Reports of Cases

OPINION OF ADVOCATE GENERAL
MENGOZZI
delivered on 20 December 2017 [1]

Case C-480/16

Fidelity Funds
v
Skatteministeriet,
intervener
NN (L) SICAV

(Request for a preliminary ruling
from the Østre Landsret (Eastern Regional Court, Denmark))

(Reference for a preliminary ruling — Freedom to provide services — Free movement of capital — Restrictions — Taxation of dividends paid to undertakings for collective investment in transferable securities (UCITS) — Dividends paid by companies resident in one Member State to undertakings resident in another Member State — Comparability of situations — Safeguarding the coherence of the tax system)

Introduction

1. By this request for a preliminary ruling, the Østre Landsret (Eastern Regional Court, Denmark) enquires about the compatibility with the free movement of capital (Article 56 EC, now Article 63 TFEU) and the freedom to provide services (Article 49 EC, now Article 56 TFEU) of Danish legislation that grants undertakings for collective investment in transferable securities ('UCITS') established in Denmark which, either in fact or technically, make a minimum distribution to their members, an exemption from tax at source on dividends distributed by Danish companies, to the exclusion of UCITS established in other Member States.

2. This question is raised in the context of proceedings between several UCITS, within the meaning of 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), [2] having their registered office in the United Kingdom and in Luxembourg, including Fidelity Funds, and the Skatteministeriet (Ministry of Taxation and Excise, Denmark), concerning claims for the repayment of tax at source retained on dividends paid to those UCITS by Danish companies

1 Original language: French.

2 OJ 1985 L 375, p. 3. The aim of that directive, according to the fourth recital thereof, was to establish common basic rules for the authorisation, supervision, structure and activities of UCITS located in the Member States and the information they must publish (see judgments of 11 September 2014, *Gruslin*, C-88/13, EU:C:2014:2205, paragraph 33, and of 26 May 2016, *NN (L) International*, C-48/15, EU:C:2016:356, paragraph 31). Directive 85/611 was amended on a number of occasions before being repealed, with effect from 1 July 2011, by Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations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), which recast the former directive.

between 2000 and 2009. The UCITS in question seek such repayment on the ground that they should have been granted the exemption enjoyed in Denmark by resident UCITS. They argue that Danish legislation establishes differential treatment which is contrary to the free movement of capital and the freedom to provide services, guaranteed under EU law.

3. It is apparent from the relevant provisions set out by the referring court that, under the lov om indkomstbeskatning af aktieselskaber m.v. ('selskabsskatteloven') (the 'Law on corporation tax'), UCITS resident for tax purposes in Denmark are liable to pay tax there on their entire income. UCITS and other investment funds that are not resident for tax purposes in Denmark are liable to pay tax solely on the dividends they receive from Danish companies; that limited liability to tax is confined to income from sources in Denmark.

4. Article 65(1) of the kildeskatteloven ('Law on tax at source') provides that all decisions to distribute dividends taken by a Danish company must stipulate that a percentage of the total amount distributed will be retained at source, unless provided otherwise. The rate of tax at source was set at 25% in 2000 and was increased to 28% for the period between 2001 and 2009, unless more favourable provision was made under a double taxation convention. If the tax rate ultimately applied is lower than the rate at which tax at source was retained, UCITS may apply for a refund of the tax overpaid.

5. The rules of the Law on tax at source also apply to Danish UCITS and they are therefore, a priori, subject to that legislation on the taxation of dividends. However, it is apparent from Article 65(8) of the Law on tax at source that the Danish Minister of Taxation may adopt rules providing that the distribution of dividends to funds which fall within the scope of Article 16 C ('the Article 16 C funds') of the lov om påligningen af indkomstskat til staten ('ligningsloven') (Law on the assessment of income tax) ('the ligningslov') are exempted from withholding tax. In adopting the ministerial order implementing the ligningslov ('the ministerial order'), the Danish Minister for Taxation used that power to exempt Article 16 C funds resident in Denmark from all tax at source.

6. Under Article 38 of the ministerial order, a UCITS may be issued with an exemption certificate and qualify for the exemption from tax at source on dividends provided that (i) it is an undertaking covered by Article 1(1)(6) of the Law on corporation tax (and thus resident in Denmark), and (ii) has the status of Article 16 C fund. A UCITS resident in Denmark which does not satisfy the conditions of Article 16 C of the ligningslov is not exempted from tax at source on dividends.

7. Article 16 C of the ligningslov defines what is meant by 'Article 16 C funds'. Thus, under the rules in force until 1 June 2005, in order for a UCIT to be treated as an 'Article 16 C fund', it had to distribute a minimum set amount ('the minimum distribution'). The minimum distribution forms the basis for taxing the fund's income as regards its members.

8. Following the adoption of Law No 407 of 1 June 2005 and with effect from that date, an undertaking is no longer required to have actually distributed a minimum amount to members in order to qualify for 'Article 16 C fund' status. Eligibility for that status is still, however, subject to the condition that the UCITS must establish a minimum distribution taxed in the hands of its members by means of a tax at source levied by the fund. It is apparent from the explanations provided by the national court, with reference to the preamble to that law, that the aim of the legislative amendment was to make it easier for non-Danish UCITS to qualify for Article 16 C fund status, so that they would no longer be required to adapt their distribution policy to Danish tax legislation, which is of interest to funds whose Danish members are very much in the minority. It follows from the observations made by the interested parties that some UCITS not resident in Denmark were able to comply with the minimum distribution rules provided for in Article 16 C of the ligningslov.

9. It should be pointed out again that those rules are set out in Article 16 C(2) to (6) of the ligningslov. Paragraph 2 of that article provides that the minimum distribution is the sum of the net amounts and revenue received during the tax year, with deductions made for losses and expenditure. Under Article 16 C(3) of the ligningslov, that calculation includes a number of specific sources of revenue listed in that article, particularly interest, share dividends, gains on receivables and financial contracts as well as gains on disposals of shares. In accordance with Article 16 C(4) and (5) of the ligningslov, Article 16 C funds may deduct allowable losses and administrative expenses.

