JUDGMENT OF THE COURT (First Chamber)

25 October 2012 (*)

(Failure of a Member State to fulfil obligations – Articles 49 TFEU and 63 TFEU – Articles 31 and 40 of the EEA Agreement – Taxation of income from capital and movable property – Resident and non-resident investment companies – Withholding tax – Setting off of withholding tax – Exemption of income from capital and movable property – Discrimination – Justifications)

In Case C-387/11,

ACTION under Article 258 TFEU for failure to fulfil obligations, brought on 19 July 2011,

European Commission, represented by W. Mölls and C. Soulay, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Kingdom of Belgium, represented by J.-C. Halleux and M. Jacobs, acting as Agents,

defendant,

supported by:

United Kingdom of Great Britain and Northern Ireland, represented by S. Behzadi-Spencer, acting as Agent,

intervener,

THE COURT (First Chamber),

composed of A. Tizzano, acting for the President of the First Chamber, A. Borg Barthet, E. Levits (Rapporteur), J.-J. Kasel and M. Berger, Judges,

Advocate General: P. Mengozzi,

Registrar: A. Calot Escobar,

having regard to the written procedure,

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

gives the following

Judgment

1 By its application, the European Commission seeks a declaration from the Court that, by maintaining different rules for the taxation of income from capital and movable property according to whether it is earned by Belgian investment companies or foreign investment companies, the Kingdom of Belgium has failed to fulfil its obligations under Articles 49 TFEU and 63 TFEU and

Articles 31 and 40 of the Agreement on the European Economic Area of 2 May 1992 (OJ 1994 L 1, p. 3; 'the EEA Agreement').

The Belgian legal context

2 Article 1 of the code des impôts sur les revenus 1992 (Income Tax Code 1992; 'the ITC 1992') provides:

'§ 1. The following types of tax shall be levied by way of income tax:

1 a tax on the total income of residents of the Kingdom, referred to as personal income tax;

2 a tax on the total income of resident companies, referred to as corporation tax;

3 a tax on the income of Belgian legal persons other than companies, referred to as tax on legal persons;

4 a tax on the income of non-residents, referred to as tax on non-residents.

§ 2. These taxes shall be levied by way of a withholding tax within the limits and subject to the conditions laid down in Title VI, First Chapter.'

The tax system applicable to investment companies which are resident in Belgium

3 It is apparent from Article 179 of the ITC 1992 that resident companies, namely companies whose seat, principal place of business or centre of management or administration is located in Belgium, are subject to corporation tax.

4 Thus, Article 185(1) of the ITC 1992 specifies that resident companies are taxable on their total profits, including dividends distributed.

5 Article 185a(1) of the ITC 1992 provides, however, that investment companies 'are taxable only on the total amount of unusual or gratuitous advantages received and of the expenditure or charges that are not deductible as business costs other than reductions in value and losses on shares, without prejudice however to their liability to the special levy provided for in Article 219'.

6 In this respect, Article 219 of the ITC 1992 provides for a separate levy collected, inter alia, in respect of company expenditure, namely commissions, brokering, commercial or other rebates which are not evidenced by the production of individual breakdowns and a summary, and in respect of hidden profits, namely profits recorded by the authorities which are not included in the accounting results of the company.

7 By virtue of Articles 249 and 261 of the ITC 1992, corporation tax is levied by means of a withholding tax on income from capital and movable property earned by residents of the Kingdom of Belgium, resident companies and taxpayers subject to the tax on non-residents who have an establishment in Belgium.

8 Article 269 of the ITC 1992 sets the rate of withholding tax at 15% for income from capital and movable property and at 25% for dividends.

9 Article 276 of the ITC 1992 provides:

‘The taxes provided for in Article 1 shall be paid to the extent indicated below, by means of a set off against property taxes, withholding taxes and business tax, the fixed percentage of foreign tax and the tax credit.’

10 Article 279 of the ITC 1992 states:

‘The withholding tax shall be set off against the amount of the withholding tax set in accordance with Article 269.’

11 The second subparagraph of Article 304(2) of the ITC 1992 provides:

‘As regards resident companies, any overpayment of withholding tax, as referred to in Article 279 … shall, where appropriate, be set off against the separate levies established pursuant to Articles 219 and 219a, and the surplus shall be refunded provided that it is equal to or greater than EUR 2.50.’

