JUDGMENT OF THE COURT (First Chamber)

10 April 2014 (*)

(Reference for a preliminary ruling — Freedom of establishment — Free movement of capital — Articles 63 TFEU and 65 TFEU — Tax on income of legal persons — Difference of treatment between dividends paid to resident and non-resident investment funds — Exclusion of tax exemption — Restriction not justified)

In Case C?190/12,

REQUEST for a preliminary ruling under Article 267 TFEU from the Wojewódzki S?d Administracyjny w Bydgoszczy (Poland), made by decision of 28 March 2012, received at the Court on 23 April 2012, in the proceedings

Emerging Markets Series of DFA Investment Trust Company

v

Dyrektor Izby Skarbowej w Bydgoszczy,

THE COURT (First Chamber),

composed of A. Tizzano, President of the Chamber, A. Borg Barthet, E. Levits (Rapporteur), M. Berger, and S. Rodin, Judges,

Advocate General: P. Mengozzi,

Registrar: K. Malacek, Administrator,

having regard to the written procedure and further to the hearing on 5 September 2013,

after considering the observations submitted on behalf of:

– Emerging Markets Series of DFA Investment Trust Company, by M. Rudnicki, Legal Adviser,

– the Polish Government, by B. Majczyna, M. Szpunar and A. Kramarczyk, acting as Agents,

– the German Government, by T. Henze and K. Petersen, acting as Agents,

– the Spanish Government, by A. Rubio González, acting as Agent,

– the French Government, by G. de Bergues, J.-S. Pilczer and D. Colas, acting as Agents,

– the Italian Government, by G. Palmieri, acting as Agent, and by A. De Stefano, avvocato dello Stato,

– the Finnish Government, by M. Pere, acting as Agent,

– the European Commission, by K. Herrmann and W. Roels, acting as Agents, after hearing the Opinion of the Advocate General at the sitting on 6 November 2013,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Articles 49 TFEU, 63 TFEU and 65 TFEU.

2 The request has been made in proceedings between Emerging Markets Series of DFA Investment Trust Company, an investment fund whose registered office is in the United States, and Dyrektor Izby Skarbowej w Bydgoszczy (the director of the Bydgoszcz tax authority; 'the Dyrektor'), concerning the latter's refusal to recognise and refund an overpayment of flat-rate corporation tax, relating to the years 2005 and 2006, paid in respect of the taxation of dividends paid to the applicant in the main proceedings by companies whose registered office is in Poland.

Legal context

Polish law

3 Article 6(1) of the law on corporation tax (ustawy o podatku dochodowym od osób prawnych) of 15 February 1992 (Dz. U., No 54, position 654), in the version applicable at the material time in the main proceedings, in other words in 2005 and 2006 ('the law on corporation tax'), provided:

'The following are exempt from tax:

...

(10) investment funds operating in accordance with the provisions of the [law on investment funds (ustawy o funduszach inwestycyjnych) of 27 May 2004 (Dz. U., No 146, position 1546; "the law on investment funds")].'

4 Article 6(1) of the law on corporation tax was amended by the law amending the law on income tax, the law on corporation tax and the law on the flat-rate income tax applicable to certain income received by natural persons (ustawa. - Zmiana ustawy o podatku dochodowym od osób fizycznych, ustawy o podatku dochodowym od osób prawnych oraz ustawy o zrycza?towanym podatku dochodowym od niektórych przychodów osi?ganych przez osoby fizyczne) of 25 November 2010 (Dz. U. 2010 No 226, position 1478). That provision, which entered into force on 1 January 2011, provides:

'The following are exempt from tax:

...

(10) investment funds operating in accordance with the provisions of the law [on investment funds];

(10a) undertakings for collective investment whose registered office is in a Member State of the European Union other than the Republic of Poland, or in another State in the European Economic Area [EEA], where those undertakings satisfy all of the following conditions:

(a) they are, in the State where they have their registered office, subject to corporation tax on their entire income, whatever the source of that income;

(b) the sole object of their business is the collective investment in transferable securities, money market instruments and other property rights of financial resources raised from the public by means of public or private invitation to purchase their investment securities;

(c) they operate with the authorisation of the competent financial market supervisory authorities of the State in which they have their registered office ...;

(d) their business is directly monitored by the competent financial market supervisory authorities of the State in which the registered office of those undertakings is situated;

(e) they have appointed a depositary for the safe-keeping of their assets;

(f) they are managed by traders who have, for the pursuit of their activity, the authorisation of the competent financial market supervisory authorities of the State in which the registered office of those undertakings is situated.'

5 Article 22 of the law on corporation tax is worded as follows:

'1. Taxation of dividends and other income constituting participation in the profits of legal persons whose registered office is situated in … the Republic of Poland is set at 19% of income received, subject to paragraph 2.

2. Taxation of income referred to in paragraph 1 of persons listed in Article 3(2) is set at 19% of the income, unless a double taxation convention agreed with the State where the taxable person has its registered office or its central administration provides otherwise.'

6 In accordance with Article 1 of the law on investment funds, as amended:

'This law defines the rules applicable to the formation and operation of investment funds whose registered office is situated in the Republic of Poland, and the rules governing the conduct by foreign funds and management companies of their business in the Republic of Poland.'

7 Article 2(7) and (9) of that law provides:

'For the purposes of this law, the following definitions shall apply:

...

(7) Member States: the Member States of the European Union other than [the Republic of] Poland;

...

(9) Foreign fund: an investment fund of the open-ended type or an investment company whose registered office is in a Member State and which operates in accordance with the Community provisions governing collective investment in transferable securities;

...'

8 Article 3(1) of that law provides:

‘An investment fund is a legal person whose business has as its sole object the collective investment in transferable securities, money market instruments and other property rights, of financial resources raised from the public by means of public or private invitation to purchase its investment securities.’

