Reports of Cases

OPINION OF ADVOCATE GENERAL
SZPUNAR
delivered on 10 September 2015[1]

Case C-252/14

Pensioenfonds Metaal en Techniek
v
Skatteverket

(Request for a preliminary ruling from the Supreme Administrative Court (Högsta förvaltningsdomstolen, Sweden))

(Reference for a preliminary ruling — Free movement of capital — Article 63 TFEU — Taxation of pension fund income — Different treatment of resident pension funds and non-resident pension funds — Lump-sum taxation of resident pension funds calculated on a fictive yield — Withholding tax applied at source to income from dividends received by non-resident pension funds)

Introduction

1. It is a well-established principle of the case-law of the Court that, although direct taxation falls within the purview of the Member States, they must exercise this power consistently with EU law.[2] This obligation, of course, applies equally to the free movement of capital.[3]

2. Under Article 65(1)(a) TFEU, the free movement of capital is to be without prejudice to the right of Member States to apply the relevant provisions of their tax law which distinguish between taxpayers who are not in the same situation with regard to their place of residence or with regard to the place where their capital is invested. In the case-law of the Court, this rule is reflected in the principle that, in relation to direct taxes, the situations of residents and of non-residents are not, as a rule, comparable.[4]

3. Even though there is already extensive relevant case-law, the issue of the appropriate balance between, on the one hand, the powers of Member States in the field of taxation and, on the other hand, the requirements of the proper functioning of the internal market continues to raise new questions. This case is one such example.

Legal framework

4. Article 63(1) TFEU and Article 65(1)(a) TFEU constitute the EU law framework for this case.

1 — Original language: French.
2 — Judgment in *Schumacker* (C-279/93, EU:C:1995:31, paragraph 21).
3 — Judgment in *Verkooijen* (C-35/98, EU:C:2000:294, paragraphs 32 and 34).
4 — Judgment in *Schumacker* (C-279/93, EU:C:1995:31, paragraph 31).

5. In Swedish law, legal persons which are fully liable to pay tax in Sweden are subject to corporation tax under the inkomstskattelagen (1999:1229) (Law (1999:1229) on income tax). This is a tax on, inter alia, income from capital gains, dividends and interest.

6. However, under Chapter 7, Paragraph 2(3) of Law (1999:1226), pension funds are wholly exempted from taxation under that law. They are, on the other hand, subject to yield tax under the lagen (1990:661) om avkastningsskatt på pensionsmedel (Law (1990:661) on yield tax on pension funds).

7. Under Paragraph 2 of Law (1990:661), Swedish pension funds and life assurance companies and foreign companies of the same kind with a permanent establishment in Sweden must pay yield tax, which is a tax calculated on a lump-sum basis, intended to tax the ongoing yields from retirement savings.

8. Under Paragraphs 3 to 8 of Law (1990:661), the tax base for yield tax is calculated in two stages. First, a capital base is calculated, made up of the value of the pension fund's assets at the beginning of the current tax year, less financial liabilities at that date. Secondly, a fictive lump-sum yield on that capital is calculated, by multiplication of the capital base by the average interest rate on Government bonds for the calendar year immediately prior to the tax year. This constitutes the base for yield tax.

9. Under Paragraph 9 of Law (1990:661), yield tax is levied at 15% on the tax base thereby obtained.

10. Foreign legal persons which receive dividends on shares in Swedish limited companies or shares in Swedish investment funds are liable to pay tax at source in Sweden under Paragraphs 1 and 4 of the kupongskattelagen (1970:624) (Law (1970:624) on withholding tax) on the dividends.

11. Pursuant to Paragraph 5 of Law (1970:624), withholding tax is applied to the gross amount of the dividends at a rate of 30%. Under the Kingdom of Sweden's tax agreement with the Kingdom of the Netherlands, however, this rate is reduced to 15% for legal persons resident in the Netherlands.

Facts, procedure and question referred for a preliminary ruling

12. Pensioenfonds Metaal en Techniek ('PMT') is a Netherlands pension fund. In the period from 2002 to 2006, PMT received dividends from Swedish limited companies, upon which 15% withholding tax was levied for a total of SEK 20 957 836.

13. PMT subsequently applied to the Skatteverket (Swedish Tax Board) for a refund of the withholding tax, on the ground that the levy of withholding tax ran counter to the EU rules on free movement of capital, as the fund should be compared with a Swedish pension fund and taxed under Law (1990:661).

