Reports of Cases

OPINION OF ADVOCATE GENERAL
KOKOTT
delivered on 12 April 2016[1]

Case C‑176/15

Guy Riskin,
Geneviève Timmermans
v
État belge(Request for a preliminary ruling

from the Tribunal de première instance de Liège (Court of First Instance, Liège, Belgium))

(Fiscal legislation — Free movement of capital (Article 63(1) TFEU) — National income tax — Dividend income — Crediting of foreign withholding tax — Double taxation conventions — Less favourable treatment of holdings in companies established in another Member State in comparison with those established in a third country)

I – **Introduction**

1. The Court has already dealt on numerous occasions with the treatment, with regard to income tax, of cross-border distributions of dividends. The taxation systems of the Member States, particularly their measures to prevent legal and economic double taxation, are in some respects very complex and have on a number of occasions come into conflict with the fundamental freedoms of the Treaty.

2. In this connection the present Belgian request for a preliminary ruling concerns a very simple question: is a Member State permitted to treat investment in companies of a third country more favourably with regard to income tax than investment in companies of other Member States? In view of the Belgian rules governing the crediting of foreign withholding tax on dividends, the Court will have two matters to clarify. First, the fundamental question arises whether any treatment of investments in other Member States that is less favourable in comparison solely with third countries but not in comparison with domestic investments is capable of restricting the free movement of capital. If appropriate, it will be necessary, secondly, to discuss the justificatory impact of double taxation conventions in circumstances that have not previously been examined by the Court.

1 — Original language: German.

II – **Legal Context**

EU law

3. Article 4(3) TEU[2] provides:

‘3. Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.

…’

4. Article 49 TFEU[3] grants the following right of establishment:

‘Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. Such prohibition shall also apply to restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State.

…’

5. Article 56 TFEU provides in respect of services:

‘Within the framework of the provisions set out below, restrictions on freedom to provide services within the Union shall be prohibited in respect of nationals of Member States who are established in a Member State other than that of the person for whom the services are intended.

…’

6. Article 58 TFEU contains supplemental provisions on services in the area of transport, banking and insurance.

7. In relation to the movement of capital, Article 63(1) TFEU provides:

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

International treaty law

8. The Kingdom of Belgium and the Republic of Poland entered into a Convention for the avoidance of double taxation in Warsaw (Poland) on 20 August 2001 (‘the Belgium/Poland Convention’).

9. Article 10 of the Belgium/Poland Convention states in relation to dividend income:

‘1. Dividends paid by a company which is a resident of a contracting State to a resident of the other contracting State may be taxed in that other State.

2. However, such dividends may also be taxed in the contracting State of which the company paying the dividends is a resident, and according to the laws of that State …’

2 — Treaty on European Union (OJ 2012 C 326, p. 13).
3 — Treaty on the Functioning of the European Union (OJ 2012 C 326, p. 47).

10. For the avoidance of double taxation, Article 23 of the Belgium/Poland Convention contains the following provision:

‘1. In the case of Belgium, double taxation shall be avoided as follows:

…

(b) Subject to the provisions of Belgian legislation regarding the allowance as a credit against Belgian tax of tax paid abroad, where a resident of Belgium receives items of income which are included in his total income subject to Belgian tax and which consist of dividends …, the Polish tax charged on that income shall be allowed as a credit against Belgian tax relating to such income.

…’

National law

11. In the Kingdom of Belgium, tax is charged on the income of natural persons. This covers the income of all the Kingdom’s residents, irrespective of whether it is earned in Belgium or abroad.

12. Article 285 of the Belgian Income Tax Code 1992 (Code des impôts sur les revenus) (‘the CIR 1992’) provides:

‘As regards income from capital ..., a fixed percentage of foreign tax shall be allowed as a credit against tax where that income has been subject abroad to a tax similar to personal income tax, corporate income tax or income tax on non-residents, and where such capital [is] applied in Belgium in the conduct of a professional activity.