The double taxation convention

9 In accordance with Article 11 of the convention between the Government of the [Republic of Poland] and the Government of the United States of America for the avoidance of double taxation and to prevent tax evasion (Umowy miedzy Rz?dem [Polskiej] Rzeczypospolitej Ludowej a Rz?dem Stanów Zjednoczonych Ameryki o unikni?ciu podwójnego opodatkowania i zapobie?eniu uchylaniu si? od opodatkowania w zakresie podatków od dochodu), signed in Washington on 8 October 1974 (Dz. U. 1976, No 31, position 178, ‘the double taxation convention’):

‘1. Dividends originating in a Contracting State which are paid to a resident of the other Contracting State are taxable in that other State.

2. However, such dividends may be taxed in the Contracting State of which the company paying the dividends is a resident, and according to the law of that State, but the tax so charged shall not exceed:

(a) 5 percent of the gross amount of the dividends if the recipient is a company which holds directly at least 10 percent of the outstanding shares of the voting stock of the company paying the dividends,

(b) In all other cases, 15 percent of the gross amount of the dividends.

This paragraph shall not affect the taxation of the company in respect of the profits out of which the dividends are paid.

...’

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

10 In December 2010 the applicant in the main proceedings, an investment fund the registered office of which is in the United States of America, investment in Polish companies forming one part of its business, requested from the Polish tax authority the refund of an overpayment of flat-rate corporation tax which had been applied, at a rate of 15%, to dividends which had been paid to it by those companies which were established in Poland. The applicant in the main proceedings considered that it was entitled to obtain that refund on the basis of Article 22(1) of the law on corporation tax, read together with Article 11(2)(b) of the double taxation convention.

11 That request was rejected by a decision of 2 May 2011, on the ground that, as an investment fund established in the United States of America, the applicant in the main proceedings did not satisfy the exemption conditions set out in Article 6(1)(10) of the law on corporation tax.

12 When that decision was confirmed by a decision of the Dyrektor on 6 October 2011, the applicant in the main proceedings brought an action for its annulment before the referring court, claiming that the provisions of the law on corporation tax discriminated between investment funds established in non-Member States and those established in Poland.

13 The referring court is uncertain whether, given the particular features of the tax exemption provided for by the law on corporation tax, which is the equivalent of a full personal exemption

from corporation tax reserved to investment funds which meet the requirements laid down by the law on investment funds, and the close link between the provisions of the latter law and that exemption, that provision of Polish legislation should be examined not with regard to the principle of free movement of capital, but with regard to the principle of freedom of establishment.

14 On the assumption that that examination should be undertaken with regard to the principle of free movement of capital, the referring court raises the question of whether the legislation at issue in the main proceedings involves a restriction on that freedom which is not justified.

15 In particular, the referring court is uncertain whether the similarity in the area of business activity and how that business is carried out is sufficient ground to hold that an investment fund whose registered office is in Poland is comparable to one whose registered office is in the United States, when the requirements laid down by European Union law in relation to the formation and operation of such a fund differ from those laid down by the law of the non-Member State and are not applicable to it.

16 Further, the referring court considers that any restriction might be justified by the need to ensure the effectiveness of fiscal supervision because the exemption is personal and is also proportionate.

17 In those circumstances the Wojewódzki S?d Administracyjny w Bydgoszczy decided to stay proceedings and to refer to the Court the following questions for a preliminary ruling:

'1. Does [Article 63 TFEU] apply to an assessment by a court, in respect of a personal tax exemption of general scope, of the permissibility of the application by a Member State of provisions of national law which draw a distinction between the legal situation of taxable persons in such a way that they grant an exemption from flat-rate corporation tax on dividends received by investment funds established in a Member State of the European Union but do not provide for such an exemption for an investment fund which is resident for tax purposes in the United States?

2. Can the difference between the treatment of investment funds established in a non-Member country and that of investment funds established in a Member State of the European Union, as provided for in national law with regard to the personal exemption relating to corporation tax, be regarded as legally justified in the light of Article [65(1)(a) TFEU, read together with Article 65(3) TFEU]?'

The request to have the oral procedure reopened

18 The oral procedure was closed on 6 November 2013 after the Advocate General delivered his Opinion.

19 By letter of 6 December 2013, lodged at the Court's Registry on 9 December 2013, the applicant in the main proceedings, in reliance on Article 83 of the Court's Rules of Procedure, requested, in essence, the reopening of the oral part of the procedure, claiming that there were new facts which were such as to have a decisive influence on the Court's decision. The applicant claims that the tax authorities of the United States have informed it that the Polish tax authorities had initiated a procedure for the exchange of information in respect of a case concerning the applicant, the subject matter of that case being identical to that of the main proceedings.

20 In that regard, it must be recalled that, under Article 83 of the Court's Rules of Procedure, the Court may at any time, after hearing the Advocate General, order the reopening of the oral part of the procedure, in particular if it considers that it lacks sufficient information or where a party has, after the close of that part of the procedure, submitted a new fact which is of such a nature as to

be a decisive factor for the decision of the Court (see Joined Cases C?228/12 to C?232/12 and C?254/12 to C?258/12 *Vodafone Omnitel and Others* [2013] ECR, paragraph 26).

21 In this case, the Court considers, after hearing the Advocate General, that it has all the information necessary to answer the question referred by the referring court and that the new fact referred to by the applicant in the main proceedings is not of such a nature as be a decisive factor for the Court’s decision.

22 Consequently, the request by the applicant in the main proceedings for the reopening of the oral part of the procedure cannot be granted.

Consideration of the questions referred for a preliminary ruling

The first question

23 By its first question, the referring court seeks to ascertain whether Article 63 TFEU applies in a situation, such as that at issue in the main proceedings, where, under the tax legislation of a Member State, the dividends paid by companies established in that Member State to an investment fund established in a non?Member State do not qualify for a tax exemption, whereas investment funds established in that Member State do receive such an exemption.

