

---

## Spain

---

### The Existence of State Aid in Tax Exemptions on Large Commercial Establishments

*The Spanish Supreme Court (SC) has resolved in judgments of 16 October 2018, as well as in those of 2 October 2018 and 26 September 2018, regarding the existence or not of aid in taxes on large commercial establishments in the Autonomous Regions of Aragon, Asturias and Catalonia, respectively.<sup>1</sup> In particular, it refers to the 'Tax on environmental damage caused by large commercial establishments' in Aragon (IDMGAV) and the 'Tax on large commercial establishments' in Asturias and Catalonia (IGEC).*

The controversial issue concerned the fact that these taxes levy the environmental externalities of large commercial establishments or those carrying out certain activities which are considered harmful but exempt or reduce the tax burden of those which do not exceed a certain size or do not perform such activities (eg exclusive sales of machinery, gardening,

building materials, vehicles and/or supply of fuel).

The Spanish Supreme Court raised several questions to the Court of Justice of the European Union (CJEU) in order to achieve a preliminary ruling and decided on the basis of those considerations, finally classifying as aid exclusively the tax exemption on collective commercial establishments in Catalonia, as opposed to individuals.

The European Commission intervened and Advocate General Kokott delivered her opinion.

In the Commission's analysis, it considered that these measures would be compatible with the State aid rules, if it was demonstrated that they were necessary, appropriate and proportional in order to achieve the objectives of environ-

mental protection and land-use planning, and that they did not respond to purely economic criteria. It concluded that, in order for these measures to be compatible with the aid rules, it would be necessary to justify (i) the reasons for exempting small commercial establishments or certain activities which could also generate negative externalities, (ii) the fact that the size was the best criteria for establishing two different tax treatments and (iii) the relationship between the fixing of exemptions and rebates and the externalities produced.

The European Commission appreciated that these tax treatment differences included (i) economic issues in so far as the legislator argued that it was necessary to compensate the imbalance between the two types of commercial establishments by recognizing the predominant position of the large ones and the difficulty of the small ones in maintaining their commercial quotas and (ii) foreign policy issues considering that the owners of most of the large commercial es-

---

DOI: 10.21552/estal/2019/2/17

<sup>1</sup> Spanish Supreme Court Judgment, n° 1506/2018 of 16.10.18; Spanish Supreme Court Judgment, n° 1456/2018 of 2.10.18; Spanish Supreme Court Judgment, n°1424/2018 of 26.09.18.

establishments belonged to other member states.

In the end, it concluded that these taxes violated the freedom of establishment and equal treatment and constituted State aid for the small commercial establishments. It also recognized the responsibility of the respective authorities to ensure whether these taxes levy foreign companies or whether they responded to the logic and structure of the tax system.<sup>2</sup>

On the other hand, Advocate General Kokott considered that the imposition of these taxes did not constitute a discriminatory measure because of the fact that foreign investors opened larger commercial establishments would affect the entry into a new market more than the 'nationality' of the economic operator, and that there was no enough evidence of such discrimination.

Lastly, it specified that there was no State aid, since (i) large and small commercial establishments were not in a factual and legally comparable situation given their

differences and that (ii) no advantage was granted to the latter either because the income obtained was used for the purposes of the tax system.<sup>3</sup>

The CJEU answered as follows:

First of all, it considered that there was not sufficient evidence to show that these measures were intended to pursue the discriminatory effect.

As regards the requirement of selectivity to consider the existence of State aid, the CJEU mentioned that the two types of commercial establishments would not be in a comparable factual and legal situation since it could not be denied that their environmental impact depended on their size and the type of the activities performed.

The one and only exception in which aid could be granted, given the selectivity and provided that the other requirements of Article 107 of the TFEU were met, was the exemption in the Catalan IGEC for collective commercial establishments (of an area equivalent to or

greater than 2,500 m<sup>2</sup>) since, on the other hand, individual commercial establishments of an equivalent area were taxed.

Lastly, it appreciated that, for the delimitation of two categories of commercial establishments with different tax burdens depending on the performance of one type of activity or another, the corresponding authority would have to demonstrate the reasons why their legal situation is not similar considering the objectives to be achieved.