The tax system applicable to investment companies which are not resident in Belgium

12 Pursuant to Articles 227 and 228 of the ITC 1992, foreign companies as well as any associations, establishments or bodies without legal personality which are constituted in a legal form similar to that of a company governed by Belgian law and which do not have their seat, principal place of business or centre of management or administration in Belgium are liable to the tax on non-residents, which is levied exclusively on taxable income produced or obtained in Belgium.

13 Those provisions are applicable to non-resident companies with an establishment located in the territory of Belgium.

14 According to Article 294 of the ITC 1992, withholding taxes are set off against the tax on non-residents.

15 In the case of non-resident companies with no establishment located in the territory of Belgium, Article 248 of the ITC 1992 provides that the tax relating to the forms of income which are not referred to in Articles 232 to 234 of the ITC 1992 is to be equal to the various withholding taxes and the special levy which is referred to in Article 301 of the ITC 1992.

The pre-litigation procedure and the procedure before the Court of Justice

16 Taking the view that the rules on taxation of income from capital and movable property earned by non-resident investment companies with no permanent establishment located in the territory of Belgian are less favourable than the rules relating to the taxation of income of investment companies established in Belgium, the Commission sent a letter of formal notice to the Belgian authorities on 17 October 2008, stating that that legislation was incompatible with Articles 49 TFEU, 54 TFEU and 63 TFEU.

17 Since the Belgian authorities did not respond to that letter, the Commission sent the Kingdom of Belgium a reasoned opinion dated 4 June 2010, requiring that Member State to comply with those articles within two months of receipt of that opinion.

18 As it was not satisfied with the reply given by the Belgian authorities on 17 September 2010, the Commission decided to bring the present action.

19 By order of the President of the Court of 9 January 2012, the United Kingdom of Great

Britain and Northern Ireland was granted leave to intervene in support of the form of order sought by the Kingdom of Belgium.

The action

The existence of restrictions on the provisions of the FEU Treaty

Arguments of the parties

20 The Commission claims that the difference between the taxation of resident investment companies and that of non-resident investment companies with no permanent establishment located in the territory of Belgium gives rise to a difference of treatment of those two types of company amounting to an infringement of Articles 49 TFEU and 63 TFEU.

21 Although the income of those two categories of taxpayers is subject to the same rate of withholding tax, resident companies benefit from a more favourable set of rules.

22 On the one hand, Article 185a of the ITC 1992 provides for an exemption in respect of income of resident companies and limits the taxation of resident companies to certain exceptional cases and to the separate levy, as provided for in Article 219 of the ITC 1992.

23 On the other hand, Article 304 of the ITC 1992 introduces a mechanism which neutralises the withholding tax paid at source. Pursuant to the second subparagraph of Article 304(2) thereof, it is possible to set off any overpayment of that withholding tax against the separate levies payable under Article 219 of the ITC 1992, and even to receive the surplus provided that it is equal to or greater than EUR 2.50.

24 In the Commission's submission, that difference in treatment amounts to an obstacle to the free movement of capital and to a restriction on freedom of establishment. By limiting to resident companies the option of setting off the withholding tax against the tax for which they are liable and of exempting the income that they earn from capital and movable property, the national legislation makes it less attractive for non-resident investment companies with no permanent establishment in Belgium to invest in Belgian companies.

25 Although the Kingdom of Belgium acknowledges that there is a difference of treatment between the system for taxing resident companies and non-resident companies with no permanent establishment in Belgium, it states that those two categories of companies are in objectively different legal and factual situations and that such difference in treatment is therefore justified.

26 First, resident companies are subject to corporation tax in accordance with Articles 185, 185a and 219 of the ITC 1992. As regards non-resident companies with no permanent establishment in Belgium, in its application, the Commission makes no differentiation on the basis of the tax system to which they are subject in their State of residence. Indeed, in states in which they are not subject to income tax or where their profits are exempt from tax, non-resident companies are not in a comparable situation to that of resident companies.

