Provisional text

JUDGMENT OF THE COURT (Fifth Chamber)

21 June 2018 (*)

(Reference for a preliminary ruling — Free movement of capital and liberalisation of payments — Restrictions — Taxation of dividends paid to undertakings for collective investment in transferable securities (UCITS) — Dividends paid by companies resident in one Member State to non-resident UCITS — Tax exemption for dividends paid by companies resident in one Member State to resident UCITS — Justifications — Balanced allocation between Member States of the power to impose taxes — Coherence of the tax system — Proportionality)

In Case C?480/16,

REQUEST for a preliminary ruling under Article 267 TFEU from the Østre Landsret (High Court of Eastern Denmark), made by decision of 31 August 2016, received at the Court on 5 September 2016, in the proceedings

Fidelity Funds,

Fidelity Investment Funds,

Fidelity Institutional Funds

v

Skatteministeret,

interveners:

NN (L) SICAV,

THE COURT (Fifth Chamber),

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

Advocate General: P. Mengozzi,

Registrar: L. Carrasco Marco, Administrator,

having regard to the written procedure and further to the hearing on 5 October 2017,

after considering the observations submitted on behalf of:

– Fidelity Funds, Fidelity Investment Funds and Fidelity Institutional Funds, by P. Farmer, Barrister, and J. Skaadstrup Andersen, advokat,

– NN (L) SICAV, by E. Vistisen, advokat,

– the Danish Government, by C. Thorning and J. Nymann-Lindegren, acting as Agents, and

by S. Horsbøl Jensen, advokat,

– the German Government, by T. Henze and R. Kanitz, acting as Agents,

– the Netherlands Government, by M. Bulterman, B. Koopman and J. Langer, acting as Agents,

– the European Commission, by W. Roels and R. Lyal, acting as Agents, and by H. Peytz, avocat,

after hearing the Opinion of the Advocate General at the sitting on 20 December 2017,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Articles 56 and 63 TFEU.

2 The request has been made in proceedings brought by Fidelity Funds, Fidelity Investment Funds and Fidelity Institutional Funds against the Skatteministeriet (Ministry of Taxation, Denmark), concerning claims for repayment of withholding tax levied on dividends paid to them by companies resident in Denmark between 2000 and 2009.

Legal context

EU law

3 The purpose of Council Directive 85/611/EEC of 20 December 1985 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) (OJ 1985 L 375, p. 3), according to its fourth recital, was to establish common basic rules for the authorisation, supervision, structure and activities of undertakings for collective investment in transferable securities (UCITS) situated in the Member States and the information they must publish. Directive 85/611 was amended on a number of occasions before being repealed, with effect from 1 July 2011, by Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) (OJ 2009 L 302, p. 32), which recast the former directive.

Danish law

4 Article 1(5a) of the lov om indkomstbeskatning af aktieselskaber m.v. (Law on corporation tax) provides that UCITS resident in Denmark for tax purposes are liable to pay tax there, while Article 1(6) of that law concerns the taxation of funds which fall within the scope of Article 16 C of the lov om påligningen af indkomstskat til staten (Law on the assessment of income tax; 'the ligningslov') and which are resident in Denmark.

5 Article 2(1)(c) of the Law on corporation tax provides that UCITS and other investment funds not resident for tax purposes in Denmark are liable to pay tax on the dividends they receive from companies resident in Denmark; that limited liability to tax is confined to income from sources in Denmark.

6 Article 65(1) of the kildeskatteloven (Law on withholding tax) provides that all decisions to distribute dividends taken by a company resident in Denmark must stipulate that a percentage of the total amount distributed will be retained at source, unless otherwise provided. The rate of the

withholding tax was set at 25% for the year 2000 and increased to 28% for the period from 2001 to 2009.

