

JUDGMENT OF THE COURT (Seventh Chamber)

9 October 2014 (*)

(Request for a preliminary ruling — Competition — State aid — Article 107(1) TFEU — Concept of ‘State aid’ — Property tax on immovable property — Tax exemption)

In Case C-522/13,

REQUEST for a preliminary ruling under Article 267 TFEU from the Juzgado Contencioso-Administrativo No 1 de Ferrol (Spain), made by decision of 12 April 2013, received at the Court on 1 October 2013, in the proceedings

Ministerio de Defensa,

Navantia SA

v

Concello de Ferrol,

THE COURT (Seventh Chamber),

composed of J.-C. Bonichot, President of the Chamber, A. Arabadjiev (Rapporteur) and J.L. da Cruz Vilaça, Judges,

Advocate General: M. Wathelet,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- the Concello de Ferrol, by M. Villalba López, avoué, and D. Vidal Lorenzo, abogado,
- the Spanish Government, by L. Banciella Rodríguez-Miñón, acting as Agent,
- the European Commission, by É. Gippini Fournier and B. Stromsky, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

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, on the one hand, the Ministerio de Defensa (Spanish Ministry of Defence) and Navantia SA and, on the other hand, the Concello de Ferrol (Municipality of Ferrol) concerning an exemption from property tax relating to land made available to Navantia.

Legal context

3 Royal Legislative Decree No 2/2004 of 5 March 2004 approving the consolidated version of the law governing local finances (Real Decreto Legislativo 2/2004 por el que se aprueba el texto refundido de la Ley Reguladora de las Haciendas Locales) (BOE No 59, of 9 March 2004, p. 10284) ('the Law of 2004'), in the version applicable to the main proceedings, defines property tax as 'a direct tax imposed on the value of immovable property in accordance with the arrangements laid down in the present law'.

4 Article 61(1) of the Law of 2004 provides:

'The chargeable event for the tax shall consist in the holding of the following rights over rural or urban immovable property and over immovable property with special characteristics:

- (a) an administrative concession over the immovable property itself or over the public services relating thereto;
- (b) a tenancy right;
- (c) a usufructory right *in rem*;
- (d) the right to property.'

5 Paragraph 1(a) of Article 62 of the Law of 2004, which is entitled 'Exemptions', states:

'The following immovable property shall be exempt:

- (a) immovable property which is owned by the State, by autonomous communities or by local authorities and which is directly used for the purposes of public security or education and prison services, and immovable property which is owned by the State and which is used for the purposes of national defence.'

6 Under Article 63(1) and (2) of the Law of 2004:

'(1) Legal and natural persons ... who are holders of the right consisting, in each individual case, of the chargeable event shall be taxable persons in respect of that tax.

...

(2) [Paragraph 1] shall apply without prejudice to the right of the taxable person to pass on, in accordance with the rules of ordinary law, the tax burden imposed.

The public administrative authorities and the entities or bodies referred to in [paragraph 1] shall pass on the amount of the tax payable which applies to persons who, as non-taxable persons, make use of their property or assets against payment. Those persons shall assume liability for the tax passed on. To that effect, the amount passed on shall be determined on the basis of the proportion of the land registry value corresponding to the area used and to the construction directly linked to each tenant or transferee of the right of use.'

The facts of the dispute and the question referred for a preliminary ruling

7 Navantia is an undertaking wholly owned by the Spanish State. Its activity consists in the construction and maintenance of naval vessels for the Spanish State and for other States — whether or not Member States of the European Union — and the manufacture, repair, and maintenance of various products for the private sector, principally in the maritime and energy fields.

8 Navantia owns a shipyard located in the territory of the Concello de Ferrol, covering an area of 932 348 m². In accordance with an agreement concluded on 6 September 2001, the Spanish State, as owner of the plot of land on which the shipyard stands, made it available to Navantia by transferring the right of use in return for payment of EUR 1 per year ('the 2001 Agreement').

9 The property tax on that plot of land, which amounted to EUR 590 308.77 for the year 2010, was levied by the Concello de Ferrol for the financial years prior to 2008.

10 In accordance with Article 61(1)(d) of the Law of 2004, the property tax is payable by the Spanish State, as the owner of that land and given that only the right of use has been transferred to Navantia. Under the 2001 Agreement, the Spanish State is to pass the amount of that tax on to Navantia and, accordingly, it is Navantia which must ultimately bear the tax burden.