14. The Swedish tax authorities rejected PMT's application and therefore PMT commenced an action before the County Administrative Court, Dalarna (Länsrätten i Dalarnas län); this action was also dismissed, as was the appeal brought before the Administrative Court of Appeal, Sundsvall (Kammarrätten i Sundsvall). In the final instance, PMT brought an appeal in cassation before the Supreme Administrative Court against the decision of the Administrative Court of Appeal.

15. In those circumstances, the Supreme Administrative Court decided to stay proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Does Article 63 TFEU constitute an obstacle to national legislation under which dividends from a resident company are taxed at source if the shareholder is resident in another Member State, while such dividends — if paid to a resident shareholder — are subject to a tax calculated as a definitive lump sum and on a fictive yield, which, over time, is intended to correspond to the normal taxation of all yields on capital?'

16. The request for a preliminary ruling was received at the Court on 23 May 2014. Written observations have been submitted by the Swedish and German Governments, and by the European Commission. The applicant in the main proceedings, the Swedish Government, the German Government and the Commission were represented at the hearing, which was held on 21 May 2015.

Analysis

17. In the main proceedings, the applicant submits that, as a foreign pension fund which has invested in shares in Swedish companies, it should be treated, as regards taxation of the dividends to which the shares entitle it, in the same way as resident pension funds which have invested in such shares. It is common ground that the tax treatment of foreign funds is not the same as that of Swedish funds.[5] According to the applicant, this difference in treatment constitutes an unjustified restriction on the free movement of capital.

18. Indeed, according to settled case-law, 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]

19. A difference in the tax treatment of dividends from resident companies paid to resident shareholders and to non-resident shareholders may, in principle, have such an effect.[7]

20. However, in accordance with Article 65(1)(a) TFEU, in conjunction with Article 65(3) TFEU, Article 63 TFEU is to be without prejudice to the right of Member States to apply the relevant provisions of their tax law which distinguish between taxpayers who are not in the same situation with regard to their place of residence, on the condition, inter alia, that the difference in treatment must concern situations which are not objectively comparable.[8]

21. As a general rule, the Court analyses whether the situations are comparable after it has established that a restriction exists.[9] However, I do not think that approach is appropriate to this case. There are two completely different taxation systems at issue here: one concerns general taxation of the entire capital yields of resident pension funds, while the other applies only to taxation of dividends from Swedish companies paid to non-resident pension funds. Thus, the question of whether the situations are comparable is fundamental to this case.

5 — However, the parties disagree as to whether this difference in treatment has an unfavourable outcome for foreign funds as regards the actual level of taxation of the dividends received. I shall deal with this issue below.

6 — Judgment in *Emerging Markets Series of DFA Investment Trust Company* (C-190/12, EU:C:2014:249, paragraph 39 and the case-law cited).

7 — See, to that effect, judgment in *Emerging Markets Series of DFA Investment Trust Company* (C-190/12, EU:C:2014:249, paragraph 42).

8 — Ibid. (paragraphs 54 to 57 and the case-law cited).

9 — See, for example, judgment in *Emerging Markets Series of DFA Investment Trust Company* (C-190/12, EU:C:2014:249).

22. Therefore I propose to reverse the usual order of analysis and to establish first of all whether Swedish pension funds and foreign pension funds which have invested in shares in Swedish companies are in comparable situations from the point of view of the relevant national legislation.

Whether the situations are comparable

Preliminary remarks

23. The Swedish Government and the Commission appear to be suggesting, in their written observations, that the tax for which pension funds resident in Sweden are liable could be regarded as a tax on assets rather than as a tax on income. I do not consider this analysis to be correct.

24. Firstly, from a technical point of view, the yield tax imposed on pension funds by Law (1990:661) clearly replaces, in the Swedish tax system, the general tax on the income of legal persons imposed by Law (1999:1229),[10] from which pension funds are exempt.

25. Secondly, although it is true that tax on assets is often calculated according to the notional income that may theoretically be achieved from the assets in question, the position of institutions such as pension funds is a particular one in that regard. The role of such institutions is precisely to invest the capital held in order to generate an income and then to distribute that income to those entitled to it. Thus, the investment of capital is the main economic activity of pension funds. The tax at issue in the main proceedings must therefore be regarded as taxing the income generated by this activity, even though the amount of tax is calculated not on the basis of the income actually achieved, but on a notional income.

