Case C-194/06

Staatssecretaris van Financiën

v

Orange European Smallcap Fund NV

(Reference for a preliminary ruling from the Hoge Raad der Nederlanden)

(Articles 56 EC to 58 EC – Free movement of capital – Taxation of dividends – Concession granted to a fiscal investment enterprise on account of tax deducted at source by another State from dividends received by that enterprise – Restriction of that concession to the amount that a shareholder resident in the Member State of establishment of that enterprise who has made an investment without such an enterprise acting as intermediary could have had credited to income tax on the basis of a convention for the prevention of double taxation – Restriction of that concession by reference to the shares of non-resident shareholders in the capital of that enterprise)

Summary of the Judgment

1. *Free movement of capital – Restrictions – Tax legislation – Corporation tax – Taxation of dividends received by collective investment enterprises*

(Arts 56 EC and 58 EC)

2. *Free movement of capital – Restrictions – Tax legislation – Corporation tax – Taxation of dividends received by collective investment enterprises*

(Arts 56 EC and 58 EC)

3. *Free movement of capital – Restrictions – Meaning – Same interpretation with regard to relations with third countries and within the Community – Limits*

(Art. 56(1) EC)

4. *Free movement of capital – Restrictions on movements of capital to or from third countries – Restrictions on capital movements involving direct investment which existed on 31 December 1993 – Meaning of 'direct investment'*

(Art. 57(1) EC)

1. Articles 56 EC and 58 EC do not preclude legislation of a Member State which grants a concession to fiscal investment enterprises established in that Member State on account of tax deducted at source in another Member State from dividends received by those enterprises, and restricts that concession to the amount which a natural person resident in the first Member State could have had credited, on account of similar deductions, on the basis of a double taxation convention concluded with that other Member State.

It is true that, by excluding from the concession (relating to the taxation at source of dividends received abroad) dividends originating in certain Member States, such legislation makes investment in those Member States less appealing than investment in the Member States in which the taxation at source of those dividends gives rise to that concession. The legislation in question is therefore liable to deter a collective investment enterprise from investing in the Member States in which the taxation of dividends does not give rise to the concession and accordingly constitutes a restriction on the free movement of capital prohibited in principle by Article 56 EC.

Nevertheless, such legislation seeks to make dividends received by a shareholder investing directly subject as far as possible to the same treatment for tax purposes as those received by a shareholder investing through the intermediary of a fiscal investment enterprise, so as to prevent investments abroad by such an enterprise from being regarded as less appealing than direct investments. However, under that legislation, where a fiscal investment enterprise receives dividends from Member States with which the Member State in which that enterprise is established has concluded a convention providing for shareholders who are natural persons to be entitled to credit the tax which those Member States have deducted from the dividends to the income tax for which those shareholders are liable in the Member State of establishment, the situation of that enterprise is different from that in which it finds itself when receiving dividends from Member States with which no such convention has been concluded, as there is no such entitlement in respect of those dividends. In fact, it is only as regards investments in the Member States with which such a bilateral tax convention has been concluded that, without the concession granted, the decision to invest through the intermediary of a fiscal investment enterprise runs the risk of being less advantageous to a shareholder who is a natural person than direct investment. By contrast, as regards the Member States with which the Member State of establishment of such an enterprise has not concluded such a convention, the decision, by a natural person, to invest through the intermediary of such an enterprise does not involve the risk of losing a benefit which he could have enjoyed if he had chosen to invest directly in those Member States. Accordingly, that situation is not objectively comparable to the situation in which the Member State of establishment of that enterprise has concluded such a tax convention.

It follows that, in the case of legislation pursuant to which – in order to make the tax treatment of direct investments the same, as far as possible, as that of investments made through the intermediary of investment enterprises – a Member State has decided to grant those enterprises a concession in respect of tax deducted at source on dividends from Member States vis-à-vis which it has undertaken, under the terms of bilateral agreements, to allow natural persons to credit those deductions to the income tax for which they are liable under national law, Articles 56 EC and 58 EC do not preclude that Member State from withholding that concession in respect of dividends from other Member States with which it has not concluded bilateral agreements containing such provisions, as these are not objectively comparable situations.

(see paras 56, 60-65, operative part 1)

2. Articles 56 EC and 58 EC preclude legislation of a Member State which grants a concession to fiscal investment enterprises established in that Member State on account of tax deducted at source in another Member State or third country from dividends received by those enterprises, and reduces that concession where and to the extent to which the shareholders of those enterprises are natural or legal persons resident or established in other Member States or in third countries, since such a reduction adversely affects all the shareholders of those enterprises without distinction, because it has the effect of reducing the total amount of profit for distribution.

Such a reduction of the concession in proportion to the interest held by shareholders resident or established in another Member State creates a restriction on the free movement of capital, which is prohibited in principle by Article 56 EC, in so far as it is liable to impede the raising of capital by a fiscal investment enterprise in Member States other than that in which that enterprise is established, and is also liable to deter investors from those other Member States from acquiring shares in that enterprise.

The exercise by a Member State of its fiscal sovereignty over the dividends paid by the fiscal investment enterprises established in that Member State both to shareholders resident or established in that Member State and to shareholders resident or established in other Member States – where such a concession is provided for – justifies the need to extend it to the fiscal investment enterprises that include shareholders who are not resident or established in that Member State.

Even though such legislation seeks to distinguish between shareholders of collective investment enterprises according to whether they are resident and non-resident, so that the concession granted to them by means of a profit distribution by those enterprises corresponds to the rates of taxation to which those shareholders are respectively subject in the Member State of establishment of those enterprises, it must be noted that that objective cannot be achieved by a reduction of that concession in proportion to the interest in those enterprises held by shareholders resident or established in other Member States. Such a reduction adversely affects all the shareholders of fiscal investment enterprises without distinction, as it has the effect of reducing the total amount of profit for distribution.

A reduction in tax revenue in relation to dividends paid by companies established in other Member States cannot be regarded as an overriding reason in the public interest which may be relied on to justify a measure which is contrary to a fundamental freedom.

The approach in relation to situations in which shareholders of a fiscal investment enterprise are resident or established in another Member State can apply equally to situations in which shareholders of a collective investment enterprise are resident or established in third countries.

In so far as, on the one hand, a Member State taxes dividends distributed by a fiscal investment enterprise established in that Member State to shareholders who are resident or established in third countries and, on the other hand, the concession granted to such an enterprise is reduced in proportion to the interest in that fiscal investment enterprise held by shareholders resident in third countries, without the fiscal treatment of those shareholders in the third countries being relevant in that regard, the need to guarantee the effectiveness of fiscal supervision cannot justify such a restriction on the movement of capital to or from third countries.

On the assumption that the avoidance of a reduction in tax revenue may be relied upon as justification for a restriction on the movement of capital to or from third countries, such a justification cannot be taken into consideration inasmuch as that reduction affects all shareholders of the collective investment enterprise concerned without distinction, whether resident or established in the Member States or in third countries.

In respect of such legislation, whether the foreign shareholders of a fiscal investment enterprise are resident or established in a State with which the Member State of establishment of that enterprise has concluded a convention providing for reciprocal crediting of tax deducted at source from dividends is irrelevant.

(see paras 72, 74, 79, 82, 84, 92-97, 108, 113-114, operative part 2)

3. The concept of restrictions on movement of capital must be interpreted in the same manner with regard to relations between Member States and third countries as it is with regard to relations between Member States. Even if the liberalisation of the movement of capital with third countries may pursue objectives other than that of establishing the internal market, such as, in particular,

that of ensuring the credibility of the single Community currency on world financial markets and maintaining financial centres with a worldwide dimension within the Member States, when the principle of free movement of capital was extended, pursuant to Article 56(1) EC, to movement of capital between third countries and the Member States, the latter chose to enshrine that principle in that article and in the same terms for movements of capital taking place within the Community and those relating to relations with third countries.