…’

13. Article 286 of the CIR 1992, in the version that applies to the dispute in the main proceedings, adds:

‘The fixed percentage of foreign tax shall be 15/85ths of net income …

…’

III – **The dispute in the main proceedings**

14. The dispute in the main proceedings concerns the income tax of Mr Guy Riskin and of Ms Geneviève Timmermans (‘the taxpayers’) for the year 2010.

15. The taxpayers owned a shareholding in the company ‘Auto Truck Centrum’ that was established in Poland. From this company they received a dividend in an amount equivalent to approximately EUR 15 000. Tax was charged by the Republic of Poland on the payment of those dividends.

16. The taxpayers were not permitted to have the Polish tax allowed as a credit against their Belgian income tax pursuant to Article 285 of the CIR 1992 because they had not applied their shareholding in the conduct of a professional activity in Belgium. The taxpayers appealed against that decision on the basis that they were being discriminated against, contrary to EU law. They argued that taxpayers having a shareholding in a company established in certain third countries instead of in Poland would be allowed a tax credit in respect of their foreign tax.

IV – **Proceedings before the Court**

17. Against this background, the Tribunal de première instance de Liège (Court of First Instance, Liège, Belgium) referred the following questions to the Court of Justice on 20 April 2015 pursuant to Article 267 TFEU:

1. Is the rule laid down in Article 285 of the CIR 1992, implicitly endorsing the double taxation of foreign dividends in the case of a natural person residing in Belgium, consistent with the principles of EU law enshrined in Article 63 TFEU, read in conjunction with Article 4 TEU, in so far as it enables Belgium to give advantage as it sees fit — according to the provisions of Belgian law to which the double taxation convention negotiated by Belgium refers (Article 285 which lays down the conditions for tax credits or Article 286 which merely prescribes the fixed percentage of tax that may be allowed as a credit) — to investment in third countries (United States), to the detriment of possible investment in the Member States of the European Union (Poland)?

2. In so far as it makes the possibility of allowing foreign tax as a credit against Belgian tax conditional upon the capital and property from which the income is derived being applied in Belgium in the conduct of professional activity, is Article 285 of the CIR 1992 not contrary to Articles 49 TFEU, 56 TFEU and 58 TFEU?

18. The taxpayers, the Kingdom of Belgium, the Federal Republic of Germany, the United Kingdom of Great Britain and Northern Ireland and the European Commission submitted written observations on these questions to the Court.

V – **Legal assessment**

19. By its two questions, the referring court essentially wishes to establish whether a provision such as the Belgian provision on the crediting of foreign withholding tax on dividends is, from various different aspects, compatible with the fundamental freedoms. The first question concerns the different approaches to tax credits depending on whether the withholding tax is levied in Poland or in a third country. In the light of the grounds of the order for reference, the second question should be understood to concern the difference in the application of tax credits depending on whether the professional activity (in the conduct of which a shareholding is applied) is carried out in the national territory or in a different Member State.

A – *Admissibility*

20. It is necessary, first, to examine the admissibility of both questions referred. According to settled case-law, the Court may refuse to answer a question that has been referred to it if it is quite obvious that the interpretation of EU law that is sought is irrelevant to the decision in the case, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the question submitted to it.[4]

4 — See, in particular, judgments of 26 September 2000 in *Kachelmann* (C-322/98, EU:C:2000:495, paragraph 17); of 18 July 2005 in *Lucchini* (C-119/05, EU:C:2007:434, paragraph 44); and of 11 November 2015 in *Pujante Rivera* (C-422/14, EU:C:2015:743, paragraph 20).

1. Admissibility of the first question referred

21. As regards, first of all, the legal material necessary in order to answer the first question referred, the referring court does not outline the exact legal circumstances of any unequal treatment of investments in Poland and in third countries. The order for reference neither reproduces the content of double taxation conventions which the Kingdom of Belgium has concluded with third countries, nor does it describe the influence of those conventions on the Belgian law applicable to the dispute in the main proceedings.