7 Under the Danish rules, the rate of the withholding tax is reduced to 15% when the authorities of the State in which the UCITS concerned is resident are required to exchange information with the Danish authorities in accordance with a double taxation convention, another international convention or an administrative agreement for assistance in tax matters. For taxpayers resident in the European Union, the final taxation may not, in practice, exceed 15%, in accordance with that provision. In addition, the tax may be further reduced on the basis of tax conventions concluded between the Kingdom of Denmark and the State of residence of the UCITS concerned.

8 The Law on withholding tax applies to UCITS established in Denmark, which are, therefore, a priori, subject to those rules on the taxation of dividends. However, it is clear from Article 65(8) of that law that the Minister for Taxation has power to adopt rules providing that the distribution of dividends to funds which fall within the scope of Article 16 C of the ligningslov ('Article 16 C funds') are exempted from withholding tax.

9 When the order concerning withholding tax was adopted, the Minister for Taxation used that power to exempt Article 16 C funds from all withholding tax. Under Article 38 of the order concerning withholding tax, a UCITS may be issued with an exemption certificate and qualify for the exemption from withholding tax on dividends provided that (i) it is an undertaking covered by Article 1(6) of the Law on corporation tax, and thus resident in Denmark, and (ii) it has the status of an Article 16 C fund. A UCITS resident in Denmark which does not satisfy the conditions of Article 16 C of the ligningslov is not exempted from withholding tax on dividends.

10 Article 16 C of the ligningslov defines what is meant by Article 16 C funds.

11 Under the rules that were in force until 1 June 2005, in order for a UCITS to be treated as an Article 16 C fund it had to make a minimum distribution. The minimum distribution forms the basis for taxing the income of the fund concerned at the level of its members.

12 The rules for calculating the minimum distribution are set out in Article 16 C(2) to (6) of the ligningslov. Paragraph 2 of that article provides that the minimum distribution is the sum of the revenue and net amounts received during the tax year, with deductions made for losses and expenditure. Under Article 16 C(3) of the ligningslov, that calculation includes a number of specific sources of revenue listed in that article, particularly interest, share dividends, gains on receivables and financial contracts as well as gains on disposals of shares. In accordance with Article 16 C(4) and (5) of the ligningslov, Article 16 C funds may deduct allowable losses and administrative expenses.

13 Following the adoption of Law No 407 of 1 June 2005, and as from that date, an undertaking is no longer required to have actually distributed a minimum amount to members in order to qualify as an Article 16 C fund. Eligibility for that status is still, however, subject to the condition that the UCITS concerned calculates a minimum distribution that is taxed in the hands of its members by means of a deduction at source made by that undertaking.

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

14 The applicants in the main proceedings are UCITS, within the meaning of Directive 85/611, having their registered offices in the United Kingdom and Luxembourg respectively. Their investments in companies established in Denmark are portfolio investments and do not exceed 10% of capital. The products offered by the applicants in the main proceedings are accessible to

clients resident in Denmark but are not actively marketed in that Member State. Similarly, the applicants in the main proceedings did not apply to the Danish tax authorities for Article 16 C fund status nor did they adapt their statutes to the rules applicable to such funds until the 2005 tax year.

15 The applicants in the main proceedings brought claims before the national court for repayment of withholding tax levied on dividend distributions made by companies established in Denmark, which they received between 2000 and 2009, arguing that UCITS resident in Denmark, unlike non-resident UCITS, can obtain an exemption from withholding tax. They submit that national tax rules set two conditions for exemption, namely that the UCITS concerned is resident in Denmark and that it calculates and declares its income in accordance with Danish tax rules. Non-resident UCITS cannot, by definition, satisfy the first of those conditions and it is impossible, or extremely difficult, for them to satisfy the second, particularly as they have no incentive to do so, given that, on account of the first condition, they are in any event ineligible for exemption from withholding tax.

16 As a result, the applicants in the main proceedings consider that, even though they do not satisfy the second condition regarding the obligation to calculate and declare a minimum distribution in accordance with Danish legislation, they are entitled to repayment of withholding tax.

