not taxed and this is not considered an infringement of the rules on State aid. In view of the legislative objectives pursued, it is also perfectly understandable to have regard to the sales area, rather than turnover or profit, as the former is easily ascertainable (simple and effective administration) and less prone to circumvention than profit, for example.

(c) *Conclusion*

105. The non-taxation of smaller retail establishments does not therefore constitute a selective advantage for such undertakings. In this regard there is no advantage or unjustified difference in treatment. Their non-taxation is objectively in keeping with the legislative objectives of the TRIMCA.

106. The exemption for certain undertakings with a larger area can also be explained objectively in the light of the legislative objectives pursued.

VI. **Conclusion**

107. I therefore propose that the questions referred by the Tribunal Supremo (Supreme Court, Spain) be answered as follows:

1. Articles 49 and 54 TFEU do not preclude a tax on retailers based on sales area such as the tax at issue here.

2. Article 107(1) TFEU may not be interpreted as meaning that the non-taxation of retail establishments with a total area of less than 2 000 m2 would constitute aid. The same holds for the exemption from tax for establishments engaged in the sale of: (a) machinery, vehicles, tools and industrial supplies; (b) construction materials, plumbing materials, doors and windows, for sale only to professionals; (c) nurseries for gardening and cultivation; (d) motor vehicles, in dealerships and repair workshops, and (e) motor fuel.

3. The question whether the exemption from tax for retail establishments in which fittings for individual, conventional and specialist establishments are sold constitutes aid within the meaning of Article 107(1) TFEU depends on comparability with retail establishments which sell fittings other than in such establishments. This must be determined by the referring court.

1 Original language: German.

2 Joined Cases C?234/16 and C?235/16 and Case C?233/16.

3 In my view, this produces a ‘sales area allowance’ of 1 333 m^2, as the addition of parking

areas and other areas is limited in each case to 25% of the sales areas (1.333 * 1.5 = 2 000). The ‘allowance’ of 2 000 m² can thus be exceeded at the lowest as from a sales area of 1 333 m². The dividing line between small and large retail establishments in Aragon does not therefore lie at 500 m², but only at 1 333 m² (or 2 000 m² without parking areas or other storage areas). For reasons of simplification, I will refer to an allowance of 2 000 m².

4 Judgments of 11 March 2004, *de Lasteyrie du Saillant* (C?9/02, EU:C:2004:138, paragraph 40 and the case-law cited); of 13 December 2005, *SEVIC Systems* (C?411/03, EU:C:2005:762, paragraph 18); and of 21 January 2010, *SGI* (C?311/08, EU:C:2010:26, paragraph 38).

5 Judgments of 29 November 2011, *National Grid Indus* (C?371/10, EU:C:2011:785, paragraph 36); of 21 May 2015, *Verder LabTec* (C?657/13, EU:C:2015:331, paragraph 34); and of 16 April 2015, *Commission* v *Germany* (C?591/13, EU:C:2015:230, paragraph 56 and the case-law cited).

6 See my Opinions in *C* (C?122/15, EU:C:2016:65, point 66); *X* (C?498/10, EU:C:2011:870, point 28 et seq.); *Hervis Sport- és Divatkereskedelmi* (C?385/12, EU:C:2013:531, points 83 and 84); and *X* (C?686/13, EU:C:2015:31, point 40).

7 See also judgment of 6 December 2007, *Columbus Container Services* (C?298/05, EU:C:2007:754, paragraphs 51 and 53); order of 4 June 2009, *KBC-bank* (C?439/07 and C?499/07, EU:C:2009:339, paragraph 80); and judgment of 14 April 2016, *Sparkasse Allgäu* (C?522/14, EU:C:2016:253, paragraph 29).

