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JUDGMENT OF THE COURT (Fifth Chamber)

24 November 2016 (*)

(Reference for a preliminary ruling — Free movement of capital — Articles 63 to 65 TFEU — EC-Tunisia Association Agreement — Articles 31, 34 and 89 — EC-Lebanon Association Agreement — Articles 31, 33 and 85 — Corporation tax — Dividends received by a company established in the Member State of the beneficiary company — Dividends received from a company established in a non-member State which is party to the association agreement — Difference of treatment — Restriction — Justification — Efficacy of fiscal supervision — Possibility of relying on Article 64 TFEU in relation to the EC-Tunisia and EC-Lebanon association agreements)

In Case C?464/14,

REQUEST for a preliminary ruling under Article 267 TFEU from the Tribunal Tributário de Lisboa (Tax Court, Lisbon, Portugal), made by decision of 25 June 2014, received at the Court on 8 October 2014, in the proceedings

SECIL — Companhia Geral de Cal e Cimento SA

v

Fazenda Pública,

THE COURT (Fifth Chamber),

composed of J.L. da Cruz Vilaça, President of the Chamber, M. Berger, A. Borg Barthet, E. Levits (Rapporteur) and F. Biltgen, Judges,

Advocate General: M. Wathelet,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 18 November 2015,

after considering the observations submitted on behalf of:

– SECIL — Companhia Geral de Cal e Cimento SA, by R. Reigada Pereira and R. Camacho Palma, advogados,

– the Portuguese Government, by L. Inez Fernandes, M. Rebelo and J. Martins da Silva, acting as Agents,

– the Greek Government, by K. Nasopoulou, acting as Agent,

– the Swedish Government, by A. Falk A. Falk, C. Meyer-Seitz, U. Persson, N. Otte Widgren, E. Karlsson and L. Swedenborg, acting as Agents,

– the European Commission, by G. Braga da Cruz and W. Roels, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 27 January 2016,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Articles 63 and 64 TFEU, Articles 31, 34 and 89 of the Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Tunisia, of the other part, signed in Brussels on 17 July 1995 and approved on behalf of the European Community and the European Coal and Steel Community by Decision 98/238/EC, ECSC of the Council and of the Commission of 26 January 1998 (OJ 1998 L 97, p. 1; 'the EC-Tunisia Agreement'), and Articles 31, 33 and 85 of the Euro-Mediterranean Agreement establishing an association between the European Community and its Member States, of the one part, and the Republic of Lebanon, of the other part, signed in Luxembourg on 17 June 2002 and approved on behalf of the European Community by Council Decision 2006/356/EC of 14 February 2006 (OJ 2006 L 143, p. 1; 'the EC-Lebanon Agreement').

2 The request has been made in proceedings between SECIL — Companhia Geral de Cal e Cimento SA ('SECIL') and the Fazenda Pública (State Treasury, Portugal) with regard to the tax treatment, for the tax year 2009, of the dividends distributed to SECIL by two companies whose seats were in Tunisia and Lebanon respectively.

Legal context

EC-Tunisia Association Agreement

3 Article 31 of the EC-Tunisia Agreement, in Title III thereof, entitled 'Right of establishment and services', is worded as follows:

'1. The Parties agree to widen the scope of the Agreement to cover the right of establishment of one Party's firms on the territory of the other and liberalisation of the provision of services by one Party's firms to consumers of services in the other.

2. The Association Council will make recommendations for achieving the objective described in paragraph 1.

In making such recommendations, the Association Council will take account of past experience of implementation of reciprocal most-favoured-nation treatment and of the respective obligations of each Party under the General Agreement on Trade in Services annexed to the Agreement establishing the WTO, hereinafter referred to as the 'GATS', particularly those in Article V of the latter.

3. The Association Council will make a first assessment of the achievement of this objective no later than five years after the Agreement enters into force.'

4 Article 34 of that agreement, in Chapter I thereof, entitled 'Current payments and movement of capital', of Title IV of that agreement, entitled 'Payments, capital, competition and other economic provisions', provides:

‘1. With regard to transactions on the capital account of balance of payments, the Community and Tunisia shall ensure, from the entry into force of this Agreement, that capital relating to direct investments in Tunisia in companies formed in accordance with current laws can move freely and that the yield from such investments and any profit stemming therefrom can be liquidated and repatriated.

2. The Parties shall consult each other with a view to facilitating, and fully liberalising when the time is right, the movement of capital between the Community and Tunisia.’

5 Article 89 of that agreement, in Title VIII thereof, entitled ‘Institutional, general and final provisions’, provides:

‘Nothing in the Agreement shall have the effect of:

– extending the fiscal advantages granted by either Party in any international agreement or arrangement by which it is bound,

– preventing the adoption or application by either Party of any measure aimed at preventing fraud or the evasion of taxes,

– opposing the right of either Party to apply the relevant provisions of its tax legislation to taxpayers who are not in an identical situation as regards their place of residence.’

The EC-Lebanon Agreement

6 Article 31 of the EC-Lebanon Agreement, contained in Chapter 1, entitled ‘Current payments and movement of capital’, of Title IV thereof, entitled ‘Payments, capital, competition and other economic provisions’ provides:

‘Within the framework of the provisions of this Agreement, and subject to the provisions of Articles 33 and 34, there shall be no restrictions between the Community of the one part, and Lebanon of the other part, on the movement of capital and no discrimination based on the nationality or on the place of residence of their nationals or on the place where such capital is invested.’

7 Article 33 of that agreement, in the same chapter thereof, is worded as follows:

‘1. Subject to other provisions in this Agreement and other international obligations of the Community and Lebanon, the provisions of Articles 31 and 32 shall be without prejudice to the application of any restriction which exists between them on the date of entry into force of this Agreement, in respect of the movement of capital between them involving direct investment, including in real estate, establishment, the provision of financial services or the admission of securities to capital markets.

2. However, the transfer abroad of investments made in Lebanon by Community residents or in the Community by Lebanese residents and of any profit stemming therefrom shall not be affected.’

8 Article 85 of that agreement, in Title VIII thereof, entitled ‘Institutional, general and final provisions’, provides:

‘As regards direct taxation, nothing in this Agreement shall have the effect of:

(a) extending the fiscal advantages granted by either Party in any international agreement or arrangement by which it is bound;

(b) preventing the adoption or application by either Party of any measure aimed at preventing fraud or the evasion of taxes;

(c) opposing the right of either Party to apply the relevant provisions of its tax legislation to taxpayers who are not in an identical situation, in particular as regards their place of residence.'

Portuguese law

9 Article 46 of Código do Imposto sobre o Rendimento das Pessoas Coletivas (Corporation Tax Code), approved by Decreto-Lei no. 442-B/88 (Decree-Law No 442-B/88) of 30 November 1988 (Diário da República I, Series I-A, No 277, of 30 November 1988), in the version in force in 2009 ('the CIRC'), entitled 'Elimination of the economic double taxation of distributed profits', provided as follows:

'1. In the determination of the taxable profits of commercial companies, civil law companies having a commercial form, cooperatives and public undertakings, with their head office or effective management in Portuguese territory, income included in the tax base that corresponds to distributed profits shall be deducted, provided that the following requirements are met:

(a) the company distributing the profits has its head office or effective management in the same territory and is subject to and not exempt from corporation tax or is subject to the tax referred to in Article 7;

(b) the beneficiary entity is not covered by the fiscal transparency regime provided for in Article 6;

(c) the beneficiary entity has a direct holding in the capital of the company distributing the profits of not less than 10% or with an acquisition value of not less than EUR 20 million, and that holding had been in its ownership for an uninterrupted period of one year on the date on which the profits were made available to it or, if it had been in its ownership for a shorter period, is retained until such time as that period is completed.

...

5. The provisions of paragraph 1 shall also apply where an entity resident in Portuguese territory holds part of the share capital, under the terms and conditions referred to in that paragraph, of an entity resident in another Member State of the European Union, provided that both entities meet the requirements laid down in Article 2 of [Council] Directive 90/435/EEC of 23 July 1990 [on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States (OJ 1990 L 225, p. 6)].

...

8. The deduction referred to in paragraph 1 shall be only 50% of the income included in taxable profits made up of:

(a) distributed profits, where none of the requirements laid down in subparagraphs (b) and (c) of that paragraph is met, as well as income received under a profit-sharing arrangement between members of a partnership, provided that, in either case, the requirement laid down in paragraph 1(a) is met;

(b) profits distributed by an entity resident in another Member State of the European Union, where that entity meets the requirements laid down in Article 2 of Directive 90/435, and none of the requirements laid down in paragraph 1(c) are met.

9. If the minimum capital condition to be held, referred to in paragraph 1, is no longer fulfilled before expiry of the period of one year referred to therein, the deduction shall be rectified in accordance with the preceding paragraph, or annulled, without prejudice to the taking into account of any tax credit for international double taxation, in accordance with Article 85, respectively.

...

11. The deduction referred to in paragraph 1 shall be reduced by 50% when the income comes from profits that have not actually been taxed, unless the beneficiary is a capital share management company.

12. For the purposes of paragraph 5 and paragraph 8(b), the taxpayer must prove that the entity in which capital is held and, in the case of paragraph 6, the recipient entity, fulfil the conditions referred to in Article 2 of [Directive 90/435], on the basis of a declaration confirmed and certified by the competent tax authorities of the Member State of the European Union of residency.'

10 As regards the tax incentives for investment arising from an agreement concluded between the Portuguese State and the entity concerned, the Estatuto dos Beneficios Fiscais (Tax Advantages Scheme), in the version in force in 2009, ('the EBF'), provided, in Article 41(5)(b) thereof:

'5. Persons promoting the investment projects referred to in the previous paragraph may be granted the following tax advantages:

...

(b) elimination of double economic taxation, under the terms laid down in Article 46 of the CIRC for the term of the contract, where the investment is made in the form of the incorporation or acquisition of foreign companies.'

11 Article 42 of the EBF provided:

'1. The deduction provided for in Article 46(1) of the [CIRC] shall apply to profits distributed to resident entities by subsidiaries resident in Portuguese-speaking African countries and Timor-Leste, provided that the following requirements are met:

(a) the entity in receipt of the profits is subject to and not exempt from [corporation] tax and the subsidiary is subject to and not exempt from an income tax similar to [corporation] tax;

(b) the recipient entity has held, directly, at least 25% of the subsidiary's capital for at least two years;

(c) the profits distributed derive from profits returned by the subsidiary which have been taxed at a rate of at least 10% and do not result from activities generating passive earnings, that is

royalties, capital gains and other earnings from securities, income from immovable property located outside the company's country of residence, earnings from the insurance business that derive essentially from the insurance of assets located outside the company's territory of residence or the insurance of persons not resident in that territory and earnings from operations forming part of the banking business which are not directly targeted at the market in that territory.

2. For purposes of the preceding paragraph, the person subject to the [corporation tax] owning the shares must provide evidence that the conditions on which the deduction depends are met.'

The Portugal-Tunisia Convention

12 The Double Taxation Convention with respect to taxes on income concluded between the Portuguese Republic and Tunisian Republic, signed in Lisbon on 24 February 1999 ('the Portugal-Tunisia Convention'), provides, in Article 10 thereof:

'1. Dividends transferred by a resident company in a Contracting State to a resident of the other Contracting State may be taxable in the latter State.