27 Second, the Commission failed to mention the fact that the amount paid by way of withholding tax can be set off against the amount payable by way of corporation tax or the tax on non-residents, or refunded, as regards resident companies or non-resident companies with a permanent establishment in Belgium respectively, only in certain conditions and subject to certain limits, which are laid down inter alia in Articles 281 and 282 of the ITC 1992.

28 Third, the Kingdom of Belgium states that common funds governed by Belgian law are not regarded as separate legal entities and are not, as such, subject to corporation tax. Accordingly,

the withholding tax on income from capital and movable property assigned to those funds is definitively levied, in the same way as the withholding tax on income from capital and movable property of non-resident investment companies with no permanent establishment in Belgium.

29 Fourth, if it were established that non-resident companies with no permanent establishment in Belgium were in a situation in which they were subject to double taxation of their income, that situation would be the consequence of failure to harmonise the tax legislation of the Member States, since it is generally accepted that the State of residence is in principle required to neutralise such double taxation.

30 Fifth, regard should be had to the fact that investment companies act as financial intermediaries on behalf of investors. If it were necessary to compare the situations of unit holders, complex disparities would necessarily be observed.

31 Sixth, the manner in which the tax is levied is different in the case of resident companies and of non-resident companies. In the first case, the tax is levied by way of declaration, whilst in the second case it is levied at source by means of a withholding tax.

32 Seventh, in so far as non-resident investment companies carry out their collective asset management activities abroad, they do not necessarily carry out the same operations as resident investment companies, such as, for example, the distribution, in Belgium, of shares without a public offering.

Findings of the Court

– The applicability of Articles 49 TFEU and 63 TFEU

33 As a preliminary point, since the Commission alleges infringement by the Kingdom of Belgium of both Article 49 TFEU and Article 63 TFEU, it should be borne in mind that, in order to ascertain whether national legislation falls within the ambit of one or other of those fundamental freedoms, the purpose of the legislation concerned must be taken into consideration (see, in particular, Case C-157/05 *Holböck* [2007] ECR I-4051, paragraph 22; Case C-326/07 *Commission* v *Italy* [2009] ECR I-2291, paragraph 33, Case C-543/08 *Commission* v *Portugal* [2010] ECR I-11241, paragraph 40, and Case C-212/09 *Commission* v *Portugal* [2011] ECR I-10889, paragraph 41).

34 In this respect, it has already been held that national legislation which is intended to apply only to shareholdings enabling the holder to exert a definite influence over a company’s decisions and determine its activities is covered by the Treaty provisions on freedom of establishment (see Case C-446/04 *Test Claimants in the FII Group Litigation* [2006] ECR I-11753, paragraph 37, and Case C-81/09 *Idryma Typou* [2010] ECR I-10161, paragraph 47). On the other hand, national provisions which apply to shareholdings acquired solely with the intention of making a financial investment, with no intention of influencing the management and control of the undertaking, must be examined exclusively in the light of the free movement of capital (Case C-310/09 *Accor* [2011] ECR I-8115, paragraph 32 and the case-law cited).

35 It must be stated that, in this action for failure to fulfil obligations, it cannot be ruled out that the national provisions in question might affect both freedom of establishment and free movement of capital. Accordingly, it is necessary to examine those provisions in the light of Articles 49 TFEU and 63 TFEU.

– Failure to fulfil obligations under Article 63(1) TFEU

36 According to the settled case-law of the Court, although direct taxation falls within their competence, the Member States must none the less exercise that competence consistently with EU law (see, inter alia, Case C-374/04 *Test Claimants in Class IV of the ACT Group Litigation* [2006] ECR I-11673, paragraph 36; Case C-379/05 *Amurta* [2007] ECR I-9569, paragraph 16; Case C-540/07 *Commission* v *Italy* [2009] ECR I-10983, paragraph 28; and Case C-487/08 *Commission* v *Spain* [2010] ECR I-4843, paragraph 37, and Case C-284/09 *Commission* v *Germany* [2011] ECR I-9879, paragraph 44).

37 In particular, it is for each Member State to organise, in compliance with EU law, its system for taxing distributed profits and, in that context, to define the tax base and the tax rate which apply to the shareholder receiving them (see, inter alia, *Test Claimants in Class IV of the ACT Group Litigation*, paragraph 50; *Test Claimants in the FII Group Litigation*, paragraph 47; Case C-194/06 *Orange European Smallcap Fund* [2008] ECR I-3747, paragraph 30; and Case C-128/08 *Damseaux* [2009] ECR I-6823, paragraph 25, and *Commission* v *Germany*, paragraph 45).

