Provisional text

JUDGMENT OF THE COURT (Grand Chamber)

27 June 2017 (*)

(Reference for a preliminary ruling — State aid — Article 107(1) TFEU — Meaning of 'State aid' — Meaning of 'undertaking' and 'economic activity' — Other conditions for the application of Article 107(1) TFEU — Article 108(1) and (3) TFEU — Meaning of 'new aid' and 'existing aid' — Agreement of 3 January 1979 between the Kingdom of Spain and the Holy See — Tax on construction, installations and works — Exemption for buildings belonging to the Catholic Church)

In Case C-74/16,

REQUEST for a preliminary ruling under Article 267 TFEU from the Juzgado de lo Contencioso-Administrativo No 4 de Madrid (Administrative Court No 4, Madrid, Spain), made by decision of 26 January 2016, received at the Court on 10 February 2016, in the proceedings

Congregación de Escuelas Pías Provincia Betania

v

Ayuntamiento de Getafe,

THE COURT (Grand Chamber),

composed of K. Lenaerts, President, A. Tizzano, Vice-President, M. Ilešič, L. Bay Larsen, T. von Danwitz, E. Juhász, M. Berger, A. Prechal, M. Vilaras and E. Regan, Presidents of Chambers, A. Rosas, A. Arabadjiev (Rapporteur), M. Safjan, D. Šváby and E. Jarašiūnas, Judges,

Advocate General : J. Kokott,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 10 January 2017,

after considering the observations submitted on behalf of:

– the Congregación de Escuelas Pías Provincia Betania, by M. Muñoz Pérez and A. Fanjul Guerricaechevarría, abogados,

– the Ayuntamiento de Getafe, by L. López Díez, abogada,

– the Spanish Government, by M.A. Sampol Pucurull and A. Rubio González, acting as Agents,

– the European Commission, by G. Luengo, P. Němečková and F. Tomat, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 16 February 2017,

gives the following

Judgment

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

2 The request has been made in proceedings between (i) the Congregación de Escuelas Pías Provincia Betania (Comunidad de Casa de Escuelas Pías de Getafe, PP. Escolapios) (Congregation of the schools of a religious order in Spain (Community of religious schools in Getafe, Piarists), 'the Congregación') and (ii) the ayuntamiento de Getafe (Municipality of Getafe, Spain; 'the Municipality') concerning the latter's refusal of the Congregación's application for a refund of the amount it had paid in respect of the tax on construction, installations and works ('ICIO').

Legal context

International law

3 Article IV of the Agreement of 3 January 1979 between the Spanish State and the Holy See concerning financial matters ('the Agreement of 3 January 1979') provides:

'1. The Holy See, the Bishops' Conference, dioceses, parishes and other territorial units, religious orders and congregations and "institutes of consecrated life" and their provinces and houses shall be entitled to the following exemptions:

...

(B) full and permanent exemption from taxes on property and earnings from property, as regards income and assets.

This exemption shall not apply to income arising from economic activities or from assets belonging to the Church in respect of which use has been assigned to third parties; nor shall it apply to capital gains or to income which is subject to deduction at source of income tax.

...'

4 Under Article VI of the Agreement of 3 January 1979:

'The Holy See and the Spanish Government shall endeavour to resolve, by common agreement, any doubts or difficulties which may arise in the interpretation or application of the terms of this Agreement, drawing for that purpose on the principles underlying it.'

Spanish law

5 ICIO is a municipal tax which was introduced by Ley 39/1988 reguladora de las Haciendas Locales (Law 39/1988 on local finances) of 28 December 1988 (BOE No 313 of 30 December 1988, p. 36636). At the material time, ICIO was governed by Articles 100 to 103 of Real Decreto Legislativo 2/2004 por el que se aprueba el texto refundido de la Ley Reguladora de las Haciendas Locales (Royal Legislative Decree 2/2004 approving the consolidated text of the Law on local finances) of 5 March 2004 (BOE

No 59 of 9 March 2004, p. 10284; 'the consolidated Law on local finances').

6 Article 100(1) of the consolidated Law on local finances provides:

'[ICIO] is an indirect tax the chargeable event for which shall be the carrying out, in the municipal area, of any building, installation or construction work for which a permit must be obtained, regardless of whether or not the permit has been obtained, or for which a declaration as to the person responsible for the work or a prior notification must be filed, provided that the issue of the permit, or the supervision concerned, is the responsibility of the municipal authority imposing the tax.'