26. It must therefore be accepted that dividends from Swedish companies paid to pension funds resident in Sweden are, like other capital yields received by these funds, correctly taxed under Law (1990:661).

Whether the situations of resident and non-resident pension funds are comparable

27. In the case-law of the Court, it is accepted that, in relation to direct taxes, the situations of residents and non-residents are not a priori comparable, so that a difference in the treatment of resident and non-resident taxpayers cannot automatically be categorised as discrimination constituting an obstacle to the free movement of capital.[11]

28. Only in the context of a specific tax rule may the Court conclude that the situation of a non-resident is comparable to that of a resident.[12]

29. In the main proceedings, the tax rule at issue taxes dividends paid to pension funds resident in Sweden in conjunction with the other capital yields received by these funds and according to a complex formula for calculating the taxable base, while dividends paid to non-resident pension funds are taxed directly, by way of taxation at source.

30. According to the information in the order for reference and in the Government of Sweden's written observations, the aim of this tax system is that, with respect to pension funds and other forms of retirement savings, taxation should be neutral both from the point of view of the form of investment (shares, bonds, government debt, etc.) and from the point of view of economic trends.

10 — See points 5 and 6 above.

11 — Judgment in *Truck Center* (C-282/07, EU:C:2008:762, paragraphs 38 and 39 and the case-law cited).

12 — See, for example, judgment in *Emerging Markets Series of DFA Investment Trust Company* (C-190/12, EU:C:2014:249, paragraph 58).

31. I consider this to be a completely legitimate aim, and one that fits perfectly into the framework in which direct taxation and the organisation of the retirement pension system fall within the purview of the Member States.

32. However, such an aim can be achieved only for persons who are fully liable to pay tax in the Member State concerned. Indeed, tax neutrality in relation to the form of investment requires that the Member State concerned be able to tax all income from the investments concerned. The same is true for tax neutrality in relation to economic trends. Only the application of a uniform tax system to different forms of investment — both those which are highly sensitive to economic trends and those which are not — enables such neutrality to be achieved.

33. Application of the Swedish tax system to one form of investment alone, namely investments in shares, would not result in neutrality in relation to economic trends, but in unduly high taxation in bad years and 'tax gifts' in other years. What is more, it would also lead to inequalities between taxpayers relative to the real yield from the shares in which they had invested, since, regardless of economic trends, one company's shares may, at a given time, entitle investors to higher dividends in relation to the capital invested than do another company's shares. Again, the tax system at issue can ensure the neutrality intended by the Swedish legislature only if it is applicable to the entire capital invested by a given taxpayer (in this instance, a pension fund), whatever the composition of that taxpayer's investment portfolio.

34. Thus, from the point of view of the Swedish State, the situation of resident pension funds is not comparable to that of foreign pension funds which have invested in shares in Swedish companies. On the one hand, Sweden taxes the entire capital yields of resident pension funds and therefore it is in a position to ensure the neutrality of this taxation by applying the system provided for by Law (1990:661). On the other hand, so far as concerns non-resident pension funds, Sweden taxes only the part of their yield which derives from investment in Swedish companies. So it is impossible for Sweden to apply the same system of taxation, otherwise, on any view, the tax system would not be fulfilling its role.

35. From the point of view of the taxpayers concerned, the situations are in no way comparable. The Swedish tax measure at issue is not specific to the taxation of dividends, but concerns taxation of the entire capital yields of resident pension funds. However, non-resident pension funds are subject only to an additional tax in Sweden, relating to their investment activity in that Member State, since their general tax liability is in their home Member State.

36. Consequently, the circumstances in this case can be likened to those in *Truck Center*, in so far as, in Sweden, the payment of dividends by a resident company to a resident pension fund and the payment of dividends by a resident company to a non-resident pension fund give rise to two distinct charges which rest on separate legal bases.[13]

37. The Court's finding in *Truck Center*, that the tax at issue in that case was lower for non-resident taxpayers than for resident taxpayers,[14] does not seem to me to weaken the analogy between *Truck Center* and this case.

13 — Judgment in *Truck Center* (C-282/07, EU:C:2008:762, paragraph 43).

14 — Ibid. (paragraph 49).