38 In the present case, it is common ground that the Belgian legislation makes subject to withholding tax dividends and interest distributed by a company established in Belgium to both investment companies which are resident in Belgium and investment companies which have their seat in another Member State. However, as regards dividends and interest distributed to investment companies established in Belgium, they are exempt from corporation tax as income from capital and movable property, pursuant to Article 185a of the ITC 1992. Moreover, under the second subparagraph of Article 304(2) of the ITC 1992, it is possible to set off the withholding tax against the corporation tax payable by those investment companies, or even to receive the difference between the amount of the withholding tax retained at source and the tax actually payable provided that that difference is equal to or greater than EUR 2.50. The same applies under the fifth subparagraph of Article 304(2) of the ITC 1992 as regards non-resident investment companies, but which are subject to the tax on non-residents in accordance with Article 233 of the ITC 1992, namely those non-resident investment companies which have a permanent establishment in Belgium. It follows that resident investment companies are liable not to be subject to the tax burden stemming from the withholding tax on income from capital and movable property that they receive from Belgian companies.

39 Whilst it is true that the right to exemption and to set off available to resident investment companies is subject to certain conditions and limitations, in particular those laid down in Articles 281 and 282 of the ITC 1992, the fact remains that such an option is not available to non-resident investment companies with no permanent establishment in Belgium and that, consequently, the tax withheld at source on income from capital and movable property that such companies receive from Belgian companies in which they have invested constitutes definitive taxation pursuant to Article 248 of the ITC 1992.

40 Consequently, it must be stated that Belgian tax legislation establishes less favourable tax treatment of income from capital and movable property received by non-resident investment companies with no permanent establishment in Belgium in comparison with income earned by resident investment companies or non-resident companies with a permanent establishment in Belgium.

41 The Kingdom of Belgium claims however that, in the light of the tax legislation in question, a resident investment company is in a situation different from that of a non-resident investment company with no permanent establishment in that Member State.

42 Under Article 65(1)(a) TFEU, '[t]he 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'.

43 In so far as Article 65(1)(a) TFEU is a derogation from the fundamental principle of the free movement of capital, it must be interpreted strictly. It cannot therefore be interpreted as meaning that all tax legislation which draws a distinction between taxpayers on the basis of their place of residence or the State in which they invest their capital is automatically compatible with the Treaty (see Case C-11/07 *Eckelkamp and Others* [2008] ECR I-6845, paragraph 57; Case C-510/08 *Mattner* [2010] ECR I-3553, paragraph 32; and Joined Cases C-436/08 and C-437/08 *Haribo Lakritzen Hans Riegel and Österreichische Salinen* [2011] ECR I-305, paragraph 56, and Joined Cases C-338/11 to C-347/11 *Santander Asset Management SGIIC and Others* [2012] ECR, paragraph 21).

44 The derogation in that provision is itself limited by Article 65(3) TFEU, which provides that the national provisions referred to in Article 65(1) 'shall not constitute a means of arbitrary discrimination or a disguised restriction on the free movement of capital and payments as defined in Article 63'.

45 The differences in treatment authorised by Article 65(1)(a) TFEU must therefore be distinguished from discrimination prohibited by Article 65(3) TFEU. The case-law shows that, for national tax legislation to be capable of being regarded as compatible with the provisions of the Treaty on the free movement of capital, the difference in treatment must concern situations which are not objectively comparable or be justified by an overriding reason in the public interest (Case C-35/98 *Verkooijen* [2000] ECR I-4071, paragraph 43; Case C-319/02 *Manninen* [2004] ECR I-7477, paragraph 29; and Case C-250/08 *Commission* v *Belgium* [2011] ECR I-12341, paragraph 51, and *Santander Asset Management SGIIC and Others*, paragraph 23).

46 In this respect, the Kingdom of Belgium relies on several factors which it claims show that the situations of resident investment companies and non-resident companies with no permanent establishment in Belgium are different.

47 In the first place, it is established that the tax legislation in question is aimed at avoiding the overtaxation of income of investment companies in the light of their quality of intermediary between the companies in which they invest and the unit holders of those investment companies.