7 According to Article 101(1) of the consolidated Law on local finances:

'The tax shall be imposed on, and paid by, natural persons, legal persons or entities … who undertake building, installation or construction works, whether or not the persons concerned are the owners of the building on which the works are carried out.

For the purposes of the preceding subparagraph, the person or entity who is responsible for meeting the expenses or the cost of carrying out the building, installation or construction works shall be regarded as the person or entity undertaking the works.'

8 By the Orden por la que se aclara la inclusión del Impuesto sobre Construcciones, Instalaciones y Obras en la letra B) del apartado l del articulo IV del Acuerdo entre el Estado Español y la Santa Sede sobre Asuntos Económicos, de 3 de enero de 1979 (Order making clear that the tax on construction, installations and works is within the scope of Article IV(1)(B) of the Agreement of 3 January 1979 between the Spanish State and the Holy See concerning financial matters), of 5 June 2001 (BOE No 144 of 16 June 2001, p. 21427; 'the Order of 5 June 2001'), the Spanish Ministry of Finance stated, in the first point of the operative part of the order, that ICIO 'is included among the taxes on property and earnings from property referred to in Article IV(1)(B) of the Agreement of 3 January 1979' and, in the second point of the operative part, that 'the Holy See, the Bishops' Conference, dioceses, parishes and other territorial units, religious orders and congregations and "institutes of consecrated life" and their provinces and houses shall be entitled to full and permanent exemption from [ICIO]'.

9 As the referring court has explained, the order of 5 June 2001 granted the Catholic Church full exemption from ICIO in relation to buildings belonging to the Church, regardless of the nature of the activities for which those buildings were used.

10 The Orden EHA/2814/2009 por la que se modifica la Orden de 5 de junio de 2001, por la que se aclara la inclusión del Impuesto sobre Construcciones, Instalaciones y Obras en la letra B) del apartado 1 del artículo IV del Acuerdo entre el Estado Español y la Santa Sede sobre asuntos económicos, de 3 de enero de 1979 (Order EHA/2814/2009 amending the Order of 5 June 2001 making clear that the tax on construction, installation and building works is within the scope of Article IV(1)(B) of the Agreement of 3 January 1979 between the Spanish State and the Holy See concerning financial matters), of 15 October 2009 (BOE No 254 of 21 October 2009, p. 88046, 'the Order of 15 October 2009'), replaced the second point of the operative part of the Order of 5 June 2001 by the following:

'The Holy See, the Bishops' Conference, dioceses, parishes and other territorial units, religious orders and congregations and "institutes of consecrated life" and their provinces and houses shall be entitled to full and permanent exemption from [ICIO] in respect of all buildings which are exempted from the urban property tax (now, the tax on immovable property).'

11 According to the information provided by the referring court, the consequence of that amendment was that the Catholic Church's exemption from ICIO applied only to buildings used for exclusively religious purposes.

12 The referring court explains that the Order of 15 October 2009 was annulled by a judgment of 9 November 2013 of the Administrative Division of the Audiencia Nacional (National High Court, Spain) and that the annulment was upheld by a judgment of 19 November 2014 of the Administrative Division of the Tribunal Supremo (Supreme Court, Spain), on the ground, inter alia, that the order reduced the scope of the exemption provided for in Article IV(1)(B) of the Agreement of 3 January 1979.

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

13 The Congregación is entered in the register of religious entities kept by the Spanish Ministry of Justice and the Agreement of 3 January 1979 applies to it. It is the owner of a complex of buildings in Getafe and the school 'La Inmaculada', which is run by the Congregación, is part of that complex.

14 On 4 March 2011, the Congregación applied for planning permission to renovate and extend the building used by the school as a hall for, amongst other things, meetings, courses and conferences, with a view to providing seating for 450 persons. Permission was granted on 28 April 2011 and the Congregación paid EUR 23 730.41 by way of ICIO.

15 Subsequently, the Congregación applied for a refund of the tax paid, taking the view that it was exempt from ICIO by virtue of the Order of 5 June 2001, which implements Article IV(1)(B) of the Agreement of 3 January 1979.

