Reports of Cases

OPINION OF ADVOCATE GENERAL
MENGOZZI
delivered on 6 November 2013[1]

**Case C-190/12**

**Emerging Markets Series of DFA Investment Trust Company**
**v**
**Dyrektor Izby Skarbowej w Bydgoszczy**

(Request for a preliminary ruling from the Wojewódzki Sąd Administracyjny w Bydgoszczy (Poland))

(Freedom of establishment — Free movement of capital — Articles 56 EC, 57 EC and 58 EC — Tax on income of legal persons — Dividends paid to investment funds established in the territory of third countries — Exemption)

## I – Introduction

1. By the present request for a preliminary ruling, the Wojewódzki Sąd Administracyjny w Bydgoszczy (Administrative Court, Bydgoszcz, Poland) is seeking, in essence, to ascertain whether the difference in tax treatment between dividends paid to investment funds situated in third countries and those paid to investment funds established in Poland is compatible with the free movement of capital.

2. The request has been made in proceedings between the investment fund Emerging Markets Series of DFA Investment Trust Company, which is established in the United States, and the Dyrektor Izby Skarbowej w Bydgoszczy (Director of the tax authority in Bydgoszcz) concerning the refusal of that authority to recognise and refund an overpayment of flat-rate corporation tax for the years 2005 and 2006, paid in respect of the taxation of dividends paid to the applicant in the main proceedings by companies established in Poland.

3. More specifically, in December 2010 the applicant in the main proceedings requested from the tax authority the refund of an overpayment of flat-rate corporation tax, having paid tax on dividends at a rate of 15% in accordance with Article 22(1) of the law on corporation tax (Ustawy o podatku dochodowym od osób prawnych) of 15 February 1992 (the 'Law on Corporation Tax'), read in conjunction with Article 11(2)(b) of the Convention between the Government of the Polish People's Republic and the Government of the United States of America for the avoidance of double taxation and the prevention of fiscal evasion with respect to income (Umowy miedzy Rządem (Polskiej) Rzeczypospolitej Ludowej a Rządem Stanów Zjednoczonych Ameryki o uniknięciu podwójnego opodatkowania i zapobieżeniu uchylaniu się od opodatkowania w zakresie podatków od dochodu) signed in Washington on 8 October 1974 ('the 1974 Double Taxation Convention').

1 — Original language: French.

4. That request was refused by decision of 2 May 2011 on the grounds that, as an investment fund established in the United States of America, the applicant in the main proceedings did not satisfy the conditions for exemption provided for in Article 6(1)(10) of the Law on Corporation Tax, under which only those investment funds operating in accordance with the provisions of the law on investment funds (Ustawy z dnia. o funduszach inwestycyjnych 27 May 2004 (the 'Law on Investment Funds') are exempt from tax.[2]

5. Since that decision was confirmed by the Dyrektor Izby Skarbowej w Bydgoszczy on 6 October 2011, the applicant in the main proceedings brought an action for annulment before the referring court.

6. After observing that, first, the investments made by the applicant in the main proceedings are in the form of 'portfolio investments' so that the shareholdings in the capital of the companies do not allow it to have an influence over the management of those companies and, second, Polish investment funds do not automatically qualify for the personal exemption but must satisfy the requirements laid down in the Law on Investment Funds, the referring court asks whether, in view of the close link between the tax exemption and the provisions of that law, freedom of establishment, rather than the free movement of capital, should apply.

7. If, however, that latter freedom was applicable, the referring court has doubts as to the compatibility of the limited scope of the exemption provided for in the Law on Corporation Tax. The referring court takes the view that, inter alia, any restriction could be justified by the need to ensure the effectiveness of fiscal supervision, since the information necessary to grant exemption from tax, relating to the status and rules on the operation of funds, does not fall within the scope of mechanisms for exchanging information.

8. In those circumstances the referring court decided to stay the proceedings and to refer to the Court the following questions for a preliminary ruling:

'(1) Does Article 56(1) EC (now Article 63 TFEU) apply to an assessment of the permissibility of the application by a Member State of provisions of national law which draw a distinction between the legal situation of taxable persons in such a way that they grant, as part of a personal tax exemption of general scope, an exemption from flat-rate corporation tax on dividends received by investment funds established in a Member State of the European Union but do not provide for such an exemption for an investment fund which is resident for tax purposes in the United States?

(2) Can the difference between the treatment of investment funds established in a non-member country and that of funds established in a Member State of the European Union, as provided for in national law with regard to the personal exemption relating to corporation tax, be regarded as legally justified in the light of Article 58(1)(a) EC, in conjunction with Article 58(3) EC (now Article 65(1)(a) TFEU in conjunction with Article 65(3) TFEU)?'

9. Written observations have been submitted by the applicant in the main proceedings, the German, Spanish, Finnish, French, Italian and Polish Governments, and the European Commission. Those interested parties, with the exception of the Finnish and Italian Governments, presented oral argument at the hearing on 5 September 2013.

2 — Note that, following the adoption of the Law of 25 November 2010, which entered into force on 1 January 2011, investment funds situated in a Member State of the European Union or in another State in the European Economic Area also qualify for exemption if they satisfy the conditions set out in Article 6(1)(10a) of the Law on Corporation Tax.

## II – Analysis

### A – *The first question, regarding the applicability of the free movement of capital*

10. Although the wording of the first question refers only to Article 56 EC, it is clear from the reasons given for the decision to refer the matter, as summarised in point 6 of this Opinion, that the referring court has doubts as to the applicability of the free movement of capital, favouring freedom of establishment in view of the close link between the tax exemption for dividends provided for by the Law on Corporation Tax and the conditions on access to the Polish market for investment funds governed by the Law on Investment Funds.

11. Whereas the applicant in the main proceedings, the German and Italian Governments and the Commission take the view that the free movement of capital does indeed apply,[3] the Polish Government submits that either the freedom of establishment or the freedom to provide services is relevant at the very least. From the perspective of the last freedom, and with reference to *Fidium Finanz*,[4] the Polish Government takes the view that, since the offer of shares in Polish companies by investment funds constitutes a service activity of a financial intermediary or of portfolio management, funds established in the territory of third countries cannot qualify for the tax incentives provided for in Article 6(1)(10) of the Law on Corporation Tax.

12. Personally, I do not believe that the applicability of the free movement of capital can reasonably be called into question.

13. In that regard, reference should first be made to the subject-matter of the legislation at issue in the main proceedings, which does not refer to the conditions for the access of investment funds of a third country to the market of a Member State, in this case Poland, but governs the tax treatment of the revenue from such funds.

14. That finding alone, in my view, without more, means that the applicability of the freedom to provide services can be ruled out.

15. Indeed, unlike the situation giving rise to the judgment in *Fidium Finanz*, which concerned the prohibition imposed by the German authorities on a Swiss company granting credit, on a commercial basis, to German customers on the ground that it did not have the authorisation necessary to carry out that activity, in which the Court held that it fell within the scope of the freedom to provide services,[5] the exclusion from the entitlement to a tax exemption, provided for in Article 6(1)(10) of the Law on Corporation Tax, to the detriment of investment funds in third countries which receive dividends paid by Polish companies, does not prevent those economic operators from having access to the Polish market.

16. As regards the delimitation between freedom of establishment and the free movement of capital, it must be noted that the tax treatment of dividends may fall under both Article 43 EC with regard to the first freedom and Article 56 EC with regard to the second.[6]

3 — Note that the Spanish, Finnish and French Governments have not explicitly indicated any view on the first question, but have all answered the second question exclusively from the perspective of the free movement of capital.