In conclusion, on the basis of the questions referred for a preliminary ruling by the CJEU, there would not be any State aid if higher tax burdens were established for large establishments over smaller ones considering that these establishments are not in comparable legal and factual situations and respond to the legislator's intention to reduce the negative externalities in the environment of those of larger size or that perform certain activities.<sup>4</sup>

However, the CJEU left a certain margin of discretion to the Spanish Supreme Court to carry out this analysis and determine whether the differentiation criteria between the two types of commercial establishments were justified.<sup>5</sup>

The SC solved the cases according to the considerations of the CJEU, with regard to the IDMGAV of Aragón,<sup>6</sup> the IGEC of Asturias<sup>7</sup> and Catalonia<sup>8</sup> on the basis of their compliance with the tax system principles. However, the SC classified as aid the exemption of collective commercial establishments of the IGEC of Catalonia.

Thus, the Spanish Supreme Court considered that these differences in tax treatment were not re-

2 European Commission. Written observations of 29.08.2016 in Joined cases C-233/16 to C-237/16 [2016] S J .C (2016)5342480 [55-135, 136-173].

3 Opinion of Advocate General Kokott of 09.11.17 in Case C-233/16 *Asociación Nacional de Grandes Empresas de Distribución (ANGED) vs Generalitat de Catalunya* [2017] ECLI: EU: C: 2017: 852 [24-60, 61-108]; Opinion of Advocate General Kokott of 09.11.17 in Joined Cases C-234/16 and C-235/16 *Asociación Nacional de Grandes Empresas de Distribución (ANGED) v Consejería de Economía y Hacienda del Principado de Asturias and Consejo de Gobierno del Principado de Asturias* [2017] ECLI: EU: C: 2017: 853 [23-58, 59-102]; Opinion of Advocate General Kokott of 09.11.17 in Joined Cases C-236/16 and C-237/16 *Asociación Nacional de Grandes Empresas de Distribución (ANGED) v Diputación General de Aragón* [2017] ECLI: EU: C: 2017: 854 [23-60, 67-106].

4 For a more in-depth analysis of the pronouncement in the case of Catalonia see: Juan Jorge Piernas López, 'Revisiting Some Fundamentals of Fiscal Selectivity: The ANGED Case' [2018] 2 EStAL 274.

5 Case C-233/16 *Asociación Nacional de Grandes Empresas de Distribución (ANGED) and Generalitat de Catalunya* [2018] ECLI:EU:C:2018:280 [28-35, 36-68]; Joined Cases C-234/16 and C-235/16 *Asociación Nacional de Grandes Empresas de Distribución (ANGED) v Consejería de Economía y Hacienda del Principado de Asturias y Consejo de Gobierno del Principado de Asturias* [2018] ECLI:EU:C:2018:281 [20-28, 29-55]; Joined Cases C-236/16 and C-237/16 *Asociación Nacional de Grandes Empresas de Distribución (ANGED) v Diputación General de Aragón* [2018] ECLI:EU:C:2018:291 [15-23, 24-51].

6 Spanish Supreme Court Judgment, n° 1506/2018 of 16.10.18.

7 Spanish Supreme Court Judgment, n° 1456/2018 of 2.10.18.

8 Spanish Supreme Court Judgment, n° 1424/2018 of 26.09.18.

garded as State aid as they could be justified in relation to the principles of environmental protection and land-use planning.

However, the SC, considering that its competence is confined to deciding on interpretative questions, left a margin for the lower courts to verify and decide otherwise, in the event that the acts applying these taxes were disputed jurisdictionally.

Therefore, those interested in demonstrating that these measures constitute State aid could re-

open the case before the national courts and demonstrate whether any of them did not comply with these principles and the national courts could have the opportunity again to decide whether or not they are State aid according to the evidence presented.

This case-law illustrates that the sovereign fiscal authorities can es-

tablish different tax treatments that could be compatible with the aid rules, as long as they respond to objective reasons of general interest and are appropriate, necessary and proportional to the objectives they target.

*Nuria Arenas and  
Marina Lafuente\**

---

\* Nuria Arenas is Partner at Broseta Abogados S.L.P, specialized in State aid and institutional relations. Marina Lafuente is a Junior Lawyer at the same law firm. For correspondence: <mlafuente@broseta.com>.