Reports of Cases

JUDGMENT OF THE COURT (Second Chamber)

17 March 2022*

(Reference for a preliminary ruling – Article 63 TFEU – Free movement of capital – Taxation of dividends paid to undertakings for collective investment (UCIs) – Resident and non-resident UCIs – Difference in treatment – Withholding tax imposed solely on dividends paid to non-resident UCIs – Comparability of the situations – Assessment – Account to be taken of the tax regime applicable to shareholders or unitholders in UCIs and of whether resident undertakings are subject to other taxes – None)

In Case C-545/19,

REQUEST for a preliminary ruling under Article 267 TFEU from the Tribunal Arbitral Tributário (Centro de Arbitragem Administrativa – CAAD) (Tax Arbitration Tribunal (Centre for Administrative Arbitration – CAAD), Portugal), made by decision of 9 July 2019, received at the Court on 17 July 2019, in the proceedings

AllianzGI-Fonds AEVN

v

Autoridade Tributária e Aduaneira,

THE COURT (Second Chamber),

composed of A. Arabadjiev, President of the First Chamber, acting as President of the Second Chamber, I. Ziemele, T. von Danwitz, P.G. Xuereb (Rapporteur) and A. Kumin, Judges,

Advocate General: J. Kokott,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– AllianzGI-Fonds AEVN, by J. Lobato Heitor and R. Pereira de Abreu, advogadas, and by F. Cabral Matos, advogado,

– the Portuguese Government, by L. Inez Fernandes, A. de Almeida Morgado, A. Homem and P. Barros da Costa, acting as Agents,

* Language of the case: Portuguese.

– the European Commission, by W. Roels and G. Braga da Cruz, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 6 May 2021,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Articles 56 and 63 TFEU.

2 The request has been made in proceedings between AllianzGI-Fonds AEVN and the Autoridade Tributária e Aduaneira (Tax and Customs Authority, Portugal) concerning the annulment of acts by which that authority withheld corporation tax at source relating to 2015 and 2016.

Portuguese law

3 Article 22 of the Estatuto dos Beneficios Fiscais (Statute of Tax Benefits), in the version applicable to the dispute in the main proceedings ('the EBF'), provided:

'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, 8 and 10 of the [Código do Imposto sobre o Rendimento das Pessoas Singulares (Personal Income Tax Code)], unless it comes from undertakings whose residence or seat is in a country, territory or region where significantly more favourable tax rules apply and which is included on the list approved by Order of the Government Minister responsible for finance and revenue; any costs in connection with such income or provided for in Article 23 A of the [Código do Imposto sobre o Rendimento das Pessoas Coletivas (Corporation Tax Code)]; and income – including discounts – and costs in respect of management fees or other fees paid to the undertakings referred to in paragraph 1.

…

6 – The undertakings referred to in paragraph 1 shall be exempt from the *derrama municipal* (payment of the municipal component) and the *derrama estadual* (national surcharge [on corporation tax]).

7 – In the case of mergers, demergers and subscriptions in kind involving any undertakings referred to in paragraph 1, including those lacking legal personality, Articles 73, 74, 76 and 78 of the Corporation Tax Code shall apply, *mutatis mutandis*; the rules on contributions of assets in Article 73(3) of the Corporation Tax Code shall apply to subscriptions in kind.

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

…

10 – 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.

…

14 – The provisions in paragraph 7 shall apply to the transactions referred to in that paragraph which involve undertakings whose seat, effective management or registered office is in Portuguese territory or in another Member State of the European Union or in the European Economic Area and, in the latter case, provided that there is an administrative cooperation obligation over the exchange of information and assistance in the recovery of taxes equivalent to that which exists within the European Union.

15 – The undertakings that manage the investment companies or funds referred to in paragraph 1 shall be jointly and severally liable for the tax debts of the investment companies or funds which they manage.'

4 Article 22-A of the EBF provides:

'1 – Without prejudice to the provisions of paragraph 3, income from shares or units in undertakings subject to the regime provided for in the preceding article shall be subject to personal income tax or corporation tax in accordance with the following provisions:

(a) in the case of income distributed to beneficiaries residing in Portuguese territory or in the case of income attributable to a permanent establishment situated in that territory, by means of a withholding tax:
   (i) at the rate laid down in Article 71(1) of the Personal Income Tax Code, where the beneficiaries are subject to personal income tax, the withholding tax being definitive where the income is obtained outside a commercial, industrial or agricultural activity;
   (ii) at the rate laid down in Article 94(4) of the Corporation Tax Code, where the beneficiaries are subject to that tax, the withholding tax constituting an advance on tax, unless the taxpayer benefits from an exemption from personal income tax which excludes income from capital, in which case it is definitive.

…

(c) in the case of income from shares in real estate investment funds and shares in real estate investment companies the beneficiaries of which are non-resident taxable persons who have no permanent establishment in Portuguese territory to which that income is attributable, by means of a definitive withholding tax at the rate of 10%, in the case of distributed income or income arising from share redemption operations, or specifically at the rate of 10%, in other cases;

(d) in the case of income from shares in investment funds in transferable securities or shares in investment companies subject to the scheme provided for in the preceding article, including the gains arising from the repurchase or liquidation of such shares, the beneficiaries of which are not resident in Portuguese territory and have no permanent establishment there to which that income is attributable, that income shall be exempt from personal income tax and from corporation tax;

(e) in other cases, in accordance with the provisions laid down in the Personal Income Tax Code or the Corporation Tax Code.

