OPINION OF ADVOCATE GENERAL
WATHELET
delivered on 21 November 2013¹

Case C-326/12

Rita van Caster,
Patrick van Caster
v
Finanzamt Essen-Süd

(Request for a preliminary ruling from the Finanzgericht Düsseldorf (Germany))

(Free movement of capital — Taxation of income from investment funds which do not provide investors with a detailed statement of the profits (‘intransparente Fonds’))

I – Introduction

1. This reference for a preliminary ruling concerns the compatibility of national provisions such as Paragraphs 5 and 6 of the German Law on Investment Tax (Investmentsteuergesetz, ‘InvStg’) with the provisions of the TFEU on the free movement of capital. According to the national provisions in question, an investor’s income from an investment fund is taxed on a flat-rate basis if the company managing the fund fails to comply with the obligations of transparency and provision of information laid down by that law.

II – The legal context

A – Union law

2. Article 63(1) TFEU (formerly Article 56(1) EC) states as follows:

‘Within the framework of the provisions set out in this chapter, all restrictions on the movement of capital between Member States and between Member States and third countries shall be prohibited.’

3. Article 65(3) TFEU (formerly Article 58(3) EC) provides as follows:

‘The measures and procedures referred to in paragraphs 1 and 2 shall not constitute a means of arbitrary discrimination or a disguised restriction on the free movement of capital and payments as defined in Article 63.’

¹ Original language: French.
4. Article 1, entitled ‘General provisions’, of Council Directive 77/799/EEC of 19 December 1977 concerning mutual assistance by the competent authorities of the Member States in the field of direct taxation,” which was applicable at the material time, provided as follows:

‘1. In accordance with the provisions of this Directive the competent authorities of the Member States shall exchange any information that may enable them to effect a correct assessment of taxes on income and on capital.

2. There shall be regarded as taxes on income and on capital, irrespective of the manner in which they are levied, all taxes imposed on total income, on total capital, or on elements of income or of capital, including taxes on gains from the disposal of movable or immovable property, taxes on the amounts of wages or salaries paid by enterprises, as well as taxes on capital appreciation.

…’

5. Article 2 of Directive 77/799, headed ‘Exchange on request’, provides as follows:

‘1. The competent authority of a Member State may request the competent authority of another Member State to forward the information referred to in Article 1(1) in a particular case. The competent authority of the requested State need not comply with the request if it appears that the competent authority of the State making the request has not exhausted its own usual sources of information, which it could have utilized, according to the circumstances, to obtain the information requested without running the risk of endangering the attainment of the sought after result.

2. For the purpose of forwarding the information referred to in paragraph 1, the competent authority of the requested Member State shall arrange for the conduct of any enquiries necessary to obtain such information.’

6. Article 11 of the Directive, entitled ‘Applicability of wider-ranging provisions of assistance’, provides as follows:

‘The foregoing provisions shall not impede the fulfilment of any wider obligations to exchange information which might flow from other legal acts.’

B – German law

7. The Finanzgericht Düsseldorf relies on the following provisions of the InvStG.

8. Paragraph 5 in the version of 15 December 2003, applicable from 1 January 2004, provides as follows:

‘(Basis of assessment)’

(1) Paragraphs 2 and 4 shall apply only if

1. for each income distribution in relation to a holding, the investment company informs investors, in the German language, of

