Reports of Cases

JUDGMENT OF THE COURT (First Chamber)

26 April 2018*

(Reference for a preliminary ruling — Regional tax on large retail establishments — Freedom of establishment — Protection of the environment and town and country planning — State aid — Selective measure — Letter from the Commission stating that no further action will be taken on a complaint — Existing aid)

In Case C-233/16,

REQUEST for a preliminary ruling under Article 267 TFEU from the Tribunal Supremo (Supreme Court, Spain), made by decision of 10 March 2016, received at the Court on 25 April 2016, in the proceedings

Asociación Nacional de Grandes Empresas de Distribución (ANGED)

v

Generalitat de Catalunya,

THE COURT (First Chamber),

composed of R. Silva de Lapuerta, President of the Chamber, C.G. Fernlund, J.-C. Bonichot (Rapporteur), A. Arabadjiev and E. Regan, Judges,

Advocate General: J. Kokott,

Registrar: L. Carrasco Marco, Administrator,

having regard to the written procedure and further to the hearing on 6 July 2017,

after considering the observations submitted on behalf of

– the Asociación Nacional de Grandes Empresas de Distribución (ANGED), by J. Pérez-Bustamante Köster and F. Löwhagen, abogados, and by J.M. Villasante García, procurador,

– the Generalitat de Catalunya, by R. Revilla Ariet and R. Riu Fortuny, letrados, and by F. Velasco Muñoz Cuellar, procurador,

– the European Commission, by N. Gossement, P. Němečková and G. Luengo, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 9 November 2017,

gives the following

* Language of the case: Spanish.

Judgment

1 This request for a preliminary ruling concerns the interpretation of Articles 49 and 54 TFEU and Article 107(1) TFEU.

2 The request has been made in proceedings between the Asociación Nacional de Grandes Empresas de Distribución (ANGED) and the Generalitat de Catalunya (Regional Government of Catalonia, Spain) concerning the lawfulness of a tax on large retail establishments situated in the Autonomous Community of Catalonia.

Legal context

EU law

3 Article 1(b) and (d) of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ 1999 L 83, p. 1) provides:

'For the purposes of this Regulation:

…

(b) "existing aid" shall mean:

…

(ii) authorised aid, that is to say, aid schemes and individual aid which have been authorised by the Commission or by the Council;

…

(iv) aid which is deemed to be existing aid pursuant to Article 15;

(v) aid which is deemed to be an existing aid because it can be established that at the time it was put into effect it did not constitute an aid, and subsequently became an aid due to the evolution of the common market and without having been altered by the Member State. Where certain measures become aid following the liberalisation of an activity by Community law, such measures shall not be considered as existing aid after the date fixed for liberalisation;

…

(d) "aid scheme" shall mean any act on the basis of which, without further implementing measures being required, individual aid awards may be made to undertakings defined within the act in a general and abstract manner and any act on the basis of which aid which is not linked to a specific project may be awarded to one or several undertakings for an indefinite period of time and/or for an indefinite amount'.

4 Article 15 of Regulation No 659/1999 provides:

'1. The powers of the Commission to recover aid shall be subject to a limitation period of ten years.

2. The limitation period shall begin on the day on which the unlawful aid is awarded to the beneficiary either as individual aid or as aid under an aid scheme. Any action taken by the Commission or by a Member State, acting at the request of the Commission, with regard to the unlawful aid shall

interrupt the limitation period. Each interruption shall start time running afresh. The limitation period shall be suspended for as long as the decision of the Commission is the subject of proceedings pending before the Court of Justice of the European [Union].

3. Any aid with regard to which the limitation period has expired, shall be deemed to be existing aid.'

5 The foregoing provisions have been reproduced in identical form in Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (OJ 2015 L 248, p. 9).

Spanish law

6 The Ley 16/2000 del Parlamento de Cataluña del impuesto sobre grandes establecimientos comerciales (Law 16/2000 of the Parliament of Catalonia on the tax on large retail establishments) of 29 December 2000 (DOGC No 3295 of 30 December 2000 and BOE No 20 of 23 January 2001, 'Law 16/2000') introduced a tax on large retail establishments ('the IGEC') within the territory of the Autonomous Community of Catalonia.

7 Article 2 of Law 16/2000 provides that that tax is chargeable on the exceptional financial capacity of large retail establishments which, on account of their large sales area, may acquire a dominant position and produce adverse effects on the territory and the environment, the cost of which they do not bear.

