Provisional text

JUDGMENT OF THE COURT (First Chamber)

26 April 2018 (*)

(Reference for a preliminary ruling — Regional tax on large retail establishments — Freedom of establishment — Protection of the environment and town and country planning — State aid — Selective measure)

In Cases C?236/16 and C?237/16,

REQUESTS for a preliminary ruling under Article 267 TFEU from the Tribunal Supremo (Supreme Court, Spain), made by decisions of 10 and 11 March 2016, received at the Court on 25 April 2016, in the proceedings

Asociación Nacional de Grandes Empresas de Distribución (ANGED)

v

Diputación General de Aragón,

THE COURT (First Chamber),

composed of R. Silva de Lapuerta, President of the Chamber, C.G. Fernlund, J.-C. Bonichot (Rapporteur), A. Arabadjiev and E. Regan, Judges,

Advocate General: J. Kokott,

Registrar: L. Carrasco Marco, Administrator,

having regard to the written procedure and further to the hearing on 6 July 2017,

after considering the observations submitted on behalf of:

– the Asociación Nacional de Grandes Empresas de Distribución (ANGED), by J. Pérez-Bustamante Köster and F. Löwhagen, abogados, and by J.M. Villasante García, procurador,

– the Diputación General de Aragón, by I. Susín Jiménez Ignacio, letrado, and J.A. Morales Hernández-San, procurador,

– the European Commission, by N. Gossement, P. N?me?ková and G. Luengo, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 9 November 2017,

gives the following

Judgment

1 These requests for a preliminary ruling concern the interpretation of Articles 49 and 54 TFEU and Article 107(1) TFEU.

2 The requests have been made proceedings between the Asociación Nacional de Grandes Empresas de Distribución (ANGED) and the Diputación General de Aragón (Regional Government of Aragon, Spain) concerning the lawfulness of a tax on large retail establishments situated in the Autonomous Community of Aragon.

Spanish law

3 The Ley de las Cortes de Aragón 13/2005, 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 on fiscal and administrative measures concerning assigned and own taxes in the Autonomous Community of Aragon) of 30 December 2005 (BOA No 154 of 31 December 2005, 'Law 13/2005') introduced, with effect from 1 January 2006, a tax on environmental damage caused by large sales areas ('the IDMGAV').

4 Article 28 of Law 13/2005 provides that that tax is to be levied on the business of retail establishments, on the ground that it leads to a great deal of traffic on the roads and, consequently, has adverse effects on the environment and the territory of the Autonomous Community of Aragon.

5 Article 29 of Law 13/2005 provides that a retail establishment is deemed to have a large sales area when its public sales area is greater than 500 m2.

6 Article 32 of Law 13/2005 states that 'the owners of the business and trade that cause the environmental damage in respect of which the tax is levied' are liable to pay the IDMGAV.

7 Article 33 of Law 13/2005 provides that retail establishments whose principal business is the sale of the following products are exempted from that tax: machinery, vehicles, tools and industrial supplies; construction materials, plumbing materials, doors and windows, for sale only to professionals; nurseries for gardening and cultivation; fittings for individual, 'conventional' and specialist establishments; motor vehicles, in dealerships and repair workshops; motor fuel.

8 Article 34 of that law sets out the methods for calculating the basis of assessment and Article 35 the methods for calculating that tax, providing, inter alia, for the application of a coefficient according to the location of the establishment when the basis for assessment exceeds 2 000 m2. The result of those methods is that the taxable amount is 0 when the basis of assessment is 2 000 m2 or less.

9 The legal framework of that tax was then specified in similar provisions of Decreto 1/2007 del Gobernio de Aragón, por el que se aprueba el Reglamento de desarrollo parcial de la Ley 13/2005 (Decree 1/2007 of the Regional Government of Aragon approving the provisions for the implementation in part of Law 13/2005) (BOA No 8 of 20 January 2007, 'Decree 1/2007').

The disputes in the main proceedings and the questions referred for a preliminary ruling

10 In 2007, the ANGED, a national association of large distribution companies, brought an action for annulment of Decree 1/2007 before the Tribunal Superior de Justicia de Aragón (High Court of Justice, Aragon, Spain). That action followed the action brought by the ANGED before that court against the orden del Departamento de Economía, Hacienda y Empleo de la Diputación General de Aragón (order of the Finance, Economy and Employment Department of the Regional Government of Aragon), of 12 May 2006 (BOA No 57 of 22 May 2006), which sets out the

provisions necessary for the application of the environmental taxes introduced by Law 13/2005 and approves the tax declaration, instalment payment and self-assessment forms.