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2 — OJ 1977 L 336, p. 15. This directive was repealed, with effect from 1 January 2013, by Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC (OJ 2011 L 64, p. 1). Although the new directive makes significant changes to the system for the exchange of information between the tax authorities of the Member States, the changes do not affect the present discussion.
(a) the amount of the distribution (to at least four decimal places),
(b) the amount of income distributed (to at least four decimal places)
(c) the sums contained in the distribution, that is to say:
   (aa) the income of the previous years equivalent to a distribution,
   (bb) capital gains on exempt sales within the meaning of the first sentence of Paragraph 2(3),
        point 1, first sentence,
   (cc) income within the meaning of Paragraph 3, point 40, of the Income Tax Law,
   (dd) income within the meaning of Paragraph 8b(1) of the Corporation Tax Law,
   (ee) capital gains on sales within the meaning of Paragraph 3, point 40, of the Income Tax
        Law,
   (ff) capital gains on sales within the meaning of Paragraph 8b(2) of the Corporation Tax
        Law,
   (gg) income within the meaning of the second sentence of Paragraph 2(3), point 1, provided
        that it is not income from capital within the meaning of Paragraph 20 of the Income Tax
        Law,
   (hh) capital gains on exempt sales within the meaning of Paragraph 2(3), point 2,
   (ii) income within the meaning of Paragraph 4(1),
   (jj) income within the meaning of Paragraph 4(2), for which there was no deduction under
       sub-paragraph 4,
   (kk) income within the meaning of Paragraph 4(2) which, by virtue of a double taxation
       convention, confers a right of set-off against the income or corporation tax of tax
       deemed to have been paid,
(d) of the portion of the distribution conferring a right of set-off or repayment of the income
    tax on the capital within the meaning of
       (aa) Paragraph 7(1) and (2),
       (bb) Paragraph 7(3),
(e) the amount of income tax on the capital to be set off or repaid within the meaning of
    (aa) Paragraph 7(1) and (2),
    (bb) Paragraph 7(3),
(f) the amount of foreign tax in respect of income within the meaning of Paragraph 4(2)
    included in the amounts distributed and
    (aa) imputable pursuant to Paragraph 34c(1) of the Income Tax Law or pursuant to a double
       taxation convention,
(bb) deductible pursuant to Paragraph 34c(3) of the Income Tax Law if there was no
deduction under Paragraph 4(4),

(cc) deemed to have been paid pursuant to a double taxation convention.

(g) the amount of the deduction for depreciation or diminution of substance pursuant to the
first sentence of Paragraph 3(3),

(h) the amount of the reduction in corporation tax claimed by the distributing company under
Paragraph 37(3) of the Corporation Tax Law;

2. the investment company shall send to the investors, in the German language, for the income
equivalent to a distribution, the information referred to in point 1 in respect of a holding in an
investment, not later than four months after the end of the accounting year in which it is
deemed to have been paid;

3. the investment company shall publish the information referred to in points 1 and 2, together
with the annual report within the meaning of Paragraph 45(1) and Paragraph 122(1) and (2) of
the Investmentgesetz (Law on Investments), in the electronic bulletin of official announcements;
the information must be accompanied by a certificate issued by a person authorised to provide
professional assistance pursuant to Paragraph 3 of the Law on the profession of tax adviser
(Steuerberatungsgesetz), of an officially recognised audit agency or similar agency, confirming
that the information was established in accordance with the rules of German tax law;
paragraph 323 of the Commercial Code (Handelsgesetzbuch) shall apply, mutatis mutandis. If
the statement of account is not published in the electronic bulletin of official announcements in
accordance with the Law on Investments, the reference under which the statement of account is
published in the German language must also be given;

4. the foreign investment company shall calculate and state, together with the redemption price, the
total income deemed to have been paid after 31 December 1993 to the holder of units in foreign
investments on which tax has not yet been paid;

5. the foreign investment company shall, at the request of the central federal tax office, provide
comprehensive proof to that office within three months of the veracity of the information set
out in points 1, 2 and 4. If the certificates are drawn up in a foreign language, a certified
translation into German may be required. If the foreign investment company gives information
of an incorrect amount, it must take account of the difference in the amount on its own
initiative or where so requested by the federal finance office in the notice for the current year.

If the information referred to in point 1(c) or (f) is not available, the income shall be taxed in
accordance with the first sentence of Paragraph 2(1), and Paragraph 4 shall not apply. 3

9. Paragraph 6 InvStG, in the version of 15 December 2003, applicable from 1 January 2004, provides
as follows:

‘(Taxation in the event of non-notification)If the requirements of Paragraph 5(1) are not fulfilled, the
investor shall be taxed on the distributions of income from units, the interim profit and 70% of the
capital gains arising from the difference between the first fixed redemption price in a calendar year
and the last fixed redemption price in the same year; the tax shall relate to not less than 6% of the
last fixed redemption price in a calendar year. If a redemption price is not fixed, the stock exchange
or market price shall be used ...’

