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?234/16 and C?235/16,

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

Consejería de Economía y Hacienda del Principado de Asturias (C?234/16),

Consejo de Gobierno del Principado de Asturias (C?235/16),

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 Consejería de Economía y Hacienda del Principado de Asturias and the Consejo de Gobierno del Principado de Asturias, by A. Roces Llaneza, letrada,

– 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 in proceedings between, on the one hand, the Asociación Nacional de Grandes Empresas de Distribución (ANGED) and, on the other hand, the Consejería de Economía y Hacienda del Principado de Asturias (Finance Department of the Principality of Asturias, Spain) and the Consejo de Gobierno del Principado de Asturias (Government Council of the Principality of Asturias) concerning the lawfulness of a tax on large retail establishments situated in the Autonomous Community of the Principality of Asturias.

Spanish law

3 Article 21 of Ley del Principado de Asturias 15/2002, de medidas presupuestarias, administrativas y fiscales (Law 15/2002 of the Principality of Asturias on budgetary, administrative and tax measures) of 27 December 2002 (BOPA No 301 of 31 December 2002), in its version applicable to the cases in the main proceedings ('Law 15/2002'), introduced a tax on large retail establishments ('the IGEC') with effect from 1 January 2003.

4 The preamble to Law 15/2002 states that the purpose of the tax is to shift to large retail establishments responsibility for the adverse effects of their business on the territory, the environment and on local business.

5 Article 21(2) of Law 15/2002 provides that revenue from the IGEC is to be used 'to draw up and carry out programmes designed to implement sectoral guidelines on retail facilities' and 'to make improvements to the environment and to infrastructure networks'.

6 In accordance with Article 21(3) of Law 15/2002, that tax is chargeable on individual or collective retail establishments with a public display and sales area equal to or greater than 4 000 m2. That threshold, which had previously been set at 2 500 m2, came into force on 1 January 2005.

7 Under Article 21(4) of Law 15/2002, large individual establishments, the public display and sales area of which do not exceed 10 000 m2 and which solely and exclusively pursue the business of a garden centre or of selling vehicles, construction materials, machinery or industrial supplies are not subject to the IGEC.

8 Under Article 21(5) of Law 15/2002, proprietors who operate large retail establishments, whether individual or collective, that is to say, the proprietors of the single or multiple premises making up those large establishments and who either directly pursue business activities or make the premises available to third parties in order to pursue such business activities are liable to pay the IGEC.

9 Article 21(7) of that law sets out the methods for calculating the basis of assessment, which take into account, inter alia, the population density within a radius of 10 kilometres of where the establishment was constructed.

10 Article 21(11) of Law 15/2002 provides that the IGEC is calculated by applying to the tax payable, where appropriate, a relief: (a) of 10% in the case of large commercial establishments not situated in population centres and to which access can be had by at least two different methods of public transport and (b) for large retail establishments that put into effect environmental protection projects deemed to be suitable by the competent authorities.

11 Since 1 January 2015, the rules governing that tax have been set out in similar terms in the

decreto legislativo 1/2014, por el que se aprueba el texto refundido de las disposiciones legales del Principado de Asturias en materia de Tributos Propios (Legislative Decree 1/2014 approving the consolidated text of legislative provisions of the Principality of Asturias on regional taxation) of 23 July 2014 (BOPA No 175 of 29 July 2014).

12 Point III of the preamble to that legislative decree reproduces in essence the preamble to Law 15/2002, without however referring to the adverse effects of large retail establishments on local business.

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

13 By Law 15/2002, a regional tax on large commercial establishments was introduced throughout the Autonomous Community of the Principality of Asturias in order to offset the potential impact of those large retail establishments on the territory, in particular on local business, and on the environment. By decision of 3 July 2003, the Regional Ministry for Economy and Finance of the Principality of Asturias approved the standard form declaration of registration, alteration and cancellation of registration for the purposes of the IGEC. The Government Council of the Principality of Asturias approved, on 11 November 2009, the rules governing the IGEC by way of decreto 139/2009, por el que se aprueba el Reglamento del Impuesto sobre Grandes Establecimientos Comerciales (Decree 139/2009 approving the regulations on the tax on large retail establishments) (BOPA No 273 of 25 November 2009).

14 In 2003, the ANGED, a national association of large distribution companies, brought an action for annulment of that decision before the Tribunal Superior de Justicia del Principado de Asturias (High Court of Justice, Principality of Asturias, Spain) on the ground that it was incompatible with the principle of freedom of establishment and with the law on State aid.

15 In 2009, the ANGED also brought an action for annulment of that decree before that court.

16 That court stayed the proceedings in those two cases pending an answer to the question it had referred to the Tribunal Constitucional (Constitutional Court, Spain) on the constitutionality of the rules governing the IGEC. Following the dismissal of that request by the Tribunal Constitucional (Constitutional Court) on 10 April 2014, the Tribunal Superior de Justicia de Asturias (High Court of Justice, Asturias) also dismissed the actions brought by the ANGED. That association then appealed against those two rulings before the Tribunal Supremo (Supreme Court, Spain).

