Reports of Cases

OPINION OF ADVOCATE GENERAL
KOKOTT
delivered on 9 November 2017 [1]

Joined Cases C-234/16 and C-235/16

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)

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

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

I. Introduction

1. The present case is connected with two other cases currently before the Court [2] and, like them, it gives the Court an opportunity to clarify the scope of the prohibition on State aid under EU law.

2. By its action, the Asociación Nacional de Grandes Empresas de Distribución (National Association of Large Distribution Companies, ANGED) is challenging a special tax on large retail establishments (IGEC) in Asturias.

3. The European Commission and ANGED consider the tax to constitute a restriction of the freedom of establishment and unlawful aid for small retail establishments in particular, as such establishments are not subject to the tax. However, the statutory exemption for certain large retail establishments (such as those selling construction materials) is also considered to be questionable from the point of view of EU law.

II. Legislative framework

A. EU law

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

1 Original language: German.

2 Joined Cases C-236/16 and C-237/16 and Case C-233/16.

B. Spanish law

5. The tax on large retail establishments (IGEC) which is at issue in the main proceedings was introduced by Ley del Principado de Asturias 15/2002, de 27 de diciembre, de medidas presupuestarias, administrativas y fiscales (Law 15/2002 of the Principality of Asturias of 27 December 2002 on budgetary, administrative and tax measures, 'Law 15/2002') on 1 January 2003.

6. Since 1 January 2015 it has been enshrined in Articles 19 to 36 of the Texto refundido de las disposiciones legales del Principado de Asturias en materia de tributos propios, aprobado por Decreto Legislativo 1/2014, de 23 de julio (Consolidated text of legislative provisions of the Principality of Asturias on regional taxation, approved by Legislative Decree 1/2014 of 23 July 2014, TRPATP).

7. The preamble to Law 15/2002 stated that the IGEC was non-fiscal in nature, since its purpose was not exclusively to collect revenue, but also, and primarily, to shift to large retail establishments responsibility for the adverse effects of their business on the territory, the environment and the urban trading structure.

8. Article 21(1) of Law 15/2002 (like Article 19.2 of the TRPATP) provides that the IGEC 'is chargeable on the exceptional economic capacity of certain retail establishments as a result of being set up as large retail outlets, in so far as that fact contributes decisively to securing a dominant position in the sector and may give rise to negative externalities for the territory and the environment, the costs of which they do not bear'.

9. Article 21(2) of Law 15/2002 (Article 20 of the TRPATP) provides that revenue from the tax 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'.

10. Under Article 21 of Law 15/2002 (Article 21 of the TRPATP), the taxable event for IGEC purposes is the operation of large retail establishments on account of their impact on the territory, the environment and the urban trading structure of the Principality of Asturias. Following amendment by Ley del Principado de Asturias 6/2004, de 28 de diciembre, de acompañamiento a los Presupuestos Generales para 2005 (Law 6/2004 of the Principality of Asturias of 28 December 2004 supplementing the 2005 general budget), retail establishments, whether individual or collective, with a public display and sales area equal to or exceeding 4 000 m^2 are subject to the IGEC.

11. The persons liable to pay the IGEC are those who own a large retail establishment, whether individual or collective. For that purpose, owners are deemed to include the proprietors of premises making up the large retail establishment which operates those premises, either by pursuing business activities directly or by making the premises available to third parties in order to pursue such business activities.

12. The basis of assessment is the area set aside for parking by the large retail establishment. In any event, the minimum parking area is deemed to be equivalent to 50% of the public display and sales area. In all cases, the parking area is reduced by 1 999 m^2 by way of a *de minimis* exemption.

13. Two coefficients are applied to the basis of assessment to take account of the population of the catchment area of the large retail establishment and the total area of the large retail establishment. In the latter case, the coefficient increases with the size of the area. The amount of the IGEC is calculated, where appropriate, by applying a relief to the tax payable, if outlying larger retail establishments can be accessed by at least two different methods of public transport or if larger retail establishments put into effect environmental protection projects deemed to be suitable.

14. Under the amended version of Article 21(4) of Law 15/2002 (Article 22 of the TRPATP), large individual retail establishments 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, provided that the public display and sales area of those establishments does not exceed 10 000 m^2.