3 — As the German Government points out, Paragraph 5 InvStG has been amended several times, but only slightly, with no bearing on the
present dispute.
10. Article 26 of the Convention between the Kingdom of Belgium and the Federal Republic of Germany for the avoidance of double taxation and regulating certain other questions on taxes on income and capital, including the payment of occupational taxes and property taxes, signed on 11 April 1967 (‘Double Taxation Convention’) provides as follows:

‘Exchange of information

1. The competent authorities of the Contracting States shall exchange the information necessary for applying the provisions of the Convention and those of the internal laws of the Contracting States relating to the taxes covered by the Convention in so far as the taxes for which they provide conform with the Convention.

...’

III – The main proceedings and the question referred

11. Mrs van Caster and her son, Mr van Caster (‘the applicants’), who are Belgian nationals resident in the Federal Republic of Germany, hold units in accumulation investment funds established in a Member State other than Germany. The units had been placed on deposit with Banque BBL/ING in Belgium.

12. The applicants declared the income from their units in the investment funds by way of an estimate or valuation on the basis of lists or of the Börsenzeitung (Stock Exchange Newspaper), that is to say, EUR 8 435.43 for 2003, EUR 10 500.94 for 2004, EUR 12 318.18 for 2005, EUR 13 263.04 for 2006, EUR 12 672.46 for 2007 and EUR 14 272.88 for 2008, amounting to a total of EUR 71 462.93.

13. However, the Finanzamt Essen-Süd took the view that the conditions laid down by Paragraph 5 InvStG were not fulfilled and assessed the income in accordance with Paragraph 6 InvStG, which states that the tax must be fixed at a flat rate of at least 6% of the last redemption price fixed in the calendar year. That method of taxation gave rise to the following amounts: EUR 38 503.53 for 2003, EUR 32 691.41 for 2004, EUR 63 603.62 for 2005, EUR 49 463.21 for 2006, EUR 37 045.03 for 2007 and EUR 25 139.27 for 2008, that is to say, a total of EUR 246 446.07.

14. The applicants contested the Finanzamt decision before the Finanzgericht Düsseldorf, claiming that the provisions of Paragraph 6 InvStG applicable from 2004 were contrary to European law, in particular the provisions of the TFEU Treaty on the free movement of capital.

15. In the course of the hearing before the referring court, the parties were heard concerning the basis for 2003, claiming that the income for that year should be estimated at 4% of the redemption price determined at 31 December 2003, that is to say, EUR 19 848.07.

16. With regard to the period from 2004 to 2008, the applicants asked the referring court to amend the notices of assessment so that the basis of assessment of the income in question was determined on the basis of the amounts declared. The Finanzamt Essen-Süd argued that the action should be dismissed because Paragraph 6 InvStG was compatible with Union law.
17. In those circumstances the referring court decided to stay proceedings and to refer the following question to the Court for a preliminary ruling:

‘Does the flat-rate taxation of income from so-called “intransparent” (domestic and) foreign investment funds under Paragraph 6 of the Investmentsteuergesetz (Law on Investment Tax) infringe European Community law (Article 56 EC) because it amounts to a disguised restriction on the free movement of capital (Article 58(3) EC)?’

IV – The procedure before the Court of Justice

18. The reference for a preliminary ruling was lodged at the Court on 10 July 2012. The applicants, the Finanzamt Essen-Süd, the German and United Kingdom Governments and the European Commission lodged written observations and, with the exception of the United Kingdom Government, made oral observations at the hearing of 9 October 2013.

V – Discussion

A – Preliminary observations on Paragraphs 5 and 6 InvStG

19. According to Paragraph 5 InvStG, if an investment company fulfils the obligation to provide investors and the German authorities with certain information in the German language, in the form and within the time limits prescribed, the income from holdings in investment funds is subject to the general rules of transparent taxation (Paragraphs 2 and 4 InvStG), that is to say, as the Commission points out, taxation based on the actual values or, at least, estimated values in accordance with Paragraph 162 of the German Tax Code and not on flat-rate values, as if the taxpayer had invested his cash directly without going through an investment fund.

20. If an investment company does not comply with the requirements of Paragraph 5(1) InvStG, the investor must pay tax on a flat-rate amount laid down by Paragraph 6 of not less than 6% of the last fixed redemption price in the calendar year. According to the referring court, there is no exception to flat-rate calculation that would permit taxpayers to be taxed on the actual income received or at least an estimated figure.

