Reports of Cases

OPINION OF ADVOCATE GENERAL
KOKOTT
delivered on 6 May 2021[1]

Case C-545/19

Allianzgi-Fonds Aevn
v
Autoridade Tributária e Aduaneira

(Request for a preliminary ruling
from the Tribunal Arbitral Tributário (Centro de Arbitragem Administrativa – CAAD) (Tax Arbitration Tribunal (Centre for Administrative Arbitration), Portugal))

(Request for a preliminary ruling – Direct tax law and fundamental freedoms – Free movement of capital – Taxation of dividends paid to collective investment undertakings – Difference in treatment between resident and non-resident collective investment undertakings – Discrimination due to a different taxation technique – Comparability in the context of the free movement of capital – Justification for different taxation systems – Guarantee of a minimum level of taxation in the State of residence – Proportionality of a different taxation technique)

I. Introduction

1. Does the free movement of capital require a Member State to tax non-resident and resident investment vehicles according to the same tax system? That is the question which the Court must answer in this case. The question arises because Portugal, in exercise of its fiscal autonomy, has chosen to adhere, in the case of non-resident investment vehicles, to the conventional taxation of capital income by means of corporation tax withheld at source in cases where the corporations concerned are not subject to corporation tax or are subject to a low rate of corporation tax in their State of residence.

2. In contrast, resident investment vehicles are taxed according to a different tax system approach (referred to by Portugal as a form of exit taxation). Such vehicles are taxed quarterly by means of a 'stamp duty', which is charged on the entire net assets (and thus also retained dividend income) of the investment vehicle. To that end, the dividend income concerned is not subject to corporation tax (not even by way of a withholding tax deduction). It is then only when dividends are distributed to the investor that the latter becomes subject to Portuguese revenue tax.

3. Although Portugal therefore taxes non-resident and also resident investment vehicles, but it does so in a different manner. This surely also entails differences in the tax burden in one direction or the other. If no dividends are distributed to the investment vehicle, the tax burden of

[1] Original language: German.

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the domestic investment vehicle is significantly higher. If dividends are distributed to the investment vehicle, the picture can be quite different. However, this is only the case if the non-resident taxpayer is not taxed or is taxed at a low rate in his or her State of residence.

4. Since the fundamental freedoms in tax law prohibit discriminatory treatment of cross-border situations ‘only’, it is necessary in the present case to compare the taxation of resident and non-resident investment vehicles. Harmonisation of income tax would be helpful in this respect, but such harmonisation is currently still lacking. This gives rise to the follow-up question as to whether the free movement of capital can remedy this situation or whether, due to the lack of comparability of the situations, different taxation systems are also possible depending on residence and on the Member State, and a certain imbalance in the tax burden must therefore be tolerated under EU law.

II. Legal framework

A. EU law

5. The relevant provisions of EU law arise from the TFEU. In that context, particular importance is attached to the free movement of capital under Article 63 and Article 65 TFEU.

6. Article 65(1)(a) and Article 65(3) TFEU read as follows:

‘1. The provisions of Article 63 shall be without prejudice to the right of Member States:

(a) to apply the relevant provisions of their tax law which distinguish between taxpayers who are not in the same situation with regard to their place of residence or with regard to the place where their capital is invested;

…

3. The measures and procedures referred to in paragraphs 1 and 2 shall not constitute a means of arbitrary discrimination or a disguised restriction on the free movement of capital and payments as defined in Article 63.’

B. International treaty law

7. Article 10 of the double taxation convention (‘the DTC’) between the Portuguese Republic and the Federal Republic of Germany governs which State is entitled to tax the recipient of dividends:

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

(2) However, such dividends may also be taxed in the Contracting State of which the company paying the dividends is a resident and according to the laws of that State, but if the recipient of the dividends is the beneficial owner, the tax so charged shall not exceed 15 per cent of the gross amount of the dividends. The competent authorities of the Contracting States shall by mutual agreement settle the mode of application of that limitation. This paragraph shall not affect the taxation of the company in respect of the profits out of which the dividends are paid.’

C. Portuguese law

8. According to the referring court, the legal situation under Portuguese law in the years at issue was as follows.

9. In principle, Portugal taxes dividends paid by a corporation resident in Portugal to another corporation in Portugal or abroad as capital income at a corporation tax rate of 25% in accordance with the Corporation Tax Code.[2] This corporation tax is paid to the Portuguese State by way of withholding tax deducted by the corporation distributing the dividends.

10. In accordance with Article 14(3) of the Corporation Tax Code, however, dividend payments to foreign investors taking the legal form of a corporation are, in principle, exempt from corporation tax in the source State (Portugal). An exception to this exists only if they are taxed in the State of residence at a rate less than 60% of the corporation tax rate applicable in Portugal.

11. Decree-Law No 7/2015 of 13 January 2015 revised the tax regime for collective investment vehicles. Since then, Article 22 of the Statute of Tax Benefits[3] has provided for exemption from corporation tax for certain undertakings for collective investment in transferable securities ('UCITS') in respect of capital income. That provision reads as follows:

'(1) The following shall be liable for corporation tax in accordance with the terms of this article: funds investing in transferable securities, property investment funds, transferable securities investment companies and property investment companies that are formed and operate under national law.

…

(3) For the purposes of determining taxable profits, the following shall be disregarded: the income referred to in Articles 5 [capital income], 8 [letting and leasing] and 10 [capital gains] of the Revenue Tax Code[4] …

…

(8) The specific tax rates established in Article 88 of the Corporation Tax Code shall apply, *mutatis mutandis*, to these arrangements.

…'

12. Article 22(10) of the Statute of Tax Benefits supplements the corporation tax exemption from capital income with an exemption from the requirement of the distributing corporation to withhold tax at source. That provision reads as follows:

'There shall be no requirement to withhold corporation tax at source in respect of income obtained by the taxable persons referred to in paragraph 1.'

[2] Código do Imposto sobre o Rendimento das Pessoas Coletivas.

[3] Estatuto dos Beneficios Fiscais (as amended by Decree-Law No 7/2015 of 13 January 2015 with effect from 1 July 2015).

[4] Código do Imposto sobre o Rendimento das Pessoas Singulares.

13. However, in accordance with Article 88(11) of the Corporation Tax Code, income of a UCITS formed and operating under Portuguese law is not treated as tax-exempt in the first year following the acquisition of shares, contrary to Article 22(3) of the Statute of Tax Benefits. This is because the former provision provides that:

‘A specific tax rate of 23% shall apply to income distributed by undertakings liable for corporation tax that is received by taxable persons who benefit from a total or partial exemption; in this case, this includes income from capital where the shares in respect of which the income was received have not been held by the same taxable person for a continuous period of one year before payment became available and are not retained long enough to complete that period.’

14. Decree-Law No 7/2015 of 13 January 2015 also brought about amendments to the Código do Imposto do Selo (Stamp Duty Code) and the Schedule of Stamp Duties annexed thereto, which sets out the rules on the taxable amount. By virtue of the addition of Part 29 of the General Annex to the Stamp Duty Code, the taxation of the total net assets of collective investment undertakings falling within the scope of Article 22 of the Statute of Tax Benefits is effected at the rates provided for therein.

15. A UCITS formed and operating under Portuguese law is therefore subject – since the introduction of Article 22 of the Corporation Tax Code – to an extended tax on documented legal transactions (‘stamp duty’). This is a quarterly tax levied at 0.0125% of the total net book value of the UCITS. In that respect, dividends received which have not yet been distributed to the investors of the UCITS are included in the taxable amount.

III. Main proceedings

16. Allianzgi-Fonds Aevn (‘the applicant’) is a collective investment undertaking (UCITS) which has its seat in Germany and receives investment income in the form of dividends paid by undertakings resident in Portugal. A UCITS is an investment fund the legal framework of which is determined by Directive 2009/65/EC.[5] The purpose of such a UCITS is to facilitate the participation of private investors in the securities market.

17. In principle, Portugal treats dividends distributed to a UCITS formed under Portuguese law as exempt from corporate income tax. It therefore makes no difference to the private investor whether he or she acquires shares directly or invests indirectly in another undertaking via a UCITS. In that respect, dividends distributed by undertakings to a resident UCITS which the latter in turn distributes to its investors are not taxed by Portugal at the level of the UCITS. Instead, a UCITS formed under Portuguese law is subject to stamp duty, which is charged quarterly as a tax under tax law on both the retained dividend income and the remaining total net book value.

