Provisional text

JUDGMENT OF THE COURT (Grand Chamber)

26 February 2019 (*)

(Reference for a preliminary ruling — Free movement of capital — Movement of capital between Member States and third countries — Standstill clause — National legislation of a Member State regarding controlled companies established in third countries — Amendment of that legislation, followed by the reintroduction of the earlier legislation — Income of a company established in a third country derived from the holding of debts owed by a company established in a Member State — Incorporation of that income into the tax base of a taxable person resident for tax purposes in a Member State — Restriction on the free movement of capital — Justification)

In Case C?135/17,

REQUEST for a preliminary ruling under Article 267 TFEU from the Bundesfinanzhof (Federal Finance Court, Germany), made by decision of 12 October 2016, received at the Court on 15 March 2017, in the proceedings

X GmbH

v

Finanzamt Stuttgart — Körperschaften,

THE COURT (Grand Chamber),

composed of K. Lenaerts, President, J.-C. Bonichot, M. Vilaras, E. Regan, F. Biltgen, K. Jürimäe and C. Lycourgos, Presidents of Chambers, A. Rosas (Rapporteur), E. Juhász, M. Ileši?, J. Malenovský, E. Levits and L. Bay Larsen, Judges,

Advocate General: P. Mengozzi,

Registrar: R. ?ere?, Administrator,

having regard to the written procedure and further to the hearing on 5 March 2018,

after considering the observations submitted on behalf of:

– X GmbH, by K. Weber and D. Pohl, Rechtsanwälte,

– the German Government, by T. Henze and R. Kanitz, acting as Agents,

– the French Government, by D. Colas, E. de Moustier and S. Ghiandoni, acting as Agents,

– the Swedish Government, by A. Falk, C. Meyer-Seitz, H. Shev, L. Zettergren and L. Swedenborg, acting as Agents,

– the European Commission, by B.-R. Killmann and N. Gossement, acting as Agents, after hearing the Opinion of the Advocate General at the sitting on 5 June 2018,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Articles 63 and 64 TFEU.

2 The request has been made in proceedings between X GmbH, a company incorporated under German law, and the Finanzamt Stuttgart — Körperschaften (Stuttgart Tax Office — Legal Persons Department, Germany) regarding the incorporation of the income obtained by Y, a company incorporated under Swiss law which is 30% owned by X, into the latter's tax base.

Legal context

3 The fourth part of the Gesetz über die Besteuerung bei Auslandsbeziehungen (Law on taxation of foreign transactions) of 8 September 1972 (BGBl. 1972 I, p. 1713), in the version applicable to the facts in the main proceedings ('the AStG 2006'), entitled 'Shareholding in foreign controlled companies', includes Paragraphs 7 to 14 of that law.

4 Paragraph 7(1) of the AStG 2006 defines a 'foreign company' as 'a legal person, a group of legal persons or a fund within the meaning of the Körperschaftsteuergesetz [(Law on Corporation Tax)], of which neither the management nor the head office are in Germany and which is not exempt from corporation tax pursuant to Paragraph 3(1) [of the latter law]'. According again to that Paragraph 7(1), when taxable persons with unlimited tax liability hold a shareholding amounting to more than half of the capital of such a company, the income with respect to which that company is a controlled company [Zwischengesellschaft], within the meaning of Paragraph 8 of the AStG 2006, is chargeable to tax as the income of each of those persons in the proportion corresponding to the shareholding attributable to each person in the share capital of that company.

5 Paragraph 7(6) of the AStG 2006 provides that:

'If a foreign company is a controlled company with respect to controlled-company income from invested capital [Zwischeneinkünfte mit Kapitalanlagecharakter] within the meaning of subparagraph 6a, and if a taxable person with unlimited tax liability holds at least 1% of the shares in that company, that controlled?company income shall be taxed as the income of that person to the extent defined in subparagraph 1, even where the remaining conditions laid down in that subparagraph are not satisfied. ...'

6 Paragraph 7(6a) of the AStG 2006 provides:

'Controlled-company income from invested capital is income of a foreign controlled company … which is derived from the holding, administering or maintenance or increasing the value of means of payment, debts, securities, shares (with the exception of the types of income referred to in Points 8 and 9 of Paragraph 8(1)) and similar assets, unless the taxable person proves that that income is derived from an activity that contributes to one of the foreign company's activities pursued on its own account covered under Points 1 to 6 of Paragraph 8(1) ...'

7 Under Paragraph 8(1) of the AStG 2006, a company established in a third country is to be regarded as a 'controlled company' with respect to income that is liable to low taxation and does not arise from the economic activities listed in Points 1 to 10 of that subparagraph. In accordance with those points, the concept of a 'controlled company' does not include companies that receive income from — subject to several exceptions and details — agriculture and forestry, the

manufacture, treatment, processing or assembly of objects, energy production activities and the search for or extraction of natural resources, the operation of credit institutions or insurance companies, trade, the provision of services, leasing and rental, raising or making available through a loan capital which the taxable person can show has been raised on foreign capital markets exclusively and not through a person related to the taxable person or foreign company, the distribution of profits of companies, the sale of shares held in another company, its dissolution or reduction of its capital, and company conversions.

8 For the purposes of the definition of a controlled company established in a third country, Paragraph 8(3) of the AStG 2006 defines a tax on profits as 'low' when it is less than 25%.

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

9 It is apparent from the order for reference that X, a limited liability company incorporated under German law, held, during the period which is the subject of the main proceedings, 30% of the shares in Y, a company with its head office and management in Switzerland. In June 2005 Y concluded a 'debt assignment contract' with Z GmbH, a sports rights management company established in Germany.

10 The debts thus assigned to Y were owed under contracts pursuant to which Z granted non-repayable subsidies to sports clubs, thereby making liquid assets available to those clubs, and received 'profit participation rights' in return, the minimum amount of which corresponded to the amount paid in subsidies by Z, although that amount could be larger depending, inter alia, on the sports performance of the club concerned and its income from, inter alia, broadcasting rights.

11 Y paid EUR 11 940 461, funded entirely from third parties, to Z as the purchase price for the assignment of the debts in question. In November 2005 X granted to Y a loan of EUR 2.8 million.

12 By decision of 1 January 2007, the Stuttgart Tax Office — Legal Persons Department determined that X had received income from the passive activity of a company established in a third country. As that office regarded Y as a controlled company with respect to 'controlled-company income from invested capital' within the meaning of Paragraph 7(6) and (6a) of the AStG 2006, part of the income obtained by Y derived from the debts purchased from Z was incorporated into the tax base of X, whose profits were calculated for the year 2006 at EUR 546 651, from which the amount of EUR 95 223 in losses for the previous year was deductible.

13 X brought an action against that decision before the Finanzgericht Baden?Württemberg (Finance Court, Baden-Württemberg, Germany), which, however, dismissed the action.