16 The Órgano de Gestión Tributaria (municipal tax office) refused that application by decision of 6 November 2013: it took the view that the exemption did not apply since it had been requested in respect of an activity of the Catholic Church which had no religious purpose.

17 The Congregación has challenged that decision, which was upheld in an administrative review procedure, in the action brought before the referring court. It argues that it was not liable for the amount paid by way of ICIO since Article IV(1)(B) of the Agreement of 3 January 1979 must be interpreted as exempting it from that tax irrespective of the intended use of the immovable property forming the basis of assessment for the tax.

18 The Municipality contends that under the Order of 15 October 2009 the exemption from ICIO applies solely to buildings which, because they are intended to be used for religious purposes of the Catholic Church, are exempted from the tax on immovable property. It submits that, in the absence of such a limitation, an exemption of this kind could be incompatible with EU law on State aid — given the scale on which the Church carries on economic activities (the running of schools, hospitals etc.).

19 The referring court notes that, although the question of the compatibility with EU law of the Catholic Church's exemption from ICIO has never been raised before the Spanish courts, it has been taken up with the European Commission but the latter has not adopted a final position on the matter. The referring court explains in that regard that, contrary to the Commission's view, the exemption is not limited to installations, buildings and works belonging to the Catholic Church which are used for exclusively religious purposes.

20 Referring also to paragraphs 19 to 23 of the judgment of 9 October 2014, *Ministerio de Defensa and Navantia* (C-522/13, EU:C:2014:2262), the national court is uncertain whether the exemption from ICIO to which Catholic Church is entitled — even when the property concerned by that measure is used by it for the purpose of an economic activity — might amount to State aid within the meaning of Article 107(1) TFEU.

21 In those circumstances, the Juzgado de lo Contencioso-Administrativo No 4 de Madrid (Administrative Court No 4, Madrid), decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Is the exemption of the Catholic Church from [ICIO] contrary to Article 107(1) TFEU, where the exemption relates to work on buildings intended to be used for economic activities that do not have a strictly religious purpose?'

Consideration of the question referred

Admissibility of the request for a preliminary ruling

22 The Spanish Government contends that the request for a preliminary ruling is inadmissible. It submits, first, that the question referred to the Court is hypothetical since it is seeking to obtain a general advisory opinion concerning the Catholic Church's exemption from ICIO in the light of the State aid rules, without establishing any connection with the actual facts of the main action or its purpose.

23 Secondly, it maintains that the request for a preliminary ruling contains significant omissions as regards the description of the factual and legal matters necessary to enable the Court to give a constructive answer to the question referred. The order for reference fails to describe either the Congregación's activity, in particular in relation to the building concerned by the tax exemption at issue in the main proceedings, or its structure and economic organisation. The referring court has also failed to set out the precise reasons why it considers it necessary to refer the question to the Court for a preliminary ruling.

24 In that regard, it should be recalled that, according to the Court's settled case-law, in the context of the cooperation between the Court and the national courts provided for in Article 267 TFEU, it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine, in the light of the particular circumstances of the case, both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted concern the interpretation of EU law, the Court is in principle required to give a ruling (judgment of 21 December 2016, *Vervloet and Others*, C-76/15, EU:C:2016:975, paragraph 56 and the case-law cited).

25 It follows that questions relating to EU law enjoy a presumption of relevance. The Court may refuse to give a ruling on a question referred by a national court only where it is quite obvious that the interpretation of EU law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to enable it to give a useful answer to the questions submitted to it (judgment of 21 December 2016, *Vervloet and Others*, C-76/15, EU:C:2016:975, paragraph 56 and the case-law cited).

26 Concerning the last point, the Court recalls that the need to provide an interpretation of EU law which will be of use to the national court requires that the national court define the factual and legal context of

the questions it is asking or, at the very least, that it explain the factual circumstances on which those questions are based. Those requirements are of particular importance in the area of competition, where the factual and legal situations are often complex (judgment of 21 November 2013, *Deutsche Lufthansa*, C-284/12, EU:C:2013:755, paragraph 20).

27 According to the Court's case-law, it is also important for the national court to set out the precise reasons why it was unsure as to the interpretation of EU law and why it considered it necessary to refer questions to the Court for a preliminary ruling (judgment of 21 November 2013, *Deutsche Lufthansa*, C-284/12, EU:C:2013:755, paragraph 21).