18. However, the exemption from corporation tax in respect of capital income of the UCITS does not apply to the applicant, as it is not an undertaking formed and operating under Portuguese law. This would be possible only if it were to have its seat or a permanent establishment in Portugal and fulfil certain other requirements of Portuguese law. The applicant is therefore subject to the

[5] Originally 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) (OJ 1985 L 375, p. 3), replaced by Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) (OJ 2009 L 302, p. 32).

general provisions of the Corporation Tax Code. Accordingly, dividends distributed by Portuguese undertakings to the applicant in 2015 and 2016 were subject to Portuguese corporation tax at a rate of 25%, which the distributing undertakings withheld at source and paid over to the Portuguese treasury.

19. However, due to the double taxation convention between Portugal and Germany, Portugal may only tax the investment income of a UCITS resident in Germany at a maximum rate of 15%. Portugal therefore refunded part of the tax withheld for 2015 at the request of the applicant. The applicant did not submit such a request for 2016.

20. The tax treatment of a UCITS in Germany constitutes an obstacle to the corporation tax exemption in respect of dividend payments to corporations located abroad which is provided for in Portuguese law under Article 14(3) of the Corporation Tax Code. According to the referring court, a UCITS which has its seat in Germany is also exempt from corporation tax in that country.

21. Germany – unlike Portugal – considers a UCITS to be a transparent 'taxable entity', that is to say, it is not the UCITS that is taxed but the investor directly. However, that taxation is not levied only on the amount of the income distributed to the investors, but on the amount of the income of the UCITS proportionally attributed to them (referred to as transparent taxation). The purpose of this is likewise to achieve equal treatment with a direct investment.

22. Since a UCITS does not owe any corporation tax in Germany, Portuguese corporation tax also cannot be offset at the level of the UCITS. Instead, the Portuguese tax can be proportionally offset only against the corresponding tax levied on the investors in accordance with Paragraph 4(2) of the German Investmentsteuergesetz (Law on investment income tax) as applicable at the time.[6] The Court is unaware of whether the applicant's investors availed themselves of this facility, however.

23. The applicant lodged an appeal against the Portuguese tax assessments on the basis of which corporation tax had been deducted at source for the tax years 2015 and 2016, by which it sought the annulment of those assessments and a refund of the tax withheld at source. The competent tax authority did not grant those requests. The application for arbitration submitted to the Centro de Arbitragem Administrativa (Centre for Administrative Arbitration, Portugal) is directed against the decision of that authority.

[6] That provision reads as follows: '(2) If the income distributed on investment units and the income that could be equated with distributed profits originate from a foreign State and are subject in that State to a tax that can be offset against income tax or corporation tax in accordance with Paragraph 34c(1) of the Einkommensteuergesetz (German Law on income tax) or Paragraph 26(1) of the Körperschaftsteuergesetz (German Law on corporation tax) or under a double taxation convention, the foreign tax assessed and paid and reduced by virtue of any right to reduction that has arisen shall be offset against the portion of the income tax or corporation tax attributable to that foreign income increased by the proportionate foreign tax. (…)' – Gesetz zur Modernisierung des Investmentwesens und zur Besteuerung von Investmentvermögen (Law on the modernisation of the investment system and the taxation of investment funds) (Investmentsteuermodernisierungsgesetz) (Law on the modernisation of investment tax) of 15 December 2003, BGBl. 2003 I p. 2676 et seq.

IV. Request for a preliminary ruling and proceedings before the Court

24. By decision of 9 July 2019, the referring court referred the following questions to the Court for a preliminary ruling:

‘(1) Does Article 63 TFEU on the free movement of capital or Article 56 TFEU on the freedom to provide services preclude tax rules such as those at issue in the main proceedings, contained in Article 22 of the Statute of Tax Benefits, which provide for a withholding to be made, in full discharge of liability, from dividends distributed by Portuguese companies and received by collective investment undertakings not resident in Portugal and established in other EU [Member States], whereas collective investment undertakings formed under Portuguese tax law and resident for tax purposes in Portugal can benefit from an exemption from the withholding at source made on the said income?

(2) In providing for a withholding to be made at source in respect of dividends paid to non-resident collective investment undertakings and in making the possibility of obtaining an exemption from such a withholding at source available only to resident collective investment undertakings, does the national legislation at issue in the main proceedings treat dividends paid to non-resident collective investment undertakings less favourably, in that such undertakings are wholly unable to take advantage of the aforesaid exemption?

(3) For the purposes of assessing whether the Portuguese legislation that establishes specific and different tax treatment for

(i) (resident) collective investment undertakings and for

(ii) the shareholders or unitholders in collective investment undertakings is discriminatory, are the tax rules that apply to the shareholders or unitholders in the collective investment undertaking relevant? Or, bearing in mind that the tax rules for resident collective investment undertakings are not affected or altered in any way by whether or not their shareholders or unitholders are resident in Portugal, in order to determine whether situations are comparable for the purposes of assessing whether the said legislation is discriminatory, should regard be had only to tax treatment at the level of the investment vehicle?

(4) Is the difference in treatment between collective investment undertakings resident in Portugal and not resident in Portugal permissible, having regard to the fact that natural or legal persons resident in Portugal who hold shares or units in collective investment undertakings (whether resident or non-resident) are, in both cases, subject in the same way to tax on income distributed by collective investment undertakings (and are generally not exempt), even if non-resident shareholders or unitholders are liable to a higher level of tax?

(5) Having regard to the fact that the discrimination at issue in these proceedings concerns a difference in the taxation of dividend income distributed by resident collective investment undertakings to their shareholders or unitholders, when it comes to assessing whether the taxation of the income is comparable, is it lawful to take account of other taxes, levies or charges payable in respect of the investments made by collective investment undertakings? In particular, in order to analyse whether the situations are comparable, is it lawful and

permissible to take account of the impact of taxes on assets or costs, or of other types of tax, rather than limiting the examination strictly to the tax on the income of collective investment undertakings, including any specific taxes?'

25. In response to a request for information from the Court of Justice, the referring court provided additional details in order to clarify the tax situation of resident and non-resident UCITS and their investors.

26. In the proceedings before the Court, the applicant, the Portuguese Republic and the European Commission submitted written observations on the request for a preliminary ruling and subsequently on the questions asked by the Court.

V. Legal assessment

27. The referring court raises five questions concerning the compatibility of a Portuguese provision of tax law with the fundamental freedoms. By all the questions referred, the referring court ultimately seeks to ascertain whether the taxation of a UCITS formed under foreign law and having its seat in another Member State is compatible with the free movement of capital and the freedom to provide services whereas, by contrast, UCITS formed under Portuguese law and having their seat in Portugal are exempt from corporation tax but are subject to a different tax – stamp duty. Therefore, in line with the view taken by the Commission, all the questions can be answered together.

A. Clarification of the question and the relevant fundamental freedom

28. The referring court asks whether the exemption from corporation tax provided for in Article 22(3) of the Corporation Tax Code and the exemption from withholding tax provided for in Article 22(10) in the case of dividends paid to UCITS formed under Portuguese law and having their seat in Portugal infringe the freedom of movement of capital (Article 63 TFEU) and the freedom to provide services (Article 56 TFEU).

29. On closer examination, however, dividends paid to the applicant would in principle also be exempt from tax. It is only Article 14(3) of the Corporation Tax Code that precludes this, if – and because – the applicant is not subject to corporation tax in the State of residence. The difference in treatment results not only from the special tax regime for UCITS founded under Portuguese law and having their seat in Portugal, but also from Article 14(3) of the Corporation Tax Code. This is clearly intended to ensure a minimum level of taxation of the dividend income of corporations resident abroad.

30. In that context, it is first necessary to clarify which fundamental freedom is to be taken as the basis for the assessment of that difference in treatment. In a case in which a court asks whether a provision is compatible with two different fundamental freedoms, it is necessary to establish, as a preliminary point, against which of the two fundamental freedoms the provision is to be assessed. It is clear from settled case-law that this is determined by the purpose of the legislation concerned.[7]

[7] Judgments of 21 June 2018, *Fidelity Funds and Others* (C-480/16, EU:C:2018:480, paragraph 33); of 5 February 2014, *Hervis Sport- és Divatkereskedelmi* (C-385/12, EU:C:2014:47, paragraph 21); and of 13 November 2012, *Test Claimants in the FII Group Litigation* (C-35/11, EU:C:2012:707, paragraph 90 and the case-law cited).