21. It is therefore the taxpayer who must bear the consequences if the company managing the investment fund fails to comply with the provisions of the InvStG.

22. Generally speaking, Paragraphs 5 and 6 InvStG apply to German and foreign investment companies without differentiation, except for, first, the obligation to calculate and, together with the redemption price, give notice of the total income deemed to have been paid after 31 December 1993 to holders of units in foreign investments (Paragraph 5(1), point 4 InvStgG) and, secondly, the obligation to prove fully to the central federal tax office the veracity of certain information (Paragraph 5(1), point 5 InvStgG). Those two requirements must be met by foreign investment companies only.

23. With regard to the latter obligation, I find that foreign investment companies are required, on demand by the central federal tax office, which need not state its reasons, to prove the veracity of the information given to investors. The documents in the case do not explain the reasons why German investment companies are not also required to provide such proof.
24. As regards the application of the InvStG to the facts of the present case, I note that the referring court does not indicate which requirement(s) of Paragraph 5 InvStG are alleged not to have been fulfilled by the foreign investment company in question. That does not affect my assessment because, as the Commission observed at the hearing, and the Finanzamt Essen-Süd agreed, failure to comply with any one of the requirements of Paragraph 5(1) InvStG leads to the flat-rate tax laid down by Paragraph 6.

B – The existence of a restriction on the free movement of capital

25. The question from the referring court refers to Articles 56 and 58(3) EC which were in force at the material time and which have been replaced, without amendment, by Articles 63 and 65(3) TFEU.

1. The parties’ positions

26. The defendant Finanzamt Essen-Süd and the German and United Kingdom governments consider that there is no restriction on the free movement of capital. They consider that a national law such as that at issue in the present case, which applies without distinction to German and foreign investment companies, cannot constitute such a restriction.

27. They also consider that there is no disguised restriction in the present case. According to the defendant and the German Government, the German authorities are entitled to require taxpayers to provide any proof which they consider necessary in order to calculate income tax correctly.

28. The defendant and the German Government observe that, in reality, the legislation at issue creates no particular difficulties for foreign investment companies. They consider that that also applies to the two requirements in respect of foreign investment companies alone, namely the obligation to state the redemption price and the total income deemed to have been paid after 31 December 1993 to holders of units in foreign investments (Paragraph 5(1), no. 4 InvStG) and the obligation to prove fully to the central federal tax office the veracity of certain information (Paragraph 5(1), no. 5 InvStG).

29. In support of their argument, the defendant and the German Government refer to the fact that in 2011 the central federal tax office examined approximately 31 800 communications from foreign investment companies. The German Government adds that the calculation and notification obligations imposed by Paragraph 5 InvStG were not complied with in relation to only 25 of those companies.

30. Starting from the principle that the referring court does not mention the requirements laid down for foreign investment companies by Paragraph 5(1), points 4 and 5 InvStG, the Commission concentrates its assessment on the two obligations given as examples by the referring court as being those which foreign investment companies ‘often’ do not fulfil, namely the obligations to give notice of investment income in the German language and to publish the information required by the InvStG in the electronic bulletin of official announcements.

31. With regard to the first obligation, the Commission observes that the prudential rules applying to investment funds during the years in question, in particular Article 47 of Directive 85/611/EEC, laid down language requirements only for information that was relevant for the purpose of prudential supervision and that had to be published for that reason.

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32. Regarding the second obligation, the Commission observes that it is their commercial interests rather than the provisions of the InvStG that induce foreign funds to provide German investors with such information in German and to publish it in the Bundesanzeiger.

33. As regards the flat-rate tax laid down in Paragraph 6 InvStG, the Commission considers it plausible, subject to the referring court’s findings, that such tax is a disguised restriction in so far as the tax advantage, namely that taxation on the basis of the true or estimated values depends on formalities which are naturally complied with by national companies whose (mainly targeted) clients are nationals with whom the companies communicate in their common language, which is not the case with regard to foreign companies.

34. In contrast, they are not complied with by a foreign investment company which markets its units passively in Germany, the only reason for compliance being the tax charged to investors established in Germany and not the company’s own commercial interests.

