JUDGMENT OF THE COURT (Grand Chamber)

17 November 2009 (*)

(Freedom to provide services – Article 49 EC – State aid – Article 87 EC – Regional legislation establishing a tax on stopovers for tourist purposes by aircraft used for the private transport of persons, or by recreational craft, to be imposed only on operators whose tax domicile is outside the territory of that region)

In Case C-169/08,

REFERENCE for a preliminary ruling under Article 234 EC from the Corte costituzionale (Italy), made by decision of 13 February 2008, received at the Court on 21 April 2008, in the proceedings

Presidente del Consiglio dei Ministri

v

Regione Sardegna,

THE COURT (Grand Chamber),

composed of V. Skouris, President, K. Lenaerts, J.-C. Bonichot, P. Lindh and C. Toader (Rapporteur), Presidents of Chambers, C.W.A. Timmermans, A. Rosas, P. Kūris, E. Juhász, G. Arestis, A. Borg Barthet, A. Ó Caoimh and L. Bay Larsen, Judges,

Advocate General: J. Kokott,

Registrar: R. Grass,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– the Region of Sardinia, by A. Fantozzi and G. Campus, avvocati,

– the Netherlands Government, by C. Wissels and M. Noort, acting as Agents,

– the Commission of the European Communities, by W. Mölls and E. Righini, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 2 July 2009,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Articles 49 EC and 87 EC.

2 The reference was made in proceedings between the President of the Council of Ministers and the

Region of Sardinia regarding the establishment by that region of a tax on stopovers for tourist purposes by aircraft used for the private transportation of persons, or by recreational craft, to be imposed only on operators whose tax domicile is outside the territory of that Region.

National legal framework

The Italian Constitution

3 The first paragraph of Article 117 of the Italian Constitution provides:

'Legislative power shall be exercised by the State and the Regions in accordance with the Constitution and within the limits set by Community law and international obligations.'

National legislation

4 The first paragraph of Article 743 of the Sea and Air Navigation Code (Codice della navigazione) gives the following definition of aircraft:

'"Aircraft" means any machine intended for the transportation by air of persons or things.'

5 In Article 1(2) of the Recreational Sailing Code (Codice della nautica da diporto), introduced by Legislative Decree No 171 (Decreto legislativo n. 171) of 18 July 2005, recreational sailing is defined as follows:

'For the purposes of this Code, recreational sailing means sailing in maritime and inland waters for sporting or leisure purposes and without a view to profit.'

6 Article 2(1) of the Recreational Sailing Code concerns the commercial use of recreational craft, which it defines as follows:

'1. Recreational craft are used for commercial purposes where:

(a) they are the subject of a contract of leasing or chartering;

(b) they are used for professional training in recreational sailing;

(c) they are used by diving and sub-aqua training centres as support craft for persons practising underwater diving for sports or leisure purposes.

…'

Regional legislation

7 Law No 4 of the Region of Sardinia of 11 May 2006 laying down miscellaneous provisions on revenue, reclassification of costs, social policy and development, as amended by Article 3(3) of Law No 2 of the Region of Sardinia of 29 May 2007 laying down provisions for the preparation of the annual and long-term budget of the Region – 2007 Finance Law ('Regional Law No 4/2006') contains an Article 4, entitled 'Regional tax on stopovers for tourist purposes by aircraft or recreational craft', which provides as follows:

'1. From 2006, a regional tax on stopovers for tourist purposes by aircraft or recreational craft shall be established.

2. The pre-conditions for the tax shall be the following:

(a) stopovers in the period between 1 June and 30 September at airfields in the territory of the region by general aviation aircraft, as referred to in Article 743 et seq. of the Sea and Air Navigation Code, used for the private transport of persons;

(b) stopovers in the period between 1 June and 30 September in harbours, berths and mooring places situated in the territory of the region and at rigged moorings in territorial waters along the coasts of Sardinia by recreational craft, as referred to in Legislative Decree No 171 of 18 July 2005 (Recreational Sailing Code) or, in any event, by craft used for recreational purposes, of a length exceeding 14 metres, measured in accordance with the EN/ISO/DIS 8666 harmonised standards, as provided for in Article 3(b) of that legislative decree.