2. Those dividends may, however, be taxed in the contracting State in which the company transferring the dividends is resident and in accordance with the legislation of that State, but if the recipient of the dividends is the person actually entitled to them, the tax thus levied may not exceed 15% of the gross amount of the dividends. The competent authorities of the Contracting States shall determine, by agreement, how those limits apply. This paragraph shall not affect the taxation of the company in respect of the profits out of which the dividends are paid.'

13 Article 22(1) of the Portugal-Tunisia Convention provides:

'Where a resident of a Contracting State receives income which, in accordance with this Convention, may be taxed in the other Contracting State, the first mentioned State shall deduct from the income tax of that resident an amount equal to the income tax paid in that other State. However, the amount of the deduction cannot exceed that portion of the income tax calculated before the deduction, corresponding to income which may be taxed in the other State.'

14 Article 25 of that convention covers the exchange of information and provides in particular that the competent authorities of the Contracting States are to exchange the information necessary for applying the provisions of that convention or those of the domestic laws of the Contracting States concerning taxes covered by that Convention, which includes corporation tax.

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

15 SECIL is a public company which is active in cement production, which has its seat in Portugal and which is subject, in that Member State, to the taxation system for groups of companies.

16 In January 2000, SECIL acquired part of the share capital of Société des Ciments de Gabès SA ('Ciments de Gabès'), a company with its seat in Tunisia. In 2009, SECIL held 52 923 of that company's shares, representing 98.72% of the share capital of the latter.

17 In May 2002, SECIL acquired part of the share capital of Ciments de Sibline SAL, a company with its seat in Lebanon. In 2009, SECIL held 51.05% of that company's share capital, 28.64% of that capital being held directly and 22.41% indirectly.

18 In 2009, SECIL received dividends in the amount of EUR 6 288 683.39 from Ciments de Gabès and EUR 2 022 478.12 from Ciments de Sibline. SECIL declared those amounts for

purposes of the corporation tax for the financial year 2009. Dividends thus received were taxed in Portugal, where no mechanism to eliminate or mitigate economic double taxation was applied.

19 On 29 May 2012, SECIL brought an administrative appeal before the Diretor de Finanças de Setúbal (Head of the Setúbal Tax Office, Portugal), claiming a reverse charge of corporation tax relating to the financial year 2009, on the ground that the tax charged on dividends paid by Ciments de Gabès and Ciments de Sibline was illegal, since the Portuguese legislation excluded the application of the economic double taxation rules and thus violated the EC-Tunisia Agreement and EC-Lebanon Agreement and the FEU Treaty.

20 That appeal was rejected by decision of 10 October 2012.

21 SECIL brought an action against that decision before the Tribunal Tributário de Lisbonne (Tax Court, Lisbon, Portugal), claiming, in essence, that the refusal to apply, to dividends distributed by Ciments de Gabès et Ciments de Sibline, the rules eliminating economic double taxation in force in Portugal in the financial year 2009 failed to have regard to the EC-Tunisia Agreement, the EC-Lebanon Agreement and Articles 49 and 63 TFEU.

22 In the circumstances, the Tribunal Tributário de Lisbonne (Tax Court, Lisbon) decided to stay proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Does Article 31 of the [EC-Tunisia Agreement] constitute a provision which is clear, precise and unconditional and, as such, directly applicable, and from which it must be inferred that the right of establishment is applicable to the present case?

(2) If so, does the right of establishment under that provision entail the consequences which the applicant claims, in the sense that, if that right is not to be infringed, it requires that the full deduction mechanism provided for in Article 46(1) of the CIRC [(Code on corporation tax)] be applied to the dividends which the applicant received from its subsidiary in Tunisia?

(3) Does Article 34 of the [EC-Tunisia Agreement] constitute a provision which is clear, precise and unconditional and, as such, directly applicable, and from which it must be inferred that the free movement of capital is applicable to the present case and must therefore be regarded as covering the investment made by the applicant?

(4) If so, does the free movement of capital under that provision have the implications which the applicant claims, inasmuch as it requires that the full deduction mechanism established in Article 46(1) of the CIRC be applied to the dividends which the applicant received from its subsidiary in Tunisia?

(5) Does it result from Article 89 of the [EC-Tunisia Agreement] that the foregoing questions must be answered in the affirmative?

(6) Is the restrictive treatment of the dividends distributed by [Ciments de Gabès] justified, given that the framework for cooperation established in 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 does not exist in the case of Tunisia [(OJ 1977 L 336, p. 15)]?

(7) Do the provisions of Article 31 and Article 33(2) of the [EC-Lebanon Agreement] constitute a rule which is clear, precise and unconditional and, as such, directly applicable, and from which it must be inferred that the free movement of capital is applicable to the present case?

(8) If so, does the free movement of capital under those provisions have the implications which

the applicant claims, inasmuch as it requires that the full deduction mechanism established in Article 46(1) of the CIRC be applied to the dividends which the applicant received from its subsidiary in Lebanon?

(9) Does it result from Article 85 of the [EC-Lebanon Agreement] that the foregoing questions must be answered in the affirmative?

(10) Is the restrictive treatment of the dividends distributed by [Ciments de Sibline] justified, given that the framework for cooperation established in [Directive 77/799] does not exist in the case of Lebanon?

(11) Are the provisions of Article 56 EC (now Article 63 TFEU) applicable to the present case and, if so, does the free movement of capital established in that provision have the effect of requiring the application to the dividends distributed in the 2009 financial year by [Ciments de Gabès] and [Ciments de Sibline] to the applicant of the full deduction mechanism provided for in Article 46(1) of the CIRC or, in the alternative, of the partial deduction mechanism provided for in Article 46(8) of the CIRC?

(12) Even if the free movement of capital is considered to be applicable in the present case, may the non-application to the dividends in question of the mechanisms for the elimination or mitigation of economic double taxation provided for in the Portuguese legislation in force at that time be regarded as being justified by the fact that the framework for cooperation established in [Directive 77/799] does not exist in the case of Tunisia and Lebanon?

(13) Does the [safeguard] clause contained in Article 57(1) EC (now Article 64 TFEU) preclude the application of the free movement of capital, together with the consequences claimed by the applicant?

(14) Must the [safeguard] clause contained in Article 57(1) EC (now Article 64 TFEU) not be applied on account of the introduction in the meantime of the scheme of tax benefits for contractual investments established in Article 41(5)(b) of the EBF and the scheme provided for in Article 42 of the EBF for dividends from the Portuguese-speaking African Countries and Timor-Leste?'

Consideration of the questions referred

Preliminary remarks

23 By its questions, the referring court asks, in essence, whether the provisions of the FEU Treaty relating to the free movement of capital, as well as the provisions of the EC-Tunisia and EC-Lebanon agreements must be interpreted as precluding the tax treatment granted, in Portugal, to dividends distributed to a company established in that Member State by companies established in non-member States, namely, respectively, the Republic of Tunisia and the Republic of Lebanon.

24 In that respect, with regard to movements of capital between Member States and non-member States, the Court has held that Article 63(1) TFEU lays down a clear and unconditional prohibition for which no implementing measure is needed and which confers rights on individuals which they can rely on before the courts (judgments of 14 December 1995, *Sanz de Lera and Others*, C?163/94, C?165/94 and C?250/94, EU:C:1995:451, paragraphs 41 and 47, and of 18 December 2007, *A*, C?101/05, EU:C:2007:804, paragraph 21). That provision, read in conjunction with Articles 64 and 65 TFEU, may therefore be relied on before national courts and may render national rules that are inconsistent with it inapplicable, irrespective of the category of capital movement in question (judgment of 18 December 2007, *A*, C?101/05, EU:C:2007:804, paragraph

27, and order of 4 June 2009, *KBC Bank and Beleggen, Risicokapitaal, Beheer*, C?439/07 and C?499/07, EU:C:2009:339, paragraph 66 and the case-law cited).

25 The Court should, therefore, in the first place, interpret Articles 63 and 65 TFEU, in order to determine, first, whether a situation such as that at issue in the main proceedings falls within the free movement of capital and whether the company receiving the dividends concerned may rely on Article 63 TFEU in order to challenge the tax treatment of dividends received by it from companies established in Tunisia and Lebanon. If so, the Court should then verify whether the treatment of dividends paid to that beneficiary company constitutes a restriction within the meaning of Article 63 TFEU, before assessing, as the case may be, whether such a restriction may possibly be justified.

26 The Court must therefore begin by examining the eleventh and twelfth questions referred by the national court.

27 In the event that Articles 63 and 65 TFEU are to be interpreted as precluding a tax treatment such as that reserved, in Portugal, to the dividends from Tunisia and Lebanon, the Court must verify, in the second place, whether that Member State may rely on the derogation provided for in Article 64(1) TFEU, and consider, accordingly, the thirteenth and fourteenth questions, concerning the interpretation of Article 64 TFEU. In that regard, in particular, the Court must check whether the conclusion of the EC-Tunisia and EC-Lebanon agreements by the Portuguese Republic could affect the power granted to that Member State in Article 64(1) TFEU.

28 In the third place, if the interpretation of Article 64 TFEU leads to the finding that the conclusion of the EC-Tunisia and EC-Lebanon agreements by the Portuguese Republic could affect the power granted to the Member State by Article 64(1) TFEU, the Court should examine the first to tenth questions concerning the interpretation of provisions of the EC-Tunisia and EC-Lebanon agreements, to determine whether they may be relied on in the main proceedings.

29 In the fourth place, the Court must answer the questions of the referring court, by explaining the consequences of the interpretation of Articles 63 to 65 TFEU and the EC-Tunisia and EC-Lebanon agreements in the main proceedings.

On the interpretation of Articles 63 and 65 TFEU

30 By its eleventh and twelfth questions, which should be considered together, the referring court asks, in essence, whether a situation such as that at issue in the main proceedings comes within Article 63 TFEU and, if so, whether Articles 63 and 65 TFEU must be interpreted as precluding national legislation such as that at issue in the main proceedings according to which a company resident in the Member State concerned may deduct from its taxable amount dividends that are distributed to it by a company resident in that Member State, but cannot deduct dividends distributed by a company resident in a non-member State.

On the applicability of Article 63 TFEU

31 As follows from the Court’s case-law, the tax treatment of dividends may fall within the scope of Article 49 TFEU on the freedom of establishment and Article 63 TFEU on the free movement of capital. 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, judgments of 13 November 2012, *Test Claimants in the FII Group Litigation*, C?35/11, EU:C:2012:707, paragraphs 89 and 90 and the case-law cited, and of 10 April 2014, *Emerging Markets Series of DFA Investment Trust Company*, C?190/12, EU:C:2014:249, paragraph 25).

32 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 Article 49 TFEU on freedom of establishment (judgment of 13 November 2012, *Test Claimants in the FII Group Litigation*, C?35/11, EU:C:2012:707, paragraph 91 and the case-law cited).

33 By contrast, 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 (judgment of 13 November 2012, *Test Claimants in the FII Group Litigation*, C?35/11, EU:C:2012:707, paragraph 92).

34 The Court has held that, in a context relative to the tax treatment of dividends originating in a non-member State, it is sufficient to examine the purpose of national legislation in order to determine whether the tax treatment of such dividends falls within the scope of the provisions of the Treaty on the free movement of capital (see, to that effect, judgment of 10 April 2014, *Emerging Markets Series of DFA Investment Trust Company*, C?190/12, EU:C:2014:249, paragraph 29 and the case-law cited).