8 Article 3 of that law provides that revenue from the IGEC is to be used for the purpose of modernising local business in Catalonia and carrying out action plans in areas affected by the installation of large retail establishments.

9 Article 4 of that law provides that the chargeable event for the IGEC is the use of sales areas equal to or greater than 2 500 m^2 by individual large retail establishments.

10 Under Article 5 of Law 16/2000, individual large retail establishments which pursue the business of a garden centre or of selling vehicles, construction materials, machinery or industrial supplies are exempt from that tax.

11 Article 6 of that law provides that a taxable person, for the purposes of the IGEC, is a natural or legal person who owns an individual large retail establishment, whether or not this is situated within a large collective retail establishment.

12 Article 8 of that law provides that the net taxable amount is reduced by 60% for retail establishments whose business concerns essentially the sale of furniture, sanitary ware, and doors and windows, and for do-it-yourself stores.

13 Article 11 of that law sets out detailed rules for calculating that tax, which take into account, inter alia, the number of inhabitants of the municipality in which the establishment is situated.

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

14 By Law 16/2000, a regional tax on large commercial establishments was introduced throughout the Autonomous Community of Catalonia in order to offset the potential impact of those large retail establishments on the territory and the environment. By decreto 342/2001 por el que se aprueba el

Reglamento del impuesto sobre grandes establecimientos comerciales (Decree 342/2001 approving the regulations on the tax on large retail establishments) of 24 December 2001 (DOGC No 3542 of 28 December 2001), the Regional Government of Catalonia implemented that tax.

15 In 2002, the ANGED, a national association of large distribution companies, brought an action for annulment of that decree before the Tribunal Superior de Justicia de Cataluña (High Court of Justice, Catalonia, Spain) on the ground that it was incompatible with the principle of freedom of establishment and with the law on State aid. That court reserved its decision pending the outcome of an action brought by the Spanish Government before the Tribunal Constitucional (Constitutional Court, Spain) against that legislation. Following the dismissal of that action by the Tribunal Constitucional (Constitutional Court) on 5 June 2012, the Tribunal Superior de Justicia de Cataluña (High Court of Justice, Catalonia) also dismissed the action brought by the ANGED. That association then appealed against that ruling before the Tribunal Supremo (Supreme Court, Spain).

16 The ANGED had also filed a complaint with the Commission concerning the introduction of the IGEC and the claim that it amounted to State aid. Further to a request for further information submitted to the Spanish authorities, the Commission informed those authorities by letter of 2 October 2003 that it had closed its investigation and would take no further action on the complaint. It had concluded, after analysing the features of the IGEC in the light of Article 87(1) EC, that that tax was compatible with the law on State aid, as the revenue from the tax was not intended to be used to support specific businesses or business sectors.

17 However, following a new complaint filed by the ANGED in 2013, the Commission informed the Spanish authorities by letter of 28 November 2014 that, further to a new preliminary assessment of the IGEC system, the exemption granted to small retail establishments and to certain specialist establishments could be regarded as State aid incompatible with the internal market, and requested the Kingdom of Spain to withdraw or amend that tax.

18 In those circumstances, the Tribunal Supremo (Supreme Court) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘(1) Must Articles 49 and 54 TFEU be interpreted as precluding a regional tax imposed on the use of individual large retail spaces with sales areas covering 2 500 m^2 or more due to their potential effect on planning, the environment and urban retailing patterns in the region, but which, as a matter of law, applies irrespective of whether or not such retail establishments are actually situated in a consolidated urban area and in practice usually affects undertakings from other Member States, given that:

(a) it does not affect traders who own several retail establishments, each with sales areas of less than 2 500 m^2, whatever the total sales area of all of those establishments together;

(b) it exempts collective large retail establishments;

(c) it excludes individual retail establishments which are garden centres and those selling vehicles, building materials, machinery and industrial supplies; and;

(d) retail establishments given over essentially to the sale of furniture, sanitary ware and doors and windows and those that are do-it-yourself stores are required to pay the tax on only 40% of the relevant net tax base?

(2) Must Article 107(1) TFEU be interpreted as meaning that the following constitute State aid prohibited under that provision:

(a) the full exemption from the IGEC of individual retail establishments whose sales areas are less than 2 500 m^2, of collective retail establishments and of individual retail establishments which are garden centres and those selling vehicles, building materials, machinery and industrial supplies; and

(b) the partial exemption from the IGEC of individual retail establishments given over essentially to the sale of furniture, sanitary ware and doors and windows and of do-it-yourself stores?