10. In the light of that legislation, Fidelity Funds and NN (L) SICAV argue that they are unable, by their very nature, to satisfy the first condition relating to tax residence in Denmark in order to qualify for the exemption from tax at source. That condition amounts to a difference in the tax treatment of UCITS according to their State of residence and is contrary, in the view of those parties to the main proceedings, to Article 56 EC. They claim that it cannot be justified by overriding reasons in the public interest. As regards the second condition concerning the calculation of a minimum distribution, Fidelity Funds and NN (L) SICAV state that they have no incentive to satisfy it because, on account of the first condition, they are in any event ineligible for the scheme open to Article 16 C funds. They claim that the second condition is contrary to the freedom to provide services, guaranteed by Article 49 EC, since UCITS are established not under the legislation of each of the Member States where their members may reside, but under the legislation of their Member State of residence. If such a requirement were to be imposed on all non-resident UCITS, the harmonisation carried out by Directive 85/611 as well as the freedom to provide services would be rendered meaningless.

11. Taking the view that the outcome of the dispute in the main proceedings depended on the interpretation of Articles 49 and 56 EC, the national court decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'Is a tax regime, such as that in the main proceedings, under which non-Danish undertakings for collective investment covered by Council Directive [85/611] are taxed at source on dividends from Danish companies, contrary to Article 56 EC (Article 63 TFEU) on free movement of capital or Article 49 EC (Article 56 TFEU) on freedom to provide services, where equivalent Danish undertakings for collective investment can obtain an exemption for tax at source, either because they in fact make a minimum distribution to their members in return for retention of tax at source, or technically a minimum distribution is calculated, on which tax at source is retained in relation to the undertakings' members?'

12. The question was the subject of written observations from Fidelity Funds, NN (L) SICAV, the Danish, German and Netherlands Governments, and the European Commission. Those parties also presented oral argument at the hearing on 5 October 2017.

Assessment

13. It should be noted at the outset that, contrary to the impression given by the arguments submitted, in particular, by Fidelity Funds before the referring the court, the latter does not question the Court on the interpretation of Directive 85/611.

14. As the Court held in the judgment of 26 May 2016, *NN (L) International* (C-48/15, EU:C:2016:356, paragraph 32), the taxation of UCITS does not fall within the area governed by that directive, which does not contain any provision relating to that area. It is true that, in its judgment, the Court recalled that Article 44(3) of Directive 85/611 required that the laws, regulations and administrative provisions applicable in a Member State to UCITS which did not fall within the field governed by that directive had to be applied in a non-discriminatory way, as a result of which Directive 85/611 does not preclude an annual tax being levied on UCITS that market their units in a Member State, provided

that it is applied in a non-discriminatory way.[3] However, the Court, quite logically, conducted its examination into whether the levying of such a tax on the UCITS at issue in that case was discriminatory and an impediment in the light of the freedoms of movement guaranteed by the EC Treaty.[4] That is why it is perfectly understandable — when dealing, as we are here, with whether legislation that provides for differential tax treatment of UCITS on the basis of a criterion generally accepted in international tax law and recognised by the Court, namely the criterion of the place of residence for tax purposes of the undertakings concerned[5] — that the referring court should confine itself to enquiring about the compatibility of such legislation with the free movement of capital and the freedom to provide services.

15. That clarification having been made, my analysis of the differential tax treatment arising under Danish legislation will cover four aspects, only the last two of which will require considerable argument. Although there is no doubt that it is the free movement of capital which is relevant in this case (A) and that the Danish rules constitute a restriction on that freedom (B), the question whether the situation of UCITS resident in Denmark is comparable to that of UCITS not resident in Denmark (C) and the grounds of justification for that restriction (D) are thornier issues, as illustrated in the oral proceedings before the Court.

A. Application of the free movement of capital

16. As the wording of the question referred for a preliminary ruling suggests, the national court is uncertain as to the choice of freedom in the light of which the legislation at issue in the main proceedings should be assessed. Specifically, the national court enquires whether Danish legislation is contrary to Article 56 EC (now Article 63 TFEU) on the free movement of capital, or Article 49 EC (now Article 56 TFEU) on the freedom to provide services.

17. In accordance with the case-law, in order to determine whether national legislation falls within the scope of one or other of the fundamental freedoms guaranteed by the EC Treaty, the purpose of the legislation concerned must be taken into consideration.[6]

18. In that connection, the Danish rules concern not only the conditions governing the access of non-resident UCITS to the market of a Member State, in this instance, the Kingdom of Denmark, but also the tax treatment of the income received by such undertakings, which thus directly affects the investments they make in Denmark. That finding alone may be sufficient, in my view, to rule out the applicability of the freedom to provide services.

19. In addition, unlike the situation giving rise to the judgment of 3 October 2006, *Fidium Finanz* (C-452/04, EU:C:2006:631, paragraphs 2 and 45 to 47), 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, the exclusion from the entitlement to the tax exemption, provided for in the Danish legislation at issue in the main proceedings, to the detriment of non-resident UCITS which receive dividends paid by Danish companies, does not prevent those economic operators from having access to the Danish market.

3 Judgment of 26 May 2016, *NN (L) International* (C-48/15, EU:C:2016:356, paragraphs 32 and 33).

4 Judgment of 26 May 2016, *NN (L) International* (C-48/15, EU:C:2016:356, paragraph 33).

5 For the record, as far as direct taxes are concerned, the respective situations of residents and non-residents are not, as a general rule, comparable: see, in particular, judgments of 14 February 1995, *Schumacker* (C-279/93, EU:C:1995:31, paragraph 31); of 22 December 2008, *Truck Center* (C-282/07, EU:C:2008:762, paragraph 38); and of 24 February 2015, *Grünewald* (C-559/13, EU:C:2015:109, paragraph 25). In consequence, a difference in the treatment of resident and non-resident taxpayers cannot in itself be categorised as discrimination within the meaning of the Treaty (see, in particular, judgment of 22 December 2008, *Truck Center* (C-282/07, EU:C:2008:762, paragraph 39 and the case-law cited)).

6 See, in particular, judgments of 1 July 2010, *Dijkman and Dijkman-Lavaleije* (C-233/09, EU:C:2010:397, paragraph 26), and of 21 May 2015, *Wagner-Raith* (C-560/13, EU:C:2015:347, paragraph 31).