3. The persons liable for the tax shall be the natural or legal persons who operate the aircraft for the purposes of Article 874 et seq. of the Sea and Air Navigation Code, or who operate the recreational craft for the purposes of Article 265 et seq. of the Sea and Air Navigation Code, and whose tax domicile is outside the territory of the region.

4. The regional tax provided for in paragraph 2(a) shall be payable in respect of each stopover, and that provided for in paragraph 2(b) shall be payable annually.

…

6. The following shall be exempt from the tax:

(a) vessels which make a stopover in order to take part in sporting regattas, rallies of vintage and monotype boats and in sailing events, including non-competitive sailing events, where the organisers have given the maritime authorities advance notification of the event; ARASE (Agenzia della Regione autonoma della Sardegna per le entrate; Revenue Office of the Autonomous Region of Sardinia) must be informed, before the berthing, that such notification has been given;

b) recreational craft which are moored throughout the year at harbour installations of the region;

c) technical stops, limited to the time necessary for those purposes.

The procedure for certification of the grounds of the exemption shall be laid down by specific measure of ARASE.

7. The tax shall be paid:

(a) in the case of aircraft referred to in paragraph 2(a), at the time of landing;

(b) within 24 hours of the arrival of the recreational craft in harbours, berths and mooring places, or at rigged moorings, along the coasts of Sardinia;

in accordance with procedures to be laid down by measure of ARASE.

…’

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

8 By two actions brought before the Corte costituzionale, the first in 2006 and the second in 2007, the

President of the Council of Ministers raised questions concerning the constitutionality of laws in relation not only to Article 4 of Regional Law No 4/2006 but also to Articles 2 and 3 of that law and to Article 5 of Law No 2 of 29 May 2007, both in the original version and as amended. All those provisions establish regional taxes.

9 With regard to Article 4 of Regional Law No 4/2006, the applicant in the main proceedings submitted in particular that that provision does not comply with the requirements of Community law, which are binding upon the legislature in Italy pursuant to the first paragraph of Article 117 of the Italian Constitution. In support of those actions, the applicant alleged (i) infringement of Articles 49 EC and 81 EC, read in conjunction with Articles 3(1)(g) EC and 10 EC, and (ii) infringement of Article 87 EC.

10 In judgment No 102 of 15 April 2008, the Corte costituzionale, after joining the above two actions, ruled on the questions of constitutionality raised in the 2006 action and on some of the questions of that nature raised in the 2007 action. With regard, in particular, to Article 4 of Regional Law No 4/2006, which is the subject of the 2007 action, the Corte costituzionale declared inadmissible or unfounded the questions of constitutionality which had been raised in relation to constitutional provisions other than the first paragraph of Article 117. It therefore decided to disjoin the proceedings relating to that provision and to stay those proceedings until the date of delivery of the judgment of the Court of Justice on the reference for a preliminary ruling made in the order for reference. In addition, with regard to the alleged infringement of Articles 3(1)(g) EC, 10 EC and 81 EC, the Corte costituzionale considered it appropriate to reserve its right to rule subsequently.

11 In the order for reference, the Corte costituzionale makes a number of points relating to the admissibility of its reference for a preliminary ruling with regard, first, to its status as a ‘court or tribunal’ within the meaning of Article 234 EC and, secondly, to the relevance of the questions referred for the purposes of resolving the case before it.

12 The Corte costituzionale states first that the concept of ‘court or tribunal’ within the meaning of Article 234 EC must be construed on the basis of Community law and not inferred from the status under national law of the body making the reference, and that the Corte costituzionale satisfies all the conditions required in order to be permitted to make a reference for a preliminary ruling.

13 With regard to the relevance of the questions referred, the Corte costituzionale states that, in direct actions for constitutional review, the provisions of Community law ‘serve as interstitial rules by reference to which the conformity of the regional legislation with the first paragraph of Article 117 of the Constitution can properly be tested ... or which, more specifically, make it possible in practice to apply the limits laid down in the first paragraph of Article 117 of the Constitution ... with the result that a regional provision held to be incompatible with such Community provisions will be declared unconstitutional’.