14 Further to that dismissal, X brought proceedings before the Bundesfinanzhof (Federal Finance Court, Germany). According to that court, it is not disputed that Y was with respect to X a 'controlled company' and that the income obtained by Y further to the debt assignment contract was 'controlled-company income from invested capital' within the meaning of Paragraphs 7(6) and 8(1) of the AStG 2006. As X held more than 1% of the shares in that company established in a third country, the income obtained by Y was correctly incorporated into X's tax base pursuant to those provisions, pro rata to the amount of its shareholding in that company. Accordingly, under German law, X's appeal against the decision of 1 January 2007 is, according to the referring court, unfounded.

15 The referring court states, however, that those provisions apply only to shares held by German taxable persons in companies established in third countries. In those circumstances, that court is uncertain whether the provisions in question could infringe Article 63(1) TFEU, which provides, inter alia, that all restrictions on the movement of capital between Member States and

third countries are prohibited.

16 Before addressing the question of whether the national legislation is compatible with Article 63 TFEU, the referring court recalls, however, that under the so-called ‘standstill clause’ in Article 64(1) TFEU, the prohibition in Article 63 TFEU is ‘without prejudice to the application to third countries of any restrictions which exist on 31 December 1993 under national or Union law adopted in respect of the movement of capital to or from third countries’ when such movement involves, inter alia, direct investment. On the assumption that the situation in the main proceedings involves direct investment in a third country, in this case Switzerland, the referring court considers it necessary to determine at the outset whether national rules on controlled companies established in third countries, applicable during the tax year at issue, must be regarded as constituting a restriction ‘which [existed] on 31 December 1993’, given that those rules underwent certain amendments after that date.

17 In that regard, the Bundesfinanzhof (Federal Finance Court) explains that those rules, as they stood on 31 December 1993, were amended by, inter alia, the Gesetz zur Senkung der Steuersätze und zur Reform der Unternehmensbesteuerung (Law on reduction of tax rates and on reform of taxation of undertakings) of 23 October 2000 (BGBl. 2000 I, p. 1433; ‘the StSenkG 2000’), which entered into force on 1 January 2001. That court indicates that the StSenkG 2000 ‘substantially reconfigured’ the rules which existed on 31 December 1993, but explains that the amendments made by way of that law were, however, repealed shortly after by the Gesetz zur Fortentwicklung des Unternehmenssteuerrechts (Law on the further development of tax law in relation to undertakings) of 20 December 2001 (BGBl. 2001 I, p. 3858; ‘the UntStFG 2001’), which entered into force on this subject on 25 December 2001 and which, as regards the tax regime in relation to controlled companies established in a third country, includes a restriction on the movement of capital relating to direct investment identical in essence to the restriction arising from the rules which existed on 31 December 1993. To the extent that the amendments introduced by the StSenkG 2000 were capable of resulting in ‘controlled-company income from invested capital’ being incorporated into the tax base of a resident taxpayer, pursuant to the relevant provisions of that legislation, only as from 2002, those provisions were repealed before those amendments would have enabled the tax authorities to carry out that incorporation.

18 In those circumstances, the Bundesfinanzhof (Federal Finance Court) requests the Court to interpret two aspects of the standstill clause in Article 64(1) TFEU.

19 In the first place, the Bundesfinanzhof (Federal Finance Court) seeks, in essence, to ascertain whether the derogation in Article 64(1) TFEU allows a restriction to be applied on movements of capital between a Member State and a third country relating to direct investment, even though the substantive scope of the legislation at issue was extended after 31 December 1993 to also cover other types of investments, including ‘portfolio’ investments. In that regard, the referring court observes that Paragraph 7(6) of the AStG 2006, in the wording following the UntStFG 2001, reduced, inter alia, the amount of shares held in the controlled company established in a third country required for such incorporation from 10% to 1% of the capital of that company. However, given that that amendment does not concern, in principle, direct investment, such as that at issue in the main proceedings, the standstill clause might still apply to the situation in the main proceedings.

20 The referring court’s second concern relating to Article 64(1) TFEU relates to the temporal scope of the substantial amendments made by way of the StSenkG 2000 to the rules on ‘controlled-company income from invested capital’. According to the referring court, those amendments came into force, but would have been capable of resulting in controlled-company income being incorporated into the tax base of a resident taxpayer only from a date that was

subsequent to the date on which those amendments were repealed by the UntStFG 2001. Nevertheless, the amendment of the legal situation which existed on 31 December 1993 became, albeit temporarily, an integral part of the national legal framework and could therefore have interrupted the validity of the restrictions which existed on that date. In that regard, the referring court is uncertain whether the protected maintenance of a national restriction on the free movement of capital which existed on 31 December 1993 can lapse exclusively as a result of the formal legislative effect of an amending piece of legislation, or whether that legislation must also have been actually implemented in practice.

21 In the event that the national legislation at issue is not covered by the standstill clause in Article 64(1) TFEU on account of one of those two aspects and should therefore be assessed in the light of EU law on the free movement of capital, the referring court is uncertain whether such legislation constitutes a restriction which is prohibited under Article 63(1) TFEU and, if so, whether such a restriction can be justified by overriding reasons in the public interest. It recalls, in that regard, that the Court has analysed the question of the taxation of controlled-company income in the case that resulted in the judgment of 12 September 2006, *Cadbury Schweppes and Cadbury Schweppes Overseas* (C?196/04, EU:C:2006:544), but that the context of that case was the freedom of establishment applicable in relationships between Member States and not the context of the free movement of capital, which is also applicable in relationships between Member States and third countries.

22 The referring court considers that, if the principles identified in that judgment concerning freedom of establishment were to be applied without any qualification to the movement of capital between Member States and third countries, the German legislation at issue would infringe Article 63(1) TFEU. According to that legislation, the incorporation of ‘controlled-company income from invested capital’ into the tax base of a shareholder residing in Germany would not occur solely in the case of wholly artificial arrangements aimed at circumventing the application of national tax provisions within the meaning of the judgment of 12 September 2006, *Cadbury Schweppes and Cadbury Schweppes Overseas* (C?196/04, EU:C:2006:544). On the contrary, the national legislation at issue would apply irrespective of the economic function of the controlled company and the shareholder concerned would not be afforded the opportunity to establish and demonstrate to the tax authorities that his investment in a third country has an economic basis.

23 The referring court is therefore uncertain whether the grounds capable of justifying a restriction on freedom of establishment set out in the judgment of 12 September 2006, *Cadbury Schweppes and Cadbury Schweppes Overseas* (C?196/04, EU:C:2006:544), apply in relationships with third countries and, if so, what qualitative and quantitative requirements must the shareholding in a company established in a third country satisfy in order for it not to be regarded as ‘wholly artificial’.