38. Firstly, the Court included this finding for the sake of completeness, having already held that the situations at issue were not comparable. The comparison of levels of taxation was not a fundamental part of its reasoning. Secondly, in this case, the parties disagree as to whether the legislation at issue leads to higher taxation of non-resident pension funds. This may be something for the national court to establish.[15] However, from the point of view of EU law, assessment of whether the situations are comparable cannot depend on the level of taxation of a specific taxpayer in a given position.

39. On the other hand, the circumstances in this case must be clearly distinguished from those in many other cases where the Court has held that purely domestic situations and cross-border situations are comparable in contexts where there are tax restrictions on the free movement of capital (or on freedom of establishment, as, in cases concerning direct investments, free movement of capital is often at issue in conjunction with freedom of establishment).

Cases concerning measures to prevent economic double taxation of dividends

40. This case must above all be distinguished from the long list of cases concerning the various measures taken by the Member States to prevent economic double taxation of dividends.

41. In paying dividends to its shareholders, a company is merely distributing the profit which it has made. This profit is normally subject, at the level of the company distributing the dividends, to corporation tax. If a State then decides to treat these same dividends as taxable income when they are received by shareholders, the same profit is in fact being taxed twice.[16]

42. Given the negative economic effects of such double taxation, States often adopt measures intended to prevent or mitigate it. Yet, according to the now settled case-law,[17] originally dating from '*Avoir Fiscal*',[18] if a Member State provides for such preventive measures relating to the economic double taxation of dividends in domestic situations, it must do the same in cross-border situations, that is to say situations involving other Member States or non-Member States to which the free movement of capital extends.[19] These cross-border situations may concern taxation of dividends in the Member State in which the shareholder receiving the dividends is resident[20] or in the Member State in which the distributing company is resident.[21]

43. The second situation is particularly relevant to this case. The Court has held that, where national legislation seeks to prevent double taxation of dividends distributed by resident companies, the situation of non-resident shareholders is comparable to that of resident shareholders.[22]

15 — See points 61 to 68 below.

16 — This must not be confused with juridical (or international) double taxation, which taxes the same income in two different States. This juridical double taxation results from the exercise of their tax powers by the different States. It is not, in principle, contrary to the fundamental freedoms of the internal market (see, in particular, judgment in *Kerckhaert and Morres*, C-513/04, EU:C:2006:713, paragraphs 16 and 17 and the operative part of the judgment).

17 — This is Advocate General Mengozzi's wording (see his Opinion in *Emerging Markets Series of DFA Investment Trust Company*, C-190/12, EU:C:2013:710, point 44).

18 — Judgment in *Commission* v *France* (270/83, EU:C:1986:37).

19 — See, most recently, judgment in *Emerging Markets Series of DFA Investment Trust Company* (C-190/12, EU:C:2014:249, paragraph 59 and the case-law cited).

20 — See, inter alia, judgments in *Verkooijen* (C-35/98, EU:C:2000:294); *Manninen* (C-319/02, EU:C:2004:484); and *Test Claimants in the FII Group Litigation* (C-446/04, EU:C:2006:774).

21 — See, inter alia, judgments in *Denkavit Internationaal and Denkavit France* (C-170/05, EU:C:2006:783); *Bouanich* (C-265/04, EU:C:2006:51); *Santander Asset Management SGIIC and Others* (C-338/11 to C-347/11, EU:C:2012:286); and *Emerging Markets Series of DFA Investment Trust Company* (C-190/12, EU:C:2014:249).

22 — Judgment in *Santander Asset Management SGIIC and Others* (C-338/11 to C-347/11, EU:C:2012:286, paragraph 42 and the case-law cited).

44. Consequently, ‘in order for non-resident companies receiving dividends not to be subject to a restriction on the free movement of capital prohibited, in principle, by Article [63 TFEU], the State in which the company making the distribution is resident is obliged to ensure that, *under the procedures laid down by its national law in order to prevent or mitigate a series of liabilities to tax or economic double taxation,*[23] non-resident shareholder companies are subject to the same treatment as resident shareholder companies’.[24]

45. However, the Swedish legislation at issue in the main proceedings does not seek to prevent double taxation of dividends paid to resident pension funds. Nothing in the order for reference or in the observations submitted to the Court indicates that the corporation tax paid by the companies distributing those dividends is taken into account for the calculation of the tax to which these funds are subject, or that they are granted a tax credit, or, finally, that the dividends paid to these funds are exempt. On the contrary, these dividends are subject, in the same way as other capital yields, to the tax imposed by Law (1990:661), even though the amount of yield tax is calculated indirectly.