However, movements of capital to or from third countries take place in a different legal context from that which occurs within the Community, since, because of the degree of legal integration that exists between Member States of the European Union, in particular by reason of the presence of Community legislation which seeks to ensure cooperation between national tax authorities, the taxation by a Member State of economic activities having cross-border aspects which take place within the Community is not always comparable to that of economic activities involving relations between Member States and third countries. It may also be that a Member State will be able to demonstrate that a restriction on the movement of capital to or from third countries is justified for a particular reason in circumstances where that reason would not constitute a valid justification for a restriction on capital movements between Member States.

(see paras 87-90)

4. A restriction is covered by Article 57(1) EC as being a restriction on the movement of capital involving direct investment in so far as it relates to investments of any kind undertaken by natural or legal persons and which serve to establish or maintain lasting and direct links between the persons providing the capital and the undertakings to which that capital is made available in order to carry out an economic activity.

(see para. 102, operative part 3)

JUDGMENT OF THE COURT (Grand Chamber)

20 May 2008 (*)

(Articles 56 EC to 58 EC – Free movement of capital – Taxation of dividends – Concession granted to a fiscal investment enterprise on account of tax deducted at source by another State from dividends received by that enterprise – Restriction of that concession to the amount that a shareholder resident in the Member State of establishment of that enterprise who has made an investment without such an enterprise acting as intermediary could have had credited to income tax on the basis of a convention for the prevention of double taxation – Restriction of that concession by reference to the shares of non-resident shareholders in the capital of that enterprise)

In Case C?194/06,

REFERENCE for a preliminary ruling under Article 234 EC by the Hoge Raad der Nederlanden (Supreme Court of the Netherlands), made by decision of 14 April 2006, received at the Court on 26 April 2006, in the proceedings

Staatssecretaris van Financiën

v

Orange European Smallcap Fund NV,

THE COURT (Grand Chamber),

composed of V. Skouris, President, C.W.A. Timmermans, A. Rosas, K. Lenaerts, L. Bay Larsen, Presidents of Chambers, R. Silva de Lapuerta, K. Schiemann, P. K?ris, E. Juhász, E. Levits (Rapporteur), A. Ó Caoimh, P. Lindh and J.?C. Bonichot, Judges,

Advocate General: Y. Bot,

Registrar: J. Swedenborg, Administrator,

having regard to the written procedure and further to the hearing on 24 April 2007,

after considering the observations submitted on behalf of:

– Orange European Smallcap Fund NV, by B.J. Kiekebeld, J. van Eijsden and D. Smit, belastingadviseurs,

– the Netherlands Government, by H.G. Sevenster and M. de Grave, acting as Agents,

– the Commission of the European Communities, by R. Lyal and A. Weimar, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 3 July 2007,

gives the following

Judgment

1 The reference for a preliminary ruling concerns the interpretation of articles 56 EC to 58 EC.

2 This reference has been made in the context of proceedings between the Staatssecretaris van Financiën (Netherlands State Secretary for Finance) and Orange European Smallcap Fund NV (‘OESF’) concerning the amount of the concession to be granted pursuant to the special tax scheme for fiscal investment enterprises provided for under Netherlands legislation in respect of tax deducted abroad on dividends received by OESF during the 1997/1998 financial year.

Legal context

3 According to Article 28 of the 1969 Law on corporation tax (Wet op de vennootschapsbelasting 1969) (Stb. 1969, No 469) (‘the Law on corporation tax’), a fiscal investment enterprise is defined as being any enterprise having the form of a public limited company (‘naamloze vennootschap’), private limited company (‘besloten vennootschap’) or pooled investment fund (‘fonds voor gemene rekening’) established in the Netherlands, the object and actual activity of which consist in investment and which satisfies a number of other conditions.

4 Such an enterprise is liable to corporation tax, but its profits are taxed at a rate of 0%. On pain of losing its status, that enterprise is required to make available, within a particular period of time, its entire profits (less certain amounts which may be legally set aside) for distribution to its shareholders.

5 Where such an enterprise receives dividends distributed by a company established in the Netherlands, tax on those dividends is deducted at source pursuant to Article 1(1) of the 1965 Law on the taxation of dividends (Wet op de dividendbelasting 1965) (Stb. 1965, No 621) ('the Law on the taxation of dividends').

6 However, under Article 10(2) of that Law, such an enterprise may, on application made within the period of six months following the end of a financial year, obtain a refund of the tax deducted in respect of those dividends.

7 With regard to dividends received in other States, from which tax has been deducted by those States, as the referring court indicates, Netherlands legislation sets off that foreign taxation against Netherlands corporation tax only up to the amount of Netherlands corporation tax proportionately attributable to the dividends in question. According to the referring court, since fiscal investment enterprises are taxed at a rate of 0%, no corporation tax is attributable to dividends from abroad, and it is therefore impossible for the foreign tax levied on those dividends to be credited.

8 Article 28 of the Law on corporation tax and Article 6 of the Royal Decree on collective investment enterprises (Besluit beleggingsinstellingen) of 29 April 1970 (Stb. 1970, No 190), in the version in force at the material time ('the Royal Decree'), set up a special scheme for fiscal investment enterprises. That scheme seeks to make the tax burden on investment proceeds through fiscal investment enterprises the same as that on direct investments by private investors, by establishing a system of concessions designed to take account of foreign tax deducted from dividends issued to those enterprises.

9 Thus, Article 28(1)(b) of the Law on corporation tax, in the version in force at the time of the facts in the main proceedings, allowed the executive to lay down, by a measure of general administration, 'the rules pursuant to which collective investment enterprises shall receive a concession on account of the deduction outside the Netherlands of tax on the yield from the securities and claims of those enterprises, which may not exceed the amount of tax which, in the event of direct investment, would be deductible from income tax pursuant to the Taxation rules for the Kingdom of the Netherlands (Belastingregeling voor het Koninkrijk) or a treaty for the prevention of double taxation by the holders of shares or units resident or established in the Netherlands'.

10 Article 6 of the Royal Decree is worded as follows:

'1. Where, at the time of a distribution in respect of the year preceding that to which the concession [referred to in Article 28(1)(b) of the Law on corporation tax] relates, investors having an interest in the capital of a collective investment enterprise are exclusively natural persons resident in the Netherlands or bodies liable to corporation tax which are established in the Netherlands, [that] concession ... shall be equal to the amount of the tax referred to in [Article 28(1)(b) of the Law on corporation tax] which would be deductible from income tax if the yield from securities and claims received by the collective investment enterprise in the year to which the concession relates had been received exclusively by natural persons resident in the Netherlands.
…

2. Where investors having an interest in the capital of a collective investment enterprise do not, at the date referred to in paragraph 1, consist exclusively of the persons or bodies liable to tax referred to in paragraph 1, the concession shall be calculated using the formula

$T = B \times (7\ Sr) / (10\ S – 3\ Sr)$,

where

T is the concession;

B is the amount of tax referred to in paragraph 1;

Sr is the amount paid, on the date referred to in paragraph 1, on the shares or units in the collective investment enterprise which are held directly or through other investment enterprises by natural persons resident in the Netherlands or by bodies liable to corporation tax, other than collective investment enterprises, which are established in the Netherlands; and

S is the amount paid, on the date referred to in paragraph 1, on all shares or units in the collective investment enterprise which are in circulation.