35 In that regard, the Court has stated that national legislation relating to the tax treatment of dividends which does 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 legislation, irrespective of the size of its shareholding in the company paying dividends established in a non-member State (see, to that effect, judgment of 10 April 2014, *Emerging Markets Series of DFA Investment Trust Company*, C?190/12, EU:C:2014:249, paragraph 30 and the case-law cited).

36 In the present case, under Article 46 of the CIRC, companies with their head office or effective management in Portuguese territory benefit from a deduction from their taxable amount of dividends when those dividends are distributed by companies with their head office or effective management in that territory and which are also subject to and not exempt from corporation tax.

37 In accordance with Article 46(1) of the CIRC, that deduction is full, where the beneficiary entity is not covered by the fiscal transparency regime provided for in Article 6 of that code and where it has a direct holding in the capital of the company distributing the profits of not less than 10% or with an acquisition value of not less than EUR 20 000 000, with that holding having to be in its ownership for an uninterrupted period of one year on the date on which the profits were made available to it or, if it had been in its ownership for a shorter period, is retained until such time as that period is completed.

38 Where the conditions provided for in Article 46(1) of the CIRC relating to fiscal transparency and the shareholding in the distributing company are not met, the company receiving the dividends is entitled under Article 46(8) of the CIRC to a deduction equal to 50% of income included in taxable profits.

39 Such legislation — which provides no threshold in respect of the shares held in the company distributing the dividends, in respect of partial deduction, and establishes a threshold, fixed at 10% of the share capital of that company or an acquisition value of EUR 20 000 000 in order to be eligible for full deduction — apply both to dividends received by a resident company on the basis of a shareholding that confers definite influence over the decisions of the company distributing the dividends and enables its activities to be determined, and to dividends received on the basis of a

shareholding which do not confer such influence.

40 As regards, in particular, the conditions relating to obtaining the full deduction, the Court has held that a threshold of 10% indeed serves to exclude from the scope of the fiscal advantage shareholdings acquired solely with the intention of making a financial investment without any intention to influence the management and control of the undertaking, but does not in itself make the deduction applicable only to those shareholdings which enable the holder to exert a definite influence on a company's decisions and to determine its activities (judgment of 11 September 2014, *Kronos International*, C?47/12, EU:C:2014:2200, paragraph 34 and 35). The Court considered that a holding of such a size does not necessarily imply that the owner of the holding exerts a definite influence over the decisions of the company in which it is a shareholder (see, to that effect, judgments of 3 October 2013, *Itelcar*, C?282/12, EU:C:2013:629, paragraph 22, and of 11 September 2014, *Kronos International*, C?47/12, EU:C:2014:2200, paragraph 35).

41 Since the legislation at issue in the main proceedings is not intended to apply exclusively to situations in which the recipient company has a decisive influence on the distributing company, it must be held that a situation such as that at issue in the main proceedings falls under Article 63 TFEU, relating to the free movement of capital.

42 It must also be borne in mind that, since the Treaty does not extend freedom of establishment to non-member States, it is important to ensure that the interpretation of Article 63(1) TFEU as regards relations with those states does not enable economic operators who do not fall within the territorial scope of freedom of establishment to profit from that freedom (judgments of 11 September 2014, *Kronos International*, C?47/12, EU:C:2014:2200, paragraph 53 and the case-law cited, and of 10 April 2014, *Emerging Markets Series of DFA Investment Trust Company*, C?190/12, EU:C:2014:249, paragraph 31).

43 There is no such risk in a situation such as that at issue in the main proceedings, inasmuch as the legislation concerned does not cover the conditions of access to the market of a non-member State by a company resident in Portugal or to the market in a Member State by a company from a non-member State but only relates to the tax treatment of dividends resulting from investments made by the beneficiary in the distributing company.

44 Consequently, in a situation such as that at issue in the main proceedings, a company established in Portugal which receives dividends from companies established in Tunisia and Lebanon respectively may rely on Article 63 TFEU in order to challenge the tax treatment of dividends in that Member State based on rules which are not intended to apply exclusively to situations in which the recipient company has a decisive influence on the distributing company.

Whether there is a restriction on the free movement of capital

45 It follows from settled case-law that the measures prohibited by Article 63(1) TFEU, as restrictions on the movement of capital, include those that 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 (judgment of 10 February 2011, *Haribo Lakritzen Hans Riegel and Österreichische Salinen*, C?436/08 and C?437/08, EU:C:2011:61, paragraph 50 and the case-law cited).

46 As regards the question whether national legislation such as that at issue in the main proceedings constitutes a restriction on the movement of capital, it should be noted, as stated in paragraphs 36 to 38 above, that where a company with its head office or effective management in Portuguese territory receives dividends distributed by a company with its head office or effective management in the same territory and the distributing company is also subject to and not exempt

from corporation tax, the company receiving such dividends may deduct them from its taxable amount. Such a deduction is full or part, depending on whether or not the conditions laid down in Article 46(1)(b) and (c) of the CIRC are met. In addition, under Article 46(11) of the CIRC, the deduction referred to in Article 46(1) is reduced to 50% where the income is derived from profits which have not been effectively taxed.

47 On the other hand, companies with their head office or effective management in Portuguese territory which receive dividends from companies with their head office or effective management in non-member States, such as the Republic of Tunisia or the Lebanese Republic, are subject to corporation tax, so far as concerns the dividends received, at the standard rate.

48 The double economic taxation of dividends received by a resident company is thus avoided or mitigated when the company paying the dividends is established in Portugal, whereas this is not the case when the company is established in a non-member State, such as the Republic of Tunisia or the Republic of Lebanon.

49 In that regard, it is common ground that the Portugal-Tunisia convention does not prevent such unfavourable treatment. The purpose of the agreement is only to mitigate the effects of double taxation on the company receiving the dividends in respect of the dividend tax levied in the State of residence of the distributing company. That agreement does not provide for a system to prevent the economic double taxation of dividends arising, for the beneficiary company, from the taxation of the distributing company in respect of the profits out of which the dividends are paid. By contrast, the Portuguese Republic and the Lebanese Republic have not entered into any agreement whose purpose is to avoid double taxation.

50 That difference in treatment is liable to discourage companies resident in Portugal from investing their capital in companies established in non-member States such as the Republic of Tunisia and the Republic of Lebanon. To the extent that the income from capital originating in non-member States receives less favourable tax treatment than dividends distributed by companies established in Portugal, the shares of companies established in non-member States are less attractive to investors residing in Portugal than those of companies with their seat in that Member State (see, to that effect, judgment of 12 December 2006, *Test Claimants in the FII Group Litigation* , C?446/04, EU:C:2006:774, paragraph 64, and of 10 February 2011, *Haribo Lakritzen Hans Riegel and Österreichische Salinen*, C?436/08 and C?437/08, EU:C:2011:61, paragraph 80).

51 Legislation such as that at issue in the main proceedings, according to which a company which is a resident of a Member State may deduct in full or in part dividends from its taxable amount where the dividends are distributed by a company which is resident in the same Member State, but cannot make such a deduction where the distributing companies are resident in a third State constitutes a restriction on the movement of capital between Member States and non-member States which is, in principle, prohibited by Article 63 TFEU.

Whether there is a justification

52 Under Article 65(1)(a) TFEU, Article 63 TFEU is 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.

53 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 FEU

Treaty. Indeed, the derogation 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 10 April 2014, *Emerging Markets Series of DFA Investment Trust Company*, C?190/12, EU:C:2014:249, paragraphs 55 and 56 and the case-law cited).

54 A distinction must therefore be made between the differences in treatment authorised by Article 65(1)(a) TFEU and discrimination prohibited by Article 65(3) TFEU. It is clear from the Court’s case-law that, before national tax legislation such as that at issue in the main proceedings may be regarded as compatible with the provisions of the Treaty on the free movement of capital, the difference in treatment must concern situations not objectively comparable or be justified by an overriding reason in the public interest (judgment of 10 May 2012, *Santander Asset Management SGIIC and Others*, C?338/11 to C?347/11, EU:C:2012:286, paragraph 23 and the case-law cited).

55 According to settled case-law, with regard to tax rules, such as those at issue in the main proceedings, which seek to prevent or mitigate the economic double taxation of distributed profits, the situation of a corporate shareholder receiving dividends sourced in a non-member State is comparable to that of a corporate shareholder receiving nationally sourced dividends in so far as, in each case, the profits made are, in principle, liable to be subject to a series of charges to tax (see, to that effect, *Haribo Lakritzen Hans Riegel and Österreichische Salinen*, C?436/08 and C?437/08, EU:C:2011:61, paragraph 84 and the case-law cited).

56 The restriction can therefore be justified only by overriding reasons in the public interest. It is further necessary, in such a case, that the restriction be appropriate for ensuring the attainment of the objective that it pursues and not go beyond what is necessary to attain it (judgment of 17 December 2015, *Timac Agro Deutschland*, C?388/14, EU:C:2015:829, paragraph 29 and the case-law cited).

57 In that regard, the Portuguese and Swedish Governments submit that such a restriction is justified by the need to ensure the effectiveness of fiscal supervision and to prevent tax evasion. The possibilities available to the Portuguese tax authorities to obtain the information necessary to ensure that the conditions for obtaining the tax advantage in question are satisfied are limited because of the absence, between the Portuguese Republic, on the one hand, and the Republic of Tunisia or the Republic of Lebanon, on the other hand, of a framework for administrative cooperation equivalent to that established between the Member States by Directive 77/799, in force at the material time in the main proceedings. The clause relating to the information exchange contained in the Portugal-Tunisia convention is not binding and no such agreement was concluded between the Portuguese Republic and the Republic of Lebanon.

58 According to the case-law, the prevention of tax evasion is an overriding reason in the public interest, capable of justifying a restriction on the exercise of freedom of movement guaranteed by the Treaty (see, inter alia, judgment of 11 October 2007, *ELISA*, C?451/05, EU:C:2007:594, paragraph 81) as is the need to guarantee the effectiveness of fiscal supervision (see, in particular, judgment of 18 December 2007, *A*, C?101/05, EU:C:2007:804, paragraph 55, and of 5 July 2012, *SIAT*, C?318/10, EU:C:2012:415, paragraph 36 and the case-law cited).

59 As regards, in the first place, the arguments relating to the need to prevent tax evasion, according to settled case-law, a national measure restricting the free movement of capital may be justified by such an overriding reason in the public interest where it specifically targets wholly artificial arrangements which do not reflect economic reality and the sole purpose of which is to avoid the tax normally payable or to obtain a tax advantage on the profits generated by activities carried out on the national territory (see, to that effect, judgments of 17 September 2009, *Glaxo Wellcome*

, C?182/08, EU:C:2009:559, paragraph 89, and of 3 October 2013, C?282/12, *Itelcar*, EU:C:2013:629, paragraph 34 and the case-law cited).

60 In those circumstances, the mere fact that the company distributing the dividends has its seat in a non-member State cannot set up a general presumption of tax evasion and justify a measure which compromises the exercise of a fundamental freedom guaranteed by the Treaty (see, by analogy, judgment of 19 July 2012, *A*, C?48/11, EU:C:2012:485, paragraph 32 and the case-law cited).

61 In the present case, the tax legislation at issue in the main proceedings excludes in general terms the possibility of avoiding or mitigating the economic double taxation of dividends, where such dividends are distributed by companies established in non-member States, and does not seek specifically to prevent conduct involving the creation of wholly artificial arrangements which do not reflect economic reality, with a view to escaping the tax normally due or to obtain a tax advantage.