31. While Article 22(3) of the Statute of Tax Benefits exempts a resident UCITS from corporation tax on dividend payments, Article 22(10) of the Statute of Tax Benefits, in a mirror image, exempts undertakings that distribute dividends to the UCITS from the obligation to withhold such tax and pay it over to the treasury.

32. The national legislation at issue in the main proceedings therefore concerns the taxation of dividends under tax law and not the taxation of services under tax law.[8] Therefore, Article 22(3) and (10) of the Statute of Tax Benefits and Article 14(3) of the Corporation Tax Code are to be assessed in relation to the free movement of capital. Since the present case concerns 'free-float' dividends, the protection conferred by the freedom of establishment cannot be invoked either.[9] Consequently, only a restriction of the free movement of capital under Article 63 TFEU need be examined.

B. Restriction of free movement of capital

33. In accordance with settled case-law, the measures prohibited by Article 63(1) TFEU, as restrictions on the movement of capital, include those which are likely to discourage non-residents from making investments in a Member State or to discourage that Member State's residents from doing so in other States.[10]

34. However, in the case of taxes and duties it must be borne in mind that they constitute a burden per se and thereby always reduce the attractiveness of a capital investment. The Court has thus ruled on a number of occasions that Member States' rules on the conditions and the level of taxation are subject to the Member States' fiscal autonomy, provided the treatment of the cross-border situation is not discriminatory compared with the domestic situation.[11] On closer inspection, this retraction of the intensity of review in tax law – to which Advocate General Hogan has recently expressly referred[12] – is in keeping with the idea that led the Court in its *Keck* ruling[13] to refrain from conducting a general review of restrictions.[14]

35. In this respect, there can be a restriction on the movement of capital in tax law only if a Member State treats dividends paid to non-resident corporations less favourably than dividends paid to resident corporations. This is because such treatment is liable to deter companies

8 See, to that effect, judgments of 21 June 2018, *Fidelity Funds and Others* (C-480/16, EU:C:2018:480, paragraphs 35 and 36); of 10 April 2014, *Emerging Markets Series of DFA Investment Trust Company* (C-190/12, EU:C:2014:249, paragraph 29); and of 13 November 2012, *Test Claimants in the FII Group Litigation* (C-35/11, EU:C:2012:707, paragraph 92).

9 This is because the shareholdings concerned are not shareholdings that allow the applicant to exercise definite influence on the company's decisions and to determine its activities. See, in this regard, judgments of 13 November 2012, *Test Claimants in the FII Group Litigation* (C-35/11, EU:C:2012:707, paragraphs 37 and 38); of 10 February 2011, *Haribo Lakritzen Hans Riegel and Österreichische Salinen* (C-436/08 and C-437/08, EU:C:2011:61, paragraph 35), and of 21 October 2010, *Idryma Typou* (C-81/09, EU:C:2010:622, paragraph 47).

10 Judgments of 21 June 2018, *Fidelity Funds and Others* (C-480/16, EU:C:2018:480, paragraph 40); of 2 June 2016, *Pensioenfonds Metaal en Techniek* (C-252/14, EU:C:2016:402, paragraph 27); and of 8 November 2012, *Commission* v *Finland* (C-342/10, EU:C:2012:688, paragraph 28).

11 See, to that effect, judgments of 26 May 2016, *NN (L) International* (C-48/15, EU:C:2016:356, paragraph 47), and of 14 April 2016, *Sparkasse Allgäu* (C-522/14, EU:C:2016:253, paragraph 29), order of 4 June 2009, *KBC-bank* (C-439/07 and C-499/07, EU:C:2009:339, paragraph 80), and judgment of 6 December 2007, *Columbus Container Services* (C-298/05, EU:C:2007:754, paragraphs 51 and 53).

12 Opinion of Advocate General Hogan in the *Autoridade Tributária e Aduaneira* case (Tax on capital gains from immovable property) (C-388/19, EU:C:2020:940, point 36 et seq.).

13 See judgment of 24 November 1993, *Keck and Mithouard* (C-267/91 and C-268/91, EU:C:1993:905, paragraph 16).

14 See, for more detail in that regard, my Opinion in the *Google Ireland* case (C-482/18, EU:C:2019:728, point 35 et seq.).

resident abroad from pursuing investments in that first Member State and, consequently, amounts to a restriction of the free movement of capital, prohibited, in principle, under Article 63 TFEU.[15]

1. The existence of such a restriction

36. Under the legislation at issue in the main proceedings, only dividends paid to a UCITS which has its seat abroad are subject to Portuguese corporation tax (but only if it is not taxed abroad by means of a corporation tax of at least 60% of the Portuguese level). Corporation tax is levied by means of a deduction at source. However, in accordance with Article 22(3) and (10) of the Statute of Tax Benefits, this is not the case for a UCITS formed under Portuguese law and having its seat in Portugal.

37. It is true that it is for each Member State to organise, in compliance with EU law, its system for taxing distributed profits and to define, in that context, the tax base and the tax rate which apply to the shareholder receiving them.[16] It follows that Member States are free to provide for, for the purposes of encouraging the use of UCITS, a specific tax regime applicable to those undertakings and to the dividends received by them, and to define the material and formal conditions which must be respected to benefit from such a regime.[17]

38. Member States must nevertheless exercise their fiscal autonomy in accordance with the requirements of EU law, in particular those imposed by the Treaty provisions on the free movement of capital.[18] Consequently, the establishment of a tax regime specific to UCITS and dependent on their residence must not constitute a restriction on the free movement of capital.

(a) Existence of a restriction if the corporate taxation of UCITS is considered in context of an examination in isolation

39. At first glance, it could therefore be argued in the present case, in line with the view taken by the Commission and the applicant, that the abovementioned provisions are liable to discourage a UCITS which has its seat in another Member State from investing in undertakings which have their seat in Portugal.

40. This is because the tax withheld in Portugal cannot be offset against the applicant's tax payable in Germany because it is likewise not subject to corporation tax in Germany, due to the transparent taxation technique (see points 21 and 22). It is true that, on the basis of the DTC between Germany and Portugal, the applicant can have part of the tax withheld refunded by the Portuguese tax authorities at its request. Nevertheless, dividends paid to it by Portuguese undertakings are in any case subject to a Portuguese corporation tax of 15%. Dividends paid by Portuguese undertakings to a UCITS resident in Portugal are not subject to that burden, however.

[15] See, to that effect, judgments of 21 June 2018, *Fidelity Funds and Others* (C-480/16, EU:C:2018:480, paragraph 44); of 2 June 2016, *Pensioenfonds Metaal en Techniek* (C-252/14, EU:C:2016:402, paragraph 28); and of 8 November 2012, *Commission* v *Finland* (C-342/10, EU:C:2012:688, paragraph 33).

[16] Judgments of 30 January 2020, *Köln-Aktienfonds Deka* (C-156/17, EU:C:2020:51, paragraph 42); of 30 June 2016, *Riskin and Timmermans* (C-176/15, EU:C:2016:488, paragraph 29); of 20 October 2011, *Commission* v *Germany* (C-284/09, EU:C:2011:670, paragraph 45); and of 20 May 2008, *Orange European Smallcap Fund* (C-194/06, EU:C:2008:289, paragraph 30).

[17] Judgments of 30 January 2020, *Köln-Aktienfonds Deka* (C-156/17, EU:C:2020:51, paragraph 43); of 24 October 2018, *Sauvage and Lejeune* (C-602/17, EU:C:2018:856); and of 9 October 2014, *van Caster* (C-326/12, EU:C:2014:2269, paragraph 47).

[18] Judgments of 30 January 2020, *Köln-Aktienfonds Deka* (C-156/17, EU:C:2020:51, paragraph 45), and of 30 June 2011, *Meilicke and Others* (C-262/09, EU:C:2011:438, paragraph 38).

41. This reduces the amount of the return on capital and thus the profitability of the applicant's investment in Portuguese undertakings and would therefore, when considered in isolation, be liable to deter the applicant from investing in Portugal. It could therefore be said to constitute a restriction on the free movement of capital.

