Reports of Cases

OPINION OF ADVOCATE GENERAL
SAUGMANDSGAARD ØE
delivered on 19 September 2018[1]

Case C-374/17

Finanzamt B
v
A-Brauerei,
intervener:
Bundesministerium der Finanzen

(Request for a preliminary ruling from the Bundesfinanzhof (Federal Finance Court, Germany))

(Reference for a preliminary ruling — State aid — Material selectivity — Absence — General availability test — General measure — Reference framework — Comparability — Justification based on the nature or overall structure of the reference framework — Tax advantage — Tax on the acquisition of land — Exemption for transformation procedures within a group of companies — Condition of a stake of at least 95% in the capital of the participating companies — Holding periods of five years prior to and following the transformation procedure)

I. Introduction

1. By decision of 30 May 2017, the Bundesfinanzhof (Federal Finance Court, Germany) made a request to the Court seeking a preliminary ruling on the interpretation of Article 107(1) TFEU.

2. The question referred arises in the context of a dispute between A-Brauerei and Finanzamt B (the tax office, Germany) concerning the latter's decision to exclude the absorption by A-Brauerei of its subsidiary T-GmbH from the benefit of the exemption provided for in Paragraph 6a of the Grunderwerbsteuergesetz (German Law on taxation of the acquisition of land, in the version of 26 February 1997, BGBl. I, p. 418, 1804, as last amended by Paragraph 12(1) of the Law of 22 June 2011, BGBl. I, p. 1126; 'the GrEStG'). In essence, that provision exempts from the GrEStG certain transformation procedures carried out within a group of companies.

3. The referring court takes the view that the merger of T-GmbH with A-Brauerei is covered by Paragraph 6a of the GrEStG and, therefore, must be exempted from the real-property transfer tax. That court does, however, ask whether that exemption must be classified as 'State aid' within the meaning of Article 107(1) TFEU. It notes that classification as State aid in the context of the dispute in the main proceedings will turn primarily on the interpretation of the condition of selectivity. Nevertheless, the referring court is of the opinion that the exemption provided for in Paragraph 6a of the GrEStG is not selective and, therefore, does not constitute State aid.

1 Original language: French.

4. I must observe, as a preliminary point, that the case-law of the Court on the issue of material selectivity is characterised by the co-existence of two methods of analysis, in particular in tax matters, which is confirmed by the European Commission Notice on the notion of State aid. [2]

5. On the one hand, the traditional method of analysis, which may be inferred from the wording of the FEU Treaty, [3] is based on the general availability test. In accordance with that approach, applied inter alia in the judgment in *Commission and Spain* v *Government of Gibraltar and United Kingdom*, [4] any advantage which is not open to all undertakings present on the national territory is selective. The general availability test requires not that all undertakings can actually enjoy the advantage concerned but rather that all *may* benefit from it. [5]

6. On the other, the 'reference framework' method, which dates back to the judgment in *Paint Graphos and Others* [6] given in 2011 and which was confirmed in the judgment in *Commission* v *World Duty Free Group and Others*, [7] is based on the discrimination test. [8] Under that three-stage approach, an advantage is selective where it constitutes a derogation from the relevant reference framework, where it is not open to all undertakings in comparable situations, and where it is not justified by the nature or overall structure of the system at issue. [9]

7. Each of these two methods of analysis seeks to distinguish selective measures, which are covered by Article 107(1) TFEU, from general measures, which are not covered by that provision. In the context of the present case, the application of each of those two methods leads, in my view, to the same outcome, namely that the exemption provided for in Paragraph 6a of the GrEStG is not selective.

8. However, I propose that the Court apply *the traditional method of analysis only* and find, in accordance with that method, that the exemption provided for in Paragraph 6a of the GrEStG constitutes a general measure since it is open to any undertaking present on the national territory, and even to any national or foreign undertaking which holds property on the national territory. [10]

9. I confess to having some concerns as regards the practical consequences of the use of the reference framework method, both in substantive and formal terms. [11] In particular, it appears to me that that method risks extending the rules on State aid to any tax differentiation, by encouraging a review of the tax systems of the Member States in their entirety with a view to finding instances of discrimination.

10. In the alternative, I will set out the reasons why the application of the reference framework method results in the same conclusion, namely that there is no State aid, without concealing the significant difficulties created by the application of that method. [12]

2 See Commission Notice on the notion of State aid as referred to in Article 107(1) TFEU C/2016/2946 (OJ 2016 C 262, p. 1, 'Commission Notice on the notion of State aid'), paragraphs 128 to 131.

3 Under Article 107(1) TFEU, aid 'favouring certain undertakings or the production of certain goods', that is to say aid which is not open to all undertakings and to the production of all goods, is to be prohibited. That provision does not, however, contain any reference to the concept of 'discrimination', unlike other provisions of the FEU Treaty.

4 Judgment of 15 November 2011 (C-106/09 P and C-107/09 P, EU:C:2011:732, paragraphs 73 and 103 to 108).

5 See point 94 of this Opinion.

6 Judgment of 8 September 2011 (C-78/08 to C-80/08, EU:C:2011:550, paragraph 49).

7 Judgment of 21 December 2016 (C-20/15 P and C-21/15 P, EU:C:2016:981).

8 See point 63 of this Opinion and the references cited in the footnote.

9 See point 118 of this Opinion.

10 See points 89 to 116 of this Opinion.

11 See points 61 to 88 of this Opinion.

12 See points 117 to 195 of this Opinion.

II. German legal context

11. Paragraph 1 of the Umwandlungsgesetz (German Law on the transformation of companies, 'the UmwG') reads as follows:

'(1) Legal entities having their registered office in Germany may be transformed

1. by way of merger;

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

3. by transfer of assets;

…'

12. Paragraph 2 of the UmwG states:

'Legal entities may merge by dissolution without going into liquidation:

1. by way of absorption through the transfer of all the assets of one or more legal entities (the absorbed entities) to another existing legal entity (the absorbing entity) …'

13. Paragraph 1 of the GrEStG provides:

'(1) The following legal transactions shall be subject to tax on the acquisition of land in so far as they concern properties located within Germany:

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

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

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

…

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

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

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

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

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

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

14. Paragraph 6a of the GrEStG provides:

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

III. The dispute in the main proceedings

15. A-Brauerei, the applicant in the main proceedings and respondent in the appeal on a point of law, is a public limited company operating a commercial business. It held 100% of the shares in T-GmbH, which owned a number of properties. T-GmbH was in turn the sole shareholder of E-GmbH.

16. By agreement dated 1 August 2012, T-GmbH, as the legal entity being acquired, transferred all its assets (including, therefore, the properties) with all rights and obligations by way of dissolution without going into liquidation, pursuant to Paragraph 1(1)(1) read in conjunction with Paragraph 2(1) of the UmwG, to A-Brauerei, as the acquiring legal entity (merger by absorption). The merger became effective upon registration in the commercial register on 24 September 2012. On that date T-GmbH, in which the applicant had held a stake for more than five years, ceased to exist. A-Brauerei thus became the sole shareholder of E-GmbH.

17. The tax office, the defendant in the main proceedings and appellant on a point of law, took the view that the transfer of the properties to A-Brauerei by way of the merger of T-GmbH with it constituted a taxable transaction pursuant to Paragraph 1(1)(3) of the GrEStG, and found that that procedure was not covered by the exemption provided for in Paragraph 6a of the GrEStG. It rejected the appeal lodged by A-Brauerei, explaining that T-GmbH is not a dependent company within the meaning of Paragraph 6a of the GrEStG on the ground that it ceased to exist following the merger and, consequently, the statutory holding period of five years following the procedure had not been observed.

18. The Finanzgericht (Finance Court, Germany) upheld the action brought by A-Brauerei and granted it the tax advantage provided for in Paragraph 6a of the GrEStG.

19. By its appeal on a point of law before the referring court, the tax office alleges that there has been a breach of Paragraph 6a of the GrEStG. It claims that the judgment of the Finanzgericht (Finance Court) should be set aside and the action dismissed. A-Brauerei contends that the appeal on a point of law should be dismissed.

20. The Bundesministerium der Finanzen (Federal Ministry of Finance, Germany) joined the proceedings as an intervener. It stated that the newly introduced tax advantage in Paragraph 6a of the GrEStG has not been subject to a formal investigation procedure conducted by the Commission.

IV. The question referred for a preliminary ruling

21. The Bundesfinanzhof (Federal Finance Court) has provided the Court with explanations relating to the tax on the acquisition of land laid down in Paragraph 1(1) of the GrEStG, the exemption provided for in Paragraph 6a of the GrEStG, and the relevance of the question referred to the resolution of the dispute in the main proceedings.

22. I consider it useful to reproduce some of those explanations so that the dispute in the main proceedings and the implications of the present case are properly understood.

A. The tax on the acquisition of land laid down in Paragraph 1(1) of the GrEStG

23. The tax on the acquisition of land laid down in Paragraph 1(1) of the GrEStG covers, in principle, all legal procedures giving rise to a change in the holder of the rights to a property located in Germany.

24. The procedures referred to in Paragraph 1(1)(3) of the GrEStG include, inter alia, changes in the holders of rights following transformations provided for in the UmwG, such as a merger, division or transfer of assets. As part of such procedures, the assets of the legal entity absorbed are transferred as a whole (overall legal succession) or in part (separate legal succession) to a new legal entity, without a separate transfer of the assets being required.

25. In addition, Paragraph 1(2a) and (3) of the GrEStG establish a legal fiction pursuant to which certain legal procedures relating to shares in companies are treated in the same way as legal procedures concerning properties held by those companies, and are, therefore, in principle subject to the tax on the acquisition of land. All the situations envisaged by that fiction entail the — overall or successive — transfer of at least 95% of the shares in the company concerned.

B. The exemption provided for in Paragraph 6a of the GrEStG

26. Paragraph 6a of the GrEStG provides for an exemption from the tax on the acquisition of land in cases of transformation within the meaning of Paragraph 1(1)(1) to (3) of the UmwG. That exemption applies to undertakings having their registered office in Germany or abroad. It also covers similar transformations provided for in the law of a Member State or of a State subject to the Agreement on the European Economic Area.

27. However, the third sentence of Paragraph 6a of the GrEStG limits the scope of that exemption to transformations conducted by groups of companies. The transformation must involve a controlling undertaking and one or more companies dependent on that controlling undertaking or several companies dependent on a controlling undertaking. A company is regarded as ‘dependent’ where at least 95% of its capital or business assets is held without interruption by the controlling undertaking, directly or indirectly, during the five years prior to the procedure and the five years following that procedure.

28. The Bundesfinanzhof (Federal Finance Court) states that it interprets Paragraph 6a of the GrEStG broadly, in accordance with the purpose of that advantage, which is to facilitate restructurings within groups of companies.

29. That broad interpretation applies to the term 'controlling undertaking' within the meaning of the third sentence of Paragraph 6a of the GrEStG. A controlling undertaking may be any natural or legal person and any partnership or association of natural or legal persons carrying on any type of economic activity. That last condition is satisfied inter alia where the controlling undertaking is present on the market via its stake in the dependent undertaking.