48 The Court has already held that, from the point of view of measures laid down by a Member State in order to prevent or mitigate the imposition of a series of charges to tax on, or the economic double taxation of, income distributed by a resident company, resident companies receiving income are not necessarily in a situation which is comparable to that of companies receiving income which are resident in another Member State (*Commission* v *Germany*, paragraph 55 and the case-law cited).

49 However, as soon as a Member State, either unilaterally or by way of a convention, imposes a charge to tax on the income not only of resident companies but also of non-resident companies from income which they receive from a resident company, the situation of those non-resident companies becomes comparable to that of resident companies (*Commission* v *Germany*, paragraph 56 and the case-law cited).

50 It is solely because of the exercise by that State of its power of taxation that, irrespective of any taxation in another Member State, a risk of a series of charges to tax or economic double taxation may arise. In such a case, in order for non-resident companies receiving income not to be subject to a restriction on the free movement of capital prohibited in principle by Article 63 TFEU, the State in which the company making the distribution is resident is obliged to ensure that, under

the procedures laid down by its national law in order to prevent or mitigate a series of liabilities to tax or economic double taxation, non-resident companies are subject to the same treatment as resident companies (see *Test Claimants in Class IV of the ACT Group Litigation*, paragraph 70; *Amurta*, paragraph 39; *Commission* v *Italy*, paragraph 53; *Commission* v *Spain*, paragraph 52; and *Commission* v *Germany*, paragraph 57).

51 In the present case, the Kingdom of Belgium clearly chose to exercise its power of taxation over income earned by investment companies resident in other Member States. Non-resident companies in receipt of that income thus find themselves in a situation comparable to that of resident companies as regards the risk of a series of charges to tax on income from capital and movable property, so that non-resident recipient companies cannot be treated differently from resident recipient companies (see, to that effect, *Commission* v *Spain*, paragraph 53, and *Commission* v *Germany*, paragraph 58).

52 That finding is not invalidated by the argument of the Kingdom of Belgium that non-resident investment companies in receipt of income from capital and movable property originating from Belgian companies are not subject to a tax burden heavier than that of resident investment companies under Article 219 of the ITC 1992.

53 On the one hand, with respect to the tax burden brought about by the payment of the special levy provided for in Article 219 of the ITC 1992 to which only resident investment companies are subject, it should be pointed out that, in accordance with settled case-law of the Court, unfavourable tax treatment contrary to a fundamental freedom cannot be regarded as compatible with EU law because of the existence of other advantages, even assuming that such advantages exist (*Commission* v *Germany*, paragraph 71 and the case-law cited).

54 Accordingly, the Kingdom of Belgium cannot rely on that factor as a criterion of differentiation in order to justify a difference of treatment between resident investment companies and non-resident investment companies.

55 With respect, on the other hand, to the mechanisms for preventing double taxation by way of conventions, it must first be observed that the application of the set-off method should enable the tax on income deducted in Belgium to be set off in full against the tax payable in the State of residence of the recipient investment company, so that, if the income from capital and movable property received by that company were ultimately taxed more heavily than the income paid to companies established in Belgium, that heavier tax burden could no longer be attributed to the Kingdom of Belgium, but to the State of establishment of the recipient company which exercised its power of taxation (see, to that effect, *Commission* v *Spain*, paragraph 60, and *Commission* v *Germany*, paragraph 67).

56 Second, it must be pointed out that the decision to tax income from Belgium in the other Member State, or the choice of the level at which it is to be taxed, depends not on the Kingdom of Belgium but on the tax rules laid down by the other Member State (*Commission* v *Spain*, paragraph 64, and *Commission* v *Germany*, paragraph 69).

57 The Kingdom of Belgium cannot therefore claim that the setting off of the tax paid in Belgium against the tax payable in the other Member State, pursuant to the double taxation conventions, allows in every case the neutralisation of the difference of treatment resulting from the application of the provisions of national tax legislation or of those conventions whose effect is to reduce the rate of the deduction arising from the withholding tax (see *Commission* v *Italy*, paragraph 39, *Commission* v *Spain*, paragraph 64, and *Commission* v *Germany*, paragraph 70).