42. However, as follows from the case-law of the Court in the *Pensioenfonds Metaal en Techniek* case,[19] the question of whether there is a restriction on the free movement of capital is not to be based on a purely formal assessment of the exemption from a type of tax. Rather, the entire fiscal environment surrounding the taxation of a UCITS must be taken into account, that is to say, it is necessary to carry out a comprehensive (material) examination.

(b) Existence of a restriction if the taxation of a UCITS in Portugal is considered in the context of a comprehensive examination

(1) Tax exemption versus taxation according to another regime

43. On closer inspection, there is no tax exemption for UCITS in Portugal. Rather, UCITS are subject, in relation to the dividends distributed to them, to just two different taxation regimes, the application of which depends on whether they are resident or non-resident in the territory of the Member State of the company distributing the dividends.

44. It is apparent from the request for a preliminary ruling and the supplementary observations provided by the referring court in response to questions asked by the Court and from the observations submitted by Portugal that the latter has opted, since 2015, for a special taxation system for UCITS residents in the national territory.

45. The exclusion of the capital income of the UCITS resident in the national territory from corporate taxation was accompanied by the introduction of a special stamp duty. As confirmed by the referring court, the special tax regime under Article 22 of the Statute of Tax Benefits for resident UCITS and the stamp duty are related. The stamp duty replaced the previous corporate taxation of dividend payments. It applies – as confirmed by the referring court – only to UCITS residents in Portugal. According to the statements made by Portugal, the intention was to implement a form of taxation according to the principle of 'exit taxation'.

46. I understand this arrangement to the effect that dividends and other assets received by the UCITS are not subject to income tax at the level of the investors until they are paid out to them. In the meantime, however, they are subject to another tax – stamp duty – on a quarterly basis. In this respect, the facts of the case are very similar to those on which the *Pensioenfonds Metaal en Techniek* judgment[20] was based. In that case, resident pension funds were taxed by a special yield tax instead of the normal corporation tax, which was also derived from the assets and regarded as a tax on assets by individual parties.[21]

47. Irrespective of the question of whether – as emphasised by the Commission – such stamp duty should actually be regarded dogmatically as a form of tax on assets or as a special income tax based on the total net book value, it also taxes dividends that are not redistributed (that is to say, dividends that are retained). The tax legislation in Portugal therefore distinguishes, in the

[19] Judgment of 2 June 2016, *Pensioenfonds Metaal en Techniek* (C-252/14, EU:C:2016:402, paragraph 29 et seq.).

[20] Judgment of 2 June 2016, *Pensioenfonds Metaal en Techniek* (C-252/14, EU:C:2016:402, paragraph 29 et seq.).

[21] See also, in that regard, Opinion of Advocate General Szpunar in *Pensioenfonds Metaal en Techniek* (C-252/14, EU:C:2015:571, point 23).

case of a resident UCITS, between investment income which is retained and that which is immediately distributed. Furthermore, that tax does not cover only the reinvested dividend income, but the entire capital stock of the UCITS. This means that all shareholdings are taxed, not only those of Portuguese undertakings.

48. Even in respect of Portuguese dividends which are immediately redistributed to investors, the resident UCITS is taxed by way of the stamp duty on the basis of the shareholdings underlying such dividends. However, the question of whether a much larger capital stock is burdened with a much lower tax (stamp duty) or the much lower distribution based on the capital stock is burdened with a higher tax (15% on dividend payments) is, in my opinion, purely a question of taxation technique. This is because if the existing capital stock is to remain constant, the stamp duty must also be paid from the dividend income (assuming that the UCITS has no other income). The claim repeatedly asserted by the applicant, that Portugal does not tax dividends paid to a resident UCITS, is therefore not correct. This is because that different taxation technique does nothing to change the fact that a Portuguese UCITS which has its seat in Portugal is taxed on the basis of its shareholdings in Portuguese undertakings.

49. This also distinguishes this case from the cases underlying the Court's judgments in *Fidelity Funds*[22] and *Denkavit Internationaal and Denkavit France*[23] – as correctly emphasised by Portugal. In those cases, the source State foregoes taxation of resident UCITS, whereas in the present case Portugal does not forego taxation but applies a different taxation technique. As was the case in the judgment in *Pensioenfonds Metaal en Techniek*,[24] it is necessary in the present case also for that other taxation technique to be included in the examination of whether a restriction exists.

50. Therefore, the diagrams and hypothetical comparative calculations provided by the applicant are not very convincing. In that respect, the applicant argued, inter alia, that the tax burden could easily be avoided through the interposition of a Portuguese UCITS. This is only partly correct. Although the interposed UCITS would not have to pay corporation tax on the dividend, it would have to pay tax on its entire capital stock on a quarterly basis, which ultimately also reduces the return of the investors of that UCITS, as that stamp duty is paid out of the income of the UCITS. The question of which variant is more favourable then depends on how high the dividend has turned out to be in relation to the capital stock. In the years in which the Portuguese undertaking does not happen to distribute any dividends, the 'interposition' of a UCITS resident in the national territory would actually be disadvantageous from a tax perspective.

(2) Significance of offsetting in full in the State of residence

51. In addition, there is another circumstance which has received little consideration in the written observations of the parties and which is related to the raison d'être of a UCITS.

52. Accordingly, a UCITS is a special investment vehicle that serves to enable private investors to invest money in the securities market without an increased administrative burden and thereby to benefit from special protection. This results, inter alia, from recital 3 of Directive 2009/65/EC and

[22] Judgment of 21 June 2018, *Fidelity Funds and Others* (C-480/16, EU:C:2018:480, paragraph 42 et seq.).

[23] Judgment of 14 December 2006, *Denkavit Internationaal and Denkavit France* (C-170/05, EU:C:2006:783, paragraph 37 et seq).

[24] Judgment of 2 June 2016, *Pensioenfonds Metaal en Techniek* (C-252/14, EU:C:2016:402).

the restriction of a UCITS to certain asset classes, specific reporting requirements, simplification of prospectuses, increased cost transparency and special monitoring of such undertakings by supervisory authorities.

53. In order for private investors to be willing to become active in the securities market via such a UCITS, the return should not be lower than that of a direct investment in an undertaking. Accordingly, the taxation of a UCITS is generally structured in such a way that it makes no difference to investors from a financial point of view whether they invest in an undertaking directly or do so indirectly as investors in a UCITS.

54. In order to achieve that objective, Germany opted, for the relevant years at issue, to treat a UCITS as a transparent taxable entity. However, this has the consequence that offsetting of the Portuguese corporation tax burden at the level of the UCITS is ruled out per se. Due to that (German) taxation technique, only offsetting at the investor level can enter into consideration. However, if this takes place in the State of residence – *in casu*, Germany – the investor concerned is not deterred from pursuing an investment in a UCITS that invests in Portuguese undertakings.

55. As the Court has already stated, the question of the offsetting of the withholding tax burden by the State of residence is also a decisive criterion for establishing unfavourable treatment. [25] If, however, for reasons pertaining to the tax system, offsetting is not possible at UCITS level and can only take place at investor level, then actual offsetting at investor level is just as relevant as offsetting at UCITS level.

56. Therefore, if Germany does indeed offset the Portuguese advance charge (15%) against the investor's income tax liability – a matter which is for the referring court to verify – it would be possible to assume, at the most, formal unequal treatment of the UCITS in that case, but not material unequal treatment of the investors. Since the raison d'être of a UCITS consists solely in providing investors with access to investments in the securities market, it is only their perspective that is relevant.

57. If no offsetting takes place, on the other hand, there is unequal treatment due to the different taxation technique. The difference between the two taxation techniques concerns, in particular, the method of calculating the tax base (capital stock versus payment of dividends), the nominal tax rate (0.0125% quarterly versus 15% once upon distribution) as well as the manner in which it is levied (quarterly versus upon payment).

58. As for the question of whether the laws of a Member State, such as those at issue in the main proceedings, constitute a restriction of the free movement of capital, it must be ascertained whether such a difference in treatment of the taxation of dividends paid to UCITS, dependent on their status as residents or not, leads to not only different treatment but also less favourable treatment of non-resident UCITS compared to resident UCITS. [26]

59. It is for the referring court, which alone can know precisely the facts of the case before it, to assess whether, with regard to the dividends at issue in this case, the levy on the applicant in the main proceedings of the withholding tax of 15% pursuant to the bilateral agreement on double

[25] See, to that effect, judgment of 14 December 2006, *Denkavit Internationaal and Denkavit France* (C-170/05, EU:C:2006:783, paragraph 44 et seq.).