24 In those circumstances, the Bundesfinanzhof (Federal Finance Court) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘(1) Is Article 57(1) EC (now Article 64(1) TFEU) to be interpreted as meaning that a restriction in a Member State which existed on 31 December 1993 in respect of the movement of capital to and from third countries involving direct investments is not affected by Article 56 EC (now Article 63 TFEU) if the national law in force at the relevant date restricting the movement of capital to and from third countries essentially applied only to direct investments, but was extended after that date to cover also portfolio holdings in foreign companies below the threshold of 10%?

(2) If the first question is to be answered in the affirmative: Is Article 57(1) EC to be interpreted as meaning that a provision of national law restricting the movement of capital to or from third countries involving direct investments, existing on the relevant date of 31 December 1993, is to be

regarded as applicable by reason of the fact that a later provision of national law that is essentially identical to the restriction in force at the relevant date is applicable, but where the restriction existing at the relevant date was substantially amended after that date and for a short period by legislation which formally entered into force but was in practice never applied due to the fact that it was replaced, before it could be applied to a specific case for the first time, by the provision that is now applicable?

(3) If either of the first two questions is to be answered in the negative: Does Article 56 EC preclude legislation of a Member State under which the basis of assessment to tax of a taxable person resident in that Member State, which holds at least 1% of the shares in a company established in another State (in the present case, Switzerland), includes, pro rata to the percentage of the shareholding, positive income obtained by that company from invested capital, where such income is taxed at a lower rate than in the Member State?’

Consideration of the questions referred

The first question

25 By its first question, the referring court seeks, in essence, to ascertain whether the standstill clause in Article 64(1) TFEU must be interpreted as meaning that Article 63(1) TFEU does not prejudice the application of a restriction on movements of capital to or from third countries involving direct investment which existed, in essence, on 31 December 1993 in the legislation of a Member State, although the scope of the restriction was extended, after that date, to include shareholdings which do not involve direct investment.

26 Article 63(1) TFEU lays down a general prohibition on restrictions on the movement of capital between Member States and third countries. Movements of capital covered by that provision include, in particular, direct investments in the form of participation in an undertaking through the holding of shares which confers the possibility of effectively participating in its management and control (‘direct’ investments) and the acquisition of shares on the capital market solely with the intention of making a financial investment without any intention of influencing the management and control of the undertaking (‘portfolio’ investments) (see, to that effect, judgment of 28 September 2006, *Commission* v *Netherlands*, C?282/04 and C?283/04, EU:C:2006:608, paragraphs 18 and 19, and Opinion 2/15 (*EU-Singapore Free Trade Agreement*) of 16 May 2017, EU:C:2017:376, paragraphs 80 and 227).

27 However, under Article 64(1) TFEU, a Member State, in its relations with third countries, may apply restrictions on movements of capital which come within the substantive scope of that provision, even though they contravene the principle of the free movement of capital laid down under Article 63(1) TFEU, provided that those restrictions already existed on 31 December 1993 (see, to that effect, judgments of 12 December 2006, *Test Claimants in the FII Group Litigation*, C?446/04, EU:C:2006:774, paragraph 187; of 24 May 2007, *Holböck*, C?157/05, EU:C:2007:297, paragraph 39; and of 24 November 2016, *SECIL*, C?464/14, EU:C:2016:896, paragraph 86).

28 In so far as the standstill clause in Article 64(1) TFEU provides that ‘Article 63 TFEU [is] to be without prejudice to the application to third countries of any restrictions which exist on 31 December 1993 under national or Union law adopted in respect of the movement of capital to or from third countries involving direct investment …’, it is apparent from the very wording of that provision that the restrictions on movements of capital to or from third countries involving direct investments fall within the substantive scope of that clause. By contrast, portfolio investments are not included in the movements of capital that are the subject of that clause.

29 In that regard, it is apparent from the order for reference that (i) during the tax year in

question in the main proceedings, X held 30% of Y's share capital, a participation which the referring court classifies as a direct investment, and (ii) the scope of the national legislation at issue in the main proceedings was extended after 31 December 1993, so that the legislation covers not only shareholdings of more than 10% in the capital of a company established in a third country, but also shareholdings of less than 10% in the capital of such companies, participations which the referring court classifies as portfolio investments.

30 However, in order for the standstill clause in Article 64(1) TFEU to apply, it is not necessary for the national legislation restricting movements of capital to or from third countries to concern exclusively the movements of capital that are the subject of that provision.

31 In that regard, the Court has previously held that the fact that national legislation may apply not only to movements of capital covered by Article 64(1) TFEU but also to other situations is not such as to preclude the standstill clause from being applicable in the circumstances which it covers. The substantive scope of that clause does not depend on the specific purpose of a national restriction, but on the effect of that restriction on the movements of capital that are the subject of Article 64(1) TFEU (see, to that effect, judgment of 15 February 2017, *X*, C?317/15, EU:C:2017:119, paragraphs 21 and 22).

32 Accordingly, Article 63(1) TFEU does not prejudice the application of a restriction which existed on 31 December 1993 under national law concerning the movements of capital that are the subject of Article 64(1) TFEU such as, inter alia, direct investment to or from third countries, notwithstanding any extensions after that date of the scope of the legislation laying down such a restriction to other types of movement of capital, such as portfolio investments.

33 In those circumstances, as observed by the Advocate General in points 58 and 59 of his Opinion, the amendment introduced by the UntStFG 2001 which lowered the shareholding threshold from 10% to 1% in the capital of the companies concerned, even though it may have resulted in the inclusion of investments other than direct investments within the scope of the national legislation at issue in the main proceedings, cannot affect the fact that the Member State concerned has the option of continuing to apply, to third countries, restrictions which existed under national law on 31 December 1993, on condition that those restrictions concern movements of capital that are the subject of Article 64(1) TFEU.

34 Having regard to the foregoing considerations, the answer to the first question is that the standstill clause in Article 64(1) TFEU must be interpreted as meaning that Article 63(1) TFEU does not prejudice the application of a restriction on movements of capital to or from third countries involving direct investment which existed, in its essence, on 31 December 1993 under the legislation of a Member State, although the scope of that restriction was extended, after that date, to include shareholdings which do not involve direct investment.

The second question

35 By its second question, asked in the event that the answer to the first question is in the affirmative, the referring court seeks, in essence, to ascertain whether the standstill clause in Article 64(1) TFEU must be interpreted as meaning that the prohibition in Article 63(1) TFEU applies to a restriction on movements of capital to or from third countries involving direct investment where the national tax legislation laying down that restriction was substantially amended after 31 December 1993, on account of the adoption of a law which entered into force but was replaced, before ever being applied in practice, by legislation that is essentially identical to that applicable on 31 December 1993.