30. Under that broad interpretation, the holding periods required by the fourth sentence of Paragraph 6a of the GrEStG are the decisive factor only in so far as compliance with those periods is possible following the transformation. Thus, in the case of a merger of a dependent company with the controlling undertaking, it is possible to comply solely with the period prior to the merger since, by definition, the controlling undertaking's stake in the capital of the dependent company ceases to exist following the merger procedure. However, the tax advantage provided for in Paragraph 6a of the GrEStG is to be granted since the reason for the failure to comply with the holding period following the merger is the very merger procedure itself. That interpretation applies to the other transformation procedures referred to in the first sentence of Paragraph 6a of the GrEStG.

C. The relevance of the question referred to the resolution of the dispute in the main proceedings

31. The referring court takes the view that the absorption of T-GmbH by A-Brauerei is covered by Paragraph 6a of the GrEStG and, therefore, must be exempted from the tax on the acquisition of land. The parties to the transformation procedure were A-Brauerei, as the controlling undertaking, and T-GmbH, which was absorbed by A-Brauerei, as the dependent company. A-Brauerei carries on an economic activity and held 100% of the shares in T-GmbH for more than five years prior to the merger by absorption. Furthermore, the failure to comply with the subsequent holding period is attributable to the merger procedure itself.

32. Nevertheless, the referring court asks whether that exemption must be classified as State aid within the meaning of Article 107(1) TFEU.

33. It observes that, in accordance with the settled case-law of the Court, in matters relating to State aid, disputes may be referred to national courts which require them to interpret and apply the concept of aid referred to in Article 107(1) TFEU, in particular with a view to determining whether a State measure has been implemented contrary to the preliminary review procedure provided for in Article 108(3) TFEU.

34. The referring court states that, if that exemption were to be classified as State aid, Paragraph 6a of the GrEStG would cease to be applicable and the proceedings in the appeal on a point of law would be stayed until the Commission has taken a decision on the compatibility of that aid with the internal market. In the opposite scenario, the appeal on a point of law brought by the tax office would be dismissed as unfounded and A-Brauerei could benefit from the exemption.

35. In particular, the referring court asks about the selectivity of the tax advantage provided for in Paragraph 6a of the GrEStG.

36. In those circumstances, the Bundesfinanzhof (Federal Finance Court) decided to stay proceedings and to refer the following question to the Court for a preliminary ruling:

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

V. Procedure before the Court

37. The request for a preliminary ruling was registered at the Court Registry on 21 June 2017.

38. Written observations were submitted by A-Brauerei, the German Government and the Commission.

39. The representatives of A-Brauerei, the German Government and the Commission appeared at the hearing on 11 June 2018 in order to present their oral argument.

VI. Analysis

40. By its question, the referring court seeks to ascertain, in essence, whether Article 107(1) TFEU is to be interpreted as meaning that a tax advantage such as that at issue in the dispute in the main proceedings, which consists in exempting from tax on the acquisition of land a transformation procedure within a group of companies, in the present case a merger, in which a controlling undertaking and a dependent company take part, it being understood that the controlling undertaking must have a stake of at least 95% in the dependent company during the five years prior to that procedure and, in principle, the five years following the procedure, is to be classified as State aid.

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

42. According to settled case-law of the Court, for a measure to be classified as State aid within the meaning of Article 107(1) TFEU, all the conditions set out in that provision must be fulfilled. [13]

43. The difficulties posed by the present case are focused on the condition of selectivity. [14]

44. The referring court, A-Brauerei and the German Government are of the view that the condition is not satisfied by the tax exemption at issue in the dispute in the main proceedings and, therefore, that it cannot be classified as State aid. The Commission takes the opposite view.

45. Mirroring the view taken by the referring court, A-Brauerei and the German Government, I am of the opinion that that tax exemption is not selective. That lack of selectivity must be inferred from the application of the traditional method of analysing selectivity, based on the concept of 'general availability' (Section C) and from the application of the reference framework method, notwithstanding the difficulties in applying the latter method (Section D).

46. First of all, I would, however, like to draw attention to the crucial importance of the interpretation of the condition of selectivity in tax matters (Section A) and the systemic significance of the choice of the method of analysing selectivity (Section B).

13 See, inter alia, judgments of 4 June 2015, *Commission* v *MOL* (C-15/14 P, EU:C:2015:362, paragraphs 46 and 47); of 16 July 2015, *BVVG* (C-39/14, EU:C:2015:470, paragraphs 23 and 24); and of 18 February 2016, *Germany* v *Commission* (C-446/14 P, not published, EU:C:2016:97, paragraphs 21 and 22).

14 For an in-depth analysis of the development of the interpretation of the concept of 'selectivity' in the case-law of the Court, see Piernas López, J.J., *The Concept of State Aid Under EU Law*, Oxford University Press, Oxford, 2015, pp. 103 to 150.

A. The crucial importance of the condition of selectivity in tax matters

47. The condition of selectivity is crucial for the purposes of classification as State aid in matters of taxation, since a tax measure which differentiates between economic operators does, in principle, satisfy the *other* conditions required for such classification.

48. Classification as State aid within the meaning of Article 107(1) TFEU is subject to the fulfilment of six conditions.[15] First, the national measure must confer an advantage on an undertaking. Second, that advantage must be selective. Third, the advantage must be attributable to the State. Fourth, it must be financed through State resources. Fifth, the measure must affect trade between the Member States. Sixth, that measure must distort or threaten to distort competition.

49. Of those six conditions, three are met, almost by definition, by any national measure providing for a tax advantage, as is the case with the exemption at issue in the dispute in the main proceedings.

50. First of all, such an exemption confers an *advantage* on the tax payers falling within its scope by relieving them of a financial burden, namely the tax on the acquisition of land laid down in Paragraph 1 of the GrEStG in the dispute in the main proceedings.

51. Next, a tax advantage is generally provided for in a legislative or regulatory provision, such as Paragraph 6a of the GrEStG in the dispute in the main proceedings. The requirement of *attributability to the State* must therefore be deemed to be satisfied.[16]

52. Finally, the Court has long held that the introduction of a tax advantage entails the use of *State resources*, notwithstanding the absence of a direct transfer of such resources, since the origin of such an advantage is the renunciation by the Member State of tax revenue which it would normally have received.[17]

53. Of the remaining three conditions, those relating to the effect on *trade* between the Member States and the risk of distortion of *competition* will, in practice, very often be satisfied where the measure at issue does not fall within the scope of a *de minimis* regulation[18] or the Commission's decision-making practice regarding measures which have a purely local impact.[19]

54. In accordance with settled case-law, it is necessary not to establish that the aid in question has a real effect on trade between Member States and that competition is actually being distorted, but merely to examine whether that aid is liable to affect such trade and distort competition.[20]

15 The traditional case-law of the Court groups some of these conditions together and identifies four constituent parts of the concept of 'aid'. First, there must be intervention by the State or through State resources. Second, that 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. See, inter alia, judgments of 18 May 2017, *Fondul Proprietatea* (C-150/16, EU:C:2017:388, paragraph 13) and of 26 April 2018, *ANGED* (C-233/16, EU:C:2018:280, paragraph 37).

16 See, in this regard, judgments of 19 December 2013, *Association Vent De Colère! and Others* (C-262/12, EU:C:2013:851, paragraphs 17 and 18), and of 13 September 2017, *ENEA* (C-329/15, EU:C:2017:671, paragraphs 21 and 22).

17 See, inter alia, judgments of 15 March 1994, *Banco Exterior de España* (C-387/92, EU:C:1994:100, paragraph 14); of 19 September 2000, *Germany* v *Commission* (C-156/98, EU:C:2000:467, paragraphs 26 to 28); and of 15 December 2005, *Italy* v *Commission* (C-66/02, EU:C:2005:768, paragraphs 76 to 81).

18 See, inter alia, Commission Regulation (EU) No 1407/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid (OJ 2013 L 352, p. 1). I would point out that the applicability of such a regulation has not been raised in the file submitted to the Court.

19 See Commission Notice on the notion of State aid, paragraphs 196 and 197.

20 See, inter alia, judgments of 8 September 2011, *Paint Graphos and Others* (C-78/08 to C-80/08, EU:C:2011:550, paragraph 78); of 9 October 2014, *Ministerio de Defensa and Navantia* (C-522/13, EU:C:2014:2262, paragraph 51); and of 27 June 2017, *Congregación de Escuelas Pías Provincia Betania* (C-74/16, EU:C:2017:496, paragraph 78).

55. In particular, when aid granted by a Member State strengthens the position of an undertaking compared with other undertakings competing in intra-Community trade, the latter must be regarded as affected by that aid, there being no need for the beneficiary undertaking itself to be involved in intra-Community trade.[21]

56. In addition, there is no threshold or percentage below which it may be considered that trade between Member States is not affected. The relatively small amount of aid or the relatively small size of the undertaking which receives it does not as such exclude the possibility that trade between Member States might be affected.[22]

57. With regard to the condition of distortion of competition, it has been made clear that, in principle, aid intended to release an undertaking from costs which it would normally have to bear in its day-to-day management or normal activities distorts the conditions of competition.[23] In that connection, the Court has already held that a tax advantage can distort competition where it gives an economic advantage to the economic operators concerned.[24]

58. It is for the referring court to assess whether those two conditions are met in the specific context of the dispute in the main proceedings. In any event, there appears to me to be little doubt that, that dispute notwithstanding, the exemption at issue is intended to apply in factual circumstances in which those two conditions will indeed be met.

59. It follows from the foregoing that the first five conditions required for classification as State aid will, in principle, be satisfied by the exemption provided for in Paragraph 6a of the GrEStG. The classification of that exemption as State aid will therefore turn, primarily, on its potential selectivity. More generally, it is for this reason that selectivity is of crucial importance for the purposes of classification as State aid in tax matters.

60. Having regard to that crucial importance of the condition of selectivity in tax matters, it is necessary to draw attention to the systemic significance of the choice of the method of analysing selectivity.

B. The systemic significance of the choice of the method of analysing selectivity and the distinction between the general availability test and the discrimination test

61. As I have set out in the introduction to this Opinion, the case-law of the Court is characterised by the co-existence of two methods of analysing material selectivity: the first is based on the general availability test (traditional method of analysis), the second on the discrimination test (reference framework method).

62. Those two methods have, in practice, different implications both in *substantive* terms, namely on the scope of the rules on State aid, and in *formal* terms, namely on the quality of the analysis required in order to determine the existence of aid.

21 See, inter alia, judgments of 15 December 2005, *Italy* v *Commission* (C-66/02, EU:C:2005:768, paragraph 117); of 8 September 2011, *Paint Graphos and Others* (C-78/08 to C-80/08, EU:C:2011:550, paragraphs 79 and 80); and of 19 March 2015, *OTP Bank* (C-672/13, EU:C:2015:185, paragraphs 55 and 56).

22 See, inter alia, judgments of 21 March 1990, *Belgium* v *Commission* (C-142/87, EU:C:1990:125, paragraph 43); of 21 July 2005, *Xunta de Galicia* (C-71/04, EU:C:2005:493, paragraph 41); and of 17 July 2008, *Essent Netwerk Noord and Others* (C-206/06, EU:C:2008:413, paragraph 76).