35. So far as the applicants are concerned, they concur with the referring court’s position that, although Paragraph 5 InvStG applies without distinction to national and foreign investment companies, there is disguised or *de facto* discrimination to the detriment of the latter because almost all German investment companies comply with the requirements of Paragraph 5 InvStG, whereas foreign investment companies would often have no reason to do so.

2. Assessment

36. First of all, it should be noted that, according to consistent case-law, direct taxes fall within the competence of the Member States, but they must exercise that competence consistently with union law.5

37. It has also consistently been held that the measures prohibited by Article 63(1) TFEU as restrictions on the movement of capital, include those which are such as to discourage non-residents from making investments in a Member State or to discourage that Member State’s residents from doing so in other States.6

38. As the Court has already held in *Persche*, ‘since the possibility of obtaining a deduction for tax purposes can have a significant influence on the donor’s attitude, the inability in Germany to deduct gifts to bodies recognised as charitable if they are established in other Member States is likely to affect the willingness of German taxpayers to make gifts for their benefit. Such legislation constitutes, therefore, a restriction on the free movement of capital prohibited, as a rule, by Article [63 TFEU].’7

39. Furthermore, the Court held very recently, in relation to a provision of Polish law limiting foreign investments by Polish open investment funds to 5% of the value of the assets of the fund concerned, that ’such a provision also has a restrictive effect in relation to companies established in other Member States in that it constitutes an obstacle to the raising, by such companies, of capital in Poland since the acquisition of, inter alia, shares in joint investment bodies is restricted’.8

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40. Therefore it is clear from the Court’s case-law that a national provision which has the effect of deterring residents of a Member State from investing in an undertaking established in a different Member State and of preventing undertakings established in other Member States from attracting investors established or residing in that Member State constitutes a restriction of the free movement of capital.

41. The question therefore is whether Paragraphs 5 and 6 InvStG have a deterrent effect.

42. Although the requirements of Paragraph 5 InvStG apply without differentiation to national and foreign investment companies (except for the obligations laid down in sub-paragraph 1, points 4 and 5) and although, as the United Kingdom Government observes, large international banks must be able to meet those obligations, it cannot be denied that, irrespective of the technical difficulties which they involve, a foreign investment company which does not target the German market at all, or to any great extent, hardly has an interest in complying with those requirements, particularly as it will be the investor that bears the consequences if the company managing the fund decides not to comply.

43. The consequences for the investor may be serious. Unlike the German Government, which considers that the flat-rate tax under Paragraph 6 InvStG is moderate, I agree with the Commission that a return at a flat rate of 6% is in itself high, particularly when interest rates have been low for a long period. At the hearing the German Government stated that the figure of 6% had been set in 2004, when the current version of the InvStG entered into force, and had not been altered since.

44. In the present case, the application of Paragraph 6 InvStG has the effect of raising the applicants’ taxable income from a true or estimated figure of EUR 71 462.93 to a flat-rate figure of EUR 246 446.07.

45. Therefore I consider that, as the referring court suggests, the combined effect of Paragraphs 5 and 6 InvStG, namely a high risk of greater tax (as a result of taxable income being assessed at a fixed rate), together with the likelihood that foreign investment companies will not comply with the requirements of Paragraphs 5 and 6 InvStG, is to deter German investors from investing in foreign investment funds.

46. The conclusion that there is a disguised restriction on the free movement of capital is supported by the fact that Paragraph 6 InvStG rules out any other assessment or estimate, particularly on the basis of figures supplied by the taxpaying investor himself.

47. Even though the Court has often taken that circumstance into account at the stage of justification, \(^9\) which I shall also do below, the Court held in Meilicke and Others, that national legislation … under which the tax credit is granted only following submission of a certificate in accordance with its national system, without any opportunity for the shareholder of showing, by means of other factors and relevant information, the tax actually paid, constitutes a disguised restriction on the free movement of capital prohibited by Article 65(3) TFEU …’. \(^10\)

48. In the light of the foregoing, I conclude that the combined effect of Paragraphs 5 and 6 InvStG entails a restriction on the free movement of capital.