4 — Case C-452/04 *Fidium Finanz* [2006] ECR I-9521.

5 — *Fidium Finanz* (paragraphs 2 and 45 to 47). Granted, the Court ruled that the company incorporated under Swiss law, as a legal person established in a third country, was not able to rely on the freedom to provide services.

6 — See, to that effect, Joined Cases C-436/08 and C-437/08 *Haribo Lakritzen Hans Riegel and Österreichische Salinen* [2011] ECR I-305, paragraph 33; Case C-310/09 *Accor* [2011] ECR I-8115, paragraph 30; and Case C-35/11 *Test Claimants in the FII Group Litigation* [2012] ECR, paragraph 89.

17. Moreover, the Court has already held that national legislation, such as that at issue in the main proceedings, the application of which does not depend on the extent of the holding which the company receiving the dividend has in the company paying it, may fall within the purview both of Article 43 EC and of Article 56 EC.[7]

18. With regard to the tax treatment of ‘incoming’ dividends originating in third countries, that is to say dividends paid by a company in a third country to a person established in the territory of a Member State, the Court has, until very recently, taken the view that that person could not rely on Article 56 EC where the facts of the main proceedings indicated that that person held shares which conferred on him a definite influence on the decisions of the company concerned in the third country.[8] In other words, only freedom of establishment applied in that context. That freedom, however, could not be invoked by that person, since it is undisputed that the EC Treaty cannot be extended to relations with the nationals of third countries.[9] In practice, the holder of those shares therefore could not rely on either of the two freedoms of movement.

19. The Grand Chamber of the Court altered that position in its judgment in Case C-35/11 *Test Claimants in the FII Group Litigation*. It held that, with regard to national rules relating to the tax treatment of dividends from a third country, which apply irrespective of the size of the shareholdings, a company established in a Member State which receives dividends from a distributing company established in a third country may, irrespective of the size of its shareholding, rely on Article 56 EC. In such cases, there is no risk that that company will unduly profit from freedom of establishment, since the tax legislation in question does not relate to the conditions for access of such a company to the market in a third country, but concerns solely the tax treatment of dividends which derive from investments made by that company.[10]

20. That new approach has the merit of ensuring the full effect of Article 56 EC in contexts where, according to the case-law in force until then, traders in third countries who were unable, by definition, to rely on freedom of establishment and in which the risk of circumventing such a freedom was, however, non-existent, were also precluded from relying on the free movement of capital.

21. The Court’s findings, reproduced in essence in point 19 above, may, in my view, be extended to ‘outbound’ dividends, that is to say dividends paid by a company in a Member State to its unit-holder who is resident in a third country, as is the case in the main proceedings, to the extent that the interpretation of Article 56 EC cannot result in unfair advantage being taken from freedom of establishment.

7 — See, to that effect, Case C-446/04 *Test Claimants in the FII Group Litigation* [2006] ECR I-11753, paragraph 36 and Case C-284/06 *Burda* [2008] ECR I-4571, paragraph 71; and the order in Joined Cases C-439/07 and C-499/07 *KBC Bank and Beleggen, Risicokapitaal, Beheer* [2009] ECR I-4409, paragraph 69.

8 — See, inter alia, albeit somewhat ambiguously, Case C-157/05 *Holböck* [2007] ECR I-4051, paragraphs 23 to 29, and the order in *KBC Bank and Beleggen, Risicokapitaal, Beheer*, paragraphs 70 and 71. See also, with regard to the tax treatment of an inheritance between two German nationals including the transfer of a 100% holding in the capital of a company in Canada, Case C-31/11 *Scheunemann* [2012] ECR, paragraphs 31 to 34.

9 — See, to that effect, *Holböck*, paragraph 28, and Case C-35/11 *Test Claimants in the FII Group Litigation*, paragraph 97.

10 — See, to that effect, Case C-35/11 *Test Claimants in the FII Group Litigation*, paragraphs 99 and 100.

22. Such a risk may, in my view, be discounted in the main proceedings. Apart from the fact, which has already been mentioned, that the relevant provisions of the Law on Corporation Tax apply not to the conditions for foreign traders accessing the Polish market but to the tax treatment of dividends, it is common ground that the applicant in the main proceedings, during the two financial years at issue, made only one 'portfolio' investment, seemingly less than 10% of the capital of the Polish companies paying the dividends, which does not enable it to influence the management and control of the Polish companies in which it holds shares.[11]

23. Accordingly, Article 56 EC must, in my view, be interpreted as meaning that that provision may be relied on against the application of the tax legislation of a Member State, such as that at issue in the main proceedings, in accordance with which the dividends paid by companies established in that Member State to an investment fund in a third country cannot qualify for exemption from tax.

B – *The second question, regarding the compatibility of the difference in tax treatment with the free movement of capital*

1. The restriction on the free movement of capital

24. The measures prohibited by Article 56(1) EC, as restrictions on capital movements, include inter alia those which are such as to discourage non-residents from making investments in a Member State.[12] The prohibition provided for in Article 56(1) EC extends, unambiguously, to restrictions on the movement of capital from third countries.

25. In the present case, in accordance with the Law on Corporation Tax, applicable to the facts in the main proceedings, thus in the version in force in 2005 and 2006 and up to January 2011, the dividends paid by a resident company to a non-resident investment fund, established in a third country, were taxed, in principle, at a rate of 19%, by way of deduction of tax at source, unless a different rate was applied in accordance with a double taxation convention, whereas such dividends were exempt from tax when paid to a resident investment fund, in so far as that fund also satisfied the conditions required by the Law on Investment Funds.

26. That difference in treatment also affected investment funds established in Member States other than Poland since, as already stated, only as of 1 January 2011, following the insertion in Article 6(1) of the Law on Corporation Tax of subparagraph 10a and infringement proceedings instituted by the Commission, did the Polish legislature extend the exemption from deduction of tax at source in respect of dividends paid to investment funds in European Union Member States and the other States party to the Agreement on the European Economic Area (EEA), which were comparable to funds governed by the Polish Law on Investment Funds.

27. Therefore, as the Commission has rightly pointed out, only those investment funds established in Poland and exercising their activity in a manner in accordance with the Law on Investment Funds were exempt from tax: non-resident funds were automatically excluded, including where, as in the main proceedings, the non-resident funds enjoyed a reduction in the rate of taxation on dividends, in accordance with a double taxation convention.

11 — See, inter alia, with regard to the distinction between direct investments and 'portfolio' investments, Case C-182/08 *Glaxo Wellcome* [2009] ECR I-8591, paragraph 40 and the case-law cited. For information, the application of the rate of 15% of the gross amount of the dividends in the present case stems from Article 11(2)(b) of the 1974 Double Taxation Convention, a provision which applies to cases other than those in which the investor holds at least 10% of the capital of the Polish company paying the dividends.

12 — See, to that effect, *Haribo Lakritzen Hans Riegel and Österreichische Salinen*, paragraph 50, and Joined Cases C-338/11 to C-347/11 *Santander Asset Management SGIIC and Others* [2012] ECR, paragraph 15.

28. In other words, only dividends paid to Polish investment funds could qualify for the exemption from deduction of tax at source laid down in the Law on Corporation Tax.