20. It is true that the application of such legislation might make it more expensive for non-resident UCITS to provide financial services to Danish investors compared with Danish UCITS under the same conditions. [7]

21. Although the freedom to provide services is therefore liable to be affected by the tax to which non-resident UCITS are subject to the exclusion of resident UCITS, in so far as that difference may have effects on the financial services offered in Denmark by the former, that freedom is nevertheless secondary in relation to the free movement of capital and may, in any event, be considered together with it. [8]

22. For whatever purpose it may serve, I would add that it is apparent from the documents in the case and the observations of the interested parties that the holdings of Fidelity Funds and NN (L) SICAV in Danish companies were acquired solely with the intention of making a financial investment and without any intention of influencing the management and control of the business, so that only the free movement of capital, to the exclusion of the freedom of establishment, is relevant. [9]

23. Consequently, as the Netherlands Government and the Commission rightly argued, I consider that the legislation at issue in the main proceedings must be examined in the light of the free movement of capital, as guaranteed by Article 56 EC.

B. Whether there is a 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. [10]

25. In the present case, in accordance with the Danish legislation that applied at the time of the facts in the main proceedings, as it transpires from the decision to refer, dividends distributed by a resident company to a non-resident UCITS were generally taxed at a rate of 25% in 2000, rising to 28% between 2001 and 2009, by means of a tax at source, unless a different rate was applied pursuant to a double taxation convention, whereas such dividends were exempt from tax when paid to a resident UCITS, in so far as that undertaking also complied with the requirements to hold Article 16 C fund status, that is to say, until 31 May 2005, it in fact made a minimum distribution to its members or, as from 1 June 2005, it technically calculated such a minimum distribution. [11]

7 For the record, national measures which prohibit, impede or render less attractive the exercise of the freedom to provide services are restrictions on that freedom: see, in particular, judgment of 18 October 2012, *X* (C-498/10, EU:C:2012:635, paragraph 22 and the case-law cited).

8 See, to that effect, judgment of 26 May 2016, *NN (L) International* (C-48/15, EU:C:2016:356, paragraph 41).

9 According to that information, during the period at issue in the main proceedings, those holdings never exceeded 10% of the share capital of the Danish companies. On the test for distinguishing between the free movement of capital and the freedom of establishment, see, in particular, judgment of 14 September 2017, *The Trustees of the BT Pension Scheme* (C-628/15, EU:C:2017:687, paragraph 30 and the case-law cited).

10 See, in particular, judgments of 10 February 2011, *Haribo Lakritzen Hans Riegel and Österreichische Salinen* (C-436/08 and C-437/08, EU:C:2011:61 paragraph 50); of 10 May 2012, *Santander Asset Management SGIIC and Others* (C-338/11 to C-347/11, EU:C:2012:286, paragraph 15); and of 26 May 2016, *NN (L) International* (C-48/15, EU:C:2016:356, paragraph 44).

11 It should be noted that, in its criticism of the referring court's assessment, NN (L) SICAV claims that under the Danish legislation that applied at the time of the facts in the main proceedings, all Danish UCITS were entitled to the exemption from tax at source on dividends, not only Danish 'distribution' UCITS, namely Article 16 C funds. However, it is common ground that, in the context of the application of Article 267 TFEU, since the referring court alone is responsible for the identification and interpretation of the applicable national law, it is not for the Court to call in question the premiss on which the referring court has relied: see, to that effect, judgment of 14 June 2017, *Online Games and Others* (C-685/15, EU:C:2017:452, paragraph 45 and the case-law cited).

26. Therefore, only UCITS resident in Denmark which held Article 16 C fund status were exempt from tax. Non-resident UCITS were automatically excluded from that exemption, including where, as appears to be the case in the main proceedings, they enjoyed a reduction in the rate of tax on dividends in accordance with a double taxation convention, or where, as does not appear to be the case in the main proceedings, they in fact distributed a minimum amount to their members or technically calculated such an amount.

27. That difference in the tax treatment of dividends according to, in particular, the UCITS' place of residence may discourage, on the one hand, non-resident UCITS from investing in companies established in Denmark and, on the other, investors resident in that Member State from acquiring shares in non-resident UCITS. [12]

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

29. The restriction on the free movement of capital described above may, however, be acceptable under EU law if, in accordance with Article 58(1) EC, the difference in treatment on which it is based concerns situations which are not objectively comparable or is justified by an overriding reason in the public interest. [13]

30. As stated earlier in this Opinion, it is necessary to examine in more detail both the comparability of the situations at issue in the main proceedings and the justification for the restriction on capital movements entailed by Danish legislation.

C. Comparability of the situations at issue in the main proceedings

31. It should be noted that the comparability of a cross-border situation with an internal one must be examined having regard to the aim pursued by the national provisions at issue as well as their purpose and content. [14]

32. So far as concerns the aims pursued by the Danish legislation at issue, it is apparent from the explanations provided by the national court and the observations of the Danish Government that these are (i) to prevent a series of double taxation charges when an investment is made through a UCITS, and (ii) to ensure that dividends distributed by Danish companies do not elude Denmark's power to impose taxes on account of the exemption they enjoy at the level of resident UCITS and are actually taxed once, namely as regards those undertakings' members.

33. As regards, in the first place, the aim of preventing of a series of charges to tax, it is true that the Court has held that, in the context of measures laid down by a Member State in order to prevent or mitigate the imposition of a series of charges to tax on, or economic double taxation of, income distributed by a resident company, resident companies, taxpayers or shareholders receiving dividends are not necessarily in a comparable situation to that of companies, taxpayers or shareholders receiving dividends which are resident in another Member State. [15]

12 See, to that effect, judgments of 10 May 2012, *Santander Asset Management SGIIC and Others* (C-338/11 to C-347/11, EU:C:2012:286, paragraph 17), and of 10 April 2014, *Emerging Markets Series of DFA Investment Trust Company* (C-190/12, EU:C:2014:249, paragraph 42).

13 See, in particular, judgment of 10 April 2014, *Emerging Markets Series of DFA Investment Trust Company* (C-190/12, EU:C:2014:249, paragraph 57 and the case-law cited).

