Reports of Cases

JUDGMENT OF THE COURT (Sixth Chamber)

16 November 2023*

(Reference for a preliminary ruling – Article 49 TFEU – Freedom of establishment – Articles 63 and 65 TFEU – Free movement of capital – Personal income tax – Tax advantage relating to the taxation of capital gains on transfers of shares in small enterprises – Exclusion of undertakings established in other Member States – Concept of 'abusive practice')

In Case C-472/22,

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 2022, received at the Court on 14 July 2022, in the proceedings

NO

v

Autoridade Tributária e Aduaneira,

THE COURT (Sixth Chamber),

composed of T. von Danwitz (Rapporteur), President of the Chamber, P.G. Xuereb and A. Kumin, Judges,

Advocate General: A.M. Collins,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– NO, by C. Avelino, J. Pedroso de Melo and R. Sarabando Pereira, advogados,

– the Portuguese Government, by A. de Almeida Morgado, P. Barros da Costa and A. Rodrigues, acting as Agents,

– the Italian Government, by G. Palmieri, acting as Agent, and by M. Cherubini and P. Gentili, avvocati dello Stato,

* Language of the case: Portuguese.

– the European Commission, by P. Caro de Sousa and W. Roels, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Articles 49 and 63 TFEU and of the general principle of EU law that abusive practices are prohibited.

2 The request has been made in proceedings between NO, a French national residing in Portugal, and the Autoridade Tributária e Aduaneira (Tax and Customs Authority, Portugal) ('the tax authority') concerning an application for annulment of an assessment for personal income tax ('IRS') in respect of income received by NO in 2019.

Legal context

The IRS Code

3 Article 10 of the Código do Imposto sobre o Rendimento das Pessoas Singulares (Personal Income Tax Code; 'the IRS Code'), entitled 'Capital gains', provides:

'1. Capital gains are any gains, other than those regarded as business or professional income, capital income or income from immovable property, arising from:

…

(b) the transfer for valuable consideration of shares and other securities;

…

4. A gain that is subject to IRS shall be made up of:

(a) the difference between the realisation value and the acquisition value, less any part that may be treated as capital income, in the cases referred to at (a), (b) and (c) in paragraph 1;

…'

4 Article 43 of that code, entitled 'Capital gains', provides:

'1. The amount of income classified as capital gains is represented by the balance of the difference between capital gains and capital losses occurring in the same year, determined in accordance with the following articles.

…

3. The balance referred to in paragraph 1, relating to the transactions referred to in Article 10(1)(b), concerning micro- and small enterprises not listed on regulated or unregulated stock exchanges, shall also be taken into account, if it is positive, at 50% of its value.

4. For the purposes of the preceding paragraph, micro- and small enterprises shall mean the entities defined as such in the annex to Decreto-Lei nº 372/2007 [(Decree-Law No 372/2007)] of 6 November 2007 [(*Diário da República*, Series I, No 213, of 6 November 2007)].'

5 Article 44(1) of the IRS Code, entitled 'Realisation value', states:

'For the purposes of determining the gains subject to IRS, "realisation value" shall mean:

…

(f) in all other cases, the value of the consideration.'

6 Article 48 of that code, entitled 'Value of the acquisition for valuable consideration of shares and other securities', provides:

'For the purposes of Article 10(1)(b), the acquisition value, where the acquisition is for valuable consideration, shall be:

…

(b) in the case of stocks, other corporate shares, warrants, the certificates referred to in Article 10(1)(g) or other securities not listed on a regulated exchange, the cost established by documents or, failing that, the nominal value;

…'

Decree-Law No 372/2007

7 Article 2 of the annex to Decree-Law No 372/2007, entitled 'Staff headcount and financial thresholds determining enterprise categories', provides:

'1. The category of micro, small and medium-sized enterprises ("SMEs") is made up of enterprises which employ fewer than 250 persons and which have an annual turnover not exceeding EUR 50 million, and/or an annual balance sheet total not exceeding EUR 43 million.

2. Within the SME category, a small enterprise is defined as an enterprise which employs fewer than 50 persons and whose annual turnover and/or annual balance sheet total does not exceed EUR 10 million.

3. Within the SME category, a micro-enterprise is defined as an enterprise which employs fewer than 10 persons and whose annual turnover and/or annual balance sheet total does not exceed EUR 2 million.'

