

JUDGMENT OF THE COURT (Second Chamber)

14 September 2017 (*)

(Reference for a preliminary ruling — Free movement of capital — Article 63 TFEU — Scope — Tax legislation of a Member State — Corporation tax — Tax credit — Pension funds — Refusal to grant the tax credit to shareholders not subject to tax on investment income for dividends arising from foreign income — Interpretation of the judgment of 12 December 2006, *Test Claimants in the FII Group Litigation* (C-446/04, EU:C:2006:774) — Tax credit unlawfully withheld — Remedies)

In Case C-628/15,

REQUEST for a preliminary ruling under Article 267 TFEU, from the Court of Appeal (England & Wales) (Civil Division), made by decision of 11 November 2015, received at the Court on 24 November 2015, in the proceedings

The Trustees of the BT Pension Scheme

v

Commissioners for Her Majesty's Revenue and Customs,

THE COURT (Second Chamber),

composed of M. Ilešič, President of the Chamber, A. Prechal, A. Rosas (Rapporteur), C. Toader and E. Jarašiūnas, Judges,

Advocate General: M. Wathelet,

Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 9 November 2016,

after considering the observations submitted on behalf of:

- the Trustees of the BT Pension Scheme, by M. Gammie QC, by C. McDonnell, Barrister, and by N. Hine and R. Collins, Solicitors,
- the United Kingdom Government, by S. Simmons, J. Kraehling and D. Robertson, acting as Agents, and by M. R. Baldry QC,
- the European Commission, by R. Lyal and W. Roels, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 21 December 2016,

gives the following

Judgment

- 1 This request for a preliminary ruling concerns the interpretation of Articles 49 and 63 TFEU.
- 2 The request has been made in proceedings between the Trustees of the BT Pension

Scheme ('the Trustees') and the Commissioners for Her Majesty's Revenue and Customs ('the Commissioners') concerning the refusal to recognise a right to a tax credit to a pension fund not subject to tax on its investment income in respect of its receipt of dividends representing foreign-sourced income of a company resident for tax-purposes in the United Kingdom.

Legal context

Advance corporation tax and the right to a tax credit

3 According to the order for reference, during the period concerned by the dispute in the main proceedings, the United Kingdom of Great Britain and Northern Ireland operated a system of taxation known as 'partial imputation', under which, in order to avoid economic double taxation, when a resident company distributed profits, part of the corporation tax paid by that company was imputed to its shareholders.

4 Under that partial imputation system, where a company resident in the United Kingdom paid dividends to its shareholders, it had to pay, pursuant to section 14 of the Income and Corporation Taxes Act 1988 ('ICTA'), advance corporation tax ('ACT'), calculated on an amount equal to the amount or value of the distribution made.

5 Such a distributing company was entitled, in respect of a distribution made during a given accounting period, to offset the ACT paid against its corporation tax liability for that period (mainstream corporation tax) or it could transfer, where appropriate, the ACT paid either during a previous or subsequent period, or to that company's subsidiaries, residing in the United Kingdom, which could offset it against the amount of corporation tax for which they themselves were liable.

6 The payment of ACT by the company distributing the dividends was accompanied by a tax credit in the hands of the recipient shareholder.

7 Thus, in accordance with section 20 ICTA, a shareholder resident in the United Kingdom was subject to income tax on the dividends paid by a company resident in that same State, provided that they were not specifically excluded from payment of that tax.

8 Where the dividends paid by a UK-resident company had been subject to ACT, the recipient shareholder resident in that same State was entitled, pursuant to section 231(1) ICTA, to a tax credit equal to the amount of ACT paid by the distributing company.

9 According to section 231(3) ICTA, that tax credit could be deducted from the amount payable by the shareholder in respect of income tax on the dividend or, where the amount of such tax credit exceeded the amount of income tax payable by the shareholder, that shareholder could claim cash payment of an amount corresponding to that tax credit from the tax authorities.

The foreign income dividend scheme

10 Before 1 July 1994, where a company resident in the United Kingdom received dividends from a company resident outside that State, the dividends received were not treated as franked investment income nor was the recipient company of those dividends entitled to a tax credit in respect of those dividends. Pursuant to sections 788 and 790 ICTA, it was entitled to relief for the tax paid by the distributing company in the State in which the latter was resident. Such relief was granted either under the legislation in force in the United Kingdom or under a double taxation convention concluded by the United Kingdom with that other State.

11 In accordance with the principle set out in paragraph 4 of the present judgment, where a UK-resident company that received dividends from a non-resident company distributed dividends to its

own shareholders, it had to pay ACT on the amount of the distribution.