36 As is apparent, in essence, from paragraph 27 of the present judgment, the standstill clause

in Article 64(1) TFEU allows, by derogation from the principle of the free movement of capital enshrined in the FEU Treaty, restrictions to be applied on certain types of movements of capital, provided, however, that those restrictions are ‘restrictions which exist on 31 December 1993’.

37 As regards the notion of ‘restrictions which exist on 31 December 1993’ in Article 64(1) TFEU, it should be borne in mind that any national provision adopted after that date is not, by that fact alone, automatically excluded from the derogation provided for in that provision. The Court has accepted that restrictions laid down in provisions adopted after that date which, in essence, are identical to previous legislation or which are limited to reducing or eliminating an obstacle to the exercise of rights and freedoms of movement in that legislation can be treated as equivalent to such restrictions ‘which exist’ (see, to that effect, judgments of 12 December 2006, *Test Claimants in the FII Group Litigation*, C?446/04, EU:C:2006:774, paragraphs 189 and 192; of 24 May 2007, *Holböck*, C?157/05, EU:C:2007:297, paragraph 41; and of 18 December 2007, *A*, C?101/05, EU:C:2007:804, paragraph 49).

38 Although the standstill clause in Article 64(1) TFEU thus permits the Member States to continue to apply restrictions falling within the substantive scope of that clause without any limitation in time, providing that those restrictions remain essentially unchanged, it should be noted that, according to the Court’s settled case-law, the words ‘restrictions which exist on 31 December 1993’ presuppose nonetheless that the legal provisions relating to the restriction in question have formed part of the legal order of the Member State concerned continuously since that date (judgments of 18 December 2007, *A*, C?101/05, EU:C:2007:804, paragraph 48; of 5 May 2011, *Prunus and Polonium*, C?384/09, EU:C:2011:276, paragraph 34; and of 24 November 2016, *SECIL*, C?464/14, EU:C:2016:896, paragraph 81).

39 The Court has thus held that the derogation established by the standstill clause in Article 64(1) TFEU cannot apply to provisions adopted by a Member State which, although essentially identical to legislation which existed on 31 December 1993, have reintroduced an obstacle to the free movement of capital which, following the repeal of the earlier legislation or the adoption of amending provisions which are based on a logic different from that of that legislation, no longer existed (see, to that effect, judgments of 12 December 2006, *Test Claimants in the FII Group Litigation*, C?446/04, EU:C:2006:774, paragraph 192; of 18 December 2007, *A*, C?101/05, EU:C:2007:804, paragraph 49; and of 24 November 2016, *SECIL*, C?464/14, EU:C:2016:896, paragraphs 87 and 88).

40 It must be held that when the Member State concerned repeals or amends legislation in such a manner, it waives the option available to it under Article 64(1) TFEU to continue to apply certain restrictions to movements of capital which existed on 31 December 1993 in its relations with third countries (see, to that effect, judgment of 24 November 2016, *SECIL*, C?464/14, EU:C:2016:896, paragraphs 86 to 88).

41 Accordingly, the application of Article 64(1) TFEU presupposes, not only that the essential substantive content of the restriction at issue has been maintained, but that that restriction has also existed continuously. If there were no requirement that the restrictions permitted under the standstill clause in that article should form part of the legal order of the Member State concerned continuously since 31 December 1993, a Member State could, at any time, reintroduce restrictions on the movement of capital to or from third countries which existed as part of the national legal order on 31 December 1993 but had not been maintained (see, to that effect, judgment of 18 December 2007, *A*, C?101/05, EU:C:2007:804, paragraph 48; of 5 May 2011, *Prunus and Polonium*, C?384/09, EU:C:2011:276, paragraph 34; and of 24 November 2016, *SECIL*, C?464/14, EU:C:2016:896, paragraph 81).

42 Moreover, in so far as it is a derogation from the fundamental principle of the free movement

of capital, the standstill clause in Article 64(1) TFEU must be interpreted strictly. Similarly, the conditions that national legislation must fulfil in order to be regarded as ‘existing’ on 31 December 1993, notwithstanding an amendment to national law after that date, must also be interpreted strictly (see, to that effect, judgment of 20 September 2018, *EV*, C?685/16, EU:C:2018:743, paragraphs 80 and 81).

43 In the present case, it is not disputed that the legislation at issue in the main proceedings, which existed on 31 December 1993, was amended after that date. However, as stated, inter alia, in paragraphs 17 and 20 of the present judgment, the referring court observes that the amendments made to the existing legal framework on that date by the StSenkG 2000 were repealed some time after they were adopted pursuant to the subsequent entry into force of the UntStFG 2001.

44 It is clear that, even though it is not apparent from the order for reference that the StSenkG 2000 repealed the provisions laying down the restriction which existed on 31 December 1993, mentioned by the referring court, that court appears nonetheless to consider that the amendments made to the earlier legislation by way of that law at the very least were based on a logic which differed from that of that legislation. The referring court submits, in that regard, that, by adopting the StSenkG 2000, the German legislature substantially reformed the system of taxation of companies and their shareholders, including the legislation concerning controlled companies established in third countries, that legislation being aligned with that general system, which was, according to the referring court, ‘substantially reconfigured’.

45 Assuming, subject to verification by the referring court, that the changes thus made to the national legislation by the StSenkG 2000 were indeed based on a logic different from that of the earlier legislation, or even repealed that legislation, it is appropriate to examine the effect on the applicability of the standstill clause of the fact, highlighted by the referring court, that those changes, although they entered into force on 1 January 2001, could result in ‘controlled-company income from invested capital’ being incorporated into a taxable person’s tax base only from 2002 onwards, that is, after those changes were repealed when the UntStFG 2001 subsequently came into force on 25 December 2001.

46 As is apparent from the Court’s case-law recalled in paragraphs 39 and 40 of the present judgment, a restriction on movements of capital which has existed under national law since 31 December 1993 cannot be regarded as having formed part of the legal order of the Member State concerned continuously since that date when, for example, the legislation laying down that restriction is repealed or amended in such a way that the logic on which that legislation is based is different. Such repeal or amendment takes place, in principle, on the entry into force, pursuant to the national constitutional procedures laid down for that purpose, of the provisions which repeal or amend the existing legislation.

47 However, notwithstanding the formal entry into force of the provisions repealing or amending the legislation laying down a restriction which existed on 31 December 1993, that restriction must be regarded as having been maintained continuously where the applicability of the repealing or modifying provisions is deferred under national law and those provisions are themselves repealed before they ever become applicable. In such a scenario, it must be held that such a restriction has remained part of the legal order of the Member State concerned, and has done so continuously.