8 Judgment of 24 March 2011, *Commission* v *Spain* (C?400/08, EU:C:2011:172).

9 Judgment of 24 March 2011, *Commission* v *Spain* (C?400/08, EU:C:2011:172, paragraph 61).

10 See, inter alia, judgments of 5 December 1989, *Commission* v *Italy* (C?3/88, EU:C:1989:606, paragraph 8); of 13 July 1993, *Commerzbank* (C?330/91, EU:C:1993:303, paragraph 14); of 14 February 1995, *Schumacker* (C?279/93, EU:C:1995:31, paragraph 26); of 8 July 1999, *Baxter and Others* (C?254/97, EU:C:1999:368, paragraph 10); of 25 January 2007, *Meindl* (C?329/05, EU:C:2007:57, paragraph 21); of 18 March 2010, *Gielen* (C?440/08, EU:C:2010:148, paragraph 37); of 1 June 2010, *Blanco Pérez and Chao Gómez* (C?570/07 and C?571/07, EU:C:2010:300, paragraph 117 et seq.); of 5 February 2014, *Hervis Sport- és Divatkereskedelmi* (C?385/12, EU:C:2014:47, paragraph 30); and of 8 June 2017, *Van der Weegen and Others* (C?580/15, EU:C:2017:429, paragraph 33); see also my Opinion in *Hervis Sport- és Divatkereskedelmi* (C?385/12, EU:C:2013:531, point 34).

11 Judgment of 5 February 2014, *Hervis Sport- és Divatkereskedelmi* (C?385/12, EU:C:2014:47, paragraph 39).

12 Judgment of 5 February 2014, *Hervis Sport- és Divatkereskedelmi* (C?385/12, EU:C:2014:47, paragraph 39 et seq.).

13 See also my Opinion in *Hervis Sport- és Divatkereskedelmi* (C?385/12, EU:C:2013:531, point 41).

14 See judgments of 7 July 1988, *Stanton and L’Étoile 1905* (143/87, EU:C:1988:378, paragraph 9); of 13 July 1993, *Commerzbank* (C?330/91, EU:C:1993:303, paragraph 15); of 8 July 1999, *Baxter and Others* (C?254/97, EU:C:1999:368, paragraph 13); of 22 March 2007, *Talotta* (C?383/05, EU:C:2007:181, paragraph 32); see also judgments of 3 March 1988, *Bergandi* (252/86, EU:C:1988:112, paragraph 28) with regard to Article 95 of the EEC Treaty; of 26 October 2010, *Schmelz* (C?97/09, EU:C:2010:632, paragraph 48) with regard to freedom to provide

services; and of 5 February 2014, *Hervis Sport- és Divatkereskedelmi* (C?385/12, EU:C:2014:47, paragraph 39 et seq.).

15 See judgment of 1 June 2010, *Blanco Pérez and Chao Gómez* (C?570/07 and C?571/07, EU:C:2010:300, paragraph 119).

16 See judgments of 22 March 2007, *Talotta* (C?383/05, EU:C:2007:181, paragraph 32), and of 1 June 2010, *Blanco Pérez and Chao Gómez* (C?570/07 and C?571/07, EU:C:2010:300, paragraph 119); see also judgment of 8 May 1990, *Biehl* (C?175/88, EU:C:1990:186, paragraph 14) with regard to free movement of workers.

17 See to that effect judgment of 28 June 2012, *Erny* (C?172/11, EU:C:2012:399, paragraph 41) with regard to free movement of workers.

18 See judgment of 8 July 1999, *Baxter and Others* (C?254/97, EU:C:1999:368, paragraph 13).

19 See judgments of 8 July 1999, *Baxter and Others* (C?254/97, EU:C:1999:368, paragraph 13); of 10 September 2009, *Commission* v *Germany* (C?269/07, EU:C:2009:527, paragraph 54); of 1 June 2010, *Blanco Pérez and Chao Gómez* (C?570/07 and C?571/07, EU:C:2010:300, paragraph 119); of 28 June 2012, *Erny* (C?172/11, EU:C:2012:399, paragraph 41); of 5 December 2013, *Zentralbetriebsrat der gemeinnützigen Salzburger Landeskliniken Betriebs* (C?514/12, EU:C:2013:799, paragraph 26); and of 2 March 2017, *Eschenbrenner* (C?496/15, EU:C:2017:152, paragraph 36).

20 See judgment of 5 December 1989, *Commission* v *Italy* (C?3/88, EU:C:1989:606, paragraph 9); see also judgment of 9 May 1985, *Humblot* (112/84, EU:C:1985:185, paragraph 14) with regard to Article 95 of the EEC Treaty.

