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The consistency of a tax on large retail establishments with the freedom of establishment and State aid rules

Analysis of Case C-233/16, Anged

by

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1 INTRODUCTION

The establishment of out-of-town superstores has affected retailing activities as well as the environment of every urbanized part of Europe. In addition to its economic impacts, the retail industry's headlong rush into more sprawling supermarkets has significant impacts on transportation, greenhouse gas emissions, land planning and the environment. Indeed, large retail establishments attract a higher volume of goods and customer traffic than smaller retail establishments. Likewise, given that they are located outside urban areas, they contribute to urban sprawl.

So far, the attitudes of central and local authorities in Member States have differed significantly.[1] In several Member States, authorities have been limiting the growth of superstores thanks to land-planning, environmental and economic instruments, whereas in others a *laissez-faire* attitude has prevailed. Indeed, environmental protection and planning rules vary significantly from one Member State to another.

In the case under review, the Court of Justice of the European Union (CJEU) took the view that 'the larger the sales area, the higher the attendance of the public, which results in greater adverse effects on the environment'.[2] However, European Union (EU) secondary law does not place direct restrictions on the building of superstores. The Member States are merely called on to assess the environmental impacts of these stores. Either the building license or the environmental license have to be subjected to an Environmental Impact Assessment (EIA) under the EIA Directive 2011/92/EU,[3] or the plan or programme underpinning the realization of the store must be subjected to a Strategic Environmental Assessment (SEA) under the SEA Directive 2001/42/EC.[4] Needless to say, these two directives are essentially of a procedural nature. The authorities granting their consent to the developers are merely called on to 'take into account' in their statement of reasons the environmental assessment.[5] They are not obliged to refuse to grant the license on the grounds that the impact assessment is negative. Accordingly, these two directives do not call into question the discretion of the national authorities to grant the building and/or the environmental licenses. Therefore, neither the SEA nor the EIA preclude the competent authorities to give their consent to projects impairing the quality of the environment.

However, national or regional environmental protection rules can be at odds with the fundamental freedoms of the internal market. Enshrined in Article 49 of the Treaty on the Functioning of the European Union (TFEU), the freedom of establishment may be relied on by developers to limit the regulatory sovereignty of Member States.

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[1] C Guy, 'Controlling New Retail Spaces: The Impress of Planning Policies in Western Europe' (1998) 35 Urban Policies 953.

[2] Case C-233/16, *Anged*, ECLI:EU:C:2018:280 para 53.

[3] Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment [2012] OJ L26/1 Annex II, para 10(b) subjecting 'the construction of shopping centres and car parks' to an EIA.

[4] Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment [2001] OJ L197/30.

[5] Article 8 Directive 2011/92/EU.

To date, the CJEU has rarely had the opportunity to rule on the validity of restrictions to the right to freedom of establishment on the grounds of environmental protection.[6] The case under review was therefore an important opportunity for the Court to clarify its views on this point. The applicants – Asociación Nacional de Grandes Empresas de Distribución (ANGED) – challenged a special tax on large retail establishments in Catalonia, alleging that it constituted a restriction of the freedom of establishment and unlawful aid for small retail establishments, which are not subject to the tax. The CJEU was therefore called to strike a balance between the Member States' fiscal sovereignty, on the one hand, and the fundamental freedoms and the rules on State aid, on the other.[7]

2 FACTS OF THE CASE

By Law 15/2000, a regional tax on large commercial establishments was introduced throughout Catalonia to offset the impact of large retail establishments on the territory and the environment. The tax at issue is levied on any owner of an 'individual large retail establishment' with a sales area exceeding the threshold of 2500 m^2. Smaller retail establishments are not subject to the tax. The tax does not differentiate between establishments in urban or rural areas. With the 2500 m^2 threshold, the Catalan lawmakers drew a dividing line between, on the one hand, small and medium-sized department stores that are usually located in urban areas which consumers can access by walking; and, on the other, superstores located on the edge of major cities that are generally accessed by driving customers.

The tax is subject to some exemptions, depending on the type of establishment. In this connection, Spanish law draws a distinction between individual and collective retail establishments, the latter being defined as part of a cluster of establishments located in one or several buildings of a commercial complex, in which different trade activities take place'.[8] Thus, individual large retail establishments, such as garden centres and those selling vehicles, building materials, machinery and industrial supplies, are exempt from the tax. Establishments mainly selling furniture, sanitary ware, doors, windows and do-it-yourself stores, benefit from a tax reduction of 60 percent. Furthermore, collective large retail establishments are exempted from the tax. Finally, a relief of 40 percent is applied to individual large retail establishments which can be accessed by three or more methods of public transport as well as by private vehicle.