46. In this connection, it should be noted that neither the Treaty rules nor the Court’s case-law requires Member States, and inter alia Member States in which companies distributing dividends are resident, to prevent or mitigate economic double taxation of these dividends. Such a requirement would mean that the Member State would be obliged to abandon its right to tax a profit generated through an economic activity undertaken on its territory.[25]

47. Of course, if, in Swedish law, there is another mechanism to prevent economic double taxation of dividends paid to resident shareholders — which is a matter for the national court to ascertain — then it should apply in the same way to dividends paid to non-resident shareholders. However, this does not seem to be either the objective or the outcome of the legislation at issue in the main proceedings — that is to say, the pension fund tax legislation.

48. It is therefore possible to apply to this case, *a contrario*, the distinction made in paragraph 43 of *Santander Asset Management SGIIC and Others*[26] between the situation in the case which gave rise to that judgment and the situation in *Truck Center*. In that judgment, the Court established that, in the *Truck Center* case, the difference in treatment lay solely in the method of levying tax, whereas in the case leading to *Santander Asset Management SGIIC and Others*, only the dividends paid to non-resident shareholders were taxed. In the case at issue in the main proceedings here, dividends paid to resident pension funds are also taxed.

49. Therefore, although the Court has held that the situations of resident and non-resident taxpayers are comparable in cases concerning measures to prevent economic double taxation of dividends, the situations in this case are not comparable.

Cases concerning other tax measures

50. The Court has already determined on several other occasions that national and cross-border situations are comparable so far as concerns the Member States’ application of the provisions of their national law on direct taxation. I shall give some relevant examples in order to demonstrate that those cases were different from this one.

23 — Emphasis added.

24 — Judgment in *Commission* v *Spain* (C-487/08, EU:C:2010:310, paragraph 52).

25 — Judgment in *Test Claimants in Class IV of the ACT Group Litigation* (C-374/04, EU:C:2006:773, paragraph 59).

26 — C-338/11 to C-347/11, EU:C:2012:286.

51. First, in a case concerning the taxation of dividends paid to pension funds in Finland,[27] the question was whether the situations of resident and non-resident pension funds were comparable from the point of view of the national rule under which dividends received and transferred to reserves were regarded as expenses deductible from taxable income. The effect of this rule was that dividends paid to resident pension funds were, in practice, not taxed, in contrast to dividends paid to non-resident pension funds, which were unable to benefit from the rule.

52. The Court concluded that the situations of resident and non-resident pension funds were comparable, since both transferred their incomes to reserves intended to pay retirement pensions, which is the specific purpose of pension funds.[28] The Court also observed that the national legislation at issue led, in practice, to only non-resident pension funds being taxed on those dividends.[29]

53. However, the legislation at issue in the main proceedings does not provide for any method allowing resident pension funds to deduct dividends received from their taxable income; nor does it, *de jure* or *de facto*, exempt these dividends from taxation. Therefore this legislation is in no way analogous to the legislation at issue in the case which gave rise to the judgment in *Commission* v *Finland*.[30]

54. Secondly, the Court has consistently held that resident and non-resident taxpayers are in comparable situations as regards the possibility of deducting business expenses which are directly linked to receipt of taxable income.[31] However, the national legislation at issue in the main proceedings does not provide for such a possibility where resident pension funds are concerned. Indeed, it seems to me that this would be difficult, in the light of the indirect method for calculating the tax base under this legislation.

55. It is true that, in calculating the base for yield tax on resident pension funds, only net assets are taken into account — that is to say, after deduction of financial liabilities (liability): however, this is an entirely different issue from that of deducting business expenses, as the Swedish Government rightly points out in its written observations.

56. Finally, thirdly, as regards whether the situations are comparable from the point of view of the company distributing the dividends, I do not believe that the facts of the matter serve to establish that there is a restriction on free movement of capital in this case.

57. First, the burden of the withholding tax does not fall on the distributing company, but on the shareholder.

58. Second, the administrative costs linked to deducting the tax at source cannot, in my view, be regarded as significant for a limited company, which must have a considerable apparatus for managing its own accounts and its own tax liabilities. Therefore, the finding that the obligation on the mere recipient of services to withhold at source tax on the remuneration paid to service providers constitutes a restriction on the freedom to provide services in that it entails an additional administrative burden and related liability risks[32] cannot be applied to this case.