(3) If those full and partial exemptions from the IGEC constitute State aid within the meaning of Article 107(1) TFEU, what would the scope *ratione temporis* of such a finding be, in the light of the [letter of the Commission dated 2 October 2003]?'

Consideration of the questions referred

Admissibility

19 The Regional Government of Catalonia claims that the request for a preliminary ruling is inadmissible on the ground that the order for reference does not state sufficient reasons and does not set out in detail the factual and legal context of the dispute in the main proceedings.

20 However, the order for reference contains all the facts and points of law necessary to enable the Court to provide useful answers to the referring court on the questions asked.

21 The Regional Government of Catalonia also argues that the request for a preliminary ruling is inadmissible as regards the part of the request concerning freedom of establishment, on the ground that the situation in the main proceedings is a purely internal one.

22 Nonetheless, as observed by the Advocate General in point 21 of her Opinion, as the referring court has been seised in proceedings for the annulment of provisions which apply not only to its own nationals but also to those of other Member States, the decision of the referring court that will be adopted following the present ruling will also have effects on nationals of other Member States, so that the Court must give an answer to the questions put to it in relation to the provisions of the Treaty, even though the dispute in the main proceedings is confined in all respects within a single Member State (see, to that effect, judgments of 8 May 2013, *Libert and Others*, C-197/11 and C-203/11, EU:C:2013:288, paragraph 35, and of 15 November 2016, *Ullens de Shooten*, C-268/15, EU:C:2016:874, paragraph 51).

23 As for the objection of inadmissibility raised by the Regional Government of Catalonia to the effect that measures such as those at issue in the main proceedings do not affect trade between Member States and do not distort competition, given the local nature of retail trade business, it suffices to note that it is a question on the interpretation of Article 107(1) TFEU, which cannot lead to the request for a preliminary ruling being declared inadmissible.

24 During the proceedings, the Regional Government of Catalonia also argued that the request for a preliminary ruling should be dismissed as inadmissible, as the dispute in the main proceedings has become devoid of purpose following the amendment of Law 16/2000.

25 However, the referring court informed the Court, by letter of 1 June 2017, received at the Court on 7 June 2017, that the dispute in the main proceedings had, in its view, retained its purpose, despite the amendment of the legislation at issue. In addition, that court maintained its request for a preliminary ruling.

26 Finally, it should be noted that although the illegality, under the law on State aid, of a tax exemption does not affect the legality of the tax itself, so that the persons liable to pay that tax cannot plead that it is unlawful in order to avoid payment of that tax (see judgment of 27 October 2005, *Distribution Casino France and Others*, C-266/04 to C-270/04, C-276/04 and C-321/04 to C-325/04, EU:C:2005:657, paragraph 44), the dispute in the main proceedings does not concern an application to be exempted from the contested tax, but the legality of the rules relating to that tax as a matter of EU

law. It is therefore by no means obvious that the second and third questions are not of genuine interest for the purpose of ruling on the dispute before the referring court (see, by analogy, judgment of 15 June 2006, *Air Liquide Industries Belgium*, C-393/04 and C-41/05, EU:C:2006:403, paragraph 25).

27 The request for a preliminary ruling is therefore admissible in its entirety.

Substance

The first question

28 By its first question, the referring court asks, in essence, if Articles 49 and 54 TFEU should be interpreted as precluding a tax levied on large retail establishments, such as that in the main proceedings.

29 According to settled case-law, freedom of establishment aims to guarantee the benefit of national treatment in the host Member State to nationals of another Member State and to companies referred to in Article 54 TFEU by prohibiting any discrimination based on the place in which companies have their seat (see, inter alia, judgments of 12 December 2006, *Test Claimants in Class IV of the ACT Group Litigation*, C-374/04, EU:C:2006:773, paragraph 43, and of 14 December 2006, *Denkavit Internationaal and Denkavit France*, C-170/05, EU:C:2006:783, paragraph 22).

30 The rules regarding equal treatment forbid not only overt discrimination based on the location of the seat of companies, but also all covert forms of discrimination which, by the application of other criteria of differentiation, lead in fact to the same result (judgment of 5 February 2014, *Hervis Sport-és Divatkereskedelmi*, C-385/12, EU:C:2014:47, paragraph 30 and the case-law cited).