…'

11 According to the referring court's explanations, where a fiscal investment enterprise pays dividends received by it from the Netherlands or from outside the Netherlands as profits to its shareholders, a Netherlands tax on dividends is deducted by the fiscal investment enterprise in respect of those shareholders. With regard to those shareholders resident or established in the Netherlands, this taxation of dividends constitutes an advance payment of tax. The tax may be credited against the income or corporation tax owed by them and, so far as the taxation of dividends exceeds that amount, it is repaid. The tax on dividends deducted in respect of other shareholders is refunded only if a convention for the prevention of double taxation or the Taxation rules for the Kingdom of the Netherlands provide for this.

12 The tax convention concluded on 16 June 1959 between the Federal Republic of Germany and the Kingdom of the Netherlands, as amended by the protocols of 13 March 1980 and 21 May 1991, made no provision, as regards the 1997/1998 financial year, for a right to set off German tax deducted from dividends paid in Germany to a Netherlands resident. No convention for the prevention of double taxation was in force during the 1997/1998 financial year between the Kingdom of the Netherlands and the Portuguese Republic.

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

13 OESF is a company with variable capital established in Amsterdam (Netherlands). The company's object is the investment of money in securities and other assets in such a way that the risks are spread, so that its shareholders can share the proceeds. The company actively manages a portfolio of securities issued by listed European undertakings. According to the referring court, in the 1997/1998 financial year, OESF had no interests in companies established outside the Netherlands of such a kind as to enable it to determine the activities of those companies.

14 OESF's shareholders are natural and legal persons. In the 1997/1998 financial year, the majority of those shareholders were individuals resident in the Netherlands and bodies established in the Netherlands and either liable or not liable to Netherlands corporation tax. The rest of the share capital was held essentially by individuals established in the Netherlands Antilles and in other Member States (namely, the Kingdom of Belgium, the Federal Republic of Germany, the

French Republic, the Grand-Duchy of Luxembourg and the United Kingdom of Great Britain and Northern Ireland), and by bodies established in Belgium. Lastly, OESF's shareholders included bodies and individuals resident in Switzerland and individuals resident in the United States.

15 In the 1997/1998 financial year, OESF received dividends on shares in foreign companies corresponding to NLG 5 257 519.15. It was taxed abroad on those dividends; the sum of NLG 735 320 was deducted at source, of which NLG 132 339 was by way of German tax and NLG 9 905 by way of Portuguese tax.

16 As a result of the payment of those foreign taxes, OESF applied for the concession provided for in Article 28(1)(b) of the Law on corporation tax, in conjunction with Article 6 of the Royal Decree. OESF calculated that concession at NLG 518 270, taking as a basis for the calculation the whole of the abovementioned sum of NLG 735 320, being the total foreign taxation.

17 The competent tax authority allowed that application only in part, taking NLG 593 076 – namely that sum of NLG 735 320, less the German and Portuguese taxation (NLG 132 339 and NLG 9 905 respectively) – as a basis for the calculation, and fixed the amount of the concession at NLG 418 013. Following an objection, that decision was confirmed.

18 Hearing an appeal by OESF, the Gerechtshof te Amsterdam (Regional Court of Appeal, Amsterdam) annulled that decision and increased the disputed concession to NLG 622 006. The Gerechtshof took the view that the exclusion of the tax deducted in Germany and Portugal from the basis for calculation of the concession, and the reduction of that concession in proportion to the shares in OESF held by shareholders resident or established outside the Netherlands, amounted to an unjustified restriction on the free movement of capital.

19 The Staatssecretaris van Financiën lodged an appeal in cassation before the referring court against the judgment of the Gerechtshof te Amsterdam in so far as the latter (i) took into account the taxes deducted in Germany and Portugal in the calculation of the concession, and (ii) failed to reduce the concession in proportion to the shares held in OESF by shareholders who are not resident or established in the Netherlands.

20 The Hoge Raad der Nederlanden (Supreme Court of the Netherlands) took the view that an interpretation of Community law was necessary in order for it to reach a decision in the main action. It accordingly decided to stay the proceedings and submit the following questions to the Court of Justice for a preliminary ruling:

'(1) Must Article 56 EC, in conjunction with Article 58(1) EC, be interpreted as meaning that the prohibition in Article 56 EC is incompatible with a rule in a Member State under which … a concession to be granted to a fiscal investment enterprise on account of taxation at source deducted in another Member State from dividends received by the fiscal investment enterprise is restricted:

(a) to the amount which a natural person resident in the Netherlands could have had credited on the basis of a tax treaty concluded with the other Member State;

(b) where and to the extent to which the shareholders of the fiscal investment enterprise are not natural persons resident in the Netherlands or bodies subject to Netherlands corporation tax?

(2) If the answer to Question 1 is wholly or partly in the affirmative:

(a) Does "direct investment" in Article 57(1) EC also include the holding of a block of shares in a company if the holder of the shares holds them only as an investment and the size of the block does not put the holder in a position to exercise a decisive influence over the management or control of the company?

(b) Under Article 56 EC, is any restriction of the movement of capital connected with the levying of tax that would be impermissible if it related to cross-border movement of capital within the EC similarly impermissible in the case of the same movement of capital – in otherwise similar circumstances – to and from third countries?

(c) If the answer to Question 2(b) is in the negative, must Article 56 EC then be interpreted as meaning that a restriction by a Member State of a tax concession granted to a fiscal investment enterprise with regard to taxation at source of a dividend received from a third country, that restriction being based on the fact that not all shareholders of the fiscal investment enterprise have their place of residence in the Member State concerned, is incompatible with that article?

(3) Is the answer to the above questions affected by whether:

(a) the tax deducted in another country from the dividend received from that country is higher than the tax on the payment of that dividend to foreign shareholders in the Member State of establishment of the fiscal investment enterprise;

(b) the shareholders of the fiscal investment enterprise who have their place of residence outside the Member State of establishment of the fiscal investment enterprise are resident or established in a country with which the abovementioned Member State has a treaty providing for reciprocal credit of taxation of dividends at source;

(c) the shareholders of the fiscal investment enterprise who have their place of residence outside the Member State of establishment of the fiscal investment enterprise are resident or established in another country of the EC?'

The questions referred for a preliminary ruling

Question 1(a)

21 By its Question 1(a), the referring court asks, in essence, whether Articles 56 EC and 58 EC must be interpreted as precluding legislation of a Member State, such as that at issue in the main proceedings, under which a concession to be granted to a fiscal investment enterprise established in that Member State on account of tax deducted at source in another Member State from dividends received by that fiscal investment enterprise is restricted to the amount which a natural person resident in the first Member State could have had credited on the basis of a convention for the prevention of double taxation concluded with the other Member State.

22 With regard to the case in the main proceedings, the effect of such legislation is that tax on dividends deducted at source in Germany and Portugal is not taken into account in the calculation of that concession because, at the material time, the convention between the Kingdom of the Netherlands and the Federal Republic of Germany made no provision for a right to set off tax deducted in Germany against Netherlands income tax, and no convention had been concluded between the Kingdom of the Netherlands and the Portuguese Republic.

23 It follows from the order for reference that the referring court queries the compatibility of such legislation with the provisions of the EC Treaty on the free movement of capital, in view of the fact that, under Netherlands law, a fiscal investment enterprise established in the Netherlands which receives dividends from companies established in the Netherlands is entitled to a full refund of the Netherlands tax on dividends which is deducted at source by those companies.