[26] See, to that effect, judgment of 2 June 2016, *Pensioenfonds Metaal en Techniek* (C-252/14, EU:C:2016:402, paragraph 33).

taxation results in that applicant, ultimately, bearing heavier tax burdens in Portugal than those borne by a resident UCITS in the applicant's situation (that is to say, with its assets).[27] The relevant period for that assessment is – as already held by the Court[28] – the individual tax year.

2. Conclusion

60. Should it therefore transpire that the quarterly stamp duty, which is charged on not only the undistributed dividends but also the capital stock, represents a comparable tax burden of 15% of the burden on the dividends paid to the applicant, there is no unfavourable treatment whatsoever from the outset, and, consequently, no restriction of the free movement of capital. Since the tax legislature normally has a certain degree of leeway in the way it structures different taxation systems, it should be sufficient if the level of taxation is not exactly identical, but only roughly comparable.

61. In this case, the applicant's request would then be more akin to 'cherry-picking', since it seeks exemption from corporation tax like a resident UCITS, without, however, bearing the stamp duty taxation introduced as an equivalent in connection with that exemption. Such a request does not seek equal treatment with a UCITS resident in the national territory, but rather better treatment. However, the fundamental freedoms do not serve to favour cross-border cases, but 'only' to ensure equal treatment.[29]

62. If, on the other hand, it should transpire that the quarterly stamp duty in the present case leads to significantly more favourable tax treatment of UCITS resident in the national territory, this is liable to deter non-resident UCITS from making investments in the Member State concerned and, consequently, amounts to a restriction of the free movement of capital, prohibited, in principle, under Article 63 TFEU.

C. Justification for the restriction of the free movement of capital

63. In the latter case, it is necessary to examine the possible justification for that restriction. In accordance with settled case-law of the Court,[30] for national tax legislation which distinguishes between domestic and foreign persons to be capable of being regarded as compatible with the provisions of the Treaty on the free movement of capital, the difference in treatment must concern situations which are not objectively comparable (see Section 2) or be justified by an overriding reason in the public interest (see Section 3). In that context, the assessment of the free movement of capital is to be based on the other fundamental freedoms, whereby the particularities of the free movement of capital must be taken into account (see Section 1).

[27] See, to that effect, judgments of 2 June 2016, *Pensioenfonds Metaal en Techniek* (C-252/14, EU:C:2016:402, paragraph 34), and of 17 September 2015, *Miljoen and Others* (C-10/14, C-14/14 and C-17/14, EU:C:2015:608, paragraph 48).

[28] Judgment of 2 June 2016, *Pensioenfonds Metaal en Techniek* (C-252/14, EU:C:2016:402, paragraph 41).

[29] See, in greater detail in that regard, my Opinion in *Google Ireland* (C-482/18, EU:C:2019:728, point 35 et seq.); see also, recently, the Opinion of Advocate General Hogan in *Autoridade Tributária e Aduaneira* (Tax on capital gains from immovable property) (C-388/19, EU:C:2020:940, point 36 et seq.).

[30] Judgments of 21 June 2018, *Fidelity Funds and Others* (C-480/16, EU:C:2018:480, paragraph 48); of 10 April 2014, *Emerging Markets Series of DFA Investment Trust Company* (C-190/12, EU:C:2014:249, paragraph 57); of 10 May 2012, *Santander Asset Management SGIIC and Others* (C-338/11 to C-347/11, EU:C:2012:286, paragraph 23); and of 6 June 2000, *Verkooijen* (C-35/98, EU:C:2000:294, paragraph 43).

1. *Particularities of the free movement of capital*

64. In this respect, the free movement of capital – unlike the other fundamental freedoms – contains a limitation of its scope of protection in the case of tax law restrictions. This is because, under Article 65(1)(a) TFEU, Article 63 TFEU is to be without prejudice to the right of the Member States to apply the relevant provisions of their tax law which distinguish between taxpayers who are not in the same situation with regard to their place of residence or with regard to the place where their capital is invested. This is also understandable, in the light of their wider scope of application. Unlike the other fundamental freedoms, the free movement of capital also covers third-country situations.

65. However, it is apparent from settled case-law of the Court that that provision, in so far as it is a derogation from the fundamental principle of the free movement of capital, is to be interpreted strictly. Accordingly, it cannot be interpreted as meaning that all tax legislation which draws a distinction between taxpayers on the basis of their place of residence or the State in which they invest their capital is automatically compatible with the FEU Treaty. Indeed, the derogation in Article 65(1)(a) TFEU is itself limited by Article 65(3) TFEU, which provides that the national provisions referred to in paragraph 1 of that article 'shall not constitute a means of arbitrary discrimination or a disguised restriction on the free movement of capital and payments as defined in Article 63 [TFEU]'. [31]

66. The Court went on to say that, consequently, a distinction must be made between the differences in treatment authorised by Article 65(1)(a) TFEU and discrimination prohibited by Article 65(3) TFEU. [32] However, the question as to the criteria according to which such permissible differences in treatment (Article 65(1)(a) TFEU) can be distinguished from arbitrary discrimination or a disguised restriction prohibited by Article 65(3) TFEU remains open in the case-law of the Court. In that respect, however, the Court uses the usual wording that is applied to all other fundamental freedoms.

67. Accordingly, for national tax legislation to be capable of being regarded as compatible with the fundamental freedoms, the difference in treatment provided for by it must concern situations that are not objectively comparable or must be justified by an overriding reason in the public interest. [33]

68. However, it seems doubtful to me whether this takes sufficient account of the abovementioned particularities of the free movement of capital. In his Opinion in the *Pensioenfonds Metaal en Techniek* case, Advocate General Szpunar took the view [34] that the Court takes account of those particularities by virtue of the principle that the situations of

[31] Judgments of 21 June 2018, *Fidelity Funds and Others* (C-480/16, EU:C:2018:480, paragraph 47); of 2 June 2016, *Pensioenfonds Metaal en Techniek* (C-252/14, EU:C:2016:402, paragraph 46); and of 10 April 2014, *Emerging Markets Series of DFA Investment Trust Company* (C-190/12, EU:C:2014:249, paragraphs 55 and 56 and the case-law cited).

[32] Judgments of 21 June 2018, *Fidelity Funds and Others* (C-480/16, EU:C:2018:480, paragraph 48); of 2 June 2016, *Pensioenfonds Metaal en Techniek* (C-252/14, EU:C:2016:402, paragraph 47); and of 10 May 2012, *Santander Asset Management SGIIC and Others* (C-338/11 to C-347/11, EU:C:2012:286, paragraph 23 and the case-law cited).

[33] See, inter alia – without any claim to exhaustiveness: judgments of 21 June 2018, *Fidelity Funds and Others* (C-480/16, EU:C:2018:480, paragraph 48); of 2 June 2016, *Pensioenfonds Metaal en Techniek* (C-252/14, EU:C:2016:402, paragraph 47); of 1 December 2011, *Commission* v *Belgium* (C-250/08, EU:C:2011:793, paragraph 51); of 7 September 2004, *Manninen* (C-319/02, EU:C:2004:484, paragraph 29); and of 6 June 2000, *Verkooijen* (C-35/98, EU:C:2000:294, paragraph 43).

[34] Opinion of Advocate General Szpunar in *Pensioenfonds Metaal en Techniek* (C-252/14, EU:C:2015:571, point 2).

residents and of non-residents are not, as a rule, comparable. That statement may be true for older case-law, such as the *Schumacker* judgment. It was also clarified in that case that, in relation to direct taxes, the situations of residents and of non-residents are not comparable.[35]

69. Consideration of the more recent case-law of the Court reveals more of a tendency in the opposite direction, however. Accordingly, it is stated that comparability is assessed only in accordance with the relevant distinguishing criteria established by the legislation in question.[36] Therefore, within the scope of application of the free movement of capital also, the comparability of a cross-border situation with a domestic situation is assessed under the same conditions as in the case of the other fundamental freedoms: the consideration of the aim pursued by the national provisions at issue[37] as well as their purpose and content.[38]

70. Should the Court take the view that the 'arbitrary discrimination'[39] prohibited under Article 65(3) TFEU is to be equated with the normal discrimination prohibited under the other fundamental freedoms in tax law, the abovementioned particularities of the free movement of capital in relation to the tax law of the Member States must, however, be taken into account at the latest when weighing them up in the context of the examination of proportionality.

