



Reports of Cases

OPINION OF ADVOCATE GENERAL
SAUGMANDSGAARD ØE
delivered on 19 December 2018¹

Case C-598/17

A-Fonds

v

Inspecteur van de Belastingdienst

(Request for a preliminary ruling from the Gerechtshof 's-Hertogenbosch (Regional Court of Appeal, 's-Hertogenbosch, Netherlands))

(Reference for a preliminary ruling — Existing aid and new aid — Concept of ‘new aid’ — Unlawful aid — Refund of dividend tax — System extended to companies established outside the territory of the Member State concerned — Free movement of capital — Role of national courts — Possibility for national courts to assess the detailed rules of a system of aid in light of provisions of the FEU Treaty other than Articles 107 and 108 — Exclusive competence of the Commission)

I. Introduction

1. The present request for a preliminary ruling from the Gerechtshof 's-Hertogenbosch (Regional Court of Appeal, 's-Hertogenbosch, Netherlands) relates to the interpretation of Articles 107 and 108 TFEU.²
2. The present reference for a preliminary ruling is made in the context of a dispute between A-Fonds, an investment undertaking governed by German law, and the Inspecteur van de Belastingdienst (Tax Inspector, Netherlands) (‘the tax authorities’). A-Fonds is seeking a refund of the Netherlands dividend tax withheld in respect of the financial years 2002/2003 to 2007/2008, relying upon the right to the free movement of capital provided for in Article 63 TFEU.
3. The tax authorities refused to give that refund on the grounds that A-Fonds is not established in the Netherlands. The referring court considers that that refusal constitutes an infringement of Article 63 TFEU and that, in order to remedy that infringement, the request submitted by A-Fonds for a refund of dividend tax must be granted.
4. The referring court questions, however, whether such a decision is compliant with State aid law. Taking the view that the Netherlands tax measure that provides for the refund of dividend tax constitutes an existing system of State aid, it seeks to ascertain, in essence, whether the rules on State aid preclude it from granting the request for a refund of dividend tax submitted by A-Fonds on the basis of Article 63 TFEU, since the effect of that decision would be to widen the group of persons entitled to benefit from the system of aid in question.

¹ Original language: French.

² In the interests of clarity, I refer in this Opinion to the provisions of the FEU Treaty, whereas the Treaty in force during the period at issue, from 2002 to 2008, was the EC Treaty.

5. In this Opinion, I will explain, by way of my principal view, the reasons why I believe that the referring court does not have jurisdiction to review the compatibility of the residence requirement of the Netherlands tax measure at issue in the main proceedings with Article 63 TFEU, in view of the European Commission's exclusive competence to assess the compatibility of aid measures with the EU market resulting from Articles 107 and 108 TFEU, as interpreted by the Court in the *Iannelli*³ and *Nygård*⁴ judgments.

6. In the alternative, if the Court were not to agree with me on that point, that would imply, in my opinion, that the referring court, on finding that the residence requirement was not compatible with Article 63 TFEU, should not apply that requirement and should grant the request for a refund of dividend tax submitted by the applicant in the main proceedings. At the end of my analysis, I will find that such a decision does not in itself constitute a State aid measure and does not give rise to any obligation for national courts to notify it to the Commission.

II. Legal framework

A. EU law

7. Article 1(b)(i) of Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty,⁵ provides that 'existing aid' is constituted by 'all aid which existed prior to the entry into force of the Treaty in the respective Member States, that is to say, aid schemes and individual aid which were put into effect before, and are still applicable after, the entry into force of the Treaty'.

8. Article 1(c) of that regulation provides that 'new aid' is constituted by 'all aid, that is to say, aid schemes and individual aid, which is not existing aid, including alterations to existing aid'.

B. Netherlands law

(a) *La Wet op de vennootschapsbelasting (Law on Corporation Tax) of 8 October 1969*

9. Article 2(1)(f) and (g) of the Law on Corporation Tax⁶ provides:

'1. The following entities established in the Netherlands are subject to tax as domestic taxable persons:

...

(f) special investment funds;

(g) the businesses, referred to in paragraph 3, of legal persons governed by public law.'

10. Article 2(3) of the Law on Corporation Tax sets out a list of businesses operating in certain economic sectors.

³ Judgment of 22 March 1977, *Iannelli & Volpi* (74/76, EU:C:1977:51) ('the *Iannelli* judgment').

⁴ Judgment of 23 April 2002, *Nygård* (C-234/99, EU:C:2002:244).

⁵ Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ 1999 L 83, p. 1).

⁶ This is the only version of the Law on Corporation Tax cited by the referring court, which did not specify the content of the amendments that may have been made to the legislation in the period at issue, from 2002 to 2008.

11. Article 2(7) of that law provides:

‘bodies of which only legal persons governed by Netherlands public law are directly or indirectly shareholders, associates or members, and bodies whose directors are exclusively appointed and removed directly or indirectly by legal persons governed by Netherlands public law and whose assets revert exclusively to legal persons governed by Netherlands public law in the event of liquidation, are subject to tax only to the extent that they carry on a business within the meaning of paragraph 3.’

(b) *La Wet op de dividendbelasting (Law on the Taxation of Dividends) of 23 December 1965*

12. Article 1(1) of the Law on the Taxation of Dividends provides:

‘Under the name “dividend tax” a direct tax shall be levied on persons who, directly or by means of certificates, are entitled to income from shares ...’

13. The version of Article 10(1) of the Law on the Taxation of Dividends in force as at 1 January 2002 provides:⁷

‘By decision of the [tax] inspector, which may be challenged by means of a complaint, a legal person established in the Netherlands and not subject to corporation tax shall, upon request by that person, be granted a refund of dividend tax withheld in respect of that person in the course of a calendar year, where that tax amounts to more than EUR 23. The first sentence shall not apply to dividend tax levied on returns of which the company is not the beneficial owner. The request shall be made by means of a declaration lodged within a time limit to be set by ministerial regulation.’

14. On 1 January 2007, a new Article 10(4) of the Law on the Taxation of Dividends came into force:

‘The first paragraph shall apply by analogy to a legal person established in another Member State of the European Union which is not subject, in that Member State, to a tax on profits and which, if it had been established in the Netherlands, would not have been subject to the levying of corporation tax there either.’

III. The dispute in the main proceedings, the questions referred for a preliminary ruling and the procedure before the Court

15. A-Fonds is an investment fund governed by German law with no legal personality (*Spezial-Sondervermögen*), all the shares in which have been held, since the outset, by a body governed by public law (*Anstalt des öffentlichen Rechts*) that has a legal personality and is made up of a group of German municipalities. The latter conducts banking business, but its aim is not solely to make profits. It also has a public role, namely to use its revenue to support social, cultural, sporting, scientific and educational activities in particular.