14 See judgment of 2 June 2016, *Pensioenfonds Metaal en Techniek* (C-252/14, EU:C:2016:402, paragraph 48 and the case-law cited).

15 See, in particular, judgments of 18 June 2009, *Aberdeen Property Fininvest Alpha* (C-303/07, EU:C:2009:377, paragraph 42); of 20 October 2011, *Commission* v *Germany* (C-284/09, EU:C:2011:670, paragraph 55); and of 25 October 2012, *Commission* v *Belgium* (C-387/11, EU:C:2012:670, paragraph 48).

34. However, as soon as a Member State, either unilaterally or by way of a convention, imposes a charge to tax the income, not only of resident companies, taxpayers or shareholders, but also of non-resident companies, taxpayers or shareholders, from dividends which they receive from a resident company, the situation of those non-residents becomes comparable to that of residents. [16]

35. It is solely because of the exercise by that State of its tax jurisdiction that, irrespective of any taxation in another Member State, a risk of a series of charges to tax or economic double taxation may arise. In such a case, in order for non-residents receiving dividends not to be subject to a restriction on the free movement of capital prohibited in principle by Article 56 TFEU, the State in which the company paying the dividend 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, non-resident companies, taxpayers or shareholders are subject to the same treatment as resident companies, taxpayers or shareholders. [17]

36. In the main proceedings, since the Kingdom of Denmark chose to exercise its tax jurisdiction over dividends paid to non-resident UCITS by Danish companies, those UCITS are thus in a situation comparable to that of resident UCITS as regards the risk of a series of charges to tax on dividends distributed by Danish companies.

37. In the second place, as regards the aim of making the exemption enjoyed by resident UCITS conditional on taxation being deferred to the level of those undertakings' members, the question may arise as to whether, when examining the comparability of the situations, the tax situation of the members should be taken into consideration.

38. It must be recalled that, according to settled case-law, only the distinguishing criteria established by the national tax legislation at issue in the main proceedings are to be taken into account when examining a difference in treatment relating to the taxation of dividends. [18]

39. As mentioned above, in the main proceedings, the exemption from tax at source enjoyed by UCITS is subject to two conditions. First, the UCITS must be resident in Denmark. Secondly, until 31 May 2005, those undertakings were required to make a minimum distribution so as to levy on that distribution a tax at source chargeable to their members. As from 1 June 2005, that requirement became a simple technical calculation of the minimum distribution on which the members continued to be taxed by means of a tax at source levied by the UCITS.

40. This twofold feature appears to distinguish Danish legislation from the French legislation at issue in the judgment of 10 May 2012, *Santander Asset Management SGIIC and Others* (C-338/11 to C-347/11, EU:C:2012:286). In its examination in that judgment of the objective comparability of UCITS resident in France and those not resident in France, the Court excluded consideration of the tax situation of UCITS' members since the French rules were based on a single distinguishing criterion, namely the place of residence of those undertakings.

41. In view of the difference between the relevant French and Danish tax provisions set out above, and although the interested parties debated, among other matters, the conclusions that should be drawn from the judgment of 10 May 2012, *Santander Asset Management SGIIC and Others* (C-338/11 to C-347/11, EU:C:2012:286) for this case, it is rather odd that none of the three governments that

16 See, to that effect, among others, judgments of 18 June 2009, *Aberdeen Property Fininvest Alpha* (C-303/07, EU:C:2009:377, paragraph 43); of 20 October 2011, *Commission* v *Germany* (C-284/09, EU:C:2011:670, paragraph 56); of 25 October 2012, *Commission* v *Belgium* (C-387/11, EU:C:2012:670, paragraph 49); and of 17 September 2015, *Miljoen and Others* (C-10/14, C-14/14 and C-17/14, EU:C:2015:608, paragraph 67).

17 See, to that effect, judgments of 20 October 2011, *Commission* v *Germany* (C-284/09, EU:C:2011:670, paragraph 57); of 25 October 2012, *Commission* v *Belgium* (C-387/11, EU:C:2012:670, paragraph 50); and of 17 September 2015, *Miljoen and Others* (C-10/14, C-14/14 and C-17/14, EU:C:2015:608, paragraph 68).

18 See judgments of 10 May 2012, *Santander Asset Management SGIIC and Others* (C-338/11 to C-347/11, EU:C:2012:286, paragraph 28), and of 10 April 2014, *Emerging Markets Series of DFA Investment Trust Company* (C-190/12, EU:C:2014:249, paragraph 61).

lodged written observations supported the proposition that the examination of the comparability of the situations should include the tax situation of the members. Whereas, with reference to that judgment, the Danish Government simply justified its legislation in terms of the need to safeguard the coherence of the tax system as well as, more briefly, the balanced allocation of powers of taxation,[19] the German and Netherlands Governments centred their respective comments concerning the objective comparability of the situations only on the investment vehicles used as UCITS.

42. While subscribing to the view that the only subject of comparison should be the situation of UCITS, to the exclusion of the tax situation of their members, it was ultimately Fidelity Funds and NN (L) SICAV as well as, to a lesser degree, the Commission, which put forward the most detailed arguments on the level at which the examination of the compatibility of the situations should be conducted. Specifically, according to NN (L) SICAV, Danish legislation laid down a distinguishing criterion based solely on the place of residence of the UCITS in receipt of dividends and the tax exemption enjoyed by resident UCITS is not conditional on their members being taxed on the income distributed. Danish legislation does not establish any link between the tax treatment of domestic dividends, received from ordinary (or capitalisation) UCITS, and the tax situation of their members. Nor does Danish legislation take account of the tax situation of the members of Article 16 C funds, which redistribute part of the dividends received. The tax at source levied on dividends paid to a non-resident UCITS is therefore not reduced if that undertaking has members resident in Denmark whose tax situation is comparable to that of members of UCITS resident in Denmark. Moreover, the Commission argues that resident and non-resident UCITS are in a comparable situation even if the taxation of the members is taken into account in the comparison. Lastly, Fidelity Funds states that since they are covered by Directive 85/611, non-resident UCITS must be compared to UCITS resident in Denmark.