III. The main proceedings

15. On 8 October 2003, ANGED — a national association of large retail establishments — brought an administrative action before the Sala de lo Contencioso-Administrativo del Tribunal Superior de Justicia de Asturias (Administrative Division of the High Court of Justice, Asturias, Spain) ultimately against the IGEC, and in particular against the decision of the Finance Department of the Principality of Asturias of 3 July 2003 approving the standard form declaration of registration, alteration and cancellation of registration for the purposes of the IGEC.

16. By judgment of 31 July 2014, the Sala de lo Contencioso-Administrativo, Sección Segunda, del Tribunal Superior de Justicia de Asturias (Second Chamber of the Administrative Division of the High Court of Justice, Asturias) dismissed the administrative action brought by ANGED.

17. On 4 November 2014, ANGED lodged an appeal on a point of law against that judgment on the ground that Article 21 of Law 15/2002 was contrary to the freedom of establishment as enshrined in Article 49 TFEU.

18. In February and May 2013, ANGED lodged a complaint against the Kingdom of Spain with the Commission, claiming that the IGEC rules in six autonomous communities infringed EU law.

19. By letter dated 28 November 2014 to the Kingdom of Spain, the Commission then stated that it was minded to regard the non-taxation of small retailers and the exemptions granted to certain specialist establishments as incompatible State aid. They appeared to give a selective advantage to certain undertakings because they were an exception to the normal tax regime.

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

IV. Procedure before the Court of Justice

21. The Tribunal Supremo (Supreme Court) has referred the following questions to the Court:

‘(1) Must Articles 49 and 54 TFEU be interpreted as precluding a regional tax levied on the operation of large retail establishments with a public display and sales area equal to or exceeding 4 000 m^2 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

(i) 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 m^2 irrespective of the total public display and sales area of all their establishments; and

(ii) is not levied on large retail establishments of an individual nature, with a public display and sales area not exceeding 10 000 m^2, 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 Asturian IGEC on retail establishments, individual or collective, with a public display and sales area of less than 4 000 m^2 and individual large retail establishments, with a public display and sales area not exceeding 10 000 m^2, which solely and exclusively pursue the business of a garden centre or of selling vehicles, construction materials, machinery or industrial supplies?'

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

V. Legal assessment

A. Restriction of the fundamental freedoms

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

24. The context is the mode of operation of the IGEC. The IGEC links the chargeable event to the existence of a large retail establishment. These are establishments which nominally have a sales area equal to or exceeding 4 000 m^2. However, the basis of assessment is the area set aside for parking by the large retail establishment. In any event, the minimum parking area is deemed to be equivalent to 50% of the sales area. Regard is thus had to the sales area in combination with the parking area. The sales area becomes relevant where it is twice the size of the parking area. Retail establishments are granted an 'allowance' of 1 999 m^2 for the parking area.

25. That parking area is further modified by various coefficients, one of which increases with the size of the area. This results in a certain progressive effect for the tax. Consequently, larger retail establishments are subject to a higher tax burden, in both absolute and relative terms, than retail establishments with a smaller area.

1. Restriction of the freedom of establishment

26. Under Article 49 in conjunction with Article 54 TFEU, the freedom of establishment includes the right for nationals of a Member State on the territory of another Member State to take up and pursue activities as self-employed persons.[3] It is also settled case-law that all measures which prohibit, impede or render less attractive the exercise of the freedom of establishment are restrictions on that freedom.[4]

27. This is the case with taxes per se. The relevant factor in examining the fundamental freedoms in respect of such prejudice, in my view,[5] is therefore that a cross-border situation is treated less favourably than a domestic situation.[6]

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

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

5 See my Opinions in *C* (C-122/15, EU:C:2016:65, point 66); *X* (C-498/10, EU:C:2011:870, points 28 and 29); *Hervis Sport- és Divatkereskedelmi* (C-385/12, EU:C:2013:531, points 83 and 84); and *X* (C-686/13, EU:C:2015:31, point 40).

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

(a) Covert discrimination against foreign undertakings

28. No overt discrimination against foreign undertakings is evident in this case. Rather, the tax is levied on any owner of a 'large retail establishment' with a parking area exceeding the 'allowance' of 1 999 m^2. As the Court has already ruled,[7] the fact that foreign investors prefer to open larger retail establishments in order to achieve the economies of scale necessary to penetrate a new territory relates to entry into a new market, rather than to the nationality of the operator.[8]

29. However, all covert forms of discrimination which, by the application of other criteria of differentiation, lead in fact to the same result are also prohibited[9] ('covert' or 'indirect' discrimination).

