Provisional text

JUDGMENT OF THE COURT (Grand Chamber)

19 December 2018 (*)

(Reference for a preliminary ruling — State aid — Article 107(1) TFEU — Real property transfer tax – Exemption — Transfers in ownership of a property occurring as a result of restructuring procedures carried out within certain groups of companies — Concept of ‘State aid’ — Condition relating to selectivity — Justification)

In Case C?374/17,

REQUEST for a preliminary ruling under Article 267 TFEU from the Bundesfinanzhof (Federal Finance Court, Germany), made by decision of 30 May 2017, received at the Court on 21 June 2017, in the proceedings

Finanzamt B

v

A-Brauerei,

intervener:

Bundesministerium der Finanzen,

THE COURT (Grand Chamber),

composed of K. Lenaerts, President, R. Silva de Lapuerta, Vice-President, J.?C. Bonichot, A. Arabadjiev, A. Prechal (Rapporteur), M. Vilaras, F. Biltgen, K. Jürimäe and C. Lycourgos, Presidents of Chambers, M. Ileši?, J. Malenovský, E. Levits, L. Bay Larsen, C.G. Fernlund and S. Rodin, Judges,

Advocate General: H. Saugmandsgaard Øe,

Registrar: K. Malacek, Administrator,

having regard to the written procedure and further to the hearing on 11 June 2018,

after considering the observations submitted on behalf of:

– A-Brauerei, by K. Naeve and B. Pignot, Rechtsanwälte, and by K. Seiferth, C. Tillmann and A. Linn, Steuerberater,

– the German Government, by T. Henze, acting as Agent,

– the European Commission, by K. Blanck-Putz, B. Stromsky and T. Maxian Rusche, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 19 September 2018, gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 107(1) TFEU.

2 The request has been made in proceedings between Finanzamt B (tax office of B, Germany) ('the Finanzamt') and A-Brauerei concerning the Finanzamt's refusal to grant A-Brauerei the exemption from the real property transfer tax which may under certain conditions be available, under German tax law, to companies acquiring a right of ownership to property in the context of restructuring procedures within certain groups of companies.

German law

The Law on the restructuring of companies

3 Paragraph 1(1) of the Umwandlungsgesetz (German Law on the restructuring of companies), in the version applicable to the dispute in the main proceedings ('the UmwG'), provides:

'Legal entities having their registered seat in Germany may be restructured

1. by way of merger;

2. by way of division (division by dissolution and transfer of all assets, division without dissolution and partial transfer of assets and liabilities, and division by subsidiarisation);

3. by transfer of assets;

...'

4 Paragraph 2 of the UmwG provides:

'Legal entities may be merged, whereby they are dissolved without being wound up

1. By way of absorption, through the transfer of all the assets of one or more legal entities (the legal entity being acquired) to another existing legal entity (the acquiring legal entity) ...'

The Law on real property transfer tax

5 Paragraph 1 of the Grunderwerbsteuergesetz (the Law on real property transfer tax), in the version applicable to the dispute in the main proceedings ('the GrEStG'), provides:

'(1) The following legal transactions shall be subject to real property transfer tax in so far as they concern properties located within Germany:

1. a purchase agreement or another legal act establishing the right to transfer ownership;

2. the conveyance agreement where there has been no prior legal act establishing the right to transfer ownership;

3. the transfer of ownership where there has been no prior legal act establishing the right to transfer ownership and nor is a conveyance agreement required ...

...

(2) Legal transactions which, without establishing a right to transfer ownership, enable another person legally or financially to make use, for its own account, of property located in Germany, shall also be subject to real property transfer tax.

(2a) If a property located within Germany forms part of the assets of a partnership and the list of partners changes directly or indirectly within five years in such a way that at least 95% of the shares in the partnership assets are transferred to new partners, this shall qualify as a legal act transferring ownership of a property to a new partnership.