23 See judgments of 30 April 2009, *Commission* v *Italy and Wam* (C-494/06 P, EU:C:2009:272, paragraph 54); of 27 June 2017, *Congregación de Escuelas Pías Provincia Betania* (C-74/16, EU:C:2017:496, paragraph 80); and of 26 April 2018, *ANGED* (C-233/16, EU:C:2018:280, paragraph 66).

24 See, to that effect, judgments of 3 March 2005, *Heiser* (C-172/03, EU:C:2005:130, paragraph 55), and of 17 November 2009, *Presidente del Consiglio dei Ministri* (C-169/08, EU:C:2009:709, paragraph 53).

63. First, with regard to the implications in substantive terms, the reference framework method, which is based on the concept of 'discrimination',[25] prompts consideration of the legitimacy of *any differentiation* made by the Member States in tax matters.

64. In comparison, the traditional method of analysis restricts the scope of the examination conducted in relation to State aid *solely to differentiations which are not generally available*, that is to say differentiations from which not all undertakings present on the national territory can benefit.

65. Although those two concepts may appear similar in theory, they do however have significantly different scopes in practice.

66. To take an extreme example, a measure providing for progressive rates of taxation, defined according to the level of income, is indisputably a general measure under the traditional method of analysis, since any undertaking may benefit from the more favourable rates. By contrast, under the reference framework method, the more favourable rates constitute a differentiation which must be validated either by the lack of comparability (second stage) or by the existence of a justification based on the nature or overall structure of the system at issue (third stage).

67. To be completely clear, I am clearly not claiming that the reference framework method would automatically result in the classification of progressive rates of taxation as 'selective',[26] but rather that it does carry with it that possibility since it prompts consideration of the legitimacy of measures previously excluded by the traditional method of analysis. This risk of extending the rules on State aid could concern, inter alia, measures similar to those which the Court has classified as 'general' in the past.[27]

68. In other words, the investigative scope of the discrimination test is significantly broader than that of the general availability test. After all, the discrimination test applies, in principle, to *any* criterion of differentiation, in particular in matters of taxation.[28]

69. In comparison, the general availability test is concerned solely with those criteria of differentiation which irrevocably exclude certain undertakings or the production of certain goods from the benefit of the advantage concerned. That is not the case, inter alia, as regards differentiations based on the use of legal instruments, such as the exemption laid down in Paragraph 6a of the GrEStG at issue in the dispute in the main proceedings. Thus, under the traditional method of analysis, that exemption is a general measure since any undertaking may structure its activities within a group of companies and, depending on the circumstances, carry out one of the transformation procedures referred to in Paragraph 6a of the GrEStG.[29]

25 See judgments of 21 December 2016, *Commission* v *Hansestadt Lübeck* (C-524/14 P, EU:C:2016:971, paragraph 53), and *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 28 June 2018, *Andres* v *Commission* (C-203/16 P, EU:C:2018:505, paragraph 83). See generally, in this regard, Thomas, S., 'Sélectivité et discrimination: quelques réflexions autour des arrêts de la Cour du 21 décembre 2016 dans les affaires World Duty Free Group et Hansestadt Lübeck', *Revue Lamy de la Concurrence*, No 58, 1 February 2017.

26 I observe, in this regard, that the Commission Notice on the notion of State aid states, in paragraph 139, that the progressive nature of income tax and its redistributive purpose may constitute justifications based on the nature or general scheme of the system in question. See also point 187 of this Opinion.

27 See points 95 to 97 of this Opinion.

28 As I have stated in points 47 to 60 of this Opinion, the other conditions laid down in Article 107(1) TFEU are satisfied as a general rule in matters of taxation.

29 See points 89 to 116 of this Opinion.

70. However, that exemption could be classified as 'selective' under the reference framework method if the body called upon to rule on it (the Commission, the General Court, the Court of Justice or a national court) takes the view that the difference in treatment resulting from it cannot be validated by the lack of comparability [30] or the existence of a justification. [31]

71. Another way of explaining the difference in scope between these two approaches consists in considering at which point the assessment of the selectivity of an advantage must be made. Under the traditional method of analysis based on the idea of availability, selectivity is assessed *before* an undertaking takes a decision which allows it to benefit from an advantage, such as making an investment, the hiring of a worker or a transformation procedure within a group of companies. Applying this first approach, an advantage is not selective if the conduct targeted by that advantage may be adopted by any undertaking. [32]

72. Conversely, the reference framework method entails an assessment of selectivity *after* such a decision is taken, by comparing the situation of undertakings which actually benefit from the advantage — because they adopted the conduct targeted — with the situation of undertakings which do not benefit from it — because they have not adopted that conduct. This second approach clearly brings back within the scope of the rules on State aid a significant number of tax differentiations which are previously excluded by the first approach. [33]

73. In summary, the reference framework method tends to turn the rules on State aid into a *general discrimination test*, covering any criterion of differentiation, and encourages a review of the Member States' tax systems in their entirety, since those systems are structured around differentiations. [34] In addition, the stringency of that test is exacerbated by the restrictions regarding the objectives which may be relied on both at the comparability stage [35] and at the justification stage. [36]

74. Moreover, in an area such as taxation, which is closely linked to the sovereignty of the Member States, which is not or scarcely harmonised at EU level and which raises delicate political issues such as equal treatment for tax purposes and progressivity in taxation, the question arises whether the use of a less intrusive method of analysis based on the concept of 'general availability' is not more appropriate.

30 See points 141 to 179 of this Opinion.

31 See points 180 to 195 of this Opinion.

32 See, in this regard, Nicolaides, P., 'Excessive Widening of the Concept of Selectivity', *European State Aid Law Quarterly*, 2017, Vol. 1, pp. 62 to 72, p. 70: 'The moment a company decides to hire an additional employee or increase its investment in research it enjoys tax benefits which are not available to similar companies which do not make the same choices. This is the unavoidable outcome of the natural functioning of tax systems. However, it does not matter that some companies do not enjoy those benefits because they choose not to enjoy them. The relevant issue is that they are not precluded by law from enjoying them. … It follows that the question as to whether companies are subject to different treatment must be asked *before* companies make their investment, hiring or research decisions, etc., *not after*. The issue of discrimination between companies arises at the point where they make their choices. If some companies are not allowed to benefit from a certain tax rule while others are allowed, then the former face adverse discrimination and are subject to different treatment' (emphasis added). In the same vein, see Derenne, J., 'Commission v World Duty Free Group a.o.: Selectivity in (Fiscal) State Aid, quo vadis Curia?', *Journal of European Competition Law & Practice*, 2017, Vol. 8, No 5, pp. 311 to 313, p. 313: 'However, one could argue that this is not the effect of the measure itself but rather the effect of the choice of the undertakings selecting or not to invest in foreign companies. … An unconditional tax advantage linked to an activity accessible to any undertaking does not appear to be selective.'

33 See, inter alia, Nicolaides, P., op. cit., p. 72, and Derenne, J., op. cit., p. 313.

34 Any tax policy is based on differentiations established according to social, economic, environmental or other objectives pursued by the State concerned. Those tax differentiations may, inter alia, take the form of exemptions, deductions, tax credits or even different rates of taxation (in particular progressive rates).

35 See points 149 to 159 of this Opinion.

36 See points 180 to 186 of this Opinion.

75. I observe, in this regard, that the assessment of the compatibility of aid measures with the internal market, pursuant to Article 107(2) and (3) TFEU, falls within the exclusive competence of the Commission. [37]

76. Apart from in the situations referred to in Article 107(2) TFEU, the practical importance of which is reduced given their specificity, in this regard the Commission enjoys wide discretion, the exercise of which involves economic and social assessments. [38] Thus, although the Commission always has to rule on the compatibility with the common market of State aid subject to review by it, even if that aid has not been notified to it, the Commission is not bound to declare such aid compatible with common market. [39] In addition, with regard to derogations from the general principle of the incompatibility of State aid with the common market, Article 107(2) and (3) TFEU must be interpreted strictly. [40]

77. In the light of the exclusive competence and wide discretion enjoyed by the Commission as regards the compatibility of aid with the internal market, an extension of the scope of the rules on State aid by means of the reference framework method would afford the Commission the power to 'smooth out' the national tax systems by requiring the removal of those differentiations legitimately established for social, economic, environmental or other reasons. [41]

78. Granting such a power to the Commission would, in my view, be difficult to reconcile with the principle of the fiscal autonomy of the Member States. According to the case-law of the Court, in the absence of EU rules governing the matter, it falls within the tax competence of the Member States to designate bases of assessment and to spread the tax burden across the different factors of production and economic sectors. [42]

79. In other words, it is not for the Commission to rule, in the context of the prohibition on State aid, on each difference in treatment stemming from the distribution of the tax burden as defined by each Member State.

80. The question also arises whether use of the reference framework method would de facto require the Member States to notify to the Commission, pursuant to Article 108(3) TFEU, the vast majority of their national measures in the field of tax policy, in particular those implementing their annual budget or those open to any undertaking such as the exemption at issue in the dispute in the main proceedings.

37 See, inter alia, judgments of 21 November 2013, *Deutsche Lufthansa* (C-284/12, EU:C:2013:755, paragraph 28); of 19 July 2016, *Kotnik and Others* (C-526/14, EU:C:2016:570, paragraph 37); of 26 October 2016, *DEI and Commission* v *Alouminion tis Ellados* (C-590/14 P, EU:C:2016:797, paragraph 96); and of 18 May 2017, *Fondul Proprietatea* (C-150/16, EU:C:2017:388, paragraph 42).

38 See, inter alia, judgments of 23 February 2006, *Atzeni and Others* (C-346/03 and C-529/03, EU:C:2006:130, paragraph 84); of 8 March 2016, *Greece* v *Commission* (C-431/14 P, EU:C:2016:145, paragraph 68); and of 19 July 2016, *Kotnik and Others* (C-526/14, EU:C:2016:570, paragraph 38). See also Bacon, K., *European Union Law of State Aid*, Oxford University Press, Oxford, 2013, 2nd edition, point 3.26: 'Article 107(3) gives the Commission a power to exempt particular types of aid from the general prohibition contained in Article 107(1). But it is under no obligation to do so. In consequence, the Commission enjoys a wide discretion in its application of Article 107(3).'

39 See, inter alia, judgments of 26 September 2002, *Spain* v *Commission* (C-351/98, EU:C:2002:530, paragraph 75); of 13 February 2003, *Spain* v *Commission* (C-409/00, EU:C:2003:92, paragraph 94); and of 29 April 2004, *Italy* v *Commission* (C-91/01, EU:C:2004:244, paragraph 44).

40 See, inter alia, judgments of 30 September 2003, *Germany* v *Commission* (C-301/96, EU:C:2003:509, paragraphs 66, 71, 106 and 131); of 23 February 2006, *Atzeni and Others* (C-346/03 and C-529/03, EU:C:2006:130, paragraph 79); and of 14 October 2010, *Nuova Agricast and Cofra* v *Commission* (C-67/09 P, EU:C:2010:607, paragraph 74).

41 As I have stated in points 47 to 60 of this Opinion, the other conditions laid down in Article 107(1) TFEU are, in principle, satisfied in matters of taxation, such that the classification of a tax differentiation as State aid turns, primarily, on its selective nature. Accordingly, the interpretation of the condition of selectivity will determine to a great extent the scope of the power afforded to the Commission to 'smooth out' aspects of the national tax systems.

