Provisional text

JUDGMENT OF THE COURT (Seventh Chamber)

9 September 2021 (*)

(Reference for a preliminary ruling – Taxation – Article 63 TFEU – Free movement of capital – Income tax – Dividends attached to listed shares – Tax advantage reserved for dividends attached to shares listed on the national stock exchange – Difference in treatment – Objective distinguishing criterion – Restriction – Article 65 TFEU – Objectively comparable situations – Justification – Objective of a purely economic nature)

In Case C?449/20,

REQUEST for a preliminary ruling under Article 267 TFEU from the Supremo Tribunal Administrativo (Supreme Administrative Court, Portugal), made by decision of 22 September 2020, received at the Court on the same date, in the proceedings

Real Vida Seguros SA

v

Autoridade Tributária e Aduaneira,

THE COURT (Seventh Chamber),

composed of A. Kumin (Rapporteur), President of the Chamber, P.G. Xuereb and I. Ziemele, Judges,

Advocate General: G. Pitruzzella,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– Real Vida Seguros SA, by C. Ramos Pereira, advogado,

– the Portuguese Government, by L. Inez Fernandes, S. Jaulino, H. Magno and P. Barros da Costa, acting as Agents,

– the European Commission, by W. Roels and I. Melo Sampaio, acting as Agents,

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

gives the following

Judgment

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

2 The request has been made in proceedings between Real Vida Seguros SA and the Autoridade Tributária e Aduaneira (Tax and Customs Authority, Portugal; ‘the tax authority’) concerning the partial deductibility of dividends attached to listed shares for the purposes of determining the basis of assessment for income tax.

Legal context

3 Under Article 2(1) of the Estatuto dos Benefícios Fiscais (Statute governing Tax Benefits) (*Diário da República* I, Series I-A, No 149, of 1 July 1989), in the version applicable to the dispute in the main proceedings (‘the EBF’):

‘Tax benefits are exceptional measures adopted in order to protect non-fiscal public interests that outweigh the fiscal public interests which thus cannot be achieved.’

4 Article 31 of the EBF provided:

‘For the purposes of personal income tax or corporation tax, only 50% of the dividends received on shares admitted to trading … shall be taken into account.’

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

5 During the financial years 1999 and 2000, Real Vida Seguros, established in Porto (Portugal), received dividends attached to shares listed on both the Portuguese and foreign stock exchanges. On the basis of Article 31 of the EBF, it deducted, for the purposes of determining the basis of assessment for income tax for those tax years, 50% of those dividends from its total net income.

6 Following a tax inspection relating to those tax years, the competent authority made corrections to the taxable amount, in the amounts of EUR 10 778.46 for the taxable income for the financial year 1999, and EUR 13 406.62 for the financial year 2000, justifying them as follows:

‘The examination of the taxable amount used as the basis for calculating income that benefits from the deduction for shares admitted to trading …, pursuant to Article 31 of the EBF shows that the taxable person included the gross dividends received on both Portuguese and foreign shares.

However, having regard to the concept of “tax benefit”, and given that the benefit in question was conceived in order to stimulate the national stock market, it should only have included dividends received on shares listed on the national stock exchange …’

7 The tax adjustments carried out following that tax inspection were unsuccessfully challenged by Real Vida Seguros, by way of an administrative appeal and then by way of judicial proceedings. Consequently, that company brought an appeal before the Supremo Tribunal Administrativo (Supreme Administrative Court, Portugal), the referring court.

8 In support of its appeal, Real Vida Seguros submits that an error of law was committed at first instance inasmuch as it was held that the deductibility provided for in Article 31 of the EBF applied only to dividends attached to shares listed on the Portuguese stock exchange, to the exclusion of dividends attached to shares listed on foreign stock exchanges. Aside from the fact that that article does not refer to the origin of dividends, any distinction to that effect would be contrary to EU law since such an application of that tax advantage would infringe the free movement of capital.

9 The referring court states that the interpretation of the tax advantage provided for in Article

31 of the EBF – according to which that advantage applies only to dividends attached to shares listed on the national stock exchange – is based on the fact that the purpose of that article was to stimulate or develop the stock market. Thus, there is a significant public interest, within the meaning of Article 2(1) of the EBF, which is deemed to outweigh the objective pursued by the tax itself.