12 However, the corporation tax payable by companies receiving large foreign-sourced dividends was often insufficient to cover the amount of ACT paid by that company. Where the ACT payable by a company distributing dividends to its shareholders was higher than the corporation tax for which the distributing company was liable, and where that ACT could not be transferred to the previous or subsequent periods of the distributing company or to that company's subsidiaries, a 'surplus' of ACT, liable to constitute an unrecoverable financial cost, arose for that company.

13 In order to allow such companies to mitigate the impact of surplus ACT, sections 246A to 246Y ICTA introduced, from 1 July 1994, the foreign income dividend ('FID') regime. Under that regime, a company resident in the United Kingdom could elect to distribute to its shareholders a FID, on which ACT was payable, but which permitted that company, to the extent that the dividend treated as a FID corresponded to the foreign-sourced income received, to claim a refund of the surplus ACT paid ('the FID regime').

The receipt of dividends treated as FIDs by a pension fund not subject to tax on investment income

14 According to section 246C ICTA, where a shareholder received a dividend treated as a FID, he was not entitled to a tax credit in respect of such a dividend. According to that article:

'Section 231(1) shall not apply where the distribution there mentioned is a foreign income dividend.'

15 Section 246D ICTA, however, provided that taxable shareholders who received a dividend treated as a FID were regarded as having received income that had already borne tax at a lower rate (20%) for the tax year in question. The effect of that provision for such shareholders was, according to the referring court, effectively the same as if section 231 ICTA had provided for a tax credit.

16 However, section 246D ICTA did not apply to shareholders who were not subject to income tax in respect of dividends.

17 During the period at issue in the main proceedings, an exempt approved pension scheme enjoyed, in accordance with section 592(2) ICTA, an exemption from income tax in respect of both UK-sourced and foreign-sourced dividends.

18 Under section 246C ICTA, where a shareholder not subject to income tax in respect of dividends received dividends treated as FIDs, he could not receive a tax credit under section 231(1) ICTA, let alone claim cash payment from the tax authorities of an amount corresponding to any tax credit exceeding his liability in respect of income tax.

19 Both the ACT system and the FID regime were abolished for dividends paid after 6 April 1999.

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

20 The BT Pension Scheme is a defined benefit pension fund whose members are employees and former employees of British Telecommunications plc. It is managed by the Trustees, who are the relevant taxable entity, while the BT Pension Scheme is the beneficial owner of the assets.

21 The BT Pension Scheme is exempt from tax in the United Kingdom on its investment income. During the period at issue in the main proceedings, shares in companies represented approximately 70% to 75% of the investments of the BT Pension Scheme (by market value). Of

the BT Pension Scheme's shareholdings, some were investments in companies resident in the United Kingdom and some were investments in companies resident elsewhere in the European Union or in third countries. The vast majority (approximately 97%) of the BT Pension Scheme's share portfolio was invested in large publicly-quoted companies in the United Kingdom and overseas. Its relationship to the companies in which it had invested being purely that of shareholder, the BT Pension Scheme typically held less than 2% of the share capital of such companies and, in any event, always less than 5%.

22 The BT Pension Scheme's investment portfolio included shares in UK-resident companies which had elected to apply the FID regime to the distribution of dividends representing foreign-sourced income to their shareholders. Thus, in its capacity as shareholder of such companies, the BT Pension Scheme received dividends treated as FIDs. While, under section 246C ICTA, the Trustees were not entitled to tax credits with respect to those dividends, they were however entitled to such credits with respect to dividends received, outside the FID regime, from UK-resident companies.

23 The Trustees, taking the view that that absence of entitlement to a tax credit in respect of dividends treated as FIDs was inconsistent with EU law, brought an action against the Commissioners before the First-tier Tribunal (Tax Chamber) with a view to obtaining *inter alia* a tax credit for the dividends treated as FIDs they had received during the period in question. That action having been upheld by the First-tier Tribunal (Tax Chamber), and that tribunal's judgment having been confirmed on appeal by the Upper Tribunal (Tax and Chancery Chamber), the Commissioners lodged an appeal against the judgment of the latter tribunal before the Court of Appeal (England & Wales) (Civil Division).

24 In the order for reference, the Court of Appeal (England & Wales) (Civil Division) explains that the dispute in the main proceedings relates only to the tax years 1997 and 1998, the Trustees' claims being time-barred under national law for the remainder. The referring court takes the view that the answer to be given to the question whether the Trustees are entitled to tax credits requires an interpretation of EU law concerning, *inter alia*, the scope of Article 63 TFEU.