28 In the present case, first, it is clear from the order for reference that one of the issues before the referring court is whether Article 107 TFEU precludes the exemption of the Congregación under the order of 5 June 2001, which implements Article IV(1)(B) of the Agreement of 3 January 1979, from the tax at issue in the main proceedings.

29 It is apparent from the order for reference that the national court considers that, in order to decide upon the case before it, it must ascertain whether an exemption of that kind is compatible with Article 107 TFEU. Its uncertainties in that regard are made plain in the order for reference.

30 In those circumstances, it is not obvious that the interpretation of EU law that is sought by the referring court concerns a hypothetical question or bears no relation to the actual facts of the main action or its purpose.

31 Secondly, as the Advocate General has observed at point 25 of her Opinion, the order for reference sets out the relevant provisions of the Agreement of 3 January 1979 and of Spanish tax law and describes the administrative practice and national case-law relating thereto, while the Spanish Government has not identified any matter that would assist in understanding the case which the referring court has failed to mention.

32 Thirdly, as regards the description of the factual background, the order for reference contains sufficient information for an understanding both of the question referred for a preliminary ruling and of its scope.

33 It must therefore be held that the order for reference contains the factual and legal material necessary to enable the Court to give a useful answer to the referring court. The order has, moreover, allowed the interested persons referred to in the second paragraph of Article 23 of the Statute of the Court of Justice of the European Union to submit observations as provided for in that provision.

34 The request for a preliminary ruling is therefore admissible.

Substance

35 By its question, the referring court asks, in essence, whether a tax exemption such as that at issue in the main proceedings, to which a congregation of the Catholic Church is entitled in respect of works on a building intended to be used for activities that do not have a strictly religious purpose, may fall under the prohibition in Article 107(1) TFEU.

36 A preliminary point to make is that, according to the Court's settled case-law, in the procedure laid down in Article 267 TFEU, which provides for cooperation between national courts and the Court of Justice, it is for the latter to provide the referring court with an answer which will be of use to it and enable it to decide the case before it. To that end, the Court may have to reformulate the questions

referred to it. The fact that a national court has, formally speaking, worded a question referred for a preliminary ruling with reference to certain provisions of EU law does not prevent the Court from providing the national court with all the points of interpretation which may be of assistance in adjudicating on the case pending before it, whether or not that court has referred to them in its questions. In that regard, it is for the Court of Justice to extract from all the information provided by the national court, in particular from the grounds of the decision referring the questions, the points of EU law which require interpretation, having regard to the subject matter of the dispute (judgment of 15 October 2015, *Biovet*, C-306/14, EU:C:2015:689, paragraph 17 and the case-law cited).

37 In the present case, having regard in particular to the observations submitted by the Kingdom of Spain and by the Commission, the Court, so as to provide the referring court with such points of interpretation, will, in replying to the question raised, consider not only Article 107(1) TFEU but also Article 108(1) and (3) TFEU.

The concept of 'State aid' within the meaning of Article 107(1) TFEU

38 The Court has consistently held that classification as 'State aid' within the meaning of Article 107(1) TFEU requires all the conditions mentioned in that provision to be fulfilled. Thus, first, there must be intervention by the State or through State resources. Second, the intervention must be liable to affect trade between Member States. Third, it must confer a selective advantage on the recipient. Fourth, it must distort or threaten to distort competition (judgments of 21 December 2016, *Commission* v *Hansestadt Lübeck*, C-524/14 P, EU:C:2016:971, paragraph 40, 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 53).

39 In addition, EU competition law and, in particular, the prohibition laid down in Article 107(1) TFEU concern the activities of undertakings (see, to that effect, judgments of 23 March 2006, *Enirisorse*, C-237/04, EU:C:2006:197, paragraphs 27 and 28, 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).

40 Accordingly, it is necessary to consider in the present case (i) whether the Congregación may be classified as an 'undertaking' for the purposes of Article 107(1) TFEU, (ii) whether the tax exemption at issue in the main proceedings confers a selective economic advantage on the Congregación, (iii) whether that measure represents intervention by the Spanish State or through resources of that Member State and (iv) whether the exemption is liable to affect trade between Member States and distort or threaten to distort competition within the internal market.