10 However, since it entertained doubts as to the compatibility of that interpretation with the free movement of capital, the Supremo Tribunal Administrativo (Supreme Administrative Court) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Does the fact that, for the purposes of calculating the amount of [corporation tax] due from the appellant in respect of financial years 1999 and 2000, Articles 31 and 2 of the [EBF] permit a 50% deduction in dividends obtained on national (Portuguese) stock markets but exclude dividends obtained on the stock markets of other countries of the European Union …, constitute a breach of the free movement of capital under Article 63 TFEU et seq.?'

Consideration of the question referred

11 By its question, the referring court is asking, in essence, whether Articles 63 and 65 TFEU must be interpreted as precluding a Member State's tax practice according to which, for the purposes of determining the basis of assessment of a taxpayer's income tax, dividends attached to shares listed on the stock exchange of that Member State account for only 50% of their amount, whereas dividends attached to shares listed on the stock exchanges of other Member States are taken into account in full.

12 As a preliminary point, it should be noted that, according to the explanations provided by the referring court, for the financial years 1999 and 2000, Article 31 of the EBF provided for 50% of dividends received to be taken into account and had been applied, having regard to the objective pursued by that article, only in so far as concerns dividends received in respect of shares listed on the Portuguese stock exchange. On the one hand, it is apparent from the written observations of the Portuguese Government that, pursuant to that article, which was introduced in 1989 and repealed in 2008, 60% rather than 50% of the amount of those dividends could be deducted from the basis of assessment of income tax in respect of the financial year 2000. On the other hand, Real Vida Seguros disputes the interpretation of Article 31 of the EBF made by both the court of first instance and the referring court, according to which that article applies only to dividends received in respect of shares listed on the Portuguese stock exchange, since no such condition appears in the wording of that article.

13 In that connection, it should be pointed out that, in the context of the procedure provided for in Article 267 TFEU, which is based on a clear separation of functions between the national courts and the Court of Justice, only the national courts may establish and assess the facts of the dispute in the main proceedings and determine the exact scope of national laws, regulations or administrative provisions (judgment of 3 October 2019, *Fonds du Logement de la Région de Bruxelles-Capitale*, C?632/18, EU:C:2019:833, paragraph 48 and the case-law cited). The Court is only empowered to rule on the interpretation or validity of EU law in the light of the factual and legal situation as described by the referring court (judgment of 17 December 2020, *Onofrei*, C?218/19, EU:C:2020:1034, paragraph 18 and the case-law cited), and cannot call that situation into question or determine its accuracy (see, to that effect, judgments of 15 September 2011, *Gueye and Salmerón Sánchez*, C?483/09 and C?1/10, EU:C:2011:583, paragraph 42, and of 21 June 2016, *New Valmar*, C?15/15, EU:C:2016:464, paragraph 25 and the case-law cited).

14 It is therefore on the basis of the premisses resulting from the decision of the referring court

that the question referred must be answered.

15 The measures prohibited by Article 63(1) TFEU, as restrictions on movements of capital, include those which are such as to deter non-residents from making investments in a Member State or deter residents of that Member State from making investments in other States (judgment of 30 April 2020, *Société Générale*, C?565/18, EU:C:2020:318, paragraph 22 and the case-law cited).

16 In particular, a difference in treatment, where it leads to less favourable treatment of the income of a taxpayer of a Member State originating in another Member State in comparison with the treatment of income originating in the first Member State, is liable to dissuade such a taxpayer from investing his or her capital in another Member State (judgment of 29 April 2021, *Veronsaajien oikeudenvalvontayksikkö (Income paid by UCITS)*, C?480/19, EU:C:2021:334, paragraph 27 and the case-law cited).

17 It is apparent from the request for a preliminary ruling that, by virtue of Article 31 of the EBF, as applied by the tax authorities, the recipient of dividends attached to listed shares could, for the purposes of determining the basis of assessment of income tax, deduct those dividends in part, provided, however, that the shares generating those dividends are listed on the Portuguese stock market.

18 The Portuguese Government denies the existence of a restriction on the free movement of capital, arguing that, during the period of applicability of Article 31 of the EBF, access to the Portuguese stock market was open to any natural or legal person in any Member State or third country, since shares in both Portuguese and foreign companies could be listed on that stock exchange.

19 In that connection, it is true that the national legislation at issue in the main proceedings, as applied by the tax authorities, made no distinction between dividends distributed by resident companies, on the one hand, and dividends distributed by non-resident companies, on the other, inasmuch as the condition to which the partial deduction was subject applied without distinction to both types of dividend.

20 However, it is clear from the case-law of the Court that national legislation which applies without distinction to resident and non-resident companies may constitute a restriction on the free movement of capital, as even a differentiation based on objective criteria may de facto disadvantage cross-border situations (judgment of 30 January 2020, *Köln-Aktienfonds Deka*, C?156/17, EU:C:2020:51, paragraph 55 and the case-law cited).