42 See, inter alia, judgments 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) and of 26 April 2018, *ANGED* (C-236/16 and C-237/16, EU:C:2018:291, paragraph 38).

81. In comparison, use of the traditional method of analysis, based on the general availability test, allows the rules on State aid, and primarily the action taken by the Commission, to be refocused on the measures which are the most damaging to competition within the internal market, namely individual aid and sectoral aid.[43] However, cross-sectoral measures would be subject to those rules only if it is established that they are indirectly selective and, therefore, damaging to competition within the internal market ('Gibraltar' exception).[44]

82. Secondly, I also wonder about the implications of the reference framework method *in formal terms*, namely on the quality of the analysis required to determine the existence of aid, for the following four reasons. I note that these formal difficulties have also been identified in legal literature.[45]

83. First, unlike the traditional method of analysis, the reference framework method is formally structured around three consecutive stages, the exact content of which is uncertain.[46]

84. Second, in the specific context of the present case, the application of that method gives rise, in my view, to a number of difficulties, which explain to a large extent the unusual length of this Opinion. Those difficulties are all the more remarkable because the tax arrangements at issue in the present case are relatively common.

85. Third, that methodology tends to shift the debate on selectivity towards formal matters, such as the identification of the relevant reference framework. Thus, in the recent judgment in *Andres* v *Commission*,[47] the Court of Justice was right, in my view, to find that the General Court had erred in law when identifying the relevant reference framework. However, faced with this formal error committed in the first stage of the reference framework method, the Court had no opportunity to rule on the substantive issue, namely whether or not a tax advantage indirectly benefiting undertakings in difficulty is selective.

86. Fourth, the question arises whether it is appropriate to require the persons called upon to examine the existence of aid nationally to undertake an analysis of such complexity. I am thinking first and foremost of the national officials tasked with notifying aid measures to the Commission, then the undertakings which might be asked to pay back aid unlawfully granted, and, finally, the national courts responsible for rectifying the unlawful grant of aid.[48] I observe that it is specifically in performance of that duty that the referring court has made the present reference to the Court for a preliminary ruling.[49]

43 I am thinking, inter alia, of the problem of administrative tax rulings, thanks to which some undertakings could have benefited from 'tailor-made' tax advantages. See Commission Notice on the notion of State aid, paragraphs 169 to 174.

44 See points 98 to 101 of this Opinion.

45 See, inter alia, Peiffert, O., 'Comparaison n'est pas raison: Pour une clarification du critère de sélectivité d'une aide d'État', *Revue Concurrences*, 2017, No 3, pp. 52 to 63, pp. 53 and 54: 'Nonobstant l'accroissement du contentieux en la matière, les arrêts de la [Cour] et du [Tribunal] paraissent parfois soulever plus de questions qu'ils n'en résolvent. Du point de vue de la sécurité juridique, une clarification jurisprudentielle de [la condition de sélectivité] paraît toujours nécessaire. Les éléments permettant d'identifier avec certitude la mesure non sélective sont rares. La discussion semble se déplacer sur le terrain du "cadre de référence" à partir duquel il s'agirait de comparer les traitements réservés aux entreprises … Plus généralement, la jurisprudence témoigne de ce que des renvois préjudiciels sont formulés par des juges nationaux confrontés à d'importantes difficultés dans l'interprétation de la condition de sélectivité, nécessaire à l'application de l'obligation de standstill qui relève de leur office.'

46 See points 121 to 140 (first stage), 141 to 179 (second stage) and 180 to 195 (third stage) of this Opinion.

47 Judgment of 28 June 2018 (C-203/16 P, EU:C:2018:505). This case concerned a tax scheme including a general rule (the loss carry-forward rule), a derogation (refusal, in full or in part, to allow losses to be carried forward where there has been a significant change in ownership) and a derogation from the derogation (losses may be carried forward once more where the purpose of the significant change in ownership is to restructure the company). The Court of Justice held that the General Court had erred in law by confirming the Commission's analysis that the reference framework was comprised of the derogation alone, to the exclusion of the general rule.

48 See, inter alia, judgments of 21 November 2013, *Deutsche Lufthansa* (C-284/12, EU:C:2013:755, paragraph 28); of 15 September 2016, *PGE* (C-574/14, EU:C:2016:686, paragraph 31); and of 18 May 2017, *Fondul Proprietatea* (C-150/16, EU:C:2017:388, paragraph 42).

49 See points 33 and 34 of this Opinion.

87. For all those reasons, both substantive and formal, I propose that the Court apply the traditional method of analysis based on the general availability test, not only in the present case but more generally in matters of taxation.

88. As will be clear from the following section, the application of that traditional method of analysis means that it may be concluded, without any difficulty, that the exemption laid down in Paragraph 6a of the GrEStG is not selective.

C. The application of the traditional method of analysing selectivity and the classification of the exemption laid down in Paragraph 6a of the GrEStG as a general measure

89. Article 107 TFEU prohibits aid 'favouring certain undertakings or the production of certain goods', that is to say selective aid. [50]

90. In accordance with settled case-law, advantages resulting from a general measure applicable without distinction to all economic operators do not constitute State aid within the meaning of Article 107(1) TFEU. [51]

91. Unlike the reference framework method, which I will examine in the following section, the traditional method of analysis is based not on the notion of discrimination [52] but on that of *general availability*. Under the latter approach, any measure which confers an advantage that is available only to 'certain undertakings or the production of certain goods' — to use the wording of Article 107(1) TFEU, which does not refer to the concept of 'discrimination' — is selective.

92. Applying that approach, advantages which are for the exclusive benefit either of one or more undertakings or categories of undertakings or one of more sectors of activity must be classified as 'selective'. [53]

93. Thus, the concept of a 'general measure' is intended to apply only to those advantages offered to all undertakings regardless of their sector of activity, that is to say to cross-sectoral advantages. Such advantages must, in principle, be regarded as general measures, it being understood that, to that end, they must be open to all undertakings located in the national territory. [54]

50 See, inter alia, judgments of 9 October 2014, *Ministerio de Defensa and Navantia* (C-522/13, EU:C:2014:2262, paragraph 32), and of 21 December 2016, *Commission* v *Hansestadt Lübeck* (C-524/14 P, EU:C:2016:971, paragraph 41).

51 See, inter alia, judgments of 29 March 2012, *3M Italia* (C-417/10, EU:C:2012:184, paragraph 39); of 26 April 2018, *ANGED* (C-236/16 and C-237/16, EU:C:2018:291, paragraph 27); and of 28 June 2018, *Lowell Financial Services* v *Commission* (C-219/16 P, not published, EU:C:2018:508, paragraph 87).

52 See point 63 of this Opinion and the references cited in the footnote.

53 See, for examples of sectoral aid, judgments of 19 May 1999, *Italy* v *Commission* (C-6/97, EU:C:1999:251, paragraph 17); of 15 December 2005, *Italy* v *Commission* (C-66/02, EU:C:2005:768, paragraphs 96 to 98), and *Unicredito Italiano* (C-148/04, EU:C:2005:774, paragraphs 45 to 49); and of 30 June 2016, *Belgium* v *Commission* (C-270/15 P, EU:C:2016:489, paragraphs 50 to 53).

54 See judgment of 8 November 2001, *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke* (C-143/99, EU:C:2001:598, paragraphs 35 and 36).

94. That being said, the concept of a 'general measure' does not require that all undertakings *actually benefit* from the cross-sectoral advantage in question (actual enjoyment test) but merely that all undertakings *may benefit from it* (availability test).[55] This is the meaning of the settled case-law pursuant to which the fact that only taxpayers satisfying the conditions for the application of a measure may benefit from that measure cannot, in itself, render that measure selective.[56] Advantages from which certain undertakings or certain economic sectors are irrevocably excluded may, however, be classified as 'selective'.

95. The case-law of the Court contains several examples of general or potentially general measures. For example, a tax measure allowing taxpayers to deduct the profit arising from the sale of financial assets, provided that they acquire other financial assets, must be classified as 'general'.[57] Similarly, the fact that an increased reduction in social security contributions is reserved solely for undertakings employing manual workers or workers whose working time exceeds a certain number of hours is not sufficient to support the conclusion that aid exists.[58]

96. The Court has also held that a national rule providing — subject to certain conditions — for the conclusion of judicial proceedings in tax matters in return for payment of a sum equivalent to 5% of the value of the claim,[59] or even national legislation providing that the interruption of criminal proceedings concerning serious value added tax (VAT) fraud has the effect of extending the limitation period by only a quarter of its initial duration,[60] must be classified as a 'general measure'.

97. Furthermore, in the judgment in *Netherlands Maritime Technology Association* v *Commission*,[61] the Court confirmed the validity of a Commission decision[62] classifying as a 'general measure' the grant of a tax advantage applicable solely to assets acquired through a leasing contract.

98. Having said that, a cross-sectoral advantage cannot be classified as a 'general measure' if it is established that it is *indirectly selective*, that is to say where, notwithstanding its general appearance, certain undertakings or certain economic sectors are, in reality, irrevocably excluded from benefiting from it.

55 An interpretation based on the actual enjoyment test would result in any tax incentive measure being classified as' selective', since — by definition — such a measure does not actually benefit all undertakings but rather seeks to influence their conduct by offering a tax advantage to those adopting the desired conduct. It would be difficult to reconcile such an interpretation with the principle of the fiscal autonomy of the Member States (see point 78 of this Opinion).

56 See, inter alia, judgments of 29 March 2012, *3M Italia* (C-417/10, EU:C:2012:184, paragraph 42); 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); and of 28 June 2018, *Andres* v *Commission* (C-203/16 P, EU:C:2018:505, paragraph 94).

57 See judgment of 19 September 2000, *Germany* v *Commission* (C-156/98, EU:C:2000:467, paragraph 22). The measure at issue in that case was, however, selective in so far as it provided for a greater deduction for acquisitions of new shares in capital companies which have their registered office and central administration in one of the new *Länder* or in Berlin and which have no more than 250 employees (see paragraph 23 of the same judgment).

58 See judgment of 17 June 1999, *Belgium* v *Commission* (C-75/97, EU:C:1999:311, paragraph 28). The measure at issue in that case was, however, selective since the benefit of that measure was expressly restricted to certain sectors of activity (see paragraphs 29 to 31 of the same judgment).

59 See judgment of 29 March 2012, *3M Italia* (C-417/10, EU:C:2012:184, paragraphs 39 to 44).

60 See judgment of 8 September 2015, *Taricco and Others* (C-105/14, EU:C:2015:555, paragraph 62).

61 Judgment of 14 April 2016 (C-100/15 P, not published, EU:C:2016:254).

62 Commission Decision C(2012) 8252 final of 20 November 2012 relating to State aid SA.34736 (2012/N) — Spain — Early depreciation of certain assets acquired through a financial leasing.

99. Thus, in the judgment in *Commission and Spain* v *Government of Gibraltar and United Kingdom*,[63] the Court held that tax advantages which appear general but which in reality benefit offshore companies only were indirectly selective. Similarly, in the judgment in *GEMO*, the Court found that a measure providing for the free collection and disposal of animal carcasses and slaughterhouse waste is indirectly selective, since such a measure essentially benefits farmers and slaughterhouses, notwithstanding the fact that it may occasionally benefit other persons.[64]

100. The reason why such advantages, whether directly or indirectly selective, must be subject to the rules on State aid is their damaging effects on competition within the internal market. Conversely, advantages open to all undertakings do not produce such anticompetitive effects and, therefore, cannot be subject to the rules on State aid.

