Provisional text

OPINION OF ADVOCATE GENERAL
KOKOTT
delivered on 16 February 2017 (1)

Case C-74/16

Congregación de Escuelas Pías Provincia Betania

v

Ayuntamiento de Getafe

(Reference for a preliminary ruling from the Juzgado de lo Contencioso-administrativo No 4 de Madrid (Court for Contentious Administrative Proceedings No 4, Madrid, Spain))

(Competition — State aid — Article 107(1) TFEU — Spanish tax on constructions, installations and works — Tax exemption for the Catholic Church — Demarcation between economic and non-economic activities of the Catholic Church — Activities of the Catholic Church which do not pursue a strictly religious purpose — Activities in the context of the social, cultural or educational mission of the Catholic Church — Churches, religious associations and religious communities — Article 17 TFEU — Article 351 TFEU)

I – Introduction

1. Does the exemption from certain taxes granted by a Member State to a religious community, even in respect of activities which have no strictly religious purpose, constitute State aid prohibited under Article 107(1) TFEU? That is, essentially, the question which is referred to the Court by a Spanish court in the present case.

2. The question arises against the background of various tax exemptions granted to the Catholic Church by the Kingdom of Spain pursuant to an international agreement entered into in 1979 with the Holy See. Relying upon that agreement, the Catholic Church, as the institution responsible for a church school, seeks in the present case to obtain reimbursement of a municipal tax which it is liable to pay in respect of construction works carried out on one of the school's buildings.

3. Since EU competition law applies only to undertakings, the outcome of this dispute turns on the not always straightforward boundary between economic and non-economic activity. It is sufficiently well known from earlier judgments (2) that the education sector in particular stands at the interface between entrepreneurial and social or indeed cultural objectives.

4. There is a further dimension to the issue in the present case, inasmuch as it ultimately concerns the relationship between State and Church on which EU primary law specifically focused in Article 17 TFEU. In the light of the frequently very passionate debate concerning the role of religion and religious communities in a modern European society, (3) the present case could not be more topical. The legal questions raised are no doubt of great interest far beyond the borders of Spain to many other Member States as well.

5. Since Spain's agreement with the Holy See dates from the time before Spain's accession to the European Communities, in resolving the case, consideration must also be given to Articles 108 and 351 TFEU.

II – Legal Framework

A – *EU law*

6. The EU law framework of this case is provided by Article 107(1) TFEU, contained in Title VII, Chapter 1, of the FEU Treaty ('Rules on Competition'):

'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 shall, in so far as it affects trade between Member States, be incompatible with the internal market.'

7. In addition, reference should be made to Article 17(1) TFEU in Part One, Title II, of the FEU Treaty ('Provisions having general application'), which is worded as follows:

'The Union respects and does not prejudice the status under national law of churches and religious associations or communities in the Member States.'

8. Finally, Article 351 TFEU, a provision from Part Seven of the FEU Treaty ('General and Final Provisions'), is also of relevance.

'The rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding States, before the date of their accession, between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of the Treaties.

To the extent that such agreements are not compatible with the Treaties, the Member State or States concerned shall take all appropriate steps to eliminate the incompatibilities established. Member States shall, where necessary, assist each other to this end and shall, where appropriate, adopt a common attitude.

In applying the agreements referred to in the first paragraph, Member States shall take into account the fact that the advantages accorded under the Treaties by each Member State form an integral part of the establishment of the Union and are thereby inseparably linked with the creation of common institutions, the conferring of powers upon them and the granting of the same advantages by all the other Member States.'

B – *Public international law*

9. The Agreement of 3 January 1979 between the Spanish State and the Holy See on financial matters (4) provides, in the first subparagraph of Article IV(1)(B) 1, for 'complete and permanent exemption from property and capital gains taxes and from income tax and wealth tax' in respect of properties of the Catholic Church.

10. As is, however, apparent from subparagraph 2 of that provision, the tax exemption in question does 'not apply to income from economic undertakings or from assets in respect of which use has been assigned to third parties' or to 'capital gains, or income subject to deduction at source of income tax'.

11. Article VI of the 1979 Agreement contains a dispute-settlement mechanism under which the Holy See and the Spanish Government undertake to resolve problems arising out of the interpretation and application of the Agreement by mutual consent and having regard to the principles contained in the Agreement.

C – *National law*

12. The tax levied in Spain on constructions, installations and works (5) dates back to a law of 1988. Currently, it is founded on Article 100(1) of the Law on the regulation of local finances, (6) as amended by Royal Legislative Decree (7) 2/2004 of 5 March 2004. (8) It is an indirect municipal property tax, the proceeds of which go to the Spanish municipalities.

13. By an order of 5 June 2001, (9) the Spanish Ministry of Finance made clear that the tax on constructions, installations and works fall under Article IV(1)(B) of the 1979 Agreement. This 2001 Order was later amended by an order of 15 October 2009 (10) in such a way as to provide that the tax exemption at issue was to apply only to buildings exempted from property tax, (11) that is to say to buildings devoted solely to religious purposes. (12) However, the 2009 Order was declared void by judgment of the Audiencia Nacional of 9 December 2013, on the ground that it infringed Article IV(1)(B) and Article VI of the 1979 Agreement. (13)

III – Facts and main proceedings

14. The Congregación de Escuelas Pías Provincia de Betania (Comunidad de Casa de Escuelas Pías de Getafe, PP. Escolapios) (14) is an establishment of the Catholic Church and as such is governed by the 1979 Agreement. It is the owner of a property in the Municipality of Getafe near Madrid on which the La Inmaculada school is situated.

15. On 4 March 2011, the Congregación applied to the Getafe municipality for planning permission to renovate and extend a freestanding building on that property. The building in question is used by the school as a hall. The hall was to be equipped with 450 seats to enable it to be used for meetings, courses, conferences, etc.

16. The planning permission was issued on 28 April 2011 and, in that connection, the Congregación had to pay tax of EUR 23 730.41 in respect of constructions, installations and works.

17. However, subsequently, the Congregación, relying on Article IV(1)(B) of the 1979 Agreement, applied for a refund of the tax paid by it.

18. By decision of 6 November 2013, the municipal tax authority (15) refused that application. It substantiated its decision by stating that the tax exemption could not apply since the relevant activity was one which was not related to the religious objectives of the Catholic Church. Following an objection by the Congregación, the refusal decision was upheld by the head of the municipal tax authority in a decision of 27 February 2014. On 21 May 2014, the Congregación brought proceedings before the Juzgado de lo Contencioso-administrativo No 4 (Court for Contentious Administrative Proceedings No 4), Madrid, Spain, the referring court.

IV – Preliminary question and procedure before the Court

19. By order of 26 January 2016, the Juzgado de lo Contencioso-administrativo No 4 (Court for Contentious Administrative Proceedings No 4), Madrid, referred the following question to the Court of Justice for a preliminary ruling under Article 267 TFEU:

'Is the exemption of the Catholic Church from the tax on constructions, installations and works contrary to Article 107(1) of the Treaty on the Functioning of the European Union, where the exemption relates to work on buildings intended to be used for economic activities that do not have a strictly religious purpose?'

20. The Spanish Government and the European Commission submitted written observations in the proceedings before the Court. At the hearing on 10 January 2017, alongside those parties, the Congregación and the Ayuntamiento de Getafe were represented as parties to the dispute in the main proceedings.