25 It recalls, in that regard, that the Court held, in the judgment of 12 December 2006, *Test Claimants in the FII Group Litigation* (C-446/04, EU:C:2006:774), *inter alia*, that Article 63 TFEU (formerly Article 56 EC) precluded certain aspects of the United Kingdom legislation on the FID regime. However, it questions whether that provision confers rights on shareholders such as the Trustees in the circumstances of the main proceedings.

26 According to the referring court, unless the Trustees derive rights directly from Article 63 TFEU, national law does not require that section 246C ICTA be disapplied in their situation. To the extent that the Trustees may rely directly on EU law in order to qualify for the tax credit, that court is uncertain as to the remedies that must be available under national law in order to provide for refund, where appropriate.

27 In those circumstances, the Court of Appeal (England & Wales) (Civil Division) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'1) Given that the Court, in its answer to Question 4 in the judgment of 12 December 2006, [*Test Claimants in the FII Group Litigation*, (C-446/04, EU:C:2006:774)], determined that Articles 43 and 56 of the EC Treaty — now Articles 49 and 63 TFEU — precluded legislation of a Member State which allows resident companies distributing dividends to their shareholders which have their origin in foreign-sourced dividends received by them to elect to be taxed under a regime which permits them to recover advance corporation tax paid, but, first, obliges those companies to pay that advance corporation tax and subsequently to claim repayment and, secondly, does not

provide a tax credit for their shareholders, whereas those shareholders would have received such a tax credit in the case of a distribution made by a resident company which had its origin in nationally sourced dividends, are any rights under EU law conferred on those shareholders themselves, whether under Article 63 TFEU or otherwise, in cases where they are the recipients of the dividends elected to be paid under that regime, in particular where a shareholder is resident in the same Member State as the company distributing the dividends?

2) If the shareholder referred to in Question 1 does not itself have rights under Article 63 TFEU, is it entitled to rely on any infringement of rights under Article 49 TFEU or Article 63 TFEU of the company distributing the dividend?

3) If the answer to Question 1 or Question 2 is that the shareholder has rights under or can rely on EU law, does EU law impose any requirements as to the remedy to be provided to the shareholder under domestic law?

4) Does it make any difference to the Court's answer to the above questions that:

a) the shareholder is not liable to income tax in the Member State on any dividends received, with the consequence that, in the case of a distribution made by a resident company outside the above regime, the tax credit to which the shareholder is entitled under domestic legislation may result in a payment of the tax credit to the shareholder by the Member State;

b) the national court has decided that the infringement of EU law by the domestic legislation in question was not sufficiently serious so as to give rise to a liability of the Member State in damages in favour of the company distributing the dividends, under the principles established [in the judgment of 5 March 1996, *Brasserie du pêcheur and Factortame* (C-46/93 and C-48/93, EU:C:1996:79)], or that

c) in some cases, but not all, the company distributing the dividends under the above regime may have increased the amount of its distributions paid to all shareholders to provide a cash sum equivalent to that which would be achieved by an exempt shareholder from a payment of dividends outside the regime?

Consideration of the questions referred

Question 1

28 By its first question, the referring court asks, in essence, whether Articles 49 and 63 TFEU must be interpreted as conferring rights on a shareholder, receiving dividends treated as FIDs, who is resident in the same Member State as the company distributing those dividends, in the light of, inter alia, the judgment of 12 December 2006, *Test Claimants in the FII Group Litigation* (C-446/04, EU:C:2006:774).

29 As a preliminary point, it must be noted that, according to the order for reference, the BT Pension Scheme held, during the period at issue in the main proceedings, less than 5% of the share capital of the companies in which it had invested and its relationship to them was purely that of shareholder.

30 It follows from the settled case-law of the Court that an acquisition of shares on the capital market solely with the intention of making a financial investment without any intention to influence the management and control of the undertaking falls, in principle, within the scope of Article 63 TFEU, and not within that of Article 49 TFEU, that latter article applying only to those shareholdings which enable the holder to exert a definite influence on a company's decisions and

to determine its activities (see, to that effect, judgment of 13 November 2012, *Test Claimants in the FII Group Litigation*, C?35/11, EU:C:2012:707, paragraphs 91 and 92 and the case-law cited).

31 In the present case, given that the BT Pension Scheme's shareholdings in the companies in which it had invested did not allow for such an influence to be exerted, the referring court's question must be examined solely from the viewpoint of Article 63 TFEU.