101. In accordance with such settled case-law, it is therefore necessary to examine whether the exemption provided for in Paragraph 6a of the GrEStG grants, *directly or indirectly*, an advantage from which certain undertakings or certain economic sectors are irrevocably excluded.

102. There is no doubt, in my view, that that exemption constitutes a general measure within the meaning stated above, that is to say a measure from which all undertakings may benefit, regardless of their sector of activity.

103. As the German Government has explained, the scope of that tax advantage is not reserved, first, for undertakings carrying on their activity in a particular field or for the production of certain types of goods, but rather applies to all undertakings irrespective of the object of their activity. Secondly, Paragraph 6a of the GrEStG does not lay down any condition relating to legal form, the size of the undertaking or the location of the undertaking's registered office. Thirdly, the transformation procedures referred to in that provision take place in all branches of activity.

104. That argument is borne out by the intention of the German legislature in adopting Paragraph 6a of the GrEStG, as identified by A-Brauerei, namely that of facilitating restructuring of undertakings with a view to eliminating certain barriers to economic growth.[65] Thus, the German legislature intended to promote the growth of the German economy *generally*, and not that of one sector in particular. In my view, the rules on State aid cannot apply to such measures.

105. I would add that any undertaking, as part of its economic strategy, may structure its activities within a group of companies and, depending on the circumstances, carry out one of the transformation procedures referred to in Paragraph 6a of the GrEStG.

106. I see no reason for treating that situation differently from that of the abovementioned tax advantage granted solely to assets acquired through a leasing contract. In the same way, any undertaking could structure the acquisition of assets by concluding a leasing contract. In this regard, the reasons which prompted the Commission to rule out the selectivity of that advantage appear to me to be entirely transposable to the exemption at issue in the present case.[66]

63 Judgment of 15 November 2011 (C-106/09 P and C-107/09 P, EU:C:2011:732, paragraphs 103 to 108).

64 Judgment of 20 November 2003 (C-126/01, EU:C:2003:622, paragraphs 35 to 39).

65 Draft Law on the acceleration of economic growth ('Entwurf eines Gesetzes zur Beschleunigung des Wirtschaftswachstums'), Deutscher Bundestag (German Federal Parliament), Document 17/15, p. 21. Annex 10 to A-Brauerei's written observations.

66 See judgment of 14 April 2016, *Netherlands Maritime Technology Association* v *Commission* (C-100/15 P, not published, EU:C:2016:254, paragraph 23): 'The Commission noted, first, that that measure was applicable to all the companies which are subject to income tax in Spain without distinction according to sectors of activity, places of establishment, size or legal status. The fact that the measure applied only to assets acquired through a leasing contract did not give rise to a selective advantage, as all kinds of assets can be financed through leasing contracts, which can be used by companies of all sizes operating in all sectors of activity. The Commission also noted that, according to the Spanish authorities, the notified measure applied both to assets built in Spain and those built in other Member States.' See also Commission Decision C(2012) 8252 final, paragraphs 26 to 36.

107. In other words, both leasing contracts and groups of companies are legal instruments open to any undertaking and to any economic activity, such that a tax advantage linked to their use constitutes a general measure.

108. I also note, as the German Government has rightly submitted, that Paragraph 6a of the GrEStG does not distinguish between national undertakings and undertakings established in other Member States. Moreover, under that provision, the exemption likewise applies to 'similar transformations' provided for in the law of a Member State.

109. Accordingly, since it is open to any undertaking present on the national territory, and even to any national or foreign undertaking which holds property on the national territory, the exemption provided for in Paragraph 6a of the GrEStG is a general measure falling outside the scope of Article 107(1) TFEU.

110. In accordance with the case-law recalled in point 94 of this Opinion, classification as a 'general measure' cannot be ruled out on the ground that not all undertakings *actually* enjoy the exemption provided for in Paragraph 6a of the GrEStG, either because they have not structured their activity within a group of companies or because they have not carried out one of the transformation procedures covered by that provision.

111. As the referring court has made clear, any tax advantage is subject to compliance with certain conditions, which necessarily exclude certain taxpayers from benefiting from that advantage. The mere existence of one or more conditions of eligibility cannot be enough to classify a tax advantage as 'selective', since otherwise all tax arrangements of the Member States would be subject to the rules on State aid.

112. In other words, a tax advantage linked to conduct which may be adopted by any undertaking constitutes a general measure.[67]

113. Finally, I would point out, to remove any ambiguity, that the traditional method of analysis applied in this section, which I endorse, must be distinguished from that adopted by the General Court and invalidated by the Court of Justice in the judgment in *Commission* v *World Duty Free Group and Others*.[68] The General Court had interpreted the condition of selectivity as requiring, from the Commission, the identification of a particular category of undertakings favoured by the tax measure at issue. As the Court of Justice rightly held, such a formalistic interpretation of the concept of 'selectivity' must be rejected.[69] In addition, as Advocate General Wathelet correctly observed in his Opinion in the latter case, the measure at issue benefited undertakings carrying out cross-border transactions.[70] That is not, however, the case vis-à-vis the measure at issue in the present case.[71]

114. In the light of the foregoing, I propose that the Court answer the question referred to the effect that the exemption provided for in Paragraph 6a of the GrEStG constitutes a general measure and, therefore, cannot be classified as 'State aid' within the meaning of Article 107(1) TFEU.

67 See point 71 of this Opinion and the references cited in the footnote.

68 Judgment of 21 December 2016 (C-20/15 P and C-21/15 P, EU:C:2016:981).

69 See judgment of 21 December 2016, *Commission* v *World Duty Free Group and Others* (C-20/15 P and C-21/15 P, EU:C:2016:981, paragraphs 71 and 94).

70 Opinion of Advocate General Wathelet in Joined Cases *Commission* v *World Duty Free Group and Others* (C-20/15 P and C-21/15 P, EU:C:2016:624, points 135 to 139).

71 See point 108 of this Opinion.

115. Use of this approach is all the more appropriate since a strict reading of the judgment in *Commission* v *World Duty Free Group and Others*[72] could suggest that the concept of a 'general measure' has, de facto, been rendered wholly meaningless, as the German Government argued at the hearing. I would, however, point out that the scope of that judgment appears to me to be limited, in this regard, to the finding of the error in law identified above.

116. In the alternative, in the following section I will apply the reference framework method.

D. Application of the reference framework method to the exemption laid down in Paragraph 6a of the GrEStG

117. For the purposes of assessing selectivity, in particular in matters of taxation, the Court has, in certain cases, used a three-stage method based on the identification of a 'reference framework'.

118. Under that method, it is necessary first of all to identify the reference framework, that is to say the common or normal tax system applicable in the Member State concerned. As part of a second stage, it is necessary to assess if the tax measure at issue derogates from that system in that it introduces a distinction between operators who, in the light of the objective pursued by that system, are in a comparable factual and legal situation. Thirdly, it is further necessary to ascertain whether the distinction at issue is justified by the nature and the overall structure of the tax system previously identified.[73]

119. As I will make clear in my account below, each of the stages of that method of analysis creates difficulties in its application in the present case. In this regard, I question whether it is appropriate to require such a complex analysis in relation to every tax differentiation established by the Member States.

120. That being said, notwithstanding those difficulties of application, I take the view that it may be inferred from each of those three stages of the reference framework method that the exemption at issue in the dispute in the main proceedings is not selective.

1. Identification of the relevant reference framework

121. The first formal mention, in the case-law of the Court, of the need to identify a reference framework dates back to the judgment in *Portugal* v *Commission*,[74] in a passage in which the Court examined the *geographical* selectivity of the advantage in question. In my view, that approach must be approved unreservedly in that context. The examination of geographical selectivity requires a prior determination whether the relevant reference framework exists at State level or at the level of the infra-State body concerned.[75]

72 Judgment of 21 December 2016 (C-20/15 P and C-21/15 P, EU:C:2016:981).

73 See, to that effect, judgments of 8 September 2011, *Paint Graphos and Others* (C-78/08 to C-80/08, EU:C:2011:550, paragraphs 49 and 64); of 21 December 2016, *Commission* v *Hansestadt Lübeck* (C-524/14 P, EU:C:2016:971, paragraph 41), and *Commission* v *World Duty Free Group and Others* (C-20/15 P and C-21/15 P, EU:C:2016:981, paragraphs 57 to 60); and of 28 June 2018, *Andres* v *Commission* (C-203/16 P, EU:C:2018:505, paragraphs 86 and 87). See also the Opinion of Advocate General Wahl in *Andres* v *Commission* (C-203/16 P, EU:C:2017:1017, point 96).

74 Judgment of 6 September 2006 (C-88/03, EU:C:2006:511, paragraphs 56 and 57).

75 See also judgment of 11 September 2008, *UGT-Rioja and Others* (C-428/06 to C-434/06, EU:C:2008:488, paragraphs 47, 75 and 143).

122. It was only later, with effect from the judgment in *Paint Graphos and Others*,[76] given in 2011, that the Court 'imported' this stage into the assessment of *material* selectivity.

123. However, the identification of the relevant framework, in the context of the assessment of material selectivity, creates difficulties which, inter alia, have been brought to light by several advocates general. In *Andres* v *Commission*,[77] Advocate General Wahl pointed out that the identification of the reference framework is a major source of legal uncertainty, in particular in matters of taxation. In *ANGED*,[78] Advocate General Kokott observed, first, that the examination of selectivity in the tax systems of the Member States presents considerable difficulties and, second, that the determination of a reference framework cannot be decisive.

124. Legal literature has also echoed these difficulties.[79]

125. The difficulties involved in identifying the reference framework are also reflected in the case-law of the Court. They have led, inter alia, to judgments of the General Court being set aside in *Commission* v *World Duty Free Group and Others* and *Andres* v *Commission*.[80]

126. In the context of the dispute in the main proceedings, those difficulties are illustrated by the variety of approaches proposed to the Court with a view to identifying the relevant reference framework.

127. Before examining those approaches, I must point out that the fact that Paragraph 6a of the GrEStG constitutes a derogation from Paragraph 1 of the GrEStG is not sufficient to exclude Paragraph 6a of the GrEStG from the reference framework. In other words, it cannot be enough to find that Paragraph 6a of the GrEStG *formally* constitutes a derogation from Paragraph 1 of the GrEStG to conclude that Paragraph 1 of the GrEStG represents the reference framework and Paragraph 6a of the GrEStG a derogation from that framework.

128. In this regard, the Court has clarified, in the recent judgment in *Andres* v *Commission*,[81] that the use of a particular regulatory technique is not sufficient to define the relevant reference framework for the purposes of assessing the condition relating to selectivity, except in order to ensure that the form of State intervention prevails decisively over its effects, and, therefore, that the regulatory technique used cannot be decisive for the purposes of the determination of the reference framework. I note that that intention to reject a formalistic approach when examining State aid is consistent with the actual wording of Article 107(1) TFEU, which prohibits aid granted 'in any form whatsoever'.