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C – Justification of restriction

49. It remains to consider whether that restriction may be justified by reference to the provisions of the TFEU.

50. The Court has repeatedly held that the free movement of capital may be limited by national legislation only if this is justified by one of the reasons mentioned in Article 65 TFEU or by overriding reasons in the public interest within the meaning of the Court’s case-law.

51. The Finanzamt Essen-Süd and the German Government cite none of the reasons mentioned in Article 65 TFEU, but two overriding reasons in the public interest which have already been recognised by the Court as capable of justifying a restriction on the freedoms of movement, namely the preservation of the allocation of the power to impose taxes between Member States and the effectiveness of fiscal supervision.

52. With regard to safeguarding the allocation of powers to impose taxes between Member States, which was not mentioned at the hearing, the defendant Finanzamt Essen-Süd and the German Government state in their written observations that the InvStG aims to treat in the same way for tax purposes, on the one hand, investments in funds and direct investments and, on the other, investments in foreign funds and investments in German funds. The defendant observes that Germany taxes the world income of its residents whose income tax liability must therefore be unlimited.

53. In my opinion, it is clear from the documents that there is no question of the allocation of taxation powers among the Member States in the present case. That overriding reason in the public interest concerns a system which is designed to prevent conduct capable of jeopardising the right of a Member State to exercise its jurisdiction in relation to activities carried out in its territory, particularly where taxpayers seek to call into question the power of one Member State to impose taxes, preferring that of another Member State which would be more favourable to them. That is not the case here as Germany’s power to tax its residents’ income remains intact, even if the income is from investments in foreign funds. Consequently there is no issue here concerning the allocation of taxation powers among the Member States.

54. In any case, the reasoning of the defendant and the German Government on that point in no way concerns the maintenance of the allocation of taxation powers among the Member States, but rather equality among German residents in relation to German taxes, irrespective of the type or location of their investments.

55. As for the effectiveness of fiscal supervision, the defendant and the German Government consider that there is a risk that the German tax authorities may not actually receive the tax on income from foreign investment funds, particularly where the income is accumulated — because in the present case the funds in question are accumulation funds — and therefore no payment is made in the country where the income from the capital is to be taxed.


56. The Court has consistently held that the need to guarantee the effectiveness of fiscal supervision constitutes an overriding reason in the public interest capable of justifying a restriction on the exercise of the freedoms of movement guaranteed by the Treaty.15

57. As the German Government points out, the tax authorities of a Member State may require taxpayers to provide such proof as they may consider necessary in order to determine whether the conditions for a tax advantage have been met.16

58. The United Kingdom Government, citing Case C-72/09 Etablissements Rimbaud [2010] ECR I-10659, paragraph 35, adds that ‘a Member State may ... apply measures which enable the amount owed by taxpayers to be ascertained clearly and precisely’, which implies that it is not excessive for that Member State to exclude from the tax advantage in question situations where ‘it is not in a position to conduct genuine and effective supervision of compliance with the conditions to which that advantage is subject under its national legislation’ (opinion of Advocate General Bot in A, paragraph 134).

59. However, for a restrictive measure to be justified by the need to ensure the effectiveness of fiscal supervision, it must observe the principle of proportionality, in that it must be appropriate for securing the attainment of the objective it pursues and must not go beyond what is necessary to attain it.17

60. It is probable that the information and the verification of certain information required by Paragraph 5 InvStG should enable the German tax authorities to establish correctly the tax due on the income from investment funds on the basis of their true or estimated value. However, I have cogent reasons for thinking that the German legislation goes further than necessary to attain the objective of correct assessment of the amount due.

61. As I have already pointed out, the referring court does not indicate the obligations imposed by Paragraph 5 InvStG which are said not to have been met in the applicants’ case, but the common points of the different categories of requirements laid down by Paragraph 5 indicate the following factors.

62. First of all, Paragraph 5 InvStG imposes obligations only on investment companies and not on taxpayers whose income is taxable in Germany. If the companies managing the investment funds are foreign, not only are they not taxable in Germany, they are not subject to German law either.

63. However, for at least some of the information required by Paragraph 5 InvStG, the German tax authorities could have sought the assistance of the tax authorities of the Member State where the investment company is established, in the present case Belgium, on the basis of Article 2(1) of Directive 77/799 or could also have used article 26 of the Convention between Belgium and Germany for the avoidance of double taxation which, subject to verification by the referring court, was not done.