58 In the second place, the Kingdom of Belgium states that, with respect to the tax legislation in

question, the Commission's basis of comparison is incorrect. Thus, first of all, on account of their specific nature, non-resident investment companies are in a situation comparable to that of Belgian common funds and not to those of resident investment companies. Next, in its submission, the activities of resident investment companies differ from those of non-resident investment companies. Lastly, it states that it is necessary to take into consideration the tax system applied to unit holders of resident investment companies and of non-resident investment companies with no permanent establishment in Belgium.

59 With respect, first, to the comparability of the situation of non-resident investment companies with that of Belgian common funds, it must be stated that, although non-resident investment companies have legal personality, that is not the case in respect of Belgian common funds. Accordingly, the Kingdom of Belgium cannot claim that the situation of non-resident investment companies must be compared to that of common funds, on the sole ground that the Belgian tax legislation treats those two categories of taxpayers, which moreover do not have the same legal form, identically.

60 Moreover, it must pointed out that the reasoning of that Member State is based on the premiss that non-resident investment companies are exempt from tax in their State of establishment.

61 However, it is apparent from the Belgian legislation that the levying of the withholding tax on the income of the recipient company does not depend on any exemption from corporation tax that that company might enjoy. Accordingly, the circumstance that Belgian common funds are fiscally transparent entities which are not, as such, subject to corporation tax does not the permit the conclusion that the situation of non-resident investment companies is not comparable to that of resident investment companies.

62 Second, with respect to the activities of resident investment companies and those of non-resident investment companies, it must be stated that the Kingdom of Belgium's reasoning is aimed not so much at underlining the intrinsic differences between those activities as at the fact that those activities are carried out in different Member States.

63 In this respect, that Member State starts from the premiss that non-resident investment companies are directed only at unit holders which are not resident in Belgium.

64 However, it cannot be ruled out that a non-resident investment company might offer its services to resident investors, so that it might ultimately carry out the same activities as a resident investment company.

65 Third, as regards the alleged need to take into consideration the tax system applied to unit holders, it must be borne in mind that, where national legislation establishes a distinguishing criterion for the taxation of income paid, account must be taken of that criterion in determining whether the situations are comparable (see, to that effect, *Santander Asset Management SGIIC and Others*, paragraph 28).

66 However, in this instance, on the one hand, Article 185a of the ITC 1992 provides, solely in favour of resident investment companies, that such companies are taxable only on the total amount of unusual or gratuitous advantages received and of the expenditure or charges that are not deductible as business costs. On the other hand, under Articles 248 and the second subparagraph of Article 304(2) of the ITC 1992, the withholding tax is a definitive tax only as regards non-resident companies.

67 In the light of the distinguishing criterion established by that legislation, based solely on the

investment company’s place of residence, the situations must be compared only at the level of the investment company in order to determine whether that legislation is discriminatory (see, to that effect, *Santander Asset Management SGIIC and Others*, paragraph 39).

68 It must therefore be concluded, in the light of the above observations, that the different treatment of income depending on whether it is paid to resident or non-resident companies, as established by the Belgian tax legislation, is liable to deter companies established in other Member States from making investments in Belgium, and is also such as to constitute an obstacle to the raising of capital by resident companies from companies established in other Member States.

69 Consequently, that legislation constitutes a restriction of the free movement of capital, which is prohibited in principle by Article 63(1) TFEU.

The reasons put forward as justification

– Arguments of the parties

70 The Kingdom of Belgium puts forwards two reasons as justification for the restriction on free movement of capital brought about by the national legislation at issue.

71 First, and in order to preserve the balanced allocation of the power to impose taxes between Member States, the Kingdom of Belgium cannot be required to allow non-resident companies with no permanent establishment on its territory to set off the withholding tax levied against their income. Such a requirement would amount in effect to requiring that Member State to refrain from levying taxes on income obtained on its territory.

72 Second, the limitation of the extent to which withholding tax levied is taken into account in the case of non-resident companies is justified on grounds of effectiveness of fiscal supervision. To the extent that investment companies are legally responsible for paying withholding tax on the dividends that they pay to unit holders, the Belgian authorities are not entitled to exercise any supervision over those holders, since they are not resident in Belgium.