76 See, in particular, paragraph 49 of the judgment of 8 September 2011, *Paint Graphos and Others* (C-78/08 to C-80/08, EU:C:2011:550), in which the Court cites, 'to that effect', paragraph 56 of the judgment of 6 September 2006, *Portugal* v *Commission* (C-88/03, EU:C:2006:511). See also judgments 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, paragraphs 35 to 45); of 21 December 2016, *Commission* v *Hansestadt Lübeck* (C-524/14 P, EU:C:2016:971, paragraph 55); and the judgments cited in footnote 80.

77 Opinion of Advocate General Wahl in *Andres* v *Commission* (C-203/16 P, EU:C:2017:1017). First of all, in point 98 of this Opinion, Advocate General Wahl states that that case highlights the difficulties involved in determining the reference framework. Next, in point 101 of the same Opinion, Advocate General Wahl observes that, 'in contrast to other types of aid scheme, determining with precision such a common, generally applicable system is replete with uncertainty in the context of taxation. Keeping in mind the consequences of any tax system and the variables involved in determining the tax burden of undertakings, it seems impossible to know with certainty what the "normal situation" is'. Finally, point 105 of the Opinion reads as follows: '… Questioned on the criteria to be employed in determining the reference system, *the Commission was unable to explain on what basis it determines the reference system*. It described that process as a search for logic in the system. If anything, the Commission's response seems to confirm that the determination of the reference system in a particular case *is not, in reality, based on an objective set of criteria*' (emphasis added).

78 Opinion of Advocate General Kokott in Joined Cases *ANGED* (C-236/16 and C-237/16, EU:C:2017:854, points 76 and 88).

79 See, inter alia, Peiffert, O., op.cit., p. 60: 'Si l'on comprend que les juridictions de l'Union ne s'estiment … pas liées par les éléments avancés par les États membres, l'identification de ce cadre de référence soulève néanmoins des difficultés importantes. Il n'existe d'ailleurs pas de méthode claire à cet égard.'

80 See judgments of 21 December 2016, *Commission* v *World Duty Free Group and Others* (C-20/15 P and C-21/15 P, EU:C:2016:981) and of 28 June 2018, *Andres* v *Commission* (C-203/16 P, EU:C:2018:505). With regard to the latter case, see also the judgments of the same day in *Germany* v *Commission* (C-208/16 P, not published, EU:C:2018:506); *Germany* v *Commission* (C-209/16 P, not published, EU:C:2018:507); and *Lowell Financial Services* v *Commission* (C-219/16 P, not published, EU:C:2018:508).

81 Judgment of 28 June 2018 (C-203/16 P, EU:C:2018:505, paragraphs 92 and 104).

129. In the same vein, I observe that, in accordance with settled case-law, Article 107(1) TFEU does not distinguish between measures of State intervention by reference to their causes or their aims but defines them in relation to their effects. [82]

130. In other words, the reference framework must be identified exclusively on the basis of the effects of the measures at issue. However, in the context of the dispute in the main proceedings, it must be observed that the effects of Paragraphs 1 and 6a of the GrEStG have been interpreted differently by the parties which submitted observations to the Court.

131. According to A-Brauerei, the purpose of the tax on the acquisition of land is to tax the acquisition of control over a property located in Germany. Under that approach, which I would classify as 'economical', the reference framework is formed jointly of Paragraphs 1 and 6a of the GrEStG. Paragraph 6a of the GrEStG is directly part of the reference framework by exempting transformation procedures which do not trigger a change in the control of the property, which continues to be held by the same controlling undertaking. Accordingly, Paragraph 6a of the GrEStG does not constitute a derogation from the reference framework and, therefore, is not selective for the purposes of Article 107(1) TFEU.

132. The German Government likewise takes the view that the reference framework is formed jointly of Paragraphs 1 and 6a of the GrEStG. However, unlike A-Brauerei, that government proposed an approach based on the notion of 'the ability to pay'. Under that approach, the purpose of the tax on the acquisition of land is to tax the objective financial capacity of the purchaser or the vendor of property which becomes apparent where assets are transferred.

133. However, in the Commission's view, the reference framework is based on Paragraph 1 of the GrEStG alone, which defines the transfer transactions which give rise to the tax obligation for all natural and legal persons who acquire, legally or economically, real estate in Germany. In that connection, it clarified that the reference framework in question is of a purely fiscal nature and is intended to tax all transfer transactions which result — legally or economically — in a transfer of ownership.

134. I confess to having the greatest difficulty in calling into question the relevance of each of those three objectives. Like most tax provisions, it seems to me that the tax on the acquisition of land at issue in the dispute in the main proceedings pursues concurrently several objectives which may be identified on the basis of its effects, and in particular those mentioned by A-Brauerei, the German Government and the Commission. In my view, giving preference to one of those objectives to the detriment of the others — with a view to identifying 'the' relevant reference framework for the purposes of examining the condition of selectivity — would give rise to a not insignificant risk of an arbitrary choice being made.

135. In particular, the Commission's approach, under which account should be taken solely of the tax objective of that system, that is to say the collection of tax revenue, must necessarily be rejected, since it would deprive the first two stages of the reference framework method of any practical effect. [83]

136. That risk of an arbitrary choice in connection with identifying the relevant reference framework is a major source of legal uncertainty, in particular for the national officials, undertakings and national courts called upon to assess whether aid exists at the national level. [84] I observe that that legal uncertainty seems to me to be part and parcel of the need to identify a reference framework on the basis of the objectives pursued by the tax at issue.

82 See, inter alia, judgments of 29 March 2012, *3M Italia* (C-417/10, EU:C:2012:184, paragraph 36); of 30 June 2016, *Belgium* v *Commission* (C-270/15 P, EU:C:2016:489, paragraph 40); and of 26 October 2016, *Orange* v *Commission* (C-211/15 P, EU:C:2016:798, paragraph 38).

83 See points 145 and 146 of this Opinion.

84 See point 86 of this Opinion.

137. In my opinion, such legal uncertainty is difficult to reconcile with the settled case-law that State aid is a legal concept which must be interpreted on the basis of objective factors.[85] Furthermore, I would observe that nothing justifies the Commission having wide discretion as regards the classification of a measure as State aid within the meaning of Article 107(1) TFEU.[86] In addition, legal uncertainty affecting the identification of the relevant reference framework would risk affording, de facto, such discretion to the Commission.

138. That legal uncertainty is all the more open to criticism since the choice of the reference framework may be of crucial importance as regards the examination of selectivity and, therefore, the classification as State aid.[87] Thus, in the present case, the reference frameworks suggested by A-Brauerei and the German Government would rule out the selectivity of the exemption provided for in Paragraph 6a of the GrEStG, unlike that proposed by the Commission.

139. That being said, I do, however, have a preference for the approach proposed by A-Brauerei, which appears to me to be supported by the explanations provided by the referring court. According to that court, the exemption established in Paragraph 6a of the GrEStG corrects the scope of Paragraph 1 of the GrEStG, which was defined too broadly, by excluding transformations within groups of companies on account of their lack of impact on the economic ownership of the property concerned.[88] Accordingly, Paragraph 6a of the GrEStG forms part of the reference framework and cannot be regarded as selective for the purposes of Article 107(1) TFEU.

140. In the alternative, if the Court were to identify the relevant reference framework as comprised of Paragraph 1 of the GrEStG alone, in accordance with the approach proposed by the Commission, in the next section I will examine whether the situations covered by Paragraph 6a of the GrEStG are comparable with those which are not.

2. The lack of comparability between the situations covered by the exemption provided for in Paragraph 6a of the GrEStG and those which are not

141. In accordance with the case-law of the Court, the second stage of the reference framework method consists in examining whether the tax measure at issue differentiates between operators who, *in the light of the objective pursued by the reference framework*, are in a comparable factual and legal situation.[89]

142. I observe that this point was not brought before the Court of Justice in the judgment in *Commission* v *World Duty Free Group and Others*,[90] since the General Court had annulled the Commission's decision without examining the arguments relating to the lack of comparability between taxpayers covered by the exemption at issue and those not so covered.

85 See, inter alia, judgments of 16 May 2000, *France* v *Ladbroke Racing and Commission* (C-83/98 P, EU:C:2000:248, paragraph 25); of 9 June 2011, *Comitato 'Venezia vuole vivere' and Others* v *Commission* (C-71/09 P, C-73/09 P and C-76/09 P, EU:C:2011:368, paragraph 132); of 21 June 2012, *BNP Paribas and BNL* v *Commission* (C-452/10 P, EU:C:2012:366, paragraph 100); and of 30 November 2016, *Commission* v *France and Orange* (C-486/15 P, EU:C:2016:912, paragraph 87).

86 See judgments of 22 December 2008, *British Aggregates* v *Commission* (C-487/06 P, EU:C:2008:757, paragraph 112), and of 9 June 2011, *Comitato 'Venezia vuole vivere' and Others* v *Commission* (C-71/09 P, C-73/09 P and C-76/09 P, EU:C:2011:368, paragraph 132).

87 In points 47 to 60 of this Opinion, I set out the reasons why differentiations in matters of taxation do, in principle, satisfy the other conditions laid down in Article 107(1) TFEU.

88 Thus, in the context of the dispute in the main proceedings, which concerns the absorption of a subsidiary (T-GmbH) by the parent company (A-Brauerei), economic ownership of the property assets of T-GmbH could already be assigned to A-Brauerei before the merger by absorption procedure since A-Brauerei held 100% of the share capital of T-GmbH.

89 See, inter alia, judgments of 21 December 2016, *Commission* v *World Duty Free Group and Others* (C-20/15 P and C-21/15 P, EU:C:2016:981, paragraph 57); of 20 December 2017, *Comunidad Autónoma de Galicia and Retegal* v *Commission* (C-70/16 P, EU:C:2017:1002, paragraphs 58 and 61); and of 26 April 2018, *ANGED* (C-233/16, EU:C:2018:280, paragraphs 38 and 40).

90 See judgment of 21 December 2016, *Commission* v *World Duty Free Group and Others* (C-20/15 P and C-21/15 P, EU:C:2016:981, paragraphs 92 to 94 and 123).

143. The assessment of comparability, as part of the second stage of the reference framework method, raises several delicate questions.

144. First, since it requires the identification of 'the objective' pursued by the reference framework, that second stage risks being tainted by legal uncertainty. As I have stated in point 134 of this Opinion, the tax on the acquisition of land at issue in the dispute in the main proceedings pursues several objectives concurrently, as is the case with most tax provisions. Once again, giving preference to one of those objectives to the detriment of the others — with a view to conducting the examination of comparability — would entail, in my view, a risk of an arbitrary choice being made.

145. By way of illustration, the approach suggested by the Commission amounts to giving preference to the tax objective of that system, namely the collection of tax revenue, in the light of which all taxpayers subject to that tax would be in a comparable situation. In my opinion, such an approach must necessarily be ruled out since it would deprive the first two stages of the reference framework method of any practical effect, it being understood that the third stage is limited in scope.