32 As regards the question, thus clarified, whether Article 63 TFEU confers, in circumstances such as those of the main proceedings, rights on a shareholder receiving shares treated as FIDs, it should be recalled that, according to the settled case-law of the Court, Article 63(1) TFEU lays down a general prohibition on restrictions on the movement of capital between Member States and third countries (see, to that effect, judgment of 28 September 2006, *Commission v Netherlands*, C?282/04 and C?283/04, EU:C:2006:608, paragraph 18 and the case-law cited).

33 Regarding, in particular, the national rules at issue in the main proceedings, the Court has ruled, in paragraph 173 of the judgment of 12 December 2006, *Test Claimants in the FII Group Litigation* (C?446/04, EU:C:2006:774), that Article 63 TFEU precludes legislation of a Member State which, while exempting from ACT resident companies paying to their shareholders dividends which have their origin in nationally-sourced dividends, allows resident companies distributing to their shareholders dividends which have their origin in foreign-sourced dividends received by them to elect to be taxed under a regime which permits them to recover the ACT paid but, inter alia, does not provide a tax credit for their shareholders, whereas those shareholders would have received such a tax credit in the case of a distribution made by a resident company which had its origin in nationally-sourced dividends.

34 Thus, the Court has held, in particular, that, to the extent that the United Kingdom tax system — including the FID regime — deprives shareholders receiving dividends of their right to a tax credit where those dividends originated in the foreign-sourced profits of a resident company — contrary to what was provided for in the case of dividends which have their origin in the nationally-sourced profits of a resident company — that system established a restriction on the free movement of capital within the meaning of Article 63 TFEU.

35 In the present case, the Trustees received dividends treated as FIDs without having been entitled to a tax credit in respect of those dividends.

36 Such an absence of a tax credit for shareholders not subject to income tax in respect of dividends, such as the Trustees, has the effect of discouraging those shareholders from investing in the capital of companies resident in the United Kingdom which receive dividends from companies resident outside the United Kingdom, and favouring investments in companies resident in the United Kingdom receiving dividends from other companies resident in that same State (see, by analogy, judgment of 12 December 2006, *Test Claimants in the FII Group Litigation*, C?446/04, EU:C:2006:774, paragraph 166).

37 It follows that the Trustees' situation comes under the treatment referred to in paragraph 173 of the judgment of 12 December 2006, *Test Claimants in the FII Group Litigation* (C?446/04, EU:C:2006:774), which is precluded by Article 63 TFEU. They may thus rely on that article for the purposes of disapplying a national provision, such as section 246C ICTA, which deprives them of a tax credit.

38 However, the Commissioners, before the referring court, and the United Kingdom Government, before this Court, argue that the Trustees may not rely on Article 63 TFEU to disapply section 246C ICTA, on the ground that their investment of capital in UK-resident companies subject to the FID regime does not involve the movement of capital between Member

States, according to the nomenclature constituting Annex I to Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article [63 TFEU] (OJ 1988 L 178, p. 5), drawn up to provide guidance in the interpretation of that article.

39 In that regard, it should be recalled that, according to the case-law of the Court, national legislation which applies without distinction to nationals of all the Member States, may generally fall within the scope of the provisions of the FEU Treaty on the free movement of capital only to the extent that it applies to situations related to trade between Member States (see, to that effect, judgment of 5 March 2002, *Reisch and Others*, C-515/99, C-519/99 to C-524/99 and C-526/99 to C-540/99, EU:C:2002:135, paragraph 24).

40 The provisions of the FEU Treaty on the free movement of capital do not apply to situations which are confined in all respects within a single Member State (judgment of 20 March 2014, *Caixa d'Estalvis i Pensions de Barcelona*, C-139/12, EU:C:2014:174, paragraph 42).

41 It does not appear to be the case that the legislation at issue in the main proceedings concerns only situations unrelated to trade between Member States, or that the relevant factors relating to the case in the main proceedings would be confined to within the United Kingdom.

42 On the contrary, the unfavourable tax treatment of certain shareholders receiving dividends treated as FIDs, namely the absence of the tax credit provided for in section 246C ICTA, is precisely due to the fact that those dividends have their origin in the profits that the distributing company has received from a non-UK-resident company, whereas in the case of dividends which have their origin in the profits received from a UK-resident company, those recipient shareholders would have been entitled to such a tax credit, all other things being equal.