24 In that regard, OESF and the Commission of the European Communities submit that, since the Kingdom of the Netherlands reimburses in full the tax deducted from dividends distributed by Netherlands companies, it must also offset the tax deducted from dividends in Germany and Portugal.

25 Failure to do so, they argue, would mean that the Kingdom of the Netherlands treats dividends issued in Germany or Portugal less favourably than those paid by Netherlands companies.

26 That less favourable treatment, they continue, has the effect of deterring OESF from investing in Germany and Portugal and of making it more difficult for undertakings established in those Member States to raise capital in the Netherlands, and therefore constitutes a restriction on the free movement of capital that is in principle prohibited by the Treaty.

27 The Netherlands Government, by contrast, contends that the Kingdom of the Netherlands cannot be accused of treating dividends from German or Portuguese companies differently from those received from Netherlands companies, inasmuch as no tax is deducted from dividends received by OESF, irrespective of their origin, and therefore those dividends are treated identically under Netherlands tax law.

28 In addition, the refund scheme at issue in the main proceedings does not generally aim to relieve a fiscal investment enterprise of a tax on incoming dividends. In fact, in domestic situations, the taxation of dividends operates as an advance payment for the purposes of corporation tax. Given that fiscal investment enterprises established in the Netherlands are zero-rated with regard to corporation tax and that Netherlands tax on dividends is therefore not levied in respect of dividends received by those enterprises, the tax deducted at source from dividends received by those enterprises is refunded to them.

29 It is necessary therefore to determine whether, in view of the fact that a fiscal investment enterprise established in the Netherlands which receives dividends from companies established in the Netherlands is entitled to a full refund of the Netherlands tax on dividends which is deducted at source by those companies, national legislation such as that at issue in the main proceedings constitutes a restriction on the free movement of capital prohibited by Articles 56 EC and 58 EC.

30 As a preliminary point, it must be observed that it is for each Member State to organise, in compliance with Community law, its system for taxing distributed profits and to define, in that context, the tax base and the tax rate which apply to the shareholder receiving them (see, to that effect, Case C?374/04 *Test Claimants in Class IV of the ACT Group Litigation* [2006] ECR I?11673, paragraph 50, and Case C?446/04 *Test Claimants in the FII Group Litigation* [2006] ECR I?11753, paragraph 47).

31 Therefore, the dividends distributed by a company established in one Member State to a company established in another may be subject to taxation at several levels. First of all, those dividends may be subject to a series of charges to tax in the Member State of establishment of the distributing company, which occurs where the distributed profits are subject, initially, to the corporation tax owed by that company and, subsequently, to a tax deducted from the dividends

paid to the recipient company. Second, those dividends may be subject to juridical double taxation, which occurs when they are taxed again with respect to the recipient company in the State in which it is established. Third, the taxation of dividends received by the recipient company in the State in which it is established – where the company distributing the dividends has been taxed on distributed profits – may also give rise to a series of charges to tax in that Member State.

32 In addition, in the absence of any unifying or harmonising Community measures, Member States retain the power to define, by treaty or unilaterally, the criteria for allocating their powers of taxation, particularly with a view to eliminating double taxation (Case C?336/96 *Gilly* [1998] ECR I?2793, paragraphs 24 and 30; Case C?307/97 *Saint-Gobain ZN* [1999] ECR I?6161, paragraph 57; and Case C?379/05 *Amurta* [2007] ECR I?0000, paragraph 17). Apart from Council Directive 90/435/EEC of 23 July 1990 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States (OJ 1990 L 225, p. 6), the Convention of 23 July 1990 on the elimination of double taxation in connection with the adjustment of profits of associated enterprises (OJ 1990 L 225, p. 10) and Council Directive 2003/48/EC of 3 June 2003 on taxation of savings income in the form of interest payments (OJ 2003 L 157, p. 38), the application of which in the dispute in the main proceedings has not been invoked, no unifying or harmonising measure designed to eliminate cases of double taxation has as yet been adopted at Community-law level.

33 With regard to the legislation at issue in the main proceedings, the Kingdom of the Netherlands decided to make fiscal investment enterprises liable to corporation tax, but at a rate of 0%, provided that all the profits of those enterprises, less certain amounts which may be legally set aside, are distributed to their shareholders.

34 As the Advocate General noted at points 85 to 87 of his Opinion, it follows that, whatever the origin of the dividends, enterprises such as OESF are not subject to tax on them under Netherlands law. As regards dividends from a company established in the Netherlands, the tax initially deducted from those dividends – which, according to the Netherlands Government’s explanations, constitutes an advance payment of corporation tax – is refunded, given that no amount of corporation tax is due from a fiscal investment enterprise. As far as dividends from companies established in Germany or Portugal are concerned, no tax is deducted in the Netherlands with respect to such an enterprise.

35 Consequently, by not charging fiscal investment enterprises tax on dividends from Germany or Portugal, the Kingdom of the Netherlands treats those dividends in the same way as dividends from Netherlands companies, in respect of which those enterprises are not taxed either. In addition, by refraining from taxing dividends from other Member States, the Kingdom of the Netherlands avoids the imposition of a series of charges to tax arising from the exercise of its own fiscal power, just as it does in respect of dividends paid by Netherlands companies.

36 Therefore, contrary to the assertions of OESF and the Commission, Netherlands legislation, such as that at issue in the main proceedings, does not treat dividends from Germany or Portugal differently from dividends distributed by Netherlands companies.

37 While, in those circumstances, dividends from Germany or Portugal are subject to a greater tax burden than are dividends distributed by Netherlands companies, that disadvantage is not attributable to the Netherlands legislation at issue in the main proceedings, but is the product of the parallel exercise of fiscal sovereignty by the Member States in which the distributing companies are established and the Member State in which the recipient company is established, whereby the former chose to impose a series of charges to tax on distributed dividends and the latter opted to refrain from any taxation of dividends with respect to fiscal investment enterprises (see, to that effect, Case C?513/04 *Kerckhaert and Morres* [2006] ECR I?10967, paragraph 20).

38 The Commission contends, however, that, in its capacity as the Member State of residence of the company in receipt of dividends, it is for the Kingdom of the Netherlands to offset the foreign tax burden on those dividends in the same way as it offsets the domestic tax burden to which those dividends are subject.

39 That argument cannot be accepted. Admittedly, it follows from the case-law that, where a Member State has a system for preventing or mitigating a series of charges to tax or economic double taxation for dividends paid to residents by resident companies, it must treat dividends paid to residents by non-resident companies in the same way (*Test Claimants in Class IV of the ACT Group Litigation*, paragraph 55 and the case-law cited).

40 Under such systems, the situation of shareholders resident in a Member State and receiving dividends from a company established in that State is comparable to that of shareholders who are resident in that State and receive dividends from a company established in another Member State, inasmuch as both the dividends deriving from a national source and those deriving from a foreign source may be subject to a series of charges to tax (see *Test Claimants in Class IV of the ACT Group Litigation*, paragraph 56).

41 However, the status of Member State of residence of the company in receipt of dividends cannot include the obligation for that Member State to offset a fiscal disadvantage arising where a series of charges to tax is imposed entirely by the Member State in which the company distributing those dividends is established, since the dividends received are neither taxed nor treated differently by the first Member State as regards investment enterprises established in that State.

42 It follows that, in a situation where the greater tax burden imposed on dividends distributed by companies established in Germany or Portugal to a fiscal investment enterprise established in the Netherlands than that which is imposed on dividends distributed to that same enterprise by companies also established in the Netherlands does not arise as a result of a difference in treatment attributable to the tax regime in the Netherlands, but stems from the decision of the Federal Republic of Germany and the Portuguese Republic to make a deduction at source from those dividends, and from the decision of the Kingdom of the Netherlands not to tax those dividends, the fact that the latter Member State has not granted a concession in respect of the deduction at source for which the first two States have opted does not constitute a restriction on the free movement of capital.