24 The Polish Government is alone in taking the view that those national rules must be assessed in the light not of free movement of capital, but rather of either freedom of establishment or the freedom to provide services. According to the Polish Government, the purpose of the personal exemption at issue in the main proceedings, which applies to the entire income of certain traders irrespective of the type of transactions carried out by them, is not to introduce a distinguishing criterion based on the place of establishment, but to encourage consumers to make use of the services of investment funds which operate within a precisely defined legal framework. Further, the business undertaken by investment funds constitutes a financial intermediary service or a portfolio asset management service, under Articles 49 TFEU or 56 TFEU.

25 In that regard, it follows from the Court’s case-law that the tax treatment of dividends may fall within the scope of Article 49 TFEU on freedom of establishment and Article 63 TFEU on the free movement of capital and, as regards the question whether national legislation falls within the scope of one or other of the freedoms of movement, the purpose of the legislation concerned must be taken into consideration (see, to that effect, Case C?35/11 *Test Claimants in the FII Group Litigation* [2012] ECR, paragraphs 89 and 90 and case-law cited).

26 In particular, national legislation intended to apply only to those shareholdings which enable the holder to exert a definite influence on a company’s decisions and to determine its activities falls within the scope of freedom of establishment (see *Test Claimants in the FII Group Litigation*, paragraph 91 and case-law cited).

27 It follows that, as regards dividends originating in a third country, where it is apparent from the purpose of such national legislation that it is intended to apply only to those shareholdings which enable the holder to exert a definite influence on a company’s decisions and to determine its activities, neither Article 49 TFEU nor Article 63 TFEU may be relied upon (see *Test Claimants in the FII Group Litigation*, paragraph 98).

28 On the other hand, national provisions which apply to shareholdings acquired solely with the intention of making a financial investment without any intention to influence the management and control of the undertaking must be examined exclusively in light of the free movement of capital (see *Test Claimants in the FII Group Litigation*, paragraph 92).

29 In a context which relates to the tax treatment of dividends originating in a third country, it is clear that it is sufficient to examine the purpose of national legislation in order to assess whether the tax treatment of dividends originating in a third country falls within the scope of the FEU Treaty provisions on the free movement of capital (see, to that effect, *Test Claimants in the FII Group Litigation*, paragraph 96).

30 In that regard, the Court has stated that national rules relating to the tax treatment of dividends from a third country which do not apply exclusively to situations in which the parent company exercises decisive influence over the company paying the dividends must be assessed in the light of Article 63 TFEU. A company established in a Member State may therefore rely on that provision in order to call into question the legality of such rules, irrespective of the size of its investment in the company paying dividends established in a third country (see, to that effect, *Test Claimants in the FII Group Litigation*, paragraph 99).

31 It is important however to ensure that the interpretation of Article 63(1) TFEU as regards relations with third countries does not enable economic operators who do not fall within the limits of the territorial scope of freedom of establishment to profit from that freedom (see, to that effect, *Test Claimants in the FII Group Litigation*, paragraph 100).

32 However, as stated by the Advocate General in point 21 of his Opinion, that assessment of the tax treatment of dividends paid by a company of a non-Member country to a person established in a Member State is equally applicable to the situation in which dividends are paid by a company established in a Member State to one of its shareholders established in a non-Member country, as is the case in the main proceedings.

33 First, the exemption at issue in the main proceedings, provided for in Article 6(1) of the law on corporation tax, makes no distinction according to the type of investment which generates the dividends received by an investment fund. Second, the risk that an economic operator who does not fall within the territorial scope of freedom of establishment might derive some advantage therefrom does not exist, since the tax legislation at issue in the main proceedings concerns the tax treatment of those dividends and is not intended to impose conditions for access to the national market on traders from non-Member countries.

34 That finding is not called into question by the arguments put forward by, in particular, the Polish Government, as described in paragraph 24 of this judgment, since the determination of whether that legislation falls within the scope of Article 63 TFEU requires an examination not of the nature of the exemption provided for by that legislation or how the business undertaken by an investment fund is to be categorised, but rather of the form of the investment made by the investment funds in resident companies.

35 In the light of the foregoing, the answer to the first question is that Article 63 TFEU on the free movement of capital applies in a situation, such as that at issue in the main proceedings, where, under national tax legislation, the dividends paid by companies established in a Member State to an investment fund established in a non-Member State are not the subject of a tax exemption, while investment funds established in that Member State receive such an exemption.

The second question

36 By its second question, the referring court seeks, in essence, to ascertain whether Articles 63 TFEU and 65 TFEU must be interpreted as precluding tax legislation of a Member State, such as that at issue in the main proceedings, under which dividends paid by companies established in that Member State to an investment fund established in a non-Member State cannot qualify for a tax exemption.

37 In particular, under the law on corporation tax, in the version applicable at the material time in the main proceedings, namely in 2005 and 2006 and until January 2011, the dividends distributed by a resident company to an investment fund established in a non-Member country were taxed, as a general rule, at the rate of 19%, by means of deduction of tax at source, except where a different rate applied under a double taxation convention, whereas such dividends were exempt from tax when they were paid to a resident investment fund, if the latter also satisfied the conditions imposed by the law on investment funds.

Whether there is a restriction on free movement of capital

38 It must be recalled at the outset that while direct taxation falls within their competence, Member States must none the less exercise that competence in accordance with European Union law (Joined Cases C?338/11 to C?347/11 *Santander Asset Management SGIIC and Others* [2012] ECR, paragraph 14 and case-law cited).