11 With respect to the financial year 2008 and the following years, the Spanish State and Navantia applied to the Concello de Ferrol, on the basis of Article 62(1)(a) of the Law of 2004, for an exemption from the property tax payable for the land on which the naval shipyard is established. That application was refused. The refusal was contested before the competent courts and it is that dispute which is the subject of the main proceedings.

12 By judgment of 22 October 2012, the Tribunal Superior de Justicia de Galicia (Supreme Court of Justice of Galicia) set aside an earlier judgment of the Juzgado Contencioso-Administrativo No 1 de Ferrol (Court for Contentious Administrative Proceedings No 1, Ferrol; or 'the referring court') of 25 November 2011, dismissing the action brought before it, since the Tribunal Superior de Justicia de Galicia held that it was necessary to grant the tax exemption sought. The case was therefore referred back to the referring court.

13 The Juzgado Contencioso-Administrativo No 1 de Ferrol finds that the tax exemption sought might entail the grant of State aid to Navantia, contrary to Article 107(1) TFEU, since that exemption would be granted through public resources to a company owned by the State and it would be capable of distorting or threatening to distort competition.

14 The referring court finds that, as beneficiary of the exemption sought, Navantia would obtain a selective advantage in that the tax burden ordinarily borne — and borne by its private competitors in the shipbuilding business — would be lightened, through a loss of income for the Concello de Ferrol. Given that Navantia's competitive position on the markets concerned by its military and civil business would be strengthened, competition would potentially be distorted and, in consequence, trade between Member States would be affected.

15 In those circumstances, the Juzgado Contencioso-Administrativo No 1 de Ferrol decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Is the tax exemption enjoyed by [Navantia] in respect of the property tax compatible with Article 107 [TFEU], and is it compatible with Article 107 TFEU for a Member State (Kingdom of Spain) to

establish a tax exemption in respect of State-owned land ..., made available to a private company whose capital is wholly publicly owned ..., on which that company provides goods and services that may be traded between Member States?’

The question referred for a preliminary ruling

16 By its question, the referring court asks in essence whether, on a proper construction of Article 107(1) TFEU, the exemption from property tax of a plot of land belonging to the State and made available to an undertaking whose capital is wholly State-owned and which produces, from that plot of land, goods and services that may be traded between Member States on markets open to competition constitutes State aid prohibited by that provision.

17 It must be noted at the outset that the Court is not called upon to consider whether it is compatible with Article 107 TFEU for a Member State to make a plot of land available to a private undertaking for a token price.

18 As regards the question referred, it should be noted that Article 107(1) TFEU provides that, save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods is, in so far as it affects trade between Member States, incompatible with the internal market.

19 According to settled case-law of the Court, for a measure to be categorised as ‘aid’ within the meaning of Article 107(1) TFEU, all the conditions set out in that provision must be fulfilled (see, to that effect, judgment in *Commission v Deutsche Post*, C-399/08 P, EU:C:2010:481, paragraph 38 and the case-law cited).

20 Accordingly, for a national measure to be categorised as State aid within the meaning of Article 107(1) TFEU, there must, first, 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 an advantage on the recipient; and fourth, it must distort or threaten to distort competition (judgment in *Commission v Deutsche Post*, EU:C:2010:481, paragraph 39 and the case-law cited).

21 It is necessary, in the first place, to examine the third of those conditions, to the effect that the measure at issue must be regarded as conferring an advantage on its recipient. In that regard, it should be noted that, according to similarly settled case-law of the Court, 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 (judgment in *Commission v Deutsche Post*, EU:C:2010:481, paragraph 40 and the case-law cited).

22 Thus, measures which, in various forms, mitigate the burdens normally included in the budget of an undertaking and which, accordingly, without being subsidies in the strict meaning of the word, are similar in character and have the same effect are considered to constitute aid (judgment in *Bouygues and Bouygues Télécom v Commission and Others* and *Commission v France and Others*, C-399/10 P and C-401/10 P, EU:C:2013:175, paragraph 101).