11 That court stayed the proceedings in those two cases pending the outcome of the actions brought before the Tribunal Constitucional (Constitutional Court, Spain) by a group of Members of Parliament and the Spanish Government in respect of the law introducing the IDMGAV. Following the dismissal of those actions by the Tribunal Constitucional (Constitutional Court), the Tribunal Superior de Justicia de Aragón (High Court of Justice, Aragon) dismissed the action brought by the ANGED against Decree 1/2007 and upheld in part the action brought against the order of 12 May 2006. The ANGED then appealed against those two rulings before the Tribunal Supremo (Supreme Court, Spain).

12 The ANGED had also filed a complaint with the Commission concerning the introduction of the IDMGAV and the claim that it amounted to State aid.

13 By letter of 28 November 2014, the Commission informed the Spanish authorities that, further to a preliminary assessment of the IGMDAV system, the exemption granted to small retail establishments and to certain specialist establishments could be regarded as State aid incompatible with the internal market, and requested the Kingdom of Spain to withdraw or amend that tax.

14 In those circumstances, the Tribunal Supremo (Supreme Court) decided to stay the proceedings and to refer the following questions, formulated in identical terms in Cases C?236/16 and C?237/16, to the Court of Justice for a preliminary ruling:

‘(1) Must Articles 49 and Article 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

(a) 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

(b) 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, as well as garden centres and service stations, 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 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, as well as garden centres and service stations?'

Consideration of the questions referred

The first question

15 By its first question, the referring court asks, in essence, if Articles 49 and 54 TFEU should be interpreted as precluding a tax levied on large retail establishments, such as that in the main proceedings.

16 According to settled case-law, freedom of establishment aims to guarantee the benefit of national treatment in the host Member State to nationals of other Member States and to companies referred to in Article 54 TFEU by prohibiting any discrimination based on the place in which companies have their seat (see, inter alia, judgments of 12 December 2006, *Test Claimants in Class IV of the ACT Group Litigation*, C?374/04, EU:C:2006:773, paragraph 43, and of 14 December 2006, *Denkavit Internationaal and Denkavit France*, C?170/05, EU:C:2006:783, paragraph 22).

17 The rules regarding equal treatment forbid not only overt discrimination based on the location of the seat of companies, but also all covert forms of discrimination which, by the application of other criteria of differentiation, lead in fact to the same result (judgment of 5 February 2014, *Hervis Sport-és Divatkereskedelmi*, C?385/12, EU:C:2014:47, paragraph 30 and the case-law cited).

18 Moreover, a tax based on an apparently objective criterion of differentiation but that disadvantages in most cases, given its features, companies whose seat is in other Member States and that are in a comparable situation to companies whose seat is situated in the Member State where that tax is charged, constitutes indirect discrimination based on the location of the seat of the companies, which is prohibited under Articles 49 and 54 TFEU (see, to that effect, judgment of 5 February 2014, *Hervis Sport-és Divatkereskedelmi*, C?385/12, EU:C:2014:47, paragraphs 37 to 41).

19 In the cases in the main proceedings, the legislation in question lays down a criterion relating to the sales area of the establishment which does not give rise to any direct discrimination.

20 Nor does the evidence submitted to the Court show that that criterion disadvantages in most cases nationals from other Member States or companies whose seat is in another Member State.

21 The information provided by the ANGED in its written observations, which, moreover, refer in essence to the tax on large establishments introduced by the Autonomous Community of Catalonia, does not lead to such a conclusion.

22 The referring court points out, in addition, that it lacks 'suitable' information in order to establish the existence of any covert discrimination.

23 In the light of the foregoing, the answer to the first question is that Articles 49 and 54 TFEU

must be interpreted as not precluding a tax levied on large retail establishments, such as that in the main proceedings.

The second question

24 By its second question, the referring court asks, in essence, whether a tax such as that at issue in the main proceedings imposed on large distribution establishments according, in essence, to their sales area, constitutes State aid within the meaning of Article 107(1) TFEU to the extent that it exempts establishments whose sales area is less than 500 m2, those whose sales area exceeds that threshold but whose basis of assessment does not exceed 2 000 m2 and those engaged in the sale of machinery, vehicles, tools and industrial supplies, construction materials, plumbing materials and doors and windows, for sale only to professionals, fittings for individual, conventional and specialist establishments, and motor vehicles, as well as garden centres and service stations.

25 Classification of a national measure as ‘State aid’, within the meaning of Article 107(1) TFEU, requires all the following conditions to be fulfilled. First, there must be an intervention by the State or through State resources. Second, the intervention must be liable to affect trade between Member States. Third, it must confer a selective advantage on the recipient. Fourth, it must distort or threaten to distort competition (see, inter alia, 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 53).