30. In *Hervis Sport* the Court ruled that where a tax assessment is based on an undertaking's level of turnover there can possibly be a de facto disadvantage for undertakings which have their registered offices in other Member States.[10] That case specifically concerned a special tax on retail undertakings, the rate of which was steeply progressive based on turnover. Furthermore, for undertakings belonging to a group the consolidated turnover was used as the basis for classification in a tax band, rather than the turnover of the individual undertaking. The Court held that indirect discrimination can exist where *the majority* of undertakings which are adversely affected by the steeply progressive scale of the tax, on account of their high turnover, belong to a group with a link in another Member State.[11]

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

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

32. In my view, it cannot be sufficient to have regard solely to whether foreign undertakings are affected *in the majority of cases* in order to be able to accept the existence of covert discrimination in the context of the fundamental freedoms,[12] which is the approach taken by the Commission and ANGED. This would, for example, prevent a Member State from introducing a corporation tax if, because of historical developments in the Member State, more than 50% of active undertakings were foreign undertakings. The fact that — more or less by chance — persons affected by the introduction of a tax originate to a large extent or even in their majority from other Member States cannot therefore constitute covert discrimination as such.

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

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

9 See, inter alia, judgments of 5 December 1989, *Commission* v *Italy* (C-3/88, EU:C:1989:606, paragraph 8); of 13 July 1993, *Commerzbank* (C-330/91, EU:C:1993:303, paragraph 14); of 14 February 1995, *Schumacker* (C-279/93, EU:C:1995:31, paragraph 26); of 8 July 1999, *Baxter and Others* (C-254/97, EU:C:1999:368, paragraph 10); of 25 January 2007, *Meindl* (C-329/05, EU:C:2007:57, paragraph 21); of 18 March 2010, *Gielen* (C-440/08, EU:C:2010:148, paragraph 37); of 1 June 2010, *Blanco Pérez and Chao Gómez* (C-570/07 and C-571/07, EU:C:2010:300, paragraphs 117 and 118); of 5 February 2014, *Hervis Sport- és Divatkereskedelmi* (C-385/12, EU:C:2014:47, paragraph 30); and of 8 June 2017, *Van der Weegen and Others* (C-580/15, EU:C:2017:429, paragraph 33); see also my Opinion in *Hervis Sport- és Divatkereskedelmi* (C-385/12, EU:C:2013:531, point 34).

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

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

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

(2) Conditions for covert discrimination

33. The precise conditions for covert discrimination must therefore be clarified. On the one hand, the question arises how strong the correlation between the chosen distinguishing criterion and the place in which a company has its seat must be in order for there to be unequal treatment based on the seat. Thus far, the Court has had in view both a correspondence in the majority of cases [13] and a mere preponderance of non-residents being affected, [14] or even mentioned a mere risk of disadvantage. [15] It would appear to have been established thus far only that a 100% correspondence between the criterion and the place in which the company has its seat is not required. [16]

34. On the other hand, not only is the necessary degree of correlation uncertain according to case-law, but also the question whether that correlation must typically [17] exist or must be inherent in the distinguishing criterion, as is indicated in a number of judgments, [18] or can also be based on more incidental factual circumstances. [19]

35. In my view, stricter conditions are necessary for the existence of covert discrimination in tax law. It is intended only to include cases which do not constitute discrimination from a purely formal perspective, but have the same effect. [20] I consider that a provision which entails covert discrimination must therefore affect foreign undertakings in particular intrinsically [21] or in the vast majority of cases, as was possibly the situation in *Hervis Sport*. [22]

36. However, this cannot be accepted where a link is made to a certain sales area, the threshold for which merely has the consequence that, according to a 2004 letter from the Commission, in one year (out of 15 possible years) in another region (with very different thresholds) [23] around 61.5% of the retailers concerned are operated by undertakings from other Member States (or have shareholders from other Member States).