73 The Commission submits that none of the reasons put forward by the Kingdom of Belgium is capable of justifying the difference of treatment between resident investment companies and non-resident investment companies with no permanent establishment in Belgium.

– Findings of the Court

74 In accordance with settled case-law, national measures restricting the free movement of capital may be justified inter alia by overriding reasons in the public interest, provided, first, that there is no harmonising measure of EU law providing for measures necessary to ensure the protection of those interests and, second, that they are appropriate to secure the attainment of the objective which they pursue and do not go beyond what is necessary in order to attain it (see, inter alia, Case C-112/05 *Commission* v *Germany* [2007] ECR I-8995, paragraphs 72 and 73; Case C-233/09 *Dijkman and Dijkman-Lavaleije* [2010] ECR I-6649, paragraph 49, and Case C-284/09 *Commission* v *Germany*, paragraph 74).

75 As regards, first, the alleged need to ensure a balanced allocation of the power to tax, it must be recalled that such a justification may be accepted, in particular, where the national tax system is designed to prevent conduct capable of jeopardising the right of a Member State to exercise its powers of taxation in relation to activities carried on in its territory (see Case C-347/04 *Rewe Zentralfinanz* [2007] ECR I-2647, paragraph 42; Case C-231/05 *Oy AA* [2007] ECR I-6373, paragraph 54; *Amurta*, paragraph 58; Case C-303/07 *Aberdeen Property Fininvest Alpha* [2009]

ECR I-5145, paragraph 66, and Case C-284/09 *Commission* v *Germany*, paragraph 77).

76 However, it also follows from the Court's case-law that, where a Member State has chosen not to tax recipient companies established in its territory in respect of income of this kind, it cannot rely on the argument that there is a need to ensure a balanced allocation between the Member States of the power to tax in order to justify the taxation of recipient companies established in another Member State (*Amurta*, paragraph 59; *Aberdeen Property Fininvest Alpha*, paragraph 67, and Case C-284/09 *Commission* v *Germany*, paragraph 78).

77 It is common ground that resident investment companies benefit in respect of the income from capital and movable property that they receive from neutralisation of the tax burden brought about by the levying of the withholding tax.

78 It is true that the Court has held that to require the State in which the company making the distribution is resident to ensure that profits distributed to a non-resident shareholder are not liable to a series of charges to tax or to economic double taxation, either by exempting those profits from tax at the level of the company making the distribution or by granting the shareholder a tax advantage equal to the tax paid on those profits by the company making the distribution, would in fact mean that that State would have to abandon its right to tax a profit generated by an economic activity carried on in its territory (see *Test Claimants in Class IV of the ACT Group Litigation*, paragraph 59; Case C-182/08 *Glaxo Wellcome* [2009] ECR I-8591, paragraph 83, and Case C-284/09 *Commission* v *Germany*, paragraph 80).

79 In the present case, however, the exemption of income from capital and movable property and the setting off of the withholding tax levied at source by the Kingdom of Belgium, if granted to companies established in another Member State with no permanent establishment in Belgium, would not in fact mean that the Kingdom of Belgium would have to waive its right to tax income generated by an economic activity carried on in its territory. The income earned by resident companies has already been taxed in the hands of the distributing companies as profits realised by them.

80 Secondly, although the Court has acknowledged 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 exercise of fundamental freedoms guaranteed by the Treaty (see *Dijkman and Dijkman-Lavaleije*, paragraph 58), it is clear, in the present case, that such an objective cannot properly be relied upon as justification for the restriction in question.

81 It is common ground that non-resident investment companies cannot, in any circumstances, enjoy exemption in respect of income from capital and movable property that they receive from Belgian companies or benefit from the setting off or reimbursement of the withholding tax, irrespective of the guarantees that they might be able to provide concerning financial supervision.

82 Accordingly, it must be held that the grounds relied upon by the Kingdom of Belgium cannot justify the restriction of the free movement of capital stemming from the legislation at issue.

83 It is apparent from the foregoing that, by maintaining different rules for the taxation of income from capital and movable property according to whether it is earned by resident investment companies or non-resident investment companies with no permanent establishment in Belgium, the Kingdom of Belgium has failed to fulfil its obligations under Article 63 TFEU.