17 The Minister for Taxation accepts that the effect of the Danish system is that, in certain circumstances, UCITS established in Denmark and UCITS established in another Member State are subject to different tax treatment as regards dividends received from companies established in Denmark. However, he considers that restriction to be justified, first, by the need to safeguard the coherence of the tax system and, second, by the need to ensure a balanced allocation between the Member States of the power to impose taxes.

18 In that context, the parties to the disputes in the main proceedings agree that such a difference in tax treatment constitutes a restriction of free movement, but the applicants in the main proceedings contend that such a restriction cannot be justified by the reasons put forward by the Minister for Taxation and that, in any event, Danish legislation goes beyond what is necessary to ensure taxation in Denmark.

19 In those circumstances, the Østre Landsret (High Court of Eastern Denmark), decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

‘Is a tax regime, such as that in the main proceedings, under which non-Danish [UCITS] covered by Directive [85/611] ... are taxed at source on dividends from Danish companies, contrary to Article 56 EC (Article 63 TFEU) on free movement of capital or Article 49 EC (Article 56 TFEU) on freedom to provide services, where equivalent Danish [UCITS] can obtain an exemption for tax at source, either because they in fact make a minimum distribution to their members in return for retention of tax at source, or technically a minimum distribution is calculated, on which tax at source is retained in relation to the undertakings’ members?’

The request for the oral procedure to be reopened

20 Following the delivery of the Advocate General’s Opinion, the applicants in the main proceedings, by a document lodged at the Court Registry on 18 January 2018, applied for the oral part of the procedure to be reopened, pursuant to Article 83 of the Rules of Procedure of the Court of Justice.

21 In support of their application, the applicants in the main proceedings claim, in essence, that the Advocate General’s Opinion is based on a misunderstanding as to the extent and nature of the

requirements laid down in Article 16 C of the ligningslov. They further submit that the reference made by the Advocate General to the fact that certain UCITS that are not resident in the Kingdom of Denmark carried out minimum distributions is wrong in fact and the circumstances surrounding such UCITS were not the subject of debate before the Court.

22 In that regard, it should be noted that, under the second paragraph of Article 252 TFEU, it is the duty of the Advocate General, acting with complete impartiality and independence, to make, in open court, reasoned submissions on cases which, in accordance with the Statute of the Court of Justice, require his involvement. The Court is not bound either by the Advocate General's Opinion or by the reasoning on which it is based (judgment of 22 June 2017, *Federatie Nederlandse Vakvereniging and Others*, C?126/16, EU:C:2017:489, paragraph 31 and the case-law cited).

23 It must also be noted in this regard that the Statute of the Court of Justice of the European Union and the Rules of Procedure of the Court make no provision for interested parties to submit observations in response to the Advocate General's Opinion (judgment of 25 October 2017, *Polbud — Wykonawstwo*, C?106/16, EU:C:2017:804, paragraph 23 and the case-law cited). As a consequence, the fact that a party disagrees with the Advocate General's Opinion, irrespective of the questions examined in the Opinion, cannot in itself constitute grounds justifying the reopening of the oral procedure (judgments of 25 October 2017, *Polbud — Wykonawstwo*, C?106/16, EU:C:2017:804, paragraph 24, and of 29 November 2017, *King*, C?214/16, EU:C:2017:914, paragraph 27 and the case-law cited).

24 By their arguments relating to the extent and nature of the requirements laid down in Article 16 C of the ligningslov, the applicants in the main proceedings are attempting to respond to the Advocate General's Opinion by questioning the description of the legislation in force in Denmark following the amendment made in 2005, as set out in the request for a preliminary ruling, the documents before the Court and the information provided at the hearing. It follows from the case-law referred to in the preceding paragraph that there is no provision in the texts governing procedure before the Court for the lodging of such observations.

25 That said, pursuant to Article 83 of its Rules of Procedure, the Court may at any time, after hearing the Advocate General, order the reopening of the oral part of the procedure, in particular if it considers that it lacks sufficient information or where a party has, after the close of that part of the procedure, submitted a new fact which is of such a nature as to be a decisive factor for the decision of the Court, or where the case must be decided on the basis of an argument which has not been debated between the parties or the interested persons referred to in Article 23 of the Statute of the Court of Justice of the European Union.