62 In those circumstances, the restriction on the free movement of capital cannot be justified on grounds relating to the need to prevent tax fraud and the evasion of taxes.

63 As regards, in the second place, the need to ensure the effectiveness of fiscal supervision, it should be pointed out that movements between Member States and non-member States fall within a legal context different from that in force within the Union and that the framework for cooperation between the competent authorities of the Member States established by Directive 77/799, as amended by Council Directive 2006/98 of 20 November 2006 (OJ 2006 L 363, p. 129), in force at the material time in the main proceedings, and by Council Directive 2011/16/EU of 15 February 2011, on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC (OJ 2011 L 64, p. 1), 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 (judgment of 10 February 2011, *Haribo Lakritzen Hans Riegel and Österreichische Salinen*, C?436/08 and C?437/08, EU:C:2011:61, paragraphs 65 and 66).

64 It is the Court’s settled case-law that, therefore, where the legislation of a Member State makes a more advantageous tax system dependent on the satisfaction of requirements, compliance with which can be verified only by obtaining information from the competent authorities of a non-member State, it is, in principle, legitimate for that Member State to refuse to grant that advantage if, in particular, because that non-member State is not under any obligation pursuant to a convention or agreement to provide information, it proves impossible to obtain such information from that non-member State (judgment of 17 October 2013, *Welte*, C?181/12, EU:C:2013:662, paragraph 63 and the case-law cited).

65 In the present case, it is clear from Article 46(1)(a) of the CIRC that, where both the distributing company and the recipient company are resident in Portugal, the full deduction of the dividends from the taxable amount is permitted where the distributing company is subject to corporation tax or to the tax referred to in Article 7 of the CIRC. Pursuant to Article 46(8) of the CIRC, in the event that the conditions to which the beneficiary company is subject, under Article 46(1)(b) and (c) of the CIRC, are not fulfilled, then, in order to qualify for the partial deduction, the condition that the distributing company be liable to tax must also be fulfilled.

66 In may therefore be considered that entitlement to the full or partial deductions provided for in Article 46(1) and (8) of the CIRC, respectively, is dependent on satisfaction of the condition of tax liability of the distributing company, which the tax authorities must be in a position to verify.

67 In that regard, Article 25 of the Portugal-Tunisia Convention, entitled ‘Exchange of

information’, provides, inter alia, that the competent authorities of the Contracting States are to exchange the information necessary for applying the provisions of that convention or of the domestic laws of the Contracting States concerning the taxes covered by that Convention, which includes corporation tax.

68 It is for the referring court to examine whether the obligations arising under the Portugal-Tunisia Convention are such as to enable the Portuguese tax authorities to obtain from the Republic of Tunisia the information which would allow them to verify satisfaction of the condition that the distributing company be subject to tax. If so, the restriction resulting from the refusal to grant full or partial deductions, provided for in Article 46(1) and (8), respectively, of the CIRC, cannot be justified by the need to ensure the effectiveness of fiscal supervision.

69 Since, as the referring court has stated, no mutual assistance convention has been entered into between the Portuguese Republic and the Republic of Lebanon, the refusal to grant the full or partial deductions provided for in Article 46(1) and (8), respectively, of the CIRC may be justified by the need to ensure the effectiveness of fiscal supervision if it proves impossible to obtain information from the Lebanese Republic allowing it to be verified whether the condition relating to the company distributing the dividends being subject to tax is satisfied.

70 It should also be noted, however, that under Article 46(11) of the CIRC, the deduction referred to in Article 46(1) of that code is reduced by 50% when the income comes from profits that have not actually been taxed, unless the beneficiary is a capital share management company.

71 It is for the referring court, with sole jurisdiction to interpret national law, to determine whether that provision can be applied in situations where the liability to tax of the distributing company in the State of residence cannot be verified. If so, the overriding reason in the general interest, based on the need to ensure the effectiveness of fiscal supervision, cannot be relied on to justify the restriction resulting from the refusal to grant the partial deduction provided for in Article 46(11) of the CIRC, in the case of dividends originating in Tunisia and Lebanon.

72 In the light of the foregoing considerations, the answer to the eleventh and twelfth questions is that Articles 63 and 65 TFEU must be interpreted as meaning that:

– a company established in Portugal which receives dividends from companies established in Tunisia and Lebanon respectively may rely on Article 63 TFEU in order to challenge the tax treatment of dividends in that Member State based on legislation which is not intended to apply exclusively to situations in which the beneficiary company has a decisive influence on the distributing company;

– legislation such as that at issue in the main proceedings, according to which a company which is a resident of a Member State may deduct in full or in part, from its taxable amount, dividends received where the dividends are distributed by a company which is resident in the same Member State, but cannot make such a deduction where the distributing company is resident in a non-member State, constitutes a restriction on the movement of capital between Member States and non-member States which is in principle prohibited by Article 63 TFEU;

– the refusal to grant a full or partial deduction from the taxable amount in respect of the dividends received, pursuant to Article 46(1) and (8) of the CIRC, may be justified by overriding reasons in the public interest based on the need to ensure the effectiveness of fiscal supervision where it proves impossible, for the tax authorities of the Member State in which the beneficiary company is resident, to obtain information from the non-member State in which the company distributing those dividends is resident, allowing those authorities to verify whether the condition that the latter company be subject to tax is satisfied;

– the refusal to grant a partial deduction in accordance with Article 46(11) of the CIRC cannot be justified by overriding reasons in the general interest based on the need to ensure the effectiveness of fiscal supervision where that provision may be applied to situations in which the tax liability of the distributing company in the State in which it is resident cannot be verified, a matter which it is for the referring court to determine.

On the interpretation of Article 64 TFEU

73 By its thirteenth and fourteenth questions, which should be examined together, the referring court asks, in essence, whether Article 64(1) TFEU must be interpreted as meaning that the legislation at issue in the main proceedings, in so far as it constitutes a restriction on the movement of capital prohibited, in principle, by Article 63 TFEU, is authorised as a restriction which existed on 31 December 1993, within the meaning of Article 64(1) TFEU.

74 According to Article 64(1) TFEU, the provisions of Article 63 are without prejudice to the application to non-member States of any restrictions which existed on 31 December 1993 under national or Union law adopted in respect of the movement of capital to or from third countries involving direct investment — including in real estate — establishment, the provision of financial services or the admission of securities to capital markets.

75 Although the concept of ‘direct investment’ is not defined by the Treaty, it has nevertheless been defined in the nomenclature of the capital movements set out in Annex I to Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty (article repealed by the Treaty of Amsterdam) (OJ 1988 L 178, p. 5). As the list of ‘direct investments’ in the first section of that nomenclature and the relative explanatory notes show, that concept concerns investments of any kind undertaken by natural or legal persons and which serve to establish or maintain lasting and direct links between the persons providing the capital and the undertakings to which that capital is made available in order to carry out an economic activity (judgment of 24 May 2007, *Holböck*, C?157/05, EU:C:2007:297, paragraphs 33 and 34 and the case-law cited).

76 As regards shareholdings in new or existing undertakings, constituted as companies limited by shares, as the explanatory notes mentioned in the previous paragraph of this judgment confirm, the objective of establishing or maintaining lasting economic links presupposes that the shares held by the shareholder enable him, either pursuant to the provisions of the national laws relating to companies limited by shares or in some other way, to participate effectively in the management of that company or in its control (judgment of 24 May 2007, *Holböck*, C?157/05, EU:C:2007:297, paragraph 35 and the case-law cited).

77 According to the case-law, the restrictions on capital movements involving establishment or direct investment within the meaning of Article 64(1) TFEU extend not only to national measures which, in their application to capital movements to or from non-member States, restrict establishment or investment, but also to those which restrict payments of dividends deriving from them (judgment of 13 November 2012, *Test Claimants in the FII Group Litigation*, C?35/11, EU:C:2012:707, paragraph 103 and the case-law cited).

78 It follows that a restriction on capital movements, such as a less favourable tax treatment of foreign-sourced dividends, comes within the scope of Article 64(1) TFEU, inasmuch as it relates to holdings acquired with a view to establishing or maintaining lasting and direct economic links between the shareholder and the company concerned and which allow the shareholder to participate effectively in the management of the company or in its control (judgments of 12 December 2006, *Test Claimants in the FII Group Litigation*, C?446/04, EU:C:2006:774, paragraph 185, and of 24 May 2007, *Holböck*, C?157/05, EU:C:2007:297, paragraph 37).

79 In the present case, the issue in the main proceedings concerns, first, the tax treatment of the dividends distributed by Ciments de Gabès, which relate to a shareholding equal to 98.72% of the share capital of the distributing company. That shareholding is such as to enable the shareholder to participate effectively in the management of the distributing company or its control and can therefore be regarded as a direct investment.

80 Second, the case at issue in the main proceedings concerns the tax treatment of dividends distributed by Ciments de Sibline, in which the beneficiary company directly holds 28.64% of the share capital. Such a shareholding may also be such, subject to verification by the referring court, to enable the shareholder to participate effectively in the management of the distributing company or its control and could therefore be regarded as a direct investment.

81 It is clear from case-law that the concept of a ‘restriction which existed on 31 December 1993’ presupposes that the legal provisions relating to the restriction in question have formed part of the legal order of the Member State concerned continuously since that date. If that were not the case, a Member State could, at any time, reintroduce restrictions on the movement of capital to or from non-member States which existed as part of the national legal order on 31 December 1993 but had not been maintained (judgment of 18 December 2007, *A*, C?101/05, EU:C:2007:804, paragraph 48).

82 It is also apparent from the 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 Union measure, it is for the Court of Justice to provide guidance on interpreting the concept of Union law which constitutes the basis of a derogation under Union law for national legislation ‘existing’ on a particular date (see, to that effect, judgments of 12 December 2006, *Test Claimants in the FII Group Litigation*, C?446/04, EU:C:2006:774, paragraph 191, and of 10 April 2014, *Emerging Markets Series of DFA Investment Trust Company*, C?190/12, EU:C:2014:249, paragraph 47).

83 In that context, the referring court wonders, in particular by its fourteenth question, about the impact of the introduction, after 31 December 1993, of a tax benefit scheme for contractual investments established in Article 41(5)(b) of the EBF and the scheme provided for in Article 42 of the EBF for dividends from the Portuguese-speaking African Countries and Timor-Leste.

84 In so far as the adoption of those two schemes has not altered the legal framework relating to the tax treatment of dividends from Tunisia and Lebanon, their adoption has not affected the classification, as an existing restriction, of the exclusion of dividends paid by companies established in such non-member States from the possibility of benefiting from a full or partial

deduction of the tax (see, to that effect, judgment of 18 December 2007, *A*, C?101/05, EU:C:2007:804, paragraph 51).

85 The Court should, nevertheless, examine the impact of the conclusion of the EC-Tunisia and EC-Lebanon agreements on the power conferred on the Portuguese Republic by Article 64(1) TFEU.

86 In that regard, it must be noted that Article 64(1) TFEU enshrines the power of the Member State, in its relations with non-member States, to apply restrictions on capital movements which come within the substantive scope of that provision, even though they contravene the principle of the free movement of capital laid down under Article 63(1) TFEU, provided that those restrictions already existed on 31 December 1993 (judgments of 12 December 2006, *Test Claimants in the FII Group Litigation*, C?446/04, EU:C:2006:774, paragraph 187, and of 24 May 2007, *Holböck*, C?157/05, EU:C:2007:297, paragraph 39).