23 It follows that a measure by which the public authorities grant certain undertakings 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, amounts to State aid within the meaning of Article 107(1) TFEU. On the other hand, tax advantages resulting from a general measure applicable without distinction to all economic operators do not constitute State aid within the meaning of Article 107 TFEU (judgment in *P*, C-6/12, EU:C:2013:525, paragraph 18

and the case-law cited).

24 In the present case, it can be seen from the documents before the Court that Navantia is required under the 2001 Agreement to repay to the Spanish State the property tax payable to the Concello de Ferrol, pursuant to Articles 60 and 61 of the Law of 2004, for the plot of land that has been made available to it and on which its shipyard is established; and also that the tax exemption at issue, provided for under Article 62 of that law, results in no tax being paid, whether by the Spanish State to the Concello de Ferrol or, consequently, by Navantia to the Spanish State.

25 Moreover, it is not disputed that, under Article 61(1) of the Law of 2004, all undertakings which conduct business operations on private or public land and which satisfy one of the conditions laid down in that provision are liable to pay property tax. In that regard, the Concello de Ferrol contends that almost all undertakings satisfy one of those conditions and that Navantia is able to avoid being categorised as a taxable person only because of the particular mechanism — transfer of the right of use — applied by the 2001 Agreement.

26 Furthermore, as the Concello de Ferrol points out, it follows from Article 63(2) of that law that, in atypical situations such as that of the case before the referring court, in which none of the rights constituting the chargeable event for the property tax is transferred together with the use of land, the Spanish State is under a statutory obligation to pass that tax on to the user of the land — an obligation that is reflected in the 2001 Agreement.

27 It must accordingly be held that the property tax constitutes a tax normally payable by Navantia and that the exemption enjoyed by that undertaking has the effect of mitigating directly, without any other measure being necessary, the charges that would ordinarily be borne by an undertaking in the same situation. Consequently, it appears that a tax exemption of that nature confers an economic advantage on Navantia.

28 To the extent that the Spanish Government contends that, under the terms of Article 62(1)(a) of the Law of 2004, the exemption allowed under that provision was established not for the benefit of undertakings such as Navantia, but exclusively for the benefit of the Spanish State, as the taxable person for the purposes of the property tax, and that the objectives pursued relate to considerations of national defence, it should be noted that the grounds underlying an aid measure do not suffice to exclude the measure at the outset from being categorised as aid within the meaning of Article 107(1) TFEU, since that provision does not distinguish between measures of State intervention by reference to their causes or their aims but defines them in terms of their effects (judgments in *Comitato 'Venezia vuole vivere' and Others v Commission*, C?71/09 P, C?73/09 P and C?76/09 P, EU:C:2011:368, paragraph 94, and *Commission v EDF*, C?124/10 P, EU:C:2012:318, paragraph 77 and the case-law cited).

29 In the present case, as can be seen from paragraphs 24 to 26 above, it appears that, under Articles 62(1)(a) and 63(2) of the Law of 2004 and pursuant to the 2001 Agreement, the exemption from property tax has the effect of mitigating directly, without any other measure being necessary, the charges that would ordinarily be borne by Navantia in the absence of such an exemption.

30 To the extent that the Spanish Government contends that a tax exemption of that nature must be regarded as recompense in return for services performed by Navantia in order to fulfil public service obligations and that, accordingly, that measure does not involve any advantage for Navantia, it should be noted that the existence of a link between, on the one hand, that exemption and, on the other hand, services in the public interest that Navantia may have performed is in no way apparent from the documents before the Court.

31 In those circumstances, it must be held that the exemption from property tax sought confers

an economic advantage on Navantia.

32 It should be noted, moreover, that Article 107 TFEU prohibits aid ‘favouring certain undertakings or the production of certain goods’, that is to say, it prohibits selective aid (judgment in *P*, EU:C:2013:525, paragraph 17).

33 Accordingly, although a measure by which the public authorities grant certain undertakings favourable tax treatment, which, although not involving the transfer of State resources, places the recipients in a more favourable financial position than other taxpayers, amounts to State aid within the meaning of Article 107(1) TFEU, that is not the position as regards advantages resulting from a general measure applicable without distinction to all economic operators, which do not constitute State aid within the meaning of that provision (judgment in *P*, EU:C:2013:525, paragraph 18).