The concepts of 'undertaking' and 'economic activity'

41 According to settled case-law of the Court, in the sphere of EU competition law, the concept of 'undertaking' covers any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed (judgment of 10 January 2006, *Cassa di Risparmio di Firenze and Others*, C-222/04, EU:C:2006:8, paragraph 107).

42 It follows that the public or private status of the entity engaged in the activity in question has no bearing on the question as to whether or not that entity is an 'undertaking'.

43 Moreover, in so far as the activity in question may be classified as 'economic', the fact that it is carried on by a religious community does not preclude the application of the rules of the Treaty, including those governing competition law (see, to that effect, judgment of 5 October 1988, *Steymann*, 196/87, EU:C:1988:475, paragraphs 9 and 14).

44 In order to determine whether the activities in question are those of an 'undertaking' within the meaning of EU competition law, it is necessary to ascertain what the nature of those activities is: each of the different activities of a given entity must thus be examined to determine whether it falls to be classified as an 'economic activity' (see, to that effect, judgments of 24 October 2002, *Aéroports de Paris* v *Commission*, C-82/01 P, EU:C:2002:617, paragraph 75, and of 1 July 2008, *MOTOE*, C-49/07, EU:C:2008:376, paragraph 25).

45 Any activity consisting in offering goods or services on a given market is an economic activity (judgment of 10 January 2006, *Cassa di Risparmio di Firenze and Others*, C-222/04, EU:C:2006:8, paragraph 108).

46 The fact that the offer of goods or services is made on a not-for-profit basis does not prevent the entity which carries out those operations on the market from being considered an undertaking, since that offer exists in competition with that of other operators which do seek to make a profit (judgment of 1 July 2008, *MOTOE*, C-49/07, EU:C:2008:376, paragraph 27).

47 Services normally provided for remuneration are services that may be classified as 'economic activities'. The essential characteristic of remuneration lies in the fact that it constitutes consideration for the service in question (see, by analogy, judgment of 11 September 2007, *Schwarz and Gootjes-Schwarz*, C-76/05, EU:C:2007:492, paragraphs 37 and 38 and the case-law cited).

48 Accordingly, courses provided by educational establishments financed essentially by private funds that do not come from the provider itself constitute services, since the aim of such establishments is to offer a service for remuneration (see, by analogy, judgments of 11 September 2007, *Schwarz and Gootjes-Schwarz*, C-76/05, EU:C:2007:492, paragraph 40, and of 11 September 2007, *Commission* v *Germany*, C-318/05, EU:C:2007:495, paragraph 69).

49 It is not necessary for that private financing to be provided principally by the pupils or their parents, as the economic nature of an activity does not depend on the service concerned being paid for by those for whom it is performed (see, by analogy, judgments of 11 September 2007, *Schwarz and Gootjes-Schwarz*, C-76/05, EU:C:2007:492, paragraph 41, and of 11 September 2007, *Commission* v *Germany*, C-318/05, EU:C:2007:495, paragraph 70).

50 The same cannot be said, however, of courses provided by certain establishments which are integrated into a system of public education and financed, entirely or mainly, by public funds. Indeed, in establishing and maintaining such a system of public education, which is, as a general rule, financed from public funds and not by pupils or their parents, the State is not seeking to engage in gainful activity, but is fulfilling its social, cultural and educational obligations towards its population (see, by analogy, judgments of 11 September 2007, *Schwarz and Gootjes-Schwarz*, C-76/05, EU:C:2007:492, paragraph 39, and of 11 September 2007, *Commission* v *Germany*, C-318/05, EU:C:2007:495, paragraph 68).

51 In that context, it is possible that a single establishment may carry on a number of activities, both economic and non-economic, provided that it keeps separate accounts for the different funds that it receives so as to exclude any risk of cross-subsidisation of its economic activities by means of public funds received for its non-economic activities.

52 In the present case, it is not disputed that the Congregación is engaged in three types of activity at 'La Inmaculada' school: strictly religious activities, education subsidised by the Spanish State and non-

compulsory education receiving no financial support from the Spanish State. The Congregación also provides catering and transport services for its pupils.

53 However, given that the tax exemption at issue in the main proceedings concerns the renovation and extension of the school hall at 'La Inmaculada' and that the Congregación stated, at the hearing before the Court, that the hall is used only for the educational activities it offers, that exemption appears to have no connection with either the strictly religious activities of the Congregación or the complementary services mentioned in the preceding paragraph.