43. In my view, and for the reasons set out below in the following passages from the present opinion, I am inclined to consider that, regardless of the perspective from which the examination of the comparability of the situations is to be conducted, the situations at issue in the main proceedings are objectively comparable, so that it will be necessary, in short, to analyse whether the Danish rules may be justified, particularly in terms of the need to safeguard the coherence of the tax system.

44. First of all, I disagree with the argument put forward by Fidelity Funds to the effect that UCITS status governed by Directive 85/611 is sufficient for a finding that non-resident UCITS are objectively comparable to Danish UCITS, in the light of Danish tax legislation. In addition to the fact that, as I have already mentioned, the taxation of UCITS does not fall within the scope of Directive 85/611,[20] from the perspective of the free movement of capital, the comparability examination covers not only the legal status of the operators concerned but also their situation from the point of view of the tax legislation at issue.[21] When analysing the comparability of the situations of economic operators, the Court has indeed previously dismissed the relevance of UCITS status where that status is not covered by the distinguishing criterion or criteria on which the applicable tax legislation is based.[22]

45. Next, in order to determine the level at which the situations should be compared, namely either only at the level of the UCITS or also at the level of the members, the interested parties exchanged arguments, at the request of the Court, on whether the two criteria on which the national rules are based were self-standing or inextricably linked.

19 On those grounds of justification, see points 61 to 81 of this Opinion.

20 See point 14 of this Opinion.

21 See, by analogy, as regards the comparability of the situation of a resident share company governed by Finnish law and a SICAV governed by Luxembourg law (a legal form not permitted under Finnish law), which both received dividends from sources in Finland, judgment of 18 June 2009, *Aberdeen Property Fininvest Alpha* (C-303/07, EU:C:2009:377, paragraphs 50 to 56).

22 See, to that effect, judgment of 10 April 2014, *Emerging Markets Series of DFA Investment Trust Company* (C-190/12, EU:C:2014:249, paragraph 68).

46. A clear answer to that question to the effect that the criterion relating to the residence of the UCITS is independent of, or severable from, the criterion relating to the requirement for an (actual or technical) minimum distribution might strongly suggest that, in the end, the Danish rules are not so different from the French rules at issue in the case giving rise to the judgment of 10 May 2012, *Santander Asset Management SGIIC and Others* (C-338/11 to C-347/11, EU:C:2012:286) or to the Polish rules at issue in the case giving rise to the judgment of 10 April 2014, *Emerging Markets Series of DFA Investment Trust Company* (C-190/12, EU:C:2014:249). In other words, in so far as those two sets of rules are based, either exclusively or predominantly, on the place of residence of the UCITS concerned, the Court has found that the situations must be compared only at the level of those undertakings. [23]

47. In the present case, irrespective of the criticism levelled by NN (L) SICAV concerning the referring court's allegedly incorrect interpretation of the Danish rules — criticism which cannot be considered by the Court in the context of the system of judicial cooperation established by Article 267 TFEU [24] — I think that there is evidence in favour of the proposition that the criterion of the UCITS's residence is not only severable from the criterion of (actual or technical) minimum distribution but also takes precedence over it. It should be noted that the two criteria set out in Article 38 of the ministerial order also appear in two separate sets of national rules. [25] Moreover, the Danish Government accepted in its written observations that the second criterion could, where appropriate, be applied independently of the criterion of the UCITS's residence. As Fidelity Funds and NN (L) SICAV pointed out and as the Danish Government conceded, while some non-resident UCITS are quite likely to satisfy (and indeed satisfy in practice) the second criterion, only Danish UCITS are able to fulfil the condition of residence in Denmark.

48. In those circumstances, the situations should be compared solely in the light of the predominant and prevailing criterion set out in Danish regulation, that is, the place of residence of the UCITS. In that case, it would be necessary to hold — as in the judgments of 10 May 2012, *Santander Asset Management SGIIC and Others* (C-338/11 to C-347/11, EU:C:2012:286), and of 10 April 2014, *Emerging Markets Series of DFA Investment Trust Company* (C-190/12, EU:C:2014:249, paragraphs 63 to 69) — that only the situation of UCITS, depending on whether or not they are resident in Denmark, should be compared and that, in the result, those investment vehicles are in objectively comparable situations as regards the tax treatment of the dividends they receive from Danish companies.

49. The fact remains that the logic underpinning the Danish rules is that the exemption from tax at source is granted to resident UCITS only if it is accompanied by an (actual or technical) minimum distribution to their members, on which those undertakings levy a tax by means of a tax at source. The Kingdom of Denmark grants the exemption from tax at source to Danish UCITS only if it is clear that it is able to exercise its tax jurisdiction over the dividends redistributed by such UCITS to their members.

23 See judgments of 10 May 2012, *Santander Asset Management SGIIC and Others* (C-338/11 to C-347/11, EU:C:2012:286, paragraphs 32, 39 and 41), and of 10 April 2014, *Emerging Markets Series of DFA Investment Trust Company* (C-190/12, EU:C:2014:249, paragraph 62, 63 and 68).

24 See, on that point, footnote 11 of this Opinion. I will not, therefore, refer any further in this Opinion to the criticisms which appear on numerous occasions in the observations of NN (L) SICAV and which were restated at the hearing.

25 Namely, the Law on corporation tax and the ligningslov, see point 6 of this Opinion.

50. Therefore, in contrast to the situation at issue in the judgments of 10 May 2012, *Santander Asset Management SGIIC and Others* (C-338/11 to C-347/11, EU:C:2012:286), and of 10 April 2014, *Emerging Markets Series of DFA Investment Trust Company* (C-190/12, EU:C:2014:249), there is a link, established by Danish legislation, between the grant of the exemption to resident UCITS and the tax situation of their members, as the Commission admitted in its written observations. I therefore take the view that the situation of the members could also be taken into account when examining the comparability of the situations.