V – Assessment

A – *Admissibility of the order for reference*

21. In accordance with Article 94 of the Rules of Procedure of the Court of Justice, (16) in addition to the question submitted for a preliminary ruling, the request for a preliminary ruling must contain the information necessary in regard to the factual and legal context of the dispute in the main proceedings. The referring court must also state what connection exists between the EU law provisions to be interpreted and the dispute in the main proceedings, and must indicate the grounds giving rise to its doubt as to the interpretation or validity of those provisions. Under the case-law, particular significance is attached in competition-law proceedings to information concerning the factual and legal context. (17)

22. Against that background, the Government of Spain and the Commission express doubts as to the admissibility of the request for a preliminary ruling in the present case. However, none of these challenges appear to me to withstand scrutiny.

23. First, I am not persuaded by the criticism expressed by the Government of Spain that the question referred for a preliminary ruling raises a purely hypothetical question and is seeking to obtain an expert opinion on an interpretation of EU law having nothing to do with the reality of the dispute in the main proceedings.

24. First of all, it is settled case-law that, as regards preliminary questions concerning EU law, there is a presumption in favour of the relevance of the questions submitted for a ruling, (18) and in that connection, the referring court is afforded a discretion. (19) Further, in the present case, it is far from clear that the interpretation of Article 107 TFEU requested is unconnected with the reality or subject matter of the dispute in the main proceedings. The correct construction of Article 107(1) TFEU is of considerable relevance to the outcome of the action brought by the Congregación; after all, the tax exemption sought can be granted only if it does not conflict with EU law provisions on State aid. The doubts expressed in this regard by the referring court are sufficiently clear from the order for reference.

25. Secondly, as regards the presentation of the legal context of the dispute in the main proceedings, the request for a preliminary ruling does not exhibit any obvious gaps, contrary to the view put forward by the Government of Spain. The order for reference intelligibly sets out the pertinent provisions of Spanish tax law and the relevant international law provisions of the 1979 Agreement. Moreover, the Government of Spain has identified no legal provision which the referring court either disregarded or failed to mention.

26. Thirdly, the presentation in the order for reference of the factual context in which the legal dispute in the main proceedings arose is also sufficient. It must admittedly be conceded that the Government of Spain and the Commission are right that the referring court could have described the activity of the Congregación in the education sector in general, as well as the use of the building at issue, with greater precision. Nonetheless, the order for reference contains all the information necessary for an understanding of the question referred and its scope. That is borne out not least by the views submitted to the Court by the Government of Spain and the Commission itself, (20) to which the Ayuntamiento de Getafe (Municipality of Getafe) rightly referred at the hearing.

27. It follows from all of the foregoing that the request for a preliminary ruling is admissible.

B – *Substantive appraisal of the question*

28. By its question, the referring court essentially seeks to ascertain whether the tax exemption at issue is to be regarded as State aid prohibited under Article 107(1) TFEU, where that tax exemption is applied to school buildings.

1. Applicability of the EU provisions on State aid

29. The first thing to consider is whether the prohibition in Article 107(1) TFEU on State aid can apply at all in a case such as this given that Article 17 TFEU requires the EU to respect the status of churches (21) in the Member States and not to prejudice that status. (22)

30. With Article 17 TFEU, the Treaty of Lisbon took over a provision which was already contained in Article I-52 of the Treaty on a Constitution for Europe (23) and whose origins go back to the 1997 Declaration on the status of the churches and non-confessional organisations. (24)

31. Ultimately, Article 17 TFEU gives specific effect to and complements the more general requirement enshrined in Article 4(2) TEU on respect for the national identity of the Member States inherent in their fundamental political and constitutional structures.

32. There is no doubt that Article 17 TFEU gives expression to the particular role played in society by churches in the Member States. The provision cannot, however, be construed as a sectoral exception under which the activity of the churches in general is seen as taking place outside the scope of EU law. In

particular, EU law must come into play where churches are economically active, (25) as is acknowledged in the Court's settled case-law in regard to sports associations or clubs (26) and educational establishments. (27)

33. In a case such as this, Article 17 TFEU is of particular significance, not because the activity of the churches is excluded from the scope of EU law but rather because *in the interpretation and application of EU law* the status of the church has to be respected and may not be prejudiced.

2. The concept of State aid under Article 107(1) TFEU

34. The prohibition on State aid under Article 107(1) TFEU is intended to prevent trade between Member States from being affected by benefits granted by public authorities which, in various ways, distort or threaten to distort competition by favouring certain undertakings or the production of certain goods. (28)

35. In its reference for a preliminary ruling, the national court expressly proceeds on the basis that the school building in question is intended for an economic use, rather than a purely religious one. However, in order to give the referring court a constructive reply enabling it to resolve the legal dispute in the main proceedings in the best possible way, (29) I shall first set out, in the context of my observations on Article 107(1) TFEU, the criteria for determining whether there is any economic activity within the meaning of EU law (see Section (a) below). I shall then go on to discuss the specific criteria for the prohibition of State aid (see Section (b) below).

(a) The concept of the undertaking as a basic prerequisite for the application of European competition law

36. The first matter to emphasise is that EU competition law concerns only the activities of undertakings. (30)

37. The concept of an undertaking must be understood from a functional perspective and encompasses every entity engaged in an economic activity, regardless of the legal form of the entity and the way in which it is financed. (31) An organisation that does not carry on an economic activity is not an undertaking within the meaning of competition law. (32)

38. The fact that the performance of religious, pastoral and social tasks is ordinarily at the heart of the activity of churches does not, as such, preclude specific church activities from nonetheless being deemed to be economic in nature. Each activity exercised by a given entity must be classified as economic or non-economic separately. (33)

39. An economic activity is any activity consisting in offering goods and services on a specific market. (34) In that connection, the lack of a profit motive or lack of an intention to achieve a profit are not in themselves enough to rebut the presumption of an economic activity as long as goods and services are offered. (35)

40. The tax exemption at issue in the main proceedings is sought by the Congregación in connection with construction works at one of its school buildings. It is therefore ultimately connected with the educational activity of the Congregación as the body responsible for La Inmaculada school.

41. Whether the educational activity is to be classified as an economic activity is dependent on an overall assessment of the circumstances of the specific case which is a matter for the national court. In that connection, regard must be had both to the financing of the education and to the tasks and objectives of the body running the school realised through the education provided. (36)

42. Where a church institution operates its educational establishments wholly or predominantly in a commercial manner, and provides the instruction given there essentially in exchange for the financial contributions and other payments or donations in kind (37) made by the pupils or their parents, it is offering services within the meaning of Article 56 TFEU (38) and, consequently, becomes economically active.

43. That is not the case, by contrast, where the church institution does not operate its educational establishments in a commercial manner but as part of its general mission in the social, cultural and educational sector and has no recourse, or only marginal recourse, to pupil or parent contributions for the financing of the instruction provided there. In such a case it is not offering services within the meaning of Article 56 TFEU (39) and is thus also not economically active.

44. Contrary to the view of the national court, for church-provided education to be classified within the non-economic sector, neither the instruction itself nor the buildings in which such instruction is provided need to be pursuing a 'strictly religious objective'. (40) Rather, for the provision of such education to be deemed non-economic, it is sufficient if a genuinely social, cultural or educational objective is being pursued.

45. This view of the matter is supported also by the duty to pay heed to the special status of the churches enshrined in Article 17(1) TFEU. For that status entails the churches performing not only strictly religious tasks in society but also making significant contributions to social, cultural and educational objectives. To classify the activity of the churches in the social, cultural or educational areas generally as forming part of normal economic life, would be to ignore the special nature of that activity and, thus, ultimately also the special status of the churches.