ANGED, a national association of large distribution companies, brought different actions for annulment of the Catalan legislation imposing the tax before the Spanish courts. The Spanish Supreme Court decided to stay the proceedings and to request a CJEU preliminary ruling over the compatibility of the tax arrangements with the freedom of establishment and the rules on State aid.

[6] N de Sadeleer, *EU Environmental Law and the Internal Market* (Oxford University Press 2014) 336–340.
[7] Case C-233/16, Opinion AG Kokott, ECLI:EU:C:2017:852, para 2.
[8] Decreto-ley 1/2009 de ordenación de los equipamientos comerciales art 5(b)

3 FREEDOM OF ESTABLISHMENT

3.1 Restrictions of the freedom of establishment

Article 49 TFEU requires the abolition of restrictions on the freedom of establishment.[9] It follows that all measures which prohibit, impede or render less attractive the exercise of the freedom of establishment must be regarded as restrictions on that freedom.[10] Article 49 and Article 54 TFEU are directed to ensuring that foreign nationals and companies are treated in the same way as nationals and companies of the host Member State. It is also settled case law that all measures which prohibit, impede or render less attractive the exercise of the freedom of establishment are restrictions on that freedom.[11]

In precluding any national measure which is liable to hinder or to render less attractive the exercise of the freedom of establishment,[12] Article 49 TFEU guarantees to every citizen of a Member State the right to establish themselves stably within another Member State with a view to pursuing an independent economic activity there.

ANGED claimed that the 2500 m^2 criterion set by the Catalonian authorities specifically disadvantaged companies from other EU Member States. It stressed that 61.5 percent of the companies subject to the tax at issue are headquartered in another Member State than Spain. By contrast, the majority of the Spanish retail shops were not subjected to the regional tax. Accordingly, ANGED argued, they benefited from a competitive advantage. Both Advocate General (AG) Kokott and the CJEU, however, reached the conclusion that there was no difference in treatment of small and large Spanish or foreign retail establishments. In effect, the tax is levied on any owner of a retail establishment with a sales area exceeding the threshold of 2499 m^2. Therefore, the criterion relating to the sales area of the establishments at issue may be considered objective. AG Kokott argued that the mere fact that foreign retailers prefer to operate large supermarkets to achieve the economies of scale necessary to penetrate a new market does not amount to direct discrimination.[13] The Court agreed and concluded that there had been no overt discrimination against foreign enterprises.[14]

That being said, under EU law all 'covert' or 'indirect' forms of discrimination which, by the application of other criteria of differentiation, lead in fact to the same result as an overt discrimination are also prohibited.[15] The concept of indirect discrimination has been defined by the CJEU as 'any national measure which, even though it is applicable without

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[9] Case C-371/10, *National Grid*, ECLI:EU:C:2011:785, para 35.
[10] See Case C-442/02, *Caixa Bank France*, ECLI:EU:C:2004:586, para 11; Case C-298/05, *Columbus Container Services*, ECLI:EU:C:2007:754, para 34.
[11] Case C-591/13, *Commission v Germany*,ECLI:EU:C:2015:230, para 56 (and the case law cited).

[12] See, e.g., Case C-299/02, *Commission v Netherlands*, ECLI:EU:C:2004:620, para 15; and Case C-140/03, *Commission v Greece*, ECLI:EU:C:2005:242, para 27.
[13] Opinion AG Kokott in Case C-233/16, para 31. See in particular Case C-400/08, *Commission v Spain*, ECLI:EU:C:2011:172, para 61.
[14] Case C-233/16, para. 32.
[15] Cases C-570/07 and C-571/07, *Blanco Pérez and Chao Gómez*, ECLI:EU:C:2008:138, para 117ff; C-385/12, *Hervis Sport-Divatkereskedelmi*, ECLI:EU:C:2014:47, para 30; and Case C-580/15, *Van der Weegen and Others*, ECLI:EU:C:2017:429, para 33.

discrimination on grounds of nationality, is liable to hinder or to render less attractive the exercise by EU citizens of the freedom of establishment that is guaranteed by the Treaty'.[16]

By way of example, 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.[17]

AG Kokott took the view that 'stricter conditions are necessary for the existence of covert discrimination in tax law. It is intended only to include cases which do not constitute discrimination from a purely formal perspective, but have the same effect.' Consequently, 'a provision which entails covert discrimination must therefore affect foreign undertakings in particular intrinsically'.[18]