71. In this respect, the amendment in the Maastricht Treaty[40] by which the current Article 65 TFEU was inserted has, in my opinion, lowered the level of protection afforded by the free movement of capital against restrictions based on tax legislation. Consequently, the free movement of capital must be attributed less weight than the other fundamental freedoms when weighed against the differentiation objectives of the Member States in such cases.[41] In other words, a restriction on the free movement of capital can be justified more easily by tax law provisions that are linked to residency than, for example, a restriction on the freedom of establishment. I will return to this in the context of the examination of proportionality.

[35] Judgment of 14 February 1995, *Schumacker* (C-279/93, EU:C:1995:31, paragraph 31), but also confirmed in the judgments of 22 December 2008, *Truck Center* (C-282/07, EU:C:2008:762, paragraph 38), and of 5 July 2005, *D.* (C-376/03, EU:C:2005:424, paragraph 26).

[36] Judgments of 21 June 2018, *Fidelity Funds and Others* (C-480/16, EU:C:2018:480, paragraph 51); of 2 June 2016, *Pensioenfonds Metaal en Techniek* (C-252/14, EU:C:2016:402, paragraph 49); and of 10 May 2012, *Santander Asset Management SGIIC and Others* (C-338/11 to C-347/11, EU:C:2012:286, paragraph 28). In the judgment of 26 February 2019, *N Luxembourg 1 and Others* (C-115/16, C-118/16, C-119/16 and C-299/16, EU:C:2019:134, paragraph 162 et seq.), the Court even takes the view that the exclusion of a cash-flow advantage in a cross-border situation when it is granted in an equivalent situation on national territory already results in a restriction of the free movement of capital. However, withholding tax results in a cash-flow disadvantage per se compared to a (subsequent) assessment, even if that disadvantage is reduced by advance payments.

[37] Judgments of 2 June 2016, *Pensioenfonds Metaal en Techniek* (C-252/14, EU:C:2016:402, paragraph 48), and of 8 November 2012, *Commission* v *Finland* (C-342/10, EU:C:2012:688, paragraph 36 and the case-law cited).

[38] Judgments of 2 June 2016, *Pensioenfonds Metaal en Techniek* (C-252/14, EU:C:2016:402, paragraph 48), and of 10 May 2012, *Commission* v *Estonia* (C-39/10, EU:C:2012:282, paragraph 51).

[39] The existence of a 'disguised restriction' within the meaning of Article 65(3) TFEU can most likely be ruled out in the case of a provision that is linked to the seat of an undertaking.

[40] Treaty on European Union of 7 February 1992 (OJ 1992, C 191, p. 1).

[41] See my Opinion in *Q* (C-133/13, EU:C:2014:2255, point 48) and Kokott, J., *Das Steuerrecht der Europäischen Union*, Munich 2018, § 3, end of paragraph 94.

2. Comparability of domestic and foreign situations

72. As stated above, 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. In that respect, only the relevant distinguishing criteria established by the legislation in question must be taken into account in determining whether the difference in treatment resulting from that legislation reflects situations which are objectively different.[42]

73. The taxation technique in the present case is tied to a distinguishing criterion that is based, in essence, on the seat of the UCITS to which the dividends are distributed. It must therefore be ascertained whether, in the light of the objective, and the purpose and content of the legislation at issue in the main proceedings as well, resident and non-resident UCITS are in a comparable situation.

74. In that respect, it must be noted that the taxation affecting resident UCITS has a different purpose from that applied to non-resident UCITS. Thus, whereas the former are taxed on the basis of their total assets, calculated on the basis of their total net book value, to which a standard tax rate is applied, irrespective of the actual receipt of dividends in the course of the tax year at issue, the latter are taxed only on the dividends received in Portugal in that tax year.

75. This special taxation technique clearly results from the special purpose of a UCITS. The latter serves to enable private investors to invest money in the securities market without an increased administrative burden and thereby to benefit from special protection (see points 52 and 53 above).

76. However, a direct investor would also only be charged with income tax at the point at which the dividend is actually distributed to him or her. However, in order to participate in the appreciation of the asset stock until then, Portugal has clearly opted for a corresponding special tax that subjects the assets of a resident UCITS in their entirety to a flat-rate tax four times a year, irrespective of whether they generate income, in particular dividends. This ensures lower but continuous tax revenues for Portugal without there being a need to wait for a distribution to the investor. From the point of view of taxation according to performance, stamp duty tends to disadvantage resident UCITS because they bear a tax burden even if they do not earn any income. This is probably also the reason for the nominally very low rate of stamp duty. The non-resident UCITS, on the other hand, is taxed only if its financial performance increases due to the dividend payment – but at a nominally much higher rate.

77. Thus, the statements already made by the Court in *Pensioenfonds Metaal en Techniek* must apply in this respect also.[43] Such taxation of resident UCITS is levied by Portugal, in its capacity as the State of residence of those UCITS, having by virtue of that capacity taxation powers over their total income – and also over all their assets in the present case.

78. As is clear from the case-law of the Court, the view is to be taken as regards wealth tax that the situation of a non-resident is different from that of a resident in so far as not only the major part of the latter's income but also the major part of his or her wealth is normally concentrated in the State where he or she has his or her seat.[44] It follows that a taxpayer who holds only a minor part

[42] Judgments of 2 June 2016, *Pensioenfonds Metaal en Techniek* (C-252/14, EU:C:2016:402, paragraph 49), and of 10 May 2012, *Santander Asset Management SGIIC and Others* (C-338/11 to C-347/11, EU:C:2012:286, paragraph 28).

[43] Judgment of 2 June 2016, *Pensioenfonds Metaal en Techniek* (C-252/14, EU:C:2016:402, paragraph 55 et seq.).

[44] Judgment of 5 July 2005, *D.* (C-376/03, EU:C:2005:424, paragraph 37).

of his or her wealth in a Member State other than the State where he or she is resident is not, as a rule, in a situation comparable to that of residents of that other Member State.[45] This most likely also applies to a UCITS.

79. By contrast, as regards the applicant resident in Germany, Portugal has, in accordance with the bilateral double taxation convention entered into with Germany, only the power to tax income from the assets of that UCITS which are situated in Portugal. Thus, Portugal taxes the dividends received by the non-resident UCITS in its capacity as the source country of those dividends.

80. Since, under that convention, Portugal has no power to tax the assets of non-resident UCITS, such as those at issue in the main proceedings, situated in its territory, the mere holding of some assets in Portugal cannot give rise to taxation of all the assets in that Member State.

81. In those circumstances, the aim pursued by the national legislation at issue in the main proceedings, that is to say, to implement exit taxation for investors of UCITS and to carry out only asset-based taxation of the UCITS up until the point at which dividends are distributed, cannot be attained in respect of non-resident UCITS.

82. Nor can that object be achieved through the taxation of dividends received by non-resident UCITS in accordance with the stamp duty method (that is to say, taxing the 'Portuguese' capital stock belonging to it). This ultimately results from the fact that, under the rules of the double taxation convention with Germany (and the general Organisation for Economic Cooperation and Development (OECD) standards), non-resident UCITS may be taxed only when dividends are distributed to them.

83. Consequently, it must be held that, in the light of the aim pursued by the national legislation, and of its purpose and content too, a non-resident UCITS is not in a situation comparable to that of a resident UCITS.

84. That outcome is also in line with the spirit of Article 65(1)(a) TFEU and the fact that there is no arbitrary unequal treatment prohibited under Article 65(3) TFEU. The stamp duty may indeed be criticised or considered strange for various reasons. However, due to the limited rights of taxation elaborated upon above, this difference in treatment of resident and non-resident UCITS is understandable and therefore not arbitrary within the meaning of Article 65(3) TFEU.