16. During the financial years 2002/2003 to 2007/2008, A-Fonds held shares in Netherlands companies. During that period, tax was withheld on the dividends distributed by those companies to A-Fonds and A-Fonds requested a refund of that tax from the Netherlands tax authorities under Article 10(1) of the Law on the Taxation of Dividends. That request was refused on the grounds that A-Fonds was not established in the Netherlands, as the abovementioned article requires.

⁷ Article 10(1) of the Law on the Taxation of Dividends was amended on several occasions during the period relevant to the facts of the main proceedings. Those amendments are not relevant to the dispute in the main proceedings.

17. With regard to the purpose of Article 10(1) of that law, the referring court, by reference to a judgment of the Hoge Raad (Supreme Court, Netherlands),⁸ explains that the non-imposition of corporation tax is extended to the withholding tax constituted, in the Netherlands tax system, by dividend tax, and that that purpose is limited to certain legal persons, including legal persons governed by public law which are not subject to corporation tax.

18. A-Fonds applied to the Rechtbank Zeeland-West-Brabant te Breda (District Court of Zeeland-West-Brabant te Breda, Netherlands) for annulment of those decisions, arguing, in particular, that the restriction of the right to a refund of Netherlands dividend tax to the public bodies established in the Netherlands referred to in Article 10(1) of the Law on the Taxation of Dividends is contrary to Article 63 TFEU. That court rejected the applications by judgment delivered on 6 May 2014.

19. A-Fonds brought an appeal against that judgment before the Gerechtshof 's-Hertogenbosch (Regional Court of Appeal, 's-Hertogenbosch).

20. Taking the view that the applicant in the main proceedings is in a situation that is objectively comparable to that of public bodies established in the Netherlands and not subject to Netherlands corporation tax, the referring court is of the opinion that the refusal to grant it a refund of dividend tax, on the grounds that it is not established in the Netherlands, constitutes an infringement of Article 63 TFEU and that the request for a refund must be granted in order to remedy that infringement.

21. However, that court questions whether such a decision is compliant with State aid law.

22. It is apparent from the order for reference that that court takes the view that the rules on the right to a refund of dividend tax provided for by Article 10(1) of the Law on the Taxation of Dividends constitute an existing system of State aid, relying on a Commission decision of 2 May 2013.⁹

23. In that decision, the Commission found that the exemption from corporation tax of certain public bodies provided for by Article 2(7) of the Law on Corporation Tax constituted an existing system of aid that was incompatible with the EU market in that that system related only to *public* bodies carrying out economic activities that were, consequently, in a situation comparable to that of *private* undertakings.¹⁰

24. Taking the view that the refund of dividend tax, which is a prepayment of corporation tax, constitutes the corollary of the non-imposition of corporation tax, the referring court considers that *both* the exemption from corporation tax provided for by the Law on Corporation Tax *and* the tax measure at issue establish the same existing system of aid, which the Commission classified as such in its decision of 2 May 2013.

25. Finally, the referring court states that this is a test case and that the Netherlands tax authorities have already received almost 1 000 similar requests for a refund.

⁸ Judgment of 15 November 2013, No 12/01866, NL:HR:2013:1128, BNB 2014/20.

⁹ Commission Decision on aid measure SA.25338, C(2013) 2372 final (E3/2008, ex CP 115/2004 and CP 120/2006).

¹⁰ The Commission adopted, pursuant to Article 18 of Regulation No 659/1999, a decision proposing that appropriate measures be taken to abolish the exemption from corporation tax granted to public bodies so that public undertakings involved in economic activities are subject to the same corporation tax regime as private undertakings.

26. In that context, the Gerechtshof 's-Hertogenbosch (Regional Court of Appeal, 's-Hertogenbosch) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

- (1) Is the extension of the scope of an existing system of aid as a result of a taxable person successfully invoking the right to the free movement of capital as laid down in Article 56 of the EC Treaty (now Article 63 TFEU) to be regarded as a new system of aid resulting from an alteration to existing aid?
- (2) If so, does the task to be performed by the national court under Article 108(3) TFEU preclude the taxable person from being granted a tax advantage which that taxable person claims under Article 56 of the EC Treaty (now Article 63 TFEU), or should a proposed judicial decision to grant that advantage be notified to the Commission, or should the national court take any other action or implement any other measure, in view of the supervisory task assigned to it under Article 108(3) TFEU?

27. A-Fonds, the Netherlands Government and the Commission lodged written observations.

IV. Analysis

A. Preliminary observations on the tax measure at issue

28. The dispute in the main proceedings relates to the refund of dividend tax provided for in Article 10(1) of the Law on the Taxation of Dividends ('the tax measure at issue'). The tax measure at issue is closely linked to the exemption from corporation tax for certain public bodies provided for in Article 2(7) of the Law on Corporation Tax.

29. Thus, in accordance with Article 2(7) of the Law on Corporation Tax, bodies controlled directly or indirectly by a Netherlands public authority are subject to corporation tax only if they carry on one of the activities listed in Article 2(3) of that law.

30. For public bodies established in the Netherlands that do not carry on one of those activities and that, as a result, are not subject to corporation tax, the Law on the Taxation of Dividends provides in Article 10(1) for a refund of the dividend tax withheld in the course of a calendar year.

B. Admissibility of the request for a preliminary ruling

31. It is apparent from the order for reference that the referring court relied upon the Commission decision of 2 May 2013 in classifying the tax measure at issue as an existing system of aid.¹¹

¹¹ See points 22 to 24 of this Opinion.

32. However, that decision does not formally relate to the system for the refund of dividend tax provided for in Article 10(1) of the Law on the Taxation of Dividends. The Commission did not analyse or refer to that provision either in that decision or in its subsequent decision concerning the legislative reform enacted in the Netherlands following the decision of 2 May 2013.¹² Those two decisions formally relate only to the exemption from corporation tax granted to public undertakings under the Law on Corporation Tax.

33. The referring court having relied, in the questions referred for a preliminary ruling, upon the premiss that the Commission would also have classified the tax measure at issue as an existing system of aid, the Commission argues that the request must be rejected as inadmissible on the grounds that it does not contain the elements of fact and law necessary to allow a useful answer to be given to the questions referred.

34. In that regard, the Commission takes the view that it is not possible to determine from the information contained in the order for reference whether Article 10(1) of the Law on the Taxation of Dividends constitutes a system of aid and, whether, if it does, that system of aid constitutes an existing or a new system of aid and whether it is compatible with the EU market.

35. With regard to the question of whether the tax measure at issue constitutes a system of aid, the Commission argues that the reasoning followed in the abovementioned decisions cannot be applied by analogy, in particular because the possibility that the group of persons entitled to benefit under Article 10(1) of the Law on the Taxation of Dividends may be wider than that provided for in Article 2(7) of the Law on Corporation Tax cannot be ruled out.