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

8 NO is a French national whose tax residence was established in Portugal in 2019. That same year, he sold 29 222 shares in a company incorporated under French law, Château de La Bourdaisière SARL ('CLB'), to another company incorporated under French law, Prince Vert SAS. Those shares accounted for 47.5% of CLB's share capital. NO, who had acquired the shares in 2011 and 2012 for EUR 279 129, transferred them for a price of EUR 850 000, which Prince Vert paid by taking out a loan.

9 On the date of the transfer, NO also held 86% of Prince Vert's share capital. Neither CLB nor Prince Vert paid out dividends between 2013 and 2019. Prior to the transfer, NO directly or indirectly held 99.71% of the shares in CLB. Following the transfer, he remained in direct or indirect possession of 93.06% of those shares. In other words, by means of the transaction he actually transferred control of only 6.65% of the share capital of CLB, of which he continued to be manager and majority shareholder.

10 In 2019, CLB was a 'small enterprise' within the meaning of Article 2 of the annex to Decree-Law No 372/2007, since it had a workforce of 15 and an annual turnover and/or annual balance sheet total not exceeding EUR 10 million. CLB's actual place of business and tax residence was in France and it did not carry on any economic activity in Portugal.

11 In his 2019 IRS return, NO declared the transfer of CLB's shares and the resulting capital gain. On the basis of that return, the tax authority issued an IRS assessment to NO. It calculated the tax payable by NO in respect of the transfer by reference to the entire capital gain resulting from that transaction, without applying the 50% reduction provided for in Article 43(3) of the IRS Code for transfers of shares in micro- and small enterprises not listed on regulated or unregulated stock exchanges.

12 On 17 June 2021 NO brought an action before the Tribunal Arbitral Tributário (Centro de Arbitragem Administrativa – CAAD) (Tax Arbitration Tribunal (Centre for Administrative Arbitration – CAAD), Portugal), the referring court, seeking a declaration that the tax authority's IRS assessment was unlawful because it had wrongly failed to apply the tax advantage provided for in Article 43(3) of the IRS Code. The tax authority argues that the aim of that provision is to support Portuguese undertakings and to stimulate economic activity in Portugal. Consequently, transfers of shares in companies established outside Portuguese territory should be excluded, since such transactions do not contribute to economic activity in that Member State.

13 The referring court is unsure whether an administrative practice under which taxpayers with shareholdings in foreign companies are refused the tax advantage provided for in Article 43(3) of the IRS Code is compatible with EU law. In particular, the referring court raises the point that that practice could lead to an unjustified restriction both on the freedom of establishment laid down in Article 49 TFEU, inasmuch as its effect is to deter Portuguese residents from participating on a stable and continuous basis in the commercial life of another Member State, and on the free movement of capital referred to in Article 63 TFEU, inasmuch as it could discourage them from investing their capital in other Member States.

14 Furthermore, the referring court observes on its own initiative that there is solid and objective evidence that the transfer of CLB's shares to Prince Vert could constitute an artificial transaction, that is to say, a transaction structured in a way that does not reflect the economic reality or the actual outcome, and may have been carried out with the fundamental aim of procuring a tax

advantage. According to the referring court, the transfer in question is not a genuine transfer of shares resulting in a capital gain, but a covert payment of dividends. Under national law, such a dividend payment should have been taxed at a higher rate than a capital gain on a share transfer. The referring court therefore enquires whether, in such a situation, a taxpayer may rely on Articles 49 and 63 TFEU in order to obtain a tax advantage established by national law.

15 In those circumstances, the Tribunal Arbitral Tributário (Centro de Arbitragem Administrativa – CAAD) (Tax Arbitration Tribunal (Centre for Administrative Arbitration – CAAD)) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘(1) Are Article 49 TFEU (right of establishment) and/or Article 63 TFEU (free movement of capital) to be interpreted as precluding a legal provision or a fiscal practice of a Member State whereby, for the purposes of personal income tax in that Member State, a tax advantage, consisting in taxation of 50% of the gain resulting from the transfer of company shares, is applied to transfers of shares in companies incorporated under national law, but not to transfers of shares in companies incorporated in another Member State?