51. However, the taking into account of the situation of UCITS' members does not mean, in my opinion, that the situations, examined as a whole, are not objectively comparable so that the differential treatment arising under Danish legislation is acceptable. Indeed, Danish legislation does not consider the overall situation of UCITS' members so that the differences in treatment resulting from that lacuna cannot be justified on the basis of an objective difference in situation. [26]

52. I consider that the examination of the tax situation of the members may be conducted from three different angles. First, it is possible to compare the tax situation of *resident* members, depending on whether they make investments in a resident UCITS or a non-resident UCITS. Secondly, the comparison could cover the tax situation of *resident* members of a resident UCITS and that of *non-resident* members of a non-resident UCITS. Thirdly, it is also possible to examine the comparability of the situations of *non-resident* members, depending on whether they make investments in a non-resident or resident UCITS. [27]

53. As regards the first scenario, I do not see any objective difference between Danish members depending on whether they invest in a resident or non-resident UCITS. Both kinds of members fall within the scope of the Kingdom of Denmark's tax jurisdiction and should, as a rule, be treated in a non-discriminatory way. However, while Danish members that make investments in non-resident UCITS — which are subject to tax at source even though they may be treated as 'Article 16 C funds' — will still have to bear a series of charges to tax, as the Danish Government conceded, Danish members investing in resident UCITS — which are treated as 'Article 16 C funds' and are exempted from tax at source — will be able to deduct the withholding of income tax or corporation tax which they are in fact liable to pay.

54. The second scenario, namely the comparison between the tax situation of resident members of a resident UCITS and the situation of non-resident members of a non-resident UCITS, does not seem to me to lead to a different outcome. From the standpoint of Danish legislation, both kinds of members are in an objectively comparable situation when they invest in UCITS which do not redistribute dividends received from Danish companies.

55. As regards non-resident members of non-resident distribution UCITS and resident members of Article 16 C funds resident in Denmark, I note that, in its judgment of 17 September 2015, *Miljoen and Others* (C-10/14, C-14/14 and C-17/14, EU:C:2015:608, paragraph 74), the Court ruled, in relation to the examination of the objective comparability of the tax treatment of resident and non-resident taxpayers by the Member State in which the dividends are paid to them, that 'where a tax on dividends is withheld at source by a Member State on dividends paid by companies established in that Member State, the comparison between the tax treatment of a non-resident taxpayer and that of a resident taxpayer must be made in the light of, on the one hand, the tax on dividends payable by

26 In its judgment of 10 May 2012, *Santander Asset Management SGIIC and Others* (C-338/11 to C-347/11, EU:C:2012:286), the Court, in rejecting the French Government's argument that national legislation also took account of the tax situation of the members, did not confine itself to pointing out that that legislation simply differentiated between UCITS depending on whether or not they resided in France. Indeed, in paragraphs 31 to 38 of that judgment, the Court specifically examined, including for distribution UCITS, whether the tax situation of the members as a whole was genuinely and fully taken into account by that legislation, as the French government claimed.

27 By contrast, in the light of the aim of the national rules as regards UCITS and their members, I do not think there is any relevance in the comparison between the situation of a non-resident member of a non-resident UCITS receiving dividends from a Danish company and the situation of a non-resident investor receiving dividends directly from a Danish company.

the non-resident taxpayer and, on the other, the income tax or corporation tax payable by the resident taxpayer which includes in its taxable base the income from the shares from which the dividends arise'. According to the Court, in order to apply Article 58(1)(a) EC (now Article 65(1)(a) TFEU), it is not sufficient merely to take into account the tax on dividends, as such, and the analysis must incorporate all taxation relating to the income of natural persons or the profits of companies arising from the ownership of shares in companies established in a Member State. [28]

56. When applied to the present case, that criterion for comparing the actual tax burden borne by resident and non-resident taxpayers in the Member State where the dividends are paid means that it is wrong simply to point out that non-resident members of a non-resident UCITS, which may be treated as an 'Article 16 C fund', indirectly bear the tax at source levied on that undertaking, while the members of a Danish Article 16 C fund directly bear the tax withheld by that fund, with the result that those members are not in an objectively comparable situation. Viewed as a whole, the tax borne by non-resident members will be definitive, whereas resident members will always be able to deduct the withholding of income tax or corporation tax they are liable to pay in Denmark.

57. It is true that non-resident members fall within the scope of the tax jurisdiction of another Member State as regards the taxation of their income. However, it seems that, as a general rule, and in so far as the Member State of residence of the member applies the offsetting method in order to prevent double taxation, the tax on dividends levied at source may not be repaid or offset against income tax or corporation tax in that Member State at all, or at the very least not in full. [29] In any event, irrespective of any double taxation convention, a Member State cannot rely on the existence of an advantage granted unilaterally by another Member State in order to escape its obligations under the Treaty. [30]

58. Lastly, as regards the comparison of non-resident members investing in a non-resident UCITS, which may be treated as an 'Article 16 C fund', and in an Article 16 C fund resident in Denmark, whereas, as the Commission pointed out, the first situation will always be subject to the levying of tax at source on the non-resident UCITS — a tax which will thus be charged on the dividends distributed, without taking account of any expenses or possible losses — members investing in an Article 16 C fund established in Denmark will be subject to withholding tax for which the basis of assessment will be the minimum distribution from which, in accordance with Article 16 C(2), (4) and (5) of the ligningslov, the undertaking's losses and management expenses may also be deducted. The overall tax burden will therefore be less onerous for the latter than for the former and is, in my view, justified by an objective difference in situation of the non-resident members as a whole from the perspective of the Member State where the dividends are paid.

59. Since the Danish rules at issue in the main proceedings cannot, to my mind, be maintained on the ground that they apply to objectively different situations, they must — if they are to be upheld — be justified by an overriding reason in the public interest.

28 See judgment of 17 September 2015, *Miljoen and Others* (C-10/14, C-14/14 and C-17/14, EU:C:2015:608, paragraph 73). If the situation of the members were not taken into account, the reasoning set out in that judgment could, in my view, be extended to investment vehicles themselves, as the overall tax burden is consistently heavier for non-resident UCITS which may be treated as Article 16 C funds than for 'Article 16 C funds' resident in Denmark.