36. The Commission adds that the tax measure at issue has been amended on several occasions since its introduction, which also makes it impossible to ascertain whether it is an existing system of aid.¹³

37. In any event, according to the Commission, the widening of the group of persons entitled to benefit from a refund of dividend tax, in order to ensure that it is compliant with Article 63 TFEU, constitutes a distinct alteration to the system provided for in Article 10(1) of the Law on the Taxation of Dividends, which must be assessed separately from that system and which could not, therefore, affect the assessment of the tax measure at issue. In that regard, the Commission argues that the order for reference does not contain sufficient information to determine whether that distinct alteration in itself constitutes aid within the meaning of Article 107(1) TFEU.

38. With regard to the admissibility of requests for a preliminary ruling, it must be borne in mind that, according to the Court's settled case-law, where the questions submitted concern the interpretation of EU law, the Court is in principle required to give a ruling. It follows that questions relating to EU law enjoy a presumption of relevance. The Court may refuse to rule on a question referred by a national

¹² Commission Decision (EU) 2016/634 of 21 January 2016 on aid measure SA.25338 (2014/C) (ex E 3/2008 and ex CP 115/2004) implemented by the Netherlands — Corporate tax exemption for public undertakings (OJ 2016 L 113, p. 148). In that decision, the Commission found that, notwithstanding the legislative reform enacted in the Netherlands in 2015 repealing, with effect from 1 January 2016, the exemption from corporation tax granted to the majority of Netherlands public undertakings under the Law on Corporation Tax, the Netherlands legislature had, nevertheless, maintained the exemption from corporation tax for certain seaports, which constituted State aid that was incompatible with the EU market.

¹³ The Commission points out that the Law on the Taxation of Dividends succeeded a decision on the taxation of dividends dating from 1941 and that, according to the parliamentary documentation, the Law on the Taxation of Dividends aimed only to carry out a 'technical revision' of that decision. However, both the limit on amount in order to be entitled to the refund and the group of persons entitled to benefit from that provision were subsequently amended on several occasions. Consequently, it is necessary, according to the Commission, to assess whether those amendments converted that existing system of aid into a new system of aid.

court only where it is quite obvious that the interpretation of EU law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it.¹⁴

39. On the last point, the need to provide an interpretation of EU law that will be of use to the national court requires, as emphasised by Article 94 of the Rules of Procedure of the Court, that the national court define the factual and legal context of the questions it is asking or, at the very least, that it explain the factual circumstances on which those questions are based.¹⁵

40. However, by virtue of the spirit of cooperation in relations between the national courts and the Court of Justice in the context of the preliminary rulings procedure, the lack of certain preliminary findings by the referring court does not necessarily lead to the request for a preliminary ruling being inadmissible if, in spite of those failings, the Court, having regard to the information available from the file, considers that it is in a position to give a useful answer to the referring court.¹⁶

41. It is important to emphasise that the issue of whether the tax measure at issue constitutes an aid measure is not the subject of the questions referred for a preliminary ruling. Nonetheless, the two questions referred for a preliminary ruling are relevant only if that tax measure is indeed State aid.

42. In that context, I note that, even though the measure at issue constitutes a tax advantage, the factual and legal information provided by the referring court is not sufficient to determine whether that advantage clearly establishes State aid within the meaning of Article 107 TFEU.

43. The tax measure at issue, considered a prepayment of corporation tax, could indeed potentially be regarded as a system of State aid in that it applies to Netherlands legal persons for which the exemption from corporation tax provided for in Article 2(7) of the Law on Corporation Tax constitutes State aid covered by the Commission decisions.

44. However, as the Commission argues, in the absence of details of the legal rules applicable to the refund of dividend tax, we know neither the exact scope of Article 10(1) of the Law on the Taxation of Dividends, nor, above all, the detailed rules for its application, necessary for the assessment of all the criteria that allow a measure to be classified as State aid.

45. Nevertheless, in my view, the absence of those preliminary findings by the referring court does not prevent the Court from giving the referring court a response that will be useful for the resolution of the dispute in the main proceedings.

46. In this case, since the classification of the tax measure at issue as ‘State aid’ is not the subject of the present request for a preliminary ruling and is a matter to be determined by the national court,¹⁷ even though the referring court gave the decisions a wider scope than the Commission gave them, that does not in itself preclude the Court from giving a response that will be useful for the resolution of the dispute in the main proceedings.

¹⁴ See judgments of 21 December 2016, *Vervloet and Others* (C-76/15, EU:C:2016:975, paragraphs 56 and 57); of 27 June 2017, *Congregación de Escuelas Pías Provincia Betania* (C-74/16, EU:C:2017:496, paragraphs 24 and 25); and of 7 March 2018, *flightright and Others* (C-274/16, C-447/16 and C-448/16, EU:C:2018:160, paragraph 46).

¹⁵ See judgments of 27 June 2017, *Congregación de Escuelas Pías Provincia Betania* (C-74/16, EU:C:2017:496, paragraph 26); of 9 November 2017, *Ispas* (C-298/16, EU:C:2017:843, paragraph 22); and of 20 December 2017, *Asociación Profesional Elite Taxi* (C-434/15, EU:C:2017:981, paragraph 24).

¹⁶ See judgments of 11 December 2014, *Azienda sanitaria locale n. 5 ‘Spezzino’ and Others* (C-113/13, EU:C:2014:2440, paragraph 48); of 28 January 2016, *CASTA and Others* (C-50/14, EU:C:2016:56, paragraph 48); of 27 October 2016, *Audace and Others* (C-114/15, EU:C:2016:813, paragraph 38); and of 8 December 2016, *Undis Servizi* (C-553/15, EU:C:2016:935, paragraph 25).

¹⁷ See, inter alia, judgment of 8 November 2001, *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke* (C-143/99, EU:C:2001:598, paragraph 29).

47. Moreover, I note that it seems conceivable that the referring court would classify it as State aid, in view of the fact that the Commission classified the exemption from corporation tax laid down by the Law on Corporation Tax for certain public bodies as a system of aid, and in view of the link between that system and the tax measure at issue.

48. Moreover, if that system does indeed constitute a system of aid, doubts as to whether that system of aid is existing or new, because of numerous alterations made since it was introduced, do not prevent the giving of a useful response to the referring court, by considering in turn the scenarios in which the tax measure at issue constitutes an existing or new system of aid.

49. Neither is the question of whether the tax measure at issue is State aid that is compatible with the EU market a determining factor in being able to give a useful response to the referring court. In the case of existing aid, that aid is presumed lawful so long as the Commission has not found that it is incompatible with the EU market,¹⁸ which is the case in the dispute in the main proceedings in which the Commission has not specifically given a decision on the tax measure at issue.

50. In the case of new aid, and in the absence of information about the notification of the aid, it is possible that that aid might be unlawful within the meaning of Article 1(f) of Regulation No 659/1999. It appears that that aid was implemented before the Commission had taken a decision authorising it, in breach of Article 108(3) TFEU. The consequences of those two situations can be usefully considered in the successive scenarios of an existing or new system of aid.