(2) Are Article 49 TFEU (right of establishment) and/or Article 63 TFEU (free movement of capital) to be interpreted as precluding a legal provision or a fiscal practice of a Member State whereby, for the purposes of personal income tax in that Member State, a tax advantage, consisting in taxation of 50% of the gain resulting from the transfer of company shares, is applied to transfers of shares in companies which have their actual domicile in the national territory, but not to transfers of shares in companies which have their actual domicile in the territory of another Member State?

(3) Are Article 49 TFEU (right of establishment) and/or Article 63 TFEU (free movement of capital) to be interpreted as precluding a legal provision or a fiscal practice of a Member State whereby, for the purposes of personal income tax in that Member State, a tax advantage, consisting in taxation of 50% of the gain resulting from the transfer of company shares, is applied to transfers of shares in companies with tax residence in the national territory, but not to transfers of shares in companies with tax residence in the territory of another Member State?

(4) Are Article 49 TFEU (right of establishment) and/or Article 63 TFEU (free movement of capital) to be interpreted as precluding a legal provision or a fiscal practice of a Member State whereby, for the purposes of personal income tax in that Member State, a tax advantage, consisting in taxation of 50% of the gain resulting from the transfer of company shares, is applied to transfers of shares in companies which conduct their business in the national territory, but not to transfers of shares in companies which conduct their business in the territory of another Member State?

(5) Is the principle of prohibition of abusive practices to be interpreted as applying to a transfer of company shares such as that in the present case, which, in essence, has a result equivalent to a dividend payment, and the legal form of which was chosen by the taxpayer with the fundamental aim of obtaining a tax advantage deriving from national law and strictly applicable to capital gains on securities, in circumstances such as those of the present case, in which the grant to the taxpayer of the tax advantage concerned depends on whether that taxpayer is able to rely on and exercise the right of establishment under Article 49 TFEU and/or free movement of capital under Article 63 TFEU?

(6) Is the principle of prohibition of abusive practices to be interpreted as precluding a taxpayer from relying on and exercising the right of establishment (under Article 49 TFEU) or the free movement of capital (under Article 63 TFEU) in order to benefit from the tax advantage provided for in national law for capital gains arising from the transfer of company shares, when, with the main objective of benefiting from that tax advantage, that taxpayer has carried out a transaction, which, in essence, has a result equivalent to a dividend payment, such as a transfer of shares?

(7) If the answer to the previous question is in the affirmative, can a taxpayer invoke legal certainty or legitimate expectations in order to challenge a refusal to recognise the right of establishment and/or free movement of capital in line with the principle of prohibition of abusive practices and, thus, legitimise that abusive practice?

(8) Is the principle of prohibition of abusive practices to be interpreted as meaning that its application depends on verification of the conditions for the application of the general anti-abuse regulations under national law?

(9) Is the principle of prohibition of abusive practices to be interpreted as meaning that its application depends on it being invoked by the national authorities?

(10) Is the principle of prohibition of abusive practices to be interpreted as meaning that its application depends on compliance by the national tax authorities with the procedure laid down for the application of the general anti-abuse regulations under national law?

(11) Given that the jurisdiction of the national court is limited to assessing the legality of tax measures and deciding whether to annul or to uphold them in the legal order, without replacing the Tax Authority, is the principle of prohibition of abusive practices to be interpreted as meaning that the Arbitration Tribunal has jurisdiction to reclassify/redefine/requalify the abusive transaction and apply the relevant national legislation to the transaction which would exist in its place?'

Consideration of the questions referred

Questions 1 to 4

16 By those questions, which should be considered together, the referring court asks, in essence, whether Articles 49 and/or 63 TFEU must be interpreted as precluding a tax practice of a Member State in the field of personal income tax under which a tax advantage, consisting in halving the tax on capital gains accruing from a share transfer, is confined solely to transfers of shares in companies established in that Member State, to the exclusion of transfers of shares in companies established in other Member States.

The applicable freedom of movement

17 Since the questions submitted for a preliminary ruling refer to the provisions of the FEU Treaty relating both to freedom of establishment and to the free movement of capital, it is necessary to determine which freedom is applicable in the main proceedings (judgment of 7 April 2022, *Veronsaajien oikeudenvalvontayksikkö (Exemption of contractual investment funds)*, C-342/20, EU:C:2022:276, paragraph 34).