43 However, OESF also submits that its investments in Germany and Portugal are treated differently from those made in other Member States in respect of which it is entitled to the concession provided for in Article 28(1)(b) of the Law on corporation tax, in conjunction with Article 6 of the Royal Decree, so as to avoid the imposition of a series of charges to tax incurred in those Member States. According to OESF, Articles 56 EC and 58 EC prohibit such a difference in treatment on the basis of the seat of the company distributing the dividends.

44 The Netherlands Government observes that, since a fiscal investment enterprise is taxed at

a rate of 0%, no corporation tax is attributable to dividends from another Member State, thus making it impossible for that enterprise to credit the tax deducted at source from those dividends. In order to prevent investments abroad which are made through such an enterprise from being regarded as less appealing than direct investment, the aim of that concession is to make the tax burden on the proceeds from investments made through fiscal investment enterprises the same as that on direct investments made by individuals.

45 Consequently, in order to calculate the amount of the concession in question, the legislature took as a basis the situation in which investments are made without such an enterprise acting as intermediary. For that reason, in the case of dividends received abroad, that concession is restricted to the circumstances in which there is, as a result of a tax convention, a right to credit the foreign tax deducted against Netherlands taxation.

46 In addition, it follows from the judgment in Case C?376/03 *D.* [2005] ECR I?5821 that the situation in which an investor receives a dividend from Germany or Portugal differs from that in which the dividend comes from a Member State with which the Kingdom of the Netherlands has concluded such a convention, such as the Italian Republic. Since the concession to be granted is indissociably linked to the right of the shareholder of a fiscal investment enterprise, pursuant to such a convention, to set off the foreign tax deducted at source, that concession should, like the right of set-off, be regarded as an integral part of that convention, rather than as a benefit which is separable from it.

47 As is apparent from paragraph 42 of this judgment, Community law does not require a Member State to grant a concession in response to offset the disadvantage resulting from a series of charges to tax that is exclusively due to the parallel exercise of the various Member States' fiscal sovereignty. However, where that Member State has decided to grant such a concession, that power must be exercised in accordance with Community law.

48 In that respect, it must be noted that, as has been observed in paragraphs 30 and 32 of this judgment, it is for the Member States to organise their systems for taxing distributed profits and to define, in that context, the tax base and the tax rate which apply to the shareholder receiving them, and that, in the absence of any unifying or harmonising Community measures, Member States retain the power to define, by treaty or unilaterally, the criteria for allocating their powers of taxation.

49 Consequently, given the resulting disparities between the tax laws of the various Member States, a Member State may find it necessary, by treaty or unilaterally, to treat dividends from the various Member States differently so as to take account of those disparities.

50 As regards the bilateral tax conventions concluded by the Member States, the Court has previously noted that the scope of such a convention is limited to the natural or legal persons referred to in it (see *D.*, paragraph 54, and *Test Claimants in Class IV of the ACT Group Litigation*, paragraph 84).

51 In those judgments, the Court held that, where a benefit granted by a bilateral tax convention cannot be classified as a benefit that is separable from that convention, but contributes to its overall balance (the fact that the reciprocal rights and obligations arising under that convention apply only to persons resident in one of the two contracting Member States being an inherent consequence of bilateral conventions), Community law does not preclude the benefit in question from not being conferred on the resident of a third Member State, in so far as that resident is not in a situation comparable to that of residents covered by the convention in question (see, to that effect, *D.*, paragraphs 59 to 63, and *Test Claimants in Class IV of the ACT Group Litigation*, paragraphs 88 to 93).

52 In the present case, as regards the payment of a concession in respect of a deduction made at source in another Member State from the dividends received by a fiscal investment enterprise established in the Netherlands, the application of Article 28(1)(b) of the Law on corporation tax results in different treatment of dividends from different Member States.

53 It is common ground, in the particular legal context of the case in the main proceedings, that a concession is granted in those situations in which the Kingdom of the Netherlands has, under the terms of a tax convention concluded with the Member State which made the deduction at source, undertaken to allow natural persons to credit that deduction to the Netherlands income tax for which they are liable.

54 However, as the Advocate General noted at point 107 of his Opinion, the payment of the concession granted in Article 28(1)(b) of the Law on corporation tax, in conjunction with Article 6 of the Royal Decree, results, not from the automatic application of such a bilateral tax convention, but from the unilateral decision of the Kingdom of the Netherlands to extend the benefit of such conventions to fiscal investment enterprises.

55 While, for the reasons set out in paragraphs 48 and 49 of this judgment, such a unilateral decision cannot, by itself, be regarded as being contrary to Community law, it is necessary to determine whether the resulting difference in treatment entails a restriction on the free movement of capital.

56 By excluding from the concession (relating to the taxation at source of dividends received abroad) dividends originating in certain Member States, legislation such as that at issue in the main proceedings makes investment in those Member States less appealing than investment in the Member States in which the taxation at source of those dividends gives rise to that concession. Such legislation is therefore liable to deter a collective investment enterprise from investing in the Member States in which the taxation of dividends does not give rise to the concession and accordingly constitutes a restriction on the free movement of capital prohibited in principle by Article 56 EC.

57 However, Article 58(1)(a) EC provides that ‘[t]he provisions of Article 56 [EC] shall be without prejudice to the right of Member States … to apply the relevant provisions of their tax law which distinguish between taxpayers who are not in the same situation with regard to … the place where their capital is invested’.

58 It must also be noted that the derogation under Article 58(1)(a) EC is itself restricted by Article 58(3) EC, which provides that the national provisions referred to in paragraph 1 of that article ‘shall not constitute a means of arbitrary discrimination or a disguised restriction on the free movement of capital and payments as defined in Article 56 [EC]’ (see Case C?319/02 *Manninen* [2004] ECR I?7477, paragraph 28).

59 Therefore, the unequal treatment permitted under Article 58(1)(a) EC must be distinguished from the discrimination prohibited by Article 58(3) EC. According to case-law, a national tax provision which distinguishes between taxpayers depending on the place where their capital is invested could be regarded as being compatible with the Treaty provisions on the free movement of capital provided that the difference in treatment applies to situations which are not objectively comparable or is justified by overriding reasons in the general interest (see, to that effect, Case C?35/98 *Verkooijen* [2000] ECR I?4071, paragraph 43; *Manninen*, paragraph 29; and Case C?512/03 *Blanckaert* [2005] ECR I-7685, paragraph 42).

60 As the Netherlands Government explains, by granting the concession, the Netherlands legislation at issue in the main proceedings seeks to make dividends received by a shareholder investing directly subject as far as possible to the same treatment for tax purposes as those received by a shareholder investing through the intermediary of a fiscal investment enterprise, so as to prevent investments abroad by such an enterprise from being regarded as less appealing than direct investments.

61 However, under such legislation, where a fiscal investment enterprise receives dividends from Member States with which the Kingdom of the Netherlands has concluded a convention providing for shareholders who are natural persons to be entitled to credit the tax which those Member States have deducted from the dividends to the income tax for which those shareholders are liable in the Netherlands, the situation of that enterprise is different from that in which it finds itself when receiving dividends from Member States with which the Kingdom of the Netherlands has not concluded such a convention, as there is no such entitlement in respect of those dividends.

62 In fact, it is only as regards investments in the Member States with which the Kingdom of the Netherlands has concluded such a bilateral tax convention that, without the concession granted by the legislation at issue in the main proceedings, the decision to invest through the intermediary of a fiscal investment enterprise runs the risk of being less advantageous to a shareholder who is a natural person than direct investment.