22. In addition, the only third country named in the order for reference as having a withholding tax on dividends which, according to the findings of the referring court, can generate a more extensive tax credit than the Polish withholding tax is the United States (of America). However, the taxpayers and the Kingdom of Belgium both put forward reasoned arguments in the proceedings before the Court disputing the existence of such a difference in treatment. In their submission, it is not the double taxation convention concluded by the Kingdom of Belgium with the United States but, inter alia, the convention concluded with Japan that contains a more favourable provision for the crediting of tax than the Belgium/Poland Convention applicable in the dispute in the main proceedings.

23. The factual material provided by the referring court is also incomplete in that it provides no information regarding the extent of the taxpayers' shareholding in the Polish company. Since Article 285 of the CIR 1992 appears to apply irrespective of the size of the shareholding, the extent of the taxpayers' interest in the Polish company is decisive for the question as to which fundamental freedom applies in the present case.[5]

24. Despite this lack of clarity as to the factual and legal context of the first question referred, the information available is nevertheless sufficient for the Court to answer it. In so doing, however, it must proceed on the basis of two assumptions, which the referring court may still have to verify in the main proceedings.

25. First of all, it must be assumed that there is at least one third country ('the third country') whose withholding tax would in the present case be allowed as a credit against Belgian tax if the company were established in that third country instead of in Poland. It must further be assumed that this set-off occurs on the basis of a corresponding obligation on the part of the Kingdom of Belgium under a double taxation convention with the third country.

26. Secondly, it must be assumed, in view of the interpretation of Article 63 TFEU requested by the referring court, that the taxpayers did not have a shareholding in the Polish company that enabled them to exert a definite influence on its decisions and to determine its activities, for in that case, the taxpayers would be protected only by the freedom of establishment under Article 49 TFEU.[6]

27. In these circumstances the first question referred is admissible.

2. Admissibility of the second question referred

28. By contrast, the second question referred — as it is to be understood in the light of the grounds of the order for reference — is inadmissible because, on the basis of the factual material provided by the referring court, it is quite obvious that it is irrelevant to the decision in the case.

5 — See, in particular, judgment of 10 June 2004 in *X* (C-686/13, EU:C:2015:375, paragraphs 16 to 23).

6 — See, in particular, judgment of 10 June 2015 in *X* (C-686/13, EU:C:2015:375, paragraphs 23 to 25).

29. The question whether EU law requires Polish withholding tax to be allowed as a credit under Article 285 of the CIR 1992 even where the professional activity in which the shareholding is applied is conducted in a different Member State instead of in Belgium has no bearing on the determination of the dispute in the main proceedings. This is because it cannot be inferred from the order for reference that the taxpayers have used the shareholding at issue in the conduct of a professional activity, whether at home or abroad. In fact the taxpayers have stated the contrary in the proceedings before the Court.

B – *Reply to the first question referred*

30. By its first and only admissible question, the referring court essentially wishes to establish whether national legislation such as that at issue here is compatible with the free movement of capital, providing as it does for a foreign withholding tax on dividends generally to be allowed as a credit where the company making the distribution is established in a third country, but not if it is established in another Member State, specifically in Poland.

1. Restriction on the free movement of capital

31. It is necessary, in that regard, to examine any restriction on the free movement of capital. Article 63(1) TFEU prohibits, inter alia, all measures which are such as to discourage residents from making investments in other States. [7]

32. Whether the refusal to allow the crediting of Polish withholding tax on dividends *per se* (that is irrespective of any comparison with the possibilities of set-off in the case of a third country) represents a restriction on the free movement of capital is not covered by the question referred. The Court has in fact already held in that respect that the juridical double taxation of dividends does not in principle constitute a restriction of a fundamental freedom. This is because it is the consequence of the parallel exercise of powers of taxation by different Member States. [8] None of the Member States involved is thus solely responsible for the disadvantage arising from the juridical double taxation. According to the case-law, the fundamental freedoms cannot therefore, in principle, place the shareholder's Member State under an obligation to prevent juridical double taxation, for example by providing for the withholding tax levied in the other Member State to be allowed as a credit against its own tax. [9] The Kingdom of Belgium is therefore in principle free, in the present case, to allow, or not to allow, the Polish withholding tax as a credit.