48 In those circumstances, if, which it is for the referring court to ascertain, the StSenkG 2000 was adopted together with provisions deferring the applicability of that law, so that the amendments made by that law to the tax regime of controlled companies established in a third country were not applicable to the cross-border movements of capital referred to in Article 64(1) TFEU during the period between 1 January and 25 December 2001, when the UntStFG 2001

entered into force, it would be appropriate to consider that the restriction mentioned by that court has been maintained since 31 December 1993 continuously, for the purpose of the standstill clause in that article.

49 By contrast, if the referring court were to find that the StSenkG 2000 became applicable as soon as it entered into force, it would be appropriate to consider that the adoption of that law interrupted the continuous existence of the restriction at issue in the main proceedings — an interruption which should result in the inapplicability of Article 64(1) TFEU.

50 This would be the case if the tax rules deriving from the StSenkG 2000, which entered into force on 1 January 2001, meant that controlled-company income arising in 2001 was bound to be incorporated into the tax base of the resident taxpayer concerned, notwithstanding the fact that, on account of the repeal of that law on 25 December 2001, the tax authorities ultimately did not apply those rules in order to collect, in 2002, the tax on that income.

51 Having regard to the foregoing considerations, the answer to the second question is that the standstill clause in Article 64(1) TFEU must be interpreted as meaning that the prohibition in Article 63(1) TFEU is applicable to a restriction on movements of capital to or from third countries involving direct investment where the national tax legislation laying down that restriction was substantially amended, after 31 December 1993, by means of the adoption of a law which entered into force, but which was replaced, before ever being applied in practice, by legislation essentially identical to that applicable on 31 December 1993, unless the applicability of that law was deferred in accordance with national law, so that, despite its entry into force, it was not applicable to cross-border movements of capital that are covered by Article 64(1) TFEU, which it is for the referring court to determine.

The third question

52 In the event that the referring court should find, in the light of the answer to the second question, that the national legislation at issue in the main proceedings does not fall within the scope of the standstill clause in Article 64(1) TFEU, it is appropriate to examine, in accordance with the referring court's request, that court's third question.

53 By that question, the referring court asks, in essence, whether Article 63(1) TFEU must be interpreted as precluding legislation of a Member State under which income obtained by a company established in a third country that does not come from an activity of that company pursued on its own account, such as income classified as 'controlled?company income from invested capital' within the meaning of that legislation, is incorporated, pro rata to the amount of the shareholding, in the tax base of a taxable person residing in that Member State, where that taxable person holds at least 1% of the shares in that company and that income is taxed, in that third country, at a lower rate than the rate prevailing in the Member State concerned.

54 In order to answer that question, it is appropriate to analyse, in the first place, whether there is a restriction on the free movement of capital within the meaning of Article 63 TFEU and, if so, in the second place, whether such a restriction is permissible.

Whether there is a restriction on the free movement of capital

55 It follows from the Court's settled case-law that the measures prohibited 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 18 December 2007, *A*, C?101/05, EU:C:2007:804, paragraph 40; of 10 February 2011, *Haribo Lakritzen Hans Riegel and Österreichische Salinen*,

C?436/08 and C?437/08, EU:C:2011:61, paragraph 50; and of 8 November 2012, *Commission* v *Finland*, C?342/10, EU:C:2012:688, paragraph 28).

56 Pursuant to the legislation at issue in the main proceedings, a taxable person who is resident for tax purposes in Germany and holds at least 1% of the shares in a company established in a third country with a 'low' tax rate, is to be allocated, pro rata to the amount of the shareholding, the so-called 'passive' income, that is, 'controlled-company income from invested capital' within the meaning of that legislation, obtained by that company, irrespective of any distribution of the profits. By contrast, a taxable person holding an equivalent shareholding in a company established in Germany is not subject to that legislation, since it applies, by definition, only to cross-border situations.

57 Such a difference in tax treatment can have detrimental consequences for a resident taxpayer who holds shares in a company established in a third country earning such 'passive' income, as that company's profits are incorporated into the taxable person's tax base, pro rata to the amount of the shareholding in that company. Compared with a taxable person holding a comparable shareholding in a company established in the Member State where he resides, in the present case Germany, that difference in treatment creates a tax disadvantage for the taxable person investing capital in a third country, in so far as the legislation at issue in the main proceedings attributes the profits of a separate legal person to that taxable person and subjects the latter person to tax on them (see, by analogy, judgment of 12 September 2006, *Cadbury Schweppes and Cadbury Schweppes Overseas*, C?196/04, EU:C:2006:544, paragraph 45).

58 In those circumstances, the Court must hold that the legislation at issue in the main proceedings is such as to discourage investors with unlimited tax liability in Germany from investing in companies established in certain third countries and therefore constitutes a restriction on the free movement of capital, which is prohibited, in principle, by Article 63(1) TFEU.

Whether the restriction is permissible

59 Given the restrictive nature of the legislation at issue in the main proceedings, it is appropriate to examine, as stated by the German Government, whether the restriction on the free movement of capital created by that legislation can be justified in the light of Article 65(1)(a) TFEU, which provides that 'the provisions of Article 63 TFEU shall be without prejudice to the rights 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'.

60 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 (judgments of 11 September 2008, *Eckelkamp and Others*, C?11/07, EU:C:2008:489, paragraph 57; of 10 February 2011, *Haribo Lakritzen Hans Riegel and Österreichische Salinen*, C?436/08 and C?437/08, EU:C:2011:61, paragraph 56; and of 10 April 2014, *Emerging Markets Series of DFA Investment Trust Company*, C?190/12, EU:C:2014:249, paragraph 55).

61 The differences in treatment permitted by Article 65(1)(a) TFEU must not constitute, according to Article 65(3), 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 (see, to that effect, judgments of 6 June 2000, *Verkooijen*,

C?35/98, EU:C:2000:294, paragraph 43; of 7 September 2004, *Manninen*, C?319/02, EU:C:2004:484, paragraph 29; and of 17 September 2009, *Glaxo Wellcome*, C?182/08, EU:C:2009:559, paragraph 68).

62 It is therefore necessary to verify, in the first place, whether the difference in treatment at issue concerns situations which are objectively comparable and, if need be, to examine, in the second place, whether the restriction on the free movement of capital at issue can be justified by an overriding reason in the public interest.

– *The comparability of the situations*

63 The German Government disputes the existence of a restriction on the free movement of capital, submitting that the situation of taxable persons holding shares in a company established in a third country which has a low tax rate, caught by the legislation at issue in the main proceedings, is not comparable to that of taxable persons holding shares in a company resident in Germany. According to that government, those situations are not comparable, inter alia, on the ground that that legislation concerns shareholdings in companies which do not come within the scope of German powers of taxation and are subject, in a third country, to only a low tax rate.

64 It is settled case-law that 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 (see, to that effect, judgments of 18 July 2007, *Oy AA*, C?231/05, EU:C:2007:439, paragraph 38; of 1 April 2014, *Felixstowe Dock and Railway Company and Others*, C?80/12, EU:C:2014:200, paragraph 25; and of 12 June 2018, *Bevola and Jens W. Trock*, C?650/16, EU:C:2018:424, paragraph 32).