63 By contrast, as regards the Member States with which the Kingdom of the Netherlands has not concluded such a convention, the decision, by a natural person, to invest through the intermediary of such an enterprise does not involve the risk of losing a benefit which he could have enjoyed if he had chosen to invest directly in those Member States. Accordingly, that situation is not objectively comparable to the situation in which the Kingdom of the Netherlands has concluded such a tax convention.

64 It follows that, in the case of legislation such as that at issue in the main proceedings, pursuant to which – in order to make the tax treatment of direct investments and of those made through the intermediary of investment enterprises the same, as far as possible – a Member State has decided to grant those enterprises a concession in respect of tax deducted at source on dividends from Member States vis-à-vis which it has undertaken, under the terms of bilateral agreements, to allow natural persons to credit those deductions to the income tax for which they are liable under national law, Articles 56 EC and 58 EC do not preclude that Member State from withholding that concession in respect of dividends from other Member States with which it has not concluded bilateral agreements containing such provisions, as these are not objectively comparable situations.

65 In the light of the foregoing, the answer to Question 1(a) must be that Articles 56 EC and 58 EC do not preclude legislation of a Member State, such as the legislation at issue in the main proceedings, which grants a concession to fiscal investment enterprises established in that

Member State on account of tax deducted at source in another Member State from dividends received by those enterprises, and restricts that concession to the amount which a natural person resident in the first Member State could have had credited, on account of similar deductions, on the basis of a double taxation convention concluded with that other Member State.

Question 1(b)

66 By its Question 1(b), the referring court asks, in essence, whether Articles 56 EC and 58 EC must be interpreted as precluding legislation of a Member State which, like the Netherlands legislation at issue in the main proceedings, grants a concession to fiscal investment enterprises on account of tax deducted at source in another Member State from dividends received by those fiscal investment enterprises, and reduces that concession where and to the extent to which the shareholders of those enterprises are not natural persons resident in the first Member State or bodies subject to corporation tax in that first Member State.

67 While it follows from the answer to Question 1(a) that, in circumstances such as those of the case in the main proceedings, Community law does not require a Member State to grant a concession to a fiscal investment enterprise on account of tax deducted at source in another Member State from dividends received by that enterprise, where the first Member State has nevertheless decided to grant such a concession, that power must be exercised in accordance with Community law.

68 As is apparent from the order for reference, OESF shareholders include natural and legal persons who are resident or established in other Member States and in third countries.

69 Therefore, it is necessary to examine, first of all, whether the reduction of the concession in proportion to the interest in the fiscal investment enterprise held by shareholders resident or established in other Member States constitutes a restriction on the free movement of capital and, if so, whether that restriction can be justified. Second, it is necessary to determine whether the answer given in relation to situations in which the shareholders of such an enterprise are resident or established in other Member States applies equally to situations in which those shareholders are resident or established in third countries.

70 It must be noted that, as regards the calculation of the amount of the concession granted in accordance with the provisions at issue in the main proceedings in order to take account of tax deducted at source from the dividends from other Member States, Netherlands legislation draws a distinction between the treatment of fiscal investment enterprises whose shareholders are all resident or established in the Netherlands, and bodies, such as OESF, some of whose shareholders are resident or established in another Member State. In the first case, that concession corresponds, under Article 6(1) of the Royal Decree, to the amount that a natural person resident in the Netherlands could have had credited, on account of those deductions, to the income tax for which he is liable in that Member State. In the second case, pursuant to Article 6(2) of the Royal Decree, that amount is reduced in proportion to the interest of the shareholders from other Member States in the enterprises concerned.

71 The concession thus granted in respect of tax deducted abroad at source from the dividends from other Member States is included in the profit to be distributed to the shareholders of the fiscal investment enterprise concerned, which is allocated among them on the basis of their respective interests in that enterprise.

72 As the Advocate General observed at point 118 of his Opinion, it follows that the reduction of the concession for foreign tax in proportion to the interest in such an enterprise held by shareholders who are resident or established in another Member State adversely affects all that

enterprise’s shareholders without distinction, since it has the effect of reducing the total amount of profit for distribution.

73 Consequently, within a legislative context such as that at issue in the main proceedings, it is of greater benefit for a fiscal investment enterprise to attract shareholders who are resident or established in the Member State in which that enterprise itself is established, since the smaller the interest in that enterprise of shareholders who are resident or established in other Member States, the greater will be the profit available for distribution to shareholders.

74 Such a reduction therefore creates a restriction on the free movement of capital, which is prohibited in principle by Article 56 EC, in so far as it is liable to impede the raising of capital by a fiscal investment enterprise in Member States other than that in which that enterprise is established, and is also liable to deter investors from those other Member States from acquiring shares in that enterprise.

75 The Netherlands Government observes, however, that, with regard to calculating the amount of the concession to be granted to a fiscal investment enterprise, Article 28(1)(b) of the Law on corporation tax refers to a situation in which a shareholder makes a direct investment abroad.

76 According to the Netherlands Government, as regards the possibility of crediting the tax deducted at source from dividends received abroad, the situation of a Netherlands resident who is liable to Netherlands income or corporation tax differs from that of a non-resident who is not liable to those taxes, since only shareholders liable to income or corporation tax in the Netherlands may credit the tax thus deducted.

77 Accordingly, it would be consonant with Article 56 EC, in conjunction with Article 58(1)(a) EC – in so far as the latter provision authorises the Member States to distinguish between taxpayers who are not in the same situation with regard to their place of residence – to draw a distinction as regards the amount of the concession granted to a fiscal investment enterprise, according to whether the shareholders of that enterprise are, or are not, liable to income or corporation tax in the Netherlands in respect of the dividends received.

78 In that respect, it must be noted that, as the Netherlands Government itself points out, the Kingdom of the Netherlands taxes dividends which are distributed by a fiscal investment enterprise to its shareholders who are resident or established in the Netherlands as well as to those who are resident or established in another Member State. Therefore, such an enterprise, whose shares are partly held by shareholders resident or established in other Member States, cannot be regarded as being in a different position from that of an enterprise whose shareholders are all resident or established in the Netherlands.

79 Therefore, as the Advocate General noted at point 121 of his Opinion, as soon as the Kingdom of the Netherlands decided to grant fiscal investment enterprises established within its territory a concession for tax deducted abroad and to exercise its fiscal sovereignty over all dividends distributed by such enterprises to their shareholders, whether resident or established in that Member State or in others, it had to extend the benefit of that concession to fiscal investment enterprises which included shareholders not resident or established in that Member State (see, to that effect, Case C?170/05 *Denkavit Internationaal and Denkavit France* [2006] ECR I?11949, paragraph 37 and the case-law cited).

80 The Netherlands Government further submits that, in so far as the concession granted to such bodies is distributed to their shareholders and included in the latters’ income for taxation purposes, the factors included in the formula for calculating that concession are related to the

rates at which the dividends which such a body distributes to its shareholders are taxed in the Netherlands.

81 According to the Netherlands Government, the rates at which the Kingdom of the Netherlands taxes companies' profit distributions to their shareholders who are resident or established in that Member State and who are subject, respectively, to income tax or corporation tax in that Member State, are higher than the rates of taxation applicable to shareholders who are resident or established abroad. The latter pay tax on dividends only at a reduced rate in the Netherlands, corresponding generally to 15%, as a result of tax conventions, which explains the reduction in the amount of the concession to be granted to a fiscal investment enterprise in proportion to the interest in the fiscal investment enterprise held by shareholders resident or established in other Member States.