21 See my Opinion in *Hervis Sport- és Divatkereskedelmi* (C?385/12, EU:C:2013:531, point 40).

22 See also, within the scope of the freedom of establishment, judgment of 1 June 2010, *Blanco Pérez and Chao Gómez* (C?570/07 and C?571/07, EU:C:2010:300, paragraph 119).

23 Judgment of 5 February 2014, *Hervis Sport- és Divatkereskedelmi* (C?385/12, EU:C:2014:47), and my Opinion in *Hervis Sport- és Divatkereskedelmi* (C?385/12, EU:C:2013:531, point 37 et seq.).

24 This concerned Catalonia in Case C?233/16 with a threshold of 2 500 m².

25 See also judgment of 24 March 2011, *Commission* v *Spain* (C?400/08, EU:C:2011:172, paragraph 60), in which consideration was given to ‘control’ and ‘shareholdings’ rather than to the place where the companies were established.

26 In this regard, according to the material produced by ANGED in Case C?233/16 regarding Catalonia with a threshold of 2 500 m², ‘only’ 52.03% of the total revenue from the tax is borne by undertakings from other Member States and their share of the total ‘taxed’ sales area is ‘only’ 46.77%.

27 Judgments of 5 October 2004, *CaixaBank France* (C?442/02, EU:C:2004:586, paragraph 17); of 24 March 2011, *Commission* v *Spain* (C?400/08, EU:C:2011:172, paragraph 73); and of 5 February 2014, *Hervis Sport- és Divatkereskedelmi* (C?385/12, EU:C:2014:47, paragraph 42).

28 Judgments of 1 October 2009, *Woningstichting Sint Servatius* (C?567/07, EU:C:2009:593, paragraph 29), and of 24 March 2011, *Commission* v *Spain* (C?400/08, EU:C:2011:172,

paragraph 74).

29 Judgments of 11 March 2010, *Attanasio Group* (C?384/08, EU:C:2010:133, paragraph 50), and of 24 March 2011, *Commission* v *Spain* (C?400/08, EU:C:2011:172, paragraph 74).

30 See also my Opinion in *Hervis Sport- és Divatkereskedelmi* (C?385/12, EU:C:2013:531, point 59 et seq.).

31 Judgments of 13 December 2005, *Marks & Spencer* (C?446/03, EU:C:2005:763, paragraph 35); of 13 December 2005, *SEVIC Systems* (C?411/03, EU:C:2005:762, paragraph 23); of 12 September 2006, *Cadbury Schweppes and Cadbury Schweppes Overseas* (C?196/04, EU:C:2006:544, paragraph 47); of 15 May 2008, *Lidl Belgium* (C?414/06, EU:C:2008:278, paragraph 27); of 29 November 2011, *National Grid Indus* (C?371/10, EU:C:2011:785, paragraph 42); and of 17 July 2014, *Nordea Bank* (C?48/13, EU:C:2014:2087, paragraph 25).

32 Judgments of 17 November 2009, *Presidente del Consiglio dei Ministri* (C?169/08, EU:C:2009:709, paragraph 42); of 12 July 2012, *HIT and HIT LARIX* (C?176/11, EU:C:2012:454, paragraph 22 and the case-law cited); and of 11 June 2015, *Berlington Hungary and Others* (C?98/14, EU:C:2015:386, paragraph 64).

33 Judgments of 10 December 2002, *British American Tobacco (Investments) and Imperial Tobacco* (C?491/01, EU:C:2002:741, paragraph 123 and the case-law cited), and of 4 May 2016, *Poland* v *Parliament and Council* (C?358/14, EU:C:2016:323, paragraph 79).

34 Judgments of 24 March 1994, *Schindler* (C?275/92, EU:C:1994:119, paragraph 61); of 21 September 1999, *Läärä and Others* (C?124/97, EU:C:1999:435, paragraph 14 et seq.); of 6 November 2003, *Gambelli and Others* (C?243/01, EU:C:2003:597, paragraph 63), all concerning games of chance; and of 5 March 1996, *Brasserie du pêcheur and Factortame* (C?46/93 and C?48/93, EU:C:1996:79, paragraph 48 et seq.) concerning foodstuffs legislation.