14 With regard to the substance of the questions referred, the Corte costituzionale states that Article 4 of Regional Law No 4/2006 falls within the scope of the Community provisions referred to in paragraph 9 of the present judgment. Being applicable to natural and legal persons, it covers undertakings which operate recreational craft or aircraft in the general aviation sector used for the private transportation of persons.

15 The Corte costituzionale adds that, by imposing a tax on undertakings which do not have their tax domicile in Sardinia, Article 4 of Regional Law No 4/2006 appears to discriminate against such undertakings as compared with undertakings which carry out the same activity but are not required to pay the tax solely because they have their tax domicile in Sardinia, and that, as a consequence, it appears to increase the cost of the services provided to the detriment of non-resident undertakings.

16 Furthermore, the Corte costituzionale entertains certain doubts regarding the justifications put forward by the Region of Sardinia, which maintains, first, that those non-resident undertakings benefit from regional and local public services, in the same way as undertakings which have their tax domicile in that region, but without contributing to the funding of those services and, secondly, that it is necessary to offset the additional costs borne by undertakings domiciled in the Region of Sardinia, on account of the geographical and economic features associated with the fact that the Region of Sardinia is an island.

17 With regard, inter alia, to the alleged infringement of Article 87 EC, the Corte costituzionale states that the issue arises as to whether the economic competitive advantage accruing to undertakings which have their tax domicile in Sardinia as a result of the fact that they are not liable to pay the regional tax on stopovers comes within the notion of State aid, given that that advantage derives not from the grant of a tax concession but indirectly from the lower costs borne by those undertakings as compared with undertakings established outside the territory of the region.

18 In those circumstances, the Corte costituzionale decided to stay the proceedings and refer the following questions to the Court for a preliminary ruling:

‘1. Is Article 49 EC to be interpreted as precluding the application of a rule, such as that laid down in Article 4 of [Regional Law No 4/2006], under which the regional tax on stopovers for tourist purposes by aircraft is levied only on undertakings, operating aircraft which they use for the transport of persons in the course of “general business aviation” activities, which have their tax domicile outside the territory of the Region of Sardinia?

2. Does Article 4 of [Regional Law No 4/2006], by providing for the imposition of the regional tax on stopovers for tourist purposes by aircraft only on undertakings, operating aircraft which they use for the transport of persons in the course of “general business aviation” activities, which have their tax domicile outside the territory of the Region of Sardinia, constitute, within the meaning of Article 87 EC, State aid to undertakings carrying on the same activities which have their tax domicile in the Region of Sardinia?

3. Is Article 49 EC to be interpreted as precluding the application of a rule, such as that laid down in Article 4 of [Regional Law 4/2006], under which the regional tax on stopovers for tourist purposes by recreational craft is levied only on undertakings, operating recreational craft, which have their tax domicile outside the territory of the Region of Sardinia and whose commercial operations involve making such craft available to third parties?

4. Does Article 4 of [Regional Law No 4/2006], by providing for the imposition of the regional tax on stopovers for tourist purposes by recreational craft only on undertakings, operating recreational craft, which have their tax domicile outside the territory of the Region of Sardinia and whose commercial operations consist in making such craft available to third parties constitute, within the meaning of Article 87 EC, State aid to undertakings carrying on the same activities which have their tax domicile in the Region of Sardinia?’

Questions referred for a preliminary ruling

First and third questions, concerning Article 49 EC

19 By its first and third questions, which should be examined together, the referring court asks, essentially, whether Article 49 EC must be interpreted as precluding tax legislation, adopted by a regional authority, such as Article 4 of Regional Law No 4/2006, which provides for the imposition of a regional tax in the event of stopovers for tourist purposes by aircraft used for the private transport of persons, or by

recreational craft, where that tax is imposed only on undertakings which have their tax domicile outside the territory of the region.

Conditions for the application of Article 49 EC

20 In order to reply to such a question, it must first be determined whether Regional Law No 4/2006 falls within the scope of the freedom to provide services under Article 50 EC.