29. That difference in the tax treatment of dividends between investment funds according to their place of residence, primarily, may discourage, on the one hand, non-resident investment funds from investing in companies established in Poland and, on the other, investors resident in that Member State from acquiring shares in non-resident investment funds.[13]

30. Consequently, tax legislation of that kind constitutes a restriction on the free movement of capital which, in principle, is contrary to Article 56 EC.

31. That restriction may however be admissible in EU law if the difference in treatment on which it is based concerns situations which are not objectively comparable,[14] which, moreover, has been argued by several Governments submitting observations in the present case.

32. The argument of those Governments, in support of the rejection of the position that the situations are objectively comparable, is based on the assertion that the investment funds of third countries would not be covered by the rules applicable to the establishment and operation of European investment funds, namely in particular Council Directive 85/611/EEC of 20 December 1985 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS),[15] the requirements of which are, in essence, reproduced in the Law on Investment Funds, compliance with which is a prerequisite for the exemption provided for in the Law on Corporation Tax being granted.

33. That line of argument must, in my opinion, be rejected for several reasons.

34. First, it must be noted that, in accordance with case-law, account must be taken solely of the distinguishing criteria established by the national legislation at issue in determining whether the situations are objectively comparable.[16]

35. In the present case that was, primarily, at the material time in the main proceedings, the residence criterion, since any investment funds not resident in Poland could not qualify for exemption from deduction of tax at source on dividends paid, as provided for by the Law on Corporation Tax.

36. Therefore, the line of argument taken by the Governments and reproduced in point 32 above is based on a false premise, according to which the only prerequisite to obtaining the exemption from deduction of tax at source laid down in the Law on Corporation Tax is that the conditions set out in the Law on Investment Funds concerning the establishment and operation of such funds are satisfied. A requirement of that kind, in short, applied only secondarily, exclusively with regard to investment funds that were established in Poland.

37. Likewise, and second, it is, in my view, wrong — as the referring court sets out in its questions by mentioning the system of ‘investment funds established in a Member State of the European Union’ and as the majority of Governments which have submitted observations in the present case argue — to compare two cross-border situations for the purposes of determining whether the situations are objectively comparable.

13 — See, to that effect, *Santander Asset Management SGIIC and Others*, paragraph 17.

14 — See, inter alia, Case C-25/10 *Missionswerk Werner Heukelbach* [2011] ECR I-497, paragraph 29, and *Santander Asset Management SGIIC and Others*, paragraph 23.

15 — OJ 1985 L 375, p. 3. Note that, with effect from 1 July 2011, that directive has been repealed and replaced by Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) (OJ 2009 L 302, p. 32).

16 — See *Santander Asset Management SGIIC and Others*, paragraphs 27 and 28 and the case-law cited, and Case C-387/11 *Commission* v *Belgium* [2012] ECR, paragraph 65.

38. That approach disregards the main distinguishing criterion specified by the Law on Corporation Tax which applied at the material time in the main proceedings, namely, in short, that the investment fund is resident in Poland.

39. Third, and in view of the main criterion of place of residence laid down in the Law on Corporation Tax, it must be noted that, in its judgment in *Santander Asset Management SGIIC and Others*, the Court held that a difference in treatment of resident undertakings for collective investment in transferable securities (UCITS), which qualify for an exemption from tax on nationally-sourced dividends received by them, and non-resident UCITS (including those established in third countries), which are subject to deduction of tax at source in respect of such dividends, cannot be justified by a relevant difference in their situations. [17]

40. Admittedly, that conclusion was reached following the examination of the question whether, in order to determine if the situations are objectively comparable, the situation of the UCITS unit-holders must be taken into account in addition to the situation of those undertakings as collective investment vehicles.

41. However, the Court specifically ruled out taking account of the tax situation of the unit-holders for the purposes of determining whether or not the tax legislation at issue was discriminatory, on the basis of the distinguishing criterion specified by that legislation, namely the place of residence of UCITS. [18]

42. However, as I have already mentioned several times, the place of residence of the investment funds is the main criterion laid down in the Law on Corporation Tax which applied at the material time in the main proceedings. That situation is therefore, in my opinion, comparable to that of the French legislation which formed the basis of the judgment in *Santander Asset Management SGIIC and Others*.

43. Moreover, the reasoning which focussed in particular on whether the situations of resident UCITS and non-resident UCITS, including those in third countries, are objectively comparable, developed in paragraphs 24 to 44 of that judgment, does not leave any doubt as to the relevance of whether their comparability is based on the general ground that investment funds established in third countries are governed by rules on their activities which are different to those which apply to UCITS established in the territory of the European Union.

44. In short, as is clear from paragraph 42 of the judgment in *Santander Asset Management SGIIC and Other*, this confirms, including with regard to undertakings established in third countries (outside the EEA), the now settled current case-law, in accordance with which, in the case of a Member State exercising its power to tax over dividends distributed to companies established in other Member States or in third countries party to the EEA Agreement, non-resident recipients of those dividends find themselves in a situation comparable to that of residents as regards the risk of economic double taxation or a series of charges to tax dividends paid by resident companies. [19]

17 — Ibid. (paragraphs 44 and 16). As far as third countries are concerned, that case involved UCITS established in the United States, as shown in paragraph 6 of the judgment.

18 — *Santander Asset Management SGIIC and Others* (paragraphs 39 and 41). As the Court held in paragraph 40 of that judgment, the situation that led to that judgment was different to that which led to the judgment in Case C-194/06 *Orange Europe Smallcap Fund* [2008] ECR I-3747, which concerned tax legislation that made the tax exemption enjoyed by UCITS conditional on the requirement that all the profits of those undertakings were distributed to their unit-holders.

19 — See, inter alia, Case C-303/07 *Aberdeen Property Fininvest Alpha* [2009] ECR I-5145, paragraphs 43 and 44; Case C-540/07 *Commission* v *Italy* [2009] ECR I-10983, paragraphs 53 and 54; Case C-487/08 *Commission* v *Spain* [2010] ECR I-4843, paragraph 53, and Case C-284/09 *Commission* v *Germany* [2011] ECR I-9879, paragraph 58.

45. As the Commission essentially argued at the hearing before the Court, that reasoning, concerning whether the situations are objectively comparable, must also be followed in the present case. The alleged difference in the regulatory context applicable to Polish investment funds in relation to their counterparts established in third countries may, more appropriately, be considered as part of the examination of the grounds of public interest such as to justify the restriction with regard to tax.

46. Fourth, and finally, it must be noted that no argument has been put forward in the present proceedings that the application of provisions of the 1974 Double Taxation Convention would allow in all cases, in accordance with the case-law of the Court, the nullification of the difference in treatment resulting from the application of the provisions of the Law on Corporation Tax or those of that convention whose effect is to reduce the rate of the tax deducted at source. [20]

47. Consequently, with regard to the tax legislation of a Member State, such as the Law on Corporation Tax, which specifies the place of residence of investment funds as the main distinguishing criterion, leading to the charging, or not, of tax deducted at source on dividends paid to them by Polish companies, investment funds established in third countries are in a situation which is objectively comparable to that of investment funds whose registered office is in Poland.

48. It therefore remains to be determined whether, as asserted by the Polish, German, Spanish and French Governments, the difference in treatment is either capable of being covered by the standstill clause, laid down in Article 57(1) EC, or justified by overriding reasons in the public interest.