34 In that regard, it is clear from the Court’s settled case-law that Article 107(1) TFEU requires it to be determined whether, under a particular statutory regime, a State measure is of such a nature as to favour ‘certain undertakings or the production of certain goods’ as compared with others which, in the light of the objective pursued by the regime in question, are in a comparable legal and factual situation (judgment in *Portugal v Commission*, C-88/03, EU:C:2006:511, paragraph 54 and the case-law cited).

35 It follows that, in order to categorise a domestic tax measure as ‘selective’, it is necessary to begin by identifying and examining the common or ‘normal’ regime applicable in the Member State concerned. It is in relation to that common or ‘normal’ tax regime that it is necessary, secondly, to assess and determine whether any advantage granted by the tax measure at issue may be selective, by demonstrating that the measure derogates from that common regime inasmuch as it differentiates between economic operators who, in the light of the objective attributed to the tax system of the Member State concerned, are in a comparable factual and legal situation (judgment in *Paint Graphos and Others*, C-78/08 to C-80/08, EU:C:2011:550, paragraph 49).

36 In that regard, it is apparent from the evidence before the Court that, in accordance with Articles 60 to 63 of the Law of 2004, any ownership or use of land entails, in principle, liability to property tax. The regime to which that tax belongs must, therefore, be regarded as the statutory regime of reference for the purposes of determining whether the exemption measure at issue is selective.

37 Secondly, it has already been observed that, as an exception to the general rule set out in the preceding paragraph, the use of the plot of land on which Navantia’s shipyard is located is — by operation of the exemption at issue and in accordance with the 2001 Agreement, to the extent that that agreement provides for the transfer to Navantia solely of the right to use that plot — exempt from property tax.

38 It is necessary, therefore, to determine whether a tax exemption such as that at issue in the main proceedings is of such a nature as to favour Navantia as compared with other undertakings whose legal and factual situation is comparable in the light of the objective pursued by the Spanish property tax regime, that is to say, the taxation of the ownership or use of land.

39 In that regard, it is clear from the documents before the Court that the exemption under Article 62(1)(a) of the Law of 2004 for immovable property owned by the State and ‘used for the purposes of national defence’ could well cover all the business activities of an undertaking such as Navantia, without any distinction between its military and its civil business, it being for the referring court to determine the actual situation.

40 It should be noted, therefore, that not only undertakings which own or use land for purposes

partly related to national defence are in a factual and legal situation comparable to that of Navantia in the light of the objective of taxing the ownership or use of land, but also those undertakings which own or use land for exclusively civil purposes.

41 Clearly, therefore, as compared with the latter group of undertakings, Navantia would enjoy, as regards its civil business activities, a tax advantage that is not available to other companies whose factual and legal situation is comparable. Consequently, it must be held that the tax advantage under consideration is *prima facie* selective.

42 However, according to settled case-law, the concept of State aid does not refer to State measures which differentiate between undertakings and which are, therefore, *prima facie* selective where that differentiation arises from the nature or the overall structure of the system of charges of which they are part, which it is for the Member State concerned to demonstrate (judgment in *Portugal v Commission*, EU:C:2006:511, paragraphs 52 and 80 and the case-law cited).

43 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 made between, on the one hand, the objectives attributed to a particular tax regime, which are extrinsic to it, and, on the other hand, the mechanisms inherent in the tax system itself, which are necessary for the achievement of such objectives (judgment in *Portugal v Commission*, EU:C:2006:511, paragraph 81).

44 In the present case, it does not appear from the information before the Court that the Spanish Government has adduced any arguments to show that the tax exemption sought results directly from the basic or guiding principles of the Spanish tax system or that it is necessary for the functioning and efficiency of that tax system. Moreover, as the European Commission pointed out, an exemption for immovable property owned by the State and used for the purposes of national defence does not appear to be directly related to the objectives of the property tax itself. It is for the referring court, however, to determine, in the light of all the relevant evidence in the dispute before it, whether a possible justification exists.

45 In the light of all of the foregoing, it must be held that, in the present case, the third condition — that the exemption sought must confer an advantage on the beneficiary — may well be satisfied.

46 In the second place, as regards the first condition, relating to an intervention by the State or through State resources, it should be noted that only advantages granted directly or indirectly through State resources or constituting an additional burden on the State are to be regarded as aid within the meaning of Article 107(1) TFEU. The very wording of that provision and the procedural rules laid down in Article 108 TFEU show that advantages granted from resources other than those of the State do not fall within the scope of the provisions in question (judgment in *Bouygues and Bouygues Télécom v Commission and Others* and *Commission v France and Others*, EU:C:2013:175, paragraph 99 and the case-law cited).