39 In that regard, it follows from the Court's settled case-law that the measures prohibited by Article 63(1) TFEU, as restrictions on the movement of capital, include those which are such as to discourage non-residents from making investments in a Member State or to discourage that Member State's residents from doing so in other States (Case C?101/05 *A* [2007] ECR I?11531, paragraph 40; Joined Cases C?436/08 and C?437/08 *Haribo Lakritzen Hans Riegel and Österreichische Salinen* [2011] ECR I?305, paragraph 50, and *Santander Asset Management SGIIC and Others*, paragraph 15).

40 In this case, the tax exemption provided for by the national tax legislation at issue in the main proceedings was granted solely to investment funds which operated in accordance with the law on investment funds.

41 It is also stated in the order of the referring court that, under the national legislation at issue in the main proceedings, investment funds qualify for the exemption only on the condition that their registered office is situated in Poland. Consequently, dividends paid to non-resident investment funds could not, solely because of where those funds were established, have the benefit of the exemption from deduction of the tax at source, even though those dividends might possibly benefit from a lower tax rate under a double taxation convention.

42 That difference in the tax treatment of dividends as between resident and non?resident investment funds may discourage, on the one hand, investment funds established in a non-Member country from investing in companies established in Poland, and, on the other hand, investors resident in Poland from acquiring shares in non-resident investment funds (see, to that effect, *Santander Asset Management SGIIC and Others*, paragraph 17).

43 It follows that national legislation such as that at issue in the main proceedings is such as to entail a restriction on the free movement of capital which is prohibited, in principle, by Article 63 TFEU.

44 It is, however, necessary to consider whether that restriction may be justified in the light of the provisions of the Treaty.

Whether Article 64(1) TFEU is applicable

45 Under Article 64(1) TFEU, Article 63 TFEU is to be without prejudice to the application to third countries of any restrictions which existed on 31 December 1993 under national or European Union law adopted in respect of the movement of capital to or from third countries involving direct investment – including in real estate – establishment, the provision of financial services or the admission of securities to capital markets.

46 In that regard, the Polish and German Governments argued, in their observations and at the hearing, that, first the provision of national law at issue in the main proceedings, which provides for the taxation of dividends paid by Polish companies to non-resident investment funds, was already in force before 31 December 1993, the rules relating to that taxation not being subsequently altered, and that, secondly, since that taxation applied indiscriminately, without regard to the number of shares owned in the Polish companies, the movements of capital at issue in the main proceedings may also fall within the scope of the concept of 'direct investment', as explained in the Court's case-law. In any event, the restriction at issue involved the provision of financial services.

47 As regards the temporal criterion laid down by Article 64(1) TFEU, it is apparent from the Court's settled case-law that while it is, in principle, for the national court to determine the content of the legislation which existed on a date laid down by a European Union measure, it is for the Court of Justice to provide guidance on interpreting the concept of European Union law which constitutes the basis of a derogation under European Union law for national legislation 'existing' on a particular date (see, to that effect, Case C?446/04 *Test Claimants in the FII Group Litigation* [2006] ECR I?11753, paragraph 191).

48 In that context, the Court has held that any national measure adopted after a date thus fixed is not, by that fact alone, automatically excluded from the derogation laid down in the European Union measure in question. A provision which is, in essence, identical to the previous legislation, or limited to reducing or eliminating an obstacle to the exercise of rights and freedoms established by European Union law in the earlier legislation, will be covered by the derogation. By contrast, legislation based on an approach which differs from that of the previous law and establishes new procedures cannot be treated as legislation existing at the date fixed in the European Union measure in question (see Case C?446/04 *Test Claimants in the FII Group Litigation*, paragraph 192, and Case C?157/05 *Holböck* [2007] ECR I?4051, paragraph 41).

49 In that regard, it is stated in the observations of the Commission, with which the Polish Government takes no issue, that the tax exemption provided for in Article 6(1)(10) of the law on corporation tax was introduced by a Law of 28 August 1997.

50 Accordingly, as stated by the Advocate General in Point 57 of his Opinion, a restriction, within the meaning of the Treaty provisions relating to free movement of capital, which was maintained after 31 December 1993 did not exist before that date.

51 On 31 December 1993 the dividends paid by Polish companies to non-resident entities were subject to the same deduction of tax at source as those paid to entities established in Poland, namely tax at a reduced rate, pursuant to a double taxation convention entered into by the Republic of Poland and the State concerned. The Law of 28 August 1997, referred to in paragraph 49 of this judgment, first introduced a restriction, since that law created a difference of treatment between resident and non-resident investment funds, by exempting the former from liability to

deduction of tax at source and the administrative procedures associated with a flat-rate levy of the tax on dividends distributed to them.

52 Consequently, the national legislation at issue in the main proceedings cannot be regarded as an existing restriction on 31 December 1993, since what constitutes a restriction on the free movement of capital, namely the tax exemption provided for in Article 6(1)(10) of the law on corporation tax, was introduced subsequently, is based on an approach which differs from that of the previous law, and establishes a new procedure, within the meaning of the case-law cited in paragraph 48 of this judgment.

53 Since the temporal criterion is not satisfied and since the two criteria, the temporal and the material, laid down in Article 64(1) TFEU must both be satisfied, Article 64(1) TFEU is not applicable to the case in the main proceedings, and there is no need to examine whether the material criterion is satisfied.

Whether the restriction is justified

54 In accordance with Article 65(1)(a) TFEU, Article 63 TFEU is to 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 their place of residence or with regard to the place where their capital is invested.

55 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 based on 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 *Haribo Lakritzen Hans Riegel and Österreichische Salinen*, paragraph 56).

56 The derogation provided for in Article 65(1)(a) TFEU is itself limited by Article 65(3) TFEU, which provides that the national provisions referred to in Article 65(1) TFEU ‘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’ (see *Haribo Lakritzen Hans Riegel and Österreichische Salinen*, paragraph 57).