18 According to the Court's settled case-law, in order to determine whether national legislation falls 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 (judgment of 16 December 2021, *UBS Real Estate*, C-478/19 and C-479/19, EU:C:2021:1015, paragraph 28 and the case-law cited).

19 In that respect, it should be recalled that national legislation intended to apply only to those shareholdings which enable the holder to exert a definite influence on a company's decisions and to determine its activities comes within the scope of Article 49 TFEU on freedom of establishment. On the other hand, national provisions which apply to shareholdings acquired solely with the intention of making a financial investment without any intention to influence the management and control of the undertaking must be examined exclusively in the light of the free movement of capital (judgment of 7 April 2022, *Veronsaajien oikeudenvalvontayksikkö (Exemption of contractual investment funds)*, C-342/20, EU:C:2022:276, paragraph 45 and the case-law cited).

20 In the present case, the national legislation at issue in the main proceedings, as implemented by the tax authority, is intended to confer a tax advantage in respect of capital gains accruing from the transfer of shares in micro- and small enterprises not listed on regulated or unregulated stock exchanges, provided that they carry on an economic activity in Portugal. As the European Commission has pointed out, that legislation applies to all transfers of shares in such companies, irrespective of the size of the holdings concerned.

21 Accordingly, without excluding from its scope situations coming within the scope of the freedom of establishment, the national legislation at issue in the main proceedings applies generally to shareholdings, regardless of whether they were acquired with the intention to influence the management and control of an undertaking. That legislation is therefore liable predominantly to affect the free movement of capital. Any restriction on freedom of establishment resulting from that legislation is an inevitable consequence of the restriction of the free movement of capital and does not, therefore, justify an independent examination in the light of Article 49 TFEU (see, to that effect, judgment of 7 April 2022, *Veronsaajien oikeudenvalvontayksikkö (Exemption of contractual investment funds)*, C-342/20, EU:C:2022:276, paragraph 47 and the case-law cited).

Restriction on the free movement of capital

22 Under Article 63(1) TFEU, all restrictions on the movement of capital between Member States and between Member States and third countries are to be prohibited.

23 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 (judgment of 17 March 2022, *AllianzGI-Fonds AEVN*, C-545/19, EU:C:2022:193, paragraph 36 and the case-law cited).

24 In the present case, the national legislation at issue in the main proceedings, as implemented by the tax authority, establishes a difference in treatment between Portuguese tax residents with shareholdings in undertakings which carry on an economic activity in Portugal and those with shareholdings in undertakings which carry on an economic activity outside Portugal, since capital gains accruing from transfers of shares in the latter undertakings are taxed more heavily. That legislation therefore makes it more attractive to invest in undertakings established in Portugal, to the detriment of those established in other Member States.

25 Such a difference in treatment on the basis of the place of investment of the capital has the effect of discouraging Portuguese tax residents from investing their capital in a company established in another State and also has a restrictive effect on companies established in other States in that it constitutes an obstacle to their raising capital in Portugal (see, by analogy, judgments of 6 June 2000, *Verkooijen*, C-35/98, EU:C:2000:294, paragraphs 34 and 35; of 15 July 2004, *Weidert and Paulus*, C-242/03, EU:C:2004:465, paragraphs 13 and 14; and of 18 December 2007, *Grønfeldt*, C-436/06, EU:C:2007:820, paragraph 14 and the case-law cited). It therefore constitutes a restriction on the free movement of capital which is prohibited, in principle, by Article 63 TFEU.

26 That being said, pursuant to Article 65(1)(a) TFEU, the provisions of Article 63 TFEU are, nonetheless, to be 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.

27 It is apparent from settled case-law that Article 65(1)(a) TFEU, in so far as it is a derogation from the fundamental principle of the free movement of capital, must be interpreted strictly. That provision cannot therefore be interpreted as meaning that all tax legislation which draws a distinction between taxpayers based on their place of residence or the State in which they invest their capital is automatically compatible with the Treaty (judgment of 7 April 2022, *Veronsaajien oikeudenvalvontayksikkö (Exemption of contractual investment funds)*, C-342/20, EU:C:2022:276, paragraph 67 and the case-law cited).