35 For a comparable test for assessing acts of Union institutions and of the Member States, see also judgment of 5 March 1996, *Brasserie du pêcheur and Factortame* (C?46/93 and C?48/93, EU:C:1996:79, paragraph 47).

36 See also — with regard to a comparable law — judgment of 24 March 2011, *Commission* v *Spain* (C?400/08, EU:C:2011:172, paragraph 80).

37 See judgments of 11 July 1989, *Schräder HS Kraftfutter* (265/87, EU:C:1989:303, paragraph 21); of 8 July 2010, *Afton Chemical* (C?343/09, EU:C:2010:419, paragraph 45); of 22 January 2013, *Sky Österreich* (C?283/11, EU:C:2013:28, paragraph 50); of 15 February 2016, *N.* (C?601/15 PPU, EU:C:2016:84, paragraph 54); of 4 May 2016, *Pillbox 38* (C?477/14, EU:C:2016:324, paragraph 48); and of 30 June 2016, *Lidl* (C?134/15, EU:C:2016:498, paragraph 33).

38 See judgments of 23 October 1997, *Commission* v *Netherlands* (C?157/94, EU:C:1997:499, paragraph 58); of 10 February 2009, *Commission* v *Italy* (C?110/05, EU:C:2009:66, paragraph 66); and of 24 March 2011, *Commission* v *Spain* (C?400/08, EU:C:2011:172, paragraph 75).

39 Judgments of 11 October 2007, *ELISA* (C?451/05, EU:C:2007:594, paragraph 82 and the case-law cited), and of 21 December 2011, *Commission* v *Poland* (C?271/09, EU:C:2011:855, paragraph 58).

40 Judgments of 12 July 2001, *Jippes and Others* (C?189/01, EU:C:2001:420, paragraph 81); of 9 November 2010, *Volker und Markus Schecke and Eifert* (C?92/09 and C?93/09,

EU:C:2010:662, paragraph 76 et seq.); of 22 January 2013, *Sky Österreich* (C?283/11, EU:C:2013:28, paragraph 50); and of 30 June 2016, *Lidl* (C?134/15, EU:C:2016:498, paragraph 33).

41 Similarly, judgment of 9 November 2010, *Volker und Markus Schecke and Eifert* (C?92/09 and C?93/09, EU:C:2010:662, paragraph 76 et seq.).

42 Judgment of 22 December 2008, *British Aggregates* v *Commission* (C?487/06 P, EU:C:2008:757, paragraph 91).

43 Judgments of 20 September 2001, *Banks* (C?390/98, EU:C:2001:456, paragraph 80); of 27 October 2005, *Distribution Casino France and Others* (C?266/04 to C?270/04, C?276/04 and C?321/04 to C?325/04, EU:C:2005:657, paragraph 42 et seq.); of 15 June 2006, *Air Liquide Industries Belgium* (C?393/04 and C?41/05, EU:C:2006:403, paragraph 43 et seq.); and of 6 October 2015, *Finanzamt Linz* (C?66/14, EU:C:2015:661, paragraph 21).

44 Judgments of 25 June 1970, *France* v *Commission* (47/69, EU:C:1970:60, paragraphs 16/17 et seq.); of 13 January 2005, *Streekgewest* (C?174/02, EU:C:2005:10, paragraph 26); and of 27 October 2005, *Distribution Casino France and Others* (C?266/04 to C?270/04, C?276/04 and C?321/04 to C?325/04, EU:C:2005:657, paragraph 40).

45 Judgments of 21 December 2016, *Commission* v *Hansestadt Lübeck* (C?524/14 P, EU:C:2016:971, paragraph 40); of 21 December 2016, *Commission* v *World Duty Free Group and Others* (C?20/15 P and C?21/15 P, EU:C:2016:981, paragraph 53); and of 27 June 2017, *Congregación de Escuelas Pías Provincia Betania* (C?74/16, EU:C:2017:496, paragraph 38).

46 Judgments of 9 October 2014, *Ministerio de Defensa and Navantia* (C?522/13, EU:C:2014:2262, paragraph 21), and of 27 June 2017, *Congregación de Escuelas Pías Provincia Betania* (C?74/16, EU:C:2017:496, paragraph 65).