65 In that regard, according to the referring court's explanations, the objective of the legislation at issue in the main proceedings is 'to prevent or offset the transfer of (passive) income of persons with unlimited tax liability to States with a low tax rate'. According to the German Government, that legislation is also designed to prevent tax avoidance by the artificial transfer of income to third countries which have a low tax rate.

66 Admittedly, an objective of combating the transfer of income to third countries with a low tax rate is not likely to be pursued by a Member State as regards investments made within that State.

67 However, as observed by the Advocate General in point 71 of his Opinion, the purpose of the legislation at issue in the main proceedings is, so far as possible, to treat the situation of resident companies which have invested capital in a company established in a third country with a 'low' tax rate in the same way as that of resident companies which have invested their capital in another company resident in Germany, with a view, inter alia, to offsetting any tax advantages which the former might obtain from investing their capital in a third country. As soon as a Member State unilaterally taxes a resident company on the income obtained by a company established in a third country, in which that resident company holds shares, the situation of that resident company becomes comparable to that of a resident company which holds shares in another resident company (see, by analogy, judgments of 12 September 2006, *Cadbury Schweppes and Cadbury Schweppes Overseas*, C?196/04, EU:C:2006:544, paragraph 45, and of 14 December 2006, *Denkavit Internationaal and Denkavit France*, C?170/05, EU:C:2006:783, paragraphs 35 and 36).

68 In those circumstances, and without prejudice to the assessment of whether the legislation at issue in the main proceedings might be justified by an overriding reason in the public interest, it would deprive Article 63(1) TFEU of all meaning if it were accepted that situations are not comparable solely because the investor in question holds shares in a company established in a third country, when that provision specifically prohibits restrictions on cross-border movements of

capital (see, by analogy, judgment of 12 June 2018, *Bevola and Jens W. Trock*, C?650/16, EU:C:2018:424, paragraph 35).

69 Having regard to the foregoing considerations, the difference in treatment at issue in the main proceedings concerns situations that are objectively comparable.

– *Whether there is an overriding reason in the public interest*

70 According to the Court’s settled case-law, a restriction on the free movement of capital is permissible only if it is justified by overriding reasons in the public interest and, if that is the case, only if it is suitable for securing the attainment of the objective in question and does not go beyond what is necessary in order to attain it (see, to that effect, judgments of 11 October 2007, *ELISA*, C?451/05, EU:C:2007:594, paragraphs 79 and 82; of 23 January 2014, *DMC*, C?164/12, EU:C:2014:20, point 44; and of 21 June 2018, *Fidelity Funds and Others*, C?480/16, EU:C:2018:480, paragraph 64).

71 In their written observations, the German, French and Swedish Governments submit that legislation such as that at issue in the main proceedings is capable of being justified by overriding reasons in the public interest, namely safeguarding the balanced allocation between Member States and third countries of the power to impose taxes, preventing tax evasion and avoidance and ensuring the effectiveness of fiscal supervision.

72 In that regard, it must be recalled at the outset that the need to safeguard the balanced allocation between the Member States of the power to impose taxes is a ground capable of justifying a restriction on the free movement of capital, in particular, where the national measures in question are designed to prevent conduct capable of jeopardising the right of a Member State to exercise its powers of taxation in relation to activities carried out in its territory (see, to that effect, judgments of 10 February 2011, *Haribo Lakritzen Hans Riegel and Österreichische Salinen*, C?436/08 and C?437/08, EU:C:2011:61, paragraph 121; of 10 May 2012, *Santander Asset Management SGIIC and Others*, C?338/11 to C?347/11, EU:C:2012:286, paragraph 47; and of 10 April 2014, *Emerging Markets Series of DFA Investment Trust Company*, C?190/12, EU:C:2014:249, paragraph 98).

73 In the same vein, the Court has held that a national measure restricting the free movement of capital may be justified by the need to prevent tax evasion and avoidance where it specifically targets wholly artificial arrangements which do not reflect economic reality and the purpose of which is to avoid the tax normally payable on the profits generated by activities carried out in the territory of the Member State concerned (see, to that effect, judgments of 12 September 2006, *Cadbury Schweppes and Cadbury Schweppes Overseas*, C?196/04, EU:C:2006:544, paragraphs 51 and 55; of 13 March 2007, *Test Claimants in the Thin Cap Group Litigation*, C?524/04, EU:C:2007:161, paragraphs 72 and 74; and of 3 October 2013, *Itelcar*, C?282/12, EU:C:2013:629, paragraph 34).

74 Moreover, the Court has consistently held that the need to guarantee the effectiveness of fiscal supervision constitutes an overriding reason in the public interest capable of justifying a restriction on the free movement of capital (see, to that effect, judgments of 9 October 2014, *van Caster*, C?326/12, EU:C:2014:2269, paragraph 46, and of 22 November 2018, *Huijbrechts*, C?679/17, EU:C:2018:940, paragraph 36). In that regard, it should be borne in mind that fiscal supervision is designed, according to the Court’s case-law, to combat tax evasion and avoidance (see, to that effect, judgment of 5 July 2012, *SIAT*, C?318/10, EU:C:2012:415, paragraph 44).

75 In those circumstances, the overriding reasons in the public interest put forward by the interested parties are, in a situation such as that in the main proceedings, closely linked (see, by

analogy, judgments of 13 December 2005, *Marks & Spencer*, C?446/03, EU:C:2005:763, paragraph 51; of 21 January 2010, *SGI*, C?311/08, EU:C:2010:26, paragraph 69; and of 5 July 2012, *SIAT*, C?318/10, EU:C:2012:415, paragraph 48). As the objective of the national legislation at issue in the main proceedings, as recalled in paragraph 65 of the present judgment, corresponds, in essence, to those overriding reasons in the public interest and, in particular, to the prevention of tax evasion and avoidance, it is therefore necessary to examine whether that legislation is suitable for securing the attainment of the objective which it pursues and does not go beyond what is necessary in order to attain it.

76 Regarding whether that legislation is suitable for attaining the objective which it pursues, it must be noted that it provides, in particular in Paragraphs 7(6) and 8(3) of the AStG 2006, that the profits of a company established in a third country, receiving 'controlled-company income from invested capital', which is not taxable in Germany and is taxed at a 'low' rate, within the meaning of that legislation, in the third country concerned, are, irrespective of any distribution of those profits, incorporated into the tax base of a person with unlimited tax liability in Germany pro rata to the amount of the shareholding in that company, and tax charged thereon as a distributed dividend.