37. In addition, it is unclear how the 'origin' of those undertakings [24] was determined. In particular, in tax law the origin of an undertaking is determined, as a rule, according to its registered office (place of establishment) and not, for example, according to the nationality of the shareholders. As ANGED is a *national* association of large distribution establishments in Spain, its members might also be understood to be Spanish undertakings. In addition, even if regard were had to a company's

13 See judgments of 7 July 1988, *Stanton and L'Étoile 1905* (143/87, EU:C:1988:378, paragraph 9); of 13 July 1993, *Commerzbank* (C-330/91, EU:C:1993:303, paragraph 15); of 8 July 1999, *Baxter and Others* (C-254/97, EU:C:1999:368, paragraph 13); of 22 March 2007, *Talotta* (C-383/05, EU:C:2007:181, paragraph 32); see also judgments of 3 March 1988, *Bergandi* (252/86, EU:C:1988:112, paragraph 28) with regard to Article 95 of the EEC Treaty; of 26 October 2010, *Schmelz* (C-97/09, EU:C:2010:632, paragraph 48) with regard to freedom to provide services; and of 5 February 2014, *Hervis Sport- és Divatkereskedelmi* (C-385/12, EU:C:2014:47, paragraph 39 et seq.).

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

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

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

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

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

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

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

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

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

23 This concerned Catalonia in Case C-233/16 with a threshold of 2 500 m^2.

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

shareholders, the available figures show the same picture, although this is to be assessed by the national court.[25] As far as can be seen, the figures do not indicate that in this instance undertakings from other Member States are disadvantaged intrinsically or in the vast majority of cases in comparison with Spanish undertakings.

2. In the alternative: justification

38. If, contrary to the above statements, covert discrimination were nevertheless taken to exist, it would have to be examined whether it is justified. However, that examination covers only the non-taxation of smaller retail establishments, as it is not apparent from the request for a preliminary ruling that Spanish undertakings benefit from the non-taxation of certain large establishments under the IGEC (Article 22 of the TRPATP — referred to hereinafter as 'exemption' for better differentiation) in the majority of cases.

39. A restriction of fundamental freedoms may be justified for overriding reasons relating to the general interest, provided it is appropriate for securing the attainment of the objective pursued and does not go beyond what is necessary for attaining that objective.[26]

(a) Overriding reasons relating to the general interest

40. The IGEC serves purposes of town and country planning and environmental protection (see points 7 and 8 above). Establishments subject to the tax are intended to contribute to the costs which they generate disproportionately (such as special costs for infrastructure), because they do not bear those costs themselves at an appropriate level (see Article 19.2 of the TRPATP). Objectives relating to town and country planning[27] and environmental protection[28] have been recognised as justifications in the Court's case-law.

41. Furthermore, the intention is to make a link to, and to skim off, the specific economic capacity 'as a result of being set up as large retail outlets, in so far as that fact contributes decisively to securing a dominant position in the sector'. In my opinion, the Court has not yet been required to decide whether a difference in economic capacity (and thus a different ability to bear financial burdens) can be regarded as a justification for a restriction of a fundamental freedom. I would not, however, like to rule out that, as with a progressive rate for example, a difference in economic capacity could also justify a difference in treatment for tax purposes.[29]

25 In this regard, according to the material produced by ANGED in Case C-233/16 regarding Catalonia with a threshold of 2 500 m^2, 'only' 52.03% of the total revenue from the tax is borne by undertakings from other Member States and their share of the total 'taxed' sales area is 'only' 46.77%. The information provided by Asturias in the written pleading also only indicates that 50% of those affected or 50% of shareholders do not come from Spain.

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

27 Judgments of 1 October 2009, *Woningstichting Sint Servatius* (C-567/07, EU:C:2009:593, paragraph 29), and of 24 March 2011, *Commission* v *Spain* (C-400/08, EU:C:2011:172, paragraph 74).

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

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

(b) Proportionality of the restriction

42. The restriction must also be appropriate for ensuring the attainment of the objective and may not go beyond what is necessary for attaining that objective, in this case compensating for effects on the territory and the environment that may be connected with setting up large retail establishments. [30]

(1) Appropriateness of the tax

43. According to the Court's case-law, national legislation is appropriate for ensuring attainment of the objective pursued only if it genuinely reflects a concern to attain it in a consistent and systematic manner. [31]

44. In this regard, the EU legislature must be allowed a broad discretion in an area which entails political, economic and social choices on its part and in which it is called upon to undertake complex assessments. Consequently, the legality of a measure adopted in that sphere can be affected only if the measure is manifestly inappropriate having regard to the objective which the competent institutions are seeking to pursue. [32]

45. Furthermore, the Court also respects the discretion enjoyed by the Member States in laying down general laws. [33] In particular, political, economic and social choices are entailed on the part of the legislature when drafting tax legislation. It is also [34] called upon to undertake complex assessments. In the absence of Community harmonisation, the national legislature has a certain discretion in the field of tax law in fixing a tax for retail establishments. The requirement of consistency is therefore satisfied if the IGEC is not manifestly inappropriate having regard to the objective.