28 The differences in treatment permitted by Article 65(1)(a) TFEU must not constitute, according to Article 65(3) TFEU, a means of arbitrary discrimination or a disguised restriction. The Court has held, consequently, that such differences in treatment are permitted only when they concern situations which are not objectively comparable or, otherwise, when they are justified by an overriding reason in the public interest (judgment of 7 April 2022, *Veronsaajien oikeudenvalvontayksikkö (Exemption of contractual investment funds)*, C-342/20, EU:C:2022:276, paragraph 68 and the case-law cited).

29 According to the Court's case-law, the comparability of a cross-border situation with an internal situation within a Member State must be examined having regard to the aim pursued by the national provisions at issue as well as their purpose and content. Only the relevant distinguishing criteria laid down by the legislation in question must be taken into account in determining

whether the difference in treatment resulting from that legislation reflects an objectively different situation (judgment of 16 December 2021, *UBS Real Estate*, C-478/19 and C-479/19, EU:C:2021:1015, paragraphs 47 and 48 and the case-law cited).

30 In the present case, it is apparent from the request for a preliminary ruling that the tax practice at issue in the main proceedings is intended to support national undertakings and stimulate economic activity in Portugal by halving the tax burden on capital gains realised by taxpayers having their tax residence in Portugal, when they transfer shares in companies established in that Member State. By contrast, capital gains realised by those taxpayers on transfers of shares in companies established in other Member States are taxed at the full rate.

31 The national legislation at issue in the main proceedings, as implemented by the tax authority, therefore applies without distinction to all natural persons resident for tax purposes in Portugal and entails a difference in treatment based exclusively on the place of establishment of the companies in which their capital is invested, with a view to encouraging investment in economic activity in Portugal, to the detriment of investment in other Member States.

32 On the one hand, a taxpayer who invests in shares in a Portuguese company and a taxpayer who invests in shares in a foreign company both invest their capital in companies for the purpose of making a profit (see, by analogy, judgment of 9 September 2021, *Real Vida Seguros*, C-449/20, EU:C:2021:721, paragraph 33).

33 On the other hand, to accept that taxpayers who have invested in undertakings which carry on an economic activity in Portugal should be placed in a different situation from that of taxpayers who have invested in undertakings which carry on an economic activity outside Portugal, when Article 63(1) TFEU specifically prohibits restrictions on cross-border movements of capital, would be to deprive that provision of all meaning (see, by analogy, judgment of 9 September 2021, *Real Vida Seguros*, C-449/20, EU:C:2021:721, paragraph 36 and the case-law cited).

34 Consequently, the difference in treatment resulting from such legislation is not based on an objective difference in situation.

35 It is therefore necessary to examine whether that restriction on free movement may be justified by an overriding reason in the public interest. According to the 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 17 March 2022, *AllianzGI-Fonds AEVN*, C-545/19, EU:C:2022:193, paragraph 75 and the case-law cited).

36 In the present case, the referring court states that the tax practice at issue in the main proceedings is intended to support national undertakings and to stimulate economic activity in Portugal.

37 In accordance with consistent case-law, an objective of a purely economic nature cannot constitute an overriding reason in the public interest justifying a restriction of a fundamental freedom guaranteed by the FEU Treaty (judgments of 6 June 2000, *Verkooijen*, C-35/98, EU:C:2000:294, paragraph 48, and of 25 February 2021, *Novo Banco*, C-712/19, EU:C:2021:137, paragraph 40 and the case-law cited).

38 In any event, even if such an objective were regarded as permissible, no indication has been submitted to suggest that it would not be achieved if the tax advantage provided for by the national legislation at issue in the main proceedings were also applied to capital gains accruing from the transfer of shares in micro- and small enterprises which carry on an economic activity outside Portugal (see, by analogy, judgment of 9 September 2021, *Real Vida Seguros*, C-449/20, EU:C:2021:721, paragraph 40).

39 Although the Portuguese Government asserts in its written observations, without disputing that purely economic objective, that the difference in treatment at issue is directly linked to preserving the coherence of the tax system, it should be recalled that, for an argument based on such a justification to succeed, a direct link has to be established between the tax advantage concerned and the offsetting of that advantage by a particular tax levy, the direct nature of that link falling to be examined in the light of the objective pursued by the legislation in question (judgment of 7 April 2022, *Veronsaajien oikeudenvalvontayksikkö (Exemption of contractual investment funds)*, C-342/20, EU:C:2022:276, paragraph 92 and the case-law cited).