2. The applicability of Article 57(1) EC

49. I note that the referring court has not referred to or mentioned Article 57(1) EC in its request for a preliminary ruling and that that reason alone has sometimes led the Court to not include considerations on the interpretation of that provision in its replies. [21]

50. However, it is important to note that Article 57(1) EC has nevertheless been covered in the written observations submitted by the Polish Government and the Commission, and in an oral debate between the interested parties during the hearing before the Court, at the Court's request.

51. Although, for reasons which will be given later, I take the view that Article 57(1) EC should not apply in the present case — and therefore the referring court ultimately was right not to mention that provision in its request — considerations on the applicability of Article 57(1) EC nevertheless seem useful to me, in particular since, during the debate before the Court, several governments, in response to the Polish Government, defended the argument, contrary to that advocated by the Commission, that the Law on Corporation Tax fell within the scope of that article, with the result that the restrictions on the free movement of capital contained in that law with regard to third countries may be maintained.

52. That being said, as is well known, Article 57(1) EC permits — subject to the conditions listed therein and notwithstanding the prohibition, laid down in Article 56(1) EC, on restrictions on the free movement of capital between Member States and third countries — restrictions existing on 31 December 1993 under national law to be maintained where the movement of capital in question involves 'direct investment — including in real estate — establishment, the provision of financial services or the admission of securities to capital markets'.

53. The legislation of a Member State will therefore fall within the scope of Article 57(1) EC if, in addition to applying to a third country, which is undoubtedly the case for the United States, it satisfies the criteria *rationae materiae* and *rationae temporis* laid down in that article.

20 — See, inter alia, to that effect, the aforementioned judgments in *Commission* v *Italy*, paragraph 39, and *Commission* v *Germany*, paragraph 70.
21 — See, to that effect, *Santander Asset Management SGIIC and Others*, paragraph 54.

54. As far as the first criterion is concerned, with the exception of the applicant in the main proceedings, the interested parties, having expressed their views on that matter at the hearing, are in agreement that it has been satisfied in the present case. The deduction of tax at source affecting the dividends paid to the applicant in the main proceedings is the result of the combination of the Law on Corporation Tax of 15 February 1992 and the 1974 Double Taxation Convention– both of which therefore predate 31 December 1993.

55. While it is, in principle, for the national court to determine the content of the legislation which existed on a date laid down by EU law,[22] as mentioned by the applicant in the main proceedings and the Commission in their observations, it must however be noted that the exemption provided for Polish investment funds was introduced only in 1997.[23]

56. I admit that that amendment to the Law on Corporation Tax has not affected the taxation of dividends paid to investment funds established in third countries.

57. However, it cannot be said that, before 31 December 1993, there was a ‘restriction’ within the meaning of the provisions of the Treaty regarding the free movement of capital, which was maintained after that date. On 31 December 1993, the dividends paid by Polish companies to foreign entities were subject to either the same deduction of tax at source as those paid to entities established in Poland, or a reduced rate, in accordance with a double taxation convention concluded between Poland and the State concerned. By introducing a difference in tax treatment between the dividends paid by Polish companies depending on whether their recipients resided in Poland or not, the 1997 amendment to the Law on Corporation Tax therefore substantially amended the tax system which existed on 31 December 1993. That amendment is therefore based on a different approach, according to case-law,[24] to that of the previous law in force on 31 December 1993 since it introduces a difference in treatment between Polish and non-Polish entities, which was previously unknown, by exempting Polish entities from deduction of tax at source and administrative procedures linked to flat-rate corporation tax on the dividends they receive. That amendment should not, in my view, be treated in the same way as the legislation which existed on 31 December 1993.

58. That finding is sufficient for Article 57(1) EC not to apply to the present case.

59. So far as may be necessary and in any event, I consider that the contested legislation does not satisfy the condition *rationae materiae* laid down by Article 57(1) EC, namely that the movements of capital in question must involve ‘direct investments’ or ‘the provision of financial services’.

60. Neither the concept of direct investments, nor that of the movement of capital, is defined by the Treaty.

61. Accordingly, for the interpretation of both Article 56 EC and Article 57 EC, the Court has, to date, consistently relied on the definitions contained in the nomenclature in Annex I to Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the EEC Treaty[25] and the associated explanatory notes.[26]

22 — See, to that effect, Case C-157/05 *Holböck* [2007] ECR I-4051, paragraph 40.

23 — See paragraph 6 of the written observations of the Commission, which were repeated at the hearing. Article 6(1)(10) of the Law on Corporation Tax was introduced by the Law of 28 August 1997.

24 — See, inter alia, *Holböck*, paragraph 41; Case C-101/05 *A* [2007] ECR I-11531, paragraph 49; and Case C-541/08 *Fokus Invest* [2010] ECR I-1025, paragraph 42.

25 — OJ 1988 L 178, p. 5. Article 67 was repealed by the Treaty of Amsterdam.

26 — See, inter alia, *Holböck*, paragraph 34 and the case-law cited.

62. Direct investments fall under category I of that nomenclature and include, in I-2, 'participation in new or existing undertaking with a view to establishing or maintaining lasting economic links'. According to the explanatory notes, direct investments are understood as being '[i]nvestments of all kinds … which serve to establish or to maintain lasting and direct links between the person providing the capital and the entrepreneur to whom or the undertaking to which the capital is made available in order to carry on an economic activity'. Those explanatory notes also state with regard to I-2, which applies to companies limited by shares, that there is 'participation in the nature of direct investment where the block of shares held by … any … holder enables the shareholder … to participate effectively in the management of the company or in its control'.

63. It is specifically on the basis of those definitions that the Court identifies among capital movements, 'direct' investments in the form of participation in an undertaking by means of a shareholding which confers the possibility of effective participation in its management and control and 'portfolio' investments which involve the acquisition of shares on the capital market solely with the intention of making a financial investment without any intention to influence the management and control of the undertaking. [27]

64. Although both of those types of investment fall under the concept of capital movements, by contrast, only 'direct investments', including the payments of dividends deriving from them, [28] are subject to the derogation permitted under Article 57(1) EC.

65. One could therefore imagine drawing a general dividing line between those two categories of investment, in particular in the interest of legal certainty.

66. However, this would prove futile in so far as it depends on the particular circumstances of each case.

67. In the main proceedings, the Law on Corporation Tax does indeed apply without distinction to the payment of dividends by Polish companies, irrespective of the size of the shareholding in those companies. [29] However, it is common ground that the issue is solely the deduction of tax at source on the remuneration of shareholdings, described by the referring court itself as reflecting 'portfolio' investments only.

68. Therefore, Article 57(1) EC cannot be relied on in the main proceedings.

69. That assessment is not undermined by the two additional arguments of the Polish Government which were put forward at the hearing before the Court, regarding, first, a broader acceptance of the concept of 'direct investments' than that adopted by the Court in paragraph 21 of its judgment in *VBV — Vorsorgekasse* [30] and, second, the fact that the capital movements at issue in the main proceedings involved, in the absence of 'direct investment', 'the provision of financial services', which is also stipulated in Article 57(1) EC.

70. With regard to the first point, it must be noted that the judgment in *VBV — Vorsorgekasse*, which applied solely to the interpretation of Article 63 TFEU (formerly Article 56 EC), concerned national legislation which restricts the acquisition, by a national of a Member State, of units of a collective investment fund established in another Member State and not, as in the main proceedings, the

27 — See, to that effect, inter alia, *Orange Europe Smallcap Fund*, paragraphs 98 to 102; *Glaxo Wellcome*, paragraph 40 and the case-law cited; and Case C-212/09 *Commission* v *Portugal* [2011] ECR I-10889, paragraph 47.