46. As was apparent from the hearing, the premises of the La Inmaculada school are predominantly used for providing instruction equivalent to compulsory education in state schools (educación obligatoria, comprising educación primaria and educación secundaria obligatoria). Those educational services are provided pursuant to an agreement between the Congregación and the competent Spanish Region — the Comunidad de Madrid (Autonomous Community of Madrid) — and the major part of the services is financed by public funds, with monetary payments and donations in kind by pupils or their parents playing only a marginal role. (41) The compulsory education provided at the La Inmaculada school may thus be regarded as being fully integrated into the public education system in Spain.

47. Such circumstances all support the view that the use of the hall, the school building at issue in this case, pursues a specifically social, cultural and educational objective, and the activity of the Congregación in that connection is of a non-economic nature, even if there is a certain degree of competition within

the education sector as a result of the choice available to pupils and parents between different schools in the public or private sectors.

48. However, it became apparent at the hearing that, in addition to compulsory instruction, the La Inmaculada school also provides other educational services which, under the Spanish system, are deemed to be voluntary. Examples of these are early-years teaching (educación infantil) and post-compulsory education (educación postobligatoria), leading either to the baccalaureate (bachillerato) or to vocational training (formación profesional). As the representative of the Congregación acknowledged before the Court, in order to finance this voluntary educational provision, a financial contribution is levied on the parents of the pupils.

49. That state of affairs indicates that at least a part of the educational services provided by the Congregación at the La Inmaculada school are classic services within the meaning of Article 56 TFEU or at least have strong similarities with such services. (42)

50. In these circumstances, the Congregación at its La Inmaculada School is operating partly economically and partly non-economically in terms of the educational services it provides. Accordingly, the hall at issue in the proceedings is not exclusively devoted to a social, cultural and educational objective but is used, at least proportionately, for an entrepreneurial activity by the Congregación.

51. In the proceedings before the Court there was no ultimate clarity as to the proportion of voluntary education, as compared to compulsory education, provided at La Inmaculada school, with the result that, on the basis of the information available to the Court, it is not possible to quantify the proportion of economic and non-economic activity by the Congregación.

52. In any event, it is for the national court, under the procedural autonomy it enjoys at national level, to make the necessary findings as to the activity of the Congregación from which it may be possible to determine the use to which the hall at issue is put. In that connection, it will definitely not be possible to focus solely on the proportion of the premises of La Inmaculada school devoted to one or other type of education, in terms of the overall usable surface area of the buildings complex. (43) Much greater weight needs, in my view, to be attached to other factors, such as, in particular, the number of school classes and lessons, as well as the number of pupils (44) and teachers allocated to one or other form of instruction. A further matter to be taken into consideration is the average annual budget which the school allocates to each form of instruction.

53. If the entrepreneurial activity of the Congregación, in comparison with its educational provision for social, cultural and educational purposes, is not conducted on any significant scale, but is entirely ancillary, then it would be justifiable overall to regard the Congregación as operating in a non-economic manner. That was also rightly submitted by the Commission at the hearing before the Court.

54. Such a view of the matter is above all justified for reasons of simplification, and results in the least bureaucratic application possible of the provisions of EU law concerning State aid. However, in order to ensure observance of the principle of legal certainty, there must be a threshold value to be used by undertakings and national authorities as a rule of thumb for classifying economic activity as being of a wholly ancillary nature.

55. The Commission seems to proceed on the basis that economic activity up to 20% of the total educational provision offered by an establishment such as the Congregación is a purely ancillary activity and of entirely secondary significance. On that point, the Commission relies on its general block exemption regulation (45) and on the EU framework for State aid for research published by it. (46)

56. It is certainly true that the general block exemption regulation — a binding legal act within the meaning of Article 288(2) TFEU — must be given particular consideration when examining the facts of the present case. Yet on closer inspection there is no reference in the operative part of this regulation to any kind of threshold value of 20%. Only in the preamble to the regulation is any mention made of such a percentage as a rule of thumb and that is in a quite specific context, in connection with research infrastructure. (47) An essentially identical formulation is to be found, again related to research establishments or research infrastructure, in the EU framework for research aid, a Commission communication, which is not legally binding, in which the Commission announces its administrative practice and suggests certain measures for the Member States to adopt. (48)

57. Under these circumstances, it does not appear to me that we are bound to apply the comparatively high threshold value of 20% mentioned by the Commission specifically for research infrastructure as a general rule for determining whether an activity is of an economic or non-economic nature.

58. Instead, borrowing from the customary threshold values in competition law (49) and in other areas relevant to the internal market, (50) the presumption should be that, in a normal case, an economic activity, in contrast to non-economic activity, may be regarded as entirely ancillary only where it constitutes less than 10% of the relevant activity of the establishment concerned in the relevant sector (in this case 10% of the activity of the Congregación in the sector of school education provision).

59. If, on the other hand, the economic activity of an establishment such as the Congregación amounts to 10% or more, such establishment must be deemed to be operating partly in an economic manner and partly in a non-economic manner. Accordingly, the preferential treatment accorded to it by the State, in this case, the tax exemption, would be deemed pro ratato be a possible benefit which would fall to be assessed in the light of the prohibition on State aid under Article 107(1) TFEU.

60. On the basis of all of the foregoing, it must be stated that a tax exemption such as the one at issue in this case does not, in the absence of any economic activity by the Catholic Church, fall within the scope of Article 107(1) TFEU, where a school building is used by the church for the provision of education services in the context of its social, cultural and educational mission. Conversely, there will be an economic activity where the relevant building is used for genuinely commercial purposes.

(b) The four conditions for the application of Article 107(1) TFEU

61. Only in so far as the Congregación is economically active on the basis of what has been stated above, (51) and is therefore to be regarded as an undertaking, is the tax exemption sought by it to be tested against the yardstick of Article 107(1) TFEU.

62. 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 shall, in so far as it affects trade between Member States, be incompatible with the internal market'.

63. Classification as 'aid' within the meaning of Article 107(1) TFEU requires that all the conditions set out in that provision are fulfilled. (52)

64. 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 an advantage on the recipient. Fourth it must distort or threaten to distort competition.(53)

65. In the examination of these conditions, it is settled case-law that it is less the subjective aims of the national authorities than the effects of the measure adopted which have the greatest relevance. (54)

i) Concept of 'intervention by the State or through State resources'

66. As regards, first, the criterion of 'aid granted by a Member State or through State resources', it is recognised that Article 107(1) TFEU not only embraces positive benefits such as subsidies but also measures which, in various forms, reduce the burdens normally to be borne by an undertaking and are thus not subsidies in the strict sense of the term but analogous to them in nature and effect. (55)

67. Preferential tax treatment which, although not involving a transfer of State resources, places the beneficiaries in a more favourable financial situation than other taxpayers, also falls within the scope of Article 107(1) TFEU. (56) Naturally, that also applies where the relevant preferential treatment is granted by an infra-State authority, in this case a municipality, or reduces that authority's revenue, since Article 107(1) TFEU refers to all measures financed from State resources and attributable to the State. (57)

68. The fact that the tax exemption at issue in the present case stems from the 1979 Agreement, and thus has its origin in public international law, does not preclude it from being a measure financed by the State or though State resources. First, the 1979 Agreement came into existence with the due participation of the Spanish State and was ratified by it. In terms of EU law, it is thus to be treated in the same way as national law. Secondly, in respect of tax on constructions, installations and works, the Agreement gives rise to a revenue waiver on the part of the public authorities in Spain. Thirdly, the Spanish State also cooperates in the interpretation and giving of actual effect to the Agreement, as is evidenced by the various decrees of the Finance Ministry. (58) Fourthly, the dispute settlement mechanism under Article VI of the Agreement confers on the Spanish State a decisive role in the interpretation and development of the Agreement.