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

47. Because smaller undertakings are also easier to integrate in terms of town and country planning, this is also beneficial from the point of view of a sensible and fair distribution of limited space. The law is thus also appropriate for serving purposes of environmental protection and attaining objectives relating to town and country planning in a consistent and systematic manner. [35]

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

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

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

33 Judgments of 24 March 1994, *Schindler* (C-275/92, EU:C:1994:119, paragraph 61); of 21 September 1999, *Läärä and Others* (C-124/97, EU:C:1999:435, paragraphs 14 and 15); of 6 November 2003, *Gambelli and Others* (C-243/01, EU:C:2003:597, paragraph 63), all concerning games of chance; and of 5 March 1996, *Brasserie du pêcheur and Factortame* (C-46/93 and C-48/93, EU:C:1996:79, paragraph 48 et seq.), concerning foodstuffs legislation.

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

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

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

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

(2) Necessity of the tax

50. It must therefore be clarified whether the tax — which is linked to parking area as from a minimum sales area of 4 000 m^2 — is also necessary for attaining those objectives.

51. In examining necessity in connection with proportionality, according to the Court's case-law, when there is a choice between several appropriate measures, recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued. [36]

52. In that regard, it should be recalled that it is for the Member State relying on an overriding reason in the public interest as justification for a restriction on one of the fundamental freedoms to demonstrate that its legislation is appropriate and necessary to attain the legitimate objective pursued. However, that burden of proof cannot be so extensive — in the context of treaty infringement proceedings — as to require the Member State to prove, positively, that no other conceivable measure could enable that objective to be attained under the same conditions. [37] This principle must apply a fortiori in preliminary ruling proceedings.

53. A feature of thresholds is that the question can always be asked why, for example, 3 000 m^2 or 5 000 m^2 was not adopted in the law rather than the chosen minimum sales area of 4 000 m^2. However, this question arises with any threshold and, in my view, can only be answered by the democratically mandated legislature. Contrary to the view taken by the Commission, the legislature is not required to prove empirically how it fixed the threshold and it also does not matter whether, in the Commission's view, the threshold is credible or even 'right', as long as it is not manifestly erroneous. That is not the case here.

54. A higher threshold (5 000 m^2) would perhaps be a less onerous measure, but would not be equally appropriate from the point of view of the Member State. It must be recognised that larger retailers face greater challenges with regard to urban planning and consideration of environmental concerns and that the size of retail establishments and the size of parking areas are indicators of a larger turnover, and thus also of a larger economic capacity (and greater financial strength). Nor can it be deemed manifestly incorrect that larger retailers with large car parks also benefit to a greater degree from urban infrastructure than smaller retailers (with large car parks). Accordingly, the sales area of retail establishments and the related parking area is a relevant factor with respect to attaining the legislative objectives.

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

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

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

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

(3) Proportionality of the tax

57. Furthermore, restrictions of a fundamental freedom must also be appropriate to the objective pursued.[38] This means that the restriction and its consequences must not be disproportionate to the aims pursued (which are worthy of protection).[39] This therefore requires the specific consequences to be weighed, taking into consideration the abstract importance of the protected legal interests (environmental protection and town and country planning) and the affected legal interest[40] (hypothetically the exercise of a fundamental freedom).

58. In this instance the tax is not disproportionate to the purposes pursued. The burden is not so high that economic activity would no longer be possible ('choking effect'). In particular, the first 1 999 m^2 of parking area is not taxed at all and, according to the authorities, the tax is deductible from the basis of assessment for Spanish income tax. In addition, other reliefs are offered where retail establishments put into effect certain environmental protection projects or can be accessed by at least two different methods of public transport. Furthermore, environmental protection and town and country planning are legal interests of high importance for the co-existence of a society, and of very high importance in the case of environmental protection (which is expressly mentioned in Article 11 TFEU, Article 3(3) TEU and Article 37 of the Charter of Fundamental Rights of the European Union).[41] Consequently, even a (covert) restriction of the freedom of establishment would be justified.

B. Existence of aid

59. With regard to the second question, it must be examined whether the rules of Law 15/2002 (or of the TRPATP) constitute unlawful aid under Article 107(1) TFEU.