3. In the alternative: justifying circumstances for different treatment

85. Only in the event that the Court proceeds on the assumption that the situations are comparable is it necessary to examine whether the different taxation of resident and non-resident UCITS can be justified. According to the case-law of the Court, for national tax legislation to be capable of being regarded as compatible with the provisions of the Treaty concerning the free movement of capital, the difference in treatment must be justified by an overriding reason in the public interest.[46]

[45] See, expressly, judgment of 5 July 2005, *D.* (C-376/03, EU:C:2005:424, paragraph 38).

[46] Judgments of 21 June 2018, *Fidelity Funds and Others* (C-480/16, EU:C:2018:480, paragraph 48); of 2 June 2016, *Pensioenfonds Metaal en Techniek* (C-252/14, EU:C:2016:402, paragraph 47); of 1 December 2011, *Commission* v *Belgium* (C-250/08, EU:C:2011:793, paragraph 51); of 7 September 2004, *Manninen* (C-319/02, EU:C:2004:484, paragraph 29); and of 6 June 2000, *Verkooijen* (C-35/98, EU:C:2000:294, paragraph 43).

86. The justifying circumstances that enter into consideration in the present case are the preservation of the balanced allocation of the power to impose taxes between the Member States (see (a)), the avoidance of non-taxation (see (b)) and the preservation of the coherence of the Portuguese tax system (see (c)). Furthermore, the measure (*in casu*, the different taxation technique) must be proportionate, that is to say, appropriate to ensuring the attainment of its objective, and must not go beyond what is necessary to attain it (see (d)).

(a) The justifying circumstance of preserving the balanced allocation of the power to impose taxes

87. The balanced allocation of the power to impose taxes between Member States is a legitimate objective recognised by the Court.[47] That objective is an expression of the fiscal sovereignty of the Member States. This includes a State's right to protect its tax revenue, in particular with regard to profits generated in its territory (principle of territoriality) and a State's right to organise its system of tax law autonomously (principle of autonomy).

88. It is true that – as also emphasised by the Commission – the Court has already held that, where a Member State has chosen not to tax resident UCITS in receipt of nationally sourced dividends, it cannot rely on the argument that there is a need to ensure a balanced allocation between the Member States of the power to tax in order to justify the taxation of non-resident UCITS in receipt of such income.[48]

89. However, that group of cases is not relevant in the present case. As explained above, resident UCITS are not exempt from any tax in Portugal, but are merely taxed differently. Portugal has opted to tax resident UCITS quarterly on the total net book value assets at a relatively low tax rate. This is a decision that was not possible with regard to non-resident UCITS. In the case of such UCITS, Portugal could – at least according to the standards of international law – access only the income from the Portuguese source (see Article 10 of the OECD Model Tax Convention or Article 10 of the DTC between Germany and Portugal).

90. A different tax burden resulting from this is also covered by that justifying circumstance, as is any cash-flow disadvantage that may arise, which is inherent in any withholding tax that is withheld at the point of payment and does not arise only after the expiry of a certain tax period (*in casu*, three months).

[47] Judgments of 7 November 2013, *K* (C-322/11, EU:C:2013:716, paragraph 50); of 6 September 2012, *Philips Electronics* (C-18/11, EU:C:2012:532, paragraph 23); of 29 November 2011, *National Grid Indus* (C-371/10, EU:C:2011:785, paragraph 45); and of 13 December 2005, *Marks & Spencer* (C-446/03, EU:C:2005:763, paragraphs 45 and 46).

[48] Judgment of 21 June 2018, *Fidelity Funds and Others* (C-480/16, EU:C:2018:480, paragraph 71); of 10 April 2014, *Emerging Markets Series of DFA Investment Trust Company* (C-190/12, EU:C:2014:249, paragraph 99); 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 20 October 2011, *Commission* v *Germany* (C-284/09, EU:C:2011:670, paragraph 78, and the case-law cited).

(b) The justifying circumstance relating to the avoidance of non-taxation ('double non-taxation') in the context of efficient tax collection

91. It further follows from the case-law of the Court that the application of a deduction at source as a taxation technique to non-resident taxpayers – while resident taxpayers are not subject to such a deduction at source – can be justified by the need to ensure the efficiency of the collection of the tax.[49] The avoidance of non-taxation ultimately also serves the efficiency of the collection of the tax.

92. The provision of Article 14(3) of the Corporation Tax Code, which allows the applicant's corporation tax liability to arise only if and because it is not subject to any (or only a low) tax in the State of residence as a result of that dividend income, serves to avoid non-taxation.

93. The withholding at source of corporation tax on a dividend at the expense of a foreign UCITS also serves to facilitate efficient tax collection. It prevents in a simple and effective way, for example, fund structures that are designed in such a way that no State, that is to say, neither the source State nor the State of residence, can tax the dividend income at the level of the UCITS or at the level of its investors, thereby generating income that results in double non-taxation.

94. Although a withholding tax entails the risk of double taxation, the latter can be reduced or avoided by means of a double taxation convention – as in the present case.

95. The fight against tax evasion has also become a high priority for the European legislature. For that reason, it adopted the directive laying down rules against tax avoidance practices.[50] It now also provides for rules to combat double non-taxation, namely rules for taking action against hybrid mismatches (Article 9) and general anti-abuse rules (Article 6).

96. Finally, the second pillar of measures recommended by the OECD to combat tax avoidance also shows that combating tax evasion is to be regarded as one of the overriding reasons in the public interest.[51] In the foreword to its most recent report on the consultation process on its recommendations to combat tax avoidance, the OECD underlined that a minimum level of taxation contributes to ensuring fairness and equity between tax systems, providing a stable tax architecture for new business models, and guaranteeing government finances,[52] thereby emphasising its particular importance for the general public.

97. It is in line with this if the objective of ensuring a minimum level of taxation of a non-resident UCITS is regarded as an overriding reason in the public interest, which is also relevant in the present case – as shown by the provision of Article 14(3) of the Corporation Tax Code.

[49] Judgments of 22 November 2018, *Sofina and Others* (C-575/17, EU:C:2018:943, paragraph 67), and of 13 July 2016, *Brisal and KBC Finance Ireland* (C-18/15, EU:C:2016:549, paragraph 21); see, to that effect, judgments of 9 October 2014, *van Caster* (C-326/12, EU:C:2014:2269, paragraph 46); of 18 October 2012, *X* (C-498/10, EU:C:2012:635, paragraph 39); and of 3 October 2006, *FKP Scorpio Konzertproduktionen* (C-290/04, EU:C:2006:630, paragraph 35).

[50] Council Directive (EU) 2016/1164 of 12 July 2016 laying down rules against tax avoidance practices that directly affect the functioning of the internal market (OJ 2016 L 193, p. 1).

[51] Tax Challenges Arising from Digitalisation – Report on Pillar Two Blueprint, https://www.oecd-ilibrary.org/docserver/abb4c3d1-en.pdf?expires= 1607888140&id=id&accname=guest&checksum=DC286FCCE9A7B15A436A5E3297CD7D78.

[52] Tax Challenges Arising from Digitalisation – Report on Pillar Two Blueprint, Cover statement, https://www.oecd-ilibrary.org/docserver/abb4c3d1-en.pdf?expires= 1607888140&id=id&accname=guest&checksum=DC286FCCE9A7B15A436A5E3297CD7D78, p. 10 et seq.

(c) The justification related to maintaining the cohesion of the tax system

98. Portugal also submits that the application of the tax regime at issue in the main proceedings is necessary to maintain the coherence of the Portuguese tax system. According to Portugal, this is because there is a direct link between the exemption from withholding tax as regards dividends paid to resident UCITS and the quarterly taxation in accordance with the stamp duty.

99. The Court has already held that the need to maintain the coherence of a tax system can justify legislation that is liable to restrict fundamental freedoms.[53] However, for an argument based on such a justification to succeed, a direct link must be established, according to settled case--law, between the tax advantage concerned and the compensating of that advantage by a particular tax levy, with the direct nature of that link having to be examined in the light of the objective pursued by the rules in question.[54]

100. According to Portugal's observations, the aim of the stamp duty is to tax investors only at a later stage (in Portugal's words: according to the logic of an exit tax) and, up until that point, to tax the capital stock in the UCITS *irrespective* of whether dividends are received. That aim could not be achieved by taxing the dividends at the point at which they are distributed to the UCITS. Therefore, that stamp duty was introduced only for such UCITS and at the same time as the introduction, in 2015, of the exemption of capital income from corporation tax and withholding tax.