The CJEU implicitly endorsed Kokott's approach, by finding that the legislation in question laid down a criterion relating to the sales area of the retail establishments which did not give rise to any indirect discrimination. In effect, the evidence submitted to the Court did not show that the criterion related to the sale area disadvantaged companies headquartered in another Member State.[19]

3.2 Covert discrimination

In the case under review, the CJEU held that the tax at issue did not give rise to any indirect discrimination. However, similar tax schemes have been adopted in other Member States. It cannot be excluded at that similar tax arrangements in other Member States can amount to an indirect form of discrimination. In effect, foreign companies established in other Member States could hypothetically bring sufficient evidence demonstrating that a tax on retail shops places a particular burden on their investment and that they could be disadvantaged in investing in that Member State.

If the tax amounts to a covert discrimination, it is thus likely to infringe the principle of free establishment. However, that freedom is not absolute. All tax arrangements, even entailing covert discriminatory effects, do not have to be struck down. In effect, Member States can restrict that economic freedom provided that they are able to demonstrate that their tax arrangements are justified and proportional. We shall thus explore the manner in which domestic courts should resolve such cases of covert discrimination. In this connection, the analysis made by AG Kokott in her opinion in ANGED of the overriding reasons relating to the general interest justifying the restrictions and their proportionality deserves attention.

It is settled law that 'restrictions on freedom of establishment which are applicable without discrimination on grounds of nationality may be justified by overriding reasons relating to the general interest, provided that the restrictions are appropriate for securing attainment of the

[16] See, e.g., Case C-299/02, para. 15; and Case C-140/03, para 27; Case C-400/08 *Commission v Spain*, ECLI:EU:C:2011:172, para 63.
[17] Case C-385/12, paras 37–41.
[18] Opinion AG Kokott in Case C-233/16, para 38.
[19] Case C-233/16, para 33.

objective pursued and do not go beyond what is necessary for attaining that objective'.[20] Most importantly for the present purposes, the overriding reasons recognized by the Court include among others environmental protection,[21] as well as town and country planning.[22] However, Member States cannot invoke, in support of their restrictions, either the protection of the economy of the country,[23] or the restoration of budgetary balance by increasing fiscal receipts.[24]

In the case at issue, the European Commission was inclined to the view that the environmental and land-planning justifications were entangled with economic considerations.[25] For instance, the tax at issue was intended to mitigate the competitive advantage resulting from the size of the sales area in comparison with smaller retail establishments.[26]

Case C-400/08 is a case in point. The European Commission claimed that by imposing certain restrictions on the establishment of retail areas in Catalonia, Spain had failed to fulfil its obligations under Article 49 TFEU on the grounds that those restrictions benefited local retailers to the detriment of operators from other Member States. In particular, the Catalan legislation made the establishment of any large retail establishment on the territory of Catalonia conditional upon a prior administrative authorization. Thus, the CJEU held that the prior authorization fell within the concept of 'restriction' for the purposes of Article 49 TFEU, since it hindered the exercise of the freedom of establishment.[27]

Spain argued that the restrictions on the location and size of large retail establishments which follow from the prohibition on setting up such establishments outside the consolidated urban areas of a limited number of municipalities were appropriate for achieving the objectives relating to town and country planning and environmental protection.[28] Indeed, by confining the location of large retail establishments to densely populated areas, where demand is greatest, and by limiting the size of establishments in less populous areas, the contested legislation seeks to avoid polluting car journeys, to counter urban decay, to preserve an environmentally integrated urban model, to avoid new road building, and to ensure access by public transport.

The CJEU held that restrictions relating to the location and size of large retail establishments appear to be 'methods suitable for achieving the objectives relating to town and country planning and environmental protection' .[29] However, the Court took the view that Spain had

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[20] Case C-169/07, *Hartlauer*, ECLI:EU:C:2009:141 para 44; Joined Cases C-171/07 and C-172/07 *Apothekerkammer des Saarlandes and Others*, ECLI:EU:C:2009:316, para 25; and Joined Cases C-570/07 and C-571/07, para 61.

[21] Case C-384/08, *Attanasio Group*, ECLI:EU:C:2010:133, para 50.

[22] Case C-400/08 *Commission v Spain*, ECLI:EU:C:2011:172 para 74; Case C-567/07 *Woningstichting Sint Servatius*, ECLI:EU:C:2009:593, para 29 (and the case law cited).