(3) If a property located within Germany forms part of the assets of a company, the following legal transactions shall also be subject to tax, provided that taxation pursuant to subparagraph 2a is excluded:

1. a legal act establishing the right to transfer one or more shares in a company if, following the transfer, at least 95% of the shares in the company would be exclusively held, directly or indirectly, by the purchaser or by controlling and dependent undertakings or dependent persons, or by dependent undertakings or dependent persons;

2. the consolidation, directly or indirectly, of at least 95% of the shares in the company, where there has been no prior contractual transaction within the meaning of point 1;

3. a legal act establishing the right to transfer, directly or indirectly, at least 95% of the shares in the company;

4. the transfer, directly or indirectly, of at least 95% of the shares in the company to another person, where that transfer is not preceded by a contractual transaction within the meaning of point 3.'

6 Paragraph 6a of the GrEStG, inserted into that law by Article 7 of the Wachstumsbeschleunigungsgesetz (Law on Economic Growth Acceleration), of 22 December 2009 (BGBl. 2009 I, p. 3950), under the title 'Tax advantage during restructuring within a group of companies', provides, in the version applicable to the dispute in the main proceedings:

'Tax shall not be charged on a legal transaction taxable under Paragraph 1(1)(3) and Paragraph 1(2a) or (3) in the event of a restructuring within the meaning of Paragraph 1(1)(1) to (3) of [the UmwG]; … the first sentence shall also apply to similar restructuring based on the laws of a Member State of the European Union or a State subject to the Agreement on the European Economic Area. The first sentence shall apply only if solely a controlling undertaking and one or more companies dependent on it or several companies dependent on a controlling undertaking take part in the restructuring procedure. A company shall be "dependent" within the meaning of the third sentence if, in its capital or business assets the controlling undertaking has held a stake of at least 95%, directly or indirectly or partly directly and partly indirectly, without interruption during the five years before and five years after the legal procedure.'

The dispute in the main proceedings and the question referred for a preliminary ruling

7 A-Brauerei, a company operating a commercial business, held 100% of the shares in T-GmbH, which owned a number of properties and was in turn the sole shareholder of another company.

8 By an agreement dated 1 August 2012, T-GmbH transferred all of its assets, including the

properties, together with all related rights and obligations, to A-Brauerei in the context of a restructuring (merger by absorption) pursuant to Paragraph 1(1)(1) and Paragraph 2(1) of the UmwG, in which those two companies alone were involved.

9 The merger became effective upon registration in the commercial register on 24 September 2012, the date on which T-GmbH, in which A-Brauerei had held a 100% stake for more than five years before that merger, ceased to exist.

10 By a notice of assessment of 7 June 2013, the Finanzamt demanded payment of the real property transfer tax allegedly payable by A-Brauerei, on the ground that the transfer to A-Braueri (as acquiring company) of the property owned by T-GmbH (as the company being acquired) as a result of the merger of those two undertakings and the transfer by comprehensive legal succession of the assets of T-GmbH to A-Braueri which that merger entailed, constituted a taxable transaction pursuant to Paragraph 1(1)(3) of the GrEStG, and did not come within the exemption referred to in Paragraph 6a of the GrEStG.

11 By a decision of 19 July 2013, the Finanzamt rejected A-Brauerei's complaint against that notice of assessment, on the ground that T-GmbH was not a 'dependent company' within the meaning of Paragraph 6a, since it had ceased to exist following the merger, with the result that the condition concerning the statutory period for holding a stake of at least 95% during the five years following the transaction taxed by Paragraph 6a was not met.

12 By a judgment of 14 October 2014, the Finanzgericht Nürnberg (Nuremburg Finance Court, Germany) upheld the action brought by A-Brauerei against that decision, on the basis that, in the present case, A-Brauerei could benefit from the tax advantage provided for in Paragraph 6a of the GrEStG.

13 The Finanzamt brought an appeal on a point of law against that judgment before the Bundesfinanzhof (Federal Finance Court, Germany).

14 In an interim judgment of 25 November 2015, that court upheld the interpretation of Paragraph 6a of the GrEStG made at first instance, on the basis that the condition relating to periods of shareholdings applied only if it could substantively be met at the time of the restructuring procedure concerned, which was not the case for the merger procedure at issue in the main proceedings, which necessarily entailed the dissolution of the company being acquired.