27 — Judgment in *Commission* v *Finland* (C-342/10, EU:C:2012:688).

28 — Ibid. (paragraphs 42 and 43). See also Opinion of Advocate General Sharpston in *Commission* v *Finland* (C-342/10, EU:C:2012:474, point 43).

29 — Judgment in *Commission* v *Finland* (C-342/10, EU:C:2012:688, paragraph 44, which refers to paragraph 43 of the judgment in *Santander Asset Management SGIIC and Others*, C-338/11 to C-347/11, EU:C:2012:286, cited in point 48 above).

30 — C-342/10, EU:C:2012:688.

31 — See, in particular, judgment in *Schröder* (C-450/09, EU:C:2011:198, paragraph 40 and the case-law cited) and, in respect of pension funds, judgment in *Commission* v *Germany* (C-600/10, EU:C:2012:737, paragraph 17).

32 — Judgment in *X* (C-498/10, EU:C:2012:635, paragraph 32).

Interim conclusion

59. In the light of the foregoing, I am of the opinion that the situation of resident pension funds in Sweden is not comparable to that of non-resident pension funds from the point of view of the system for taxing resident pension funds provided for by Law (1990:661). Therefore Article 63 TFEU, in conjunction with Article 65(1)(a) TFEU, does not preclude such a tax system.

Final remarks

60. In the event that the Court were to decide not to adopt my proposal and were to conclude that the situations of resident and non-resident pension funds are comparable under the Swedish legislation relating to yield tax on resident pension funds, other problems would be raised by this case: I now wish to consider some of these.

Less favourable treatment of non-resident pension funds

61. The parties to the main proceedings and the interested parties which have submitted written observations disagree as to whether the Swedish system for taxing pension funds involves less favourable treatment of non-resident funds than of resident funds.

62. Indeed, the question is debatable. On the one hand, as a rule, tax on resident pension funds, based on the Government bond yield, seems to be lower than tax on the actual income of non-resident pension funds from dividends paid by companies, since investment in Government bonds, which involves lower risk, is generally less profitable. On the other hand, resident funds are liable to pay tax each year, whether or not they have received dividends, unlike non-resident funds, which are taxed solely on actual income. Moreover, tax on resident funds takes into account the value of their investments and also, accordingly, any increase in this value — owing, for example, to an increase in the value of shares held — whereas tax on non-resident funds depends only on the amount of the dividends paid.

63. The referring court itself, in its order, comes to the conclusion that the Swedish taxation system may favour resident pension funds in some years and non-resident pension funds in other years.

64. In my opinion, from the point of view of EU law, the question should be analysed as follows.

65. As I have already mentioned above,[33] according to settled case-law, less favourable tax treatment of dividends paid to non-residents than of those paid to residents may, theoretically, constitute a measure prohibited by Article 63(1) TFEU, as a restriction on the free movement of capital. The same is true if this less favourable treatment is not automatic but ad hoc.[34] Assessing whether or not a national tax measure has an unfavourable outcome is a finding of fact, and so it is a matter for the national courts.

66. In the context of the case in the main proceedings, the tax base for pension funds resident in Sweden is calculated by multiplying the value of the fund's assets at the beginning of the current tax year by the average interest rate on Government bonds for the calendar year immediately prior to the tax year in question. Tax at 15% is then applied to the base thereby defined.[35]

33 — See points 18 and 19 above.

34 — See, to that effect, although with regard to a different field, judgment in *Talotta* (C-383/05, EU:C:2007:181, paragraph 31 and the case-law cited).

35 — See points 8 and 9 above.

67. For the reasons set out in points 32 to 34 of this Opinion, application of the same system to non-resident pension funds, which the applicant in the main proceedings urges, is not possible or would not produce the effect sought. Consequently, if the Court were to conclude that the situations of resident and non-resident pension funds are comparable in this case, the most appropriate means of establishing whether the national legislation at issue is unfavourable to non-resident pension funds would be to treat — in my opinion, completely artificially — the overall level of tax on the capital yields of resident pension funds in the same way as the level of tax on just the share income of non-resident funds.

68. For each dividend payment giving rise to withholding tax, it would therefore be necessary to multiply the value of the assets (shares) entitling the pension fund to these dividends by the average interest rate on Swedish Government bonds for the calendar year immediately prior to the tax year in which the payment had been made and then to calculate 15% of the sum thereby obtained. If the amount of withholding tax actually paid by the non-resident pension fund exceeded this 15%, the fund would be entitled to repayment of the excess tax, as it would have been levied in contravention of EU law.