28 — See, inter alia, Case C-35/11 *Test Claimants in the FII Group Litigation*, paragraph 103 and the case-law cited.

29 — For the record, I note that, in *Holböck*, the Court accepted that Article 57(1) EC could be used to cover restrictions on the free movement of capital contained in legislation which applied without distinction to Member States and to third countries and which concerned the payment of dividends. The proceedings giving rise to the judgment in *Holböck* however concerned holdings between the shareholder and the company concerned which allowed the shareholder to participate effectively in the management of the company or in its control.

30 — Case C-39/11 *VBV — Vorsorgekasse* [2012] ECR.

taxation of dividends paid by a company of a Member State to a non-resident investment fund. In paragraph 21 of that judgment, the Court did indeed take the view that an acquisition of that kind constituted a 'direct investment' and, consequently, a movement of capital for the purposes of Article 63 TFEU. However, it did refer, somewhat ambiguously I admit, to heading IV of the nomenclature in Annex I to Directive 88/361, entitled 'Operations in units of collective investment undertakings' and not to heading I of that nomenclature concerning 'direct investments', and to paragraphs of two earlier judgments [31] which, in turn, interpreted heading I and noted that direct investment is characterised by the possibility of participating effectively in the management of a company or in its control.

71. Therefore, it seems to me that the Court's intention in paragraph 21 of its judgment in *VBV — Vorsorgekasse* was not to distinguish direct investments from portfolio investments or to broaden the scope of the first concept, but at the very most to make clear that the acquisition of units of a collective investment fund constituted an investment falling under the concept of the free movement of capital for the purposes of Article 63 TFEU and the nomenclature in Annex I to Directive 88/361.

72. After all, although a certain 'vagueness' can be tolerated in the use of terms designating the different categories of capital movements falling under Article 63 TFEU as a result of its very broad scope, this however cannot be the case with regard to the 'direct investment' specified in Article 64(1) TFEU (formerly Article 57(1) EC), which, as a derogation from a freedom provided for under EU law which is, moreover, particularly broad, must be narrowly construed. [32]

73. The second argument put forward by the Polish Government is that, where they are not regarded as relating to 'direct investment', the capital movements which are subject to the restriction provided for in the Law on Corporation Tax involve 'the provision of financial services', namely services provided by the investment fund to its unit-holders.

74. It will be noted, first, that neither the Treaty, the case-law nor the nomenclature in Annex I to Directive 88/361/EEC define the concept of 'provision of financial services'. The explanatory notes to the directive merely list a number of financial operations, such as those in current and deposit accounts, financial loans and credits, transfers in the performance of insurance contracts, as well as mentioning the 'financial institutions' which fall within the scope of that directive, such as banks, insurance companies, investment companies and other institutions of the like character. However, it is correct, in my opinion, to presume that such services concern those given by those institutions to their customers.

75. Furthermore, in the light of the wording of Article 57(1) EC, the scope of that provision includes only those situations which fall under the free movement of capital involving the provision of financial services and not, conversely, the provision of financial services involving capital movements. Accordingly, I consider that the subject-matter of the national measures falling with the scope of Article 57(1) EC principally concerns capital movements and not the provision of financial services. If that were not the case, such measures would fall within the scope of the provisions in the Treaty concerning the freedom to provide services. However, I note that those provisions do not extend to relations with third countries.

31 — Namely, paragraph 37 of the judgment in Case C-483/99 *Commission* v *France* [2002] ECR I-4781 and paragraph 38 of the judgment in Case C-503/99 *Commission* v *Belgium* [2002] ECR I-4809 respectively, which both contained the same wording and were the first 'golden shares' judgments.

32 — See, to that effect, point 51 of my Opinion in Case C-181/12 *Welte* [2013] ECR.

76. Finally — and this is without doubt the most sensitive issue — this involves determining the nature of the link that the capital movements concerned and the provision of financial services must maintain. Should any restriction on capital movements with regard to third countries linked to the provision of financial services be allowed within the scope *rationae materiae* of Article 57(1)(EC), which would mean that it would include almost all financial operations, or must that provision be interpreted more restrictively?

77. The latter option seems preferable to me for two reasons. First, Article 57(1) EC refers in its wording to the movement of capital 'involving',[33] that is to say entailing, the provision of financial services. Second, a narrow interpretation of the reservation included in Article 57(1) EC also enables the effectiveness of the *erga omnes* freedom laid down in Article 56 EC to be maintained.

78. In the present case, it must be noted that the subject-matter of the Law on Corporation Tax concerns the taxation of dividends received by investment funds situated in third countries without, in that regard, the relationship between the unit-holders of that fund and the investment fund having any influence on the basis of assessment or on the tax rate. Accordingly, the national measure does not concern capital movements related to the provision of financial services by the investment fund to its unit-holders, whether they reside in the territory of a Member State or in that of a third country. However, in itself, the holding of shares by an investment fund in a third country in the capital of companies established in a Member State does not result in the provision of financial services.

79. I consider, therefore, that the capital movements concerned, namely the acquisition of shares by investment funds in the capital of Polish companies which have paid dividends taxed in accordance with the Law on Corporation Tax, do not involve the provision of financial services for the purposes of Article 57(1) EC.

80. Accordingly, contrary to the view taken by the Polish Government in its observations before the Court, I consider that a restriction on the free movement of capital such as that at issue in the main proceedings does not fall within the scope of Article 57(1) EC.

81. At this stage it remains to be ascertained whether that restriction may be justified by an overriding reason in the public interest.

### 3. Whether the restriction is justified

82. The Governments which submitted observations in the present case have put forward a number of reasons which, they believe, would justify the restriction contained in the Law on Corporation Tax, including, first and foremost, the need to guarantee the effectiveness of fiscal supervision, which is also supported by the Commission. Moreover, those Governments submit that the difference in treatment could also be maintained by reason of the need to maintain the coherence of the tax system and to ensure a balanced allocation of the power to impose taxes. The German Government adds that safeguarding tax revenue could properly justify a valid restriction with regard to third countries.

83. I do not consider it necessary to examine those reasons in turn, since the first may indeed be sufficient, again in my view, to justify the contested restriction. I will therefore analyse primarily the justification based on the need to guarantee the effectiveness of fiscal supervision. The other reasons, which are also significantly less convincing, will be the subject only of subsidiary arguments.

33 — Although a number of the language versions of that article, such as the German and the Polish, appear quite neutral, the versions in English ('involving'), Spanish ('supongan'), Italian ('implichino') and Portuguese ('envolva') seem to me to confirm a certain causal link between the capital movement in question and the provision of financial services. The 'neutral' versions in any event do not preclude a strict interpretation of Article 57(1) EC, on the basis of the need to maintain the effectiveness of the freedom laid down in Article 56 EC.

a) The need to guarantee the effectiveness of fiscal supervision

84. The Governments participating in the present proceedings submit that, if the contested restriction did not exist, the national tax authorities would not be able to verify with the competent tax authorities in the United States that an investment fund established in that country is carrying out its activities under conditions which are equivalent to those provided for in the Polish Law on Investment Funds, as referred to in Article 6(1)(10) of the Law on Corporation Tax, which transposes Directive 85/611. The need to ensure the effectiveness of fiscal supervision, which, undisputedly, constitutes an overriding reason in the public interest,[34] therefore justifies the refusal to grant the contested exemption from tax to investment funds established in the United States, since the tax conventions binding Poland and the United States, after all, do not help in obtaining the information required.