2 – The provisions in subparagraphs (a)(i) and (b) of the preceding paragraph shall apply without prejudice to an option for taxation in respect of the whole of the income in the case of income received by natural persons liable to income tax outside a commercial, industrial or agricultural activity, in which case the withholding tax shall constitute an advance on income tax in accordance with Article 78 of the Personal Income Tax Code.

3 – The provisions of paragraph 1(c) and (d) shall not apply and income shall be taxed in accordance with the provisions of paragraph 1(a), (b) or (e) where:

(a) the beneficiaries reside in a country, territory or region subject to a tax regime which is clearly more favourable, according to the list approved by decree of the Government Minister responsible for finance;

(b) the beneficiaries are non-resident entities which are owned, directly or indirectly, at more than 25% by undertakings or natural persons resident in the national territory.

…

13 – For the purposes of applying that regime, income from shares in real estate investment funds and shares in real estate investment companies, including gains arising as a result of a transfer for consideration, redemption or liquidation of such shares, shall be treated as income from immovable property.'

5 Article 3(1) of the Corporation Tax Code, in the version applicable to the dispute in the main proceedings, was worded as follows:

'Corporation tax shall be payable on:

…

(d) income in the various categories to which personal income tax applies, and capital gains obtained by the undertakings listed in paragraph 1(c) of the previous article which do not have a permanent establishment or which have a permanent establishment but cannot attribute the said gains to that establishment.'

6 Article 4 of that code states:

'2 – Legal persons and other undertakings which do not have either their seat or their centre of effective management in Portuguese territory shall be liable for corporation tax only in respect of the income that they obtain in the said territory.

3 – For the purposes of the previous paragraph, income obtained in Portuguese territory shall mean income attributable to a permanent establishment situated in Portuguese territory and income which does not satisfy this requirement but which is listed below:

…

(c) the categories of income listed below where the person making the payment has his, her or its residence, seat or centre of effective management in Portuguese territory or where payment of the income is attributable to a permanent establishment situated in Portuguese territory:

…

(3) other income from capital;

…'

7 Article 87(4) of that code provides:

'The rate of corporation tax applicable to income obtained by undertakings which do not have their seat or their centre of effective management in Portuguese territory and which do not have a permanent establishment in Portuguese territory to which they can attribute such income shall be 25% …'

8 Under Article 88(11) of that code:

'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.'

9 Article 94 of the Corporation Tax Code provides:

'1 – Corporation tax shall be withheld at source in respect of the following types of income obtained in Portuguese territory:

…

(c) income on capital not included within the previous subparagraphs and income from property, in accordance with the definitions of those concepts established for personal income tax purposes, where the person liable for payment of the said income is liable for corporation tax or where the income constitutes an expense in connection with the business or professional activities of persons liable for personal income tax who maintain accounts or are required to maintain accounts;

…

3 – Sums withheld at source are classed as payments on account of the tax, except in the circumstances set out below, where they constitute full discharge of liability:

…

(b) where the owner of the income, with the exception of property income, is a non-resident undertaking which does not have a permanent establishment in Portuguese territory or which has a permanent establishment there but cannot attribute the income to that establishment.

…

5 – The previous paragraph shall not apply to sums withheld which, under paragraph 3, constitute full discharge of liability, to which the tax rates established in Article 87 shall apply.

6 – The requirement to withhold corporation tax at source arises on the date on which the same requirement arises under the Code governing personal income tax or, failing that, on the date on which the income is made available to the beneficiary. The sums withheld must be paid to the Government before the 20th day of the month following that in which the withholding was effected, in accordance with the terms laid down in the Code governing personal income tax or its implementing regulations.'

10 Paragraph 29 of the general table in the [Código do Imposto do Selo (Stamp Duty Code)], in the version applicable to the dispute in the main proceedings, provided:

'29 – Net book value of collective investment undertakings that come within Article 22 of the EBF:

29.1 – collective investment undertakings that invest solely in money-market instruments and deposits: 0.0025% of the net book value for each quarter;

29.2. – other collective investment undertakings: 0.00125% of the net book value for each quarter.'

The dispute in the main proceedings and the questions referred for a preliminary ruling

11 AllianzGI-Fonds AEVN is an open-ended undertaking for collective investment (UCI), formed under German legislation and having its seat in Germany. It is managed by a management company which also has its seat in Germany. That company is neither resident nor has a permanent establishment in Portugal.

12 AllianzGI-Fonds AEVN is resident for tax purposes in Germany and is exempt from corporation tax in that Member State under German legislation. That tax status prevents it from recovering taxes paid abroad in the form of a tax credit in respect of international double taxation or from requesting any repayment of those taxes.

13 In 2015 and 2016 AllianzGI-Fonds AEVN held shares in various companies resident in Portugal. The dividends which it received on that basis during those two years were taxed, in accordance with Article 87(4)(c) of the Corporation Tax Code, at source in full discharge of its liability at a rate of 25%, for a total amount of EUR 39 371.29.

14 For 2015, AllianzGI-Fonds AEVN obtained a refund of EUR 5 065.98 in accordance with the double taxation convention concluded between the Portuguese Republic and the Federal Republic of Germany, which establishes a maximum tax rate of 15% for dividends.