26 In the present case, the Court, after hearing the views of the Advocate General, considers that it has all the information necessary to enable it to answer the question raised by the referring court and that all the arguments necessary for making a decision on the matter at issue — in particular the possibility for an undertaking that is not resident in Denmark of establishing a minimum distribution in accordance with Danish legislation and qualifying as an Article 16 C fund — have been debated before the Court.

27 In the light of the foregoing, there is no need to reopen the oral part of the procedure.

Consideration of the question referred

28 By its question, the referring court asks, in essence, whether Articles 56 and 63 TFEU must be interpreted as precluding legislation of a Member State, such as that at issue in the main proceedings, under which the dividends distributed by a company resident in that Member State to a non-resident UCITS are subject to withholding tax, while dividends distributed to a UCITS

resident in that same Member State are exempt from such tax, provided that the undertaking concerned makes a minimum distribution to its members, or technically calculates a minimum distribution, and withholds on that actual or notional minimum distribution the tax payable by its members.

29 According to the referring court's description of the national legislation at issue in the main proceedings, in order to be exempted from withholding tax, a UCITS must, first, be resident in Denmark and, second, have Article 16 C fund status.

30 In order to obtain that status, a UCITS must satisfy the conditions set out in Article 16 C of the ligningslov and, specifically, in accordance with the legislation in force before 1 June 2005, undertake to make a minimum distribution and withhold from that distribution the tax payable by its members. After that date there is no longer a requirement to actually make a minimum distribution to members, but, in order to qualify for that status, the UCITS concerned must calculate a minimum distribution which is taxed in the hands of its members by means of a deduction at source made by that undertaking. UCITS resident in Denmark that have not obtained Article 16 C fund status are subject to withholding tax on the dividends distributed by companies resident in that Member State.

31 It is clear from the case file and has not been disputed before the Court that, during the period at issue in the main proceedings, only UCITS resident in Denmark could qualify for an exemption from withholding tax. It follows from the explanations offered by the Danish Government and the parties to the main proceedings that, although a UCITS that is not resident in Denmark may in principle satisfy the conditions laid down in Article 16 C of the ligningslov, the fact that it is not resident in Denmark means that it cannot qualify for the exemption from withholding tax on dividends distributed by companies resident in Denmark.

The freedom at issue

32 As the question referred for a preliminary ruling concerns both Article 56 TFEU and Article 63 TFEU, it is necessary to establish, as a preliminary point, whether, and if so, to what extent, national legislation such as that at issue in the main proceedings is liable to affect the exercise of the freedom to provide services and the free movement of capital.

33 In that regard, it is clear from settled case-law that the purpose of the legislation concerned must be taken into consideration (judgments of 13 November 2012, *Test Claimants in the FII Group Litigation*, C?35/11, EU:C:2012:707, paragraph 90 and the case-law cited, and of 5 February 2014, *Hervis Sport- és Divatkereskedelmi*, C?385/12, EU:C:2014:47, paragraph 21 and the case-law cited).

34 The disputes in the main proceedings concern claims for repayment of withholding tax levied on dividends paid to the applicants in the main proceedings by companies established in Denmark between 2000 and 2009, and the compatibility with EU law of national legislation under which only UCITS resident in Denmark that satisfy the conditions laid down in Article 16 C of the ligningslov have the possibility of qualifying for exemption from such tax.

35 The national legislation at issue in the main proceedings therefore concerns the tax treatment of dividends received by UCITS.

36 As a result, it must be held that the situation at issue in the main proceedings falls within the scope of the free movement of capital.