26 So far as concerns the condition relating to the selectivity of the advantage, also mentioned before the Court, it is clear from settled case-law that in order to assess that condition it is necessary to determine whether, under a particular legal regime, the national measure in question is such as to favour ‘certain undertakings or the production of certain goods’ over others which, in the light of the objective pursued by that regime, are in a comparable factual and legal situation and which accordingly suffer different treatment that can, in essence, be classified as ‘discriminatory’ (see, inter alia, 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 and the case-law cited).

27 As regards, in particular, national measures that confer a tax advantage, it must be recalled that a measure of that nature which, although not involving the transfer of State resources, places the recipients in a more favourable position than other taxpayers is capable of procuring a selective advantage for the recipients and, consequently, constitutes State aid, within the meaning of Article 107(1) TFEU. By contrast, a tax advantage resulting from a general measure applicable without distinction to all economic operators does not constitute such aid within the meaning of that provision (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 56).

28 In that regard, in order to classify a national tax as ‘selective’, the ordinary or ‘normal’ tax system applicable in the Member State concerned must first be identified and it must then be demonstrated that the tax being examined is a derogation from that system, in so far as it differentiates between operators who, in the light of the objective pursued by that ordinary tax system, are in a comparable factual and legal situation (see, inter alia, 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 57 and the case-law cited).

29 It should also be recalled that the legal reference framework for the purpose of assessing the selectivity of a measure must not necessarily be determined within the territory of the Member State concerned, but may be that of the territory within which a regional or local authority exercises the powers conferred on it by the constitution or by law. Such is the case when that entity enjoys a

legal and factual status which makes it sufficiently autonomous in relation to the central government of a Member State, with the result that, by the measures it adopts, it is that body and not the central government which plays a fundamental role in the definition of the political and economic environment in which undertakings operate (see, to that effect, judgment of 11 September 2008, *UGT-Rioja and Others*, C?428/06 to C?434/06, EU:C:2008:488, paragraphs 47 to 50 and the case-law cited).

30 A measure that differentiates between undertakings which, in the light of the objective pursued by the legal regime concerned, are in a comparable factual and legal situation and is, therefore, a priori selective, does not, however, constitute State aid within the meaning of Article 107(1) TFEU where the Member State concerned is able to demonstrate that the differentiation is justified since it flows from the nature or overall structure of the system of which it forms part (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 58 and the case-law cited).

31 A measure which creates an exception to the application of the general tax system may be justified by the nature and overall structure of the tax system if the Member State concerned can show that the measure results directly from the basic or guiding principles of its tax system. In that connection, a distinction must be made between, on the one hand, the objectives attributed to a particular tax scheme and which are extrinsic to it and, on the other, the mechanisms inherent in the tax system itself, which are necessary for the achievement of those objectives (judgment of 6 September 2006, *Portugal* v *Commission*, C?88/03, EU:C:2006:511, paragraph 81).

32 It should also be borne in mind that although, in order for a tax to be established as being selective, it is not always necessary that it should derogate from a tax system considered to be an ordinary tax system, the fact that it can be so characterised is highly relevant in that regard where its effect is that two categories of operators are distinguished and are subject, a priori, to different treatment, namely those who fall within the scope of the derogating measure and those who continue to fall within the scope of the ordinary tax system, although those two categories are in a comparable situation in the light of the objective pursued by that system (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 77).

33 With regard to the legislation at issue in the main proceedings, it must first be noted that the question of whether the territorial reference framework should be the Autonomous Community of Aragon has not been disputed before the Court.

34 Although the criterion relating to the sales area does not appear to formally derogate from a given legal reference framework, its effect is nonetheless to exclude retail establishments whose sales area is less than the fixed threshold from the scope of that tax. Thus, the IMGDAV cannot be distinguished from a regional tax on retail establishments whose sales areas exceed a certain threshold.

35 Article 107(1) TFEU defines State interventions on the basis of their effects, independently of the techniques used (judgment of 22 December 2008, *British Aggregates Association*, C?487/06 P, EU:C:2008:757, paragraph 89).

36 It cannot, therefore, be excluded a priori that such a criterion enables an advantage to be given, in practice, to ‘certain undertakings or the production of certain goods’ within the meaning of Article 107(1) TFEU.

37 In that connection, it must therefore be determined whether the retail establishments thus excluded from the scope of that tax are in a comparable situation to the establishments that come

within that scope.

38 In the context of that analysis, account must be taken of the fact that, in the absence of EU rules governing the matter, it falls within the competence of the Member States, or of infra-State bodies having fiscal autonomy, to designate bases of assessment and to spread the tax burden across the various factors of production and economic sectors (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 97).

39 As recalled by the Commission in paragraph 156 of its Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union (OJ 2016 C 262, p. 1), 'Member States are free to decide on the economic policy which they consider most appropriate and, in particular, to spread the tax burden as they see fit across the various factors of production ... in accordance with Union law'.