57 The differences in treatment authorised by Article 65(1)(a) TFEU must thus be distinguished from discrimination prohibited by Article 65(3) TFEU. It is clear from the Court’s case-law that, if national tax legislation such as that at issue in the main proceedings is to be regarded as compatible with the provisions of the Treaty on the free movement of capital, the difference in treatment which it prescribes must concern situations which are not objectively comparable or be justified by an overriding reason in the public interest (see *Haribo Lakritzen Hans Riegel and Österreichische Salinen*, paragraph 58 and case-law cited).

Whether the situations are objectively comparable

58 As regards the question of comparability, it must first be stated that in the context of a tax rule, such as that at issue in the main proceedings, which seeks to exempt from tax profits distributed by resident companies, the situation of a resident investment fund receiving profits is comparable to that of a non-resident investment fund receiving profits in so far as, in each case, the profits made are, in principle, liable to be subject to economic double taxation or a series of charges to tax (see, to that effect, Case C?446/04 *Test Claimants in the FII Group Litigation*, paragraph 62; *Haribo Lakritzen Hans Riegel and Österreichische Salinen*, paragraph 113; Case

C?284/09 *Commission* v *Germany* [2011] ECR I?9879, paragraph 56; and *Santander Asset Management SGIIC and Others*, paragraph 42 and case-law cited).

59 Yet, since it is solely because of the exercise by the Republic of Poland of its power to tax that, irrespective of any taxation in another non-Member State, a risk of a series of charges to tax or economic double taxation may arise, Article 63 TFEU obliges that Member State, which establishes a tax exemption, with regard to dividends paid to resident traders by companies which are also resident, to accord equivalent treatment to dividends paid to traders established in non?Member States (see, to that effect, Case C?446/04 *Test Claimants in the FII Group Litigation*, paragraph 72; *Haribo Lakritzen Hans Riegel and Österreichische Salinen*, paragraph 60; and *Commission* v *Germany*, paragraph 57).

60 However, the national legislation at issue in the main proceedings does not provide for such equivalent treatment. Although that legislation prevents the economic double taxation of nationally-sourced dividends received by resident investment funds, by ensuring that the situation of shareholders in such funds is in line with that of individual investors, it does not eliminate, or even mitigate, the double taxation to which a non-resident investment fund is likely to be subject when it receives such dividends.

61 Secondly, it must be borne in mind that only the distinguishing criteria for taxing distributed profits established by the national tax legislation at issue in the main proceedings are to be taken into account in determining whether situations subject to differential treatment are objectively comparable (see, to that effect, *Santander Asset Management SGIIC and Others*, paragraph 28).

62 In that regard, it is common ground that the only distinguishing criterion established by the tax legislation at issue in the main proceedings is based on the place of residence of the investment fund, since only investment funds established in Poland can qualify for the exemption from deduction of tax at source on dividends which they receive. The tax exemption enjoyed by resident investment funds is not conditional on their unit-holders being taxed on the income distributed to them.

63 In the light of that distinguishing criterion, the assessment of whether the situations are comparable must be carried out only at the level of the investment vehicle, since the rules at issue do not take into account the tax situation of their unit-holders (see, to that effect, *Santander Asset Management SGIIC and Others*, paragraphs 32, 39 and 41).

64 Consequently, the argument put forward by the German Government, that the effects of a restriction may in general be nullified where an investor may, in his State of residence, attribute the tax to which the non-resident investment fund is subject at source to his personal tax liability or deduct that tax when the basis of the tax for which he is liable in his State of residence is determined, cannot be accepted.

65 Third, it is indicated, in the order for reference, in the observations of the Polish, German, Spanish, French, Italian and Finnish Governments and in those of the Commission, that the situation of an investment fund having its registered office in a non-Member State is not comparable to that of an investment fund established in Poland and subject to the law on investment funds, or to the situation of those funds which have their registered office in another Member State.

66 More specifically, the difference between investment funds whose registered office is situated in the United States and those whose registered office is situated in the Member States of the European Union is said to consist, in essence, in the fact that the latter are subject to uniform rules applicable to the formation and operation of European investment funds, namely Council

Directive 85/611/EEC of 20 December 1985 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) (OJ 1985 L 375, p. 3), as amended by Directive 2004/39/EC of the European Parliament and the Council of 21 April 2004 (OJ 2004 L 145, p. 1; 'the UCITS Directive'), the requirements of which are, in essence, reproduced by the law on investment funds. Since only investment funds which meet those requirements are in a position to qualify for the exemption provided for by the law on corporation tax, non-resident investment funds, which are not subject to the UCITS directive, are, it is claimed, consequently in a legal and factual situation which is fundamentally different from that of investment funds established in the Member States of the European Union.

67 However, the fact that non-resident investment funds are not part of the European Union's uniform regulatory framework, set up by the UCITS Directive on the rules applicable to the formation and operation of investment funds within the European Union, as transposed into national law by the Polish law on investment funds, cannot in itself be sufficient reason to find that the situations of those funds are in fact different. Since the UCITS directive does not apply to investment funds established in non-Member countries, because they are outside the scope of European Union law, a requirement that such investment funds be regulated in the same way as resident investment funds would deprive the principle of free movement of capital of any practical effect.

68 In any event, as the Advocate General observes in Points 37 to 38 of his Opinion and as said above in paragraph 62 of this judgment, since the main criterion laid down by the national tax legislation at issue in the main proceedings is based on the place of residence of an investment fund, enabling solely investment funds which are established in Poland to qualify for the tax exemption, in this case a comparison of the regulatory framework governing funds established in a non?Member country and the uniform regulatory framework applied within the Union is of no relevance, in that such a comparison forms no part of the applicable legislation at issue in the main proceedings.