87 A Member State waives such a power when it repeals the provisions which gave rise to the restriction in question. Article 64(1) TFEU does not cover provisions which, whilst in substance identical to legislation which existed on 31 December 1993, have reintroduced an obstacle to the free movement of capital which, following the repeal of the earlier legislation, no longer existed (see, to that effect, judgment of 18 December 2007, *A*, C?101/05, EU:C:2007:804, paragraph 49).

88 A Member State also waives such a power when it adopts provisions which alter the logic underlying the earlier legislation. In that regard, it is clear from the case-law that, when assessing the power of a Member State to invoke Article 64(1) TFEU, the aspects relating to the form of the act constituting a restriction are secondary in relation to the aspects concerning the substance of that restriction. A national measure adopted after 31 December 1993 is not, for that reason alone, automatically excluded from the derogation provided for in Article 64(1) TFEU. That regime covers the provisions which, in their substance, are identical to previous legislation or which merely reduce or eliminate an obstacle to the exercise of Community rights and freedoms in earlier legislation but excludes provisions which are based on a logic different from that of the earlier law and introduce new procedures (see, to that effect, judgments of 12 December 2006, *Test Claimants in the FII Group Litigation*, C?446/04, EU:C:2006:774, paragraph 192, and of 24 May 2007, *Holböck*, C?157/05, EU:C:2007:297, paragraph 41).

89 In those circumstances, it must be held that a Member State waives the power provided for in Article 64(1) TFEU also where, without formally repealing or amending the existing rules, it concludes an international agreement, such as an association agreement, which provides, in a provision with direct effect, for a liberalisation of a category of capital referred to in Article 64(1). That change in the legal framework must therefore be deemed to amount, in its effects on the possibility of invoking Article 64(1) TFEU, to the introduction of new legislation, since in it is based on a logic different from that of the existing legislation.

90 A liberalisation of the movement of capital provided for by an international agreement would be devoid of any useful effect if, in situations where that agreement precludes legislation of a Member State, that Member State could continue to apply that legislation pursuant to Article 64(1) TFEU.

91 The Court must therefore interpret the EC-Tunisia and EC-Lebanon agreements so as to determine whether those agreements provide, in provisions with direct effect, for a liberalisation of direct investment covered by the situation at issue in the main proceedings.

92 In the light of the foregoing, the answer to the thirteenth and fourteenth questions is that Article 64(1) TFEU must be interpreted as meaning that:

– in so far as the adoption of the tax benefit scheme for contractual investments established in Article 41(5)(b) of the EBF and the scheme provided for in Article 42 of the EBF for dividends from the Portuguese-speaking African Countries and Timor-Leste have not changed the legal framework for the tax treatment of dividends from Tunisia and Lebanon, the adoption of those schemes has not affected the classification, as an existing restriction, of the exclusion of dividends paid by companies established in those non-member States from the possibility of benefiting from a full or partial deduction;

– a Member State waives the power provided for in Article 64(1) TFEU where, without formally repealing or amending the existing rules, it concludes an international agreement, such as an association agreement, which provides, in a provision with direct effect, for a liberalisation of a category of capital referred to in Article 64(1) TFEU. Such a change in the legal framework must therefore be deemed to amount, in its effects on the possibility of invoking Article 64(1) TFEU, to the introduction of new legislation, based on a logic different from that of the existing legislation.

On the interpretation of the EC-Tunisia and EC-Lebanon agreements

93 By its first to tenth questions, the referring court asks, in essence, whether the provisions of the EC-Tunisia and EC-Lebanon agreements must be interpreted as precluding national legislation such as that at issue in the main proceedings, according to which a company resident in Portugal may deduct from its taxable amount the dividends received from a company which is a resident of that Member State but may not deduct dividends distributed by a company resident in Tunisia or Lebanon.

94 As a preliminary point, it must be recalled that, according to settled case-law, an international treaty must be interpreted not solely by reference to the terms in which it is worded but also in the light of its objectives. Article 31 of the Vienna Convention on the Law of Treaties of 23 May 1969 (United Nations Treaty Series, vol. 1155, p. 331) provides in that respect that a treaty is to be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose (see, to that effect, inter alia, judgment of 25 February 2010, *Brita*, C?386/08, EU:C:2010:91, paragraphs 42 and 43 and the case-law cited).

95 In respect of the question of the direct effect of an agreement within the legal systems of the parties, the Court has ruled that when that question has not been addressed in the agreement itself, it is for the Court to resolve that question in the same way as any other question of interpretation concerning the application of agreements within the Union (judgment of 14 December 2006, *Gattoussi*, C?97/05, EU:C:2006:780, paragraph 24 and the case-law cited). That is the case in respect of both the EC-Tunisia and EC-Lebanon agreements.

96 According to settled case-law, a provision in an agreement concluded by the Union with a non-member State must be regarded as having direct effect where, regard being had to its wording and to the purpose and nature of that agreement, the provision lays down a clear and precise obligation which is not subject, in its implementation or its effects, to the adoption of any subsequent measure (see, to that effect, inter alia, judgments of 27 September 2001, *Gloszczuk*, C?63/99, EU:C:2001:488, paragraph 30; of 8 May 2003, *Wählergruppe Gemeinsam*, C?171/01, EU:C:2003:260, paragraph 54; of 12 April 2005, *Simutenkov*, C?265/03, EU:C:2005:213, paragraph 21, and of 14 December 2006, *Gattoussi*, C?97/05, EU:C:2006:780, paragraph 25).

On the EC-Tunisia Agreement

– On the relevant provisions (first and third questions)

97 By its first and third questions, the referring court asks, in essence whether Articles 31 and 34 of the EC-Tunisia Agreement have direct effect and whether, if so, the situation at issue in the main proceedings falls within those provisions.

98 To the extent that, as stated in paragraph 91 above, the interpretation of the EC-Tunisia Agreement should make it possible to determine whether that agreement provides for, in the provisions with direct effect, the liberalisation of investments covered by the situation at issue in the main proceedings, there is no need to reply to the referring court’s first question relating to Article 31 of that agreement, which concerns the right of establishment and services.

99 As regards Article 34 of the EC-Tunisia Agreement, it must be held that that article lays down, in paragraph 1 thereof, in clear, precise and unconditional terms, an obligation on the part of the Community and the Republic of Tunisia to ensure, with regard to transactions on the capital account of balance of payments and from the entry into force of the agreement, that capital relating to direct investments in Tunisia in companies formed in accordance with the laws in force can move freely and that the yield from such investments and any profit stemming therefrom can be liquidated and repatriated.

100 That provision lays down a precise obligation to produce a specific result, which may be relied on by an individual to apply to a national court to set aside the provisions at the origin of an obstacle to the free movement of capital or to apply, in its regard, the rules whose non-application is at the origin of that obstacle to the free movement of capital, without any further implementing measures being required for that purpose (see, by analogy, judgments of 27 September 2001, *Kondova*, C?235/99, EU:C:2001:489, paragraph 34, and of 27 September 2001, *Barkoci and Malik*, C?257/99, EU:C:2001:491, paragraph 34).

101 The finding that the principle of the free movement of capital relating to direct investment in Tunisia, enshrined in Article 34(1) of the EC-Tunisia Agreement, is capable of directly governing the situation of individuals is not invalidated by in Article 34(2) of that agreement.

102 Article 34(2) of that agreement, according to which the parties are to consult each other with a view to facilitating, and fully liberalising when the time is right, the movement of capital between the Community and Republic of Tunisia, must be interpreted as referring to subsequent liberalisation of movements of capital not referred to in Article 34(1) of that agreement.

103 Moreover, such a finding regarding the direct effect of Article 34(1) of the EC-Tunisia Agreement is not at odds with the object and purpose of that agreement. The Court notes that Article 1(1) of the agreement establishes an association between the Community and its Member States, on the one hand, and the Republic of Tunisia, on the other hand. The objective of the EC-Tunisia Agreement, which aims, in particular, as set out in Article 1(2) of the EC-Tunisia Agreement, to establish the conditions for the gradual liberalisation of capital, supports the interpretation that, on the one hand, the movements of capital referred to in Article 34(1) of that agreement have been liberalised as from the entry into force of that agreement and, on the other hand, the other movements are to be gradually liberalised, in accordance with Article 34(2) of that agreement.

104 In those circumstances, it must be held that Article 34(1) of the EC-Tunisia Agreement has direct effect and is capable of being relied on by an individual before a court.

105 It is therefore necessary to ascertain whether a situation such as that at issue in the main proceedings falls within Article 34(1) of the EC-Tunisia Agreement.

106 In that regard, it must be held that, according to its terms, Article 34(1) of the EC-Tunisia Agreement refers to the transactions on the capital account of balance of payments and covers the direct investments in Tunisia, made in companies formed in accordance with the laws in force, and the liquidation and repatriation of the yield from such investments and any profit stemming therefrom.

107 The fact that a company resident in Portugal receives dividends from a company which is a resident of Tunisia by virtue of holding shares equal to 98.72% of the share capital of the distributing company falls within the scope of that provision. As was found in paragraph 79 above, such a shareholding can be regarded as direct investment and the receipt of dividends as a result of that shareholding falls within the concept of 'repatriation of the profits' arising therefrom.

108 Consequently, a situation such as that at issue in the main proceedings must be regarded as falling within Article 34(1) of the EC-Tunisia Agreement.

109 In the light of all the foregoing considerations, the answer to the third question is that Article 34(1) of the EC-Tunisia Agreement must be interpreted as meaning that it has direct effect and may be relied on in a situation such as that at issue in the main proceedings in which a company resident in Portugal receives dividends from a company resident in Tunisia as a result of the direct investment which it has made in the distributing company, in order to challenge the tax treatment reserved for those dividends in Portugal.

110 In the light of the considerations set out in paragraph 98 above, there is no need to answer the second question.

– On the scope of Article 34(1) of the EC-Tunisia Agreement (fourth to sixth questions)

111 By its fourth to sixth questions, which should be examined together, the referring court asks, in essence, whether Article 34(1) of the EC-Tunisia Agreement, read in conjunction with Article 89 of that agreement, must be interpreted as precluding legislation, such as that at issue in the main proceedings, according to which a company which is a resident of a Member State may deduct in full or in part, from its taxable amount, dividends received where the dividends are distributed by a company which is resident in the same Member State, but cannot make such a deduction where the distributing company is resident in Tunisia.

112 As noted in paragraph 48 above, pursuant to the legislation at issue in the main proceedings, the double economic taxation of dividends received by a resident company is avoided or mitigated when the company paying the dividends is established in Portugal, whereas this is not the case when the company is established in Tunisia.

113 This difference in treatment is liable to discourage companies resident in Portugal from making direct investments in companies established in Tunisia. In so far as the capital income originating in that third country is subject to less favourable tax treatment than that reserved for dividends distributed by companies established in Portugal, the shares of companies established in Tunisia are less attractive to investors resident in Portugal than those of companies with their seat in that Member State (see, by analogy, judgments of 12 December 2006, *Test Claimants in the FII Group Litigation*

, C?446/04, EU:C:2006:774, paragraph 64, and of 10 February 2011, *Haribo Lakritzen Hans Riegel and Österreichische Salinen*, C?436/08 and C?437/08, EU:C:2011:61, paragraph 80).