33. A distinction must, however, be made between this entitlement of the Member States to juridical double taxation and the question whether the Kingdom of Belgium may, in compliance with the free movement of capital, reserve to shareholders of companies established in particular States the general crediting of tax paid on dividends in the source State. The resultant disadvantage for other shareholders is not in consequence of the parallel exercise of powers of taxation by different Member States but arises solely from the decision of the Kingdom of Belgium to treat the crediting of withholding tax on dividends differently depending on the source State. [10] Article 23(1)(b) of the Belgium/Poland Convention leaves it to Belgian law to determine the extent to which Polish withholding tax is to be allowed as a credit.

7 — See, in particular, judgment of 28 February 2013 in *Beker* (C-168/11, EU:C:2013:117, paragraph 35 and the case-law cited).

8 — Judgment of 10 February 2011 in *Haribo Lakritzen Hans Riegel and Österreichische Salinen* (C-436/08 and C-437/08, EU:C:2011:61, paragraphs 167 to169 and the case-law cited).

9 — See judgments of 14 November 2006 in *Kerckhaert and Morres* (C-513/04, EU:C:2006:713); of 12 February 2009 in *Block* (C-67/08, EU:C:2009:92, paragraph 31); and of 10 February 2011 in *Haribo Lakritzen Hans Riegel and Österreichische Salinen* (C-436/08 and C-437/08, EU:C:2011:61, paragraphs 170 and 171 and the case-law cited).

10 — See, to this effect, also judgments of 20 May 2008 in *Orange European Smallcap Fund* (C-194/06, EU:C:2008:289, paragraph 54), and of 16 October 2008 in *Renneberg* (C-527/06, EU:C:2008:566, paragraph 57).

34. To that extent, a restriction on the free movement of capital could, however, be established in the present case only if Article 63(1) TFEU prohibited any different treatment of investments made in a Member State, on the one hand, and in a third country, on the other, as this provision primarily prohibits the preferential treatment of dividends from *domestic* companies in comparison with dividends from companies having their seats in other Member States [11] or in third countries. [12]

35. As regards the relevance of the unequal treatment of dividends from different foreign countries, the Court has thus far made two findings. On the one hand, Article 63(1) TFEU fundamentally prohibits any difference in the treatment of dividends from different *Member States*. [13] On the other, the different treatment of income from various *third countries* is not contrary to the free movement of capital. [14] The special situation of third countries which are parties to the EEA Agreement does not need to be examined here.

36. This distinction can only be explained by the fact that the movement of capital to or from other Member States within the framework of Article 63(1) TFEU enjoys greater protection than the movement of capital to or from third countries. The movement of capital to or from a third country is protected only to the extent that it is treated less favourably than the domestic movement of capital. By contrast, the movement of capital to or from another Member State is additionally protected against the existence of more favourable conditions for investments in other Member States.

37. The differing scope of the protection offered by Article 63(1) TFEU for investments in other Member States, on the one hand, and in third countries, on the other, makes it virtually inevitable that the less favourable treatment of dividends from another Member State as against dividends from a third country also constitutes a restriction on the free movement of capital. In so far as the case-law already prohibits, in principle, the less favourable treatment of the movement of capital to or from another Member State in comparison with the movement of capital to or from a different Member State, the same must certainly be true of the less favourable treatment of the movement of capital to or from a third country, in respect of which Article 63(1) TFEU offers only comparatively little protection.

38. This approach is not called into question by the fact that, according to case-law, the general principle of non-discrimination on grounds of nationality (now Article 18 TFEU) does not, given its limited scope of application, in principle preclude the less favourable treatment of nationals of Member States as against nationals of third countries. [15] The scope of application of the free movement of capital at issue here is broader. Under Article 63(1) TFEU it applies to the movement of capital not only to or from other Member States but also to or from third countries.