15 On 29 December 2017, AllianzGI-Fonds AEVN lodged an administrative appeal with the Tax and Customs Authority against the acts of the latter withholding corporation tax at source for 2015 and 2016. It requested that those acts be annulled on the ground that they infringed EU law, and it also sought a ruling that it was entitled to a refund of the tax improperly paid in Portugal. That appeal was dismissed by decision of 13 November 2018.

16 On 12 February 2019 AllianzGI-Fonds AEVN brought an action before the referring court, the Tribunal Arbitral Tributário (Centro de Arbitragem Administrativa – CAAD) (Tax Arbitration Tribunal (Centre for Administrative Arbitration – CAAD), Portugal) seeking annulment of the acts withholding at source the remaining amount of EUR 34 305.31.

17 Before the referring court, AllianzGI-Fonds AEVN argues that, in 2015 and 2016, UCIs formed and operating in accordance with Portuguese legislation were subject to a more favourable tax regime than that to which it was subject in Portugal, in so far as, with regard to dividends paid by companies formed in Portugal, those undertakings were exempt, under Article 22(3) of the EBF, from corporation tax. AllianzGI-Fonds AEVN submits that, since it is taxed at a rate of 25% on dividends paid to it by companies established in Portugal, it is subject to discriminatory treatment prohibited by Article 18 TFEU and to a restriction on the free movement of capital prohibited by Article 63 TFEU.

18 The Tax and Customs Authority, for its part, asserts that the Portuguese tax regime applicable to UCIs formed and operating in accordance with national legislation and that applicable to UCIs formed and operating in Germany are not, by their nature, comparable, given that the first of those regimes also does not preclude the taxation of dividends payable by the undertakings which it covers, whether by means of stamp duty or the specific tax provided for in Article 88(11) of the Corporation Tax Code. In view of the fact that dividends are taxed according to different procedures, there is nothing to indicate that the tax burden on dividends received by UCIs formed and operating in accordance with Portuguese legislation is lower than that imposed on dividends received in Portugal by an undertaking such as AllianzGI-Fonds AEVN. The Tax and Customs Authority adds that it has also not been shown that the portion of the tax not recovered by AllianzGI-Fonds AEVN will not be recoverable by its investors.

19 The referring court asks whether, by exempting from corporation tax dividends paid by companies formed in Portugal to UCIs which have their seat in that Member State and have been formed and are operating in accordance with Portuguese legislation, while at the same time taxing at the rate of 25% dividends paid by such companies to UCIs formed in another Member State of the European Union and thus not formed or operating in accordance with national legislation, the Portuguese tax regime is contrary to Article 56 TFEU on the freedom to provide services or to Article 63 TFEU on the free movement of capital.

20 In those circumstances, the Tribunal Arbitral Tributário (Centro de Arbitragem Administrativa – CAAD) (Tax Arbitration Tribunal (Centre for Administrative Arbitration)) decided to stay the proceedings and to refer 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 [EBF], which provide for a withholding to be made, in full discharge of liability, from dividends distributed by Portuguese companies and received by [UCIs] not resident in Portugal and established in other EU [Member States], whereas [UCIs] 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 [UCIs] and in making the possibility of obtaining an exemption from such a withholding at source available only to resident [UCIs], does the national legislation at issue in the main proceedings treat dividends paid to non-resident [UCIs] 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) [UCIs] and for (ii) the shareholders or unitholders in [UCIs] is discriminatory, are the tax rules that apply to the shareholders or unitholders in the [UCIs] relevant? Or, bearing in mind that the tax rules for resident [UCIs] 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 [UCIs] resident in Portugal and those not resident in Portugal permissible, having regard to the fact that natural or legal persons resident in Portugal who hold shares or units in [UCIs] (whether resident or non-resident) are, in both cases, subject in the same way to tax on income distributed by [UCIs] (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 [UCIs] 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 [UCIs]? 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 [UCIs], including any specific taxes?’

The request to have the oral procedure reopened

21 Following the delivery of the Advocate General’s Opinion, AllianzGI-Fonds AEVN, by a document lodged at the Court Registry on 21 July 2021, requested that the oral part of the procedure be reopened, pursuant to Article 83 of the Rules of Procedure of the Court of Justice.

22 In support of its request, AllianzGI-Fonds AEVN submits, in essence, that the Advocate General’s Opinion, in so far as it examines the question of the applicability, in the case in the main proceedings, of Article 14(3) of the Código do Imposto sobre o Rendimento das Pessoas Coletivas (Corporation Tax Code), is based on new elements not yet discussed by the parties. AllianzGI-Fonds AEVN refers, in particular, to points 10, 20 and 92 of that Opinion. It also challenges both the Advocate General’s interpretation of the alleged need to avoid non-taxation of dividends distributed by non-resident UCIs and the analysis carried out by her in the light of the method of taxation of dividends by means of stamp duty.

23 In that regard, it must be recalled, first, that the Statute of the Court of Justice of the European Union and the Rules of Procedure of the Court make no provision for the interested parties referred to in Article 23 of the Statute to submit observations in response to the Advocate General's Opinion (judgment of 3 March 2020, *Tesco-Global Áruházak*, C-323/18, EU:C:2020:140, paragraph 22 and the case-law cited).