31 Moreover, a tax based on an apparently objective criterion of differentiation but that disadvantages in most cases, given its features, companies whose seat is in other Member States and that are in a comparable situation to companies whose seat is situated in the Member State where that tax is charged, constitutes indirect discrimination based on the location of the seat of the companies, which is prohibited under Articles 49 and 54 TFEU (see, to that effect, judgment of 5 February 2014, *Hervis Sport-és Divatkereskedelmi*, C-385/12, EU:C:2014:47, paragraphs 37 to 41).

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

33 Nor does the evidence submitted to the Court show that that criterion disadvantages in most cases nationals from other Member States or companies whose seat is in another Member State.

34 More specifically, neither the information in the letter sent by the Commission to the Spanish authorities on 7 July 2004, referred to in the order for reference, from which it is apparent that undertakings from other Member States represent 61.5% of the area occupied by undertakings of over 2 500 m^2 subject to the IGEC, nor the information provided by the ANGED in its written observations, from which it is apparent, inter alia, that 52% of tax paid by way of IGEC is borne by large retail establishments of other Member States, are sufficient, having regard, inter alia, to the level of those percentages, to show that that is the case.

35 Consequently, the answer to the first question is that Articles 49 and 54 TFEU must be interpreted as not precluding a tax levied on large retail establishments, such as that in the main proceedings.

The second question

36 By its second question, the referring court asks, in essence, whether a tax such as that at issue in the main proceedings imposed on large retail establishments according, in essence, to their sales area, constitutes State aid within the meaning of Article 107(1) TFEU, to the extent that it exempts establishments whose sales area is less than 2 500 m^2 and those which pursue the business of a garden centre or of selling vehicles, construction materials, machinery or industrial supplies and reduces by 60% the tax base of establishments selling furniture, sanitary ware and doors and windows and those that are do-it-yourself stores.

37 Classification of a national measure as 'State aid', within the meaning of Article 107(1) TFEU, requires all the following conditions to be fulfilled. First, there must be an intervention by the State or through State resources. Second, the intervention must be liable to affect trade between Member States. Third, it must confer a selective advantage on the recipient. Fourth, it must distort or threaten to distort competition (see, inter alia, judgment of 21 December 2016, *Commission* v *World Duty Free Group and Others*, C-20/15 P and C-21/15 P, EU:C:2016:981, paragraph 53).

38 So far as concerns the condition relating to the selectivity of the advantage, also mentioned before the Court, it is clear from settled case-law that in order to assess that condition it is necessary to determine whether, under a particular legal regime, the national measure in question is such as to favour 'certain undertakings or the production of certain goods' over others which, in the light of the objective pursued by that regime, are in a comparable factual and legal situation and which accordingly suffer different treatment that can, in essence, be classified as 'discriminatory' (see, inter alia, judgment of 21 December 2016, *Commission* v *World Duty Free Group and Others*, C-20/15 P and C-21/15 P, EU:C:2016:981, paragraph 54 and the case-law cited).

39 As regards, in particular, national measures that confer a tax advantage, it must be recalled that a measure of that nature which, although not involving the transfer of State resources, places the recipients in a more favourable position than other taxpayers is capable of procuring a selective advantage for the recipients and, consequently, constitutes State aid, within the meaning of Article 107(1) TFEU. By contrast, a tax advantage resulting from a general measure applicable without distinction to all economic operators does not constitute such aid within the meaning of that provision (judgment of 21 December 2016, *Commission* v *World Duty Free Group and Others*, C-20/15 P and C-21/15 P, EU:C:2016:981, paragraph 56).

40 In that regard, in order to classify a tax as 'selective', the ordinary or 'normal' tax system applicable in the Member State concerned must first be identified and it must then be demonstrated that the tax being examined is a derogation from that system, in so far as it differentiates between operators who, in the light of the objective pursued by that ordinary tax system, are in a comparable factual and legal situation (see, inter alia, judgment of 21 December 2016, *Commission* v *World Duty Free Group and Others*, C-20/15 P and C-21/15 P, EU:C:2016:981, paragraph 57 and the case-law cited).

41 It should also be recalled that the legal reference framework for the purpose of assessing the selectivity of a measure must not necessarily be determined within the territory of the Member State concerned, but may be that of the territory within which a regional or local authority exercises the powers conferred on it by the constitution or by law. Such is the case when that entity enjoys a legal and factual status which makes it sufficiently autonomous in relation to the central government of a Member State, with the result that, by the measures it adopts, it is that body and not the central government which plays a fundamental role in the definition of the political and economic environment in which undertakings operate (see, to that effect, judgment of 11 September 2008, *UGT-Rioja and Others*, C-428/06 to C-434/06, EU:C:2008:488, paragraphs 47 to 50 and the case-law cited).