51. Finally, I note that the question of whether a decision of the referring court upholding the request for a refund to A-Fonds¹⁹ *in itself* constitutes State aid is only relevant in so far as the view is taken, as the Commission does, that such a decision is capable of constituting State aid. As I will explain in this Opinion, I do not agree with the Commission's analysis on that point.²⁰

52. It follows from all those observations that, whilst it is for the referring court to carry out the checks necessary to classify the tax measure at issue as State aid, the order for reference contains sufficient elements of law and fact to allow the Court to give the referring court a response that will be useful for the resolution of the dispute in the main proceedings.

53. Consequently, the questions referred for a preliminary ruling appear, in my opinion, to be admissible.

54. In order to respond to the questions referred for a preliminary ruling, I am proceeding on the basis, in what follows, that the tax advantage provided for by Article 10(1) of the Law on the Taxation of Dividends does indeed constitute a system of State aid.

¹⁸ See, *inter alia*, judgment of 18 July 2013, *P* (C-6/12, EU:C:2013:525, paragraph 41).

¹⁹ See point 37 of this Opinion.

²⁰ See section IV.C.3.(a) of this Opinion.

C. Questions referred for a preliminary ruling

1. Preliminary observations on the questions raised by the referring court

55. At the outset, I note that the referring court is not asking the Court about the free movement of capital, the infringement of which it believes to be clear in light of the residence requirement of the tax measure at issue.²¹ Consequently, I will not deal with that point in my Opinion.

56. By its two questions, the referring court seeks to ascertain, in essence, whether a decision of a national court the effect of which is to widen the group of persons entitled to benefit from an existing system of State aid can in itself constitute State aid, and more precisely new aid within the meaning of Article 1(c) of Regulation No 659/1999, in that it would alter existing aid. If so, it seeks to ascertain, in essence, whether the national court is obliged to notify such a decision to the Commission under Article 108(3) TFEU.

57. It is apparent from the order for reference that the referring court also questions whether it has jurisdiction to assess the compatibility of the residence requirement with Article 63 TFEU and to grant A-Fonds' request, in light of the division of powers between national courts and the Commission derived from Articles 107 and 108 TFEU, as interpreted by the Court in its *Iannelli*²² and *Nygård*²³ judgments.

58. Given that the two questions referred for a preliminary ruling are relevant only in so far as the referring court has jurisdiction to assess the substance of the system of aid in light of Article 63 TFEU, I will set out my analysis on that preliminary point (section 2), before responding to the two questions referred for a preliminary ruling, which I will address together (section 3).

2. Jurisdiction of the referring court to review the compatibility of the residence requirement of the tax measure at issue in light of Article 63 TFEU (preliminary issue affecting the questions referred for a preliminary ruling)

59. The referring court seeks to ascertain, in essence, if it has jurisdiction to review the compatibility of the residence requirement of the tax measure at issue, classified as State aid, with Article 63 TFEU.

60. I think it is important to provide the referring court with guidance on that point, since the dispute in the main proceedings highlights, in my opinion, the necessary interaction between the rules governing the review of State aid and the protection of the freedoms of movement that national courts must ensure by means of direct effect.

61. According to the settled case-law of the Court, the implementation of the system of supervising State aid, as laid down in Articles 107 and 108 TFEU, is a matter for both the Commission and the national courts, their respective roles being complementary but separate.²⁴

²¹ I note, however, that the Netherlands Government challenges the referring court's assessment on that point. That government takes the view that A-Fonds, because of its banking business (see, in that regard, point 15 of this Opinion), must be compared to undertakings governed by public law that are subject to corporation tax, such as other banks owned by public authorities. According to the Netherlands Government, that comparison leads to the conclusion that A-Fonds and other banks owned by public authorities are treated in an identical manner, given that none of them is entitled to a refund of dividend tax.

²² Judgment of 22 March 1977, *Iannelli & Volpi* (74/76, EU:C:1977:51).

²³ Judgment of 23 April 2002, *Nygård* (C-234/99, EU:C:2002:244).

²⁴ See judgments of 21 November 1991, *Fédération nationale du commerce extérieur des produits alimentaires and Syndicat national des négociants et transformateurs de saumon* (C-354/90, EU:C:1991:440, paragraph 8); of 5 October 2006, *Transalpine Ölleitung in Österreich* (C-368/04, EU:C:2006:644, paragraph 37); and of 21 November 2013, *Deutsche Lufthansa* (C-284/12, EU:C:2013:755, paragraph 27).

62. Whilst assessment of the compatibility of aid measures with the EU market falls within the exclusive competence of the Commission, subject to review by the Courts of the European Union, it is for the national courts to ensure the safeguarding, until the final decision of the Commission, of the rights of individuals faced with a possible breach by State authorities of the prohibition laid down by Article 108(3) TFEU. The involvement of national courts is the result of the direct effect that that provision, which seeks to prohibit the implementation of planned aid before the Commission has authorised it, has been held to have.²⁵

63. The Court has reiterated on several occasions that the principal and exclusive role conferred on the Commission by Articles 107 and 108 TFEU, which is to hold aid to be incompatible with the EU market where this is appropriate, is fundamentally different from the role of national courts in safeguarding rights that individuals enjoy as a result of the direct effect of the prohibition laid down in the last sentence of Article 108(3) TFEU.²⁶

64. With regard to the Commission, the Court has held that, while the procedure provided for in Articles 107 and 108 TFEU leaves a wide discretion to the Commission in coming to a decision on the compatibility of a system of State aid with the requirements of the EU market, that procedure must never produce a result that is contrary to the specific provisions of the Treaty.²⁷ The Commission, therefore, has an obligation to ensure that Article 107 TFEU is applied consistently with other provisions of the Treaty. That obligation on the part of the Commission is all the more necessary where those other provisions also pursue the objective of undistorted competition in the EU market.²⁸

65. With regard to the role of national courts, the Court has regularly noted that they must guarantee to individuals that all the appropriate conclusions will be drawn from an infringement of Article 108(3) TFEU, in accordance with their national law, as regards the validity of measures giving effect to the aid, the recovery of financial support granted in disregard of that provision and possible interim measures. While the national courts may be led, for that purpose, to determine whether or not a national measure must be classified as State aid within the meaning of Article 107 TFEU, they may not, however, rule on the compatibility of aid measures with the EU market, the final determination on that matter being the exclusive responsibility of the Commission, subject to review by the Court of Justice.²⁹

66. However, it is also settled case-law that the fundamental freedoms laid down by the TFEU, which have direct effect, give rise to rights for individuals that national courts are obliged to safeguard. Thus, a national court that is called upon, within the exercise of its jurisdiction, to apply provisions of EU law is, in particular, under a duty to give full effect to those provisions, if necessary refusing of its own motion to apply any conflicting provision of national legislation.³⁰

25 See judgments of 21 November 1991, *Fédération nationale du commerce extérieur des produits alimentaires and Syndicat national des négociants et transformateurs de saumon* (C-354/90, EU:C:1991:440, paragraphs 9 to 13); of 5 October 2006, *Transalpine Ölleitung in Österreich* (C-368/04, EU:C:2006:644, paragraphs 36 to 38); and of 21 November 2013, *Deutsche Lufthansa* (C-284/12, EU:C:2013:755, paragraphs 27 to 29).