114 Such a disadvantageous treatment thus constitutes a restriction on the free movement of capital, which is prohibited, in principle, as regards direct investments and, in particular, the repatriation of the proceeds of those investments, by Article 34(1) of the EC-Tunisia Agreement.

115 It is also necessary to ascertain, as the referring court asks, in essence, in its fifth question, whether the effect of Article 34(1) of that agreement is limited, in a situation such as that at issue in the main proceedings, by Article 89 of that agreement.

116 First, as regards the first indent of Article 89 of the EC-Tunisia Agreement, according to which nothing in that agreement is to have the effect of extending the fiscal advantages granted by a party in any international agreement or arrangement by which that party is bound, suffice it to point out that the prohibition of the restriction found in the preceding paragraphs of the present judgment follows from the EC-Tunisia Agreement itself and does not result from the extension of advantages provided for by another international agreement or arrangement. Furthermore, as pointed out by the Advocate General in point 87 of his Opinion, SECIL is not seeking to obtain an advantage granted by the Portuguese Republic in another international agreement or arrangement.

117 Next, as regards the second indent of Article 89 of the EC-Tunisia Agreement, according to which the agreement does not have the effect of preventing the adoption or application by either party of any measure aimed at preventing fraud or the evasion of taxes, it must be held that, in order to allow Article 34(1) of the EC-Tunisia Agreement to retain its practical effect, the second indent of Article 89 of that agreement must be interpreted as meaning that the measures falling within the scope of that provision are those which are specifically aimed at preventing fraud or the evasion of taxes.

118 As was stated in paragraph 61 above, the tax legislation at issue in the main proceedings excludes in general terms the possibility of obtaining a tax advantage consisting of avoiding or mitigating the economic double taxation of dividends, where such dividends are distributed by companies established inter alia, in Tunisia, and does not seek specifically to prevent conduct involving the creation of wholly artificial arrangements which do not reflect economic reality, with a view to escaping the tax normally due or to obtain a tax advantage.

119 In so far as, subject to verification by the referring court, the legislation at issue in the main proceedings does not fall within the scope of measures designed to prevent fraud or the evasion of taxes, the situation at issue in the main proceedings does not fall within the situation referred to in the second indent of Article 89 of the EC-Tunisia Agreement.

120 Finally, the third indent of Article 89 of the EC-Tunisia Agreement provides that that agreement does not have the effect of opposing the right of a party to apply the relevant provisions of its tax legislation to taxpayers who are not in an identical situation as regards their place of residence. In that regard, suffice it to point out that the legislation at issue in the main proceedings makes a distinction not on the basis of the residence of the taxpayer, namely the company receiving the dividends, but on the basis of the place of residence of the company distributing the dividends and hence the place where the taxpayer’s capital is invested. Consequently, the situation at issue in the main proceedings does not also fall within the situation referred to in the third indent of Article 89 of the EC-Tunisia Agreement.

121 The answer to the fifth question is therefore that the effect of Article 34(1) of the EC-Tunisia Agreement is not limited, in a situation such as that at issue in the main proceedings, by Article 89 of that agreement.

122 By its sixth question, the referring court asks, in essence, whether the restrictive treatment reserved for the dividends concerned may nevertheless be justified by the need to preserve the effectiveness of fiscal supervision, in particular because of the absence between the Portuguese Republic and the Republic of Tunisia of a framework for administrative cooperation equivalent to that established between the Member States by Directive 77/799, in force at the material time in the main proceedings.

123 In order to decide whether an overriding reason in the public interest relating to the need to preserve the effectiveness of fiscal supervision may justify a restriction on the free movement of capital guaranteed in Article 34(1) of the EC-Tunisia Agreement, the Court must analyse that agreement in the light of its purpose and context, in accordance with the case-law referred to in paragraph 94 above.

124 By virtue of Article 1 thereof, the EC-Tunisia Agreement establishing an association between the Community and its Member States, on the one hand, and the Republic of Tunisia, on the other hand, seeks to strengthen relations between the parties, to establish conditions for the gradual liberalisation of trade in goods, services and capital, and to promote trade and the expansion of harmonious economic and social relations between the parties.

125 That agreement does not aim at creating an internal market, comparable to that established by the FEU Treaty or establishing, like the Agreement on the European Economic Area of 2 May 1992 (OJ 1994 L 1, p. 3, 'the EEA Agreement'), in the most complete way possible, the free movement of goods, persons, services and capital, so as to extend the internal market established in the Union to States which are parties to that agreement (see, to that effect, judgment of 23 September 2003*, Ospelt and Schlössle Weissenberg*, C?452/01, EU:C:2003:493, paragraph 29).

126 To the extent that the need to ensure the effectiveness of fiscal supervision is accepted as an overriding reason in the public interest which may justify a restriction on the freedoms guaranteed by the FEU Treaty and the EEA Agreement, such justification must, a fortiori, be allowed under the EC-Tunisia Agreement.

127 As the Advocate General pointed out in point 125 of his Opinion, it seems inconceivable, having regard to the purpose and context of the EC-Tunisia Agreement, that the parties to that agreement wished to grant full freedom of movement of capital between the Union and Tunisia, given that restrictions may be imposed both on relations between Member States and on relations between Member States of the Union and the other parties to the EEA Agreement.

128 In those circumstances, the analysis carried out in paragraphs 63 to 68 and 70 and 71 above can be applied to the analysis carried out in the context of the assessment of the justification for the restriction in Article 34(1) of the EC-Tunisia Agreement, since that agreement did not impose an obligation on the Republic of Tunisia to provide information to the Portuguese authorities.

129 Article 34(1) of the EC-Tunisia Agreement must therefore be interpreted as meaning that:

– legislation, such as that at issue in the main proceedings, according to which a company which is a resident of a Member State may deduct in full or in part, from its taxable amount, dividends received where the dividends are distributed by a company which is resident in the

same Member State, but cannot make such a deduction where the distributing company is resident in Tunisia, constitutes a restriction on the free movement of capital, prohibited in principle as regards direct investment and, in particular, the repatriation of the proceeds of those investments, by Article 34(1) of the EC-Tunisia Agreement;

– the effect of that provision is not limited, in a situation such as that at issue in the main proceedings, by Article 89 of the EC-Tunisia Agreement.

– the refusal to grant, pursuant to Article 46(1) and (8) of the CIRC, a full or partial deduction of the dividends received from the beneficiary company's taxable amount may be justified by overriding reasons in the public interest relating to the need to preserve the effectiveness of fiscal supervision where it is impossible for the tax authorities of the Member State in which the beneficiary company is resident to obtain information from the Republic of Tunisia, where the company distributing such dividends is resident, in order to allow it to be verified that the condition relating to the tax liability of the company distributing those dividends is satisfied;

– the refusal to grant such a partial deduction in accordance with Article 46(11) of the CIRC cannot be justified by overriding reasons in the public interest relating to the need to preserve the effectiveness of fiscal supervision, where that provision can be applied in situations where the distributing company's tax liability in Tunisia, in which that company is resident, cannot be verified, a matter which it is for the referring court to determine.

On the EC-Lebanon Agreement

– On the direct effect of Article 31 of the EC-Lebanon Agreement (seventh question)

130 By its seventh question, the referring court asks, in essence, whether Article 31 of the EC-Lebanon Agreement has direct effect and may, in the light of Article 33 of that agreement, be relied on in the case at issue in the main proceedings.

131 In that regard, it must be held, first, that, by providing that, in the framework of the provisions of EC-Lebanon Agreement and subject to Articles 33 and 34 thereof, there are to be no restrictions between the Community, on the one hand, and the Republic of Lebanon, on the other hand, no restrictions on the movement of capital and no discrimination based on the nationality or on the place of residence of their nationals or on the place where such capital is invested, Article 31 of that agreement lays down, in clear and unconditional terms, a specific obligation as to the result to be achieved which may be relied on by an individual to request a national court to disapply the discriminatory provisions which impede the free movement of capital or to apply, in its regard, the rules whose non-application is at the origin of that obstacle to the free movement of capital, without any further implementing measures being required for that purpose (see, by analogy, judgments of 27 September 2001, *Kondova*, C?235/99, EU:C:2001:489, paragraph 34, and of 27 September 2001, *Barkoci and Malik*, C?257/99, EU:C:2001:491, paragraph 34).

132 The scope of the obligation under Article 31 of the EC-Lebanon Agreement is, admittedly, limited by the safeguard clause in Article 33(1) of that agreement. However, such an exception cannot preclude Article 31 from conferring on individuals rights which they may rely on before the courts (see, by analogy, judgment of 18 December 2007, *A*, C?101/05, EU:C:2007:804, paragraph 26).

133 The finding that Article 34(1) of the EC-Lebanon Agreement has direct effect is not at odds with the object and purpose of that agreement. The Court notes that Article 1(1) of that agreement establishes an association between the Community and its Member States, on the one hand, and the Republic of Lebanon, on the other hand. The objective of the EC-Lebanon Agreement, which

aims in particular, as set out in Article 1(2) thereof, to establish the conditions for the gradual liberalisation of capital, supports the interpretation that the movements of capital which do not fall within the safeguard clause in Article 33(1) of that agreement were to be liberalised as from the entry into force of that agreement.

134 As regards the possibility of relying on Article 31 of the EC-Lebanon Agreement in a situation such as that at issue in the main proceedings, it must be pointed out that admittedly, in accordance with Article 33(1) of that agreement, Article 31 thereof is indeed without prejudice to the application of any restrictions existing between the Community and the Republic of Lebanon on the date of entry into force of that agreement in respect of the movement of capital between them involving direct investment, including in real estate, establishment, the provision of financial services or the admission of securities to capital markets.

135 However, the scope of the safeguard clause in Article 33(1) of the EC-Lebanon Agreement is limited by Article 33(2) thereof, which provides that the transfer abroad of investments made in Lebanon by Community residents or in the Community by Lebanese residents and of any profit stemming therefrom is not to be affected by it.

136 In so far as the situation at issue in the main proceedings concerns the tax treatment of dividends stemming from direct investments in Lebanon by a person resident in Portugal, that situation falls within the situation referred to in Article 33(2) of the EC-Lebanon Agreement. Consequently, Article 33(1) of that agreement does not preclude Article 31 thereof from being relied on in the present case.

137 In the light of the foregoing, the answer to the seventh question is that Article 31 of the EC-Lebanon Agreement must be interpreted as meaning that:

– it has direct effect;

– a situation, such as that at issue in the main proceedings, concerning the tax treatment of dividends stemming from direct investments in Lebanon by a person resident in Portugal, falls within the situation referred to in Article 33(2) of that agreement; consequently, Article 33(1) of that agreement does not preclude Article 31 thereof from being relied on in the present case.

– On the scope of Article 31 of the EC-Lebanon Agreement (eighth to tenth questions)

138 By its eighth to tenth questions, which should be examined together, the referring court asks, in essence, whether Article 31 of the EC-Lebanon Agreement, read in conjunction with Article 85 thereof, is to be interpreted as precluding legislation such as that at issue in the main proceedings, according to which a company which is a resident of a Member State may deduct in full or in part, from its taxable amount, dividends received where the dividends are distributed by a company which is resident in the same Member State, but cannot make such a deduction where the distributing company is resident in Lebanon.