43 The United Kingdom Government argues that such a restriction is, in any event, permitted in so far as it is justified by the need to ensure the cohesion of the national tax system. However, suffice it to state, in that regard, that it is apparent *inter alia* from paragraph 163 of the judgment of 12 December 2006, *Test Claimants in the FII Group Litigation* (C-446/04, EU:C:2006:774), that the restriction of Article 63 TFEU found in that case could not, in the Court's view, be justified by the need to preserve the cohesion of the tax system at issue. As has been observed by the Advocate General in point 66 of his Opinion, the arguments put forward by that government in the course of the present proceedings are essentially identical to the ones which were rejected by the Court in that latter case. Consequently, they cannot justify, in the present case, the restriction of Article 63 TFEU found in paragraph 36 of the present judgment.

44 In those circumstances, the answer to Question 1 is that Article 63 TFEU must be interpreted as conferring, in circumstances such as those at issue in the main proceedings, rights on a shareholder receiving dividends treated as FIDs.

Question 2

45 Having regard to the answer given to Question 1, there is no need to answer Question 2.

Question 3

46 By its third question, the referring court asks, in essence, whether and, if so, to what extent does EU law require that the domestic law of a Member State provide remedies to shareholders who, in a situation such as that at issue in the main proceedings, have received dividends treated as FIDs without, however, having obtained a tax credit in respect of those dividends, in order to enable those shareholders to enforce the rights that Article 63 TFEU confers on them.

47 It must be noted, at the outset, that the Member States are obliged, under, *inter alia*, the principle of sincere cooperation, laid down in the first subparagraph of Article 4(3) TEU, to ensure, in their respective territory, the application of and compliance with EU law and that, under the second subparagraph of Article 4(3) TEU, the Member States are to take any appropriate measure, general or particular, to ensure fulfilment of the obligations resulting from the acts of the institutions of the Union. Moreover, under the second subparagraph of Article 19(1) TEU, Member States are to provide remedies sufficient to ensure effective legal protection in the fields covered by EU law.

48 In accordance with the answer given to Question 1, Article 63 TFEU, in circumstances such as those at issue in the main proceedings, confers on shareholders receiving dividends treated as FIDs the right to the same tax treatment for those dividends as that reserved, to those shareholders, for dividends which have their origin in the income which the UK-resident distributing company has received from a company also residing in that State.

49 According to the settled case-law of the Court, Article 63 TFEU may be relied on before national courts and may render national rules that are inconsistent with it inapplicable (see, to that effect, judgments of 14 December 1995, *Sanz de Lera and Others*, C-163/94, C-165/94 and C-250/94, EU:C:1995:451, paragraph 48, and of 18 December 2007, *A*, C-101/05, EU:C:2007:804, paragraph 27).

50 It is also the settled case-law of the Court that the right to a refund of charges levied by a Member State in breach of rules of EU law is the consequence and complement of the rights conferred on individuals by provisions of EU law, as interpreted by the Court. The Member State is therefore required, in principle, to repay charges levied in breach of EU law (see, to that effect, judgments of 9 November 1983, *San Giorgio*, 199/82, EU:C:1983:318, paragraph 12; of 14 January 1997, *Comateb and Others*, C-192/95 to C-218/95, EU:C:1997:12, paragraph 20, and of 6 September 2011, *Lady & Kid and Others*, C-398/09, EU:C:2011:540, paragraph 17).

51 According to the United Kingdom Government, however, such a right to a refund of charges unduly levied does not exist in the present case, given that the Trustees, not being subject to income tax in respect of dividends, did not pay any tax in respect of the dividends to which the claimed tax credits relate.

52 However, it must be recalled that the right to a refund, within the meaning of the case-law cited in paragraph 50 of the present judgment, is concerned not only with the amounts paid to the Member State by way of unlawful charges but also any deducted amount the refund of which is essential in restoring the equal treatment required by the provisions of the FEU Treaty on the freedoms of movement (see, by analogy, judgments of 8 March 2001, *Metallgesellschaft and Others*, C-397/98 and C-410/98, EU:C:2001:134, paragraph 87; of 12 December 2006, *Test Claimants in the FII Group Litigation*, C-446/04, EU:C:2006:774, paragraph 205, and of 19 July 2012, *Littlewoods Retail and Others*, C-591/10, EU:C:2012:478, paragraph 25), including, consequently, the amounts due to the individual in respect of a tax credit of which he has been deprived under the national legislation precluded by EU law.