146. First of all, if the reference framework is defined as being the tax, any tax advantage granted to certain taxpayers necessarily represents a derogation from that framework (first stage). Next, all taxpayers may, as persons subject to that tax, be regarded as being in a comparable situation in the light of the objective of collecting tax revenue (second stage). Finally, only the mechanisms inherent in the reference framework are allowed as a justification based on the nature or overall structure of the system at issue (third stage). [91]

147. In any event, assigning one or more objectives to a particular tax system is a necessarily uncertain exercise. In that connection, I observe that, in the recent case of *Belgium* v *Commission*, [92] Advocate General Bobek identified no less than three factors which may be taken into account for the purposes of assessing comparability within the context of selectivity, whilst making the point that that assessment '*will always entail some elements of subjective value choice* as to what undertakings are comparable and why, putting more stress on one factor instead of another'.

148. The subjectivity of that assessment seems to me to be at odds with the settled case-law, reproduced in point 137 of this Opinion, pursuant to which, first, State aid is a concept which must be interpreted on the basis of objective factors and, second, nothing justifies the Commission having wide discretion as regards the classification of a measure as State aid.

149. Secondly, there is also uncertainty as to the type of objectives which may be relied on with a view to conducting the assessment of comparability. According to the Commission Notice on the notion of State aid, that assessment must be made in the light of 'the *intrinsic objective* of the system of reference', since '*external policy objectives* — such as regional, environmental or industrial policy objectives — cannot be relied upon by the Member States to justify the differentiated treatment of undertakings'. [93]

91 See points 180 to 186 of this Opinion.

92 Opinion of Advocate General Bobek in *Belgium* v *Commission* (C-270/15 P, EU:C:2016:289, paragraphs 31 to 37), emphasis added. According to the Advocate General, the three relevant factors are the scope of the measure, the aim of the measure and the sustainability of the products involved.

93 Commission Notice on the notion of State aid, paragraph 135, emphasis added.

150. That distinction between the 'intrinsic objective' and 'objectives external' to the reference framework raises the question, in practice, of the conditions required for a legitimate objective to become 'intrinsic' to the reference framework. It would appear, according to the reading of the relevant case-law [94] proposed in the Notice on the notion of State aid, [95] that the tax scheme at issue must be closely structured around the legitimate objective relied on, as in the case of an environmental levy based on the objective of protection of the environment.

151. However, that interpretation by the Commission would preclude the ability to rely on a legitimate objective, such as the protection of the environment, in the context of a general tax such as income tax, since a general tax is not closely structured around such an objective. In addition, in this regard, I question the appropriateness of regarding a legitimate objective, such as the protection of the environment, as 'intrinsic' to a *special tax* based on that objective, even though that objective should be regarded as being 'extrinsic' to a *general tax*.

152. Such an interpretation would result in the asymmetrical treatment of the advantages provided for in the context of special taxes, on the one hand, and of those laid down in the context of general taxes, on the other. A tax advantage offered in the context of a special tax could be classified as 'non-selective' on the basis of the legitimate objective (deemed to be 'intrinsic'), unlike a tax advantage based on the same objective (deemed to be 'extrinsic') in the context of a general tax on income. [96]

153. Such asymmetrical treatment would create a bias in favour of special taxes and to the detriment of general taxes — such as income tax — at the very heart of the rules on State aid, in possible contradiction with the principle of the fiscal autonomy of the Member States. [97]

154. More fundamentally, I confess to having some misgivings as regards the practical implications of an interpretation which excludes the ability to rely on certain legitimate objectives pursued by the tax system in question.

155. I have already pointed out that the reference framework method tended to turn the prohibition on State aid into a *general* test of non-discrimination, prohibiting in principle any tax differentiation. [98] In addition, the interpretation set out above would further exacerbate the stringency of that prohibition by accepting — for the purposes of the assessment of comparability — only those *objectives intrinsic* to the tax system at issue.

94 See, inter alia, judgments of 22 December 2008, *British Aggregates* v *Commission* (C-487/06 P, EU:C:2008:757, paragraphs 86 to 93), in which the Court recalls the obligation to verify comparability in the light of the environmental objective pursued by an environmental levy; of 8 September 2011, *Commission* v *Netherlands* (C-279/08 P, EU:C:2011:551, paragraphs 63 to 68), in which the Court finds comparability to exist in the light of the environmental objective pursued by a scheme seeking to limit NO_x emissions (protection of the environment); of 18 July 2013, *P* (C-6/12, EU:C:2013:525, paragraphs 29 and 30), in which the Court rejects objectives unrelated to the tax system at issue, such as maintaining employment (paragraph 30), but this passage seems rather to refer to the third stage of the reference framework method (see paragraph 29); of 4 June 2015, *Kernkraftwerke Lippe-Ems* (C-5/14, EU:C:2015:354, paragraphs 78 and 79), in which the Court finds there to be no comparability in the light of the environmental objective pursued by a special duty on the use of nuclear fuel for the production of electricity; and of 26 April 2018, *ANGED* (C-233/16, EU:C:2018:280, paragraphs 49 to 56), *ANGED* (C-234/16 and C-235/16, EU:C:2018:281, paragraphs 42 to 50) and *ANGED* (C-236/16 and C-237/16, EU:C:2018:291, paragraphs 37 to 46), in which the Court finds there to be no comparability in the light of the objectives of protection of the environment and town and country planning pursued by a special tax.

95 Commission Notice on the notion of State aid, paragraph 136: 'The structure of *certain special-purpose levies* (and in particular their tax bases), such as environmental and health taxes imposed to discourage certain activities or products that have an adverse effect on the environment or human health, will normally integrate the policy objectives pursued. In such cases, a differentiated treatment for activities or products whose situation is different from the situation of those activities or products which are subject to the tax as regards the intrinsic objective pursued, does not constitute a derogation' (emphasis added).

96 See, in this regard, Piernas López, J.J., 'Revisiting Some Fundamentals of Fiscal Selectivity: The ANGED Case', *European State Aid Law Quarterly*, 2018, Vol. 2, pp. 274 to 281, p. 279: 'It could be argued that Member States may be tempted to pursue national policy objectives through special regimes, as they will be able to defend the general character of those regimes on the basis of the objectives pursued, rather than through derogations from general tax schemes, such as from the corporate income tax, where the extrinsic (e.g. environmental) objectives will not be taken into account, and therefore the measure will probably be considered as selective aid.'

97 See points 74 and 78 of this Opinion.

98 See points 61 to 73 of this Opinion.

156. By way of comparison, the provisions of the FEU Treaty establishing the freedoms of movement provide for a prohibition on discrimination based simply on *origin*, whilst accepting the ability to rely on *any legitimate objective* when assessing comparability and examining any justifications.

157. In this regard, I am unconvinced by the argument that any legitimate objective pursued by the tax system at issue, relating inter alia to social or environmental protection, *may*, in any event, be taken into account by the Commission in the examination of the compatibility of aid with the internal market. Such a *possibility* cannot be regarded as sufficient, having regard to the obligation to interpret Article 107(2) and (3) TFEU strictly and to the wide discretion enjoyed by the Commission when conducting that examination, [99] in particular in a non-harmonised area such as taxation.

158. Consequently, although mere reliance by a Member State on a legitimate objective cannot, in itself, result in the exclusion of a State measure from the scope of Article 107(1) TFEU, in accordance with the findings of the Court inter alia in the judgment in *Italy* v *Commission* [100] and in the judgment in *British Aggregates* v *Commission*, [101] it must be possible to rely on any legitimate objective *in the specific context of the second stage of the reference framework method*, namely the examination of comparability.

159. I find confirmation of that approach in the recent judgments in *ANGED*, in which the Court assessed comparability in the light of the protection of the environment and town and country planning, without classifying those objectives as 'intrinsic' to the tax system at issue. [102]

160. That being said, it is necessary to examine, in the context of the present case, whether the taxpayers who fall within the scope of the exemption provided for in Paragraph 6a of the GrEStG, on the one hand, and those who do not, on the other, are in a comparable factual and legal situation in the light of *all the objectives* pursued by the tax on the acquisition of land.

161. Like the approaches advocated by the referring court, A-Brauerei and the German Government, it is my view that this is not the case and, therefore, that the exemption is not selective.

(a) The lack of comparability between the transformation procedures conducted within a group and the procedures conducted outside a group

162. First, the exemption provided for in Paragraph 6a of the GrEStG covers mergers, divisions or transfers of assets [103] within a group of companies in which one controlling undertaking and one or more companies dependent on that controlling undertaking or several companies dependent on a controlling undertaking are involved.

163. According to the Commission, the objective pursued by Paragraph 1 of the GrEStG is of a purely fiscal nature, namely it is intended to tax all transfer transactions which result — legally or economically — in a transfer of ownership. In addition, in the light of that objective, those undertakings carrying out real-property transfers outside a group are in a factual and legal situation comparable to the undertakings benefiting from the exemption at issue.

164. I disagree with the Commission's view in this regard. In my view, the transformation procedures conducted *within* a group are not comparable to the procedures conducted *outside* a group.

99 See point 76 of this Opinion.

100 Judgment of 2 July 1974 (173/73, EU:C:1974:71, paragraphs 21, 22, 27 and 28).

101 Judgment of 22 December 2008 (C-487/06 P, EU:C:2008:757, paragraphs 86 to 93).

102 Judgments of 26 April 2018, *ANGED* (C-233/16, EU:C:2018:280, paragraphs 49 to 56); *ANGED* (C-234/16 and C-235/16, EU:C:2018:281, paragraphs 42 to 50); and *ANGED* (C-236/16 and C-237/16, EU:C:2018:291, paragraphs 37 to 46).

103 Paragraph 6a of the GrEStG refers to transformation procedures within the meaning of Paragraph 1(1)(1) to (3) of the UmwG, which covers mergers, divisions and transfers of assets.

165. In economic terms, any property belonging to a group of companies is indirectly held by the parent company, up to the value of its stake in the company which is the legal owner of that property. I observe, in this connection, that the exemption provided for in Paragraph 6a of the GrEStG is subject to the requirement that the controlling undertaking holds at least 95% of the capital of the companies involved in the transformation. In such a situation, the impact of a transformation procedure is neutral or marginal in economic terms, with the controlling undertaking remaining the indirect holder of the property before and after that procedure, as the referring court has in essence observed. [104] In the same vein, A-Brauerei has pointed out that that provision sought to exempt procedures which do not entail any change in the control of the properties concerned.

166. In other words, and as the German Government confirmed at the hearing, Paragraph 6a of the GrEStG has the effect, inter alia, of avoiding economic double taxation for groups of companies. Since the tax has to be paid when a property becomes part of the assets of a group company, it would be unfair to levy that tax again on the occasion of every transformation within a group of companies.

167. In my opinion, this specific feature of transformation procedures conducted *within a group*, between companies related by a stake of at least 95%, prevents such procedures from being comparable to real-property transfers *outside a group*, such as a mere sale between independent persons.

(b) The lack of comparability between transformation procedures conducted within a group and other restructuring measures adopted within a group

168. Secondly, the Commission has argued that transformation procedures conducted within a group are comparable, in the light of the tax objective pursued by the tax on the acquisition of land, to other restructuring measures adopted within a group. For example, it made the point that the sale of a property between companies belonging to the same group does not benefit from the exemption laid down in that provision.