139 As was held in paragraph 48 above, pursuant to the legislation at issue in the main proceedings, the double economic taxation of dividends received by a resident company is avoided or mitigated when the company paying the dividends is established in Portugal, whereas this is not the case when the company is established in Lebanon.

140 That difference in treatment with regard to the place where their capital is invested is liable to discourage companies resident in Portugal from making direct investments in companies established in Lebanon. In so far as the capital income originating in that third country is subject to less favourable tax treatment than that reserved for dividends distributed by companies

established in Portugal, the shares of companies established in Lebanon are less attractive to investors resident in Portugal, than those of companies with their seat in that Member State (see, by analogy, judgments of 12 December 2006, *Test Claimants in the FII Group Litigation*, C?446/04, EU:C:2006:774, paragraph 64, and of 10 February 2011, *Haribo Lakritzen Hans Riegel and Österreichische Salinen*, C?436/08 and C?437/08, EU:C:2011:61, paragraph 80).

141 In that regard, it must be recalled that it is settled case-law that with regard to a tax rule, such as that at issue in the main proceedings, which seeks to prevent or to mitigate the double economic taxation of distributed profits, the situation of a shareholder company receiving dividends sourced in a non-member State is comparable to that of a shareholder company receiving nationally sourced dividends in so far as, in each case, the profits made are, in principle, liable to be subject to a series of charges to tax (see, by analogy, judgments of 12 December 2006, *Test Claimants in the FII Group Litigation*, C?446/04, EU:C:2006:774, paragraph 62, and of 10 February 2011, *Haribo Lakritzen Hans Riegel and Österreichische Salinen*, C?436/08 and C?437/08, EU:C:2011:61, paragraph 84).

142 Consequently, such disadvantageous treatment is prohibited, in principle, by Article 31 of the EC-Lebanon Agreement.

143 It is also necessary to ascertain, as the referring court asks, in essence, in its ninth question, whether the effect of Article 31 of that agreement is limited, in a situation such as that in the main proceedings, by Article 85 of that agreement.

144 First, as regards Article 85(a) of the EC-Lebanon Agreement, concerning direct taxation, according to which nothing in that agreement has the effect of extending the fiscal advantages granted by a party in any international agreement or arrangement by which that party is bound, suffice it to point out that the prohibition of the restriction found in the preceding paragraphs of the present judgment follows from the EC-Lebanon Agreement itself and does not result from the extension of advantages provided for by another international agreement or arrangement. Furthermore, as pointed out by the Advocate General in point 87 of his Opinion, SECIL is not seeking to obtain an advantage granted by the Portuguese Republic in another international agreement or arrangement.

145 Next, as regards Article 85(b) of the EC-Lebanon Agreement, according to which that agreement does not have the effect of preventing the adoption or application by either party of any measure aimed at preventing fraud or the evasion of taxes, it must be held that, in order to allow Article 31 of that agreement to retain its practical effect, Article 85(b) of that agreement must be interpreted as meaning that the measures falling within the scope of that provision are those specifically aimed at preventing fraud or the evasion of taxes.

146 As was stated in paragraph 61 above, the tax legislation at issue in the main proceedings excludes in general terms the possibility of obtaining a tax advantage consisting of the avoiding or mitigating the economic double taxation of dividends, where such dividends are distributed by companies established inter alia, in Lebanon, and does not seek specifically to prevent conduct involving the creation of wholly artificial arrangements which do not reflect economic reality, with a view to escaping the tax normally due or to obtain a tax advantage.

147 In so far as, subject to verification by the referring court, the legislation at issue in the main proceedings does not fall within the scope of measures designed to prevent fraud or the evasion of taxes, the situation at issue in the main proceedings does not fall within the situation referred to in Article 85(b) of the EC-Lebanon Agreement.

148 Finally, Article 85(c) of the EC-Lebanon Agreement provides that that agreement does not

have the effect of precluding a party from applying the relevant provisions of its tax legislation to taxpayers who are not in an identical situation, in particular, as regards their place of residence. First, as was pointed out in paragraph 120 above, the legislation at issue in the main proceedings does not make a distinction on the basis of the residence of the taxpayer, namely the company receiving the dividends.

149 Second, it must, admittedly, be acknowledged that, on the basis of the use of the words ‘in particular’ in Article 85(c) of the EC-Lebanon Agreement, distinctions based on other factors, including where the taxpayer’s capital is invested, may come under that provision. However, that provision must be read together with Article 31 of the EC-Lebanon Agreement, which prohibits any discrimination based, in particular, on the place where the capital is invested. Accordingly, it is necessary to distinguish the differences in treatment permitted under Article 85(c) of the EC-Lebanon Agreement from discrimination which does not fall within the scope of Article 85(c) thereof and is prohibited under Article 31 of that agreement.

150 As was stated in paragraph 55 above, with regard to tax rules, such as those at issue in the main proceedings, which seek to prevent or mitigate the economic double taxation of distributed profits, the situation of a corporate shareholder receiving dividends sourced in a non-member State is comparable to that of a corporate shareholder receiving nationally sourced dividends in so far as, in each case, the profits made are, in principle, liable to be subject to a series of charges to tax.

151 Consequently, the situation at issue in the main proceedings is also not covered by the situation referred to in Article 85(c) of the EC-Lebanon Agreement.

152 The answer to the ninth question is therefore that the effect of Article 31 of the EC-Lebanon Agreement is not limited, in a situation such as that at issue in the main proceedings, by Article 85 of that agreement.

153 By its tenth question, the referring court asks, in essence, whether the restrictive treatment reserved for the dividends concerned may nevertheless be justified by the need to preserve the effectiveness of financial supervision, in particular because of the absence between the Portuguese Republic and the Republic of Lebanon, of a framework for administrative cooperation equivalent to that established between the Member States by Directive 77/799, in force at the material time in the main proceedings.

154 In that regard, it must be pointed out that the findings set out in paragraphs 123 to 127 above can be applied to the analysis of the EC-Lebanon Agreement, which, as is apparent from Article 1, pursues objectives similar to those pursued by the EC-Tunisia Agreement.

155 Since the EC-Lebanon Agreement has not, moreover, provided for an obligation on the Republic of Lebanon to provide information to the Portuguese authorities, the considerations set out in paragraphs 69 to 71 above can be transposed to the assessment of the justification for the restriction in Article 31 of the EC-Lebanon Agreement.

156 Article 31 of the EC-Lebanon Agreement must therefore be interpreted as meaning that:

– legislation, such as that at issue in the main proceedings, according to which a company which is a resident of a Member State may deduct in full or in part, from its taxable amount, dividends received where the dividends are distributed by a company which is resident in the same Member State, but cannot make such a deduction where the distributing company is resident in Lebanon, constitutes a restriction on the free movement of capital, prohibited in principle by Article 31 of the EC-Lebanon Agreement;

– the effect of that provision is not limited, in a situation such as that at issue in the main proceedings, by Article 85 of that agreement;

– the refusal to grant, pursuant to Article 46(1) and (8) of the CIRC, a full or partial deduction of the dividends received from the beneficiary company's taxable amount may be justified by overriding reasons in the public interest relating to the need to preserve the effectiveness of fiscal supervision where it is impossible for the tax authorities of the Member State of which the beneficiary company is resident to obtain information from the Republic of Lebanon, the State in which the company distributing such dividends is resident, in order to allow it to be verified that the condition relating to the tax liability of the company distributing those dividends is satisfied;

– the refusal to grant such a partial deduction in accordance with Article 46(11) of the CIRC cannot be justified by overriding reasons in the public interest relating to the need to preserve the effectiveness of fiscal supervision, where that provision can be applied in situations where the distributing company's liability to tax in Lebanon, in which that company is resident, cannot be verified, a matter which it is for the referring court to determine.

The consequences of the interpretation of Articles 63 to 65 TFEU and the EC?Tunisia and EC-Lebanon agreements in the case in the main proceedings

157 It follows from the answer to the eleventh and twelfth questions that the refusal to grant, pursuant to Article 46(1) and (8) of the CIRC, a full or partial deduction of the dividends received from the beneficiary company's taxable amount may be justified by overriding reasons in the public interest relating to the need to preserve the effectiveness of fiscal supervision where it is impossible for the tax authorities of the Member State of which the beneficiary company is resident to obtain information from the non-member State in which the company distributing such dividends is resident, in order to allow it to be verified that the condition relating to the tax liability of the company distributing dividends is satisfied.

158 Consequently, if, in particular, by virtue of the Portugal-Tunisia Convention, the authorities of the Member State where the beneficiary company is resident can obtain information from the Republic of Tunisia, the State in which the company paying the dividends is resident, allowing those authorities to verify that the condition that the company distributing those dividends is liable to tax is satisfied, such overriding reasons in the public interest cannot justify a restriction prohibited, in principle, by Article 63 TFEU.

159 In that situation, the Portuguese Republic also cannot rely on Article 64(1) TFEU, in so far as the EC-Tunisia Agreement, Article 34(1) of which has direct effect, also precludes a rule such as that at issue in the main proceedings, according to which a company resident in a Member State may make a partial or full deduction from its taxable amount of dividends received where such dividends are distributed by a resident company in the same Member State, but may not make such a deduction where the distributing company is resident in Tunisia. That legislation constitutes a restriction on the free movement of capital, prohibited in principle as regards direct investment and, in particular, repatriation of the proceeds of those investments, by Article 34(1) of the EC-Tunisia Agreement. Such a restriction is not justified if the Portuguese tax authorities can

obtain information from the Republic of Tunisia, the State in which the company distributing the dividends is resident, allowing them to verify that the condition relating to the taxation of the company distributing those dividends is satisfied.

160 The change in the legal framework resulting from the introduction of such a provision in the EC-Tunisia Agreement must be deemed to amount, as regards its effects on the possibility of invoking Article 64(1) TFEU, to the introduction of new legislation, based on a logic different from that of the existing legislation.

161 It also follows from the answer to the first to tenth questions and to the eleventh and twelfth questions that Articles 63 and 65 TFEU and Article 34(1) of the EC?Tunisia Agreement and Article 31 of the EC-Lebanon Agreement preclude a refusal to grant, in accordance with Article 46(11) of the CIRC, a partial deduction of the taxable amount of the company receiving the dividends where that provision can be applied in situations in which the tax liability of the companies distributing those dividends in Tunisia and Lebanon, the States in which those companies are resident, cannot be verified, a matter which it is for the referring court to determine.

162 In those circumstances, for the reasons set out in paragraphs 87 to 90 and, *mutatis mutandis* , in paragraph 160 above, the Portuguese Republic cannot rely on Article 64(1) TFEU in order to continue to apply the legislation creating the abovementioned restriction.

163 In that regard, according to the case-law, Article 63 TFEU requires a Member State which has a system for preventing economic double taxation as regards dividends paid to residents by other resident companies to accord equivalent treatment to dividends paid to residents by non-resident companies (see judgments of 10 February 2011, *Haribo Lakritzen Hans Riegel and Österreichische Salinen*, C?436/08 and C?437/08, EU:C:2011:61, paragraph 60, and 13 November 2012, *Test Claimants in the FII Group Litigation*, C?35/11, EU:C:2012:707, paragraph 38).

164 It is also clear from the case-law that the right to a refund of charges levied in a Member State in breach of the rules of Union law is the consequence and complement of the rights conferred on individuals by Union provisions as interpreted by the Court and the Member State is therefore required in principle to repay charges levied in breach of Union law (see judgment of 15 September 2011, *Accor*, C?310/09, EU:C:2011:581, paragraph 71 and the case-law cited).