53 Thus, in circumstances such as those at issue in the main proceedings, shareholders not subject to income tax in respect of dividends, who have received dividends treated as FIDs without, however, having obtained a tax credit pertaining to those dividends, such as the Trustees, are entitled to the payment of the tax credit of which they have been unduly deprived under the national legislation incompatible with Article 63 TFEU.

54 Next, it must be recalled that, according to the settled case-law of the Court, both the

administrative authorities and the national courts called upon, within the exercise of their respective jurisdiction, to apply provisions of EU law, are under a duty to give full effect to those provisions, if necessary refusing of their own motion to apply any conflicting provision of national law, and it is not necessary for that court to request or to await the prior setting aside of that provision of national law by legislative or other constitutional means (see, to that effect, in relation to administrative authorities, judgments of 22 June 1989, *Costanzo*, 103/88, EU:C:1989:256, paragraph 31, and of 29 April 1999, *Ciola*, C?224/97, EU:C:1999:212, paragraphs 26 and 30, and, in relation to courts, judgments of 9 March 1978, *Simmenthal*, 106/77, EU:C:1978:49, paragraph 24, and of 5 July 2016, *Ognyanov*, C?614/14, EU:C:2016:514, paragraph 34).

55 Moreover, that obligation does not prevent the national courts with jurisdiction from applying, among the various procedures of the internal legal order, those which are appropriate to safeguard the individual rights conferred by EU law (see, to that effect, judgments of 22 October 1998, *IN. CO. GE.'90 and Others*, C?10/97 to C?22/97, EU:C:1998:498, paragraph 21, and of 19 July 2012, *Littlewoods Retail and Others*, C?591/10, EU:C:2012:478, paragraph 33).

56 It follows that, in the context of an action brought by the non-taxable shareholders receiving dividends treated as FIDs with a view to obtaining payment of the tax credit of which they have been unduly deprived by the national legislation at issue in the main proceedings, the national court is, in principle, required to disapply the provisions of that legislation which is responsible for the treatment that is contrary to Article 63 TFEU, so as to give full effect to EU law.

57 As regards, last, the procedural rules governing such an action, it is not for the Court of Justice to assign a legal classification to the actions brought by the Trustees before the referring court, as it is for them to specify the nature and basis of their action, subject to review by the referring court. It is apparent from the case-law of the Court, however, that individuals must have an effective legal remedy enabling them to obtain payment of the tax credit of which they have been unduly deprived (see, by analogy, judgment of 12 December 2006, *Test Claimants in the FII Group Litigation*, C?446/04, EU:C:2006:774, paragraphs 201 and 220).

58 Thus, although, in the absence of EU rules in the area of payment of tax credits of which the beneficiaries have been unduly deprived, it is for the domestic legal system of each Member State to determine the procedural rules governing actions intended to ensure the protection of directly effective EU law rights, under the principle of equivalence, those rules must not be less favourable than those relating to similar domestic actions (see, to that effect, judgments of 16 December 1976, *Rewe-Zentralfinanz and Rewe-Zentral*, 33/76, EU:C:1976:188, paragraph 5; of 8 March 2001, *Metallgesellschaft and Others*, C?397/98 and C?410/98, EU:C:2001:134, paragraph 85; of 12 December 2006, *Test Claimants in the FII Group Litigation*, C?446/04, EU:C:2006:774, paragraph 203, and of 6 October 2015, *Târ?ia*, C?69/14, EU:C:2015:662, paragraphs 26 and 27).

59 Furthermore, under the principle of effectiveness, the Member States are responsible for ensuring that the rights conferred by EU law are effectively protected in each case and, in particular, for ensuring compliance with the right to an effective remedy and to a fair hearing enshrined in Article 47(1) of the Charter of Fundamental Rights of the European Union (see, to that effect, judgments of 15 September 2016, *Star Storage and Others*, C?439/14 and C?488/14, EU:C:2016:688, paragraph 46; of 8 November 2016, *Lesoochranárske zoskupenie VLK*, C?243/15, EU:C:2016:838, paragraph 65, and of 16 May 2017, *Berlioz Investment Fund*, C?682/15, EU:C:2017:373, paragraph 44).

60 In the present case, it is *inter alia* for the referring court, first, to ensure that shareholders not subject to income tax in respect of dividends who have received dividends that have their origin in foreign-sourced dividends treated as FIDs, such as the Trustees, have a remedy ensuring payment of the tax credit pertaining to those dividends — of which the beneficiaries have been

unduly deprived — under rules which are not less favourable than those relating to an action seeking payment of such a tax credit, or of a comparable tax advantage, in a situation where the tax authorities have unduly deprived the beneficiaries of that tax advantage on a distribution of dividends which have their origin in the dividends received from a UK-resident company. Second, that court must ensure that that remedy allows the protection of the rights conferred on such shareholders by Article 63 TFEU to be guaranteed in an effective manner.

