



Reports of Cases

Case C-39/23

Keva and Others

v

Skatteverket

(Request for a preliminary ruling from the Högsta förvaltningsdomstolen)

Judgment of the Court (First Chamber) of 29 July 2024

(Reference for a preliminary ruling – Article 63 TFEU – Free movement of capital – Taxation of dividends received by pension funds governed by public law – Difference in treatment between resident and non-resident pension funds governed by public law – Exemption only of resident pension funds governed by public law – Comparability of situations – Whether justified – Need to safeguard the objective pursued by social policy – Need to preserve a balanced allocation of the power of taxation of the Member States)

Free movement of capital and liberalisation of payments – Restrictions – Tax legislation – Taxation of dividends – Dividends received by pension funds governed by public law – Difference in treatment between resident and non-resident pension funds governed by public law – Exemption from tax only of resident pension funds governed by public law – Not permissible – Whether justified – None

(Art. 63 TFEU)

(see paragraphs 43, 46, 47, 49-51, 55-58, 60-65, 68, 71, 72, 74, 75, operative part)

Résumé

In the context of a reference for a preliminary ruling, the Court of Justice confirms the infringement of the free movement of capital by a national system which establishes a distinction between recipients in relation to the tax treatment of dividends distributed by resident companies. That distinction is based exclusively on the place of residence of those beneficiaries.

In the present case, the applicants in the main proceedings, three pension funds with various legal forms governed by Finnish public law, had paid tax in Sweden on dividends received from Swedish companies. Since those dividends had not been taxed in Finland, the tax on dividends to which they were subject in Sweden could not be deducted as provided for in the Nordic Tax Convention.¹ However, in Sweden, pension funds governed by public law, which form part of the State, are exempt from tax.

¹ Convention between the Nordic countries for the avoidance of double taxation with respect to taxes on income and on capital, signed in Helsinki on 23 September 1996.

Taking the view that the levying of the tax on dividends in Sweden was contrary to the free movement of capital, within the meaning of Article 63 TFEU, since they were comparable to pension funds governed by Swedish public law, the applicants in the main proceedings applied to the Swedish tax agency for a refund of the tax on dividends paid in Sweden.

Following the rejection of their complaint, the action was brought before the referring court, Högsta förvaltningsdomstolen (Supreme Administrative Court, Sweden).

The referring court questions the compatibility with the free movement of capital, within the meaning of Article 63 TFEU, of such a system providing for the taxation of dividends distributed by resident companies to non-resident pension institutions governed by public law, whereas dividends distributed to resident pension funds governed by public law are exempt from that tax.

The Court considers that such a scheme is contrary to Article 63 TFEU.

Findings of the Court

In the first place, the Court states that the scheme at issue constitutes a restriction on the free movement of capital that is prohibited, in principle, by Article 63 TFEU. That scheme creates a difference in tax treatment that leads to a disadvantageous treatment of dividends paid to non-resident pension institutions governed by public law, liable to deter those institutions from investing in companies established in Sweden.

In that regard, as to compliance with its obligations under the Treaty, a State's reliance on points 10 and 12 of the Commentary on Article 24 of the Model Tax Convention of the Organisation for Economic Cooperation and Development (OECD)² – from which it is apparent that a State is not obliged to grant the same tax advantages to public bodies of a State other than those which it grants to its own public bodies – is irrelevant.

In addition, when exercising their power to organise their social security systems, the Member States must comply with EU law and, in particular, with the provisions of the TFEU relating to the fundamental freedoms.

In the second place, the Court finds that the difference in treatment between non-resident pension institutions governed by public law and resident pension funds governed by public law concerns situations that are objectively comparable.

First, the fact that a pension fund governed by public law is part of the Swedish State does not necessarily place it in a different situation from that of a non-resident pension institution governed by public law in the light of the objective of the tax exemption at issue, which is intended to avoid a circular flow of the public resources of the Swedish State. That objective could also be achieved if non-resident pension institutions governed by public law were to benefit in Sweden from the same tax exemption on dividends paid by resident companies as that granted to resident pension funds governed by public law.

² Model convention for the avoidance of double taxation with respect to taxes on income and capital drawn up by the Fiscal Committee of the OECD, annexed to an OECD Recommendation of 30 July 1963 concerning the avoidance of double taxation.

Furthermore, the fact that non-resident pension institutions governed by public law are not intended to promote the financial stability and viability of the Swedish social security system, unlike resident pension funds governed by public law, cannot constitute an argument that renders impossible the cross-border comparison of pension funds since, by definition, the objective of each fund is to protect the stability and viability of a separate national pension system.

Second, the only relevant criterion which must be taken into account in order to assess whether the difference in treatment between resident pension funds governed by public law and non-resident pension institutions governed by public law reflects an objective difference in situation is, in the present case, the place of residence of the funds. The differences between the two types of entity relating to their legal form or the nature of their tasks in the collection of pension contributions or the payment of pensions do not appear to have a direct link with the tax treatment of the dividends received from Swedish companies.

In the third and last place, the Court holds that neither the need to safeguard the objective pursued by Swedish social policy nor the need to preserve a balanced allocation of the power of taxation between the Member States can constitute, in the present case, an overriding reason in the public interest capable of justifying the Swedish scheme at issue with respect to the free movement of capital.