39. Given that, in the present case, it is not possible to make a deduction for withholding tax levied on dividends in the Republic of Poland, whereas it would be possible were the company to be established in a third country, the legislation at issue here thus constitutes a restriction on the free movement of capital.

11 — See, inter alia, judgments of 7 September 2004 in *Manninen* (C-319/02, EU:C:2004:484, paragraph 20); of 6 March 2007 in *Meilicke* (C-292/04, EU:C:2007:132, paragraph 22); and of 13 November 2012 in *Test Claimants in the FII Group Litigation* (C-35/11, EU:C:2012:707, paragraph 38).

12 — See, in particular, judgment of 10 February 2011 in *Haribo Lakritzen Hans Riegel and Österreichische Salinen* (C-436/08 and C-437/08, EU:C:2011:61, paragraph 48).

13 — See judgment of 20 May 2008 in *Orange European Smallcap Fund* (C-194/06, EU:C:2008:289, paragraph 56); see, to that effect, also judgments of 5 July 2005 in *D.* (C-376/03, EU:C:2005:424, paragraphs 53 to 63), and of 12 December 2006 in *Test Claimants in Class IV of the ACT Group Litigation* (C-374/04, EU:C:2006:773, paragraphs 82 and 83).

14 — Judgment of 10 February 2011 in *Haribo Lakritzen Hans Riegel and Österreichische Salinen* (C-436/08 and C-437/08, EU:C:2011:61, paragraph 48).

15 — Judgment of 4 June 2009 in *Vatsouras and Koupatantze* (C-22/08 and C-23/08, EU:C:2009:344, paragraph 52).

2. Justification for the restriction

40. According to the case-law, a restriction on the free movement of capital will be compatible with Article 63(1) TFEU only if there are adequate grounds for the difference in treatment. This may be assumed if the difference in treatment either concerns situations which are not objectively comparable or is otherwise justified by an overriding reason in the public interest.[16]

41. Thus, in the present case, it is significant that the Kingdom of Belgium has made the decision to administer the crediting of foreign withholding tax differently, depending on the source State, in the context of different international treaty obligations. While the Belgium/Poland Convention gives it the option in the present case of allowing deductions to be made in respect of the Polish withholding tax, the double taxation convention with the third country imposes an obligation to allow deductions to be made in respect of withholding tax levied by that third country.[17]

42. In the judgment in *D.*, the Court has already held that non-residents residing in different Member States may be treated differently by the host Member State in which the capital investment is made if a tax benefit arises from a bilateral double taxation convention. Such a benefit, which applies only to taxpayers who are resident in the Member State that is a party to the convention, cannot be separated from the other provisions of the convention but are an integral part of its overall balance.[18]

43. Admittedly, the present case does not concern a restriction on the free movement of capital imposed by the host Member State receiving the capital investment, but by the Member State from which that capital investment came. This is because the Kingdom of Belgium treats residents differently depending on where their capital investment is made. However, the Court's decision in *D.* can be applied to this case, because in this case also the different provisions relating to the deduction of withholding tax in the double taxation convention concluded with the relevant host Member State in which the capital investment is made cannot be separated from the remaining provisions of that convention. Moreover, the position is exactly the same in the case of double taxation conventions concluded with Member States as it is in the case of those concluded with third countries.

44. Thus, the free movement of capital cannot impose a blanket obligation on a Member State to grant tax advantages to which it is committed under a double taxation convention in the context of a general balanced allocation of contracting States' overlapping powers of taxation even in situations not subject to the convention or the other obligations resulting therefrom. The fact that this can be established in respect of the free movement of capital in these general terms is attributable also to the fact that Article 65(1)(a) TFEU expressly permits Member States (albeit only in the context of the obligations under Article 65(3) TFEU and the case-law in this regard[19]) to treat taxpayers with different places of residence or of capital investment differently.