15 In that interim judgment, the referring court also raised of its own motion the issue of whether Paragraph 6a of the GrEStG had to be disapplied on the ground that the tax advantage conferred by that paragraph had to be characterised as 'State aid' within the meaning of Article 107(1) TFEU, so that an infringement of the obligation to notify and of the 'standstill' laid down in Article 108(3) TFEU could be established.

16 In that regard, the Bundesministerium der Finanzen (Federal Ministry of Finance, Germany), which joined the proceedings before the referring court as an intervener, noted that the tax advantage provided for in Paragraph 6a of the GrEStG had not been notified to the European Commission and that, therefore, the Commission's procedure for investigating that tax advantage had not been instituted. It argued, however, by reference to the judgment of the General Court of the European Union of 7 November 2014, *Autogrill España* v *Commission* (T?219/10, EU:T:2014:939), that the advantage in question did not constitute 'State aid' within the meaning of Article 107(1) TFEU, because it would be impossible to characterise the undertakings benefiting from that advantage as a favoured category by reason of properties specific to them, so that the condition relating to selectivity laid down by that provision would not be met.

17 In those circumstances the Bundesfinanzhof (Federal Finance Court) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

‘Is Article 107(1) TFEU to be interpreted as meaning that there is aid prohibited under that provision in the case where legislation of a Member State provides that real property transfer tax is not charged on a taxable acquisition pursuant to a restructuring (merger) in the event that certain legal entities (a controlling undertaking and a dependent company) are involved in the restructuring procedure and the controlling undertaking’s 100% holding in the dependent company has existed for five years prior to the legal procedure and for five years thereafter?’

Consideration of the question referred

18 By its question, the referring court asks, in essence, whether Article 107(1) TFEU must be interpreted as meaning that a tax advantage, such as that at issue in the main proceedings, which consists in exempting from real property transfer tax the transfer of ownership of a property which occurred because of a restructuring procedure involving solely companies of the same group, linked by a shareholding of at least 95% during a minimum, uninterrupted period of five years prior to that procedure and of five years thereafter, fulfils the condition relating to the selectivity of the advantage concerned, laid down in Article 107(1) TFEU.

19 According to the settled case-law of the Court, 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. Secondly, the intervention must be liable to affect trade between the Member States. Thirdly, it must confer a selective advantage on the recipient. Fourthly, it must distort or threaten to distort competition (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 and the case-law cited).

20 As regards the condition relating to the selectivity of the advantage, which is a constituent factor in the concept of ‘State aid’ within the meaning of Article 107(1) TFEU, the Court must examine first of all whether, as the German Government contends, the tax advantage conferred by Paragraph 6a of the GrEStG must be characterised, at the outset, as a ‘general measure’ and must, therefore, fall outside the scope of Article 107(1) TFEU since it does not fulfil the condition relating to selectivity laid down by that provision.

21 In that respect, 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, of constituting State aid, within the meaning of Article 107(1) TFEU (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 and the case-law cited).

22 In that context, the Court has also held that a condition for the application or the receipt of tax aid may be grounds for a finding that that aid is selective, if that condition leads to a distinction being made between undertakings despite the fact that they are, in the light of the objective pursued by the tax system concerned, in a comparable factual and legal situation, and if, therefore, it represents discrimination against undertakings which are excluded from it (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 86).

23 On the other hand, national measures applicable to all economic operators in the Member

State concerned without distinction constitute general measures and are not, therefore, selective (see, to that effect, judgments of 29 March 2012, *3M Italia*, C?417/10, EU:C:2012:184, paragraph 39, 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 56 and the case-law cited).

24 The fact that only taxpayers satisfying the conditions for the application of a measure can benefit from the measure cannot, in itself, turn it into a selective measure (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 59).

25 However, the fact that the measure at issue applies regardless of the nature of the undertakings' activity is of no account for the purposes of characterising it as a 'general measure' (see, to that effect, 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 82 to 84).