24 Second, under the second paragraph of Article 252 TFEU, the Advocate General, acting with complete impartiality and independence, is to make, in open court, reasoned submissions on cases which, in accordance with the Statute of the Court of Justice of the European Union, require the Advocate General's involvement. The Court is not bound either by the Advocate General's submissions or by the reasoning which led to those submissions. Consequently, a party's disagreement with the Opinion of the Advocate General, irrespective of the questions that he or she examines in the Opinion, cannot in itself constitute a ground justifying the reopening of the oral procedure (judgment of 3 March 2020, *Tesco-Global Áruházak*, C-323/18, EU:C:2020:140, paragraph 23 and the case-law cited).

25 Nevertheless, the Court may at any time, after hearing the Advocate General, order the reopening of the oral part of the procedure, in accordance with Article 83 of its Rules of Procedure, in particular if it considers that it lacks sufficient information or where the case must be decided on the basis of an argument which has not been debated between the interested parties (judgment of 3 March 2020, *Tesco-Global Áruházak*, C-323/18, EU:C:2020:140, paragraph 24 and the case-law cited).

26 In the present case, however, the Court takes the view, after hearing the Advocate General, that it has available to it, at the end of the written procedure and having regard, first, to the information provided by the referring court in response to the Court's request for additional information and, second, to the answers provided by the parties to the Court's written questions, all the information necessary to give a ruling. Moreover, the present case does not have to be decided on the basis of an argument which has not been debated between the parties and the request to have the oral part of the procedure reopened does not reveal any new fact capable of influencing the decision to be taken.

27 Moreover, having regard to the case-law cited in paragraph 24 of the present judgment, the objections of AllianzGI-Fonds AEVN concerning the assessment in the Advocate General's Opinion on the alleged need to avoid the non-taxation of dividends distributed by non-resident UCIs and the method of taxing dividends by means of stamp duty cannot justify the reopening of the oral part of the procedure.

28 In those circumstances, the Court considers, after hearing the Advocate General, that there is no need to order the reopening of the oral part of the procedure.

Consideration of the questions referred

29 By its five questions, which it is appropriate to examine together, the referring court asks, in essence, whether Articles 56 and 63 TFEU must be interpreted as precluding legislation of a Member State under which dividends distributed by resident companies to a non-resident UCI are subject to a withholding tax, whereas dividends distributed to a resident UCI are exempt from such a withholding tax. The referring court is uncertain, first, whether that different tax treatment depending on the place of residence of the beneficiary undertaking is capable of being

justified by the fact that resident UCIs are subject to a different taxation technique and, second, whether the assessment of the comparability of the situations of resident and non-resident UCIs for the purposes of determining whether there is an objective difference between them, such as to justify the difference in treatment introduced by the legislation of that Member State, must be carried out solely at the level of the investment vehicle or whether it must also take into account the situation of the shareholders or unitholders.

The applicable freedom of movement

30 As the questions referred for a preliminary ruling concern both Article 56 TFEU and Article 63 TFEU, it is necessary to establish, as a preliminary point, whether, and, if so, to what extent, national legislation such as that at issue in the main proceedings is liable to affect the exercise of the freedom to provide services and/or the free movement of capital.

31 In that regard, it follows from settled case-law that, in order to determine whether national legislation comes within the scope of one or other of the fundamental freedoms guaranteed by the FEU Treaty, the purpose of the legislation concerned must be taken into consideration (see, to that effect, judgments of 21 June 2018, *Fidelity Funds and Others*, C-480/16, EU:C:2018:480, paragraph 33 and the case-law cited, and of 3 March 2020, *Tesco-Global Áruházak*, C-323/18, EU:C:2020:140, paragraph 51 and the case-law cited).

32 The dispute in the main proceedings concerns a request for annulment of acts withholding tax for 2015 and 2016 on dividends paid to the applicant in the main proceedings by companies established in Portugal and the compatibility with EU law of national legislation which reserves the possibility of benefiting from the exemption from such a withholding tax solely to UCIs formed and operating in accordance with Portuguese legislation or whose management company operates in Portugal through a permanent establishment.

33 Since the national legislation at issue in the main proceedings thus concerns the tax treatment of dividends received by UCIs, the situation at issue in the main proceedings must be regarded as coming within the scope of the free movement of capital (see, by analogy, judgment of 21 June 2018, *Fidelity Funds and Others*, C-480/16, EU:C:2018:480, paragraphs 35 and 36).

34 Furthermore, on the assumption that the legislation at issue in the main proceedings has the effect of prohibiting, impeding or rendering less attractive the activities of a UCI established in a Member State other than the Portuguese Republic, where it lawfully provides similar services, such effects are the unavoidable consequence of the tax treatment of the dividends paid to that non-resident undertaking and do not justify a separate examination of the questions referred for a preliminary ruling in the light of the freedom to provide services. That freedom appears here to be secondary to the free movement of capital and may be considered together with it (see, by analogy, judgment of 21 June 2018, *Fidelity Funds and Others*, C-480/16, EU:C:2018:480, paragraph 37).

35 In the light of the foregoing considerations, it is necessary to examine the national legislation at issue in the main proceedings exclusively in the light of Article 63 TFEU.

The existence of a restriction on the free movement of capital

36 It follows from the Court's settled case-law that the measures prohibited by Article 63(1) TFEU, as restrictions on the movement of capital, include those which are such as to discourage non-residents from making investments in a Member State or to discourage that Member State's residents from doing so in other States (see, inter alia, judgments of 2 June 2016, *Pensioenfonds Metaal en Techniek*, C-252/14, EU:C:2016:402, paragraph 27 and the case-law cited, and of 30 January 2020, *Köln-Aktienfonds Deka*, C-156/17, EU:C:2020:51, paragraph 49 and the case-law cited).