69. It is also for the referring court to assess whether non-resident pension funds are subject to a liquidity disadvantage because the withholding tax payable by these funds is deducted at source when the dividends are paid, whereas resident pension funds pay yield tax on an annual basis. Such a disadvantage may constitute a restriction contrary to Article 63(1) TFEU.[36] However, this liquidity disadvantage may be insignificant because of the requirement, pointed out by the Swedish and German Governments in their written observations, for pension funds resident in Sweden to make monthly advance payments on the final amount of yield tax.[37]

Whether the measure is justified

70. If the Court were to rule that pension funds resident in Sweden and non-resident pension funds which receive dividends from resident companies are in objectively comparable situations and that non-resident funds are, even potentially, disadvantaged by the difference in taxation of income from these dividends as between resident and non-resident funds, it would then have to determine whether this difference in treatment is justified by an overriding reason in the public interest.

71. It is apparent from the order for reference that, of all the reasons that might justify a difference in treatment, the one raised by the defendant in the main proceedings before the referring court was the necessity of maintaining the Swedish pensions system. However, from the point of view of EU law, the issue does not arise from the Swedish pensions system or even from the system for taxing resident pension funds, but from the fact that non-resident pension funds are taxed less favourably. Eliminating this disadvantage would not, in my opinion, necessitate abandoning the Swedish system relating to resident pension funds but would, at most, mean forgoing part of the tax revenues from dividends received by non-resident pension funds.

72. The Swedish Government also invokes, in its written observations, the balanced allocation of tax powers between the Kingdom of Sweden and the Kingdom of the Netherlands. It submits that Sweden's tax agreement with the Kingdom of the Netherlands does not allow the Swedish system for taxing resident pension funds to be applied to Netherlands pension funds. However, it would not be a

36 — See, to that effect, judgment in *Test Claimants in the FII Group Litigation* (C-446/04, EU:C:2006:774, paragraphs 152 to 154).

37 — See, to that effect, the judgment in *Truck Center* (C-282/07, EU:C:2008:762, paragraph 49) and the Opinion of Advocate General Kokott in *Truck Center* (C-282/07, EU:C:2008:513, points 48 and 49).

matter of applying the entire system to Netherlands pension funds, but only of bringing their tax burden into line with the burden on pension funds resident in Sweden. This does not appear to infringe the tax agreement between the Kingdom of Sweden and the Kingdom of the Netherlands or, in general, to undermine the balanced allocation of tax powers between those two Member States.

73. Finally, the German Government, in its written observations, raises the necessity of ensuring the effective collection of tax. It submits that the deduction of tax at source is a straightforward, effective collection technique, from the tax authorities' as well as the taxpayers' point of view, and that it is particularly well suited to non-resident taxpayers. However, it is not necessary to abandon this tax collection technique in order to bring the tax burden on non-resident pension funds into line with the burden on resident funds. It is sufficient to calculate the theoretical tax burden on a resident pension fund on the basis of the value of the assets entitling the fund to the dividend and then to limit the deduction to that amount, if it is less than 15% of the dividend. This calculation should not represent an unreasonable administrative burden for the company distributing the dividends, since the required data — namely, the Government bond yield for the previous year and the value of the shares held by the non-resident pension fund at the time when the dividends were paid — are already known.

74. Consequently, if the Court were to hold that, in this case, there is a restriction on the free movement of capital, prohibited by Article 63(1) TFEU, that restriction would not be justified, in my view, by any overriding reason in the public interest. That said, as I have stated above, I am of the opinion that there is no such restriction, since the different treatment of pension funds resident in Sweden and non-resident pension funds concerns situations which are not objectively comparable and, accordingly, falls within the derogation contained in Article 65(1)(a) TFEU.

Conclusion

75. In the light of the above considerations, I propose that the Court give the following answer to the question referred by the Supreme Administrative Court (Högsta förvaltningsdomstolen):

Article 63(1) TFEU, in conjunction with Article 65(1)(a) TFEU, does not preclude national legislation under which dividends from a resident company are taxed at source if the shareholder is resident in another Member State, while such dividends — if paid to a resident shareholder — are subject to total tax calculated as a definitive lump sum and on a fictive yield, which is intended to ensure uniform taxation of the entire capital yields of a given category of resident taxpayers.