26 The a priori selective nature of a measure conferring an advantage need not necessarily be based on a condition linked to the sector in which an undertaking operates, but may be based on other conditions, such as a condition relating to the legal form of the undertaking which may benefit from that advantage (see, to that effect, judgment of 10 January 2006, *Cassa di Risparmio di Firenze and Others*, C?222/04, EU:C:2006:8, paragraph 136).

27 In addition, the fact that a measure, which is a priori or potentially accessible to any undertaking, does not enable a particular category of undertakings to be identified which are exclusively favoured by the measure concerned and which can be distinguished by reason of specific properties that are common to them and characteristic of them, is irrelevant for the purposes of characterisation as a 'general measure' (see, to that effect, 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 69 to 71).

28 In the present case, it is apparent from the Court's file that the exemption from the real property transfer tax, provided for by Paragraph 6a of the GrEStG, was inserted into that law by the Law on Economic Growth Acceleration of 22 December 2009, under the title 'Tax advantage during restructuring within a group of companies', as a measure formally derogating from Paragraph 1(1)(3) and Paragraph 1(2a) and (3) of the GrEStG.

29 It is clear also from the explanatory memorandum relating to the draft law from which that exemption stems that the latter sought, in essence, to facilitate the restructuring of undertakings and, in particular, the structural changes involving the transfer of property between companies, in order make them more competitive in the face of the financial crisis affecting the Federal Republic of Germany since 2008.

30 It is further apparent from the Court's file that it was only during the legislative process that a decision was taken to restrict the benefit of that tax advantage to certain groups of companies, by the insertion into the text initially proposed of an additional condition under which only a 'controlling' company and/or one or more 'dependent' companies — 'dependant' companies being defined as companies in whose capital or business assets the controlling undertaking has held a stake of at least 95% during a minimum, uninterrupted period of the five years before and the five years after the procedure concerned — could participate in the restructuring procedure concerned.

31 The tax exemption at issue in the main proceedings is such that it favours only the groups of companies envisaged, which carry out restructuring procedures, whereas companies not forming part of such groups are excluded from that advantage even if they carry out restructuring procedures identical to those carried out by those groups.

32 In that regard, it is true that regulatory technique is not decisive for determining whether a measure is selective or general, in the sense that, as is apparent in particular from paragraph 101 of the 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), even a measure which is not formally a derogation and founded on criteria that are in themselves of a general nature may be selective, if it in practice discriminates between companies which are in a comparable situation in the light of the objective of the tax system concerned.

33 However, while the regulatory technique used is not decisive in order to establish that a tax measure is selective, so that it is not always necessary for that technique to derogate from a common tax system, the fact that it is, like the measure at issue in the main proceedings, a derogation is relevant for those purposes where the effect of that technique is that two categories of operators — those who fall within the scope of the derogating measure and those who continue to fall within the scope of the ordinary tax system — are distinguished and are subject, a priori, to different treatment, even though those two categories are in a comparable situation in the light of the objective pursued by that system (judgments 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, and of 28 June 2018, *Andres (insolvency of Heitkamp BauHolding)* v *Commission*, C?203/16 P, EU:C:2018:505, paragraph 93).

34 It follows that the German Government's argument mentioned in paragraph 20 above does not suffice to establish that the measure at issue in the main proceedings falls outside the scope of Article 107(1) TFEU.

35 According to the settled case-law of the Court, the assessment of the condition relating to the selectivity of the advantage concerned, which is a constituent factor in the concept of 'State aid' within the meaning of Article 107(1) TFEU, requires a determination, in the first place, of whether, under a given legal regime, a national measure is such as to favour 'certain undertakings or the production of certain goods' over other undertakings which, in the light of the objective pursued by that regime, are in a comparable factual and legal situation and which accordingly suffer different treatment that can essentially be classified as discriminatory (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).

36 In the context of tax measures, in order to classify a national tax measure as 'selective', the Commission must begin by identifying the ordinary or 'normal' tax system applicable in the Member State concerned, and thereafter demonstrate that the tax measure at issue is a derogation from that ordinary 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, to that effect, 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).

37 In the present case, it must be stated, initially, that, as is apparent from the description of the national law in the order for reference, the reference framework in the light of which an examination of comparability must be carried out is composed of German law rules on real property transfer tax which, taken together, determine the subject matter or the chargeable event covered by that tax.