21 That is the case where national legislation makes entitlement to a tax advantage subject to a condition which, whilst applying without distinction, is by its nature or in fact, specific to the national market, in such a way that only resident companies are capable of complying with that condition whereas non-resident companies do not generally comply with that condition (see judgment of 30 January 2020, *Köln-Aktienfonds Deka*, C?156/17, EU:C:2020:51, paragraph 56 and the case-law cited).

22 It must be held that a practice whereby the favourable tax treatment of dividends is subject to the condition that the shares generating those dividends be listed on the national stock exchange leads, by the very nature of that condition, to investments in resident companies being favoured and, consequently, investments in non-resident companies being disadvantaged.

23 First, it should be observed that companies which are the subject of an initial public offering, shares in which are thus admitted to trading on a regulated market are, as a general rule, listed on

their national stock market. Second, although companies may have their shares listed on a foreign stock exchange and on their national stock exchange simultaneously, by means of an international cross-listing, the proportion of non-resident companies listed on a given stock exchange is, in general, significantly lower than that of resident companies.

24 That finding applies, moreover, entirely to the Portuguese stock exchange since, as is apparent from the Commission’s written observations, the number of non-resident companies whose shares are listed on that stock exchange is marginal compared with the number of resident companies, and there is nothing to suggest that that situation would have been different during the period of applicability of the tax advantage provided for by the national legislation at issue in the main proceedings.

25 Accordingly, it must be found that the tax practice according to which the recipient of dividends attached to listed shares could, for the purposes of determining the basis of assessment of income tax, partly deduct those dividends provided, however, that the shares generating those dividends are listed on the Portuguese stock exchange, was such as to deter persons eligible for the tax advantage provided for in Article 31 of the EBF from making investments in non-resident companies, and therefore constitutes a restriction on the free movement of capital prohibited, in principle, by Article 63 TFEU.

26 That being the case, and as the Portuguese Government observes, pursuant to Article 65(1)(a) TFEU, Article 63 TFEU is, nonetheless, 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.

27 In so far as that provision constitutes a derogation from the fundamental principle of the free movement of capital, it must be interpreted strictly. Consequently, it cannot be interpreted as meaning that all tax legislation which draws a distinction between taxpayers on the basis of their place of residence or of the State in which they invest their capital is automatically compatible with the FEU Treaty. Indeed, the derogation laid down in Article 65(1)(a) TFEU is itself limited by Article 65(3) TFEU, which provides that the national provisions referred to in paragraph 1 of that article ‘shall not constitute a means of arbitrary discrimination or a disguised restriction on the free movement of capital and payments as defined in Article 63 [TFEU]’ (judgment of 29 April 2021, *Veronsaajien oikeudenvalvontayksikkö (Income paid by UCITS)*, C?480/19, EU:C:2021:334, paragraph 29 and the case-law cited).

28 The Court has also held that a distinction must, therefore, be made between the differences in treatment authorised under Article 65(1)(a) TFEU and the discrimination prohibited by Article 65(3) TFEU. Before national tax legislation can be regarded as compatible with the Treaty provisions on the free movement of capital, the difference in treatment resulting from that legislation must concern situations which are not objectively comparable or must be justified by an overriding reason in the public interest (judgment of 29 April 2021, *Veronsaajien oikeudenvalvontayksikkö (Income paid by UCITS)*, C?480/19, EU:C:2021:334, paragraph 30 and the case-law cited).

29 It is therefore necessary to examine, first, whether there is an objective difference between, on the one hand, the recipients of dividends attached to shares listed on the Portuguese stock exchange and, on the other hand, the recipients of dividends attached to shares listed on foreign stock exchanges.

30 It is settled case-law that the comparability of a cross-border situation with an internal situation within a Member State must be examined having regard to the aim pursued by the

national legislation concerned (judgment of 30 April 2020, *Société Générale*, C?565/18, EU:C:2020:318, paragraph 26 and the case-law cited).

31 In that connection, the Portuguese Government refers to the different situation in which the Portuguese stock exchange was at that time compared with the stock exchanges of the other Member States, together with the fact that taxpayers could, instead of deducting dividends from income, deduct from the tax levied in Portugal the tax paid abroad in respect of those dividends.

32 Those arguments cannot succeed.

33 First of all, a taxpayer who makes investments in shares listed on the Portuguese stock exchange and a taxpayer who makes investments in shares listed on foreign stock exchanges both invest their capital in companies listed for the purpose of making profits.