54 In that situation, for the purpose of ascertaining whether the prohibition in Article 107(1) TFEU is applicable to the exemption, the referring court will have to determine, in the light of the guidance set out in paragraphs 41 to 51 of the present judgment, which, if any, of the Congregación's educational activities are economic in nature.

55 In that regard, the Congregación, the Municipality and the Spanish Government all provided information at the hearing before the Court which was consistent and showed that the educational activities subsidised by the Spanish State are integrated in Spain's system of public primary and secondary education, given that education at 'La Inmaculada' is provided pursuant to an agreement between the Congregación and the Autonomous Community of Madrid and in accordance with the conditions laid down therein and is financed in full from public funds.

56 If that information were to prove to be correct — which it is for the referring court to determine — the educational activities of the Congregación that are subsidised by the Spanish State could not, according to the Court's case-law set out in paragraphs 41 to 50 of the present judgment, be classified as 'economic'.

57 By contrast, it would seem from the information provided by the Congregación, the Municipality and the Spanish Government at the hearing before the Court that the Congregación's educational activities that are not financed by the Spanish State, corresponding to early-years teaching, extracurricular activities and post-compulsory education, meet all the criteria set out in paragraphs 44 to 49 of the present judgment for classification as 'economic activities', a matter which it is nonetheless for the referring court to verify.

58 According to that information, those activities are not funded by the Spanish State. Rather, they are organised by the Congregación itself and are financed essentially by private contributions, especially from students and their parents, to school costs.

59 If, following that verification, the referring court were to consider that the educational activities of the Congregación that are not subsidised by the Spanish State constitute an 'economic activity', it would then have to ascertain whether the school hall at 'La Inmaculada' is used exclusively for one or other of those educational activities or whether its use is mixed.

60 If the hall were used solely for educational activities subsidised by the Spanish State and meeting all the criteria set out in paragraph 50 of the present judgment, the tax exemption at issue in the main proceedings would not fall under the prohibition in Article 107(1) TFEU.

61 If, on the other hand, the school hall were used exclusively for the educational activities provided by the Congregación without financial support from the Spanish State and meeting the criteria set out in paragraphs 44 to 49 of the present judgment, the exemption at issue in the main proceedings might well fall under that prohibition.

62 If there is mixed use of that hall, the tax exemption at issue in the main proceedings might be caught by the prohibition in so far as the hall is used for activities meeting the criteria set out in paragraphs 44 to 49 and 51 of the present judgment.

63 It follows from all the foregoing considerations that the prohibition in Article 107(1) TFEU can only apply to the tax exemption at issue in the main proceedings if (i) at least some of the educational activities carried on by the Congregación at 'La Inmaculada' school have to be classified as 'economic activities' within the meaning of the case-law referred to in paragraphs 44 to 49 of the present judgment and (ii) the hall is used, at least in part, for such economic activities.

64 The following examination of whether, in a situation such as that at issue in the main proceedings, the four conditions set out in paragraph 38 of the present judgment are met will therefore be relevant only if the referring court finds, on an assessment of the facts, that the Congregación uses the school hall for activities which must be classified as 'economic'.

The concept of 'selective economic advantage'

65 Concerning the question whether the tax exemption at issue in the main proceedings must be regarded as conferring an advantage on its beneficiary, it should be recalled that, according to settled case-law of the Court, measures which, whatever their form, are likely directly or indirectly to favour certain undertakings, or which fall to be regarded as an economic advantage that the recipient undertaking would not have obtained under normal market conditions, are regarded as State aid (judgment of 9 October 2014, *Ministerio de Defensa and Navantia*, C-522/13, EU:C:2014:2262, paragraph 21).

66 Thus, measures which, in various forms, mitigate the charges that are normally included in the budget of an undertaking and which therefore, without being subsidies in the strict meaning of the word, are similar in character and have the same effect are considered to constitute aid (judgment of 19 March 2013, *Bouygues and Bouygues Télécom* v *Commission and Others* and *Commission* v *France and Others*, C-399/10 P and C-401/10 P, EU:C:2013:175, paragraph 101).

67 In the present case, it is apparent from the order for reference, first, that, in accordance with Article 100(1) and Article 101(1) of the consolidated Law on local finances, all undertakings which carry out works such as those at issue in the main proceedings are subject to ICIO and that the Congregación paid the tax due. The order for reference also makes clear that the tax exemption at issue in the main proceedings would result in the Congregación receiving a refund of the tax already paid by it.