64. Indeed, as the Court observed in Persche, ‘the tax authorities concerned may, pursuant to Directive 77/799, call upon the authorities of another Member State in order to obtain all the information that may be necessary to effect a correct assessment of a taxpayer’s liability to tax ... The information which Directive 77/799 allows the competent authorities of a Member State to request is in fact all

15 — Cassis de Dijon, paragraph 8; Futura Participations and Singer, paragraph 31; Laboratoires Fournier, paragraph 24; X and Passenheim-van Schoot, paragraph 45; Dijkman and Dijkman-Lavaleije, paragraph 58; Commission v Portugal, paragraph 42; Melicke and Others, paragraph 41; SIAT, paragraph 36, and Petersen, paragraph 50.


17 — Melicke and Others, paragraph 42; Case C-55/94 Gebhard [1995] ECR I-4165, paragraph 37; a, paragraph 56, and Persche, paragraph 52.
the information which appears to them to be necessary in order to ascertain the correct amount of tax in relation to the legislation which they have to apply themselves.\textsuperscript{18} The German authorities therefore had the option of asking the Belgian authorities for the information listed in Paragraph 5(1), points 1 and 2, InvStG.

65. Furthermore, it has consistently been held,\textsuperscript{19} irrespective of the application of those two instruments for the exchange of information, namely Directive 77/799 and the Convention between Belgium and Germany for the avoidance of double taxation, that an absolute prohibition preventing taxpayers, in the present case the applicants, from submitting to the tax authorities the necessary information to prove that the true or estimated value of their holding in the foreign investment fund is less than that presumed by virtue of applying Paragraph 6 InvStG cannot, in an internal situation in the Union, be justified with regard to the free movement of capital.

66. On that point the Court was very clear in \textit{Meilicke and Others}:

\textquote{43. National rules which would unconditionally prevent shareholders having invested abroad from adducing evidence which satisfies criteria, in particular those of presentation, other than those laid down for national investments, would not only breach the principle of sound administration, but in particular go beyond what is necessary to attain the objective of effective fiscal supervision.}

44. It is not a priori inconceivable that those shareholders may be able to provide relevant documentary evidence enabling the tax authorities of the Member State of taxation to ascertain, clearly and precisely, the reality and nature of tax deductions made in other Member States. \textellipsis\textsuperscript{20}

67. At the hearing the German Government suggested that it was pointless to permit a taxpaying investor himself to provide the information specified in Paragraph 5(1) InvStG because it was not information generally available to him. I do not see why that possibility should be excluded at the outset, particularly as the possibility cannot be ruled out that the investor may ask for and obtain the information from the company managing the fund. In that case, there would be no justification for the German tax authorities to refuse to take the information into account.

68. For all those reasons I consider that the restrictive measure constituted by Paragraph 5 in conjunction with Paragraph 6 InvStG cannot be justified by the need to ensure the effectiveness of fiscal supervision.

\textbf{VI – Conclusion}

69. In the light of the foregoing considerations, I propose that the Court should reply in the following terms to the question referred for a preliminary ruling by the Finanzgericht Düsseldorf:

A national law of a Member State such as Paragraphs 5 and 6 of the German Law on Investment Tax (Investmentsteuergesetz) at issue in the present case, which have the combined effect of imposing a flat-rate tax on the income of residents of that Member State from foreign investment funds in the event of non-compliance with the obligations of transparency and the production of information provided for by that law, rather than a tax on the basis of the true or estimated values constitutes a


\textsuperscript{19} \textit{Meilicke and Others}, paragraphs 43 and 44; also, to that effect, \textit{Baxter and Others}, paragraphs 19 and 20; \textit{Laboratoires Fournier}, paragraph 25; \textit{ELISA}, paragraph 96; \textit{Persche}, paragraph 53, and \textit{Commission v Portugal}, paragraph 46.

\textsuperscript{20} \textit{Meilicke and Others}, paragraphs 43 and 44.
restriction of the free movement of capital, prohibited by Article 63 TFEU, and cannot be justified by the need to maintain a balanced distribution of the power to tax among the Member States or to ensure the effectiveness of fiscal supervision.