82 Even though the legislation at issue in the main proceedings seeks to distinguish between shareholders of collective investment enterprises according to whether they are resident and non-resident, so that the concession granted to them by means of a profit distribution by those enterprises corresponds to the rates of taxation to which those shareholders are respectively subject in the Netherlands, it must be noted that that objective cannot be achieved by a reduction of that concession in proportion to the interest in those enterprises held by shareholders resident or established in other Member States. As has been noted in paragraph 72 of this judgment, such a reduction adversely affects all the shareholders of fiscal investment enterprises without distinction, as it has the effect of reducing the total amount of profit for distribution.

83 By contrast, the reduction of the concession in proportion to the interest in the fiscal investment enterprise held by shareholders resident or established in other Member States has the effect of avoiding a reduction in tax revenue in relation to dividends distributed by fiscal investment enterprises, which, for the Kingdom of the Netherlands, would mean granting that concession without having regard to the presence, among the shareholders of those enterprises, of non-residents subject – as regards the dividends distributed by those bodies – to tax at a lower rate than that applicable to resident shareholders.

84 However, it has been consistently held in the case-law that a reduction in tax revenue cannot be regarded as an overriding reason in the public interest which may be relied on to justify a measure which is, in principle, contrary to a fundamental freedom (see, inter alia, *Manninen*, paragraph 49 and the case-law cited).

85 It follows that Articles 56 EC and 58 EC preclude legislation of a Member State, such as the legislation at issue in the main proceedings, which grants a concession to fiscal investment enterprises established in that Member State designed to take account of tax deducted at source in another Member State from dividends received by those enterprises, and reduces that concession where and to the extent to which the shareholders of those enterprises are natural or legal persons resident or established in other Member States, in so far as such a reduction adversely affects all the shareholders of those enterprises without distinction.

86 With regard to the question whether the answer given in the preceding paragraph may be extended to situations in which foreign shareholders in a collective investment enterprise are resident or established in a third country, the Netherlands Government takes the view that a Member State may draw a distinction between that situation and the situation in which the shareholders are resident or established in another Member State.

87 In that regard, as the Court held in paragraph 31 of the judgment in Case C?101/05 *A* [2007] ECR I?0000, even if the liberalisation of the movement of capital with third countries may pursue objectives other than that of establishing the internal market, such as, in particular, that of ensuring

the credibility of the single Community currency on world financial markets and maintaining financial centres with a world-wide dimension within the Member States, it is clear that, when the principle of free movement of capital was extended, pursuant to Article 56(1) EC, to movements of capital between third countries and the Member States, the latter chose to enshrine that principle in that article and in the same terms for movements of capital taking place within the Community and for those relating to relations with third countries.

88 The Court also held that the argument that, if the concept of restrictions on movements of capital were interpreted in the same manner with regard to relations between Member States and third countries as it is with regard to relations between Member States, the Community would unilaterally open up the Community market to third countries without retaining the means of negotiation necessary to achieve such liberalisation on the part of those countries, cannot be regarded as decisive (see *A*, paragraph 38).

89 However, the Court found that movements of capital to or from third countries take place in a different legal context from that which occurs within the Community (see *A*, paragraph 36). Indeed, because of the degree of legal integration that exists between Member States of the European Union, in particular by reason of the presence of Community legislation which seeks to ensure cooperation between national tax authorities, such as Council Directive 77/799/EEC of 19 December 1977 concerning mutual assistance by the competent authorities of the Member States in the field of direct taxation (OJ 1977 L 336, p. 15), the taxation by a Member State of economic activities having cross-border aspects which take place within the Community is not always comparable to that of economic activities involving relations between Member States and third countries (*Test Claimants in the FII Group Litigation*, paragraph 170, and *A*, paragraph 37).

90 It may also be that a Member State will be able to demonstrate that a restriction on the movement of capital to or from third countries is justified for a particular reason in circumstances where that reason would not constitute a valid justification for a restriction on capital movements between Member States (*Test Claimants in the FII Group Litigation*, paragraph 171, and *A*, paragraph 37).

91 In the present case, both the Netherlands Government and the Commission submitted inter alia that the Member States must be able to rely on the need to guarantee the effectiveness of fiscal supervision as an overriding requirement of general interest capable of justifying a restriction on the movement of capital to or from third countries.

92 In that regard, it must be noted, on the one hand, that the Kingdom of the Netherlands imposes a dividend tax on dividends distributed by a fiscal investment enterprise established in the Netherlands to shareholders who are resident or established in third countries. On the other hand, the concession granted to such an enterprise is reduced in proportion to the interest in that fiscal investment enterprise held by shareholders resident in third countries, without the fiscal treatment of those shareholders in the third countries being relevant in that regard. The need to guarantee the effectiveness of fiscal supervision cannot therefore be relied upon in the present case.

93 The Netherlands Government also takes the view that the need to avoid a reduction in tax revenue must be capable of being relied upon as justification for a restriction on the movement of capital to or from third countries. While the problems connected in particular with the reduction in the basis of assessment could be resolved by strengthening the harmonisation of the Member States' tax legislation at Community level, there is no comparable possibility of harmonising tax legislation in relation to third countries.

94 It must, however, be borne in mind that the reduction of the concession in proportion to the interest in the fiscal investment enterprise held by shareholders resident or established in third

countries has the effect of reducing the total amount of profit available for distribution to the shareholders of that enterprise.

95 Consequently, on the assumption that such a ground may be relied upon as justification for a restriction on the movement of capital to or from third countries, such a justification cannot be taken into consideration in the present case, inasmuch as that reduction affects all shareholders of the collective investment enterprise concerned without distinction, whether resident or established in the Member States or in third countries.

96 It follows that, in a legal context such as that at issue in the main proceedings, the answer given in relation to situations in which shareholders of a fiscal investment enterprise are resident or established in another Member State applies equally to situations in which shareholders of a collective investment enterprise are resident or established in third countries.

97 In view of the foregoing, the answer to Question 1(b) must be that Articles 56 EC and 58 EC preclude legislation of a Member State, such as the legislation at issue in the main proceedings, which grants a concession to fiscal investment enterprises established in that Member State on account of tax deducted at source in another Member State from dividends received by those enterprises, and reduces that concession where and to the extent to which the shareholders of those enterprises are natural or legal persons resident or established in other Member States or in third countries, since such a reduction adversely affects all the shareholders of those enterprises without distinction.

Question 2(a)

98 By its Question 2(a), the referring court asks whether ‘direct investment’ within the meaning of Article 57(1) EC covers the holding of a block of shares in a company which does not put the holder in a position to exercise a decisive influence over the management or control of that company.

99 Under Article 57(1) EC, the provisions of Article 56 EC are without prejudice to the application to third countries of any restrictions which existed on 31 December 1993 under national or Community law adopted in respect of the movement of capital to or from third countries involving direct investment – including investment in real estate – establishment, the provision of financial services or the admission of securities to capital markets.

100 In the absence of a Treaty definition of ‘movement of capital’ for the purposes of Article 56(1) EC, the Court has previously recognised the nomenclature annexed to Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty [article repealed by the Treaty of Amsterdam] (OJ 1988 L 178, p. 5) as having indicative value. Movements of capital within the meaning of Article 56(1) EC therefore include direct investments, that is to say, as that nomenclature and the related explanatory notes show, investments of any kind undertaken by natural or legal persons and which serve to establish or maintain lasting and direct links between the persons providing the capital and the undertakings to which that capital is made available in order to carry out an economic activity (see, to that effect, *Test Claimants in the FII Group Litigation* , paragraphs 179 to 181; Case C?112/05 *Commission* v *Germany* [2007] ECR I?0000, paragraph 18; and *A*, paragraph 46).