38 Secondly, the question of whether the tax advantage conferred by Paragraph 6a of GrEStG — whereby the benefit thereof is restricted to a restructuring procedure involving only companies in a group of companies linked by a shareholding of at least 95% during a minimum, uninterrupted period of the five years before and five years after the procedure concerned — gives rise to a difference in treatment with regard to operators which, in the light of the objective pursued by the common tax system at issue in the main proceedings, are in comparable factual and legal situations, in that companies carrying out those restructuring procedures without being linked by such a shareholding are excluded from that exemption.

39 In that regard, it is apparent form the order for reference that the objective of the tax regime relating to real property transfer tax is to tax any change in owner of the rights (*Rechtsträgerwechsel*) attaching to a property or, in other words, to tax any transfer of the right of ownership in a property from one natural or legal person to another natural or legal person within the meaning of civil law.

40 That objective is also expressly mentioned in the explanatory memorandum relating to the draft law from which Paragraph 6a of the GrEStG stems. Indeed, it is stated there that in order to avoid the exemption concerned giving rise to arbitrary profits, it must be restricted to procedures for the restructuring of undertakings, since such procedures, unlike other types of change in the structure of undertakings, result in a change in owner of the rights attaching to a property, within the meaning of the GrEStG.

41 In the light also of the wording of Paragraph 6a of the GrEStG (from which it is apparent that that provision expressly exempts from the tax certain transactions which are routinely taxed pursuant to Paragraph 1(1)(3) and Paragraph 1(2a) and (3) of the GrEStG), it must be concluded that the examination of comparability — within the meaning of the principle enshrined in the case-law referred to in paragraph 35 above — must be carried out, as the referring court suggests, in the light of the objective in question, which is to tax any change in proprietor of the ownership rights attaching to the properties, pursued in general by the regime for the real property transfer tax at issue in the main proceedings and, in particular, the rules in Paragraph 1 of GrEStG; that regime and those rules determine the subject matter and chargeable event covered by that tax and, as has been found in paragraph 37 above, constitute the reference framework in the light of which comparability must be examined.

42 It is apparent that Paragraph 6a of the GrEStG differentiates between, on the one hand, companies carrying out a restructuring procedure within a group such as that referred to in that provision and which are capable of benefiting from the tax exemption at issue in the main proceedings and, on the other, companies carrying out that same procedure without belonging to such a group, which are however excluded from that exemption, whereas both are in comparable factual and legal situations in the light of the objective pursued by the tax in question, which is to tax the change in proprietor of the ownership rights from the point of view of civil law, implying the transfer of those rights from one natural or legal person to another natural or legal person.

43 In addition, the differentiation effect stemming from the condition that only companies in the same group, linked by a shareholding of at least 95%, may participate in the restructuring procedure is strengthened by the requirement, laid down by that condition, for that shareholding to

be held during a minimum, uninterrupted period of five years before and five years after that procedure.

44 It should, however, be borne in mind, in the second place, that, according to the settled case-law of the Court, the concept of 'State aid' does not cover measures that differentiate between undertakings which, in the light of the objective pursued by the legal regime concerned, are in a comparable factual and legal situation, and are, therefore, a priori selective, where the Member State concerned is able to demonstrate that that differentiation is justified since it flows from the nature or general structure of the system of which the measures form part (see 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).

45 In the present case, it must be found, as the referring court suggests and as was also stated in the written observations submitted to the Court and during the oral arguments at the hearing, that the exemption provided for in Paragraph 6a of the GrEStG seeks to introduce a correction for the purposes of avoiding taxation that is considered excessive.