37 Furthermore, even if the legislation at issue in the main proceedings has the effect of

prohibiting, impeding or rendering less attractive the activities of a UCITS established in a Member State other than the Kingdom of Denmark where it lawfully provides similar services, such effects are the unavoidable consequence of the tax treatment of the dividends paid to that UCITS which is not resident in Denmark and do not justify an independent examination in the light of the freedom to provide services (see, to that effect, judgment of 17 September 2009, *Glaxo Wellcome*, C?182/08, EU:C:2009:559, paragraph 51 and the case-law cited). Indeed, that freedom is secondary here in relation to the free movement of capital and may be considered together with it (judgment of 26 May 2016, *NN (L) International*, C?48/15, EU:C:2016:356, paragraph 41).

38 Moreover, it is clear from the information provided by the referring court that the investments of the applicants in the main proceedings in Denmark are portfolio investments and have never exceeded 10% of capital of a company established in Denmark, and it is common ground that the freedom of establishment is not the subject of the question referred.

39 It is appropriate, therefore, to answer the question referred in the light of Article 63 TFEU.

Whether there is a restriction on the free movement of capital

40 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 May 2012, *Santander Asset Management SGIIC and Others*, C?338/11 to C?347/11, EU:C:2012:286, paragraph 15 and the case-law cited).

41 In the present case, under the legislation at issue in the main proceedings, UCITS resident in Denmark and those which are resident in another Member State are treated differently as regards the dividends distributed to them by companies resident in Denmark.

42 The dividends distributed by companies resident in Denmark to non-resident UCITS are subject to withholding tax. By contrast, UCITS resident in Denmark may be eligible for an exemption from withholding tax on those dividends, provided that they satisfy the conditions set out in Article 16 C of the ligningslov.

43 By levying a withholding tax on the dividends paid to non-resident UCITS and giving only resident UCITS the possibility of obtaining exemption from that tax, the national legislation at issue in the main proceedings results in the dividends paid to non-residents being treated disadvantageously.

44 Such disadvantageous treatment may discourage, on the one hand, non-resident UCITS from investing in Danish companies and, on the other hand, investors resident in Denmark from acquiring shares in non-resident UCITS (judgment of 10 May 2012, *Santander Asset Management SGIIC and Others*, C?338/11 to C?347/11, EU:C:2012:286, paragraph 17).

45 Therefore, the national legislation at issue in the main proceedings constitutes a restriction on the free movement of capital, prohibited in principle by Article 63 TFEU.

Whether there is justification

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

47 In so far as that provision is a derogation from the fundamental principle of the free

movement of capital, it must be interpreted strictly. Accordingly, it cannot be interpreted as meaning that all tax legislation which draws a distinction between taxpayers on the basis of their place of residence or 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).

48 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. According to the Court's case-law, for national tax legislation such as that at issue in the main proceedings to be capable of being regarded as compatible with the provisions of the Treaty concerning the free movement of capital, the difference in treatment must concern situations that are not objectively comparable or must 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).

49 Consequently, it is appropriate to examine whether giving only UCITS resident in Denmark the possibility of obtaining an exemption from withholding tax is justified by an objective difference between the situation of UCITS resident in Denmark and non-resident UCITS.

50 In that regard, it is clear from the Court's case-law that the comparability of a cross-border situation with an internal one must be examined having regard to the aim pursued by the national provisions at issue as well as their purpose and content (judgment of 2 June 2016, *Pensioenfonds Metaal en Techniek*, C?252/14, EU:C:2016:402, paragraph 48 and the case-law cited).

51 Moreover, only the relevant distinguishing criteria established by the legislation in question must be taken into account in determining whether the difference in treatment resulting from that legislation reflects an objectively different situation (judgments of 10 May 2012 in *Santander Asset Management SGIIC and Others*, C?338/11 to C?347/11, EU:C:2012:286, paragraph 28, and of 2 June 2016, *Pensioenfonds Metaal en Techniek*, C?252/14, EU:C:2016:402, paragraph 49).

52 As is clear from the Danish Government's observations, the aim of the legislation at issue in the main proceedings is, first, to ensure equality of the tax burden on private individuals investing in companies established in Denmark through a UCITS and of that on private individuals investing directly in companies established in Denmark. That legislation thus prevents economic double taxation which would occur if the dividends were taxed at the level of the UCITS concerned and at the level of its members. Second, the legislation seeks to ensure that the dividends distributed by companies established in Denmark do not elude the Kingdom of Denmark's power to impose taxes on account of the exemption they enjoy at the level of UCITS, and are actually taxed once.