26 See judgments of 21 November 1991, *Fédération nationale du commerce extérieur des produits alimentaires and Syndicat national des négociants et transformateurs de saumon* (C-354/90, EU:C:1991:440, paragraph 14); of 16 December 1992, *Lornoy and Others* (C-17/91, EU:C:1992:514, paragraph 30); of 8 November 2001, *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke* (C-143/99, EU:C:2001:598, paragraphs 26 to 29); of 18 July 2007, *Lucchini* (C-119/05, EU:C:2007:434, paragraphs 50 and 51); and of 18 July 2013, *P* (C-6/12, EU:C:2013:525, paragraph 38).

27 Judgment of 15 June 1993, *Matra v Commission* (C-225/91, EU:C:1993:239, paragraph 41).

28 Judgment of 15 June 1993, *Matra v Commission* (C-225/91, EU:C:1993:239, paragraph 42).

29 See, inter alia, judgment of 8 November 2001, *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke* (C-143/99, EU:C:2001:598, paragraph 29).

30 See, inter alia, judgment of 18 July 2007, *Lucchini* (C-119/05, EU:C:2007:434, paragraph 61).

67. In that context, the Court has already considered the question of whether the Commission's exclusive competence to assess the compatibility of aid measures with the EU market in accordance with Articles 107 and 108 TFEU precludes other provisions of the TFEU that have direct effect from being invoked before national courts, if those provisions are infringed.

68. In that regard, in the *Iannelli* judgment,³¹ the Court was, in particular, asked whether an existing aid measure, in respect of which the Commission had not given, for the dates relevant to the main proceedings, a decision that it was compatible, could also be examined in light of the provisions on the free movement of goods, in particular Article 34 TFEU,³² by the national court.

69. The Court first of all responded that the fact that a system of aids provided by the State or by means of State resources may, simply because it benefits certain national undertakings or products, hinder, at least indirectly, the importation of similar or competing products coming from other Member States is not in itself sufficient to put an aid as such on the same footing as a measure having an effect equivalent to a quantitative restriction within the meaning of Article 34 TFEU. Moreover, the effect of an interpretation of Article 34 TFEU that is so wide as to treat an aid as such within the meaning of Article 107 TFEU as being similar to a quantitative restriction referred to in Article 34 TFEU would be to alter the scope of Articles 107 and 108 TFEU and to interfere with the system adopted in the Treaty for the division of powers by means of the procedure for keeping aids under constant review laid down in Article 108 TFEU.

70. The Court adds that those aspects of State aid that contravene specific provisions of the TFEU other than Articles 107 and 108 may be so 'indissolubly linked to the object of the aid that it is impossible to evaluate them separately so that their effect on the compatibility or incompatibility of the aid viewed as a whole must therefore of necessity be determined in the light of the procedure prescribed in Article [108 TFEU]'.³³

71. The Court, nevertheless, conceded that 'the position is different if it is possible when a system of aid is being analysed to separate those conditions or factors which, even though they form part of this system, may be regarded as not being necessary for the attainment of its object or for its proper functioning'. In the latter case, 'there are no reasons based on the division of powers under Articles [107 and 108 TFEU] which permit the conclusion to be drawn that, if other provisions of the Treaty which have direct effect are infringed, those provisions may not be invoked before national courts simply because the factor in question is an aspect of aid'.³⁴

72. In 2002, the Court ruled on that point again in the *Nygård* judgment.³⁵ In that case, it was asked whether the fact that a national levy was intended to finance an aid scheme authorised by the Commission pursuant to the provisions of the TFEU on State aid precluded a national court from examining whether such a levy was compatible with other directly effective provisions of the TFEU, in particular Article 110 TFEU.³⁶

³¹ Judgment of 22 March 1977, *Iannelli & Volpi* (74/76, EU:C:1977:51).

³² Formerly Article 30 EEC. In the interests of clarity, I refer only to the articles of the TFEU in the remainder of this Opinion.

³³ Judgment of 22 March 1977, *Iannelli & Volpi* (74/76, EU:C:1977:51, paragraphs 10 to 14).

³⁴ Judgment of 22 March 1977, *Iannelli & Volpi* (74/76, EU:C:1977:51, paragraph 14). Since that judgment, the Court has again ruled on the relationship between Articles 34 and 107 TFEU, in actions for failure to fulfil obligations, in particular in judgments of 7 May 1985, *Commission v France* (18/84, EU:C:1985:175, paragraph 13) and of 5 June 1986, *Commission v Italy* (103/84, EU:C:1986:229, paragraph 19), and in a judgment of 20 March 1990, *Du Pont de Nemours Italiana* (C-21/88, EU:C:1990:121, paragraphs 19 to 21). Those judgments may have cast doubt on the scope of the *Iannelli* judgment, in that the Court did not distinguish between aspects of aid that are indissolubly linked to the object of the aid and aspects that are not indissolubly linked. However, on that point, the *Iannelli* judgment was subsequently upheld by the judgment of 23 April 2002, *Nygård* (C-234/99, EU:C:2002:244).

³⁵ Judgment of 23 April 2002, *Nygård* (C-234/99, EU:C:2002:244).

³⁶ Formerly Article 95 EC.

73. In that judgment, the Court first of all noted that, while Articles 107 and 108 TFEU, on the one hand, and Article 110 TFEU, on the other, pursue the same objective, namely to ensure that the two categories of intervention on the part of a Member State, that is to say, the grant of aid, on the one hand, and the imposition of discriminatory taxation, on the other, do not distort the conditions of competition within the EU market, the application of those provisions presupposes distinct conditions peculiar to the two kinds of State measure that they are intended to govern and they differ, furthermore, as to their legal consequences, particularly inasmuch as in the implementation of Articles 107 and 108 TFEU, unlike Article 110 TFEU, the intervention of the Commission plays a large part.³⁷ From this the Court concludes that discriminatory taxation practices are not exempted from the application of Article 110 TFEU by reason of the fact that they may at the same time be described as a means of financing State aid.