ii) Selective advantage

69. Article 107(1) TFEU prohibits aid 'favouring certain undertakings or the production of certain goods', that is to say selective aid. (59) According to case-law, what characterises the selective nature of the advantage is that certain undertakings or the production of certain goods are favoured in relation to other undertakings which, in the light of the objective of the measure at issue, are in a comparable factual and legal situation. (60)

70. According to settled case-law, in order for a tax advantage to be adjudged selective, the crucial factor is that the underlying State measure departs from the general system by introducing an unjustified distinction between economic operators who are in a comparable factual and legal situation, as regards the objective pursued by the tax rules of that Member State. (61)

71. Under the 'general system' concerned in this case, in Spain, a tax in favour of the municipality is levied on all constructions, installations and works. The fact that under the 1979 Agreement only the Catholic Church does not have to pay this tax constitutes an advantage for it which puts it in a better financial position than other economic operators, to the extent to which it is economically and therefore entrepreneurially active. (62) In no way is it an advantage founded on a general measure applicable without distinction to all economic operators and available to anyone satisfying the conditions for it to be granted. (63)

72. It is true that the Court of Justice recognises that a tax advantage is not selective where the preferential treatment is justified by the nature and overall structure of the tax system, in particular if the Member State concerned can show that that measure results directly from the basic or guiding principles of its tax system. (64) However, on the basis of all the information available to the Court, there can be no such justification in a case such as this. The grounds underpinning the tax exemption of the Catholic Church are not apparent either from the structure of the relevant tax rules, or from the basic or guiding principles of the Spanish tax regime. The tax exemption at issue is based rather on the 1979 Agreement. It is therefore based on assessments originating outside Spanish tax law which, consequently, do not preclude the advantage from being selective.

73. Nonetheless, there may be no selective advantage within the meaning of Article 107(1) TFEU where the tax exemption at issue is merely intended to offset any burdens assumed by the Catholic Church in the area of public-service obligations. In determining whether that is the case the criteria laid down in *Altmark Trans* (65)are the relevant tests to be applied.

74. In the application of those criteria, the special status of the churches must be taken into due consideration, pursuant to the constitutional mandate in Article 17(1) TFEU. This may result in the educational services offered in a church school being regarded as the discharge of public-service obligations, especially where those education services are integrated into the State education system. (66)

75. However, the *general* exemption of the Catholic Church from a tax on constructions, installations and works is not an objective and transparently calculated compensation for the *specific* burdens incurred by the churches in the discharge of public-service obligations. (67) Rather, such compensation should be effected only by targeted measures, in particular by specific financial allocations by the State, in which connection, however, it should be verified whether the financial allocations which the Congregación already receives from the Spanish State represent a sufficient offset.

76. Without the arrangements mentioned being put in place, the *Altmark Trans* case cannot, in a case such as this, preclude a selective advantage for the Catholic Church.

iii) Effect on trade between Member States and distortion of competition

77. The third and fourth conditions in Article 107(1) TFEU, which are closely connected, deal with the effects of State aid on competition and on intra-EU trade respectively. In accordance with settled case-law, there is no requirement for proof of an actual effect on trade between Member States and an actual distortion of competition, but only an examination of the issue whether a measure is liable to affect trade and to distort competition. (68)

78. A measure is always liable to affect trade between Member States if it strengthens the position of an undertaking compared with other competitors in that trade. The favoured undertaking does not itself need to be a participant in intra-EU trade. (69)

79. With regard to the condition of the distortion of competition, it should be borne in mind 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. (70)

80. For *commercially* provided education services, as discussed in this section of my Opinion, that is to say the voluntary education on offer and other options offered by the school, there is a market on which larger and even smaller suppliers may operate across borders. If one of the suppliers of such education services, such as in this case the Catholic Church, receives an exemption from the tax on constructions, installations and works, and its actual or potential competitors in comparable situations have to pay that tax, that supplier obtains a cost advantage which may work in his favour in terms of competition.

81. Admittedly, in the present case, the tax of EUR 23 730.41 to be paid by the Congregación for the conversion of the hall of the La Inmaculada school is a relatively minor amount compared with other cost factors relevant to the internal market.

82. According to the case-law of the Court of Justice, however, in EU law there is no threshold or percentage below which trade between Member States can be regarded as not having been affected. Neither the relatively small amount of aid nor the relatively small size of the advantaged undertaking can a priori mean that trade between Member States is not affected. (71)

83. Thus, if the economic activity of an establishment is of sufficient weight in order for the establishment to be classified as an undertaking for the purposes of the competition rules of EU law (which is a prior condition for the application of Article 107 TFEU), (72) even relatively small amounts of aid may affect trade between Member States.

84. In addition, under European competition law the effects of measures on intra-EU trade and competition in the internal market are never assessed in isolation but within their economic and legal context. In that connection, consideration should be given to whether what is at issue is an isolated specific instance or a series ('bundle') of problems of the same kind. (73)

85. Where an establishment, in this case the Catholic Church, possesses numerous properties which all are capable of enjoying the tax exemption at issue, its actual competitive advantage goes far beyond what the amount of EUR 23 730.41 at issue in the main proceedings for specific building work, in this case, the renovation of the hall of La Inmaculada school, may, on a superficial view, suggest. For, as the supplier of educational services, the Catholic Church can take into account, in its calculation of costs, the advantage accruing to it in respect of all its school premises from the exemption from tax on constructions, installations and works. If one also considers that the 1979 Agreement provides for a further series of tax exemptions, this advantage is potentially even greater.

86. Moreover, under the *de minimis* Regulation (74) issued by the European Commission, only such aid measures not exceeding a total of EUR 200 000 over a period of three tax years may be deemed to be 'aid measures' which do not 'meet all the criteria in Article 107(1)' of the TFEU. The tax exemption at issue in this case under the 1979 Agreement is not accompanied by any such limit as to amount and time; indeed, under Article IV(1)(B) of that agreement, the tax exemption applies generally and without limit to *all* constructions, installations and works of the Catholic Church in Spain. Consequently, this tax exemption cannot enjoy the benefit of the *de minimis* Regulation.

(c) Interim conclusion

87. In so far, therefore, as the Congregación is economically active and thus to be regarded as an undertaking on the basis of the matters stated above. (75) A tax exemption such as the one at issue in the main proceedings is to be classified as State aid to which the prohibition in Article 107(1) TFEU applies.

3. Consequences of classification as State aid

88. The question remains as to the consequences for the dispute in the main proceedings of the classification of the tax exemption at issue as State aid as defined in Article 107(1) TFEU. Particular implications may arise in this connection from Articles 108 and 351(1) TFEU; the Spanish Government has firmly directed the Court's attention to these issues. In order to give the national court a constructive reply, it is also necessary, in conclusion, to consider briefly those two provisions and the problems to which they give rise. (76)

(a) Demarcation between existing aid and new aid as defined in Article 108 TFEU

89. Article 108 TFEU distinguishes between existing aid and new aid. Whilst new aid may not be implemented if it has not been authorised by the Commission (Article 108(3) TFEU), existing aid provision is subject merely to constant review by the Commission (Article 108(1) TFEU). In other words, for new aid there is a duty of notification and a prohibition on implementation and, in the event of infringement, the grant of the aid is regarded as unlawful, (77) whereas existing aid provision may ordinarily be implemented, provided that the Commission has not determined it to be incompatible with the Treaties. (78)

90. Thus, should the tax exemption at issue be an existing aid provision, under Article 108(1) TFEU, the national court ought not to classify the grant thereof as unlawful, as long as the Commission has not declared it to be incompatible with the internal market.