47 Consequently, it is necessary to establish whether there is a sufficiently direct link between, on the one hand, the advantage given to the beneficiary and, on the other, a reduction of the State budget or a sufficiently concrete economic risk of burdens on that budget (see, to that effect, judgment in *Bouygues and Bouygues Télécom v Commission and Others* and *Commission v France and Others*, EU:C:2013:175, paragraph 109).

48 In that regard, first, it is not disputed that the tax exemption sought was established by the Spanish State and that it therefore constitutes an intervention on the part of that State. Secondly, it

is not disputed that the mitigation, as a result of that exemption, of a charge which would ordinarily be borne by Navantia would entail as a corollary a reduction of the Concello de Ferrol's budget.

49 In those circumstances, the condition relating to an intervention by the State through its resources may well be satisfied, it being for the referring court to determine whether that is indeed the case.

50 That finding is not weakened by the Spanish Government's argument by reference to the judgments in *Streekgewest*, C?174/02, EU:C:2005:10 and *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. That case-law is not relevant to the case before the referring court, since it relates to a situation, different from that at issue in the main proceedings, in which the tax is an integral part of an aid measure and, as such, constitutes aid in itself. In the main proceedings, on the other hand, it is in no way claimed that the property tax itself constitutes an aid measure, but merely that the exemption from that tax has the effect, in the circumstances, of granting aid in favour of Navantia.

51 In the third place, as regards the second and fourth conditions relating, respectively, to an effect on trade between Member States and on competition of a tax exemption such as that at issue in the main proceedings, it should be borne in mind that for the purposes of categorising a national measure as State aid, it is necessary, not to establish that the aid has a real effect on trade between Member States and that competition is actually being distorted, but only to determine whether that aid is liable to affect such trade and to distort competition (judgment in *Libert and Others*, C?197/11 and C?203/11, EU:C:2013:288, paragraph 76 and the case-law cited).

52 In particular, if aid granted by a Member State strengthens the position of an undertaking as compared with that of other undertakings competing in intra-Community trade, the latter undertakings must be regarded as affected by that aid (judgment in *Libert and Others*, EU:C:2013:288, paragraph 77 and the case-law cited).

53 In the present case, it is not disputed that the shipbuilding sector is a market open to competition and to trade between Member States, on which Navantia is therefore in competition with other undertakings. Moreover, as can be seen from the information given in the order for reference, that is the position not only as regards Navantia's civil business activities, but also as regards its business activities in the military sector.

54 In those circumstances, the tax exemption sought is capable of affecting trade between Member States and of distorting competition, it being for the referring court to determine whether that is indeed the case.

55 It follows that the four conditions set out in paragraph 20 above may well be satisfied in the present case. It is for the referring court, however, to determine whether, in the light of all the relevant evidence in the dispute before it, assessed by reference to the interpretative guidance provided by the Court, that tax exemption falls to be categorised as State aid within the meaning of Article 107(1) TFEU.

56 In the light of all of the foregoing considerations, the answer to the question referred is that, on a proper construction of Article 107(1) TFEU, the exemption from property tax of a plot of land belonging to the State and made available to an undertaking whose capital is wholly State-owned and which produces, from that plot of land, goods and services that may be traded between Member States on markets open to competition may constitute State aid prohibited by that provision. It is for the referring court, however, to determine whether, in the light of all the relevant evidence in the dispute before it, assessed by reference to the interpretative guidance provided by

the Court, that tax exemption falls to be categorised as State aid within the meaning of that provision.

Costs

57 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 (Seventh Chamber) hereby rules:

On a proper construction of Article 107(1) TFEU, the exemption from property tax of a plot of land belonging to the State and made available to an undertaking whose capital is wholly State-owned and which produces, from that plot of land, goods and services that may be traded between Member States on markets open to competition may constitute State aid prohibited by that provision. It is for the referring court, however, to determine whether, in the light of all the relevant evidence in the dispute before it, assessed by reference to the interpretative guidance provided by the Court of Justice of the European Union, that tax exemption falls to be categorised as State aid within the meaning of that provision.

[Signatures]

* Language of the case: Spanish.