37 In the present case, it is common ground that the tax exemption provided for by the national legislation at issue in the main proceedings is granted to UCIs formed and operating in accordance with Portuguese legislation, whereas the dividends paid to UCIs formed in another Member State cannot benefit from that exemption.

38 By levying a withholding tax on the dividends paid to non-resident UCIs and granting to resident UCIs alone the possibility of obtaining exemption from that tax, the national legislation at issue in the main proceedings results in the dividends paid to non-resident UCIs being treated disadvantageously.

39 Such disadvantageous treatment may discourage, on the one hand, non-resident UCIs from investing in Portuguese companies and, on the other hand, investors resident in Portugal from acquiring shares in non-resident UCIs and, consequently, amounts to a restriction of the free movement of capital, prohibited, in principle, by Article 63 TFEU (see, by analogy, judgment of 21 June 2018, *Fidelity Funds and Others*, C-480/16, EU:C:2018:480, paragraphs 44 and 45 and the case-law cited).

40 That being the case, pursuant to Article 65(1)(a) TFEU, Article 63 TFEU is without prejudice to the right of Member States to apply the relevant provisions of their tax law which distinguish between taxpayers who are not in the same situation with regard to their place of residence or with regard to the place where their capital is invested.

41 In so far as that provision constitutes a derogation from the fundamental principle of the free movement of capital, it must be interpreted strictly. Consequently, 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 of 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]' (judgment of 29 April 2021, *Veronsaajien oikeudenvalvontayksikkö (Income paid by UCITS)*, C-480/19, EU:C:2021:334, paragraph 29 and the case-law cited).

42 The Court has also held that a distinction must, therefore, be made between the differences in treatment authorised under Article 65(1)(a) TFEU and the discrimination prohibited by Article 65(3) TFEU. Before national tax legislation can be regarded as compatible with the FEU Treaty provisions on the free movement of capital, the difference in treatment resulting from that legislation must concern situations which are not objectively comparable or must be

justified by an overriding reason in the public interest (judgment of 29 April 2021, *Veronsaajien oikeudenvalvontayksikkö (Income paid by UCITS)*, C-480/19, EU:C:2021:334, paragraph 30 and the case-law cited).

Whether the situations are objectively comparable

43 For the purposes of assessing whether the situations concerned are comparable, the referring court asks, first, whether the situation of the shareholders or unitholders must be taken into account in the same way as that of the UCIs and, second, whether it is relevant that the Portuguese tax regime includes certain taxes to which resident UCIs alone are subject.

44 The Portuguese Government submits, in essence, that the respective situations of resident and non-resident UCIs are not objectively comparable because the taxation of dividends received by those two categories of investment undertakings from companies resident in Portugal is governed by different taxation techniques – namely, first, such dividends are subject to withholding tax when paid to a non-resident UCI and, second, they are subject to stamp duty as well as to the specific tax provided for in Article 88(11) of the Corporation Tax Code when paid to a resident UCI.

45 That Government also states that it follows from Article 22-A of the EBF that dividends distributed by resident UCIs to shareholders or unitholders resident in Portuguese territory or which are attributable to a permanent establishment situated in that territory are taxed at the rate of 28% (where the beneficiaries are subject to personal income tax) or 25% (where the beneficiaries are subject to corporation tax), whereas dividends paid to shareholders or unitholders who do not reside in Portuguese territory and who do not have a permanent establishment there are, in principle, exempt from personal income tax and corporation tax (with some exceptions intended essentially to prevent abuse).

46 According to that Government, there is a close coherence between the taxation of the income of UCIs and that of shareholders or unitholders in those undertakings. Thus, the Portuguese model for the taxation of UCIs, which is ‘composite’ in nature, combines structurally the taxes imposed, first, on resident UCIs, namely stamp duty and the specific tax provided for in Article 88(11) of the Corporation Tax Code, and, second, on shareholders or unitholders in such undertakings, as noted in the preceding paragraph. Those various taxes, in so far as they are very well integrated with each other, each of which is indispensable to the coherence of the system of taxation established, must be regarded as a whole.

47 In addition, the Portuguese Government adds, in essence, that, in the assessment as to whether the situations concerned are comparable, the effects of the tax transparency which characterises the relationship between the applicant in the main proceedings and the shareholders or unitholders in it must not be disregarded, which would mean that the withholding tax levied in Portugal may be passed on immediately to the shareholders or unitholders who, not being exempt from tax, may offset, or even credit, their share of that withholding tax levied in Portugal against their tax liability in Germany.

48 Lastly, the Portuguese Government takes the view that, in so far as it freely chose not to operate in Portugal through a permanent establishment, the applicant in the main proceedings has excluded itself from any possible comparison with UCIs formed in Portugal, its situation being, in fact, comparable to that of other non-resident undertakings whose dividends received in Portugal are always taxed at a rate of 25%.

49 It is settled case-law that as soon as a Member State, either unilaterally or by way of a convention, imposes a charge to tax on the income not only of resident taxpayers but also of non-resident taxpayers obtained from dividends which they receive from a resident company, the situation of those non-resident taxpayers becomes comparable to that of the resident taxpayers (judgment of 22 November 2018, *Sofina and Others*, C-575/17, EU:C:2018:943, paragraph 47 and the case-law cited).