169. That position taken by the Commission is surprising. EU law, and more specifically Directive 2009/133/EC, [105] appears to me to have acknowledged the specific nature of transformation procedures within a group, in particular that of merger procedures such as that at issue in the main proceedings. Thus, Article 4(1) of that directive provides for the non-taxation of capital gains — in particular those on immoveable property — in the case of mergers, divisions or partial divisions. [106]

170. However, that advantage has not been extended by the EU legislature to other procedures between companies of the same group, in particular to mere sales of assets between such companies. This difference in treatment is explained, in my view, by the specific nature of restructuring procedures, a point also raised by A-Brauerei. Restructuring procedures have specific legal effects, on account — inter alia — of their scale, legal personality and/or the assets of the companies concerned. By way of illustration, merger procedures result, in principle, in the disappearance of a legal person and the transfer of its assets to the absorbing company. By comparison, a mere sale has the sole effect of entailing the transfer of a specific asset to the pool of assets held by another person.

104 See point 139 of this Opinion.

105 Council Directive of 19 October 2009 on the common system of taxation applicable to mergers, divisions, partial divisions, transfers of assets and exchanges of shares concerning companies of different Member States and to the transfer of the registered office of an SE or SCE between Member States (OJ 2009 L 310, p. 34).

106 See Article 4(1) of Directive 2009/133: ‘A merger, division or partial division shall not give rise to any taxation of capital gains calculated by reference to the difference between the real values of the assets and liabilities transferred and their values for tax purposes.’

171. That objective difference in nature precludes, in my view, the view being taken that transformation procedures and other procedures between companies of the same group, in particular sales, may be regarded as comparable in the light of a tax applicable to real estate transactions, whether that tax is a direct tax on capital gains or an indirect tax on real-property transfers, such as that at issue in the dispute in the main proceedings.

(c) The lack of comparability between transformation procedures reaching the 95% participation threshold and those which do not

172. Thirdly, I note that Paragraph 6a of the GrEStG provides for a 95% participation threshold in the dependent company (or companies) participating in the transformation procedure. As the German Government has stated, to be eligible to benefit from the exemption at issue in the dispute in the main proceedings, the transformation must involve:

– a controlling undertaking and a dependent company;

– a controlling undertaking and several dependent companies; or

– several companies dependent on a controlling undertaking.

173. Under the provision cited above, a company is 'dependent' where at least 95% of its capital or business assets is held by the controlling undertaking, either directly or indirectly. A difference in treatment therefore exists between participations below the 95% threshold, on the one hand, and those equal to or greater than that threshold, on the other, with only the second category eligible to benefit from the exemption.

174. However, those participations are not in a comparable situation since that 95% participation threshold likewise constitutes a condition for taxation under Paragraph 1(2a) and (3) of the GrEStG, as A-Brauerei and the German Government have rightly explained.

175. To use the arithmetical example provided by A-Brauerei, the acquisition of a 94% stake in a company which is the owner of property located in Germany is not taxable under Paragraph 1(2a) and (3) of the GrEStG. However, the subsequent merger between the subsidiary and the parent company would not benefit from the exemption provided for in Paragraph 6a of the GrEStG and would therefore be taxable. Accordingly, in this situation, the tax would be levied just once on the occasion of those two procedures.

176. Conversely, the acquisition of a stake of 95% or more in the same company is taxable under Paragraph 1 of the GrEStG, whereas the subsequent merger would benefit from the exemption provided for in Paragraph 6a of the GrEStG. Once again, the tax would be levied just once on the occasion of those two procedures.

177. Accordingly, the 95% participation threshold required in order to benefit from the exemption (Paragraph 6a of the GrEStG), examined jointly at the 95% participation threshold provided for as a condition for taxation (Paragraph 1(2a) and (3) of the GrEStG), does not establish a distinction between comparable situations but, on the contrary, makes it possible to guarantee the non-discriminatory treatment of the various procedures covered by the system at issue in the main proceedings.

178. In the light of the foregoing, I take the view that taxpayers who fall within the scope of the exemption provided for in Paragraph 6a of the GrEStG, on the one hand, and those who do not, on the other, are not in a comparable factual and legal situation in the light of the objectives pursued by the tax at issue in the dispute in the main proceedings. That exemption is therefore not selective for the purposes of Article 107(1) TFEU.

179. In the alternative, in the event that the Court were to find that those two categories of taxpayers are in a comparable situation, I will examine in the following section the existence of a justification based on the nature or overall structure of the system at issue.

3. The existence of a justification based on the nature or overall structure of the system at issue

180. It is clear from case-law that the concept of State aid does not refer to State measures which differentiate between undertakings and which are, therefore, prima facie selective where that differentiation arises from the nature or the overall structure of the system of which they form part. [107]

181. In matters of taxation, the scope of that justification has been clarified as follows. A measure may be justified by the nature and overall structure of the tax system if the Member State concerned can show that that measure results directly from the basic or guiding principles of its tax system. In that connection, a distinction must be made between, on the one hand, the objectives attributed to a particular tax regime, which are extrinsic to it, and, on the other hand, the mechanisms inherent in the tax system itself, which are necessary for the achievement of such objectives. [108]

182. Like the distinction between the 'intrinsic objective' and 'external objectives', examined in the context of the second stage, [109] the distinction between 'mechanisms inherent in the tax system itself' and 'extrinsic objectives' appears to me to be difficult to implement.

183. First, it is questionable whether the expression 'the tax system itself' refers to the reference framework — which concerns the tax on the acquisition of land in the main proceedings — or the entire system of taxation of a Member State.

184. In my view, restricting that concept to the mechanisms inherent in the entire system of taxation of a Member State would risk depriving the third stage of the reference framework method of all practical effect. Indeed, in those circumstances, a justification based on combating abusive practices or the intention of avoiding double taxation would be permissible, in the context of the dispute in the main proceedings, only if *the entire system of taxation* of the Federal Republic of Germany were structured around those objectives.

185. Accordingly, I take the view that the concept of 'mechanisms inherent in the tax system itself' refers to the mechanisms inherent *in the reference framework alone*, which concerns the tax on the acquisition of land in the dispute in the main proceedings. I find confirmation for that interpretation in the Commission Notice on the notion of aid, which refers unequivocally to the intrinsic basic or guiding principles of the 'reference system'. [110]

107 See, inter alia, judgments of 22 December 2008, *British Aggregates* v *Commission* (C-487/06 P, EU:C:2008:757, paragraph 83); of 21 June 2012, *BNP Paribas and BNL* v *Commission* (C-452/10 P, EU:C:2012:366, paragraph 101); of 9 October 2014, *Ministerio de Defensa and Navantia* (C-522/13, EU:C:2014:2262, 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 58).

108 See, inter alia, judgments of 6 September 2006, *Portugal* v *Commission* (C-88/03, EU:C:2006:511, paragraph 81); of 8 September 2011, *Paint Graphos and Others* (C-78/08 to C-80/08, EU:C:2011:550, paragraph 65); of 18 July 2013, *P* (C-6/12, EU:C:2013:525, paragraph 22); and of 9 October 2014, *Ministerio de Defensa and Navantia* (C-522/13, EU:C:2014:2262, paragraph 43).

109 See points 149 to 159 of this Opinion.

110 Commission Notice on the notion of State aid, paragraph 138.

186. On the other hand, the preceding comment notwithstanding, the dividing line between 'objectives extrinsic' to and 'mechanisms inherent' in the tax system under consideration also gives rise to difficulties. In this regard, I refer the reader to my observations on the distinction between the 'intrinsic objective' and 'external objectives' in the context of the assessment of comparability. [111]

187. That being said, in its notice on the notion of aid, the Commission identified several objectives which, in its view, can be relied on in the context of this third stage, such as the need to fight fraud or tax evasion, the need to take into account specific accounting requirements, administrative manageability, the principle of tax neutrality, the progressive nature of income tax and its redistributive purpose, the need to avoid double taxation, or the objective of optimising the recovery of fiscal debts. [112]

188. In the context of the present case, the justifications relied on by A-Brauerei and the German Government appear to me to correspond to several objectives identified by the Commission.

189. First of all, A-Brauerei has submitted that the exemption provided for in Paragraph 6a of the GrEStG is based directly on the basic or guiding principles of the system of the tax on the acquisition of land, given that that tax concerns legal procedures which culminate in a change in the control over properties located in Germany.

190. In my view, that justification, which may be linked to the objective, pursued by the regime at issue in the main proceedings, of preventing double taxation, must be endorsed for the reasons set out in points 162 to 167 of this Opinion.

191. Next, the German Government has asserted that the exemption provided for in Paragraph 6a of the GrEStG is consistent with the objective attributed to the tax on the acquisition of land of taxing the objective financial capacity of the purchaser or of the vendor which becomes apparent where a property is transferred. In its view, the procedures referred to in Paragraph 6a of the GrEStG have no impact on the financial capacity of the participants, since those participants are not independent but rather linked to one another by a stake of at least 95% held by the controlling undertaking in the capital of one or more participant companies.

192. Once again, I see no reason to call into question the validity of that explanation.

193. Finally, A-Brauerei and the German Government have likewise justified the requirement relating to the five-year holding periods before and after the transformation procedure, with regard to the 95% stake in the capital of the dependent company. [113] According to their explanations, those periods prevent the exemption provided for in Paragraph 6a of the GrEStG from applying to certain abusive practices consisting inter alia in the short-term acquisition of shares in order to carry out transformations not subject to the tax on the acquisition of land.

194. In this regard, I observe that the referring court has confirmed the validity of that explanation. In addition, Article 3(2)(b) of Directive 2011/96/EU similarly allows Member States to make the benefit of a tax advantage subject to the duration of the stake in the capital of a subsidiary. [114]

111 See points 149 to 159 of this Opinion.

112 Commission Notice on the notion of State aid, paragraph 139.

113 According to the explanations provided by the referring court, the second five-year period does not apply in the case of a merger in accordance with the broad interpretation adopted by it. See point 30 of this Opinion.

114 Council Directive of 30 November 2011 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States (OJ 2011 L 345, p. 8). According to recital 3 thereof, the objective of that directive is to exempt dividends and other profit distributions paid by subsidiary companies to their parent companies from withholding taxes and to eliminate double taxation of such income at the level of the parent company. Under Article 3(2)(b) of the directive, Member States are to have the option of not applying the directive to companies of that Member State which do not maintain for an uninterrupted period of at least two years holdings qualifying them as parent companies, or to those of their companies in which a company of another Member State does not maintain such a holding for an uninterrupted period of at least two years.

195. It follows from the foregoing that the conditions for the grant of the exemption laid down in Paragraph 6a of the GrEStG are justified by the nature and overall structure of the tax system at issue in the dispute in the main proceedings and, therefore, that that exemption does not constitute State aid within the meaning of Article 107(1) TFEU.

VII. Conclusion

196. In the light of the foregoing, I propose that the Court answer the question referred for a preliminary ruling by the Bundesfinanzhof (Federal Finance Court, Germany) as follows:

Article 107(1) TFEU is to be interpreted as meaning that a tax advantage such as that at issue in the dispute in the main proceedings, which consists in exempting from tax a transformation procedure within a group of companies, in the present case a merger, in which a controlling undertaking and a dependent company are involved, it being understood that the controlling undertaking must hold a stake of at least 95% in the dependent company in the five years preceding the procedure and, in principle, in the five years following that procedure, constitutes a general measure and, therefore, cannot be classified as 'State aid'.