68 In those circumstances, it must be held that ICIO is a tax that is normally payable by all taxpayers who carry out the construction or renovation works to which that tax applies and that the exemption at issue in the main proceedings would have the effect of mitigating the charges that are included in the Congregación's budget. Consequently, a tax exemption of that nature would confer an economic advantage on the Congregación.

69 Furthermore, it follows from the order of 5 June 2001 that the Holy See, the Bishops' Conference, dioceses, parishes and other territorial units, religious orders and congregations and institutes for certain Catholic communities and their provinces and houses are entitled to full and permanent exemption from ICIO.

70 Accordingly, it would appear that that order is not a general measure applicable without distinction to all economic operators but is rather a measure that is prima facie selective.

71 Nevertheless, according to settled case-law of the Court, 'State aid' does not cover State measures which differentiate between undertakings — and which are, therefore, prima facie selective — where that differentiation arises from the nature or overall structure of the system of which they are part, which it is for the Member State concerned to demonstrate (judgment of 9 October 2014, *Ministerio de Defensa and Navantia*, C-522/13, EU:C:2014:2262, paragraph 42).

72 In the present case, however, there is nothing in the documents before the Court which suggests that the tax exemption provided for by the order of 5 June 2001 derives directly from the founding or guiding principles of the Kingdom of Spain's tax system or that it is necessary for the functioning and efficiency of that system.

73 In view of all the foregoing considerations, it must be held that, in the present case, the condition concerning the existence of a selective economic advantage is likely to be satisfied.

The concept of 'aid granted by the State or through State resources'

74 For it to be possible to classify advantages as aid within the meaning of Article 107(1) TFEU, first, they must be granted directly or indirectly through State resources and, secondly, that grant must be attributable to the State (judgment of 19 December 2013, *Association Vent De Colère! and Others*, C-262/12, EU:C:2013:851, paragraph 16).

75 As regards, in the first place, the condition that the measure be attributable to the State, it is sufficient to note that the tax exemption at issue in the main proceedings derives directly from the order of 5 June 2001 (which was adopted by the Ministry of Finance of the Spanish State) and stems originally from the Agreement of 3 January 1979, which was entered into and implemented by the Kingdom of Spain.

76 Concerning, in the second place, the condition that the advantage be conferred directly or indirectly through State resources, it is not disputed that the corollary of the exemption at issue in the main proceedings, which entails the removal of a charge which would ordinarily be borne by the Congregación, is a corresponding reduction in the revenue of the Municipality.

77 In those circumstances, the condition concerning intervention through State resources would appear to be satisfied.

The concept of aid which 'affects trade between Member States' and 'distorts or threatens to distort competition'

78 As regards the conditions relating to the effect of an economic advantage on trade between Member States and the distortion of competition that may be entailed, the Court recalls that for the purpose of categorising a national measure as State aid, it is necessary, not to establish that the aid has a real effect on trade between Member States and that competition is actually being distorted, but only to examine whether that aid is liable to affect such trade and distort competition (judgment of 21 December 2016, *Vervloet and Others*, C-76/15, EU:C:2016:975, paragraph 102).

79 In particular, when aid granted by a Member State strengthens the position of certain undertakings as compared with that of other undertakings competing in trade between Member States, such trade must be regarded as affected by the aid. In that regard, it is not necessary that the beneficiary undertakings themselves be involved in trade between Member States. Where a Member State grants aid to undertakings, internal activity may be maintained or increased as a result, so that the opportunities for undertakings established in other Member States to penetrate the market in that Member State are

thereby reduced (judgment of 21 December 2016, *Vervloet and Others*, C-76/15, EU:C:2016:975, paragraph 104).

80 With regard to the condition concerning distortion of competition, the point should be made 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 (judgment of 26 October 2016, *Orange* v *Commission*, C-211/15 P, EU:C:2016:798, paragraph 66).

81 In the case before the referring court, it is possible that the exemption from ICIO for which the Congregación may qualify might make the educational services it provides more attractive by comparison with the services provided by establishments that are also active on the same market.