47 See, inter alia, judgments of 15 March 1994, *Banco Exterior de España* (C?387/92, EU:C:1994:100, paragraph 14); of 15 November 2011, *Commission and Spain* v *Government of Gibraltar and United Kingdom* (C?106/09 P and C?107/09 P, EU:C:2011:732, paragraph 72); and of 9 October 2014, *Ministerio de Defensa and Navantia* (C?522/13, EU:C:2014:2262, paragraph 23).

48 Judgments of 15 March 1994, *Banco Exterior de España* (C?387/92, EU:C:1994:100, paragraph 13); of 19 March 2013, *Bouygues and Bouygues Télécom* v *Commission* (C?399/10 P and C?401/10 P, EU:C:2013:175, paragraph 101); of 14 January 2015, *Eventech* (C?518/13, EU:C:2015:9, paragraph 33); and of 27 June 2017, *Congregación de Escuelas Pías Provincia Betania* (C?74/16, EU:C:2017:496, paragraph 66).

49 See in particular the current reference from the Bundesfinanzhof (Federal Finance Court) (order of 30 May 2017 — II R 62/14, BFHE 257, 381) regarding the ‘Konzernklausel’ (clause governing groups of undertakings) in Paragraph 6a of the Grunderwerbsteuergesetz (Law on the tax of transfer of real property), pending as Case C?374/17.

50 See in particular judgments of 8 November 2001, *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke* (C?143/99, EU:C:2001:598, paragraph 35); of 15 November 2011, *Commission and Spain* v *Government of Gibraltar and United Kingdom* (C?106/09 P and C?107/09 P, EU:C:2011:732, paragraph 73); of 29 March 2012, *3M Italia* (C?417/10, EU:C:2012:184, paragraph 39); of 9 October 2014, *Ministerio de Defensa and Navantia* (C?522/13, EU:C:2014:2262, paragraph 23); and of 21 December 2016, *Commission* v *World Duty Free Group and Others*

(C?20/15 P and C?21/15 P, EU:C:2016:981, paragraph 53 et seq.).

51 See to that effect in particular judgments of 29 March 2012, *3M Italia* (C?417/10, EU:C:2012:184, paragraph 42), and of 21 December 2016, *Commission* v *World Duty Free Group and Others* (C?20/15 P and C?21/15 P, EU:C:2016:981, paragraph 59).

52 See also to that effect judgments of 14 January 2015, *Eventech* (C?518/13, EU:C:2015:9, paragraph 53); and of 21 December 2016, *Commission* v *World Duty Free Group and Others* (C?20/15 P and C?21/15 P, EU:C:2016:981, paragraph 54); expressly also, outside the field of tax law, judgment of 21 December 2016, *Commission* v *Hansestadt Lübeck* (C?524/14 P, EU:C:2016:971, paragraphs 53 and 55).

53 See judgments of 17 November 2009, *Presidente del Consiglio dei Ministri* (C?169/08, EU:C:2009:709); of 8 September 2011, *Paint Graphos* (C?78/08 to C?80/08, EU:C:2011:550, paragraph 49); of 29 March 2012, *3M Italia* (C?417/10, EU:C:2012:184, paragraph 42); of 18 July 2013, *P* (C?6/12, EU:C:2013:525, paragraph 19); of 9 October 2014, *Ministerio de Defensa and Navantia* (C?522/13, EU:C:2014:2262, paragraph 35); of 21 December 2016, *Commission* v *Hansestadt Lübeck* (C?524/14 P, EU:C:2016:971, paragraphs 49 and 58); of 21 December 2016, *Commission* v *World Duty Free Group and Others* (C?20/15 P and C?21/15 P, EU:C:2016:981, paragraph 54); and of 21 December 2016, *Commission* v *Aer Lingus and Ryanair Designated Activity* (C?164/15 P and C?165/15 P, EU:C:2016:990, paragraph 51).

54 See judgments of 8 September 2011, *Paint Graphos* (C?78/08 to C?80/08, EU:C:2011:550, paragraphs 65 and 69); of 18 July 2013, *P* (C?6/12, EU:C:2013:525, paragraph 22); see also to that effect, inter alia, judgments of 2 July 1974, *Italy* v *Commission* (173/73, EU:C:1974:71, paragraph 33); of 8 November 2001, *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke* (C?143/99, EU:C:2001:598, paragraph 42); of 15 November 2011, *Commission and Spain* v *Government of Gibraltar and United Kingdom* (C?106/09 P and C?107/09 P, EU:C:2011:732, paragraph 145); and of 9 October 2014, *Ministerio de Defensa and Navantia* (C?522/13, EU:C:2014:2262, paragraphs 42 and 43).