29 See, to that effect, Adema, R., *UCITS and Taxation*, Kluwer Law International, The Hague, 2009, pp. 39 and 40, and Hippert, G., 'The TFEU Eligibility of Non-EU Investment Funds Subjected to Discriminatory Dividend Withholding Taxes', *EC Tax Review*, 2016-2, p. 82 (the considerations set out therein also concern the situation within the European Union). In its judgment of 20 May 2008, *Orange European Smallcap Fund* (C-194/06, EU:C:2008:289, paragraphs 42 to 47 and 65), the Court also accepted that the Member State of residence of a UCITS could refuse to grant a concession in respect of tax at source levied on the distribution of dividends paid to that undertaking by companies resident in other Member States, in contrast to the situation of a UCITS receiving dividends from companies in that Member State or other Member States, with which the Member State of residence had concluded double taxation conventions, due to the fact that the difference in treatment was the result of the parallel exercise of the Member States' powers of taxation.

30 See, in particular, judgments of 8 November 2007, *Amurta* (C-379/05, EU:C:2007:655, paragraph 78), and of 17 September 2015, *Miljoen and Others* (C-10/14, C-14/14 and C-17/14, EU:C:2015:608, paragraph 77).

D. Whether the restriction is justified

60. According to the Danish and Netherlands Governments, the differential treatment arising under Danish legislation is justified both by the need to ensure a balanced allocation of taxation powers (1) and by the need to safeguard the coherence of the tax system (2). I should state at this juncture that, although the first ground is unconvincing, I am inclined to think that it might be possible to justify the Danish rules by the need to safeguard the coherence of the tax system, but that those rules are nonetheless disproportionate in the light of that objective.

1. Balanced allocation of powers of taxation

61. The Danish Government recalls that non-Danish members have a limited liability to tax (at source) on periodic minimum distributions paid by Article 16 C funds resident in Denmark, while the corresponding income paid to them by non-resident UCITS does not fall within the scope of Denmark's power of taxation, even if the funds thereby distributed come from investments made by those UCITS in Danish companies. According to the Danish Government, exempting non-resident UCITS from tax at source on dividends distributed by Danish companies would have the effect that non-Danish members would completely avoid paying Danish tax on dividends distributed by Danish companies simply because their investments in those companies are made through non-resident UCITS, which would undermine Denmark's right to exercise its tax jurisdiction in relation to activities carried out in its territory.

62. Those arguments are entirely unconvincing.

63. It is true that, according to settled case-law, the need to safeguard the balanced allocation between the Member States of the power to tax may be accepted where the system in question is designed to prevent conduct capable of jeopardising the right of a Member State to exercise its tax jurisdiction in relation to activities carried out in its territory. [31]

64. However, it is also apparent from settled case-law 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. [32]

65. In this case, since the Kingdom of Denmark chose [33] only to exempt from tax at source dividends paid to Article 16 C funds resident in Denmark, to the exclusion of non-resident UCITS, including, above all, those capable of satisfying or which satisfy the distribution conditions set out in Article 16 C of the ligningslov, the taxation of non-resident UCITS alone cannot be justified by the objective of not undermining the exercise of that Member State's tax jurisdiction.

66. Consequently, the justification relating to the balanced allocation between the Member States of the power to tax must, in my view, be rejected.

31 See, in particular, judgments of 10 May 2012, *Santander Asset Management SGIIC and Others* (C-338/11 to C-347/11, EU:C:2012:286, paragraph 47), and of 10 April 2014, *Emerging Markets Series of DFA Investment Trust Company* (C-190/12, EU:C:2014:249, paragraph 98).

32 See judgments of 10 May 2012, *Santander Asset Management SGIIC and Others* (C-338/11 to C-347/11, EU:C:2012:286, paragraph 48), and of 10 April 2014, *Emerging Markets Series of DFA Investment Trust Company* (C-190/12, EU:C:2014:249, paragraph 99).

33 So far as this point is relevant, I note that, in the main proceedings, the exemption of Article 16 C funds resident in Denmark is the result of a choice made by the Danish Minister for Taxation (see point 6 of this Opinion).

2. Need to safeguard the coherence of the tax system

67. The Danish, German and Netherlands Governments submit that there is a direct link, within the meaning of the case-law, between the tax advantage granted in the form of the exemption from tax at source and the offsetting of that advantage by immediately taxing members on the profits of the UCITS. That direct link is maintained even if the amounts distributed by the UCITS to its members are lower than the dividends exempted from tax at source. It is apparent from the judgments of 20 May 2008, *Orange European Smallcap Fund* (C-194/06, EU:C:2008:289), and of 27 November 2008, *Papillon* (C-418/07, EU:C:2008:659), that a direct link may exist even if the tax advantage under a scheme is not offset in full, that is to say even if the dividends eligible for an exemption from tax at source are redistributed in full. In addition, according to the German Government, that direct link is maintained even where two different taxpayers are concerned, as illustrated by the case-law of the Court.

68. Fidelity Funds, NN (L) SICAV and the Commission take the opposite view. In particular, the Commission argues that the basis of assessment to tax applied to the members of a resident UCITS is not equivalent to that applied by the tax at source on dividends paid to non-resident UCITS, and that the tax at source is not sufficient to offset the advantages enjoyed by the members of resident UCITS compared with the members of non-resident UCITS. The Commission also states that a person or company resident in Denmark which has a holding in a non-resident UCITS is taxed in Denmark on income deriving from the non-resident UCITS, irrespective of the fact that that undertaking is already subject, in Denmark, to tax at source on the dividends it receives from Danish companies. That economic double taxation does not occur in the case of a person or company resident in Denmark which has a holding in a resident UCITS with the status of distributing undertaking under Article 16 C of the ligningslov. The advantage enjoyed by those resident UCITS is not offset by any other elements under Danish legislation.

69. It should be recalled that it is now settled case-law that, 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 offsetting of that advantage by a particular tax levy, with the direct nature of that link falling to be examined in the light of the objective pursued by the rules in question.[34] Moreover, the grounds relating to safeguarding tax coherence requires an examination with regard to one and the same tax system.[35]

70. In its judgments of 18 June 2009, *Aberdeen Property Fininvest Alpha* (C-303/07, EU:C:2009:377, paragraph 73), of 10 May 2012, *Santander Asset Management SGIIC and Others* (C-338/11 to C-347/11, EU:C:2012:286, paragraph 52), and of 10 April 2014, *Emerging Markets Series of DFA Investment Trust Company* (C-190/12, EU:C:2014:249, paragraph 93), the Court rejected the existence of a direct link on the ground that the exemption from tax at source on the dividends at issue in those cases was not conditional on the dividends received by the companies, investment funds or UCITS concerned being redistributed by them and on their taxation in the hands of the shareholders and members of those companies and undertakings allowing the exemption from tax at source to be offset.