42 A measure that differentiates between undertakings which, in the light of the objective pursued by the legal regime concerned, are in a comparable factual and legal situation and is, therefore, a priori selective, does not, however, constitute State aid within the meaning of Article 107(1) TFEU where the Member State concerned is able to demonstrate that the differentiation is justified since it flows from the nature or overall structure of the system of which it forms part (judgment of 21 December 2016, *Commission* v *World Duty Free Group and Others*, C-20/15 P and C-21/15 P, EU:C:2016:981, paragraph 58 and the case-law cited).

43 A measure which creates an exception to the application of the general tax system may be justified by the nature and overall structure of the tax system if the Member State concerned can show that the measure results directly from the basic or guiding principles of its tax system. In that connection, a distinction must be made between, on the one hand, the objectives attributed to a particular tax scheme and which are extrinsic to it and, on the other, the mechanisms inherent in the tax system itself, which are necessary for the achievement of those objectives (judgment of 6 September 2006, *Portugal* v *Commission*, C-88/03, EU:C:2006:511, paragraph 81).

44 It should also be borne in mind that although, in order for a tax to be established as being selective, it is not always necessary that it should derogate from a tax system considered to be an ordinary tax system, the fact that it can be so characterised is highly relevant in that regard where its effect is that two categories of operators are distinguished and are subject, a priori, to different treatment, namely those who fall within the scope of the derogating measure and those who continue to fall within the scope of the ordinary tax system, although those two categories are in a comparable situation in the light of the objective pursued by that system (judgment of 21 December 2016, *Commission* v *World Duty Free Group and Others*, C-20/15 P and C-21/15 P, EU:C:2016:981, paragraph 77).

45 With regard to the legislation at issue in the main proceedings, it must first be noted that the question of whether the territorial reference framework should be the Autonomous Community of Catalonia has not been disputed before the Court.

46 Next, although the tax criterion relating to the sales area does not appear to formally derogate from a given legal reference framework, its effect is nonetheless to exclude retail establishments whose sales area is less than 2 500 m^2 from the scope of that tax. Thus, the IGEC cannot be distinguished from a regional tax on retail establishments whose sales areas exceed a certain threshold.

47 Article 107(1) TFEU defines State interventions on the basis of their effects, independently of the techniques used (judgment of 22 December 2008, *British Aggregates Association*, C-487/06 P, EU:C:2008:757, paragraph 89).

48 It cannot, therefore, be excluded a priori that such a criterion enables an advantage to be given, in practice, to 'certain undertakings or the production of certain goods' within the meaning of Article 107(1) TFEU by mitigating their tax burden in relation to those subject to the tax at issue in the main proceedings.

49 In that connection, it must therefore be determined whether the retail establishments thus excluded from the scope of that tax are in a comparable situation to the establishments that come within that scope.

50 In the context of that analysis, account must be taken of the fact that, in the absence of EU rules governing the matter, it falls within the competence of the Member States, or of infra-State bodies having fiscal autonomy, to designate bases of assessment and to spread the tax burden across the various factors of production and economic sectors (judgment of 15 November 2011, *Commission and Spain* v *Government of Gibraltar and United Kingdom*, C-106/09 P and C-107/09 P, EU:C:2011:732, paragraph 97).

51 As recalled by the Commission in paragraph 156 of its Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union (OJ 2016 C 262, p. 1), 'Member States are free to decide on the economic policy which they consider most appropriate and, in particular, to spread the tax burden as they see fit across the various factors of production … in accordance with Union law'.

52 As regards the tax at issue in the main proceedings, the information provided by the referring court shows that the purpose of that tax is to contribute towards environmental protection and town and country planning. Its purpose is to correct and counteract the environmental and territorial consequences of the activities of these large retail establishments, deriving, inter alia, from the ensuing rise in traffic flows, by having those establishments contribute to the financing of environmental action plans and making improvements to infrastructure networks.

53 In that regard, it is not disputed that the environmental impact of retail establishments is largely dependent on their size. The larger the sales area, the higher the attendance of the public, which results in greater adverse effects on the environment. Consequently, a condition relating to sales area thresholds, such as that adopted by the national legislation at issue in the main proceedings, in order to distinguish between undertakings with a greater or lesser environmental impact, is consistent with the objectives pursued.