69 In the light of the foregoing, with regard to the tax legislation of a Member State, such as the law on corporation tax, which adopts as the main distinguishing criterion the place of residence of investment funds, according to which criterion tax is or is not deducted at source on dividends paid to them by Polish companies, non-resident investment funds are in a situation which is objectively comparable to that of investment funds whose registered office is situated in Poland.

70 That being established, it remains to be examined whether the restriction resulting from national rules, such as that at issue in the main proceedings, is justified by overriding reasons in the public interest (see *Haribo Lakritzen Hans Riegel and Österreichische Salinen*, paragraph 63 and case-law cited).

Whether there is an overriding reason in the public interest

– The need to guarantee the effectiveness of fiscal supervision

71 It is settled case-law 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 (Case C?493/09 *Commission* v *Portugal* [2011] ECR I?9247, paragraph 42 and case-law cited).

72 In that regard, as is stated in the order for reference and as all the interested Governments and the Commission submitted in their observations lodged with the Court, in the absence of a common legal framework in relation to administrative cooperation with non-Member States,

comparable, within the European Union, to 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 Polish tax authority is not in a position to determine, in the case of a non-resident investment fund, whether it complies with specific conditions laid down by the Polish legislation and to assess the extent and effectiveness of the supervision of that fund by comparison with the mechanism of enhanced cooperation provided for by the UCITS directive within the European Union.

73 However, in relation to the argument that there is no legal instrument which makes it possible for the Polish tax authorities to check the evidence and information submitted by investment funds established in the United States in order to establish whether they are comparable in nature with investment funds established in Poland or in another Member State, it must be stated at the outset that the mechanism for the exchange of information between Member States set up by the UCITS directive is part of the system of cooperation established between their authorities for the approval and supervision of investment funds, in order to ensure that they can carry out their task, the extent of that task being set out in Article 50(5) of that directive.

74 Under Article 50(5), competent authorities receiving confidential information may use it only in the course of their duties either to check that the conditions governing the taking-up of the business of UCITS or of undertakings contributing towards their business activity are met and to facilitate the monitoring of the conduct of that business, or for administrative and accounting procedures and internal-control mechanisms, or to impose sanctions, or in administrative appeals against decisions by the competent authorities, or in court proceedings initiated under Article 51(2) of the UCITS Directive.

75 Further, the other provisions of the UCITS directive relating to that system for the exchange of information emphasise the necessity of maintaining professional secrecy in that context.

76 It is apparent from Article 50(5) of the UCITS Directive and the general structure of that directive that that system for the exchange of information is part of the supervisory system set up by that directive. Accordingly, that form of cooperation provided for between Member States does not relate to the area of taxation, but is solely concerned with the activity of investment funds in the area of UCITS.

77 Consequently, the UCITS Directive cannot confer on the Polish tax authority the power to undertake, or cause to be undertaken, checks in order to determine whether the investment funds have met the obligations incumbent on them under the law on investment funds, since that power is reserved to the supervisory authorities on whom that power is bestowed by the UCITS Directive.

78 Nor can the UCITS Directive permit a supervisory authority in one Member State to exchange with the supervisory authority in the Member State of taxation information obtained following checks made by the former authority on investment funds established in its territory, in order to enable the supervisory authority in the Member State of taxation to transmit that information to the national tax authorities.

79 It follows from the foregoing that the fact that the system for the exchange of information set up by the UCITS Directive is not capable of being applied to non-resident investment funds is not such as to justify the restriction at issue in the main proceedings.

80 Moreover, by excluding from the tax exemption non-resident investment funds on the sole ground that they are established in the territory of a non-Member State, the national tax legislation at issue in the main proceedings does not give those taxpayers the opportunity to prove that they satisfy requirements which are equivalent to those contained in the law on investment funds.

81 Admittedly, according to the Court’s case-law, in relations between Member States of the European Union, it cannot be excluded, *a priori*, that a taxpayer may be able to provide relevant documentary evidence enabling the tax authorities of the Member State of taxation to ascertain, clearly and precisely, that he meets equivalent requirements to those laid down by the national law at issue in his State of residence (see, to that effect, *A*, paragraph 59, and *Commission* v *Portugal*, paragraph 46).

82 However, that case-law cannot be transposed in its entirety to movements of capital between Member States and non-member States, since such movements take place in a different legal context (*A*, paragraph 60; Case C?540/07 *Commission* v *Italy* [2009] ECR I?10983, paragraph 69; Case C?72/09 *Établissements Rimbaud* [2010] ECR I?10659, paragraph 40; and *Haribo Lakritzen Hans Riegel and Österreichische Salinen*, paragraph 65).

83 It must be observed that the framework established by Directive 77/799 for cooperation between the competent authorities of the Member States does not exist between those authorities and the competent authorities of a non-Member State where that State has not entered into any undertaking of mutual assistance (*Commission* v *Italy*, paragraph 70; *Établissements Rimbaud*, paragraph 41; and *Haribo Lakritzen Hans Riegel and Österreichische Salinen*, paragraph 66).

84 It follows from the foregoing that the justification based on the need to maintain the effectiveness of fiscal supervision can only be accepted where the legislation of a Member State makes entitlement to a tax advantage dependent on the satisfaction of conditions compliance with which can be verified only by obtaining information from the competent authorities of a non-Member State and where, because that non-Member State is not bound under an agreement to provide information, it proves impossible to obtain that information from it (see *Haribo Lakritzen Hans Riegel and Österreichische Salinen*, paragraph 67 and case-law cited).

85 However, unlike the cases which gave rise to the judgments cited in paragraph 82 of this judgment, where there was no obligation under an agreement on the non-Member State concerned to provide information, with the result that the Court ruled out the possibility that the taxpayer himself could provide the evidence required for the correct determination of the taxes concerned, in so far as concerns the main proceedings, there does exist a regulatory framework of mutual administrative assistance established between the Republic of Poland and the United States of America which permits the exchange of information which may be required for the application of the tax legislation.