16 — See, in particular, judgments of 25 October 2012 in *Commission* v *Belgium* (C-387/11, EU:C:2012:670, paragraph 45); of 7 November 2013 in *K* (C-322/11, EU:C:2013:716, paragraph 36); and of 17 September 2015 in *Miljoen and Others* (C-10/14, C-14/14 and C-17/14, EU:C:2015:608, paragraph 64).

17 — See point 25 above.

18 — Judgment of 5 July 2005 in *D.* (C-376/03, EU:C:2005:424, paragraphs 61 and 62); see also judgment of 12 December 2006 in *Test Claimants in Class IV of the ACT Group Litigation* (C-374/04, EU:C:2006:773, paragraph 88) in relation to the freedom of establishment.

19 — See, in particular, judgment of 17 September 2015 in *Miljoen and Others* (C-10/14, C-14/14 and C-17/14, EU:C:2015:608, paragraphs 62 to 64 and the case-law cited).

45. Given the relatively little weight given to the free movement of capital under tax law,[20] there is no need in the present case (as also in the judgment in *D.*) to examine the proportionality of unequal treatment arising from double taxation conventions,[21] which would otherwise be a prerequisite to justifying any restriction on the free movement of capital.[22] The duty of sincere cooperation which, according to the first subparagraph of Article 4(3) TEU, exists between the Member States and which is presumably being referred to by the referring court in its question is equally incapable of justifying a 'most favoured nation' principle with regard to double taxation conventions between Member States and third countries.

46. However, it should be emphasised that double taxation conventions do not give Member States carte blanche to treat places of capital investment within the European Union less favourably than those outside it. According to settled case-law, the Member States can certainly allocate their powers of taxation in the context of double taxation conventions. However, when exercising the powers of taxation thus allocated, they are still obliged to comply both with the principle of equal treatment and with the fundamental freedoms.[23] Thus, in a case such as this, if both of the relevant double taxation conventions left it to the Kingdom of Belgium to decide whether to allow the foreign withholding tax as a credit against Belgian tax, any different treatment of such withholding tax would be contrary to the free movement of capital (unless justified on other grounds).

47. Since, however, in the present case, the Kingdom of Belgium has an *obligation* under the convention vis-à-vis the third country to allow withholding tax paid on dividends to be credited generally,[24] the existing restriction on the free movement of capital is justified.

VI – **Conclusion**

48. Thus the first and the only admissible question referred by the Tribunal de première instance de Liège (Court of First Instance, Liège, Belgium) should be answered as follows:

Article 63(1) TFEU does not preclude national legislation which, on the basis of an obligation under a double taxation convention concluded with a third country, generally allows withholding tax levied in the third country on dividends from companies established in that country as a credit against tax payable on those dividends in the particular Member State itself by shareholders resident in that Member State, while making such crediting of tax subject to additional requirements in the case of dividends distributed by companies established in a different Member State.

20 — See also in that regard my Opinion in *Q* (C-133/13, EU:C:2014:2255, point 48).

21 — See judgment of 5 July 2005 in *D.* (C-376/03, EU:C:2005:424, paragraphs 58 to 63), albeit without reference to Article 65(1)(a) TFEU; see, by contrast, judgment of 12 December 2006 in *Test Claimants in Class IV of the ACT Group Litigation* (C-374/04, EU:C:2006:773, paragraph 87), in which the Court examines the proportionality as to substance in the context of the freedom of establishment.

22 — See judgment of 4 September 2014 in *Commission* v *Germany* (C-211/13, EU:C:2014:2148, paragraph 47).

23 — See, in particular, judgments of 12 December 2002 in *de Groot* (C-385/00, EU:C:2002:750, paragraphs 93 and 94); of 16 October 2008 in *Renneberg* (C-527/06, EU:C:2008:566, paragraphs 50 and 51); and of 19 November 2015 in *Bukovansky* (C-241/14, EU:C:2015:766, paragraph 37).

24 — See point 25 above.