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

18 By letter of 28 November 2014, the Commission informed the Spanish authorities that, further to a preliminary assessment of the IGEC 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.

19 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?234/16 and C?235/16, to the Court of Justice for a preliminary ruling:

‘(1) Must Article 49 and Article 54 TFEU be interpreted as precluding a regional tax levied on the operation of large retail establishments with a public display and sales area greater than or equal to 4 000 m² on account of their impact on the territory, environment and urban trading area

of that region, but which applies regardless of whether the retail establishments are actually situated inside or outside the consolidated urban area and is borne in most cases by undertakings of other Member States, bearing in mind that the tax

(a) does not affect traders who own several retail establishments, whether of an individual or collective nature, with a public display and sales area of less than 4 000 m² irrespective of the total public display and sales area of all their establishments, and

(b) is not levied on large retail establishments of an individual nature, with a public display and sales area not exceeding 10 000 m², which solely and exclusively pursue the business of a garden centre or of selling vehicles, construction materials, machinery or industrial supplies?

(2) Must Article 107(1) TFEU be interpreted as meaning that the following constitutes State aid prohibited under that provision: the non-imposition of the IGEC introduced within the territory of the Autonomous Community of the Principality of Asturias on retail establishments, of an individual or collective nature, with a public display and sales area of less than 4 000 m2 and individual large retail establishments, with a public display and sales area not exceeding 10 000 m2, which solely and exclusively pursue the business of a garden centre or of selling vehicles, construction materials, machinery or industrial supplies?'

Consideration of the questions referred

The first question

20 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.

21 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).

22 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).

23 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).

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

25 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.

26 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. The Autonomous Community of the Principality of Asturias argued, in addition, that the IGEC is levied in essence on Spanish taxable persons.

27 The referring court also points out that it lacks ‘suitable’ information in order to establish the existence of any covert discrimination.

28 Consequently, 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

29 By its second question, the referring court asks, in essence, whether a tax such as that in the main proceedings imposed on large distribution establishments according, in essence, to their display and 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 4 000 m2 and those which pursue the business of a garden centre or of selling vehicles, construction materials, machinery or industrial supplies and whose sales area does not exceed 10 000 m2.

30 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).

31 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).

32 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).

33 In that regard, in order to classify a 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).

34 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).

35 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).

36 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).

37 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).

38 With regard to the legislation at issue in the main proceedings, the question of whether the territorial reference framework should be the Autonomous Community of the Principality of Asturias has not been raised before the Court.

39 Moreover, although the criterion relating to the display and sales area does not appear to formally derogate from a given legal reference framework, its effect is nonetheless to exclude retail

establishments whose display and sales area is less than 4 000 m2 from the scope of that tax. Thus, the IGEC cannot be distinguished from a regional tax on retail establishments whose display and sales areas exceed a certain threshold.

40 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).

41 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 by mitigating their tax burden in relation to those subject to the tax at issue in the main proceedings.

42 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.

43 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).

44 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’.

45 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 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.

46 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 greater 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.

47 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).

48 The determination of the threshold comes within the discretion of the national legislature and is based on technical, complex assessments that the Court only has limited powers to review. In that context, the initial threshold of 2 500 m2, or the subsequently adopted threshold of 4 000 m2, should not be regarded as manifestly inappropriate for the purposes of the objectives pursued.

49 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.

50 Therefore, the tax exemption received by the retail establishments within the territory of the Autonomous Community of the Principality of Asturias, whose sales area is less than a certain threshold, 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.

51 The referring court is also uncertain as to the other features of the tax at issue in the main proceedings. It questions whether the tax exemption granted to retail establishments which solely and exclusively pursue the business of a garden centre or of selling vehicles, construction materials, machinery or industrial supplies and the sales area of which does not exceed 10 000 m2 constitutes an advantage for those establishments.

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

53 The Autonomous Community of the Principality of Asturias argues, in its written observations, that the activities of the retail establishments concerned require, by their very nature, large sales and warehouse areas. It submits that the adverse effects they have on the environment and on town and country planning are assessed by reference to a distinct but equivalent threshold to that applied, in principle, to retail trade activities of establishments that are subject to that tax.

54 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.

55 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 display and 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 is less than 4 000 m2. Nor, in so far as that tax exempts establishments which pursue the business of a garden centre or of selling vehicles, construction materials, machinery or industrial supplies and whose sales area does not exceed 10 000 m2, 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

56 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 display and 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 is less than 4 000 m2. Nor, in so far as that tax exempts establishments which pursue the business of a garden centre or of selling vehicles, construction materials, machinery or industrial supplies and whose sales area does not exceed 10 000 m2, 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.