86 More specifically, that framework of cooperation stems from Article 23 of the double taxation convention and from Article 4 of the convention of the Organisation for Economic Co-operation and Development (OECD) and the Council of Europe, signed in Strasbourg on 25 January 1988, on mutual administrative assistance in tax matters.

87 It follows that, taking into account the existence of those obligations under agreements to which the Republic of Poland and the United States of America are party, establishing a common legal framework for cooperation and providing mechanisms for the exchange of information between the national authorities concerned, it cannot be ruled out *a priori* that investment funds established in the United States of America may be obliged to provide relevant documentary evidence to enable the Polish tax authorities to determine, in cooperation with the competent

authorities of the United States of America, that those investment funds operate under conditions equivalent to those applicable to investment funds established in the European Union.

88 It is none the less for the referring court to examine whether the obligations under agreements to which the Republic of Poland and the United States of America are party, establishing a common legal framework for cooperation and providing mechanisms for the exchange of information between the national authorities concerned, are in fact capable of enabling the Polish tax authorities to verify, where it may be necessary, the information provided by investment funds established in the United States of America on the conditions for their formation and operation, in order to determine that they operate within a regulatory framework equivalent to that of the European Union.

– The need to preserve the coherence of the tax system

89 In support of the argument that the restriction entailed by the national tax legislation at issue in the main proceedings can be justified by the need to preserve the coherence of the tax system, the Polish Government maintains that the exemption provided for by that legislation is closely linked to the taxation of payments made by investment funds to their shareholders. The coherence of the tax system requires a guarantee that the taxation of the income of a given taxable person is uniform and effective, irrespective of the Member State in which that income is received, and that it takes into account taxes paid in other Member States.

90 Further, the German Government submits that in situations involving non?Member States, particularly where investment funds are concerned, the concept of tax coherence should be extended and the various stages of taxation should be assessed as a whole, on the assumption that the dividends are paid to shareholders established abroad.

91 It must be recalled that the Court has previously held that the need to safeguard such coherence may justify rules that are liable to restrict fundamental freedoms (*Santander Asset Management SGIIC and Others*, paragraph 50 and case-law cited).

92 However, for an argument based on such a justification to succeed, a direct link must be established, according to settled case?law, between the tax advantage concerned and the compensating of that advantage by a particular tax levy, with the direct nature of that link falling to be examined in the light of the objective pursued by the rules in question (*Santander Asset Management SGIIC and Others*, paragraph 51 and case-law cited).

93 However, as stated above in paragraph 62 of this judgment, the exemption from the deduction of tax at source on dividends at issue in the main proceedings is not subject to the condition that the dividends received by the investment fund concerned are redistributed by it and that the tax liability of the unit-holders of that fund in respect of those dividends makes it possible to offset the exemption from the deduction of tax at source.

94 Further, as stated by the Advocate General in point 113 of his Opinion, the extended interpretation of the concept of tax coherence proposed by the German Government rests on the unproven premise that the unit-holders in investment funds established in non-Member countries also themselves reside in those countries or, at the least, outside the national territory. An examination of the ground of tax coherence requires, in principle, an examination with regard to one and the same tax system.

95 Consequently, in the absence of a direct link, within the meaning of the case-law cited in paragraph 92 of this judgment, between the exemption from the deduction of tax at source on dividends of national origin received by a resident investment fund and the taxation of those

dividends as the income of unit-holders in that investment fund, the national legislation at issue in the main proceedings cannot be justified by the need to preserve the coherence of the tax system.

– The allocation of the power to tax and safeguarding tax revenue

96 The German Government additionally relied on the need to preserve the allocation of the power to tax as between the Republic of Poland and the United States of America and to safeguard tax revenue as grounds which may justify the restriction at issue, grounds which can be examined together given that the arguments relied on are similar.

97 First, as regards the allocation of the power to tax, the German Government submits that the case-law concerning that ground for justification must be applied solely to situations internal to the European Union, since, in cases of movements of capital to and from non-Member countries, the persons concerned may not rely on the rules of the internal market, since a restriction on the fiscal sovereignty of a Member State by the effect of the free movement of capital would have as a direct consequence a transfer of the tax base to a non-Member country.

98 According to the Court’s settled case-law, it must be recalled that the need to safeguard the balanced allocation between the Member States of the power to tax may be accepted, in particular, where the system in question 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 out in its territory (*Santander Asset Management SGIIC and Others*, paragraph 47 and case-law cited).

99 However, where a Member State has chosen not to tax resident investment funds in receipt of nationally-sourced dividends, 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 non-resident investment funds in receipt of such income (see, to that effect, *Santander Asset Management SGIIC and Others*, paragraph 48 and case-law cited).

100 In that regard, it cannot validly be maintained that that case-law is not applicable to relations between Member States and non-Member States, since a lack of reciprocity in such relations, as relied on by the German Government, cannot justify a restriction on movements of capital between Member States and those non-Member States (see, to that effect, *Haribo Lakritzen Hans Riegel and Österreichische Salinen*, paragraph 128).

101 Secondly, as regards the safeguarding of national tax revenue, the German Government submits that the free movement of capital should not compel the Member States to surrender tax revenue in favour of non-Member countries. The purpose of the internal market is to ensure an efficient allocation of resources within the European Union while preserving fiscal neutrality within that market. Non-Member countries which are not part of that market are not, consequently, obliged to accept a comparable loss of tax revenues vis à vis the Member States.

102 In that respect, suffice it to recall that, in accordance with the Court’s settled case-law, diminution of tax revenue cannot be regarded as an overriding reason in the public interest which may be relied upon in order to justify a measure which is, in principle, contrary to a fundamental freedom (*Haribo Lakritzen Hans Riegel and Österreichische Salinen*, paragraph 126).