74. The Court added that the existence of the procedure provided for in Article 108 TFEU does not in any way prevent the compatibility of an aid scheme in relation to rules of EU law other than those contained in Article 107 TFEU from being assessed, in the case of directly effective provisions of the Treaty, by national courts.³⁸

75. However, referring to the *Iannelli* judgment,³⁹ the Court noted that ‘the possibility for national courts to assess the arrangements of a system of aid in the light of [TFEU] provisions other than those of Articles [107 and 108 TFEU] presupposes that the arrangements in question can be evaluated separately, and are thus conditions or factors which, though forming part of the system of aid in question, are not necessary for the attainment of its object or for its functioning’. If ‘that is ... the case, there are no reasons based on the division of powers under Articles [107 and 108 TFEU] which permit the conclusion to be drawn that, if other provisions of the Treaty which have direct effect are infringed, those provisions may not be invoked before national courts simply because the factor in question is an aspect of aid’.⁴⁰

76. On the other hand, it is apparent from that case-law that, in the case of conditions or factors that are necessary for the attainment of the object or for the functioning of the system of aid, the division of powers precludes national courts from assessing the compatibility of those conditions in light of rules other than those contained in Article 107 TFEU.

77. In this case, I note that the referring court is faced with an issue that is similar to that addressed by the Court in the abovementioned judgments, even if those judgments were delivered in different contexts.

78. Consequently, in the present case, I cannot agree with the Commission when it states that the invoking of Article 63 TFEU in the dispute in the main proceedings is independent of the exclusive competence of the Commission to assess the compatibility of aid measures with the EU market, when the point at issue is precisely the interaction between the two types of power.

37 Judgment of 23 April 2002, *Nygård* (C-234/99, EU:C:2002:244, paragraph 55).

38 Judgment of 23 April 2002, *Nygård* (C-234/99, EU:C:2002:244, paragraph 56).

39 Judgment of 22 March 1977, *Iannelli & Volpi* (74/76, EU:C:1977:51).

40 Judgment of 23 April 2002, *Nygård* (C-234/99, EU:C:2002:244, paragraphs 57 and 58). In that regard, the Court found that, while any examination into whether an aid scheme is compatible with the EU market is a matter for the Commission, regard being had to the fact that such an examination involves assessments of an economic and social nature, it cannot be disputed that, regarding the assessment of the manner in which the revenue generated by a domestic parafiscal charge is allocated, the national courts are best placed to collate the necessary information and to carry out the assessments required in that regard on the basis of data that should normally follow from the accounts and other documents relating to the management of the bodies that collect the levy and allocate subsidies and other benefits, see paragraph 61 of the judgment.

79. Like the referring court, I am inclined to take the view that the abovementioned case-law is relevant in the present case. Thus, that case-law makes it possible to guarantee the legal protection individuals derive from the direct effect of Treaty provisions and, should those provisions be infringed, to re-establish internal legality, without thereby encroaching on the central and exclusive role reserved, in Articles 107 and 108 TFEU, for the Commission in determining whether aid is compatible with the EU market.⁴¹

80. In the present case, the question of whether the referring court can review the residence requirement in light of Article 63 TFEU depends, as a result, on whether that requirement can be evaluated separately, in that it is not necessary for the attainment of the object or for the functioning of the system of aids in question. I accept that such an analysis is not straightforward, and all the more so because the Court has, to my knowledge, not yet ruled on a situation where an aspect of aid is found to be necessary for the attainment of the object or for the functioning of the system of aid in question and thus to exclude the jurisdiction of the national court.

81. In my opinion, an aspect of aid is necessary for the attainment of the object or for the functioning of aid where it is a constituent or essential element of the aid, so that its inapplicability leads to a change in the scope or the principal characteristics of the aid.

82. In this case, it seems to me, as the Netherlands Government argues, that the requirement of residence in the Netherlands is necessary for the attainment of the object or for the functioning of the system of aid in question.

83. In view of the information supplied by the referring court on the purpose of the tax measure at issue, it is common ground that the Netherlands legislature limited the scope of the system provided for in Article 10(1) of the Law on the Taxation of Dividends to companies established in the Netherlands that are not subject to corporation tax. As the Netherlands Government argues, undertakings governed by public law that are established in the Netherlands and that are exempt from corporation tax cannot set off the dividend tax withheld against corporation tax. To prevent dividend tax from continuing, in this case, to be imposed on the dividends received, the tax measure at issue provides for a refund of the dividend tax withheld.

84. It follows from those rules that the requirement of residence in the Netherlands is a condition of the granting of the aid and thereby determines the persons entitled to benefit from the aid. That requirement is, therefore, a constituent and essential element of the aid. The inapplicability of that residence requirement due to its incompatibility with Article 63 TFEU, as found by the referring court, leads to the right to benefit from the aid being conferred on legal persons governed by public law that are established in another Member State and that are not exempt from corporation tax in the Netherlands, but are in a comparable situation, the effect of which is to change the scope of the aid as envisaged by the Netherlands legislature.

85. In my view, that means that the residence requirement is indissolubly linked to the object of the system laid down in the tax measure at issue, so that its effect on the compatibility or the incompatibility of the aid as a whole falls within the exclusive competence of the Commission under the procedure laid down in Articles 107 and 108 TFEU. It follows that the referring court is prevented from applying Article 63 TFEU.⁴²

⁴¹ See, to that effect, judgment of 23 April 2002, *Nygård* (C-234/99, EU:C:2002:244, paragraph 62).

⁴² In addition, I note that the contrary position leads to a particular situation as in the dispute in the main proceedings where, in upholding the claim based on Article 63 TFEU, the effect of that decision is to widen the group of persons entitled to benefit from a system of aid. However, under EU State aid rules, no undertaking can claim a right to receive State aid. See, to the same effect, Opinion of Advocate General Wahl in *Kotnik and Others* (C-526/14, EU:C:2016:102, point 79). To put it differently, no Member State can be considered obliged to grant State aid to an undertaking, as the decision to grant aid is a political choice on the part of national legislative and administrative bodies. If EU law could, nevertheless, by virtue of other provisions such as Article 63 TFEU, oblige national courts to give decisions which, through their effects, serve to extend the scope of systems of aid, contrary to the intention of the legislature, that would seem to me to result in a paradoxical situation.

86. Although national courts are normally obliged to comply with the provisions of the Treaty that have direct effect, I take the view that if the criterion established in the *Iannelli* judgment and applied in the *Nygård* judgment is to have real meaning, it must, for the abovementioned reasons, apply to the case in the main proceedings, and result in the referring court not having jurisdiction to review the compatibility of the tax measure at issue with Article 63 TFEU.

87. Consequently, I will propose that the Court rule, in response to the questions referred for a preliminary ruling, that Articles 107 and 108 TFEU preclude a national court from carrying out an assessment of the compatibility of a residence requirement of an existing system of aid with Article 63 TFEU, if that requirement, such as that at issue in the main proceedings, is indissolubly linked to the system of aid in that it is necessary for the attainment of the object or for the functioning of that system.