61 Consequently, the answer to Question 3 is that EU law requires that the domestic law of a Member State provide remedies to shareholders who, in a situation such as that at issue in the main proceedings, have received dividends treated as FIDs but have not, however, obtained a tax credit in respect of those dividends, in order to enable those shareholders to enforce the rights that Article 63 TFEU confers on them. In that regard, the national court with jurisdiction must ensure that shareholders not subject to income tax in respect of dividends who have received dividends that have their origin in foreign-sourced dividends treated as FIDs, such as the Trustees, have a remedy which, first, ensures payment of such a tax credit — of which the beneficiaries have been unduly deprived — under rules which are not less favourable than those relating to an action seeking payment of a tax credit, or of a comparable tax advantage, in a situation where the tax authorities have unduly deprived the beneficiaries of that tax credit or of that tax advantage during a distribution of dividends which have their origin in the dividends received from a UK-resident company and, second, allows the protection of the rights conferred on such shareholders by Article 63 TFEU to be guaranteed in an effective manner.

Question 4(a)

62 By part (a) of its fourth question, the referring court asks, in essence, what is the potential significance, in relation to the answers to be given to the first three questions, of the fact that the Trustees are not subject to income tax in the United Kingdom in respect of any dividends they receive.

63 In that regard, it must be recalled that the infringement of Article 63 TFEU identified by the Court in paragraph 173 of the judgment of 12 December 2006, *Test Claimants in the FII Group Litigation* (C-446/04, EU:C:2006:774) resides, inter alia, in the difference in treatment of dividends received by a shareholder, such as the Trustees, depending on whether those dividends have their origin in foreign-sourced dividends treated as FIDs or in nationally-sourced dividends not treated as FIDs.

64 As the Advocate General noted, in essence, in point 88 of his Opinion, in so far as compliance with Article 63 TFEU simply requires the elimination of a difference in tax treatment between those two categories of dividends received by shareholders, such as the Trustees, the question whether or not the shareholder receiving dividends treated as FIDs is subject to income tax in respect of such dividends does not appear to be relevant.

65 The answer to Question 4(a), therefore, is that the fact that the Trustees are not subject to income tax in respect of the dividends they receive is not such as to alter the answers given to the first three questions asked by the referring court.

Question 4(b)

66 By part (b) of its fourth question, the referring court wonders as to the potential significance, in relation to the answers to be given to the first three questions, of the fact that the infringement of EU law at issue is not, in its view, sufficiently serious so as to give rise to the non-contractual liability of the Member State in favour of the company distributing dividends treated as FIDs, under the principles established in the judgment of 5 March 1996, *Brasserie du pêcheur and Factortame*

(C-46/93 and C-48/93, EU:C:1996:79).

67 In the present case, it is apparent from the order for reference that the action for non-contractual liability due to infringements of Article 63 TFEU was brought against the United Kingdom by companies distributing dividends, not by the Trustees.

68 In that regard, it is appropriate to point out, as the Advocate General noted in point 91 of his Opinion, that the rights which Article 63 TFEU confers on the shareholders in question are, in any event, independent of those conferred on the companies that distributed the dividends.

69 In those circumstances, the answer to Question 4(b) is that, even if the infringement of EU law at issue in the main proceedings is not, in the referring court's view, sufficiently serious so as to give rise to the non-contractual liability of the Member State concerned in favour of the company distributing dividends treated as FIDs, under the principles established in the judgment of 5 March 1996, *Brasserie du pêcheur and Factortame* (C-46/93 and C-48/93, EU:C:1996:79), that circumstance is not such as to alter the answers given to the first three questions.

Question 4(c)

70 By part (c) of its fourth question, the referring court wonders as to the potential significance, in relation to the answers to be given to the first three questions, of the fact that it is possible that, in certain cases, the shareholder who has received dividends treated as FIDs obtained an increased amount of dividends from the distributing company in order to make up for the fact that such a shareholder were not entitled to a tax credit.