85. The Commission shares that view in essence. It considers that Article 6(1)(10) and (10a) of the Law on Corporation Tax may be upheld, since the absence of a legal instrument to allow the Polish tax authorities and the referring court to verify the evidence and the information presented by the American investment fund to assess whether it is comparable to investment funds established in Poland, the European Union or the EEA means that it cannot be placed on an equal footing with those funds.

86. With some qualifications, I essentially concur with that line of argument.

87. Indeed, as the Polish Government conceded in the hearing before the Court, investment funds in third countries are in any event excluded from the benefit of the exemption from deduction of tax at source provided for in the Law on Corporation Tax, even though they may satisfy the requirements for such exemption.

88. With regard to relations between the Member States of the European Union, the Court has already held that the taxpayer should not be precluded a priori from providing relevant documentary evidence enabling the tax authorities of the Member State imposing the tax to ascertain, clearly and precisely, that he is not attempting to avoid or evade the payment of taxes.[35]

89. Consequently, within the European Union, the absolute refusal by a Member State to grant a tax benefit to a non-resident taxpayer, by prohibiting him from submitting the evidence that he can satisfy the conditions required to obtain that benefit, cannot, in principle, be justified in the name of the need to guarantee the effectiveness of fiscal supervision, as a refusal of that kind is disproportionate.[36]

90. However, that case-law, which relates to restrictions on the exercise of freedom of movement within the European Union, cannot be transposed automatically and in its entirety to relations with third countries, since the Court takes the view that the exercise of the free movement of capital with those countries, including those bound by the EEA Agreement, takes place in a different legal context.[37]

34 — See, inter alia, Case C-493/09 *Commission* v *Portugal* [2011] ECR I-9247, paragraph 42 and the case-law cited.

35 — See, inter alia, Case C-101/05 *A* [2007] ECR I-11531, paragraph 59, and *Commission* v *Portugal*, paragraph 46.

36 — See, inter alia, to that effect, *Commission* v *Portugal*, paragraph 46.

37 — See, to that effect, the aforementioned judgments in *A*, paragraph 60, and *Haribo Lakritzen Hans Riegel and Österreichische Salinen*, paragraph 65.

91. To demonstrate a difference in legal context of that kind, the Court, as a general rule, stresses that, whereas within the European Union the competent authorities of the Member States have mutual assistance mechanisms, namely Directive 77/799/EEC,[38] which allow them to verify the information submitted by non-resident taxpayers for the purposes of establishing the tax correctly, those mechanisms do not extend to third countries, since the framework of cooperation with the competent authorities of those countries depends on multilateral or bilateral undertakings.[39]

92. In its written observations, the Commission suggested that the current case-law be followed by submitting in essence that, since, in the present case, according to the referring court and its own analysis, neither the requirements (Article 23) of the 1974 Double Taxation Convention,[40] nor those (Article 4) of the Convention on Mutual Administrative Assistance in Tax Matters of the OECD and the Council of Europe, signed in Strasbourg on 25 January 1988,[41] to which the United States of America is a contracting party,[42] enable the necessary information to be obtained regarding the establishment and operation of investment funds, as required by the Law on Corporation Tax in order to grant the exemption claimed, that fact is sufficient to justify the contested difference in treatment.

93. However, I do not see that form of reasoning as relevant in the present case, as indeed the Commission finally conceded at the hearing.

94. The difference in the legal context between the cooperation established within the European Union, on the one hand, and relations with third countries, on the other, is not, in the present case, at the level of mechanisms for cooperation in tax matters because Directive 77/799 does not provide for a mechanism for exchanging information between the tax authorities of the Member States on the conditions for the authorisation, supervision and operation of investment funds any more than the stipulations in the convention binding Poland and the United States. In other words, as the referring court has quite rightly pointed out, such information, which is required under the Law on Corporation Tax to grant the contested exemption, falls outside the scope of the mechanism for exchanging information contained in Directive 77/799.

95. By contrast, I consider that the difference in the legal context is essentially based on the existence of the system introduced by Directive 85/611, from which third countries are excluded.

96. As is stated inter alia in the fourth recital in the preamble thereto, Directive 85/611 establishes common basic rules for the authorisation of UCITS situated in the Member States (authorisation which applies to all of those States), their supervision, structure, activities and the information they must publish. UCITS cannot be authorised if the management company (where the undertaking is constituted under the law of contract) or the investment company (where the undertaking is constituted under statute) does not satisfy the pre-conditions laid down in Sections III and IV of the directive, regarding the conditions for access to and performance of those activities. With regard to the supervision of UCITS, Section IX of Directive 85/611 provides that the competent authorities of the Member States, which must be granted all the powers necessary to carry out their task, are to collaborate closely in order to carry out their task and must for that purpose communicate to each

38 — Council Directive 77/799 of 19 December 1977 concerning mutual assistance by the competent authorities of the Member States in the field of direct taxation (OJ 1977 L 336, p. 15), as amended by Council Directive 2004/106/EC of 16 November 2004 (OJ 2004 L 359, p. 30), in the version applicable at the material time of the financial years contested in the main proceedings.

39 — See, inter alia, and to that effect, *Commission* v *Italy*, paragraphs 70 and 71, and *Haribo Lakritzen Hans Riegel and Österreichische Salinen*, paragraphs 66 and 67.

40 — Article 23 of the Convention provides inter alia that the competent authorities are to exchange the information required to implement the provisions of the convention or to prevent fraud, or even to manage the enforcement of the main provisions concerning taxes to which the Convention applies, provided that the nature of the information allows for it to be sent in accordance with the law and the administrative practice in each contracting State in relation to its own taxes.

41 — That Convention entered into force on 1 April 1995. Article 4 thereof states that the Parties are to exchange any information that is foreseeably relevant to inter alia the assessment and collection of tax, and the recovery and enforcement of tax claims. The text of the Convention is available at http://conventions.coe.int.

42 — The United States of America signed that Convention on 26 August 1989 and ratified it on 13 February 1991.

other all the information required. It also states that its provisions regarding the exchange of information are not to preclude, under certain conditions, both within a Member State and between Member States, communications between competent authorities and authorities entrusted with the public task of supervising financial institutions and financial markets, bodies involved in the liquidation or bankruptcy of UCITS and other similar procedures and of undertakings contributing towards their business activity and persons responsible for carrying out statutory audits of the accounts of financial undertakings. Moreover, in the conditions laid down in Article 50a thereof, Directive 85/611 provides for a mechanism for the prompt reporting to the competent authorities of any fact or decision which is liable to constitute a material breach of the laws or regulations governing authorisation or the conditions for the exercise of the activity of UCITS or undertakings contributing towards their activity, or which may affect the continuous functioning of their operations or those of an undertaking contributing towards their business activity, or which is liable to lead to refusal to certify the accounts or to the expression of reservations.