88. In case the Court takes the view that the abovementioned case-law does not prevent the referring court from reviewing the compatibility of the residence requirement in light of Article 63 TFEU, I will address, in the alternative, in the following section, the question of whether State aid law precludes a national court from granting the request for a refund to A-Fonds, on the basis of Article 63 TFEU.

3. Question of whether State aid law precludes the national court from granting the request for a refund of dividend tax to A-Fonds in light of Article 63 TFEU (first and second questions referred for a preliminary ruling)

89. As I explained in point 31 of this Opinion, in raising the questions referred for a preliminary ruling, the referring court relied upon the premiss that the tax measure at issue constituted an existing system of aid. However, as the Commission observed, it appears that the tax measure at issue has been amended on several occasions.⁴³ In the absence of sufficient information regarding those amendments having been made available by the referring court, it cannot be excluded that, as the Commission also pointed out, that the version of the tax measure at issue in force during the period relevant to the dispute in the main proceedings constitutes new aid within the meaning of Article 1(c) of Regulation No 659/1999.

90. Consequently, in order to respond to the questions referred for a preliminary ruling, it is necessary to address in turn the hypotheses that that tax measure constitutes an existing or new system of aid.

91. In the following sections, I will set out the reasons why, in my opinion, if it is an existing system of aid, State aid law does not preclude the national court from granting the request for a refund of dividend tax to A-Fonds on the basis of Article 63 TFEU (section a), and if it is a new system of aid, Article 108(3) precludes such a decision (section b).

(a) Existing system of aid

92. If the tax measure at issue constitutes an existing system of aid, it must be regarded as lawful since the Commission has not found that it is incompatible with the EU market.⁴⁴

⁴³ See point 36 of this Opinion.

⁴⁴ See point 49 of this Opinion.

93. In such a situation, it seems, therefore, that State aid law does not preclude the granting of A-Fonds' request for a refund. In other words, if the Court does not agree with my analysis of the issue of jurisdiction, that means, in my opinion, that in the case in the main proceedings, when the referring court finds that the residence requirement infringes Article 63 TFEU, it is obliged not to apply that requirement and to grant the request of the applicant in the main proceedings for a refund of dividend tax.

94. I accept that the practical consequences of such a decision give rise to a particular situation. Although, by giving such a decision, the national court eliminates the distortion of competition that exists between public undertakings established in the Netherlands and public bodies established in another Member State, such a decision could, at the same time, increase the distortion of competition that might exist in light of Article 107(2) and (3) TFEU.

95. As the effect of such a decision is to widen the group of persons entitled to benefit from an existing system of State aid, the referring court seeks to ascertain whether that judicial decision can in itself constitute State aid, and more precisely new aid within the meaning of Article 1(c) of Regulation No 659/1999, in that it would alter existing aid, and, if so, if such a decision must be notified to the Commission under Article 108(3) TFEU.

96. In my view, a decision of a national court, taken as part of its function of protecting the free movement of capital, is not capable of in itself constituting a State aid measure within the meaning of Article 107(1) TFEU.

97. As A-Fonds and the Netherlands Government also argued, such a decision cannot be regarded as attributable to a Member State within the meaning of Article 107(1) TFEU, which is one of the conditions for classification as 'State aid'.

98. The concept of aid envisaged in Article 107(1) TFEU refers to the decisions of Member States by which the latter, in pursuit of their own economic and social objectives, give resources to undertakings or other persons or procure for them advantages intended to encourage the attainment of the economic or social objectives sought.⁴⁵ In other words, the decision to grant aid and the detailed rules of such a measure constitute a political choice that is a matter for national legislative and administrative bodies, subject to review by the Commission and the Court.

99. In that context, even if national courts form part of a Member State as public bodies, their task is to ensure, as independent courts, compliance with EU law, so that their decisions cannot be regarded as attributable to the State within the abovementioned meaning of Article 107(1) TFEU, and in themselves constitute a State aid measure.

100. That is the case in the dispute in the main proceedings. The refund of tax is merely a consequence of the implementation by the national court, as part of its function, of the free movement of capital in a specific dispute.

101. In that context, I note that that decision does not have an *erga omnes* effect but concerns only the situation of the applicant in the main proceedings. The question of whether other legal persons governed by public law that are not resident in the Netherlands also have the right to a refund of tax, by invoking Article 63 TFEU, presupposes that the referring court, in light of a specific assessment, takes the view that that person is in a situation that is comparable to that of public bodies established in the Netherlands and not subject to Netherlands corporation tax.

⁴⁵ See, inter alia, judgment of 27 March 1980, *Denkavit italiana* (61/79, EU:C:1980:100, paragraph 31).

102. For the same reason, neither the purpose nor the effect of a decision of the referring court granting A-Fonds' request for a refund will be to generally amend the legislative provisions of the tax measure provided for in Article 10(1) of the Law on the Taxation of Dividends, but such a decision will mean that a requirement of the national rules which is contrary to Article 63 TFEU will not be applicable in the specific dispute before it.

103. If the Court were, nevertheless, to find that such a decision of the national court can, through *its effects*, in itself constitute an aid measure within the meaning of Article 107(1) TFEU, and that that aid is new, implying an obligation to notify as provided for in Article 108(3) TFEU, I would draw the Court's attention to the practical difficulties that result from such a position. Logically, it would lead the national court to stay the proceedings in order to notify, possibly through the Member State's Government, its draft decision capable of giving rise, through its effects, to new aid. Moreover, the national court would be able to give its decision only following a Commission decision authorising it, taken, where necessary, at the conclusion of a formal investigation procedure, which would make it a completely impracticable process.⁴⁶

104. Article 108(3) TFEU cannot imply, in my opinion, that the decision of a judicial body is subject to the approval of the Commission, since that calls into question the principles of independence and impartiality when adjudicating, and the principle that judicial deliberations are secret. As the Netherlands Government argues, the obligation to notify aid plans applies only to State bodies which have the capacity to grant aid, that is, in the present case, the Netherlands Government or the Netherlands administrative authorities.

105. Finally, I note that the referring court, in raising the questions referred for a preliminary ruling, refers to the *DEI* judgment.⁴⁷ Even if that judgment might, as the referring court indicates, suggest that a judicial decision is capable, in general, of in itself constituting new aid in that its effect would be to alter existing aid, and that it would require to be notified pursuant to Article 108(3) TFEU, I am, however, not sure that that is the real significance of that judgment.

106. Thus, the view could also be taken that the Court simply found, in the context of an appeal, with regard to a very specific situation and in relation to an interim measure of a national court ruling in interim proceedings, that that measure could have the same effects as State aid and that the General Court could not, in general, assert that national court's ruling in interim proceedings are not required to comply with Articles 107 and 108 TFEU.⁴⁸

107. In any event, in view of the uncertainty as to the real significance of that judgment, I invite the Court to take the opportunity afforded by the case in the main proceedings to depart from its case-law resulting from the *DEI* judgment, if the meaning of that judgment is indeed that indicated by the referring court, or to clarify it.