40 As regards the tax at issue in the main proceedings, the information provided by the referring court shows that the purpose of that tax is to contribute towards environmental protection and town and country planning. Its purpose is to correct and counteract the environmental and territorial consequences on the territory in question of the activities of these large retail establishments, deriving, inter alia, from the ensuing rise in traffic flows, by having those establishments contribute to the financing of environmental action plans and making improvements to infrastructure networks.

41 In that regard, it is not disputed that the environmental impact of retail establishments is largely dependent on their size. The larger their sales area, the higher the attendance of the public, which results in adverse effects on the environment. Consequently, a condition relating to sales area thresholds, such as that adopted by the national legislation at issue in the main proceedings, in order to distinguish between undertakings with a greater or lesser impact, is consistent with the objectives pursued.

42 It is also clear that the setting-up of such establishments is of particular significance for town and country planning policies, wherever those establishments may be situated (see, by analogy, judgment of 24 March 2011, *Commission* v *Spain*, C?400/08, EU:C:2011:172, paragraph 80).

43 The determination of the threshold and of the methods for calculating the basis of assessment comes within the discretion of the national legislature and is based, in addition, on technical, complex assessments that the Court only has limited powers to review.

44 It is appropriate to add that the fact that the legislation at issue in the main proceedings does not provide that the areas of the retail establishments owned by a single owner should be added together for the purpose of calculating the tax does not appear to be inconsistent with the objectives pursued by the national legislature.

45 In those circumstances, a condition under which the imposition of a tax is based on the sales area of an undertaking, such as that in the main proceedings, differentiates between categories of establishments that are not in a comparable situation in the light of those objectives.

46 Therefore, the tax exemption received by the retail establishments within the territory of the Autonomous Community of Aragon whose sales area is less than 500 m2, and those whose sales area exceeds that threshold but whose basis of assessment does not exceed 2 000 m2 cannot be regarded as conferring a selective advantage on those establishments and, therefore, is not capable of constituting State aid within the meaning of Article 107(1) TFEU.

47 The referring court is also uncertain as to the other features of the tax at issue in the main proceedings. It questions whether the total exemption granted to the establishments pursuing the business of selling machinery, vehicles, tools and industrial supplies, construction materials, plumbing materials and doors and windows, for sale only to professionals, fittings for individual, conventional and specialist establishments, and motor vehicles, as well as garden centres and service stations constitutes an advantage for those establishments.

48 It must be noted that that measure derogates from the framework established by that specific tax.

49 The Autonomous Community of Aragon argues, in its written observations, that the activities of the retail establishments concerned, although they require large sales areas, have fewer adverse effects on the environment and on town and country planning than the activities of the establishments that are subject to the tax in question.

50 That factor may be such as to justify the distinction adopted in the contested legislation in the main proceedings, which, accordingly, would not result in a selective advantage being given to the retail establishments concerned. It is, however, for the referring court to determine whether in fact that is the case in the proceedings before it.

51 In the light of the foregoing, the answer to the second question is that a tax such as that at issue in the main proceedings imposed on large distribution establishments according, in essence, to their sales area does not constitute State aid within the meaning of Article 107(1) TFEU to the extent that it exempts establishments whose sales area does not exceed 500 m2 and those whose sales area exceeds that threshold but whose basis of assessment does not exceed 2 000 m2. Nor, in so far as that tax exempts establishments which pursue the business of selling machinery, vehicles, tools and industrial supplies, construction materials, plumbing materials and doors and windows, for sale only to professionals, fittings for individual, conventional and specialist establishments, and motor vehicles, as well as garden centres and service stations, does it constitute State aid within the meaning of Article 107(1) TFEU, provided that those establishments do not have as significant an adverse effect on the environment and on town and country planning as the others, which it is for the referring court to ascertain.

Costs

52 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (First Chamber) hereby rules:

1. **Articles 49 and 54 TFEU must be interpreted as not precluding a tax levied on large retail establishments, such as that at issue in the main proceedings.**

2. **A tax such as that at issue in the main proceedings imposed on large distribution establishments according, in essence, to their sales area, does not constitute State aid within the meaning of Article 107(1) TFEU to the extent that it exempts establishments whose sales area does not exceed 500 m**2 **and those whose sales area exceeds that threshold but whose basis of assessment does not exceed 2 000 m**2**. Nor, in so far as that tax exempts establishments which pursue the business of selling machinery, vehicles, tools and industrial supplies, construction materials, plumbing materials and doors and windows, for sale only to professionals, fittings for individual, conventional and specialist establishments, and motor vehicles, as well as garden centres and service stations, does it constitute State aid within the meaning of Article 107(1) TFEU, provided that those**

establishments do not have as significant an adverse effect on the environment and on town and country planning as the others, which it is for the referring court to ascertain.

[Signatures]

* Language of the cases: Spanish.