50 As regards the argument of the Portuguese Government set out in paragraph 44 of the present judgment, it must be recalled that, in the circumstances which gave rise to the judgment of 22 December 2008, *Truck Center* (C-282/07, EU:C:2008:762), the Court accepted that different taxation techniques should be applied to recipients of income from capital depending on whether they were resident or non-resident, since that difference in treatment relates to situations which are not objectively comparable (see, to that effect, judgment of 22 December 2008, *Truck Center*, C-282/07, EU:C:2008:762, paragraph 41).

51 Similarly, in the case which gave rise to the judgment of 2 June 2016, *Pensioenfonds Metaal en Techniek* (C-252/14, EU:C:2016:402), the Court held that the different treatment of the taxation of dividends paid to pension funds according to their status as resident or non-resident, resulting from the application to those respective funds of two different methods of taxation, was justified by the difference in situation between those two categories of taxpayers in the light of the objective pursued by the national legislation at issue in that case, and its purpose and content.

52 However, subject to verification by the referring court, the national legislation at issue in the main proceedings does not merely lay down detailed rules for the collection of tax which differ depending on the place of residence of the UCI receiving nationally sourced dividends, but provides, in fact, for the imposition of systematic taxation of those dividends only on non-resident undertakings (see, by analogy, judgment of 8 November 2012, *Commission v Finland*, C-342/10, EU:C:2012:688, paragraph 44 and the case-law cited).

53 In that connection, it should be noted, first, as regards stamp duty, that it is apparent both from the written observations submitted by the parties and from the referring court's reply to the Court's request for information that, because its basis of assessment is the net book value of UCIs, that stamp duty is a tax on assets, which cannot be treated as a corporation tax.

54 In addition, as the Advocate General observed in point 47 of her Opinion, in the case in the main proceedings, Portuguese tax legislation distinguishes, in the case of resident UCIs, income from retained capital and income from capital which is immediately redistributed, with only the first of those being included in the basis of assessment of that stamp duty. That aspect is sufficient, in itself, to distinguish the present case from that which gave rise to the judgment of 2 June 2016, *Pensioenfonds Metaal en Techniek* (C-252/14, EU:C:2016:402).

55 Even if the view is taken that that stamp duty may be treated in the same way as a dividend tax, a resident UCI may avoid such taxation of dividends by proceeding to their immediate distribution, whereas such a possibility is not open to a non-resident UCI.

56 Second, as regards the specific tax provided for in Article 88(11) of the Corporation Tax Code, it is apparent from the information provided by the tax authorities in the order for reference that, under that provision, that tax is levied on dividends received by resident UCIs only in the case where the shares to which the dividends relate have not remained in the hands of the same taxable person, without interruption, during the year preceding the date of their availability and which

were not retained for the duration necessary to complete that period. Thus, the tax provided for by that provision applies to nationally sourced dividends received by a resident UCI only in limited situations, with the result that it cannot be treated in the same way as the general tax applicable to nationally sourced dividends received by non-resident UCIs.

57 Consequently, the fact that non-resident UCIs are not subject to stamp duty and to the specific tax provided for in Article 88(11) of the Corporation Tax Code does not place them in a situation which is objectively different from that of resident UCIs with regard to the taxation of dividends from Portuguese sources.

58 Next, as regards the Portuguese Government's argument set out in paragraph 48 of the present judgment, it should be noted that, as the Commission stated in response to the written questions put by the Court, in the light of the freedom to provide services, under Article 56 TFEU, economic operators must be free to choose the means appropriate for pursuing their activities in a Member State other than that of their residence, whether or not they establish themselves permanently in that other Member State, as that freedom must not be restricted by discriminatory tax provisions.

59 Furthermore, in so far as the Portuguese Government's argument relates to the alleged need to take account of the situation of the shareholders or unitholders, it is clear from the Court's case-law that the comparability of a cross-border situation with a situation internal to the Member State concerned must be examined in the light of the objective pursued by the national provisions at issue (see, inter alia, judgment of 30 April 2020, *Société Générale*, C-565/18, EU:C:2020:318, paragraph 26 and the case-law cited), and the subject matter and content of those provisions (see, inter alia, judgment of 2 June 2016, *Pensioenfonds Metaal en Techniek*, C-252/14, EU:C:2016:402, paragraph 48 and the case-law cited).

60 Moreover, only the relevant distinguishing criteria established by the legislation concerned must be taken into account in determining whether the difference in treatment resulting from that legislation reflects an objective difference in situations (see, to that effect, judgment of 2 June 2016, *Pensioenfonds Metaal en Techniek*, C-252/14, EU:C:2016:402, paragraph 49 and the case-law cited).

61 In the present case, as regards, in the first place, the purpose, content and objective of the Portuguese regime on the taxation of dividends, whether at the level of UCIs themselves or at that of their shareholders or unitholders, it is apparent both from the reply of the referring court to the Court's request for information and from the reply provided by the Portuguese Government to the written questions addressed to it in the context of the present proceedings, that that regime was conceived in accordance with the logic of 'exit taxation', in the sense that UCIs which are formed and operate in accordance with Portuguese legislation are exempt from income tax, the burden of that tax being transferred to the shareholders or unitholders who are residents, while non-resident shareholders or unitholders are exempt.