101. Contrary to the view that the Commission and the applicant appear to take, there is therefore a sufficient direct connection. This is demonstrated by the coordination of the two taxes in terms of timing and content. The fact that the offsetting of the advantage is not prescribed within the Corporation Tax Code, but as an equivalent substitute in another tax law by means of a different taxation technique, cannot call into question the existence of a direct connection. The views taken by the Commission and the applicant amount to a very formal consideration of the justifying circumstance of preserving the coherence of the tax system. However, this formal view fails to recognise that the justifying circumstance does not concern only the coherence of the individual tax law, but the coherence of the tax system (régime fiscale)[55] as such.

102. However, a tax system may well consist of several different types of tax and taxation methods. If these different advantages and disadvantages are therefore connected with each other in terms of content – which is demonstrated quite clearly in the present case by the legislative history of the extension of the stamp duty when the Statute of Tax Benefits was introduced – it cannot matter whether the direct advantage and disadvantage are provided for in the same law or 'merely' in the same tax system.

[53] Judgments of 21 June 2018, *Fidelity Funds and Others* (C-480/16, EU:C:2018:480, paragraph 79); of 10 May 2012, *Santander Asset Management SGIIC and Others* (C-338/11 to C-347/11, EU:C:2012:286, paragraph 50); and of 23 October 2008, *Krankenheim Ruhesitz am Wannsee-Seniorenheimstatt* (C-157/07, EU:C:2008:588, paragraphs 43 and 44).

[54] Judgments of 21 June 2018, *Fidelity Funds and Others* (C-480/16, EU:C:2018:480, paragraph 80); 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 27 November 2008, *Papillon* (C-418/07, EU:C:2008:659, paragraph 44).

[55] See, at least also in the German translation of the more recent case-law: judgments of 21 June 2018, *Fidelity Funds and Others* (C-480/16, EU:C:2018:480, paragraph 83 et seq.); of 12 June 2018, *Bevola and Jens W. Trock* (C-650/16, EU:C:2018:424, paragraph 51); of 21 December 2016, *Commission* v *Portugal* (C-503/14, EU:C:2016:979, paragraph 62); of 30 June 2016, *Feilen* (C-123/15, EU:C:2016:496, paragraph 29); and of 17 December 2015, *Timac Agro Deutschland* (C-388/14, EU:C:2015:829, paragraph 45).

(d) Safeguarding the principle of proportionality

103. Since the justifying circumstances of preserving the balanced allocation of the power to impose taxes, efficient tax collection to avoid non-taxation and maintaining the coherence of the tax system are applicable, it is necessary to examine whether the restriction of the possibility of obtaining an exemption from withholding tax only to UCITS formed in Portugal is appropriate in the specific case and does not go beyond what is necessary[56] to attain those objectives. It seems to me that this is the case.

104. On the one hand, with regard to the dividend payments received, an equally appropriate form of taxation other than by means of a withholding tax deduction is not conceivable in the present case in view of the lack of fiscal autonomy with regard to the total net assets of non-resident UCITS. This is already demonstrated by the fact that the third sentence of Article 10(2) of the OECD Model Tax Convention confers on the source State not only the right to tax the distributing corporation but also a right to tax the recipient of dividends. Indeed, it follows that at least the OECD States proceed on the assumption that the taxation of those dividends by the source State, *in addition to* the taxation of the profits of the Portuguese undertaking, is an appropriate and necessary means of distributing tax revenue appropriately between States.

105. Taxation of the entire net assets of a non-resident UCITS at its request (option) may be equally suitable with regard to the resulting double taxation, but is not a less severe means. It is therefore not necessary to address here the question rightly raised by Advocate General Hogan[57] as to whether the case-law of the Court,[58] according to which the existence of an option is in any case not suitable to prevent unequal treatment, should be upheld.

106. It is also unclear whether an analogous but limited taxation of the capital stock of non-resident UCITS – limited to the net value of the Portuguese shareholdings of the resulting retained dividends – is a less severe means. This is because that would require a non-resident UCITS to prepare its balance sheets in accordance with Portuguese law in order to determine a corresponding total net book value. In any case, such a means would not be equally effective, as the tax registration and monitoring of non-resident UCITS is significantly more difficult than deducting tax at source at the point at which dividends are paid to a non-resident UCITS.

107. Consequently, it is solely a matter of weighing the applicant's freedom of movement of capital against the abovementioned overriding reasons of public interest in this specific case. In that context, it is first necessary – as explained above in point 64 et seq. – to take into account the fact that the free movement of capital must be attributed less weight when weighed against the differentiation objectives of the Member States. On the other hand, the guarantee of a minimum level of taxation, the effective enforcement of taxation claims and an appropriate allocation of the power to impose taxes are among the central public interests, as they serve to finance the State budget. Without a sufficient tax basis, the State cannot perform its tasks and fulfil its functions.

[56] Judgments of 21 June 2018, *Fidelity Funds and Others* (C-480/16, EU:C:2018:480, paragraph 64), of 24 November 2016, *SECIL* (C-464/14, EU:C:2016:896, paragraph 56), of 17 December 2015, *Timac Agro Deutschland* (C-388/14, EU:C:2015:829, paragraph 29).

[57] Opinion of Advocate General Hogan in *Autoridade Tributária e Aduaneira* (Tax on capital gains from immovable property) (C-388/19, EU:C:2020:940, point 73).

[58] See judgments of 18 March 2010, *Gielen* (C-440/08, EU:C:2010:148, paragraphs 49 to 54, with very curious reasoning), and of 8 June 2016, *Hünnebeck* (C-479/14, EU:C:2016:412, paragraph 42). See also, however, the judgment of 12 June 2018, *Bevola and Jens W. Trock* (C-650/16, EU:C:2018:424, paragraph 25 et seq.), where the Court at least considers whether an option could call into question the difference in treatment.

108. In the present case, these legal interests are to be weighed against only slight disadvantages for the applicant. Either – as with investors resident in Germany in the present case – the Portuguese tax burden is offset against their tax liability so that they are not deterred from investing, or, in the worst case, there is economic double taxation (on the one hand, Portuguese corporation tax of 15% at the level of the UCITS and, on the other hand, foreign income tax at the level of the foreign shareholder). This does make investing in non-resident UCITS by way of shareholdings in Portuguese undertakings somewhat less attractive.

109. However, first, such double taxation is to be eliminated by means of a common agreement between the States concerned and not unilaterally via the fundamental freedoms at the expense of Portugal. Second, that disadvantage is in any case mitigated, if not entirely offset, by the lack of a quarterly stamp duty charge.

110. Added to that is the fact that the applicant is taxed according to the financial performance of its income, that is to say, there is no taxation of the substance – unlike in the case of a resident UCITS. In addition, taxation by Portugal is tied to the fact that the applicant is not taxed or is taxed at only a low rate in the State of residence. Furthermore, the tax burden is already reduced by the double taxation convention between Germany and Portugal.

111. After due consideration of all these points, the justifying circumstances of the preservation of the balanced allocation of the power to impose taxes by the Member States, the effective enforcement of taxation claims and the preservation of the coherence of the Portuguese tax system therefore outweigh the applicant’s interest in being exempt from corporation tax like a resident UCITS and at the same time not being burdened with stamp duty – unlike a resident UCITS.

(e) Conclusion of the examination of justification

112. Consequently, the restriction of the freedom of movement of capital that might be brought about by the Portuguese provisions taken together (corporation tax liability of non-resident UCITS in the absence of taxation abroad under Article 14(3) of the Corporation Tax Code, corporation tax exemption of resident UCITS under Article 22 of the Statute of Tax Benefits with simultaneous taxation in accordance with the Law on stamp duty) is in any event justified.

VI. Conclusion

113. I therefore propose that the questions referred by the Tax Arbitration Tribunal be answered as follows:

Article 63 TFEU does not preclude national legislation under which withholding tax is levied on dividends distributed by a resident company where those dividends are distributed to a non-resident collective investment undertaking which is not subject to corporation tax in the State of residence. This also applies if no corporation tax is levied on those dividends when they are distributed to a resident collective investment undertaking, but another taxation technique is applied which is intended to ensure that no corresponding income tax is levied until they are redistributed to the investor, and, until that point, a quarterly taxation of the total net assets of the resident collective investment undertaking is levied instead.