55 See, inter alia, judgments of 23 February 1961, *De Gezamenlijke Steenkolenmijnen in Limburg* v *High Authority* (30/59, EU:C:1961:2, p. 43); of 15 June 2006, *Air Liquide Industries Belgium* (C?393/04 and C?41/05, EU:C:2006:403, paragraph 29); of 19 March 2013, *Bouygues and Bouygues Télécom* v *Commission* (C?399/10 P and C?401/10 P, EU:C:2013:175, paragraph 101); and of 9 October 2014, *Ministerio de Defensa and Navantia* (C?522/13, EU:C:2014:2262, paragraph 22).

56 See also to that effect judgment of 18 July 2013, *P* (C?6/12, EU:C:2013:525, paragraphs 22 to 27).

57 Judgments of 9 October 2014, *Ministerio de Defensa and Navantia* (C?522/13, EU:C:2014:2262, paragraph 42), and of 27 June 2017, *Congregación de Escuelas Pías Provincia Betania* (C?74/16, EU:C:2017:496, paragraph 71).

58 See judgment of 15 November 2011, *Commission and Spain* v *Government of Gibraltar and United Kingdom* (C?106/09 P and C?107/09 P, EU:C:2011:732, paragraph 104).

59 Judgment of 21 December 2016, *Commission* v *World Duty Free Group and Others* (C?20/15 P and C?21/15 P, EU:C:2016:981, paragraph 73 et seq. and paragraph 86 et seq.).

60 Paragraphs 59 and 86 of that judgment do not appear to be entirely consistent.

61 This follows at least, in my view, from the statements made in the judgment of 21 December 2016, *Commission* v *World Duty Free Group and Others* (C?20/15 P and C?21/15 P, EU:C:2016:981, paragraph 85 et seq.).

62 See judgment of 15 November 2011, *Commission and Spain* v *Government of Gibraltar and United Kingdom* (C?106/09 P and C?107/09 P, EU:C:2011:732, paragraphs 90 and 91 and 131).

63 Judgment of 21 December 2016, *Commission* v *World Duty Free Group and Others* (C?20/15 P and C?21/15 P, EU:C:2016:981, paragraphs 54, 67 and 74).

64 See expressly judgment of 8 September 2011, *Paint Graphos* (C?78/08 to C?80/08, EU:C:2011:550, paragraph 70).

65 See also judgment of 4 June 2015, *Commission* v *MOL* (C?15/14 P, EU:C:2015:362, paragraph 65).

66 With regard to this task, see also judgment of 14 January 2015, *Eventech* (C?518/13, EU:C:2015:9, paragraph 57 et seq.).

67 See judgments of 8 September 2011, *Paint Graphos* (C-78/08 to C-80/08, EU:C:2011:550, paragraph 49); of 18 July 2013, *P* (C-6/12, EU:C:2013:525, paragraph 19); of 9 October 2014, *Ministerio de Defensa and Navantia* (C?522/13, EU:C:2014:2262, paragraph 35); and of 21 December 2016, *Commission* v *World Duty Free Group and Others* (C-20/15 P and C?21/15 P, EU:C:2016:981, paragraph 54).

68 Judgment of 21 December 2016, *Commission* v *World Duty Free Group and Others* (C-20/15 P and C-21/15 P, EU:C:2016:981, paragraph 54); previously also: judgments of 28 July 2011, *Mediaset* v *Commission* (C-403/10 P, not published, EU:C:2011:533, paragraph 36); of 15 November 2011, *Commission and Spain* v *Government of Gibraltar and United Kingdom* (C-106/09 P and C-107/09 P, EU:C:2011:732, paragraphs 75 and 101); and of 14 January 2015, *Eventech* (C-518/13, EU:C:2015:9, paragraph 55); of 4 June 2015, *Commission* v *MOL* (C?15/14 P, EU:C:2015:362, paragraph 59).