62 The Portuguese Government stated that the national regime relating to the taxation of dividends was intended to achieve objectives such as, in particular, the avoidance of international economic double taxation and the transfer of taxation from the level of UCIs to the level of shareholders or unitholders, so that the taxation of that income is approximately equivalent to that which would have been applied if that income had been obtained directly by the shareholders or unitholders in those UCIs.

63 It will be for the referring court, which alone has jurisdiction to interpret national law, taking into account all the elements of the tax legislation at issue in the main proceedings and all the constituent elements of that tax system, to determine the main objective pursued by the national legislation at issue in the main proceedings (see, to that effect, judgment of 30 January 2020, *Köln-Aktienfonds Deka*, C-156/17, EU:C:2020:51, paragraph 79).

64 If the referring court reaches the conclusion that the Portuguese regime on the taxation of dividends is intended to avoid double taxation of dividends paid by resident companies, having regard to the intermediary status of UCIs vis-à-vis their shareholders or unitholders, it should be recalled that the Court has already held that, in relation to measures laid down by a Member State in order to prevent or mitigate the imposition of a series of charges to tax on, or the economic double taxation of, income distributed by a resident company, resident companies receiving income are not necessarily in a situation which is comparable to that of non-resident companies (judgment of 21 June 2018, *Fidelity Funds and Others*, C-480/16, EU:C:2018:480, paragraph 53 and the case-law cited).

65 However, as is apparent from paragraph 49 of the present judgment, as soon as a Member State, whether unilaterally or by way of a convention, subjects not only resident companies but also non-resident companies to tax on the income which they receive from a resident company, the situation of those non-resident companies becomes comparable to that of the resident companies.

66 It is solely because of the exercise by that State of its power of taxation that, irrespective of any taxation in another Member State, a risk of a series of charges to tax or economic double taxation may arise. In such a case, in order for non-resident companies receiving dividends not to be subject to a restriction on the free movement of capital prohibited, in principle, by Article 63 TFEU, the State in which the company making the distribution is resident must ensure that, under the procedures laid down by its national law in order to prevent or mitigate a series of charges to tax or economic double taxation, non-resident companies are subject to the same treatment as resident companies (judgment of 21 June the case-law cited). 2018, *Fidelity Funds and Others*, C-480/16, EU:C:2018:480, paragraph 55 and

67 As the Portuguese Republic chose to exercise its powers to tax the income received by non-resident UCIs, the latter are consequently in a situation comparable to that of UCIs resident in Portugal as regards the risk of economic double taxation of dividends paid by companies resident in Portugal (see, by analogy, judgment of 21 June 2018, *Fidelity Funds and Others*, C-480/16, EU:C:2018:480, paragraph 56 and the case-law cited).

68 If the referring court reaches the conclusion that the Portuguese regime on the taxation of dividends seeks, in the desire not to waive all taxation of dividends distributed by companies resident in Portugal, to transfer the level of taxation of dividends to the shareholders or unitholders of UCIs, it should be noted that the Court has already held that, although the aim of the legislation at issue in the main proceedings is to move the level of taxation from the investment vehicle to the shareholder of that vehicle, it is, in principle, the substantive conditions of the power to tax unit-holders' income that must be considered decisive, and not the method of taxation used (judgment of 21 June 2018, *Fidelity Funds and Others*, C-480/16, EU:C:2018:480, paragraph 60).

69 A non-resident UCI may have shareholders or unitholders with tax residence in Portugal over whose income that Member State exercises its power of taxation. In that respect, a non-resident UCI is in a situation that is objectively comparable to that of a UCI resident in Portugal (see, by analogy, judgment of 21 June 2018, *Fidelity Funds and Others*, C-480/16, EU:C:2018:480, paragraph 61).

70 It is true that the Portuguese Republic cannot tax non-resident shareholders or unitholders on the dividends distributed by non-resident UCIs, as the Portuguese Government has, moreover, acknowledged both in its written observations and in reply to the questions put to it by the Court. However, the absence of such a possibility is consistent with the logic of moving the level of taxation from the vehicle to the shareholder or unitholder (see, by analogy, judgment of 21 June 2018, *Fidelity Funds and Others*, C-480/16, EU:C:2018:480, paragraph 62).

71 As regards, in the second place, the relevant distinguishing criteria, within the meaning of the case-law of the Court cited in paragraph 60 above, it must be held that the only distinguishing criterion established by the national legislation at issue in the main proceedings is based on the place of residence of the UCIs, by making only non-resident undertakings subject to withholding tax on the dividends which they receive.

72 As is apparent from the Court's case-law, the situation of a resident UCI receiving a distribution of dividends is comparable to that of a non-resident recipient UCI in so far as, in both cases, the profits made are, in principle, liable to be subject to economic double taxation or a series of charges to tax (see, to that effect, judgment of 10 April 2014, *Emerging Markets Series of DFA Investment Trust Company*, C-190/12, EU:C:2014:249, paragraph 58 and the case-law cited).

73 Consequently, the distinguishing criterion to which the national legislation at issue in the main proceedings refers, relating solely to the place of residence of UCIs, does not make it possible to conclude that there is an objective difference between resident and non-resident entities.

74 In the light of all of the foregoing considerations, it must be held that, in the present case, the difference in treatment between resident UCIs and non-resident UCIs concerns objectively comparable situations.