165 The only exception to the right to repayment of taxes levied in breach of EU law is in a case in which a charge that was not due has been directly passed on by the taxable person to another person (see judgments of 6 September 2011, *Lady & Kid and Others*, C?398/09, EU:C:2011:540, paragraph 18, and 15 September 2011, *Accor*, C?310/09, EU:C:2011:581, paragraphs 72 and 74).

166 Furthermore, the Court has held that, where a Member State has levied taxes in breach of the rules of EU law, individuals are entitled to reimbursement not only of the tax unduly levied but also of the amounts paid to that State or retained by it which relate directly to that tax (see judgment of 15 October 2014, *Nicula*, C?331/13, EU:C:2014:2285, paragraph 28 and the case-law cited).

167 It follows that the Portuguese authorities are obliged to repay with interest the amounts collected in breach of Articles 63 and 65 TFEU, Article 34 of the EC-Tunisia Agreement and Article 31 of the EC-Lebanon Agreement.

168 Those amounts correspond to the difference between the amount paid by SECIL and the amount it should have paid pursuant to Article 46(1), Article 46(8) or Article 46(11) of the CIRC, if, in the conditions such as those in the case at issue in the main proceedings, the dividends

distributed by Ciments de Gabès and Ciments de Sibline had been deemed to have been paid by a company established in Portugal.

169 Therefore, the answer to be given to the referring court, concerning the consequences of the interpretation of Articles 63 to 65 TFEU and the EC-Tunisia and EC-Lebanon agreements on the case at issue in the main proceedings, is that:

– where the authorities of the Member State in which the beneficiary company is resident can obtain information from the Republic of Tunisia, the State in which the company paying the dividends is resident, allowing them to verify that the condition relating to the tax liability of the company distributing these dividends is satisfied, Articles 63 and 65 TFEU and Article 34(1) of the EC-Tunisia Agreement preclude the refusal to grant, pursuant to Article 46(1) or Article 46(8) of the CIRC, a full or partial deduction from the taxable amount of the company receiving the dividends distributed, and the Portuguese Republic may not to rely, in this respect, on Article 64(1) TFEU;

– Articles 63 and 65 TFEU, Article 34(1) of the EC-Tunisia Agreement and Article 31 of the EC-Lebanon Agreement preclude the refusal to grant, pursuant to Article 46(11) of the CIRC, a partial deduction of the taxable amount of the company receiving the dividends distributed, where that provision may be applied in situations where the tax liability of the distributing companies in Tunisia and Lebanon, in which those companies are resident, cannot be verified, which is a matter for the referring court to determine, and the Portuguese Republic cannot rely on Article 64(1) TFEU in that regard;

– the amounts collected in breach of Union law must be repaid, with interest, to the taxpayer.

Costs

170 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 (Fifth Chamber) hereby rules:

1. **Articles 63 and 65 TFEU must be interpreted as meaning that:**

– **a company established in Portugal which receives dividends from companies established in Tunisia and Lebanon respectively may rely on Article 63 TFEU in order to challenge the tax treatment of dividends in that Member State based on legislation which is not intended to apply exclusively to situations in which the beneficiary company has a decisive influence on the distributing company;**

– **legislation such as that at issue in the main proceedings, according to which a company which is a resident of a Member State may deduct in full or in part, from its taxable amount, dividends received where the dividends are distributed by a company which is resident in the same Member State, but cannot make such a deduction where the distributing company is resident in a non-member State, constitutes a restriction on the movement of capital between Member States and non-member States which is in principle prohibited by Article 63 TFEU;**

– **the refusal to grant a full or partial deduction from the taxable amount in respect of the dividends received, pursuant to Article 46(1) and (8) of the Código do Imposto sobre o Rendimento das Pessoas Coletivas (Corporation Tax Code), in the version in force in 2009, may be justified by overriding reasons in the public interest based on the need to ensure the effectiveness of fiscal supervision where it proves impossible, for the tax authorities of**

the Member State in which the beneficiary company is resident, to obtain information from the non-member State in which the company distributing those dividends is resident, allowing those authorities to verify whether the condition that the latter company be subject to tax is satisfied;

– **the refusal to grant a partial deduction in accordance with Article 46(11) of the Corporation Tax Code, in that version, cannot be justified by overriding reasons in the general interest based on the need to ensure the effectiveness of fiscal supervision where that provision may be applied to situations in which the tax liability of the distributing company in the State in which it is resident cannot be verified, a matter which it is for the referring court to determine.**

2. **Article 64(1) TFEU must be interpreted as meaning that:**

– **in so far as the adoption of the tax benefit scheme for contractual investments established in Article 41(5)(b) of the Estatuto dos Beneficios Fiscais (Tax Advantages Scheme), in the version in force in 2009 and the scheme provided for in Article 42 of that law for dividends from the Portuguese-speaking African Countries and Timor-Leste, have not changed the legal framework for the tax treatment of dividends from Tunisia and Lebanon, the adoption of those schemes has not affected the classification, as an existing restriction, of the exclusion of dividends paid by companies established in those non-member States countries from the possibility of benefiting from a full or partial deduction;**

– **a Member State waives the power provided for in Article 64(1) TFEU where, without formally repealing or amending the existing rules, it concludes an international agreement, such as an association agreement, which provides, in a provision with direct effect, for a liberalisation of a category of capital referred to in Article 64(1) TFEU; such a change in the legal framework must therefore be deemed to amount, in its effects on the possibility of invoking Article 64(1) TFEU, to the introduction of new legislation, based on a logic different from that of the existing legislation.**

3. **Article 34(1) of the Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Tunisia, of the other part, signed in Brussels on 17 July 1995 and approved on behalf of the European Community and the European Coal and Steel Community by Decision 98/238/EC, ECSC of the Council and of the Commission of 26 January 1998, must be interpreted as meaning that:**

– **it has direct effect and may be relied on in a situation such as that at issue in the main proceedings in which a company resident in Portugal receives dividends from a company resident in Tunisia as a result of the direct investment which it has made in the distributing company, in order to challenge the tax treatment reserved for the those dividends in Portugal;**

– **legislation, such as that at issue in the main proceedings, according to which a company which is a resident of a Member State may deduct in full or in part, from its taxable amount, dividends received where the dividends are distributed by a company which is resident in the same Member State, but cannot make such a deduction where the distributing company is resident in Tunisia, constitutes a restriction on the free movement of capital, prohibited in principle as regards direct investment and, in particular, the repatriation of the proceeds of those investments, by Article 34(1) of that agreement;**

– **the effect of that provision is not limited, in a situation such as that at issue in the**

main proceedings, by Article 89 of that agreement;

– **the refusal to grant, pursuant to Article 46(1) and (8) of the Corporation Tax Code, in the version in force in 2009, a full or partial deduction of the dividends received from the beneficiary company's taxable amount may be justified by overriding reasons in the public interest relating to the need to preserve the effectiveness of fiscal supervision where it is impossible for the tax authorities of the Member State in which the beneficiary company is resident to obtain information from the Republic of Tunisia, in which the company distributing such dividends is resident, in order to allow it to be verified that the condition relating to the tax liability of the company distributing those dividends is satisfied;**

– **the refusal to grant such a partial deduction in accordance with Article 46(11) of the Corporation Tax Code, in that version, cannot be justified by overriding reasons in the public interest relating to the need to preserve the effectiveness of fiscal supervision, where that provision can be applied in situations in which the distributing company's tax liability in Tunisia, in which that company is resident, cannot be verified, a matter which it is for the referring court to determine.**

4. **Article 31 of the Euro-Mediterranean Agreement establishing an association between the European Community and its Member States, of the one part, and the Republic of Lebanon, of the other part, signed in Luxembourg on 17 June 2002 and approved on behalf of the European Community by Council Decision 2006/356/EC of 14 February 2006, must be interpreted as meaning that:**

– **it has direct effect;**

– **a situation, such as that at issue in the main proceedings, concerning the tax treatment of dividends stemming from direct investments in Lebanon by a person resident in Portugal, falls within the situation referred to in Article 33(2) of that agreement; consequently, Article 33(1) of that agreement does not preclude Article 31 thereof from being relied on in the present case;**

– **legislation, such as that at issue in the main proceedings, according to which a company which is a resident of a Member State may deduct in full or in part, from its taxable amount, dividends received where the dividends are distributed by a company which is resident in the same Member State, but cannot make such a deduction where the distributing company is resident in Lebanon, constitutes a restriction on the free movement of capital, prohibited in principle by Article 31 of the Euro-Mediterranean Agreement establishing an association between the European Community and its Member States, of the one part, and the Republic of Lebanon, of the other part;**

– **the effect of that provision is not limited, in a situation such as that at issue in the main proceedings, by Article 85 of that agreement;**

– the refusal to grant, pursuant to Article 46(1) and (8) of the Corporation Tax Code, in the version in force in 2009, a full or partial deduction from the beneficiary company's taxable amount of the dividends received may be justified by overriding reasons in the public interest relating to the need to preserve the effectiveness of fiscal supervision where it is impossible for the tax authorities of the Member State in which the beneficiary company is resident to obtain information from the Republic of Lebanon, the State in which the companies distributing such dividends are resident, allowing it to be verified that the condition relating to the tax liability of the company distributing those dividends is satisfied;

– the refusal to grant such a partial deduction in accordance with Article 46(11) of the Corporation Tax Code, in that version, cannot be justified by overriding reasons in the public interest based on the need to preserve the effectiveness of fiscal supervision, where that provision can be applied in situations in which the distributing company's liability to tax in Lebanon, where that company is resident, cannot be verified, a matter which it is for the referring court to determine.

5. **As regards the consequences for the case at issue in the main proceedings, of the interpretation of Articles 63 to 65 TFEU and the Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Tunisia, of the other part, and the Euro-Mediterranean Agreement establishing an association between the European Community and its Member States, of the one part, and the Republic of Lebanon, of the other part:**

– where the authorities of the Member State in which the beneficiary company is resident can obtain information from the Republic of Tunisia, the State in which the company paying the dividends is resident, allowing them to verify that the condition relating to the tax liability of the company distributing these dividends is satisfied, Articles 63 and 65 TFEU and Article 34(1) of the Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Tunisia, of the other part, preclude the refusal to grant, pursuant to Article 46(1) or Article 46(8) of the Corporation Tax Code, in the version in force in 2009, a full or partial deduction from the taxable amount of the company receiving the dividends distributed, and the Portuguese Republic may not rely, in this respect, on Article 64(1) TFEU;

– Articles 63 and 65 TFEU and Article 34(1) of the Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Tunisia, of the other part, and Article 31 of the Euro-Mediterranean Agreement establishing an association between the European Community and its Member States, of the one part, and the Republic of Lebanon, of the other part preclude the refusal to grant, pursuant to Article 46(11) of the Corporation Tax Code, in the version in force in 2009, a partial deduction from the taxable amount of the company receiving the dividends distributed, where that provision may be applied in situations in which the tax liability of the distributing companies in Tunisia and Lebanon, where those companies are resident, cannot be verified, a matter which it is for the referring court to determine, and the Portuguese Republic may not rely on Article 64(1) TFEU in that regard;

– the amounts collected in breach of Union law must be repaid, with interest, to the taxpayer.

[Signatures]

* Language of the case: Portuguese.