103 That case-law applies both where the Member State concerned surrenders tax revenue in favour of another Member State and where that surrender is in favour of a non-Member State. In any event, as observed by the Advocate General in point 127 of his Opinion, the Polish companies continue to be liable to taxation on their profits and European Union law does not prevent the Member State concerned, in the longer term, from abandoning the prevention of double taxation, by obliging it to adopt or maintain measures designed to eliminate situations where such double

taxation arises.

104 It follows from the foregoing that the restriction resulting from the national tax legislation, such as that at issue in the main proceedings, is not justified by the need to preserve the balanced allocation of the power to tax and the safeguarding of the tax revenue of the Member State concerned.

105 In the light of all the foregoing, the answer to the second question referred is that Articles 63 TFEU and 65 TFEU must be interpreted as precluding tax legislation of a Member State, such as that at issue in the main proceedings, under which dividends paid by companies established in that Member State to an investment fund situated in a non-Member State cannot qualify for a tax exemption, provided that that Member State and the non-Member State concerned are bound by an obligation under a convention on mutual administrative assistance which enables the national tax authorities to verify any information which may be transmitted by the investment fund. It is for the referring court, in the main proceedings, to examine whether the mechanism for the exchange of information provided for within that cooperation framework is in fact capable of enabling the Polish tax authorities to verify, where necessary, the information provided by investment funds established in the United States of America on the conditions for their formation and the conduct of their business, in order to establish that they operate within a regulatory framework equivalent to that of the European Union.

The temporal effect of this judgment

106 In its written observations, the Polish Government requested that the Court should limit in time the effects of this judgment if the Court finds that Articles 63 TFEU and 65 TFEU preclude the tax legislation at issue in the main proceedings.

107 In support of its request, the Polish Government has, first, drawn the Court’s attention to the risk that a judgment containing such a finding would cause serious economic difficulties, given the significant number of cases in which Article 22(1) of the law on corporation tax has been applied. The Polish Government argues that the Republic of Poland held in good faith the belief that the provisions of the law on corporation tax were compatible with European Union law, since the Commission did not challenge those provisions with regard to the free movement of capital with non-Member States, but solely with regard to other Member States of the European Union and the European Economic Area.

108 In that connection, regard must be had to the Court’s settled case-law to the effect that the interpretation which, in the exercise of the jurisdiction conferred on it by Article 267 TFEU, the Court gives to a rule of European Union law clarifies and defines the meaning and scope of that rule as it must be or ought to have been understood and applied from the time of its entry into force. It follows that the rule as so interpreted may, and must, be applied by the courts to legal relationships arising and established before the judgment ruling on the request for interpretation, provided that in other respects the conditions enabling an action relating to the application of that rule to be brought before the courts having jurisdiction are satisfied (*Santander Asset Management SGIIC and Others*, paragraph 58 and case-law cited).

109 It is only quite exceptionally that the Court may, in application of the general principle of legal certainty inherent in the legal order of the European Union, be moved to restrict for any person concerned the opportunity of relying on a provision which it has interpreted with a view to calling into question legal relationships established in good faith. Two essential criteria must be fulfilled before such a limitation can be imposed: those concerned must have acted in good faith and there must be a risk of serious difficulties (*Santander Asset Management SGIIC and Others*, paragraph 59 and case-law cited).

110 More specifically, the Court has taken that step only in quite specific circumstances, where there was a risk of serious economic repercussions owing in particular to the large number of legal relationships entered into in good faith on the basis of rules considered to be validly in force and where it appeared that individuals and national authorities had been led to adopt practices which did not comply with European Union law by reason of objective, significant uncertainty regarding the implications of European Union provisions, to which the conduct of other Member States or the Commission may even have contributed (*Santander Asset Management SGIIC and Others*, paragraph 60 and case-law cited).

111 As regards the Polish Government's argument concerning the far?reaching consequences which the judgment to be delivered by the Court might have for the Polish budget, it is settled case?law that the financial consequences which might ensue for a Member State from a preliminary ruling do not in themselves justify limiting the temporal effects of the ruling (*Santander Asset Management SGIIC and Others*, paragraph 62 and case-law cited).

112 The Polish Government has not provided, either in its written observations or at the hearing, any data which would enable the Court to assess whether the Republic of Poland actually risks suffering serious economic difficulties as a result of the judgment to be delivered.

113 To that extent, and without it being necessary to examine whether the Republic of Poland held in good faith the belief that the provisions of the law on corporation tax were compatible with European Union law, the request of that Member State that the effects in time of this judgment should be limited cannot be granted, since there is nothing in the submissions of the Republic of Poland to support its argument that this judgment would be likely, if its effects were not limited in time, to cause serious economic difficulties.

Costs

114 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 (First Chamber) hereby rules:

1. **Article 63 TFEU on the free movement of capital applies in a situation, such as that at issue in the main proceedings, where, under national tax legislation, the dividends paid by companies established in a Member State to investment funds established in a non-Member State are not the subject of a tax exemption, while investment funds established in that Member State receive such an exemption.**

2. **Articles 63 TFEU and 65 TFEU must be interpreted as precluding tax legislation of a Member State, such as that at issue in the main proceedings, under which dividends paid by companies established in that Member State to an investment fund situated in a non-Member State cannot qualify for a tax exemption, provided that that Member State and the non-Member State concerned are bound by an obligation under a convention on mutual administrative assistance which enables the national tax authorities to verify any**

information which may be transmitted by the investment fund. It is for the referring court, in the main proceedings, to examine whether the mechanism for the exchange of information provided for within that cooperation framework is in fact capable of enabling the Polish tax authorities to verify, where necessary, the information provided by investment funds established in the United States on the conditions for their formation and the conduct of their business, in order to establish that they operate within a regulatory framework equivalent to that of the European Union.

[Signatures]

* Language of the case: Polish.