40 It must be stated that the Portuguese Government has not put forward any legal arguments to support its assertion. Accordingly, it has not shown that the tax advantage granted to taxpayers with shareholdings in undertakings which carry on an economic activity in Portugal was offset by a particular tax levy, thereby justifying the exclusion of taxpayers with shareholdings in undertakings which carry on an economic activity outside Portugal from entitlement to that advantage.

41 Thus, subject to verification by the referring court, it appears that the legislation at issue in the main proceedings, as implemented by the tax authority, is not justified by overriding reasons in the public interest.

42 Consequently, Article 63 TFEU must be interpreted as precluding a tax practice of a Member State in the field of personal income tax under which a tax advantage, consisting in halving the tax on capital gains accruing from a share transfer, is confined solely to transfers of shares in companies established in that Member State, to the exclusion of transfers of shares in companies established in other Member States.

Questions 5 to 11

43 By those questions, which should be examined together, the referring court enquires about the interpretation of the general principle of EU law that abusive practices are prohibited, on the ground that the applicant in the main proceedings allegedly sought to take improper advantage of EU law, including the fundamental freedoms enshrined in Articles 49 and 63 TFEU, in order to qualify for the treatment set out in Article 43(3) of the IRS Code.

44 It should be recalled that, according to the Court's settled case-law, in the context of the cooperation between the Court of Justice and the national courts, the need to provide an interpretation of EU law which will be of use to the national court means that the national court is bound to observe scrupulously the requirements concerning the content of a request for a preliminary ruling, expressly set out in Article 94 of the Rules of Procedure of the Court of Justice, of which the national court is presumed to be aware. Moreover, those requirements are set out in the Court's recommendations to national courts and tribunals in relation to the

initiation of preliminary ruling proceedings (OJ 2019 C 380, p. 1) (judgment of 6 October 2021, *Consorzio Italian Management and Catania Multiservizi*, C-561/19, EU:C:2021:799, paragraph 68 and the case-law cited).

45 Thus, it is essential, as is stated in Article 94(c) of the Rules of Procedure, that the request for a preliminary ruling itself contains a statement of the reasons which prompted the referring court or tribunal to enquire about the interpretation or validity of certain provisions of EU law, and the relationship between those provisions and the national legislation applicable to the main proceedings (judgment of 6 October 2021, *Consorzio Italian Management and Catania Multiservizi*, C-561/19, EU:C:2021:799, paragraph 69 and the case-law cited).

46 In the present case, with regard to questions 5 to 11, it must be found that the referring court has provided only an incomplete description of the legislative and factual context and, in particular, of the advantage which the applicant in the main proceedings allegedly sought to procure by transferring the shares at issue in the main proceedings instead of paying out dividends. CLB and Prince Vert being companies incorporated under French law, the referring court did not set out the full tax burden that would have fallen on such a dividend payout, particularly in the light of the provisions of the IRS Code on foreign-sourced dividends and the double taxation convention between the French Republic and the Portuguese Republic, which were cited by the applicant in the main proceedings in his written observations but which are not referred to in the request for a preliminary ruling.

47 Furthermore, the referring court has failed to explain how the applicant in the main proceedings may have misused the freedoms enshrined in Articles 49 and 63 TFEU. Similarly, it has not explained the link it seeks to establish between the alleged tax advantage, which results from national law alone and not EU law, and the requested interpretation of the general principle of EU law that abusive practices are prohibited.

48 In those circumstances, the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it, questions which do not therefore satisfy the conditions on admissibility laid down in Article 94 of the Rules of Procedure.

49 Consequently, it must be held that questions 5 to 11 are inadmissible, although the referring court retains the right to submit a new request for a preliminary ruling when it is in a position to provide the Court with all the information enabling the Court to give a ruling (see, by analogy, order of 1 October 2020, *Inter Consulting*, C-89/20, EU:C:2020:771, paragraph 34 and the case-law cited).

Costs

50 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring 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 (Sixth Chamber) hereby rules:

Article 63 TFEU must be interpreted as precluding a tax practice of a Member State in the field of personal income tax under which a tax advantage, consisting in halving the tax on capital gains accruing from a share transfer, is confined solely to transfers of shares in

companies established in that Member State, to the exclusion of transfers of shares in companies established in other Member States.

[Signatures]