97. However, even assuming that an investment fund situated in a third country is able to provide a body of information to enable the authorities of a Member State to find that it is governed by rules which are comparable to those in force in the territory of that country which transpose the provisions of Directive 85/611, in the absence of a common framework similar to that which applies within the European Union, those authorities cannot ensure the veracity of the information sent to them by approaching the competent authorities in the third country in question, nor can they obtain information from them concerning possible changes affecting the status or operation of the investment fund. This is all the more important as, within the European Union, Article 1(5) of Directive 85/611 ensures the sustainability of the status of UCITS governed by the provisions of that act, requiring the Member States to prohibit those undertakings from transforming themselves into undertakings which are not covered by the directive, which is not guaranteed in any way in third countries.

98. In those circumstances it is lawful, in my opinion, in the light of the criteria included in the Law on Corporation Tax for granting the contested exemption, to refuse that exemption for an investment fund situated in a third country where there is no obligation to exchange information with the competent authorities in that country, similar to that required in the relations between the European Union Member States and the States party to the EEA Agreement, which are bound by the provisions of Directive 85/611.

99. I do not think that such a conclusion is affected by the fact that the Polish legislature extended unequivocally the benefit of the contested exemption to UCITS established in the territory of a European Union Member State or a State party to the EEA Agreement only as of 1 January 2011, with the introduction of Article 6(1)(10a) of the Law on Corporation Tax, following infringement proceedings instituted by the Commission, or by the fact that Directive 85/611 does not contain any provisions regarding the possibility of exchanging information between the competent authorities within the meaning of that directive and the tax authorities of a Member State.

100. With regard to the first point, it is sufficient to note that, although, prior to the amendment to the Law on Corporation Tax, the differentiated system applicable to UCITS established in the territory of a European Union Member State or a State party to the EEA Agreement could, as the Commission considered in any case, legitimately seem to be contrary to the free movement of capital enshrined in the EC Treaty, such a fact could not, in my view, be extended to the different treatment of investment funds situated in third countries by reason, precisely, of the absence of an obligation on the competent authorities of those countries to exchange information, analogous to that imposed on the authorities of the Member States and States party to the EEA Agreement, which are bound by the provisions of Directive 85/611.

101. In other words, the fact that the need to guarantee the effectiveness of fiscal supervision cannot justify a restriction, such as that contained in Article 6(1)(10) of the Law on Corporation Tax, in the relations between Member States and States party to the EEA Agreement, does not mean that it cannot be invoked against an investment fund situated in a third country.

102. In addition, with regard to the second point, the lack of provision in Directive 85/611 on the exchange of information between the authorities responsible for the supervision of UCITS, in accordance with Directive 85/611, and the tax authorities of the Member States does not mean — even within the European Union — that sufficient information cannot be sent to those authorities to enable them to grant a personal tax benefit, like the contested tax exemption.

103. For a benefit of that kind to be granted, and presuming that the tax authorities of a Member State are unable directly to obtain or to verify certain information sent to them on the basis of the national provisions transposing Directive 85/611, those authorities will simply be able to use the confirmation by the competent authorities, within the meaning of Directive 85/611, of their own Member State of the veracity of the information sent by the UCITS, where appropriate, so far as those authorities have verified or obtained certain information from their counterparts in other Member States or States party to the EEA Agreement. However, that possibility does not exist in relations with third countries.

104. Finally, the fact that, in the aforementioned judgment in *Santander Asset Management SGIIC and Others*, the Court rejected the justification deriving from the need to guarantee the effectiveness of fiscal supervision with regard to French tax legislation, including in its relations with third countries, does not in any way invalidate the direction proposed in this Opinion. It is sufficient to note in that regard that that refusal is based on the fact that the French Government failed to put forward any argument to explain on what grounds that objective was supposed to justify taxation affecting non-resident UCITS.[43]

105. In those circumstances, and taking into account the different legal context prevailing in the relations between Member States and the States party to the EEA Agreement compared with those which exist with third countries, I consider that the Member State concerned may rely on the need to safeguard the effectiveness of fiscal supervision in order to justify the difference in tax treatment applicable to the distribution of dividends to an investment fund situated in a third country, as laid down in the Law on Corporation Tax.

106. Therefore, I propose that the second question referred by the national court be answered to the effect that Articles 56 EC and 58 EC do not preclude the application of the tax legislation of a Member State, such as that at issue in the main proceedings, in accordance with which dividends paid by companies established in that Member State to an investment fund in a third country cannot qualify for exemption from tax where the authorities of that Member State are not able to verify the information, if any, sent by the investment fund concerning inter alia its authorisation and its operation, in the absence of a legal framework and administrative cooperation similar to those which prevail in the European Union and the EEA.

107. In view of that proposal, and as I have already pointed out, it would not be strictly necessary to examine the other grounds of justification advanced by the Governments participating in the present proceedings. Therefore, I shall succinctly address those other grounds merely against the possibility that the Court does not agree with the proposal which has just been made.

43 — See the judgment in *Santander Asset Management SGIIC and Others*, paragraph 54.

b) Maintaining the coherence of the tax system

108. According to the Polish Government, the exemption at issue is directly linked to the taxation of payments made by the investment funds to participants in those funds. The coherence of the tax system is ensured by guaranteeing the effective (genuine) uniform taxation of the revenue of a given taxable person, regardless of the Member State in which it has been levied and which takes into account the amount of taxes paid in the other Member States.

109. The German Government adds, in essence, that in situations involving third countries, in particular where investment funds are concerned, the concept of fiscal coherence must be broadened and the different stages of taxation must be assessed together, assuming that the dividends are paid to unit-holders established abroad. An approach of that kind is complementary to the objective of maintaining the allocation of the power to impose taxes and is all the more justified as the national system at issue in the main proceedings aims to treat investments in funds in the same way as direct investments. Broadening the concept of coherence in such a way that the taxation of different taxable persons is considered as a whole, but limiting that enlargement to third countries only, may prevent excessive use of that ground of justification.

110. That line of argument, which is similar in essence to that put forward by the French Government and rejected by the Court in the case giving rise to the judgment in *Santander Asset Management SGIIC and Others*, should, in my opinion, meet with the same outcome.

111. According to now well settled case-law, if maintaining the coherence of a tax system is to justify a restriction on a freedom of movement, a direct link must be established between the tax advantage concerned and the compensating 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. [44]

112. However, no more than was the case in the French tax legislation giving rise to the judgment in *Santander Asset Management SGIIC and Others*, the Law on Corporation Tax does not make the exemption from deduction of tax at source on dividends conditional on redistribution by an investment fund of the dividends received by it and on the unit-holders in that investment fund being taxed in respect of the dividends as a means of compensating for the exemption from deduction of tax at source. [45]

113. Moreover, I fail to see any objective reason why that interpretation should be made more flexible or called into question in relations with third countries, as the German Government argues. After all, that argument is based on the unproven premise that the unit-holders of third-country investment funds also reside in those countries or at least outside the national territory and means that the coherence of that kind of tax legislation of a Member State is, irrespective of the objective it pursues, conditional in all circumstances on the examination of the tax system which applies to those unit-holders in the State where they are resident for tax purposes. However, with that in mind, the consequence of that line of argument would be that the examination of the coherence of the tax system of a Member State as a ground would be distorted, since that examination must, in principle, be carried out with regard to one and the same tax system.

114. Accordingly, I take the view that the Member State concerned cannot rely on the public interest objective deriving from the need to maintain the coherence of its tax system.

44 — See *Santander Asset Management SGIIC and Others*, paragraph 51 and the case-law cited.