77 In that regard, it cannot be ruled out, as observed in essence by the Advocate General in point 94 of his Opinion, that, in circumstances such as those in the main proceedings, the assignment of debts by Z, a company established in Germany, to Y, a company not subject to German powers of taxation, could result in the revenue generated by the activities of sports clubs carried out in Germany, to which those debts relate, being, at least in part, excluded from German powers of taxation, although the question of the substantive tax law applicable is a matter for the referring court to determine. Moreover, although the Court does not have enough factual information before it to make a finding that, in the present case, the transactions at issue in the main proceedings are artificial, nor can it be ruled out that, to the extent that Y's sole activity consists of holding debts purchased from a company established in Germany using funding provided by third parties, including a loan granted by X, the shares held by the latter in Y have no valid commercial justification, but rather X's primary objective or one of its primary objectives is to avoid the tax normally due on the profits generated by activities carried out in Germany by using Y as a controlled company for that purpose.

78 When legislation, such as that at issue in the main proceedings, by providing that the income of a company established in a third country with a 'low' tax rate is to be incorporated into the tax base of a company with unlimited tax liability in Germany, is such as to offset, in a situation such as that in the main proceedings, the effects of any artificial transfer of income to such a third country, such legislation is, in principle, suitable for ensuring the attainment of the objective which it pursues.

79 It must further be determined whether that legislation goes beyond what is necessary in order to attain its objective.

80 According to the Court's settled case-law, the mere fact that a resident company holds shares in another company established in a third country cannot, as such, give rise to a general presumption of tax evasion and avoidance and, on that basis, justify a measure which compromises the free movement of capital (see, to that effect, judgments of 16 July 1998, *ICI*, C?264/96, EU:C:1998:370, paragraph 26; of 21 November 2002, *X and Y*, C?436/00, EU:C:2002:704, paragraph 62; and of 11 October 2007, *ELISA*, C?451/05, EU:C:2007:594, paragraph 91). By contrast, as is apparent from the case-law recalled in paragraph 73 above, a national measure restricting the free movement of capital may be justified when it is designed specifically to prevent conduct that consists of creating wholly artificial arrangements.

81 In that regard, the referring court seeks to ascertain whether the interpretation of the

concept of ‘wholly artificial arrangement’ adopted by the Court in the judgment of 12 September 2006, *Cadbury Schweppes and Cadbury Schweppes Overseas* (C?196/04, EU:C:2006:544), can be applied to the situation in the main proceedings. It notes, moreover, that the case that gave rise to that judgment related to freedom of establishment, provided for in Article 49 TFEU in particular, in that the case concerned national legislation of a Member State covering the taxation, imposed on a taxable person established in that State, of the income of a company established in another Member State, in particular when the resident taxpayer held more than 50% of the capital of that company.

82 It should be noted that the Court held, in paragraphs 67 and 68 of the judgment of 12 September 2006, *Cadbury Schweppes and Cadbury Schweppes Overseas* (C?196/04, EU:C:2006:544), that the establishment of a company in a Member State is a ‘wholly artificial arrangement’ when it is demonstrated, based on objective factors which are ascertainable by third parties, that that company is a fictitious establishment in so far as it does not carry out any genuine economic activity in the territory of the host Member State, account being taken, in particular, of the extent to which that company physically exists in terms of premises, staff and equipment. The Court inferred that such fictitious establishments, in particular those that have the characteristics of a ‘letterbox’ or ‘front’ subsidiary, can be subject to a specific tax regime for the purpose of preventing tax evasion and avoidance, and that the Treaty provisions on that freedom do not preclude such a regime.

83 That said, with respect to the question, expressly raised by the referring court, of what qualitative and quantitative requirements the shareholding held by a resident taxpayer in a company established in a third country must satisfy in order for it not to be regarded as ‘wholly artificial’, it should be borne in mind that the free movement of capital between Member States and third countries is intended not to frame the conditions under which companies can establish themselves within the internal market (see, to that effect, judgment of 13 November 2012, *Test Claimants in the FII Group Litigation*, C?35/11, EU:C:2012:707, paragraph 100), but to liberalise cross-border movements of capital (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 19, and of 10 February 2011, *Haribo Lakritzen Hans Riegel and Österreichische Salinen*, C?436/08 and C?437/08, EU:C:2011:61, paragraph 46).

84 Therefore, in the context of the free movement of capital, the concept of ‘wholly artificial arrangement’ cannot necessarily be limited to merely the indications, referred to in paragraphs 67 and 68 of the judgment of 12 September 2006, *Cadbury Schweppes and Cadbury Schweppes Overseas* (C?196/04, EU:C:2006:544), that the establishment of a company does not reflect economic reality, since the artificial creation of the conditions required in order to escape taxation in a Member State improperly or enjoy a tax advantage in that Member State improperly can take several forms as regards cross-border movements of capital. Indeed, those indications may also amount to evidence of the existence of a wholly artificial arrangement for the purpose of applying the rules on the free movement of capital, in particular when it proves necessary to assess the commercial justification of acquiring shares in a company that does not pursue any economic activities of its own. However, that concept is also capable of covering, in the context of the free movement of capital, any scheme which has as its primary objective or one of its primary objectives the artificial transfer of the profits made by way of activities carried out in the territory of a Member State to third countries with a low tax rate.

85 Nonetheless, in the present case, it is apparent that the legislation at issue in the main proceedings is not designed solely to prevent conduct consisting of creating such artificial schemes. Indeed, it is apparent from the order for reference that, under Paragraphs 7(6) and 8(3) of the AStG 2006, when a resident taxpayer has been found to hold at least 1% of the shares in a

company, established in a third country with a ‘low’ tax rate, which receives ‘controlled-company income from invested capital’ within the meaning of that legislation, that income is automatically incorporated into the tax base of that taxable person, without the latter being afforded the opportunity to provide evidence to show that his shareholding is not the result of an artificial scheme, such as, inter alia, the commercial reasons for his shareholding in that company or the genuine nature of the company’s economic activities.

86 The automatic nature of the legislation at issue in the main proceedings, comparable, in essence, to an irrebuttable presumption of tax evasion or avoidance, cannot be justified solely on the basis of the criteria established by that legislation. Although a low tax rate applicable to the income of a company established in a third country or the ‘passive’ nature of the activities which generated that income, as defined by that legislation, can constitute indications of conduct that might amount to tax evasion or avoidance, they are not, as such, sufficient grounds to find that the acquisition of shares in that company by a taxable person residing in a Member State necessarily constitutes an artificial scheme in all cases.

87 It is settled case-law that, as regards relationships between Member States, national legislation, in order for it to be proportionate to the aim of preventing tax evasion or avoidance, must, on each occasion on which the existence of artificial transactions cannot be ruled out, give the taxable person an opportunity, without subjecting him to undue administrative constraints, to provide evidence of any commercial justification that there may have been for the transaction at issue (see, to that effect, judgments of 13 March 2007, *Test Claimants in the Thin Cap Group Litigation*, C?524/04, EU:C:2007:161, paragraph 82; of 5 July 2012, *SIAT*, C?318/10, EU:C:2012:415, paragraph 50; and of 3 October 2013, *Itelcar*, C?282/12, EU:C:2013:629, paragraph 37).