71. As I have already made clear in previous Opinions,[36] and as the three judgments cited above clearly illustrate, the Court no longer excludes that the condition relating to the existence of a direct link might be satisfied even where the advantage and the particular tax levy designed to offset that advantage does not concern one and the same taxpayer.

34 See, in particular, judgments of 10 May 2012, *Santander Asset Management SGIIC and Others* (C-338/11 to C-347/11, EU:C:2012:286, paragraph 51), and of 10 April 2014, *Emerging Markets Series of DFA Investment Trust Company* (C-190/12, EU:C:2014:249, paragraph 92).

35 See judgment of 10 April 2014, *Emerging Markets Series of DFA Investment Trust Company* (C-190/12, EU:C:2014:249, paragraph 94).

36 See my Opinions in *Columbus Container Services* (C-298/05, EU:C:2007:197, point 189) and in *Commission* v *Portugal* (C-493/09, EU:C:2011:344, point 38).

72. Unlike the national legislation at issue in the three judgments cited in point 70 of this Opinion, and as demonstrated earlier, the Danish rules make the exemption from resident UCITS conditional on an (actual or technical) minimum distribution to their members, which are liable to a withholding tax levied on their behalf by those undertakings. The advantage thereby granted to resident UCITS, in the form of an exemption from tax at source, is therefore offset by the taxation of the dividends, redistributed by those companies, in the hands of their members.

73. Without fundamentally calling in question the existence of such a direct link, the Commission submits, in essence, that the advantage granted to Article 16 C funds resident in Denmark is not offset totally or in its entirety by the tax liability of their members, so that the coherence of the tax system is undermined.

74. I note that the condition referred to by the Commission according to which the tax must wholly offset the advantage granted is not apparent from the case-law of the Court and the Commission does not rely on any authority to that effect.

75. In actual fact, and more generally, the case-law shows that the direct link that is required between the advantage granted and the particular tax levy is more legal in nature than the result of an arithmetic ratio of variable accuracy between those two elements. That approach is easy to understand because the direct nature of the link, as I have pointed out, must be examined having regard to the aim pursued by the national legislation. The examination therefore concerns the inner logic between the advantage and the tax levy rather than a calculation of the actual offsetting effect of that levy and, *a fortiori*, the extent of the offset.

76. It is true that the Court has on occasion held that the direct nature of the link entailed a 'strict correlation' between the deductible element, namely the advantage, and the taxable element.[37]

77. Nonetheless, it should be noted that that clarification was essentially provided in circumstances highlighting the fact that the tax coherence claimed in those cases was not established in relation to one and the same tax system but was shifted to another level, namely that of the reciprocity of the rules applicable between the States parties to double taxation conventions.[38] Furthermore, none of those judgments states that the 'strict correlation' entails a perfect match between the amount of the advantage granted and the amount of the tax levy to offset that advantage.

78. That being so, it is also necessary for the restriction, if it is to be accepted, to be appropriate and proportionate in the light of the aim pursued, being to safeguard the coherence of the tax system.

79. In that regard, I am prepared to admit, as the Danish Government points out, that the direct link between the tax advantage in the form of the exemption from tax at source and its offsetting by means of the immediate taxation of the profits distributed would vanish if that advantage were also granted to UCITS which do not make periodic distributions of their profits.

80. However, since the Kingdom of Denmark has conceded that non-resident UCITS may voluntarily satisfy the distribution conditions laid down in Danish legislation and, therefore, be lawfully treated as 'Article 16 C funds', I, like the Commission, do not see any reason why those undertakings could not enjoy the exemption from tax at source, provided that the tax authorities of that Member State ensure, with the full cooperation of those undertakings, that the latter pay a tax that is equivalent to

37 See judgments of 11 August 1995, *Wielockx* (C-80/94, EU:C:1995:271, paragraph 24); of 3 October 2002, *Danner* (C-136/00, EU:C:2002:558, paragraph 41); of 21 November 2002, *X and Y* (C-436/00, EU:C:2002:704, paragraph 53); of 28 February 2008, *Deutsche Shell* (C-293/06, EU:C:2008:129, paragraph 39); and of 22 January 2009, *STEKO Industriemontage* (C-377/07, EU:C:2009:29, paragraph 53).

38 See judgments of 11 August 1995, *Wielockx* (C-80/94, EU:C:1995:271, paragraph 24); of 3 October 2002, *Danner* (C-136/00, EU:C:2002:558, paragraph 41); and of 21 November 2002, *X and Y* (C-436/00, EU:C:2002:704, paragraph 53).

the tax which Danish Article 16 C funds are required to retain, as a withholding, on the minimum distribution calculated in accordance with that provision. Such a measure would, to my mind, be less restrictive than the current system and would not affect the conditions and internal coherence of the system.

81. In the main proceedings, in so far as it appears that Fidelity Funds did not attempt, even as a precautionary measure, to meet the minimum distribution requirements laid down in Article 16 C of the ligningslov in the tax years at issue in the main proceedings, it seems to me that, in spite of the affirmative answer that should be given to the question referred by the national court, its action cannot, in all likelihood, succeed.

Conclusion

82. In the light of all the foregoing considerations, I propose that the Court reply as follows to the question referred for a preliminary ruling by the Østre Landsret (Eastern Regional Court, Denmark):

Article 56 EC (now Article 63 TFEU) must be interpreted as precluding a Member State's tax regime, such as that at issue in the main proceedings, under which undertakings for collective investment in transferable securities in that Member State can obtain an exemption from tax at source on the dividends they receive from resident companies, either because they in fact make a minimum distribution to their members on which tax at source is retained, or because technically a minimum distribution is calculated on the basis of which tax at source is retained in the hands of their members, while non-resident undertakings for collective investment in transferable securities of the same kind are taxed at source on the dividends distributed by resident companies.