34 Next, in both scenarios, such profits are taxed in Portugal. Inasmuch as the Portuguese Government refers to the possibility, for taxpayers who have invested their capital in shares listed on foreign stock markets, of deducting from the tax levied in Portugal the tax paid abroad in respect of those dividends, it must be borne in mind that it is settled case-law that, with regard to tax rules which seek to prevent or mitigate the economic double taxation of distributed profits, the situation of a corporate shareholder receiving dividends sourced in another Member State is comparable to that of a corporate shareholder receiving nationally sourced dividends in so far as, in both scenarios, the profits made are, in principle, liable to be subject to a series of charges to tax (see, to that effect, judgment of 24 November 2016, *SECIL*, C?464/14, EU:C:2016:896, paragraph 55 and the case-law cited). Accordingly, the possibility for taxpayers who have invested their capital in shares listed on foreign stock exchanges to deduct from the tax levied in Portugal the tax paid abroad in respect of those dividends, assuming such a possibility is established, cannot place those taxpayers in a situation which differs from that of taxpayers who have invested their capital in shares listed on the Portuguese stock exchange.

35 Lastly, it is apparent from both the order for reference and the written observations submitted by the Portuguese Government that the tax advantage granted to taxpayers who invested their capital in shares listed on the Portuguese stock exchange was intended to stimulate and develop the Portuguese stock market.

36 In so far as such an objective is, as is clear from the considerations set out in paragraphs 22 and 23 of the present judgment, necessarily and closely linked to the promotion of domestic investments, to accept that an investment in shares listed on the Portuguese stock exchange places taxpayers in a situation which differs from that of taxpayers who have invested in shares listed on foreign stock exchanges, when Article 63(1) TFEU specifically prohibits restrictions on cross-border movements of capital, would be to deprive that provision of its content (see, by analogy, judgment of 26 February 2019, *X (Controlled companies established in third countries)*, C?135/17, EU:C:2019:136, paragraph 68).

37 As regards, in the second place, the justification for the restriction by an overriding reason in the public interest, the Portuguese Government maintains, first, that the tax practice at issue in the main proceedings constituted the exercise of the Portuguese Republic's own tax powers and was based on the symmetry between the right to tax dividends and the right to authorise the non-taxation of those dividends.

38 In that connection, it should be observed that, although it is for each Member State to organise its system for taxing distributed profits and to define, in that context, the tax base which applies to the shareholder receiving the dividends, it is settled case-law that Member States must nevertheless exercise their fiscal autonomy in accordance with the requirements of EU law, in

particular those imposed by the provisions of the FEU Treaty on the free movement of capital, which requires that the tax system be designed to be non-discriminatory (see, to that effect, judgment of 30 January 2020, *Köln-Aktienfonds Deka*, C?156/17, EU:C:2020:51, paragraphs 42 and 45 and the case-law cited).

39 In so far as the Portuguese Government refers, second, to the promotion of the national stock market, it is the settled case-law of the Court that an objective of a purely economic nature cannot justify a restriction on a fundamental freedom guaranteed by the FEU Treaty (judgment of 25 February 2021, *Novo Banco*, C?712/19, EU:C:2021:137, paragraph 40 and the case-law cited).

40 Furthermore, even if such an objective were regarded as permissible, no indication has been submitted to suggest that that objective would not have been achieved if the tax advantage provided for by the national legislation at issue in the main proceedings had also been applied to the dividends attached to shares listed on foreign stock exchanges and that, therefore, it would have been essential to exclude those dividends from the benefit of that tax advantage.

41 In the light of all the foregoing considerations, the answer to the question referred is that Articles 63 and 65 TFEU must be interpreted as precluding a Member State’s tax practice according to which, for the purposes of determining the basis of assessment of a taxpayer’s income tax, the dividends attached to shares listed on that Member State’s stock exchange account for only 50% of their amount, whereas dividends attached to shares listed on the stock exchanges of the other Member States are taken into account in full.

Costs

42 Since these proceedings are, for the parties to the main proceedings, a step in the actions 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 (Seventh Chamber) hereby rules:

Articles 63 and 65 TFEU must be interpreted as precluding a Member State’s tax practice according to which, for the purposes of determining the basis of assessment of a taxpayer’s income tax, the dividends attached to shares listed on that Member State’s stock exchange account for only 50% of their amount, whereas dividends attached to shares listed on the stock exchanges of the other Member States are taken into account in full.

[Signatures]

* Language of the case: Portuguese.