71 In paragraph 207 of the judgment of 12 December 2006, *Test Claimants in the FII Group Litigation* (C-446/04, EU:C:2006:774), the Court did, it is true, take the view, inter alia, that the resident companies that elected to be taxed under the FID regime could not, on the basis of EU law, invoke the damage they claimed to have suffered because they saw themselves as having to increase the amount of their dividends in order to compensate for the fact that their shareholders were not entitled to a tax credit, since such increases in the amount of dividends were the result of decisions taken by such distributing companies and did not constitute, on their part, an inevitable consequence of the refusal of the United Kingdom to grant those shareholders the same treatment as that afforded to shareholders receiving a distribution which had its origin in nationally-sourced dividends.

72 However, the situation of the shareholders who have received dividends treated as FIDs and the fact that they were not entitled to a tax credit in respect of those dividends results not from any decision on their part, but from the legislation in force in the United Kingdom at the time of the relevant tax year.

73 It follows that, contrary to the position put forward by the United Kingdom Government, whether or not a company distributing dividends treated as FIDs has increased the amount of the dividend paid to such shareholders is not liable to give rise to 'double recovery' by the Trustees.

74 In addition, any increase in the amount of dividends treated as FIDs distributed by a UK-resident company, in order to make up for the fact that the shareholder receiving those dividends was not entitled to a tax credit, cannot give rise to double recovery of the tax credits due to that shareholder, since that distribution of dividends by that company cannot be equated to the grant of a tax credit by the tax authorities. Such a distribution of profits by a company to its shareholder represents merely a transfer between the company and its shareholder, which is not capable of affecting the rights and obligations of the tax authorities in respect of that shareholder.

75 In those circumstances, the answer to the Question 4(c) is that the fact that a UK-resident company has distributed an increased amount of dividends treated as FIDs in order to make up for the fact that the recipient shareholder was not entitled to a tax credit is not such as to alter the answers given to the first three questions asked by the referring court.

76 In view of all the foregoing, the answer to Question 4 is that neither the fact that the Trustees are not subject to income tax in respect of the dividends they receive, nor the fact that the infringement of EU law at issue is not, in the referring court's view, sufficiently serious so as to give rise to the non-contractual liability of the Member State concerned in favour of the company distributing dividends treated as FIDs, under the principles established in the judgment of 5 March 1996, *Brasserie du pêcheur and Factortame* (C-46/93 and C-48/93, EU:C:1996:79), nor the fact that a UK-resident company has distributed an increased amount of dividends treated as FIDs in order to make up for the fact that the recipient shareholder was not entitled to a tax credit are such as to alter the answers given to the other questions asked by the referring court.

Costs

77 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:

1. **Article 63 TFEU must be interpreted as conferring, in circumstances such as those at issue in the main proceedings, rights on a shareholder receiving dividends treated as 'foreign income dividends'.**
2. **EU law requires that the domestic law of a Member State provide remedies to shareholders who, in a situation such as that at issue in the main proceedings, have received dividends treated as 'foreign income dividends' but have not, however, obtained a tax credit in respect of those dividends, in order to enable those shareholders to enforce the rights that Article 63 TFEU confers on them. In that regard, the national court with jurisdiction must ensure that shareholders not subject to income tax in respect of dividends who have received dividends that have their origin in foreign-sourced dividends treated as 'foreign income dividends', such as the Trustees of the BT Pension Scheme, have a remedy which, first, ensures payment of such a tax credit — of which the beneficiaries have been unduly deprived — under rules which are not less favourable than those relating to an action seeking payment of a tax credit, or of a comparable tax advantage, in a situation where the tax authorities have unduly deprived the beneficiaries of that tax credit or of that tax advantage on a distribution of dividends which have their origin in the dividends received from a UK-resident company and, second, allows the protection of the rights conferred on such shareholders by Article 63 TFEU to be guaranteed in an effective manner.**
3. **Neither the fact that the Trustees of the BT Pension Scheme are not subject to income tax in respect of the dividends they receive, the fact that the infringement of EU law at issue is not, in the referring court's view, sufficiently serious so as to give rise to the non-contractual liability of the Member State concerned in favour of the company distributing dividends treated as 'foreign income dividends', under the principles established in the judgment of 5 March 1996, *Brasserie du pêcheur and Factortame* (C-46/93 and C-48/93, EU:C:1996:79) nor the fact that a UK-resident company has distributed an increased amount of dividends treated as 'foreign income dividends' in order to make up for the fact that the recipient shareholder was not entitled to a tax credit are such as to alter the**

answers given to the other questions asked by the referring court.

Ileši?

Prechal

Rosas

Toader

Jaraši?nas

Delivered in open court in Luxembourg on 14 September 2017.

A. Calot Escobar

M. Ileši?

Registrar

President of the Second Chamber

* Language of the case: English.