91. On a superficial view, the fact that the 1979 Agreement predates Spain's accession to the European Communities provides support for the view that we are dealing with an existing aid provision. Spain's accession took place, as we know, only in 1986.

92. However, the only relevant point in time for classifying the measure as an existing aid provision or as new aid should be the time from which the distortion of competition associated with the aid occurs or threatens to occur.(79) In the present case, any such distortion of competition could not have occurred until 1988 when Spain introduced the tax on constructions, installations and works. At that time, Spain was already a Member State of the European Communities.

93. Thus, a tax exemption such as the one at issue in this case cannot be classified as an existing aid provision, but is to be regarded as new aid. Consequently, Article 108 TFEU would not prevent the national court in the dispute in the main proceedings from assuming there to be an unlawful grant of aid.

(b) Consideration of Article 351 TFEU in the light of the 1979 Agreement

94. Finally, the question remains whether Article 351 TFEU allows or even requires the referring court to refrain from prohibiting State aid under Article 107(1) TFEU, and to allow the Catholic Church to enjoy the tax exemption at issue, even if it is actually unlawful State aid.

95. Under Article 351(1) TFEU, the rights and duties under a public international law agreement entered into by a Member State prior to accession to the EU with a non-Member State are not affected by EU law.

96. Article 351 TFEU is of general scope and applies to all international agreements which may impact on the application of EU law, irrespective of subject matter. (80) That provision may thus also be entirely applicable to the 1979 Agreement.

97. However, there is no *obligation* under Article 351 TFEU to depart from provisions of EU law such as Article 107(1) TFEU. The Member States are merely given the *possibility* of continuing to adhere to obligations under public international law incurred before their accession to the EU (81) and to that end, if necessary, to depart from EU law provisions. (82) However, in so far as the international agreement in question allows the Member State a margin of discretion, it must use that in such a way as to conduct itself in a manner which is consistent with EU law. (83)

98. In any event, it is not for the Court but for the national court to determine the extent of obligations under international law imposed on Spain by the 1979 Agreement. (84)

99. The referring court will therefore have to examine whether it necessarily follows from Article IV(1)(B) of the 1979 Agreement that the Catholic Church must *generally be exempt* from the tax on constructions, installations and works in respect of *all* its buildings in Spain, even those which are devoted, either wholly or in part, to an economic activity. Only then would there be conflict with the prohibition on State aid under Article 107(1) TFEU, and only then would Article 351(1) TFEU allow the referring court to depart from Article 107(1) TFEU in resolving the dispute in the main proceedings.

100. Incidentally, it should be observed that, in such a case, the Spanish State would be obliged under Article 351(2) TFEU to apply all appropriate means in order to remove any incompatibility of Article IV(1)(B) of the 1979 Agreement with the EU law provisions on State aid. First, Spain would have to make active use of the dispute-settlement mechanism in Article VI of the Agreement in order, in consultation with the Holy See, to achieve, at least for the future, an interpretation of Article IV(1)(B) of the Agreement which is compatible with EU law and, in particular, with Article 107(1) TFEU. If, in that way, a solution in conformity with EU law were not achieved within a reasonable space of time, Spain would have to give notice of termination of the Agreement. (85)

4. Summary

All in all it may be stated as follows:

101. A tax exemption, such as that at issue in this case, does not contravene the prohibition on State aid under Article 107(1) TFEU, where it affects a school building which is used by the Catholic Church for the provision of educational services in the context of its social, cultural and educational mission. On the other hand, that tax exemption would constitute State aid prohibited under Article 107(1) TFEU if the building concerned were used for genuinely commercial objectives.

VI – Conclusion

102. In the light of the foregoing considerations, I propose that the Court answer the question referred by the Juzgado de lo Contencioso-administrativo No 4 (Court for Contentious Administrative Proceedings No 4), Madrid for a preliminary ruling as follows:

An exemption from the tax on constructions, installations and works to which the Catholic Church is entitled under the Agreement of 3 January 1979 between the Spanish State and the Holy See concerning economic matters does not contravene the prohibition on State aid under Article 107(1) TFEU, where it affects a school building which is used by the Catholic Church, not for the commercial provision of educational services, but for the provision of education services in the context of its social, cultural and educational mission.

Original language: German.

2 – See, inter alia, judgments of 27 September 1988, *Humbel and Edel* (263/86, EU:C:1988:451), of 7 December 1993, *Wirth (*C-109/92, EU:C:1993:916), and of 11 September 2007, *Schwarz and Gootjes-Schwarz* (C-76/05, EU:C:2007:492), and *Commission* v *Germany* (C-318/05, EU:C:2007:495); also judgment of the EFTA Court of 21 February 2008, *Private Barnehagers* v *EFTA Surveillance Authority* (E-5/07, *Report of the EFTA Court*,2008, 61).

3 – See, most recently, *Achbita* (C-157/15) and *Bougnaoui and ADDH* (C-188/15).

4 – BOE No 300 of 15 December 1979, p. 28782, '1979 Agreement' or 'Agreement'.

5 – Impuesto sobre Construcciones, Instalaciones y Obras (ICIO).

6 – Ley reguladora de las Haciendas Locales.

7 – Real Decreto Legislativo.

8 – BOE No 59 of 9 March 2004, p. 10284.

9 – BOE No 144 of 16 June 2001, p. 21427 ('the 2001 Order').

10 – EHA/2814/2009, BOE No 254 of 21 October 2009, p. 88046 ('the 2009 Order').

11 – Impuesto sobre Bienes Inmuebles (IBI).

12 – According to the Spanish Government, that clarification was provided 'in agreement with the Spanish Bishops' Conference' in order to allay the concerns of the European Commission in regard to the prohibition of State aid (Az. SA.22829, Spain — Tax exemption in favour of Catholic institutions (E 2/2007)).

13 – ECLI:ES:AN:2013:5382. The latter judgment was upheld by the judgment of the Spanish Tribunal Supremo of 19 November 2014, ECLI:ES:TS:2014:4901.

14 – 'Congregación.'

15 – Órgano de Gestión Tributaria.

16 – For instance, the Court highlights the need to observe Article 94 of the Rules of Procedure in the order of 12 May 2016, *Security Service and Others* (C-692/15 to C-694/15, EU:C:2016:344, paragraph 18). Analogous requirements as to the admissibility of requests for a preliminary ruling had already been formulated by the Court in a line of authorities; see, inter alia, judgments of 24 April 2012, *Kamberaj* (C-571/10, EU:C:2012:233, paragraph 42), and of 21 December 2016, *Vervloet and Others* (C-76/15, EU:C:2016:975, paragraphs 56 and 57).

17 – To this effect, see order of 8 October 2002, *Viacom* (C-190/02, EU:C:2002:569, paragraphs 21 and 22), and judgments of 31 January 2008, *Centro Europa 7* (C-380/05, EU:C:2008:59, paragraph 58); of 21 November 2013, *Deutsche Lufthansa* (C-284/12, EU:C:2013:755, paragraph 20); and of 13 February 2014, *Airport Shuttle Express and Others* (C-162/12 and C-163/12, EU:C:2014:74, paragraph 38).

18 – Judgments of 7 September 1999, *Beck and Bergdorf* (C-355/97, EU:C:1999:391, paragraph 22); of 16 June 2015, *Gauweiler and Others* (C-62/14, EU:C:2015:400, paragraph 25); of 6 September 2016, *Petruhhin* (C-182/15, EU:C:2016:630, paragraph 20); and of 21 December 2016, *Vervloet and Others* (C-76/15, EU:C:2016:975, paragraph 57).