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

60. It should be pointed out, first of all, that the Court has held on a number of occasions that businesses liable to pay a tax cannot rely on the argument that the exemption enjoyed by other businesses constitutes State aid in order to avoid payment of that tax.[42]

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

39 Judgments of 12 July 2001, *Jippes and Others* (C-189/01, EU:C:2001:420, paragraph 81); of 9 November 2010, *Volker und Markus Schecke and Eifert* (C-92/09 and C-93/09, EU:C:2010:662, paragraph 76 et seq.); of 22 January 2013, *Sky Österreich* (C-283/11, EU:C:2013:28, paragraph 50); and of 30 June 2016, *Lidl* (C-134/15, EU:C:2016:498, paragraph 33).

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

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

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

61. It would be otherwise, however, if the tax and the envisaged exemption were *an integral part of an aid measure*. For that to be so, it must be hypothecated to the aid measure under the relevant national rules, in the sense that the revenue from the tax is necessarily allocated for the financing of the aid and has a direct impact on the amount thereof and, consequently, on the assessment of the compatibility of that aid with the internal market. [43]

62. In this regard it can be stated that revenue from this tax is not used for specific aid for businesses. Instead, it is used 'to 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' (Article 20 of the TRPATP). Accordingly, it can be ruled out that the revenue obtained favours a specific undertaking or a particular sector, as it pursues an objective in the general interest and benefits society as a whole.

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

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

2. Definition of aid

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

66. According to the Court's settled case-law, classification as 'State aid' within the meaning of Article 107(1) TFEU requires, first, that there is an intervention by the State or through State resources. Second, the intervention must be liable to affect trade between the Member States. Third, it must confer a selective advantage on the recipient. Fourth, it must distort or threaten to distort competition. [44]

(a) The concept of advantage

67. With regard to the question whether the rules at issue in the main proceedings grant the recipient an advantage, it should be noted that, according to the Court's settled case-law, measures which, whatever their form, are likely directly or indirectly to favour certain undertakings or which fall to be regarded as an economic advantage that the recipient undertaking would not have obtained under normal market conditions are regarded as State aid. [45]

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

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

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

68. Favourable tax treatment which, although not involving the transfer of State resources, places the recipients in a financial position more favourable than that of other taxpayers can also come under Article 107(1) TFEU. [46]

69. In particular, measures which, in various forms, mitigate the burdens *normally* included in the budget of an undertaking, and which therefore, without being subsidies in the strict meaning of the word, are similar in character and have the same effect, are considered to be aid. [47]

70. As regards the non-taxation of smaller retail establishments, it should be stated that under Law 15/2002 (or of the TRPATP) only retail establishments with a sales area of 4 000 m^2 or more are to be taxed. The background to this is that a certain economic capacity is presumed (on a highly generalised basis) as from this size (see Article 19.2 of the TRPATP). Under normal market conditions and in accordance with the will of the Spanish regional legislature, smaller retail establishments below the threshold under Article 21 of the TRPATP are not taxed on their parking areas. Therefore, for them no burdens are mitigated which are *normally* included in the budget of smaller retail establishments. There is thus no economic advantage which smaller retail establishments would not have obtained under normal market conditions.

71. The non-taxation of small retail establishments cannot therefore constitute aid. At most, the exemption for certain larger retail establishments from the intrinsically relevant tax (under Article 22 of the TRPATP it applies, inter alia, to those selling machinery, construction materials or industrial supplies, provided that their sales area does not exceed 10 000 m^2) can be construed as such an advantage. It would then also have to be selective.

(b) Selectivity of the advantage

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

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

(1) Selectivity in tax law

74. The examination of such selectivity in the tax legislation of the Member States presents considerable difficulties. [48]

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

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

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

75. Case-law repeatedly takes as its starting point the premiss that a tax regime is not selective if it is applicable without distinction to all economic operators. [49] According to case-law, however, the mere fact that a tax regime grants an advantage only to those undertakings which satisfy its conditions is not in itself capable of establishing its selectivity. [50]

76. As far as tax advantages are concerned, therefore, the Court has made any finding as to their selectivity subject to special conditions. According to that case-law, the ultimately decisive factor is whether, in accordance with the criteria laid down by the national tax system, the conditions governing the tax advantage are selected in a non-discriminatory manner. [51] To answer that question, it is necessary to begin by identifying the ordinary or 'normal' tax regime applicable in the Member State concerned. It is in relation to that ordinary or 'normal' tax regime that it is necessary, secondly, to assess whether the advantage granted by the tax measure in question is selective.