46 The taxation of real property transfers resulting from restructuring procedures within a group of companies characterised by a pre-existing acquisition of a particularly high level of shareholding, of at least 95%, is considered excessive, since, pursuant to Paragraph 1(2a) and (3) of the GrEStG, the transfer of the property concerned is, as a rule, already taxed 'at entry', that is to say at the time when the company owning that property is integrated into such a group of companies. If, subsequently, the transfer of that property were again taxed because of a restructuring procedure carried out within that group, in particular as in the present case, as a result of a merger by absorption of the wholly owned subsidiary — which is the owner of that same property — this would result in the same transaction transferring the property concerned being taxed twice: on the first occasion at the time of the transfer of ownership deemed to correspond to the controlling company's acquisition of at least 95% of the capital or business assets of the dependent company and, on the second occasion, at the time of the restructuring procedure consisting, in the present case, in the merger by absorption of the dependent company by the controlling company.

47 Conversely, as the Advocate General observed in point 175 of his Opinion, such double taxation is precluded in the case of a restructuring procedure involving two companies linked by a shareholding of less than 95%. In such a case, the controlling company's acquisition of a shareholding of less than 95% of the dependent company's capital or business assets is not taxable under Paragraph 1(2a) and (3) of the GrEStG, whereas the subsequent restructuring procedure between those two companies would not benefit from the exemption provided for in Paragraph 6a of the GrEStG.

48 It must be borne in mind that 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 that measure results directly from the basic or guiding principles of its tax system. In that connection, a distinction must be drawn between, on the one hand, the objectives attributed to a particular tax scheme which are extrinsic to it and, on the other, the mechanisms inherent in the tax system itself which are necessary for the achievement of such objectives (judgment of 6 September 2006, *Portugal* v *Commission*, C?88/03, EU:C:2006:511, paragraph 81).

49 In its case-law, the Court has accepted that objectives inherent in the general tax system concerned could justify an a priori selective tax regime (see, to that effect, judgments of 29 April 2004, *GIL Insurance and Others*, C?308/01, EU:C:2004:252, paragraphs 74 to 76, and of 8 September 2011, *Paint Graphos and Others*, C?78/08 to C?80/08, EU:C:2011:550, paragraphs 64

to 76).

50 In the present case, the objective related to the proper functioning of the general tax regime at issue in the main proceedings, seeking to avoid double and, hence, excessive taxation, may therefore give good grounds for restricting the tax exemption provided for by Paragraph 6a of the GrEStG to the restructuring procedures carried out between companies linked by a shareholding of at least 95% during a minimum, uninterrupted period of five years before and five years after that procedure.

51 In addition, as the referring court has also noted, the requirement relating to the minimum period for holding such a shareholding appears justified by the intention of excluding undesirable windfall effects and, therefore, of preventing abuse, by precluding shareholdings of that level, which will come to an end once the restructuring has been concluded, from being acquired for a short period for the sole purposes of benefiting from that tax exemption. The prevention of abuse may constitute a justification linked to the nature or general scheme of the system concerned (see, by analogy, judgment of 29 April 2004, *GIL Insurance and Others*, C?308/01, EU:C:2004:252, paragraph 74).

52 It follows that even though that exemption introduces a distinction between undertakings which are, in the light of the objective pursued by the legal system at issue, in comparable factual and legal situations, that distinction is justified since it seeks to avoid double taxation and stems, to that extent, from the nature and general scheme of the system of which it forms part.

53 In the light of the foregoing considerations, the answer to the question referred is that Article 107(1) TFEU must be interpreted as meaning that a tax advantage, such as that at issue in the main proceedings, which consists in exempting from real property transfer tax the transfer of ownership of a property which occurred because of a restructuring procedure involving only companies of the same group, linked by a shareholding of at least 95% during a minimum, uninterrupted period of five years prior to that procedure and of five years thereafter, does not fulfil the condition relating to the selectivity of the advantage concerned, laid down in Article 107(1) TFEU.

Costs

54 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 (Grand Chamber) hereby rules:

Article 107(1) TFEU must be interpreted as meaning that a tax advantage, such as that at issue in the main proceedings, which consists in exempting from real property transfer tax the transfer of ownership of a property which occurred because of a restructuring procedure involving only companies of the same group, linked by a shareholding of at least 95% during a minimum, uninterrupted period of five years prior to that procedure and of five years thereafter, does not fulfil the condition relating to the selectivity of the advantage concerned, laid down in Article 107(1) TFEU.

[Signatures]

* Language of the case: German.