21 As is clear from the wording of Article 4 of Regional Law No 4/2006, the tax at issue in the main proceedings applies to stopovers for tourist purposes by general aviation aircraft used for the private transport of persons (Article 4(2)(a) of that law), or by recreational craft or craft used for recreational purposes to the extent that those craft exceed 14m in length (Article 4(2)(b) of that law).

22 Accordingly, the regional tax on stopovers does not apply to civil transport undertakings which carry persons or goods. The referring court states that the tax applies inter alia to undertakings operating aircraft in order to carry out air transport operations free of charge for reasons connected with their business activities. With regard to recreational craft, the referring court adds that the tax applies inter alia to undertakings whose activity consists in making those craft available to third parties in return for remuneration.

23 In that regard, it should be borne in mind that, according to the case-law of the Court, the concept of 'services' within the meaning of Article 50 EC implies that they are ordinarily provided for remuneration and that the remuneration constitutes consideration for the service in question and is agreed upon between the provider and the recipient of the service (see Case 263/86 *Humbel and Edel* [1988] ECR 5365, paragraph 17; Case C-109/92 *Wirth* [1993] ECR I-6447, paragraph 15; and Case C-355/00 *Freskot* [2003] ECR I-5263, paragraphs 54 and 55).

24 In the present case, the regional tax on stopovers, as is apparent from the observations of the Region of Sardinia, applies to operators of means of transport which travel to the territory of the region and not to undertakings which carry out their activity in that region. However, as was stated by the Advocate General in point 34 of her Opinion, it cannot be inferred from the sole fact that the tax in question does not apply to the provision of transport services that the tax legislation at issue in the main proceedings has no connection at all with the freedom to provide services.

25 It follows from well-established case-law that, whilst the third paragraph of Article 50 EC refers only to the active provision of services – where the provider moves to the beneficiary of the services – that also includes the freedom of the persons for whom the services are intended, including tourists, to go to another Member State, where the provider is, in order to enjoy the services there (see, inter alia, Joined Cases 286/82 and 26/83 *Luisi and Carbone* [1984] ECR 377, paragraphs 10 and 16; Case C-76/05 *Schwarz and Gootjes-Schwarz* [2007] ECR I-6849, paragraph 36; and Case C-318/05 *Commission* v *Germany* [2007] ECR. I-6957, paragraph 65).

26 In the main proceedings, as the Advocate General stated in point 37 of her Opinion, persons operating a means of transport and the users of such transport receive a number of services on the territory of the Region of Sardinia, such as the services provided at the airports and ports. Consequently, the stopover is a necessary condition for receiving such services and the regional tax on stopovers has a certain link with their provision.

27 With regard to the regional tax on stopovers by recreational craft, it should in addition be pointed out that this also applies to the undertakings operating such recreational craft and, inter alia, to those whose commercial operations consist in making such craft available to third parties for remuneration. Thus, by enacting Regional Law No 4/2006, the Sardinian legislature established a direct tax on the provision of

services within the meaning of Article 50 EC.

28 Finally, as was pointed out by the Commission of the European Communities, the services on which the regional tax on stopovers has an impact may have a cross-border character since, in the first place, that tax is likely to affect the ability of undertakings established in Sardinia to offer stopover services at the airports and ports to nationals of, or undertakings established in, another Member State and, in the second place, it affects the operations of outsider undertakings having their seat in a Member State other than the Italian Republic and operating recreational craft in Sardinia.

The existence of a restriction on the freedom to provide services

29 With regard to the question whether the legislation at issue in the main proceedings constitutes a restriction on the freedom to provide services, it should be borne in mind at the outset that, in the field of freedom to provide services, a national tax measure restricting that freedom may constitute a prohibited measure, whether it was adopted by the State itself or by a local authority (see, inter alia, Joined Cases C-544/03 and C-545/03 *Mobistar and Belgacom Mobile* [2005] ECR I-7723, paragraph 28 and the case-law cited).