Whether there is an overriding reason in the public interest

75 It should be recalled that, according to the Court's settled case-law, a restriction on the free movement of capital is permissible if it is justified by overriding reasons in the public interest, if it is suitable for securing the attainment of the objective which it pursues and if it does not go beyond what is necessary in order to attain that objective (judgment of 29 April 2021, *Veronsaajien oikeudenvalvontayksikkö (Income paid by UCITS)*, C-480/19, EU:C:2021:334, paragraph 56 and the case-law cited).

76 In the present case, it must be held that, although the referring court does not rely on such reasons in the request for a preliminary ruling, which focuses only on the possible comparability of the situations at issue in the main proceedings, the Portuguese Government submits, both in its written observations and in response to the questions put to it by the Court, that the restriction on the free movement of capital brought about by the national legislation at issue in the main proceedings is justified in the light of two overriding reasons in the public interest, namely, first,

the need to preserve the coherence of the national tax regime and, second, the need to preserve a balanced distribution of the power of taxation between the two Member States concerned, namely the Portuguese Republic and the Federal Republic of Germany.

77 As regards, in the first place, the need to preserve the coherence of the national tax regime, the Portuguese Government maintains, as is apparent from paragraph 46 of the present judgment, that the Portuguese dividend tax model constitutes a 'composite' model. Thus, it is possible to ensure the coherence of that model only if the management company of non-resident UCIs operates in Portugal through a permanent establishment, in such a way that that company can give concrete expression to the necessary deductions at source from resident shareholders or unitholders, and, in certain exceptional cases guided by considerations linked to the avoidance of tax planning, from non-resident shareholders or unitholders.

78 In that regard, it must be recalled that, although the Court has previously held that the need to preserve the coherence of a national tax system may justify national rules that are liable to restrict fundamental freedoms (see, to that effect, judgments of 10 May 2012, *Santander Asset Management SGIIC and Others*, C-338/11 to C-347/11, EU:C:2012:286, paragraph 50 and the case-law cited, and of 13 March 2014, *Bouanich*, C-375/12, EU:C:2014:138, paragraph 69 and the case-law cited), it has nevertheless clarified that, in order for an argument based on such a justification to succeed, a direct link must be established between the tax advantage concerned and the offsetting of that advantage by a particular tax levy (see, to that effect, judgments of 8 November 2012, *Commission v Finland*, C-342/10, EU:C:2012:688, paragraph 49 and the case-law cited, and of 13 November 2019, *College Pension Plan of British Columbia*, C-641/17, EU:C:2019:960, paragraph 87).

79 As is apparent from paragraph 71 of the present judgment, the exemption of dividends from withholding tax for resident UCIs is not conditional on redistribution by those UCIs of the dividends received by them and on the shareholders or unitholders in those UCIs being taxed in respect of the dividends as a means of compensating for the exemption from withholding tax (see, by analogy, judgments of 10 May 2012, *Santander Asset Management SGIIC and Others*, C-338/11 to C-347/11, EU:C:2012:286, paragraph 52, and of 10 April 2014, *Emerging Markets Series of DFA Investment Trust Company*, C-190/12, EU:C:2014:249, paragraph 93).

80 Consequently, there is no direct link, within the meaning of the case-law cited in paragraph 78 of the present judgment, between the exemption from withholding tax on nationally-sourced dividends received by a resident UCI and the taxation of those dividends as income received by the shareholders or unitholders in that undertaking.

81 The need to preserve the coherence of the national tax regime cannot, therefore, be relied on in order to justify the restriction on the free movement of capital brought about by the national legislation at issue in the main proceedings.

82 As regards, in the second place, the need to preserve a balanced allocation of the power of taxation between the Portuguese Republic and the Federal Republic of Germany, it should be recalled that, as the Court has repeatedly held, the justification based on the preservation of the balanced allocation of the power of taxation between the Member States can be accepted where the system in question is designed to prevent behaviour capable of jeopardising the right of a Member State to exercise its powers of taxation in relation to activities carried on within its territory (see, to that

effect, judgments of 22 November 2018, *Sofina and Others*, C-575/17, EU:C:2018:943, paragraph 57 and the case-law cited, and of 20 January 2021, *Lexel*, C-484/19, EU:C:2021:34, paragraph 59).

83 However, the Court has also held that, where a Member State has chosen, as in the situation at issue in the main proceedings, not to tax resident UCIs 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 of taxation in order to justify the taxation of non-resident UCIs in receipt of such income (judgment of 21 June 2018, *Fidelity Funds and Others*, C-480/16, EU:C:2018:480, paragraph 71 and the case-law cited).

84 It follows that the justification based on the preservation of a balanced allocation of the power of taxation between the Member States also cannot be accepted.

85 In the light of all of the foregoing considerations, the answer to the questions referred is that Article 63 TFEU must be interpreted as precluding legislation of a Member State under which dividends distributed by resident companies to a non-resident UCI are subject to withholding tax, whereas dividends distributed to a resident UCI are exempt from such withholding tax.

Costs

86 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Second Chamber) hereby rules:

Article 63 TFEU must be interpreted as precluding legislation of a Member State under which dividends distributed by resident companies to a non-resident undertaking for collective investment (UCI) are subject to withholding tax, whereas dividends distributed to a resident UCI are exempt from such withholding tax.

[Signatures]