101 As regards shareholdings in new or existing undertakings, as those explanatory notes confirm, the objective of establishing or maintaining lasting economic links presupposes that the shares held by the shareholder enable him, either pursuant to the provisions of the national laws relating to companies limited by shares or in some other way, to participate effectively in the management of that company or in its control (*Commission* v *Germany*, paragraph 18 and the

case-law cited).

102 The answer to Question 2(a) must therefore be that a restriction is covered by Article 57(1) EC as being a restriction on the movement of capital involving direct investment in so far as it relates to investments of any kind undertaken by natural or legal persons and which serve to establish or maintain lasting and direct links between the persons providing the capital and the undertakings to which that capital is made available in order to carry out an economic activity.

Question 2(b) and 2(c)

103 By its Question 2(b), the referring court asks, in essence, whether Article 56 EC has the same effect as regards the movement of capital to or from third countries as it does within the Community, and, by Question 2(c), whether a Member State's reduction of the concession provided for fiscal investment enterprises established in that Member State with regard to taxation at source of a dividend received from a third country on the basis of the interest in that enterprise of shareholders who are not resident or are not established in the Member State concerned constitutes a restriction on the free movement of capital.

104 These questions, which should be considered together, seek to establish whether the answer to Question 1(b) would be different if the dividends are received from a third country instead of from another Member State.

105 In that regard, it is apparent from paragraphs 79 and 96 of this judgment that, as soon as the Kingdom of the Netherlands decided to grant fiscal investment enterprises established on its territory a concession for tax deducted abroad and to exercise its fiscal sovereignty over all dividends distributed by such enterprises to their shareholders, whether resident or established in that Member State or in others, or in third countries, it had to extend the benefit of that concession to fiscal investment enterprises whose shareholders include shareholders who are not resident or are not established in the Netherlands.

106 As has been noted in paragraphs 70 to 96 of this judgment, a rule under which such a concession is reduced in proportion to the interest in the enterprise held by shareholders resident or established in another Member State or in a third country introduces a distinction in the treatment of such enterprises all of whose shareholders are resident or established in the Netherlands and those enterprises whose shareholders include shareholders resident or established in another Member State or in a third country which is not justified by the fact that those bodies are in a different situation or by fiscal-policy objectives such as those put forward by the Netherlands Government.

107 It must be held that such a rule is contrary to Articles 56 EC and 58 EC irrespective of whether the tax revenue giving rise to the concession has been deducted in another Member State or in a third country, inasmuch as, in both cases, there is a difference in the treatment of fiscal investment enterprises all of whose shareholders are resident or established in the Netherlands and those whose shareholders include shareholders resident or established in another Member State or in a third country, and the justification put forward does not relate to the State of origin of the dividends received by those enterprises.

108 The answer to Question 2(b) and 2(c) must therefore be that Articles 56 EC and 58 EC preclude legislation of a Member State, such as the legislation at issue in the main proceedings, which grants a concession to collective investment enterprises established in that Member State designed to take account of tax deducted at source in a third country from dividends received by those enterprises, and reduces that concession where and to the extent to which the shareholders of those enterprises are natural or legal persons resident or established in other Member States or

in third countries, since such a reduction adversely affects all the shareholders of those enterprises without distinction.

Question 3(a)

109 By its Question 3(a), the referring court asks whether the fact that the tax deducted in a Member State from dividends received in that Member State by a collective investment enterprise established in another Member State is higher than the tax on the payment of that dividend to foreign shareholders in that second Member State is relevant to the answers to Questions 1 and 2.

110 As the order for reference shows, that question is motivated by the fact that, in the financial year concerned, tax was deducted at source in Portugal from dividends paid to OESF from Portugal at a rate of 17.5%, whereas the rate at which tax was deducted at source in the Netherlands from dividends distributed to OESF shareholders was 15%.

111 However, since the dividends from Portugal were not taken into account in the calculation of the concession granted to the fiscal investment enterprise involved in the main proceedings, and in the light of the answer to Question 1(a), there is no need to answer Question 3(a).

Question 3(b)

112 By its Question 3(b), the referring court asks whether the answer to Questions 1 and 2 is affected by whether the foreign shareholders of a collective investment enterprise are resident or established in a State with which the Member State of establishment of that enterprise has a convention providing for reciprocal crediting of tax deducted at source from dividends. However, since the place of residence or establishment of the shareholders of that enterprise is taken into account only for the reduction of the concession in proportion to the interest in the fiscal investment enterprise held by shareholders who are not resident or established in the Member State in which that enterprise is established, this question must be regarded as relating solely to Question 1(b).

113 It must be held in that regard that the fact that the State of residence or establishment of the shareholders of the fiscal investment enterprise and the Kingdom of the Netherlands have agreed on the possibility of crediting tax deducted by the latter from the dividends distributed to those shareholders by that enterprise does not in any way alter the fact that the Kingdom of the Netherlands is exercising its fiscal sovereignty by taxing those dividends. As paragraphs 79 and 96 of this judgment show, it is the exercise by a Member State of its fiscal sovereignty over the dividends paid by the fiscal investment enterprises established in that Member State both to shareholders resident or established in that Member State and to shareholders resident or established in other Member States or third countries which – where a concession such as that at issue in the main proceedings is provided for – justifies the need to extend it to the fiscal investment enterprises that include shareholders who are not resident or established in that Member State.

114 Accordingly, the answer to Question 3(b) must be that whether the foreign shareholders of a fiscal investment enterprise are resident or established in a State with which the Member State of establishment of that enterprise has concluded a convention providing for reciprocal crediting of tax deducted at source from dividends is irrelevant to the answer given to Question 1(b).

Question 3(c)

115 By its Question 3(c), the referring court asks whether, in answering Questions 1 and 2, it is necessary to take into account the fact that the shareholders of the fiscal investment enterprise

who have their place of residence outside the Member State of establishment of the fiscal investment enterprise are resident or established in another Member State of the Community.

116 In the light of the answer to Question 1(b), there is no need to answer that question.

Costs

117 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. **Articles 56 EC and 58 EC do not preclude legislation of a Member State, such as the legislation at issue in the main proceedings, which grants a concession to fiscal investment enterprises established in that Member State on account of tax deducted at source in another Member State from dividends received by those enterprises, and restricts that concession to the amount which a natural person resident in the first Member State could have had credited, on account of similar deductions, on the basis of a double taxation convention concluded with that other Member State.**

2. **Articles 56 EC and 58 EC preclude legislation of a Member State, such as the legislation at issue in the main proceedings, which grants a concession to fiscal investment enterprises established in that Member State on account of tax deducted at source in another Member State or third country from dividends received by those enterprises, and reduces that concession where and to the extent to which the shareholders of those enterprises are natural or legal persons resident or established in other Member States or in third countries, since such a reduction adversely affects all the shareholders of those enterprises without distinction.**

In that respect, whether the foreign shareholders of a fiscal investment enterprise are resident or established in a State with which the Member State of establishment of that enterprise has concluded a convention providing for reciprocal crediting of tax deducted at source from dividends is irrelevant.

3. **A restriction is covered by Article 57(1) EC as being a restriction on the movement of capital involving direct investment in so far as it relates to investments of any kind undertaken by natural or legal persons and which serve to establish or maintain lasting and direct links between the persons providing the capital and the undertakings to which that capital is made available in order to carry out an economic activity.**

[Signatures]

* Language of the case: Dutch.