19 – Judgments of 24 June 2008, *Commune de Mesquer* (C-188/07, EU:C:2008:359, paragraph 31), and of 28 February 2012, *Inter-Environnement Wallonie and Terre wallonne* (C-41/11, EU:C:2012:103, paragraph 36).

20 – See in the same vein, inter alia, judgment of 18 October 2011, *Boxus and Others* (C-128/09 to C-131/09, C-134/09 and C-135/09, EU:C:2011:667, paragraph 27).

21 – On grounds of simplicity I shall, in the present case, refrain from specifically mentioning 'religious associations or communities', which are also referred to in Article 17 TFEU.

22 – In so far as the Congregación relied on freedom of religion (Article 10 of the Charter of Fundamental Rights of the European Union) at the hearing before the Court, my submissions on Article 17 TFEU apply by analogy.

23 – Signed at Rome on 29 October 2004 (OJ 2004 C 310, p. 1).

24 – Declaration No 11 in the Final Act of the Inter-Governmental Conference on the Treaty of Amsterdam signed on 2 October 1997 (OJ 1997 C 340, p. 133).

25 – Judgments of 5 October 1988, *Steymann* (196/87, EU:C:1988:475, paragraphs 9 and 14), and of 14 March 2000, *Church of Scientology* (C-54/99, EU:C:2000:124).

26 – Judgments of 12 December 1974, *Walrave and Koch* (36/74, EU:C:1974:140); of 15 December 1995, *Bosman* (C-415/93, EU:C:1995:463); of 18 July 2006, *Meca-Medina and Majcen* v *Commission* (C-519/04 P, EU:C:2006:492); of 1 July 2008, *MOTOE* (C-49/07, EU:C:2008:376); and of 16 March 2010, *Olympique Lyonnais* (C-325/08, EU:C:2010:143).

27 – Judgments of 11 September 2007, *Schwarz and Gootjes-Schwarz* (C-76/05, EU:C:2007:492), and *Commission* v *Germany* (C-318/05, EU:C:2007:495).

28 – Judgments of 2 July 1974, *Italy* v *Commission* (173/73, EU:C:1974:71, paragraph 26); of 11 July 1996, *SFEI and Others* (C-39/94, EU:C:1996:285, paragraph 58); and of 15 June 2006, *Air Liquide Industries Belgium* (C-393/04 and C-41/05, EU:C:2006:403, paragraph 27).

29 – See on this, inter alia, judgments of 12 December 1990, *SARPP* (C-241/89, EU:C:1990:459, paragraph 8); of 2 December 2009, *Aventis Pasteur* (C-358/08, EU:C:2009:744, paragraph 50); of 17 July 2014, *Leone* (C-173/13, EU:C:2014:2090, paragraphs 56 and 64); and of 13 July 2016, *Pöpperl* (C-187/15, EU:C:2016:550, paragraph 35).

30 – Judgments of 16 November 1977, *GB-Inno-BM* (13/77, EU:C:1977:185, paragraph 31); of 11 December 2007, *ETI and Others* (C-280/06, EU:C:2007:775, paragraph 38); of 1 July 2008, *MOTOE* (*C*-49/07, EU:C:2008:376, paragraph 20); and of 5 March 2015, *Commission and Others* v *Versalis and Others* (C-93/13 P and C-123/13 P, EU:C:2015:150, paragraph 88).

31 – Judgments of 23 April 1991, *Höfner and Elser* (C-41/90, EU:C:1991:161, paragraph 21); of 16 March 2004, *AOK Bundesverband and Others* (C-264/01, C-306/01, C-354/01 and C-355/01, EU:C:2004:150, paragraph 46); and of 17 September 2015, *Total* v *Commission* (C-597/13 P, EU:C:2015:613, paragraph 33); also judgment of 12 July 1984, *Hydrotherm Gerätebau* (170/83, EU:C:1984:271, paragraph 11).

32 – Judgment of 19 February 2002, *Wouters and Others* (C-309/99, EU:C:2002:98, paragraph 112).

33 – Judgment of 1 July 2008, *MOTOE* (C-49/07, EU:C:2008:376, paragraph 25, last sentence). In the same vein, judgments of 16 June 1987, *Commission* v *Italy* (118/85, EU:C:1987:283, paragraph 7); of 18 March 1997, *Diego Calì & Figli* (C-343/95, EU:C:1997:160, paragraphs 16 and 18); and of 24 October

2002, *Aéroports de Paris* v *Commission* (C-82/01 P, EU:C:2002:617, paragraph 75). Also my Opinions in *Viacom Outdoor* (C-134/03, EU:C:2004:676, point 72) and *MOTOE* (C-49/07, EU:C:2008:142, point 49).

34 – Judgments of 18 June 1998, *Commission* v *Italy* (C-35/96, EU:C:1998:303, paragraph 36); of 12 September 2000, *Pavlov and Others* (C-180/98 to C-184/98, EU:C:2000:428, paragraph 75); of 10 January 2006, *Cassa di Risparmio di Firenze and Others* (C-222/04, EU:C:2006:8, paragraph 108); of 1 July 2008, *MOTOE* (C-49/07, EU:C:2008:376, paragraph 22); and of 23 February 2016, *Commission* v *Hungary* (C-179/14, EU:C:2016:108, paragraph 149).

35 – In the same vein, judgments of 10 January 2006, *Cassa di Risparmio di Firenze and Others* (C-222/04, EU:C:2006:8, paragraphs 122 to 124), and of 1 July 2008, *MOTOE* (C-49/07, EU:C:2008:376, paragraph 27). See also judgment of 18 December 2007, *Jundt* (C-281/06, EU:C:2007:816, paragraph 33).

36 – The mere fact that there is freedom to found educational establishments (Article 14(3) of the Charter of Fundamental Rights) and that freedom of religion also has an educative component (Article 10(1), second sentence, of the Charter), cannot in itself give any indication as to whether educational services provided in a specific educational establishment are to be regarded as subsumed within the economic cycle or not.

37 – This refers, inter alia, to donations in kind by pupils and their parents and also the private financing of certain constructions or building works.

38 – To this effect, see — in relation to private educational establishments — judgments of 7 December 1993, *Wirth* (C-109/92, EU:C:1993:916, paragraph 17), and of 11 September 2007, *Schwarz and Gootjes-Schwarz* (C-76/05, EU:C:2007:492, paragraph 40), and *Commission* v *Germany* (C-318/05, EU:C:2007:495, paragraph 69).

39 – To this effect, see — in relation to state educational establishments — judgments of 27 September 1988, *Humbel and Edel* (263/86, EU:C:1988:451, paragraphs 17 and 18); of 7 December 1993, *Wirth* (C-109/92, EU:C:1993:916, paragraphs 15 and 16); and of 11 September 2007, *Schwarz and Gootjes-Schwarz* (C-76/05, EU:C:2007:492, paragraph 39); and *Commission* v *Germany* (C-318/05, EU:C:2007:495, paragraph 68). As the EFTA Court emphasises this case-law which was decided in connection with freedom to provide services may be transposed to competition law and to the sector of State aid*,* judgment of 21 February 2008, *Private Barnehagers* v *EFTA Surveillance Authority* (E-5/07, Report of the EFTA Court, 2008, 61, paragraphs 80 to 83). The Commission makes the same point in paragraphs 28 to 30 of its Notice on the notion of State aid *(*OJ 2016 C 262, p. 1).