77. This is conceivable where that measure is a derogation from that ordinary system, in so far as it differentiates between operators who, in the light of the objective pursued by the tax system of that Member State, are in a comparable factual and legal situation. [52] Even if those conditions are satisfied, the favourable treatment may be justified by the nature or general purposes of the system of which it is a part, in particular where a tax regime results directly from the basic or guiding principles of the national tax system. [53]

78. Such a special test to establish whether or not tax regimes are selective is necessary because — unlike subsidies in the narrow sense in the form of cash benefits — tax advantages are granted in the context of a tax system to which, as a general rule, undertakings are permanently and inevitably subject. Tax systems include differentiations in many different ways, the purpose of those differentiations being, as a rule, simply to ensure that the tax achieves the precise objective it pursues. That said, according to case-law. such 'favourable' differentiations, which are not subsidies in the narrow sense, are classified as aid only if they are similar in character and have the same effect. [54]

79. Thus, it is only where a Member State also uses its existing tax system as a means of distributing cash benefits for purposes other than those of that tax system that there are grounds for treating such tax advantages as subsidies in the narrow sense. [55]

49 See in particular judgments of 8 November 2001, *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke* (C-143/99, EU:C:2001:598, paragraph 35); of 15 November 2011, *Commission and Spain* v *Government of Gibraltar and United Kingdom* (C-106/09 P and C-107/09 P, EU:C:2011:732, paragraph 73); of 29 March 2012, *3M Italia* (C-417/10, EU:C:2012:184, paragraph 39); of 9 October 2014, *Ministerio de Defensa and Navantia* (C-522/13, EU:C:2014:2262, paragraph 23); and of 21 December 2016, *Commission* v *World Duty Free Group and Others* (C-20/15 P and C-21/15 P, EU:C:2016:981, paragraph 53 et seq.).

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

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

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

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

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

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

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

81. It follows from this finding, first, that an unjustifiable difference in treatment operated in the tax system of the Member State is necessary to support the conclusion that a tax advantage is selective within the meaning of Article 107(1) TFEU. The crucial factor in this regard is whether that differentiation arises from the nature or the overall structure of the system of which it is part. [56]

82. Furthermore, in accordance with the wording of Article 107(1) TFEU, that unjustified difference in treatment would have to be based on a differentiation for the benefit of either 'certain undertakings' or 'the production of certain goods'. It is for that reason that the Court, in particular in the judgment in *Gibraltar*, has held that a tax system must characterise the recipient undertakings, by virtue of the properties which are specific to them, as a privileged category. [57]

83. In *World Duty Free Group* [58] this finding seems at first sight to have been qualified slightly. [59] In that case, a tax scheme which provided tax advantages (short amortisation period) for all taxable persons which acquired foreign undertakings with goodwill was regarded as selective because other taxable persons which acquired domestic undertakings were able to amortise goodwill only over a longer period. As taxable persons do not per se constitute specific undertakings or the production of specific goods, the criteria laid down in Article 107(1) TFEU did not apply. [60] However, that ruling concerned a special case of 'export promotion' for domestic undertakings in respect of investments abroad to the detriment of foreign undertakings, which runs counter to the legal principle laid down in Article 111 TFEU. Accordingly, specific export subsidies can satisfy the selectivity criterion even where they apply to all taxable persons.

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

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

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

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

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

58 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 73, 74, and 86 et seq.).

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

60 This follows at least, in my view, from the statements made in the judgment of 21 December 2016, *Commission* v *World Duty Free Group and Others* (C-20/15 P and C-21/15 P, EU:C:2016:981, paragraphs 85 and 86).

86. The reference framework therefore varies according to the difference in treatment under consideration. This makes apparent the fact — as the Court, too, found in the judgment in *Gibraltar*[61] — that the determination of a 'normal' tax system cannot be decisive. As the Court reiterated in *World Duty Free*,[62] the examination of the difference in treatment in question in the light of the objective pursued by the law alone is decisive.

87. It must therefore be clarified, in accordance with the Court's case-law, whether the rules of Law 15/2002 (or of the TRPATP) result in differences in treatment which are not based in the specific tax legislation itself, but pursue purposes which are extrinsic to it — that is to say, extraneous purposes.[63]

(i) Analysis of the legislative objectives

88. This entails a closer analysis of the legislative objectives. As was stated above in point 40, the aim of the law is environmental protection, town and country planning and contribution to costs by undertakings which are presumed, based on a generalised approach, to have a particular economic capacity because they use large sales areas. There is also a certain 'redistributive function' when economically stronger actors are subject to a heavier financial burden than economically weaker actors.