[23] Case C-35/98 *Verkooijen*, ECLI:EU:C:2000:294, paras 47–48.

[24] See, to that effect, Case C-436/00 *X and Y*, ECLI:EU:C:2002:704, para 50.

[25] European Commission, '*Observations écrites, Cases C-233/16 and C237/16''* (29 August 2016), paras 73–86.

[26] Opinion AG Kokott in Case C-233/16, para 44.

[27] Case C-400/08, para 64.

[28] Ibid., para 56.

[29] Ibid., para 79.

not produced sufficient evidence to explain why the restrictions at issue are necessary to achieve the objectives pursued.[30]

The CJEU found that the requirement to obtain a license before opening a large retail establishment has been regarded as an appropriate means of achieving the objective of environmental protection and of town and country planning. Indeed, the adoption of measures *a posteriori,* such as a tax against an existing retail establishment with a negative environmental impact, is a less effective and more costly alternative to planning restrictions.[31] In other words, the Court based its judgement on the assumption that prevention is better than cure.

The CJEU held that the regional provisions requiring the application of ceilings of market share and of the impact on existing retail trade were to be deemed to be 'purely economic'.[32] Therefore, such considerations could not constitute an overriding reason in the public interest.[33]

Though covert discrimination may be justified, it is still for the competent national authorities to show, first, that their legislation is necessary to attain the objective pursued and, second, that the legislation is in conformity with the principle of proportionality.[34] The first question to answer is therefore whether the impacts of large retail establishments justify the adoption of a specific taxation to protect the environment or to improve the decision making with respect to land planning policy. In other words, do the environmental impacts of stores require the regional authorities to introduce a tax on large retail establishments? To be compatible with EU law, the tax at issue must constitute a reasonable means to abate the nuisance associated with these establishments. This gives rise to the following question: to which extent must the CJEU respect the discretion enjoyed by the Member States in laying down tax legislation striking a balance between complex political, economic and social interests?

It is settled case law that given the absence of EU harmonization, the national legislature has a certain discretion in fixing a tax for retail establishments.[35] In the present case, AG Kokott took the view that the tax was not inappropriate.[36]The principle of proportionality implies a comparison of measures likely to attain the desired result and the selection of the one with the least disadvantages.[37] If it appears that an alternative measure would meet the objective while hindering less inter-State trade, the contested measure must be deemed to be disproportionate. The tax arrangement must therefore be necessary to attain the objective pursued. Is the Member State required to prove that no other conceivable measure would enable that objective to be attained under the same conditions?

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[30] Ibid., paras 83–85.
[31] Ibid., para 92.
[32] Ibid., paras 90 and 98.
[33] Ibid., para 97.
[34] See, to that effect, Case C-54/05 *Commission v Finland*, ECLI:EU:C:2007:168 para 39; and Case C-297/05 *Commission v Netherlands*, ECLI:EU:C:2007:531 para 76.
[35] Case C-254/08 *Futura Immobiliare*, ECLI:EU:C:2009:479.

[36] Opinion AG Kokott in Case C-233/16, para 51.
[37] Case C-477/14, *Pillbox 38*, ECLI:EU:C:2016:324, para 48; and case C-134/1,5 *Lidl*, ECLI:EU:C:2016:498, para 33.

In Kokott's view, only a 'democratically mandated legislature' is empowered to determine the relevant threshold.[38] Accordingly, the legislature is not required to prove empirically how it set the threshold.[39] She stressed that, while larger retailers face greater challenges with regard to urban planning and consideration of environmental concerns, they also benefit from a larger turnover, a larger financial capacity and greater financial strength.[40] *Given that the Court found that there had been no covert discrimination, the opinion of AG Kokott is merely informative. Nevertheless, her opinion suggests that* tax arrangements aiming at offsetting the impacts of large retail establishments amounting to an indirect form of discrimination can still escape the Caudine forks of Article 49 TFEU, in so far as they are properly justified, appropriate and necessary in attaining the objective pursued.

4 RULES ON STATE AID

4.1 Definition of aid

Tax regulation falls within the scope of the arrangements governing State aid. The fact that a tax measure complies with the freedom of establishment does not however mean that it is also lawful under state aid rules. In the judgment at issue, the question arose as to whether the exemption granted to small retail establishments, and to certain specialist establishments could be regarded as compatible with Article 107(1) TFEU.