40 – That is how the question submitted by the referring court is formulated.

41 – Apart from voluntary donations, the pupils' parents pay only for optional services by the school such as transport of pupils and lunch.

42 – It should be mentioned in passing that there would also be entrepreneurial activity if the school hall were hired out to third parties to a significant extent for *non-school* events without any social or cultural connotation.

43 – In that connection, it is apparent from the files that 5.46% of the usable surface area of the buildings belonging to the La Inmaculada school are used by a non-profit establishment for educational provision which is not co-financed by the State. It will be for the national court to assess whether those particular activities form part of the voluntary educational provision mentioned above or whether they are a separate additional commercial educational provision.

44 – At the hearing the Commission contended that the number of pupils taking up the voluntary educational provision at the La Inmaculada school is up to 23%. It claims that this number emerges from the information published by the school itself on its web page. In that connection the Commission appears to base itself on the pupil numbers in the bachillerato and formación profesional branches for the school year 2008/2009 (see www.escolapiosdegetafe.es/historia, most recently visited on 12 January 2017). It is not the task of the Court of Justice to verify the correctness and completeness of this information.

45 – Commission Regulation(EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty(OJ 2014 L 187, p. 1).

46 – Communication from the Commission — Framework for State aid for research and development and innovation (OJ 2014 C 198, p. 1).

47 – Recital 49 of Regulation No 651/2014.

48 – Paragraph 20 of the EU framework.

49 – In assessing the question whether under Articles 101 and 102 TFEU certain conduct by undertakings can have discernible effects on trade between Member States a market share threshold of 5% is used in the case-law and the practice of the Commission in addition to other criteria; see on this Commission Notice 'Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty', paragraphs 46, 52 and 53 (OJ 2004 C 101, p. 81).

50 – Thus in the VAT sector Germany was authorised by the Council to exclude from the right to deduct the VAT charged on expenditure on goods and services where more than 90% of those goods and services are used for the private purposes of a taxable person or of his employees or, more generally, for non-business purposes (Article 1 of Council Decision 2000/186/EC of 28 February 2000; OJ 2000 L 59, p. 12). Economic activity may thus be deemed to be wholly ancillary in this case only if it constitutes or amounts to less than 10%.

51 – See points 60 to 62 of this Opinion.

52 – Judgments of 24 July 2003, *Altmark Trans and Regierungspräsidium Magdeburg* (C-280/00, EU:C:2003:415, paragraph 74); of 8 May 2013, *Libert and Others* (C-197/11 and C-203/11, EU:C:2013:288, paragraph 74); and of 21 December 2016, *Commission* v *Hansestadt Lübeck* (C-524/14 P, EU:C:2016:971, paragraph 40); and *Commission* v *World Duty Free Group and Others* (C-20/15 P and C-21/15 P, EU:C:2016:981, paragraph 53).

53 – Judgments of 24 July 2003, *Altmark Trans and Regierungspräsidium Magdeburg* (C-280/00, EU:C:2003:415, paragraph 75); of 8 May 2013, *Libert and Others* (C-197/11 and C-203/11, EU:C:2013:288, paragraph 74); and of 21 December 2016, *Commission* v *Hansestadt Lübeck* (C-524/14 P, EU:C:2016:971, paragraph 40); and *Commission* v *World Duty Free Group and Others* (C-20/15 P and C-21/15 P, EU:C:2016:981, paragraph 53).

54 – Judgments of 3 March 2005, *Heiser* (C-172/03, EU:C:2005:130, paragraph 46); 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 94); of 26 October 2016, *Orange* v *Commission* (C-211/15 P, EU:C:2016:798, paragraph 38); and of 21 December 2016, *Commission* v *Hansestadt Lübeck* (C-524/14 P, EU:C:2016:971, paragraph 48).

55 – Judgments of 23 February 1961, *De Gezamenlijke Steenkolenmijnen in Limburg* v *High Authority* (30/59, EU:C:1961:2, p. 43); of 15 March 1994, *Banco Exterior de España (*C-387/92, EU:C:1994:100, paragraph 13); of 11 July 1996, *SFEI and Others* (C-39/94, EU:C:1996:285, paragraph 58); and of 14 January 2015, *Eventech* (C-518/13, EU:C:2015:9, paragraph 33).

56 – Judgments of 15 March 1994, *Banco Exterior de España* (C-387/92, EU:C:1994:100, paragraph 14); of 15 November 2011, *Commission and Spain* v *Government of Gibraltar and United Kingdom* (C-106/09 P and C-107/09 P, EU:C:2011:732, paragraph 72); of 9 October 2014, *Ministerio de Defensa and Navantia* (C-522/13, EU:C:2014:2262, paragraph 23); and of 21 December 2016, *Commission* v *World Duty Free Group and Others* (C-20/15 P and C-21/15 P, EU:C:2016:981, paragraph 56); similarly judgment of 22 June 2006, *Belgium and Forum 187* v *Commission* (C-182/03 and C-217/03, EU:C:2006:416,, inter alia, paragraph 81).

57 – To this effect, see judgments of 14 October 1987, *Germany* v *Commission* (248/84, EU:C:1987:437, paragraph 17), and of 6 September 2006, *Portugal* v *Commission* (C-88/03, EU:C:2006:511, paragraph 55).

58 – See above, point 28 of this Opinion.

59 – Judgment of 14 January 2015(*Eventech,* C-518/13, EU:C:2015:9, paragraph 54).

60 – Judgments of 3 March 2005, *Heiser* (C-172/03, EU:C:2005:130, paragraph 40); of 14 January 2015, *Eventech* (C-518/13, EU:C:2015:9, paragraph 55); and of 21 December 2016, *Commission* v *Hansestadt Lübeck* (C-524/14 P, EU:C:2016:971, paragraphs 41 and 54); and *Commission* v *World Duty Free Groupand Others* (C-20/15 P and C-21/15 P, EU:C:2016:981, paragraph 54); In the same vein, judgment of 8 November 2001, *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke* (C-143/99, EU:C:2001:598, paragraph 41).

61 – Judgments of 8 November 2001, *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke* (C-143/99, EU:C:2001:598, paragraphs 41 and 42); of 6 September 2006, *Portugal* v *Commission (*C-88/03, EU:C:2006:511, paragraphs 54 and 56); of 15 November 2011, *Commission and Spain* v *Government of Gibraltar and United Kingdom* (C-106/09 P and C-107/09 P, EU:C:2011:732, paragraphs 73, 75 and 101); 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, paragraphs 54 and 60).

62 – See on the criterion of financial advantage, judgments of 15 June 2006, *Air Liquide Industries Belgium* (C-393/04 and C-41/05, EU:C:2006:403, paragraph 30); of 9 October 2014, *Ministerio de Defensa and Navantia* (C-522/13, EU:C:2014:2262, paragraph 23); of 8 September 2015, *Taricco and Others* (C-105/14, EU:C:2015:555, paragraph 61); 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 56).

63 – See, on the issue of general measures applicable without distinction to all economic operators, judgments of 18 July 2013, *P* (C-6/12, EU:C:2013:525, paragraph 18); of 9 October 2014, *Ministerio de Defensa and Navantia* (C-522/13, EU:C:2014:2262, paragraph 23); and of 21 December 2016, *Commission* v *World Duty Free Group and Others* (C-20/15 P and C-21/15 P, EU:C:2016:981, paragraphs 56 and 59); In the same vein, judgment of 8 November 2001, *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke* (C-143/99, EU:C:2001:598, paragraph 35).