30 In the present case, it is common ground that the regional tax on stopovers is imposed on operators of aircraft or recreational craft having their tax domicile outside the territory of the region and that the chargeable event for tax purposes is the stopover of the aircraft or recreational craft in that territory. Even though, admittedly, that tax is applicable only in a particular part of a Member State, it applies to stopovers by the aircraft and recreational craft in question irrespective of whether they come from another region of Italy or from another Member State. In those circumstances, the regional character of the tax does not mean by definition that it cannot impinge on the freedom to provide services (see, by analogy, Case C-72/03 *Carbonati Apuani* [2004] ECR I-8027, paragraph 26).

31 The application of that tax legislation makes the services concerned more costly for the persons liable for that tax, who have their tax domicile outside the territory of the region and who are established in other Member States, than they are for operators established in that territory.

32 Such legislation introduces an additional cost for stopovers made by aircraft or boats operated by persons having their tax domicile outside the territory of the region and established in other Member States, and thus creates an advantage for some categories of undertaking established in that territory (see Case C-353/89 *Commission* v *Netherlands* [1991] ECR I-4069, paragraph 25; Case C-250/06 *United Pan-Europe Communications Belgium and Others* [2007] ECR I-11135, paragraph 37; and Case C-212/06 *Government of the French Community and Walloon Government* [2008] ECR I-1683, paragraph 50).

33 However, the Region of Sardinia states that, in view of the nature and objectives of the regional tax on stopovers, which was introduced for the protection of the environment, residents and non-residents are not in an objectively comparable situation and, accordingly, the fact that they are treated differently does not constitute a restriction on the freedom to provide services, according to the case-law of the Court and, in particular, the judgment in Case C-279/93 *Schumacker* [1995] ECR I-225. Whereas residents, by financing the activities of the Region of Sardinia through general taxation and, in particular, through income tax revenues, part of which fall within the regional budget, contribute to the resources to be used for conservation purposes, restoration and the protection of environmental assets, non-resident undertakings behave like environmental ‘free riders’, by using the resources without paying towards the costs of those activities.

34 In that regard, the Court has indeed accepted, in relation to direct taxation, that the situation of

residents and the situation of non-residents in a given Member State are not generally comparable, since there are objective differences between them, both from the point of view of the source of the income and from the point of view of their ability to pay tax or the possibility of account being taken of their personal and family circumstances (see, inter alia, *Schumacker*, paragraphs 31 to 33, and Case C-527/06 *Renneberg* [2008] ECR I-7735, paragraph 59).

35 However, in order for the comparison of the situation of the taxpayers to be carried out, the specific characteristics of the relevant tax must be taken into account. Accordingly, a difference in treatment as between residents and non-residents may constitute a restriction on the freedom to provide services prohibited by Article 49 EC where there is no objective difference in the situation, with regard to the tax levy in question, which would justify different treatment between the various categories of taxpayer (see, to that effect, *Renneberg*, paragraph 60).

36 That is notably the case with the tax at issue in the main proceedings. As stated by the Commission, the obligation to pay that tax arises on account of stopovers made by aircraft used for the private transport of persons or by pleasure boats and not because of the financial situation of the taxpayers concerned.

37 It follows that, in terms of the consequences for the environment, all natural and legal persons who receive the services in question are – contrary to the contentions of the Region of Sardinia – in an objectively comparable situation with regard to that tax, irrespective of the place where they reside or are established.

38 The fact that taxpayers in Sardinia contribute, through general taxation and, in particular, income tax, to the environmental protection activities undertaken by the Region of Sardinia, is irrelevant for the purposes of comparing the situation of residents with that of non-residents in relation to the regional tax on stopovers. As the Advocate General stated in point 87 of her Opinion, that tax is not of the same nature and does not pursue the same objectives as the other taxes paid by Sardinian taxpayers, which serve above all to fund the State budget in a general way and thereby to finance all regional activities.

39 It follows from the above that there is nothing in the documents before the Court to support a finding that residents and non-residents are not in an objectively comparable situation with regard to the regional tax on stopovers. The tax legislation at issue in the main proceedings therefore constitutes a restriction on the freedom to provide services in that it taxes only operators of aircraft used for the private transport of persons, or of pleasure boats, who have their tax domicile outside the territory of the region, without imposing the same tax on the operators established in that territory.