45 — See, by analogy, *Santander Asset Management SGIIC and Others*, paragraph 52. See also, to that effect, *Commission* v *Portugal*, paragraphs 37 to 39.

c) The balanced allocation of the power to impose taxes and the safeguarding of tax revenue

115. Only the German Government invoked the need to maintain the allocation of the power to impose taxes between Poland and the United States and the safeguarding of tax revenue as reasons to justify the restriction at issue — reasons which, in my opinion, must be examined together, since they are interwoven in the line of argument put forward by that Government.

116. Even though the German Government's reasoning essentially brings together the considerations regarding a difference in legal context between the relations within the European Union and those between Member States and third countries that I have already addressed in the examination of the justification based on the need to guarantee the effectiveness of fiscal supervision, the German Government considers, more generally, that, as far as capital movements to and from third countries are concerned, the persons concerned can take advantage of internal market rules only if the mutual opening-up of markets is guaranteed in an international agreement, since a restriction on the fiscal sovereignty of a Member State by the free movement of capital would automatically transfer the subject of taxation to a third country.

117. The German Government adds that the arguments put forward by the Court regarding situations within the European Union, namely that, where a Member State has chosen not to tax recipient companies established in its territory as far as that type of revenue is concerned, it cannot invoke the need to ensure the balanced allocation of the power to impose taxes between the Member States in order to justify the taxation of recipient companies established in another Member State, or that Poland should waive its right to tax a revenue generated by an economic activity exercised in its territory because the dividends distributed by the resident companies have already been subject to taxation imposed on the distributing companies as profits made by them, do not apply in a situation involving third countries.

118. Similarly, the German Government also submits that the safeguarding of national tax revenue should be recognised as an independent ground of justification with regard to third countries. The internal market, it is claimed, aims to ensure an efficient allocation of resources within the European Union, and accordingly prohibits the specific taxation of cross-border situations as opposed to internal situations in order to preserve tax neutrality within that market. However, third countries that are not part of that market are not therefore obliged to accept a comparable loss in tax revenue in relation to Member States. Therefore, the free movement of capital should not require the Member States to forego tax revenue for the benefit of third countries. Moreover, the institutional counterweight of the approximation of laws (Articles 114 and 115 TFEU) which, within the internal market, may help coordinate the fiscal interests of the various Member States vis-à-vis market players, is also lacking in relations with third countries.

119. I am not convinced by that view.

120. First, since that argument tends, generally, to make the free movement of capital to and from third countries conditional on the existence of a condition of reciprocity, it must be noted that the EC Treaty (and now the FEU Treaty) does not contain a requirement of that kind. That has also been stated explicitly, in general terms, by the Court in paragraphs 127 and 128 of *Haribo Lakritzen Hans Riegel and Österreichische Salinen*.

121. Moreover, the EC Treaty (now the FEU Treaty) envisages the adoption of several measures at EU level, such as those provided for in Article 57(3) EC and Article 59 EC, which apply specifically to capital movements from or to third countries and which have been introduced specifically in order to reflect the willingness of the High Contracting Parties to control that freedom by authorising the use of measures constituting a step backwards in EU law with regard to the liberalisation of those movements

in relations with third countries or the use of temporary safeguard measures.[46]

122. The very existence of such provisions, which specifically and comprehensively restrict the free movement of capital with regard to third countries, laid down in Article 56 EC, also shows that such free movement should not be subject to an additional condition of reciprocity which is not provided for in the EC Treaty.

123. Second, it is important to note that, in its judgment in *Santander Asset Management SGIIC and Others*, the Court — relying on case-law which is now well established — held that, where a Member State has chosen not to tax resident UCITS in receipt of nationally-sourced dividends, it cannot rely on the argument that there is a need to ensure a balanced allocation between the Member States of the power to tax in order to justify the taxation of non-resident UCITS in receipt of such income.[47] Indeed, where a Member State decides, unilaterally, in particular in order to prevent economic double taxation, to waive its power to impose taxes with regard to income received by its residents in relation to activities which took place on its territory, it is inconsistent for it to invoke the need to ensure a balanced allocation of the power to impose taxes to justify, in those circumstances, the use of that same power solely with regard to income received by non-residents.

124. Apart from the issue of reducing tax revenue, invoked by the German Government and which I will examine immediately below, I do not see how an argument put forward by a Member State that lacks coherence with regard to the other Member States would then, conversely, become coherent when put forward with regard to third countries. Since the German Government has not explained that point further, I do not think that the Court should devote any more time to it.

125. Finally, with regard to reducing tax revenue, the Court has indeed already held that it may be that a Member State will be able to demonstrate that a restriction on the movement of capital to or from non-Member States is justified for a particular reason in circumstances where that reason would not constitute a valid justification for a restriction on capital movements between Member States.[48]

126. To date, the Court has refused to accept, including in relations with third countries other than States party to the EEA Agreement, that a reduction in tax revenue can be an overriding reason in the public interest which may be relied on to justify a measure which restricts the free movement of capital.[49]

127. I do not think that that approach should be set aside. Not only do Polish companies continue to be subject to taxation on the profits, but, in the longer term, the Member State concerned may, in order first to guarantee the non-discriminatory treatment of all investment funds which benefit from dividends distributed to them and, second, to avoid the reduction in tax revenue, abandon the avoidance of double taxation, since EU law, to date, does not require it to adopt or maintain measures to eliminate situations of double taxation.[50]

128. I therefore take the view that the restriction at issue cannot be justified by the need to safeguard a balanced allocation of the power to impose taxes and the tax revenue of the Member State concerned.

46 — The interpretation is also confirmed by the wording of Article 57(1) EC, which, contrary to the second subparagraph of Article 7(1) of Directive 88/361/EEC, which precedes it, does not make the maintenance of the national provisions concerned with regard to third countries conditional on 'any reciprocal conditions'.

47 — Paragraph 48 and the case-law cited.

48 — See, inter alia, *Haribo Lakritzen Hans Riegel and Österreichische Salinen*, paragraph 120 and case-law cited.

49 — Ibid., paragraphs 125 and 126.

50 — See, to that effect, inter alia, Case C-298/05 *Columbus Container Services* [2007] ECR I-10451, paragraph 45, and Case C-157/10 *Banco Bilbao Vizcaya Argentaria* [2011] ECR I-13023, paragraph 31. See also the order in Case C-540/11 *Levy and Sebbag* [2012] ECR, paragraphs 24 to 29.

129. In view of the response I have proposed to the second question referred by the national court, which consists, in essence, in justifying the restriction at issue with regard to the need to safeguard the effectiveness of fiscal supervision, there is no need to take a view on the ancillary request by the Polish Government to limit the temporal effects of the forthcoming judgment.

## III – Conclusion

130. In the light of all the foregoing, I propose that the Court answer the questions referred for a preliminary ruling by the national court as follows:

(1) Article 56 EC must be interpreted as meaning that that provision may be relied on against the application of the tax legislation of a Member State, such as that at issue in the main proceedings, in accordance with which the dividends paid by companies established in that Member State to an investment fund in a third country cannot qualify for exemption from tax.

(2) Articles 56 EC and 58 EC do not preclude the application of the tax legislation of a Member State, such as that at issue in the main proceedings, in accordance with which dividends paid by companies established in that Member State to an investment fund in a third country cannot qualify for exemption from tax where the authorities of that Member State are not able to verify the information, if any, sent by the investment fund concerning, inter alia, its authorisation and its operation, in the absence of a legal framework and administrative cooperation similar to those which prevail within the European Union and the European Economic Area.