64 – Judgments of 29 April 2004, *Netherlands* v *Commission* (C-159/01, EU:C:2004:246, paragraphs 42 and 43); of 18 July 2013, *P* (C-6/12, EU:C:2013:525, paragraph 22); 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); and *Commission* v *Hansestadt Lübeck* (C-524/14 P, EU:C:2016:971, paragraph 41); similarly judgments of 8 November 2001, *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke* (C-143/99, EU:C:2001:598, paragraph 42), and of 9 October 2014, *Ministerio de Defensa and Navantia* (C-522/13, EU:C:2014:2262, paragraphs 42 and 43).

65 – Judgment of 24 July 2003, *Altmark Trans and Regierungspräsidium Magdeburg* (C-280/00, EU:C:2003:415, paragraphs 83 to 94, in particular, paragraphs 88 to 93); settled case-law, finally see judgment of 26 October 2016, *Orange* v *Commission* (C-211/15 P, EU:C:2016:798, paragraphs 42 and 44).

66 – First criterion in *Altmark Trans* (judgment of 24 July 2003, *Altmark Trans and Regierungspräsidium Magdeburg*, C-280/00, EU:C:2003:415, paragraph 89).

67 – Second criterion in *Altmark Trans* (judgment of 24 July 2003, *Altmark Trans and Regierungspräsidium Magdeburg*, C-280/00, EU:C:2003:415, paragraphs 90 and 91).

68 – Judgments of 10 January 2006, *Cassa di Risparmio di Firenze and Others* (C-222/04, EU:C:2006:8, paragraph 140); of 14 January 2015, *Eventech* (C-518/13, EU:C:2015:9, paragraph 65); of 26 October 2016, *Orange* v *Commission* (C-211/15 P, EU:C:2016:798, paragraph 64); and of 21 December 2016, *Vervloet and Others* (C-76/15, EU:C:2016:975, paragraph 102).

69 – Judgments of 10 January 2006, *Cassa di Risparmio di Firenze and Others* (C-222/04, EU:C:2006:8, paragraphs 141 to 143); of 14 January 2015, *Eventech* (C-518/13, EU:C:2015:9, paragraphs 66 and 67); and of 21 December 2016, *Vervloet and Others* (C-76/15, EU:C:2016:975, paragraph 104).

70 – Judgments of 30 April 2009, *Commission* v *Italy and Wam* (C-494/06 P, EU:C:2009:272, paragraph 54), and of 26 October 2016, *Orange* v *Commission* (C-211/15 P, EU:C:2016:798, paragraph 66).

71 – Judgments of 21 March 1990, *Belgium* v *Commission* ('*Tubemeuse*',C-142/87, EU:C:1990:125, paragraph 43); of 24 July 2003, *Altmark Trans and Regierungspräsidium Magdeburg* (C-280/00, EU:C:2003:415, paragraph 81); of 14 January 2015, *Eventech* (C-518/13, EU:C:2015:9, paragraph 68); and of 21 December 2016, *Vervloet and Others* (C-76/15, EU:C:2016:975, paragraph 107).

72 – See on this my comments above on the concept of undertaking, inter alia, at points 53 to 60 of this Opinion.

73 – Fundamental in this regard is the judgment of 28 February 1991, *Delimitis* (C-234/89, EU:C:1991:91, paragraphs 19 to 27), according to which when assessing any anticompetitive effects of agreements between undertakings it is relevant to consider that a '*bundle of similar contracts*' exists on the market capable of producing a '*cumulative sealing-off effect*'; see also judgments of 27 April 1994, *Almelo* (C-393/92, EU:C:1994:171, paragraph 37), and of 26 November 2015, *Maxima Latvija* (C-345/14, EU:C:2015:784, paragraph 26); similarly, judgment of 11 September 2014, *CB* v *Commission* (C-67/13 P, EU:C:2014:2204, paragraph 79).

74 – Article 3(1) and (2) of 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 EU to *deminimis* aid. This regulation applies under Article 7(1) also to aid granted before its entry into force.

75 – See above, points 36 to 60 of this Opinion.

76 – On the need to give the referring court a useful reply and thus if necessary to discuss aspects of EU law which are not expressly forming the subject matter of a request for a preliminary ruling, see judgments of 12 December 1990, *SARPP* (C-241/89, EU:C:1990:459, paragraph 8); of 2 December 2009, *Aventis Pasteur* (C-358/08, EU:C:2009:744, paragraph 50); of 18 December 2014, *Centre public d'action sociale d'Ottignies-Louvain-La-Neuve* (C-562/13, EU:C:2014:2453, paragraph 37); and of 17 December 2015, *Neptune Distribution* (C-157/14, EU:C:2015:823, paragraphs 33 and 34).

77 – Judgments of 14 February 1990, *France* v *Commission* (C-301/87, EU:C:1990:67, paragraph 17); of 12 February 2008, *Centre d'exportation du livre français* (C-199/06, EU:C:2008:79, paragraphs 36 and 37); of 21 November 2013, *Deutsche Lufthansa* (C-284/12, EU:C:2013:755, paragraphs 25 and 26); and of 11 November 2015, *Klausner Holz Niedersachsen* (C-505/14, EU:C:2015:742, paragraphs 18 and 19).

78 – Judgments of 15 March 1994, *Banco Exterior de España* (C-387/92, EU:C:1994:100, paragraph 20); of 18 July 2013, *P* (C-6/12, EU:C:2013:525, paragraph 36); and of 26 October 2016, *DEI* v *Commission* (C-590/14 P, EU:C:2016:797, paragraph 45).

79 – In that connection see my Opinion in *Vervloet and Others* (C-76/15, EU:C:2016:386, point 115), in relation to the question when new aid is to be deemed to be 'initiated' or 'put into effect' within the meaning of Article 108(3) TFEU. The same criterion of the occurrence of the distortion of competition may also be used for the demarcation between new aid and existing aid.

80 – Judgments of 14 October 1980, *Burgoa* (812/79, EU:C:1980:231, paragraph 6), and of 2 August 1993, *Levy* (C-158/91, EU:C:1993:332, paragraph 11).

81 – Judgments of 28 March 1995, *Evans Medical and Macfarlan Smith* (C-324/93, EU:C:1995:84, paragraph 27); of 14 January 1997, *Centro-Com* (C-124/95, EU:C:1997:8, paragraph 56); and of 21 December 2011, *Air Transport Association of America and Others* (C-366/10, EU:C:2011:864, paragraph 61).

82 – To this effect, see judgments of 14 January 1997, *Centro-Com* (C-124/95, EU:C:1997:8, paragraph 61), and of 3 September 2008, *Kadi and Al Barakaat International Foundation* v *Council and Commission* (C-402/05 P and C-415/05 P, EU:C:2008:461, paragraph 301).

83 – Judgment of 28 March 1995, *Evans Medical and Macfarlan Smith* (C-324/93, EU:C:1995:84, paragraph 32).

84 – Judgments of 2 August 1993, *Levy* (C-158/91, EU:C:1993:332, paragraph 21); of 28 March 1995, *Evans Medical and Macfarlan Smith* (C-324/93, EU:C:1995:84, paragraph 29), and of 14 January 1997, *Centro-Com* (C-124/95, EU:C:1997:8, paragraph 58).

85 – Judgments of 14 September 1999, *Commission* v *Belgium* (C-170/98, EU:C:1999:411, paragraph 42), and of 4 July 2000, *Commission* v *Portugal* (C-62/98, EU:C:2000:358, paragraph 49) and *Commission* v *Portugal* (C-84/98, EU:C:2000:359, paragraph 58).