88 Having regard to the case-law recalled in the previous paragraph, the legislation at issue in the main proceedings, in that it presumes that conduct is artificial on the sole ground that the conditions laid down by that legislation are met, while affording the taxable person concerned no opportunity whatsoever to rebut that presumption, goes, in principle, beyond what is necessary in order to attain its objective.

89 That said, the legislation at issue in the main proceedings does not concern Member States, but third countries.

90 It that regard, it must be recalled that the case-law concerning restrictions on the exercise of the freedoms of movement within the European Union cannot be transposed in its entirety to movements of capital between Member States and third countries, since such movements take place in a different legal context (see, inter alia, judgment of 28 October 2010, *Établissements Rimbaud*, C?72/09, EU:C:2010:645, paragraph 40 and the case-law cited).

91 Regarding, in particular, a Member State’s obligation to give a taxable person the opportunity to produce evidence demonstrating any commercial justification for its shareholding in a company established in a third country, it is apparent from the Court’s case-law that the existence of such an obligation must be assessed according to the availability of administrative and legislative measures permitting, if necessary, the accuracy of such evidence to be verified (see, to that effect, judgments of 11 October 2007, *ELISA*, C?451/05, EU:C:2007:594, paragraph 98; of 28 October 2010, *Établissements Rimbaud*, C?72/09, EU:C:2010:645, paragraphs 45 and 46; and of 10 April 2014, *Emerging Markets Series of DFA Investment Trust Company*, C?190/12, EU:C:2014:249, paragraph 85).

92 It is also apparent from the Court’s settled case-law that, where the legislation of a Member State makes entitlement to a tax advantage dependent on the satisfaction of conditions,

compliance with which can be verified only by obtaining information from the competent authorities of a third country, it is, in principle, legitimate for that Member State to refuse to grant that advantage if, for example, because that third country has no treaty obligation to provide information, it proves impossible to obtain that information from that third country (see, to that effect, judgments of 18 December 2007, *A*, C?101/05, EU:C:2007:804, paragraph 63; of 10 February 2011, *Haribo Lakritzen Hans Riegel and Österreichische Salinen*, C?436/08 and C?437/08, EU:C:2011:61, paragraph 67; and of 10 April 2014, *Emerging Markets Series of DFA Investment Trust Company*, C?190/12, EU:C:2014:249, paragraph 84).

93 In the present case, the finding that the shareholding of the company established in Germany, at issue in the main proceedings, in a company established in a third country is not, even if the conditions laid down in Paragraphs 7(6) and 8(3) of the AStG 2006 are met, the result of an artificial scheme requires the German tax authorities to analyse information relating, in particular, to the nature of the activities of that company that is established in a third country.

94 Since a Member State is not required to accept the information relating to the activities of a company established a third country in which a taxable person of that Member State holds shares, when it is not able to verify, if necessary, the accuracy of that information (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 85), it is for the referring court to examine, in the present case, whether there are, in particular, treaty obligations between the Federal Republic of Germany and the Swiss Confederation, establishing a legal framework of cooperation and procedures for the exchange of information between the national authorities concerned, which are genuinely such as to empower the German tax authorities to verify, if necessary, the accuracy of the information provided on the company established in Switzerland in order to demonstrate that that taxable person’s shareholding in that company is not the result of an artificial scheme.

95 To the extent that such a legal framework, governed, inter alia, by treaties, does not exist between the Member State and the third country concerned, it must be held that Article 63(1) TFEU does not preclude the Member State concerned from applying legislation, such as that at issue in the main proceedings, which provides for the incorporation of the income of a company established in a third country into the tax base of a resident taxpayer, without the latter being afforded the opportunity to demonstrate any commercial justification for its shareholding in that company. By contrast, if such a legal framework were found to exist, the taxable person concerned should be given the opportunity to demonstrate, without being subject to undue administrative constraints, any commercial justification that there may have been for its investment in the third country concerned.

96 Having regard to the foregoing considerations, the answer to the third question is that Article 63(1) TFEU must be interpreted as not precluding legislation of a Member State under which income obtained by a company established in a third country that does not come from an activity of that company pursued on its own account, such as income classified as ‘controlled-company income from invested capital’ within the meaning of that legislation, is incorporated, pro rata to the amount of the shareholding, into the tax base of a taxable person residing in that Member State where that taxable person holds at least 1% of the shares in that company and that income is taxed, in that third country, at a lower rate than that prevailing in the Member State concerned, unless there is a legal framework providing, in particular, treaty obligations that empower the national tax authorities of that Member State to verify, if necessary, the accuracy of information provided in respect of that company with a view to demonstrating that that taxable person’s shareholding in that company is not the result of an artificial scheme.

Costs

97 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 (Grand Chamber) hereby rules:

1. **The standstill clause in Article 64(1) TFEU must be interpreted as meaning that Article 63(1) TFEU does not prejudice the application of a restriction on movements of capital to or from third countries involving direct investment which existed, in its essence, on 31 December 1993 in the legislation of a Member State, although the scope of the restriction was extended, after that date, to include shareholdings which do not involve direct investment.**

2. **The standstill clause in Article 64(1) TFEU must be interpreted as meaning that the prohibition in Article 63(1) TFEU is applicable to a restriction on movements of capital to or from third countries involving direct investment where the national tax legislation laying down that restriction was substantially amended, after 31 December 1993, by means of the adoption of a law which entered into force, but which was replaced, before ever being applied in practice, by legislation essentially identical to that applicable on 31 December 1993, unless the applicability of that law was deferred in accordance with national law, so that, despite its entry into force, it was not applicable to cross?border movements of capital that are covered by Article 64(1) TFEU, which it is for the referring court to determine.**

3. **Article 63(1) TFEU must be interpreted as not precluding legislation of a Member State under which income obtained by a company established in a third country that does not come from an activity of that company pursued on its own account, such as income classified as 'controlled?company income from invested capital' within the meaning of that legislation, is incorporated, pro rata to the amount of the shareholding, into the tax base of a taxable person residing in that Member State where that taxable person holds at least 1% of the shares in that company and that income is taxed, in that third country, at a lower rate than the rate prevailing in the Member State concerned, unless there is a legal framework providing, in particular, treaty obligations that empower the national tax authorities of that Member State to verify, if necessary, the accuracy of information provided in respect of that company with a view to demonstrating that that taxable person's shareholding in that company is not the result of an artificial scheme.**

[Signatures]

* Language of the case: German.