54 It is also clear that the setting up of such establishments is of particular significance for town and country planning policies, wherever those establishments may be situated (see, by analogy, judgment of 24 March 2011, *Commission* v *Spain*, C-400/08, EU:C:2011:172, paragraph 80).

55 In those circumstances, a condition under which the imposition of a tax is based on the sales area of an undertaking, such as that in the case in the main proceedings, differentiates between categories of establishments that are not in a comparable situation in the light of the objectives pursued by the legislation that imposed that condition.

56 Therefore, the tax exemption received by the retail establishments whose sales area is less than 2 500 m^2 cannot be regarded as conferring a selective advantage on those establishments and, therefore, is not capable of constituting State aid within the meaning of Article 107(1) TFEU.

57 The referring court is also uncertain as to the other features of the tax at issue in the main proceedings. It questions whether the total tax exemption granted to collective retail establishments and individual retail establishments pursuing the business of a garden centre or of selling vehicles, construction materials, machinery or industrial supplies, as well as the 60% reduction of the tax base for establishments selling furniture, sanitary ware and doors and windows and those that are do-it-yourself stores, constitute advantages for those establishments.

58 It must first of all be noted that those measures derogate from the framework established by that specific tax.

59 Next, the Regional Government of Catalonia argues in its written observations that the activities of the retail establishments concerned require, by their very nature, large sales areas that are not intended to attract the greatest number of consumers or increase flows of customers who travel there by private vehicle. Thus, those activities will have fewer adverse effects on the environment and on town and country planning than the activities of establishments liable for the tax in question.

60 That factor may be such as to justify the distinction adopted in the contested legislation in the main proceedings, which, accordingly, would not result in selective advantages being given to the retail establishments concerned. It is, however, for the referring court to determine whether in fact that is the case.

61 Lastly, as far as concerns the criterion drawing a distinction for fiscal purposes on the basis of the individual nature of retail establishments, the effect of which is to exempt collective large retail establishments from the IGEC, it creates, by contrast, a distinction between two categories of establishment that are objectively in a comparable situation in the light of the objectives of environmental protection and town and country planning pursued by the legislation at issue in the main proceedings. As a result, the exemption of those collective large retail establishments from that tax is selective and is therefore likely to constitute State aid if the other conditions set out in Article 107(1) TFEU are met.

62 In that regard, it may be noted that such a measure is financed through State resources and is attributable to the State for the purpose of that provision.

63 In addition, contrary to the Regional Government of Catalonia's claims in its written observations, such a measure is also liable to affect trade and to distort or to threaten to distort competition within the meaning of Article 107(1) TFEU.

64 It is settled case-law that, for the purpose of categorising a national measure as State aid, it is necessary, not to establish that the aid has a real effect on trade between Member States and that competition is actually being distorted, but only to examine whether that aid is liable to affect such trade and distort competition (see, inter alia, judgment of 27 June 2017, *Congregación de Escuelas Pías Provincia Betania*, C-74/16, EU:C:2017:496, paragraph 78).

65 In particular, when aid granted by a Member State strengthens the position of certain undertakings as compared with that of other undertakings competing in trade between Member States, such trade must be regarded as affected by the aid and it is not necessary that the beneficiary undertakings themselves be involved in trade between Member States. Where a Member State grants aid to undertakings, internal activity may be maintained or increased as a result, so that the opportunities for undertakings established in other Member States to penetrate the market in that Member State are thereby reduced (see, inter alia, judgment of 27 June 2017, *Congregación de Escuelas Pías Provincia Betania*, C-74/16, EU:C:2017:496, paragraph 79).

66 With regard to the condition concerning distortion of competition, 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 (see, inter alia, judgment of 27 June 2017, *Congregación de Escuelas Pías Provincia Betania*, C-74/16, EU:C:2017:496, paragraph 80).

67 In the light of the foregoing, the answer to the second question is that a tax such as that at issue in the main proceedings imposed on large retail establishments according, in essence, to their sales area does not constitute State aid within the meaning of Article 107(1) TFEU to the extent that it exempts establishments whose sales area is less than 2 500 m^2. Nor, in so far as that tax exempts establishments which pursue the business of a garden centre or of selling vehicles, construction materials, machinery or industrial supplies or reduces by 60% the tax base of establishments selling furniture, sanitary ware and doors and windows and those that are do-it-yourself stores, does it constitute State aid within the meaning of Article 107(1) TFEU, provided that those establishments do not have as significant an adverse effect on the environment and on town and country planning as the others, which it is for the referring court to ascertain.