The possible justification of the legislation at issue in the main proceedings

– The justification related to the requirements of environmental protection and the protection of public health

40 The Region of Sardegna submits that, even admitting that the regional tax on stopovers constitutes a measure restricting the freedom to provide services, such a tax is justified on public interest grounds and, in particular, by environmental protection requirements which can be regarded as ‘public health’ grounds as expressly referred to in Article 46(1) EC.

41 In particular, justification for that tax is said to be found in a new regional policy for the protection of the environment and countryside of Sardinia. Under that policy, according to the Region of Sardinia, there are plans for a series of levies designed, first, to discourage squandering of the environmental and coastal landscape heritage and, secondly, to finance expensive measures to restore coastal areas. Such a tax can also be justified by the ‘polluter pays’ principle since, indirectly, it is imposed on the operators of the means of transport which are one of the sources of pollution.

42 In that regard, it should be borne in mind that, according to settled case-law, irrespective of the existence of a legitimate objective which serves overriding reasons relating to the public interest, a restriction on the fundamental freedoms guaranteed by the EC Treaty may be justified only if the relevant measure is appropriate to ensuring the attainment of the objective in question and does not go beyond what is necessary to attain that objective (see Case C-150/04 *Commission* v *Denmark* [2007] ECR I–1163, paragraph 46; *Government of the French Community and Walloon Government*, paragraph 55; and Case C-222/07 *UTECA* [2009] ECR I-0000, paragraph 25). Furthermore, national legislation is appropriate to ensuring attainment of the objective pursued only if it genuinely reflects a concern to attain it in a consistent and systematic manner (Case C-169/07 *Hartlauer* [2009] ECR I-0000, paragraph 55).

43 In the present case, it should be pointed out that, even if the reasons given by the Region of Sardinia could justify the establishment of the regional tax on stopovers, they cannot justify the way in which it is implemented and, in particular, the fact that operators whose tax domicile is outside the territory of the region – who are the only persons liable to pay that tax – are treated differently.

44 It is clear that those implementing rules, which entail a restriction on the freedom to provide services within the meaning of Article 49 EC, are not appropriate or necessary for the attainment of those general objectives. As the Advocate General stated in points 73 and 74 of her Opinion, even if it is accepted that private aircraft and recreational craft making stopovers in Sardinia constitute a source of pollution, that pollution is caused regardless of where those aircraft and boats come from and, in particular, it is not linked to the tax domicile of those operators. The aircraft and boats of residents and non-residents alike contribute to environmental damage.

45 Accordingly, the restriction on the freedom to provide services which is brought about by the tax legislation at issue in the main proceedings cannot be justified on grounds relating to environmental protection since the basis for applying the regional tax on stopovers introduced by that legislation is a distinction between persons which is unrelated to that environmental objective. Nor can such a restriction be justified on public health grounds, since the Region of Sardinia has not provided any evidence which would make it possible to hold that that legislation is intended to protect public health.

– The justification related to cohesion of the tax system

46 In its observations, the Region of Sardinia, in order to justify the tax legislation at issue in the main proceedings, relies on the need to preserve the cohesion of its tax system. The regional tax on stopovers, imposed only on persons who have their tax domicile outside the territory of the region, is said to be justified by the fact that residents of the region pay other taxes which contribute to operations for the protection of the Sardinian environment.

47 In that regard, it should be borne in mind that the Court has acknowledged that the need to preserve the cohesion of a tax system may justify a restriction on the fundamental freedoms guaranteed by the Treaty, but has pointed out that such a justification requires a direct link between the tax advantage concerned and the offsetting of that advantage by a particular tax levy, with the direct nature of that link falling to be examined in the light of the objective pursued by the rules in question (see, inter alia, Case C-303/07 *Aberdeen Property Fininvest Alpha* [2009] ECR I-0000, paragraphs 71 and 72).

48 As was stated in paragraph 38 of the present judgment, the regional tax on stopovers does not pursue the same objectives as the taxes paid by taxpayers who are resident in Sardinia, which serve to fund the State budget in a general way and thereby to finance all the activities of the Region of Sardinia. The non-imposition of that tax on those residents cannot therefore be regarded as offsetting the other taxes imposed on them.