(ii) Exemption for retail establishments which require large areas

89. As regards the exemption under Article 22 of the TRPATP, it should be borne in mind that those selling vehicles, construction materials, machinery and industrial supplies and gardening retail establishments generally require a larger sales and storage area on account of their product range. In comparison with large retail establishments with a smaller range, the generalised presumption of stronger economic capacity in the case of a larger sales area is not entirely accurate.

90. In addition, such retail establishments are especially reliant on a larger area, with the result that they in particular are affected by the tax. As special regard must be had to the principle of proportionality in tax law, it is perfectly understandable,[64] and not manifestly extraneous in the light of the objective of taxing particular economic capacity, that the national legislature takes this particular burden into consideration.

91. It should also be taken into account, in the light of the objective of environmental protection — and contrary to what ANGED seems to think — that because of their product range the abovementioned taxable persons do not attract as high a volume of customers per m^2 as other retail establishments. As a rule, a construction materials store is visited less often by a customer than a discount supermarket with the same area. These less frequent customer visits probably also contribute to a lower volume of goods traffic. The retail establishments mentioned in Article 22 of the TRPATP generally sell to other undertakings which purchase in larger volumes but visit the sales areas less frequently.

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

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

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

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

92. It is also understandable that this exemption is limited to an area of 10 000 m^2. This avoids an incentive to create particularly large retail establishments selling the goods mentioned. As the national legislature is required to take a decision based on forecasts in this regard, this can be reviewed only with respect to a manifest error (with regard to the test, see point 45 above). No such manifest error is evident in this instance, however.

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

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

94. Furthermore, the referring court also criticises the complete non-taxation of retail establishments with a sales area of less than 4 000 m^2. However, according to case-law, a selective advantage possibly exists only where the measure is a derogation from the ordinary system, in so far as it differentiates between operators who, in the light of the objective pursued by the tax system of that Member State, are in a comparable factual and legal situation. [65]

– *Comparable factual and legal situation?*

95. In *World Duty Free Group* in particular, the Court stressed that the recipient must, in the light of the objective pursued by the regime in question, be in a comparable factual and legal situation and accordingly suffer different treatment that can, in essence, be classified as discriminatory. [66]

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

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

– *In the alternative: justification of differentiation*

98. If, on the other hand, the Court accepts that small and larger retail establishments are factually and legally comparable, it must then be examined whether the envisaged differentiation can be justified.

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

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

99. With regard to the size of the sales area, that is so, in my view. The size of the sales area indicates (without manifest error at least) a certain volume of products and customers, and thus a certain level of customer and goods traffic with the resulting noise and air emissions and other effects which are of particular detriment to the community. In addition, the size of a retail establishment can also be seen as a (rough) indicator of a larger turnover and a larger economic capacity, and thus greater economic strength. The same holds for the link to the size of the car park (where this is more than 50% of the sales area) and the presumption underlying the IGEC that retail establishments with a sales area of less than 4 000 m^2 rarely have a parking area of more than 1 999 m^2.

100. In addition, there can be no objection from the point of view of administrative procedure if the number of retail establishments covered, and thus to be checked, is reduced by means of a threshold. Like the non-aggregation of the areas of different retail establishments, this also contributes to administrative simplification. Even in EU VAT law, small undertakings (undertakings whose turnover does not exceed a certain 'allowance') are not taxed and this is not considered an infringement of the rules on State aid. In view of the legislative objectives pursued, it is also perfectly understandable to have regard to the sales area (or parking area if it exceeds 50% of the sales area), rather than turnover or profit, as the former is easily ascertainable (simple and effective administration) and less prone to circumvention than profit, for example.

(c) Conclusion

101. The non-taxation of smaller retail establishments does not therefore constitute a selective advantage for such undertakings. In this regard there is no advantage or unjustified difference in treatment. Their non-taxation is objectively in keeping with the legislative objectives of Law 15/2002 (or of the TRPATP).

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

VI. Conclusion

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

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

(2) Article 107(1) TFEU may not be interpreted as meaning that the non-taxation of retail establishments with a sales area of less than 4 000 m^2 and the exemption from tax for large individual retail establishments which solely and exclusively pursue the business of a garden centre or of selling vehicles, construction materials, machinery or industrial supplies, provided their public display and sales area does not exceed 10 000 m^2, would constitute aid.