68 Such a tax does, however, constitute State aid within the meaning of that provision to the extent that it exempts collective large retail establishments with a surface area equal to or greater than 2 500 m^2.

The third question

69 By its third question, the referring court asks, in essence, if, in the event that the answer to the second question is in the affirmative, State aid resulting from the exemptions to and reductions of a tax levied on large retail establishments, such as the tax at issue in the main proceedings, could be regarded as existing aid within the meaning of Article 1(b) of Regulation No 659/1999, which is reproduced, in essence, in Article 1(b) of Regulation 2015/1589.

70 In view of the answer given to the second question, that third question must be answered.

71 In that regard, it must be borne in mind at the outset that the validity of measures giving effect to aid is affected if national authorities act in breach of the last sentence of Article 108(3) TFEU and that national courts must offer to individuals in a position to rely on such breach the certain prospect that all the necessary inferences will be drawn, in accordance with their national law, as regards the validity of measures giving effect to the aid, the recovery of financial support granted in disregard of that provision and possible interim measures (judgment of 21 November 1991, *Fédération nationale du commerce extérieur des produits alimentaires and Syndicat national des négociants et transformateurs de saumon*, C-354/90, EU:C:1991:440, paragraph 12).

72 Nevertheless, existing aid may, in accordance with Article 108(1) TFEU, be lawfully implemented so long as the Commission has made no finding of incompatibility, so that Article 108(3) TFEU does not give national courts the power to prohibit that aid being put into effect (see judgment of 18 July 2013, *P*, C-6/12, EU:C:2013:525, paragraphs 36 and 41).

73 However, Article 1(b)(v) of Regulation No 659/1999, referred to by the referring court, concerns the case where it can be established that a measure, at the time it was put into effect, did not constitute aid, but, without it having been altered by the Member State, subsequently became aid as a result of the development of the internal market. Those conditions do not appear to have been met in the circumstances of the case in the main proceedings.

74 As for the question whether the aid received by the establishments concerned in connection with the tax at issue in the main proceedings could be regarded as having been authorised by the Commission within the meaning of Article 1(b)(ii) of Regulation No 659/1999, reproduced in Article 1(b)(ii) of Regulation 2015/1589, it must be borne in mind that, in matters of State aid, an act, whatever its kind, constitutes such a decision when, taking account of its substance and the Commission's intention, that institution has, at the end of the preliminary examination stage, definitively established its position — by way of that act — on the measure in question and, therefore, once it has decided whether or not that measure constituted aid and that it has no doubts as regards its compatibility with the internal market (see, to that effect, judgments of 17 July 2008, *Athinaïki Techniki* v *Commission*, C-521/06 P, EU:C:2008:422, paragraph 46, and of 9 June 2011, *Diputación Foral de Vizcaya and Others* v *Commission*, C-465/09 P to C-470/09 P, not published, EU:C:2011:372, paragraph 94).

75 The Court has also ruled that it must be possible to establish the existence of such a Commission decision on the basis of objective factors and that decision must correspond to a clear and definitive expression of the Commission's position on the measure in question (see judgment of 9 June 2011, *Diputación Foral de Vizcaya and Others* v *Commission*, C-465/09 P to C-470/09 P, not published, EU:C:2011:372, paragraph 95).

76 The effect of the Commission's prior control in matters of State aid, and, in particular, of the prohibition on putting new aid measures into effect before a final decision has been adopted by the Commission laid down in the last sentence of Article 108(3) TFEU, is that the existence of a decision on the compatibility of an aid measure leaves no room for doubt, all the more so when the allegedly authorised aid measures have not been notified to the Commission pursuant to Article 108(3) TFEU,

thereby jeopardising the legal certainty that that provision is intended to safeguard (see, to that effect, judgment of 9 June 2011, *Diputación Foral de Vizcaya and Others* v *Commission*, C-465/09 P to C-470/09 P, not published, EU:C:2011:372, paragraphs 96 and 97).

77 Consequently, in the case in the main proceedings, such authorisation cannot be inferred from the wording of the Commission's letter of 2 October 2003, referred to by the referring court and in paragraph 16 of the present judgment, if only because the information before the Court shows that the Commission adopted a position in that letter only on whether the detailed rules for applying IGEC revenue are compatible with the law on State aid.