49 It follows from those considerations that the restriction on the freedom to provide services which is brought about by the tax legislation at issue in the main proceedings cannot be justified on grounds of the cohesion of the tax system of the Region of Sardinia.

50 In those circumstances, the answer to the first and third questions is that Article 49 EC must be interpreted as precluding tax legislation, adopted by a regional authority, such as that provided for under Article 4 of Regional Law No 4/2006, which establishes a regional tax on stopovers for tourist purposes by aircraft used for the private transport of persons, or by recreational craft, to be imposed only on undertakings whose tax domicile is outside the territory of the region.

Second and fourth questions relating to Article 87 EC

51 By its second and fourth questions, which should be examined together, the referring court asks whether Article 87 EC must be interpreted as meaning that tax legislation, adopted by a regional authority, which establishes a regional tax on stopovers, such as that provided for under Article 4 of Regional Law No 4/2006, to be imposed only on operators whose tax domicile is outside the territory of the region, constitutes a State aid measure in favour of undertakings established in that territory.

52 It should be recalled at the outset that, according to the case-law of the Court, for a measure to be categorised as State aid within the meaning of the Treaty, each of the four cumulative conditions laid down in Article 87(1) EC must be fulfilled. First, there must be an intervention by the State or through State resources; second, the intervention must be liable to affect trade between Member States; third, it must confer an advantage on the recipient; fourth, it must distort or threaten to distort competition (see, in particular, Case C-237/04 *Enirisorse* [2006] ECR I-2843, paragraphs 38 and 39 and the case-law cited).

53 In the present case, it is common ground that the tax at issue in the main proceedings satisfies the second and fourth criteria since it applies to services provided in connection with stopovers by aircraft and recreational craft, which concern intra-Community trade, and that such a tax, by giving an economic advantage to operators established in Sardinia, as indicated in paragraph 32 of the present judgment, can distort competition.

54 The questions relating to the interpretation of Article 87 EC thus concern the application of the two remaining criteria for categorising the regional tax on stopovers as State aid. The Region of Sardinia maintains that the tax cannot be regarded as State aid, both because it does not involve the use of State resources and because it is selective in nature. The Commission contends, in its written observations, that the tax satisfies all the criteria set out in Article 87 EC.

Use of State resources

55 According to the Region of Sardinia, the legislation at issue in the main proceedings does not involve any intervention using regional resources. There is no renunciation of regional revenue, since the resident undertakings already contribute to environmental expenditure through the revenue deriving from the taxes paid by them. The regional tax on stopovers increases that revenue by extending the obligation to pay towards protecting the environment to those who, as non-residents, do not contribute to that expenditure through general taxes.

56 In that regard, it should be noted that, according to settled case-law of the Court, the notion of aid can encompass not only positive benefits such as subsidies, loans or direct investment in the capital of enterprises, but also interventions which, in various forms, mitigate the charges which are normally included in the budget of an undertaking and which therefore, without being subsidies in the strict sense of the word, are of the same character and have the same effect (see Case C-156/98 *Germany* v

Commission [2000] ECR I-6857, paragraph 25, and Joined Cases C-341/06 P and C-342/06 P *Chronopost and La Poste* v *UFEX and Others* [2008] ECR I-4777, paragraph 123 and the case-law cited).

57 As stated by the Commission, tax legislation such as that at issue in the main proceedings, which grants certain undertakings exclusion from the obligation to pay the tax in question, constitutes State aid, even if it does not involve the transfer of State resources, since it involves the renunciation by the authorities concerned of tax revenue which they would normally have received (*Germany* v *Commission*, paragraphs 26 to 28).

58 As a consequence, the fact that the provision made under the tax legislation at issue in the main proceedings is not the grant of a subsidy, but rather the exclusion from the obligation to pay the tax in question of operators of aircraft used for the private transport of persons, or of recreational craft, who have their tax domicile in the territory of the region, means that that exclusion from tax liability may be regarded as constituting State aid.