Article 107 TFEU does not provide any definition of the concept of State aid. According to settled case law, to be classified as State aid, a measure must satisfy four conditions:

- an advantage must be conferred on the recipient of the aid measure;
- the advantage must be of state origin;
- the aid must have a selective nature; and
- the aid must be liable to affect trade between the Member States.[41]

To fall within the scope of Article 107 TFEU, State measures need to be selective and favour 'certain undertakings or the production of certain goods', rather than indiscriminately benefit all undertakings situated within the Member State. This criterion reflects the thinking that the more an aid measure is selective, the more it is likely to distort competition.

The CJEU has drawn the following distinctions. On the one hand, national measures constitute State aid when they confer a tax advantage which, although not involving the transfer of State resources, places the recipients in a more favourable position than other taxpayers, therefore procuring a selective advantage for the recipients. On the other hand, a tax advantage resulting from a general measure applicable without distinction to all economic operators does not constitute State aid.[42]

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[38] Opinion AG Kokott in Case C-233/16, para 56.
[39] Ibid.
[40] Ibid.
[41] Case C-142/87, *Belgium v Commission* ('*Tubemeuse*'), ECLI:EU:C:1990:125, para 25; Joined Cases C-278/92 to C-280/92, *Spain v Commission*, ECLI:EU:C:1994:325, para 20; Case C-482/99, *Stardust*, ECLI:EU:C:2002:294, para 68; Case C-280/00, *Altmark*, ECLI:EU:C:2003:415, para 74; and Case C-345/02, *Pearle and Others*, ECLI:EU:C:2004:448, para 32.
[42] Case C-233/16, para 39.

Accordingly, selective State aid stands in opposition to so-called general measures of economic policy which are not aiming at favouring specific products or sectors, but all undertakings in national territory, without distinction. These general measures do not constitute State aid,[43] provided they are justified by the nature of the general structure of the system under which they fall. In effect, an economic benefit granted to an undertaking constitutes State aid only if it favours certain undertakings or the production of certain goods.[44]

In the judgment under review, the CJEU recalls that the legal reference framework is not necessarily the national geographical framework when a measure is taken by a sub-State entity enjoying institutional, procedural, economic and financial autonomy.[45]

4.2 Selectivity of the advantage conferred on several retail establishments

As far as environmental policy is concerned, the distinction between general measures of economic policy and selective measures is particularly elusive. For example, the financing of a waste incinerator or a landfill by the public authorities will not particularly benefit any given undertaking. However, if it appears that an undertaking would be favoured by such infrastructure due to the fact that it would be the principal beneficiary, the prerequisite of selectivity would be met.

The assessment of the selective nature of the tax arrangement requires a two-step process. First, it is necessary to identify and examine the common taxation regime applicable (in this case the specific tax system applicable on retail stores). Second, whether any advantage granted by the tax measure at issue may deemed to be selective will be determined in relation to this 'normal' tax regime.[46] In so doing, the Court has to demonstrate that the measure derogates from that common regime inasmuch as it differentiates between economic operators who, in light of the objective pursued by the tax system of the Member State concerned, are in a comparable factual and legal situation.

In the judgment under review, the CJEU reiterates:

> 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.[47]It is important to stress

[43] Case C-143/99, *Adria-Wien Pipeline*, ECLI:EU:C:2001:598, para 35; and Case T-55/99, *CETM v Commission*, ECLI:EU:T:2000:223, para 40.
[44] Regarding environmental taxes capable of procuring a selective advantage for the recipients, see de Sadeleer, *EU Environmental Law and the Internal Market,* above, 444.

[45] Case C-233/16, para 41. See also Case C-88/03, *Portugal v Commission*, ECLI:EU:C:2006:511; Joined Cases C-428/06 to C-434/06, *Unión General de Trabajadores de La Rioja*, ECLI:EU:C:2008:488; and Joined Cases T-211/04 and 215/04, *Government of Gibraltar v Commission*, ECLI:EU:T:2008:595.
[45] Case C-143/99, paras. 43–53.

[46] Case T-210/02, *British Aggregates v Commission*, ECLI:EU:T:2014:65 para 49.
[47] Case C-233/16, para 43.

the specificity of this test. Unlike subsidies such as cash benefits, which are only sporadically granted, tax advantages are granted 'in the context of a tax system to which, as a general rule, undertakings are permanently and inevitably subject'.[48]

With respect to exemptions, in order to determine whether a tax advantage is selective within the meaning of Article 107(1) TFEU the CJEU was called on to decide whether there had been an unjustifiable difference in treatment in the tax system.