78 Lastly, it must be observed that, according to Article 1(b)(iv) of Regulation No 659/1999, reproduced in essence in Article 1(b)(iv) of Regulation 2015/1589, 'existing aid' is to be understood as also meaning 'aid which is deemed to be existing aid pursuant to Article 15' of Regulation No 659/1999.

79 Under Article 15(1) of Regulation No 659/1999, reproduced in Article 17 of Regulation 2015/1589, the powers of the Commission to recover unlawful aid are to be subject to a limitation period of 10 years. By virtue of paragraph 2 of that article, the limitation period begins on the day on which the unlawful aid is awarded to the beneficiary, either as individual aid or as aid under an aid scheme, and any action taken by the Commission or by a Member State, acting at the request of the Commission, with regard to the unlawful aid interrupts the limitation period. Moreover, according to paragraph 3 of that article, any aid with regard to which the limitation period has expired is to be deemed to be existing aid.

80 Irrespective of the scope that should be given to that provision when it is relied on before national courts, it must be observed that the conditions it lays down are not, in any event, met in the main proceedings.

81 To the extent that beneficiaries of aid received in connection with a tax such as that in the main proceedings are defined in a general and abstract manner and the amount of the aid thereby granted to them remains indeterminate, such aid falls under the definition of 'aid schemes' within the meaning of Article 1(d) of Regulation No 659/1999, reproduced in identical terms in Article 1(d) of Regulation 2015/1589.

82 Consequently, in accordance with Article 15(2) of Regulation No 659/1999, the day on which the unlawful aid is actually granted to the beneficiary is the starting point for the limitation period (see, to that effect, judgment of 8 December 2011, *France Télécom* v *Commission*, C-81/10 P, EU:C:2011:811, paragraphs 80 to 82, and order of 7 December 2017, *Ireland* v *Commission*, C-369/16 P, not published, EU:C:2017:955, paragraph 41).

83 However, it is apparent from the order for reference that, by letter of 28 November 2014 mentioned in the order for reference and referred to in paragraph 17 of the present judgment, the Commission informed the Spanish authorities that the IGEC was likely to constitute State aid and that tax had to be amended or withdrawn. Such a document therefore constitutes action taken by the Commission within the meaning of Article 15(2) of Regulation No 659/1999, which interrupts the limitation period, so that the aid awarded during the 10-year period preceding that letter cannot be regarded as existing aid.

84 As far as concerns the aid awarded before that period, it is apparent from both the 2014 letter and from the Commission's letter of 2 October 2003 mentioned by the referring court that those letters were sent following exchanges of and requests for information to the Spanish authorities on the IGEC regime.

85 In those circumstances, such requests also interrupted the limitation period laid down in Article 15 of Regulation No 659/1999 (see, to that effect, judgment of 6 October 2005, *Scott* v *Commission*, C-276/03 P, EU:C:2005:590, paragraph 36).

86 In the light of the foregoing, the answer to the third question is that, in circumstances such as those in the main proceedings as described by the referring court, State aid resulting from a tax regime such as that at issue in the main proceedings cannot constitute existing aid within the meaning of Article 1(b) of Regulation No 659/1999, the wording of which is reproduced in Article 1(b) of Regulation 2015/1589.

Costs

87 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (First Chamber) hereby rules:

1. **Articles 49 and 54 TFEU must be interpreted as not precluding a tax levied on large retail establishments, such as that at issue in the main proceedings.**

2. **A tax such as that at issue in the main proceedings imposed on large retail establishments according, in essence, to their sales area does not constitute State aid within the meaning of Article 107(1) TFEU to the extent that it exempts establishments whose sales area is less than 2 500 m^2. Nor, in so far as that tax exempts establishments which pursue the business of a garden centre or of selling vehicles, construction materials, machinery or industrial supplies or reduces by 60% the tax base of establishments selling furniture, sanitary ware and doors and windows and those that are do-it-yourself stores, does it constitute State aid within the meaning of Article 107(1) TFEU, provided that those establishments do not have as significant an adverse effect on the environment and on town and country planning as the others, which it is for the referring court to ascertain.**

   Such a tax does, however, constitute State aid within the meaning of that provision, to the extent that it exempts collective large retail establishments with a surface area equal to or greater than 2 500 m^2.

3. **In circumstances such as those described by the referring court, State aid resulting from a tax regime such as that at issue in the main proceedings cannot constitute existing aid within the meaning of Article 1(b) of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty, the wording of which is reproduced in Article 1(b) of Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union.**

[Signatures]