The selective nature of the tax legislation at issue in the main proceedings

59 According to the Region of Sardinia, the difference in treatment as between resident undertakings and non-resident undertakings does not constitute a selective advantage. The tax legislation at issue in the main proceedings is not selective from a geographic perspective because, in accordance with the interpretation of the Court in Case C-88/03 *Portugal* v *Commission* [2006] ECR I–7115, the framework for reference in which the 'general nature' of the measure should be assessed is that of the infra-State body, if it enjoys sufficient autonomy. That is so in the case in the main proceedings, since the Region of Sardinia has autonomous powers conferred on it by a statute having the authority of constitutional law which authorises it to establish its own taxes. In addition, in accordance with the more general principle of equal treatment in the area of taxation, that legislation taxes differently situations which are legally and factually distinct.

60 In that regard, it does indeed follow from the case-law relied upon by the defendant in the main proceedings that, with regard to a measure adopted not by the national legislature, but by an infra-State body, such a measure is not selective for the purposes of Article 87(1) EC solely on the ground that it confers an advantage only in the part of the national territory in which the measure applies (see *Portugal* v *Commission*, paragraphs 53 and 57, and Joined Cases C-428/06 to C-434/06 *UGT-Rioja and Others* [2008] ECR I-6747, paragraphs 47 and 48).

61 However, it also follows from that case-law that, in order to determine whether a measure is selective, where it is adopted by an infra-State body which enjoys autonomy vis-à-vis the central government of the kind enjoyed by the Region of Sardinia, it is necessary to determine whether, with regard to the objective pursued by that measure, it constitutes an advantage for certain undertakings as compared with others which, within the legal framework in which that body exercises its competences, are in a comparable legal and factual situation (see Case C-143/99 *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke* [2001] ECR I-8365, paragraph 41, and *Portugal* v *Commission*, paragraphs 56 and 58).

62 Thus it must therefore be established whether, having regard to the characteristics of the regional tax on stopovers, the undertakings having their tax domicile outside the territory of the region are, with reference to the legal framework in question, in a factual and legal situation comparable with that of undertakings which are established in that territory.

63 As is clear from paragraphs 36 and 37 of the present judgment, it must be held that, in the light of the

nature and objectives of that tax, all the natural and legal persons who receive stopover services in Sardinia are, contrary to what is argued by the defendant in the main proceedings, in an objectively comparable situation, irrespective of their place of residence or the place where they are established. It follows that the measure cannot be regarded as general, since it does not apply to all operators of aircraft or pleasure boats which make a stopover in Sardinia.

64 Accordingly, tax legislation such as that at issue in the main proceedings constitutes a State aid measure in favour of undertakings established in Sardinia.

65 It is for the referring court to draw the appropriate inferences from that conclusion.

66 In those circumstances, the answer to the second and fourth questions is that Article 87(1) EC must be interpreted as meaning that tax legislation, adopted by a regional authority, which establishes a tax on stopovers, such as that at issue in the main proceedings, to be imposed only on natural and legal persons whose tax domicile is outside the territory of the region, constitutes a State aid measure in favour of undertakings established in that territory.

Costs

67 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:

1. **Article 49 EC must be interpreted as precluding tax legislation, adopted by a regional authority, such as that provided for under Article 4 of Law No 4 of the Region of Sardinia of 11 May 2006 (Miscellaneous provisions on revenue, reclassification of costs, social policy and development) as amended by Article 3(3) of Law No 2 of the Region of Sardinia of 29 May 2007 (Provisions for the preparation of the annual and long-term budget of the Region – 2007 Finance Law), which establishes a regional tax on stopovers for tourist purposes by aircraft used for the private transport of persons, or by recreational craft, to be imposed only on natural and legal persons whose tax domicile is outside the territory of the region.**

2. **Article 87(1) EC must be interpreted as meaning that tax legislation, adopted by a regional authority, which establishes a tax on stopovers, such as that at issue in the main proceedings, to be imposed only on natural and legal persons whose tax domicile is outside the territory of the region, constitutes a State aid measure in favour of undertakings established in that territory.**

[Signatures]

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* Language of the case: Italian.