Failure to fulfil obligations under Article 49 TFEU

84 With respect to the Commission's application for a declaration that the Kingdom of Belgium

has failed to fulfil its obligations under Article 49 TFEU, it is sufficient to observe that the considerations set out in the preceding paragraphs apply in the same manner where an investment company has received income on the basis of a shareholding which confers on it a definite influence over the decisions of the company in which it has invested and enables it to determine its activities.

85 The difference of treatment found in paragraph 40 of this judgment may have the effect of deterring potential investors who, through an investment company resident aboard, wish to invest in Belgian companies in order to have a definite influence over those companies' decisions and to determine their activities.

86 Accordingly, the difference of treatment arising from the legislation at issue constitutes a restriction on freedom of establishment prohibited by Article 49 TFEU; that restriction cannot be justified for the reasons set out in paragraphs 74 to 81 of this judgment.

87 It is apparent from the foregoing that, by maintaining different rules for the taxation of income from capital and movable property according to whether it is earned by resident investment companies or non-resident investment companies with no permanent establishment in Belgium, the Kingdom of Belgium has failed to fulfil its obligations under Article 49 TFEU.

Infringement of the EEA Agreement

88 In so far as the provisions of Articles 31 and 40 of the EEA Agreement have the same legal scope as the substantially identical provisions of Articles 49 TFEU and 63 TFEU (see Case C-521/07 *Commission* v *Netherlands* [2009] ECR I-4873, paragraph 33, and Case C-72/09 *Établissements Rimbaud* [2010] ECR I-10659, paragraph 22), all of the foregoing considerations may, in circumstances such as those of the present case, be transposed, *mutatis mutandis*, to Articles 31 and 40 of that agreement.

The temporal effects of the judgment

89 The Kingdom of Belgium requested that, should the Court uphold the Commission's action, the effects of the judgment should be subject to temporal limitation 'in order to allow for the implementation of any changes in an efficient manner'. That temporal limitation of the effects of the judgment is justified, first, by the fact that that Member State acted in good faith in adopting the national provisions constituting the restrictions found in 2007 and, second, by the risk of serious difficulties which the Court's judgment could give rise to.

90 Even if judgments delivered under Article 258 TFEU were to have the same effects as those delivered under Article 267 TFEU and considerations of legal certainty might make it necessary, exceptionally, to limit their temporal effects provided that the conditions laid down by the Court's case-law in the context of Article 267 TFEU are met (see, to that effect, Case C-178/05 *Commission* v *Greece* [2007] ECR I-4185, paragraph 67; Case C-239/06 *Commission* v *Italy* [2009] ECR I-11913, paragraph 59; Case C-284/05 *Commission* v *Finland* [2009] ECR I-11705, paragraph 58, Case C-387/05 *Commission* v *Italy* [2009] ECR I-11831, paragraph 59, and judgment of 29 September 2011 in Case C-82/10 *Commission* v *Ireland*, paragraph 63), it must be stated, in any event, that those conditions do not appear to have been satisfied in the present case.

91 In this case, it is sufficient to note that although the Belgian Government has quantified approximately the amounts wrongly levied by the Belgian authorities on the basis of the legislation at issue, it has not demonstrated in any way that there is a risk of serious economic repercussions, whereas this is an essential condition for the temporal limitation of judgments of the Court of

Justice.

92 Accordingly, it is not appropriate to grant that request.

Costs

93 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs and the Kingdom of Belgium has been unsuccessful, the latter must be ordered to pay the costs. Pursuant to the first subparagraph of Article 69(4) of the Rules of Procedure, the United Kingdom, which has intervened in the proceedings, is to be ordered to bear its own costs.

On those grounds, the Court (First Chamber) hereby:

1. **Declares that, by maintaining different rules for the taxation of income from capital and movable property according to whether it is earned by resident investment companies or non-resident investment companies with no permanent establishment in Belgium, the Kingdom of Belgium has failed to fulfil its obligations under Articles 49 TFEU and 63 TFEU, and Articles 31 and 40 of the Agreement on the European Economic Area of 2 May 1992;**

2. **Orders the Kingdom of Belgium to pay the costs;**

3. **Orders the United Kingdom of Great Britain and Northern Ireland to bear its own costs.**

[Signatures]

* Language of the case: French.