4.3 Application of the selectivity test to the different tax categories

The CJEU had to verify whether the three different tax exemptions could be deemed to be selective for the purpose of Article 107(1) TFEU. The Court applied the abovementioned criteria (advantage of state origin conferred on the recipient of the aid, distortion of competition and impact upon the trade between the Member States) to the three following categories: (i) non-taxation of retail establishments with a sales area of less than 2500 m^2; (ii) tax relief for retail establishments which require large areas; and (iii) and the exemption of collective retail establishments.

4.3.1 Non-taxation of retail establishments with a sales area of less than 2500 m^2

The question arose as to whether the non-taxation of smaller retail establishments was a derogation from the ordinary system, in so far as it differentiates between operators who, in light of the objective pursued by the tax system of that Member State, are in a comparable factual and legal situations.

AG Kokott stressed that there was no unequal treatment of smaller and larger retail establishments in this respect because large retail establishments are also not taxed on the first 2499 m^2 of their sales area.

The CJEU expressed the view that the purpose of the Catalan tax was 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.[49]It follows that the threshold of 2499 m^2 set to distinguish between undertakings with a greater or lesser environmental impact, is consistent with the objectives pursued.[50] Accordingly, small and larger retail establishments are factually not comparable in light of the objectives pursued by the Catalan lawmaker.[51] Consequently, the non-taxation of smaller retailers is not a selective advantage.

4.3.2 Tax relief for retail establishments which require large areas

AG Kokott suggested that retailers selling furniture, doors and windows as well as do-it-yourself stores were exempted from the tax on the grounds that they generally require a larger

[48] Opinion AG Kokott in Case C-233/16, para 79.
[49] Case C-233/16, para 52.
[50] Ibid., para 53.
[51] Ibid., para 55.

sales and storage area on account of their product range.[52] Given that their environmental impacts are likely to be less significant than other large retail establishments, these establishments are factually not comparable with other large retail stores in the light of the objectives pursued by the Catalan lawmaker. The Court found that the exemption does not constitute State aid, provided that 'those establishments do not have as significant an adverse effect on the environment and on town and country planning'.[53] If this were not the case, the measure at issue should be qualified as a State aid.

With respect to garden centres and those selling vehicles, building materials, machinery and industrial supplies, these establishments are reliant on a particularly large area, and fewer customers visit them. Accordingly, the CJEU presumed that they 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.[54] Therefore, the distinction adopted in the contested legislation would not result in selective advantages being given to the retail establishments concerned.

4.3.3 Collective retail establishments

In contrast to the two previous categories, the CJEU held that the collective large retail establishments (e.g. malls) exempted from the tax and the establishments with a sales area above 2500 m^2 were objectively in a comparable situation. The exemption at stake thus created an unlawful distinction between these two categories in light of the objectives of environmental protection and town and country planning. As the other criteria were fulfilled – namely, State resources, liable to affect trade and distort competition[55] – the Court reached the conclusion that such an exemption constituted State aid within the meaning of Article 107(1) TFEU.[56] The Court's reasoning is correct. It occurs to us that malls are likely to have similar adverse effects on the environment and town and country planning to those of other large retail establishments.

CONCLUSIONS

Member States retain a large measure of discretion in the field of environmental taxation. However, their room for manoeuvre is not unfettered, given that they have to comply with primary law, and in particular with the freedom of establishment and State aid rules. The significance of the judgment under review lies in the fact that the CJEU has adopted a nuanced position regarding the validity of the Catalan tax scheme. The CJEU reached the conclusion that the tax arrangement was neither a direct nor a covert discrimination. Given that Article 49 TFEU was inapplicable, it was not necessary to assess the proportionality of the tax at issue. With respect to the selectivity test to assess whether a national measure is State aid, the Court paid heed to the environmental and land planning objectives underpinning the regional tax arrangement. These objectives justified most of the exemptions provided under the Catalan legislation. Consequently, they did not constitute State aid within the meaning of Article 107(1) TFEU. Accordingly, national authorities are allowed to lay down distinctions between the different categories of establishments inasmuch as that differentiation

[52] Kokot, para 93.
[53] Case C-233/16, para 67.
[54] Ibid., para para 59.
[55] Ibid., paras 62-66.
[56] Ibid., para 68.

is made in support of environmental and land planning objectives. Thus, the non-taxation of smaller retail establishments is not a selective advantage on the account that these establishments have reduced environmental adverse effects. In contrast, the exemption granted to collective large retail establishments (e.g. malls) was inconsistent with the objectives pursued by the Catalan lawmaker. Such an exemption amounted thus to State aid.