82 That said, in accordance with Article 2 of Commission Regulation (EC) No 1998/2006 of 15 December 2006 on the application of Articles [107 and 108 TFEU] to *de minimis* aid (OJ 2006 L 379, p. 5), read in the light of recital 8 thereof, aid not exceeding a ceiling of EUR 200 000 over any period of three years is deemed not to affect trade between Member States and not to distort or threaten to distort competition; such measures are therefore excluded from the concept of State aid (judgment of 8 May 2013, *Libert and Others*, C-197/11 and C-203/11, EU:C:2013:288, paragraph 81).

83 In that regard, it is for the referring court to determine whether that threshold is reached in the present case, bearing in mind that, for the purposes of the necessary calculation, only the advantages that the Congregación has obtained in respect of any economic activities it may carry on can be taken into account, since non-economic activities have to be excluded from that calculation, as indicated in paragraphs 41 to 63 of the present judgment.

84 It is therefore for the referring court to determine in fact, in the light of the foregoing points of interpretation and on the basis of all the relevant circumstances of the case before it, whether trade between Member States is liable to be affected by the exemption at issue in the main proceedings and whether Regulation No 1998/2006 applies to this case.

85 In that regard, if the referring court were to have doubts or difficulties concerning the determination of the amount of aid which the Congregación may have received in respect of any possible economic activity, it may, in addition to seeking the cooperation of other bodies of the Member State concerned, request the assistance of the Commission for this purpose, in accordance with the principle of sincere cooperation, as is apparent in particular from paragraphs 77 to 96 of the Commission notice on the enforcement of State aid law by national courts (OJ 2009 C 85, p. 1) (see, to that effect, judgment of 13 February 2014, *Mediaset*, C-69/13, EU:C:2014:71, paragraph 30).

The concepts of 'existing aid' and 'new aid' for the purposes of paragraphs 1 and 3 of Article 108 TFEU respectively

86 The Spanish Government has argued in its observations before the Court that, in view of the fact that the Agreement of 3 January 1979 was concluded before the Kingdom of Spain's accession to the European Union and that that agreement is the basis for the exemption at issue in the main proceedings, the exemption in any event constitutes existing aid. It should be recalled in that regard that in the context of the State aid control system, established in Articles 107 and 108 TFEU, the procedure differs according to whether the aid is existing or new. Whereas existing aid may, in accordance with Article 108(1) TFEU, be lawfully implemented so long as the Commission has made no finding of incompatibility, Article 108(3) TFEU provides that plans to grant new aid or alter existing aid must be

notified, in due time, to the Commission and may not be put into effect until the procedure has resulted in a final decision (judgment of 26 October 2016, *DEI and Commission* v *Alouminion tis Ellados*, C-590/14 P, EU:C:2016:797, paragraph 45).

87 Without prejudice to the Act of Accession of the Member State concerned, 'existing aid' is all aid which existed prior to the entry into force of the Treaty in that Member State, that is to say, aid schemes and individual aid put into effect before, and still applicable after, the entry into force of the Treaty (see, to that effect, judgment of 18 July 2013, *P*, C-6/12, EU:C:2013:525, paragraph 42).

88 In the present case, whilst it is true that Article IV(1)(B) of the Agreement of 3 January 1979, which provides that the Spanish Catholic Church is to be generally exempted from property taxes, dates from before the Kingdom of Spain's accession to the European Union, the fact remains that ICIO was introduced into Spanish legislation only after that accession and the tax exemption at issue in the main proceedings came into being as a result of the order of 5 June 2001.

89 In those circumstances, if the referring court were to find that State aid has been granted to the Congregación, that aid could only be new aid for the purposes of Article 108(3) TFEU.

90 In view of all the foregoing considerations, the answer to the question raised is that a tax exemption such as that at issue in the main proceedings, to which a congregation belonging to the Catholic Church is entitled in respect of works on a building intended to be used for activities that do not have a strictly religious purpose, may fall under the prohibition in Article 107(1) TFEU if, and to the extent to which, those activities are economic, a matter which it is for the referring court to determine.

Costs

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

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

A tax exemption such as that at issue in the main proceedings, to which a congregation belonging to the Catholic Church is entitled in respect of works on a building intended to be used for activities that do not have a strictly religious purpose, may fall under the prohibition in Article 107(1) TFEU if, and to the extent to which, those activities are economic, a matter which it is for the referring court to determine.

[Signatures]

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* Language of the case: Spanish.