⁴⁶ I also note that the notification of new aids must be made using a standard form for notification which appears in Annex I, part I, of Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty. Even though that form must be submitted to the Commission by the permanent representative of the Member State concerned, pursuant to Article 3(1) of that regulation, I observe however that the information that must be provided in the standard form for notification, set out in Annex I, part I, to that regulation, is information that the judges of national courts are not necessarily capable of providing.

⁴⁷ Judgment of 26 October 2016, *DEI v Commission* (C-590/14 P, EU:C:2016:797, paragraphs 59 and 108).

⁴⁸ See, in that regard, in particular, judgment of 26 October 2016, *DEI v Commission* (C-590/14 P, EU:C:2016:797, paragraphs 59 and 60 and paragraphs 103 to 108).

108. For the foregoing reasons, I will propose that the Court, in the alternative, rule in response to the questions raised that, in the case of an existing system of aid on which the Commission has not given a decision, State aid law does not preclude a national court from granting the request of a person entitled to benefit from that aid based on the free movement of capital in a dispute before it. Such a decision does not in itself constitute State aid and does not give rise to any obligation for national courts to notify it to the Commission.

(b) New system of aid

109. If the tax measure at issue constitutes a new system of aid within the meaning of Article 1(c) of Regulation No 659/1999, it would be unlawful aid within the meaning of Article 1(f) of that regulation, as that system would have been introduced in breach of the obligation to notify provided for in Article 108(3) TFEU.⁴⁹

110. The next question that arises is whether, despite the fact that the system of aid is incompatible with Article 63 TFEU, the referring court could be obliged to refuse to grant a refund of the dividend tax to A-Fonds, in order to comply with the prohibition on implementation provided for in Article 108(3) TFEU.

111. I note that that is a peculiar question in that the consequences to be drawn from an infringement of Article 63 TFEU and those resulting from a failure to comply with the obligation to notify laid down in Article 108(3) TFEU are, in reality, contradictory.

112. Whilst an infringement of Article 63 TFEU renders national rules that are inconsistent with it inapplicable,⁵⁰ which in the present case leads, in principle, to the granting to A-Fonds of a refund of dividend tax as a result of the inapplicability of the residence requirement, a failure to comply with the obligation to notify laid down by Article 108(3) TFEU leads, on the contrary, to the conclusion that the system of aid is unlawful and invalid, which in the present case precludes A-Fonds' entitlement to that refund.

113. Thus, according to the settled case-law of the Court concerning the obligation to notify laid down in Article 108(3) TFEU, in the event of a failure to comply with that obligation, national courts are required to exclude the application of national provisions establishing the unlawful privileges.⁵¹ Where national aid measures infringe the prohibition, the legal consequence is that they are unlawful,⁵² leading, in principle, to their being invalid.⁵³

114. With regard, more precisely, to the rebate of a tax constituting an unlawful aid measure because it was granted in breach of the obligation of notification, the Court held that it would not be compatible with the interest of the European Union to order that such a rebate be applied also in favour of other undertakings if such a decision would have the effect of widening the circle of recipients, thus leading to an increase in the effects of that aid instead of their elimination.⁵⁴ According to the Court, national courts must not merely extend the aid to a further class of beneficiaries.⁵⁵

⁴⁹ See point 50 of this Opinion.

⁵⁰ See, inter alia, judgment of 18 December 2007, *A* (C-101/05, EU:C:2007:804, paragraph 27).

⁵¹ See, inter alia, judgment of 16 April 2015, *Trapeza Eurobank Ergasias* (C-690/13, EU:C:2015:235, paragraph 53).

⁵² See judgments of 27 October 2005, *Distribution Casino France and Others* (C-266/04 to C-270/04, C-276/04 and C-321/04 to C-325/04, EU:C:2005:657, paragraph 30), and of 8 December 2011, *Residex Capital IV* (C-275/10, EU:C:2011:814, paragraph 28).

⁵³ See, in particular, judgments of 21 November 1991, *Fédération nationale du commerce extérieur des produits alimentaire and Syndicat national des négociants et transformateurs de saumon* (C-354/90, EU:C:1991:440, paragraphs 16 and 17); of 21 October 2003, *van Calster and Others* (C-261/01 and C-262/01, EU:C:2003:571, paragraph 63); of 5 October 2006, *Transalpine Ölleitung in Österreich* (C-368/04, EU:C:2006:644, paragraph 41); and of 12 February 2008, *CELF and ministre de la Culture et de la Communication* (C-199/06, EU:C:2008:79, paragraph 40).

⁵⁴ See, inter alia, judgment of 5 October 2006, *Transalpine Ölleitung in Österreich* (C-368/04, EU:C:2006:644, paragraph 49).

⁵⁵ See, inter alia, judgment of 5 October 2006, *Transalpine Ölleitung in Österreich* (C-368/04, EU:C:2006:644, paragraph 50).

115. I note that the situation that gave rise to the abovementioned case-law differs from that in the main proceedings in so far as it does not simply involve unlawful aid, but also an infringement of Article 63 TFEU, which is remedied, in principle, by granting the request for a refund of dividend tax to A-Fonds.

116. Nevertheless, in my view, the same applies in that situation. National courts must comply generally and fully with the prohibition on implementation. It is important to protect parties affected by the distortion of competition caused by the grant of the unlawful aid.⁵⁶

117. As long as the Commission has not examined the compatibility of the aid with the EU market, it would not, in my opinion, be compliant with EU law to order that aid be granted to other undertakings if the effect of such a decision is to widen the group of persons entitled to benefit from the aid, thus increasing the effects of that aid, which is unlawful because it was introduced without prior authorisation, instead of eliminating those effects.⁵⁷

118. Consequently, in the case of a new and unlawful system of aid, the prohibition on implementation laid down in Article 108(3) TFEU would preclude the referring court from granting the request for a refund of dividend tax to A-Fonds.

V. Conclusion

119. In view of the foregoing considerations, I propose that the Court respond to the questions referred by the *Gerechtshof 's-Hertogenbosch* (Regional Court of Appeal, 's-Hertogenbosch, Netherlands) as follows:

Articles 107 and 108 TFEU preclude a national court from carrying out an assessment of the compatibility of a residence requirement of an existing system of aid with Article 63 TFEU, if the requirement, such as that in the main proceedings, is indissolubly linked to the system of aid in that it is necessary for the attainment of the object or for the functioning of that system.

⁵⁶ Judgment of 12 February 2008, *CELF and ministre de la Culture et de la Communication* (C-199/06, EU:C:2008:79, paragraph 38).

⁵⁷ See also, to that effect, Opinion of Advocate General Kokott in *Finanzamt Linz* (C-66/14, EU:C:2015:242, points 27 to 30). I note that, as it declared the first question referred for a preliminary ruling inadmissible in the case in question, the Court did not rule directly on that question.