53 As concerns the first aim invoked by the Danish Government, it is clear from the Court's case-law that, in relation to measures laid down by a Member State in order to prevent or mitigate the imposition of a series of charges to tax on, or the economic double taxation of, income distributed by a resident company, resident companies receiving income are not necessarily in a situation which is comparable to that of companies receiving income which are resident in another Member State (judgment of 25 October 2012, *Commission* v *Belgium*, C?387/11, EU:C:2012:670, paragraph 48 and the case-law cited).

54 However, as soon as a Member State, either unilaterally or by way of a convention, subjects not only resident companies but also non-resident companies to tax on the income which they

receive from a resident company, the situation of those non-resident companies becomes comparable to that of resident companies (see, to that effect, judgment of 25 October 2012, *Commission* v *Belgium*, C?387/11, EU:C:2012:670, paragraph 49 and the case-law cited).

55 It is solely because of the exercise by that State of its power of taxation that, irrespective of any taxation in another Member State, a risk of a series of charges to tax or economic double taxation may arise. In such a case, in order for non-resident companies receiving dividends not to be subject to a restriction on the free movement of capital prohibited in principle by Article 63 TFEU, the State in which the company making the distribution is resident must ensure that, under the procedures laid down by its national law in order to prevent or mitigate a series of charges to tax or economic double taxation, non-resident companies are subject to the same treatment as resident companies (see, to that effect, judgment of 25 October 2012, *Commission* v *Belgium*, C?387/11, EU:C:2012:670, paragraph 50 and the case-law cited).

56 As the Kingdom of Denmark chose to exercise its powers of taxation on the income received by non-resident UCITS, the latter are consequently in a situation comparable to that of UCITS resident in Denmark as regards the risk of economic double taxation of dividends paid by companies resident in Denmark (judgment of 20 October 2011, *Commission* v *Germany*, C?284/09, EU:C:2011:670, paragraph 58, and of 10 May 2012, *Santander Asset Management SGIIC and Others*, C?338/11 to C?347/11, EU:C:2012:286, paragraph 42).

57 The second aim put forward by the Danish Government consists, in essence, in the wish not to forego all taxation of dividends distributed by companies resident in Denmark, but to defer their taxation to the level of the UCITS' members. That aim is given effect by providing that, in order to have Article 16 C fund status — and consequently exemption from withholding tax — a UCITS resident in Denmark must deduct withholding tax, chargeable to its members, from the minimum distribution that it has actually made to them or, since the amendments made in 2005, from the minimum distribution calculated in accordance with Article 16 C of the ligningslov.

58 By contrast, the Kingdom of Denmark cannot subject a non-resident UCITS to such an obligation to deduct withholding tax, for the benefit of that Member State, from the dividends that it distributes. Such a UCITS is covered by the Kingdom of Denmark's taxation powers solely in respect of the dividends that it receives from sources in Denmark and not, in principle, in respect of the dividends that it itself distributes.

59 However, taking into account the aim, the subject and the content of the legislation at issue in the main proceedings, that distinction, which indeed reflects the difference between an undertaking resident in Denmark and a non-resident undertaking, should not be considered decisive.

60 Although the aim of the legislation at issue in the main proceedings is to move the level of taxation from the investment vehicle to the shareholder of that vehicle, it is, in principle, the substantive conditions of the power to tax unit-holders' income that must be considered decisive, and not the method of taxation used.

61 A non-resident UCITS may have members with tax residence in Denmark on whose income that Member State may exercise its power of taxation. In that respect, a non-resident UCITS is in a situation that is objectively comparable to a UCITS resident in Denmark.

62 It is true that the Kingdom of Denmark cannot tax the non-resident members on the dividends distributed by non-resident UCITS. However, the absence of such a possibility is consistent with the logic of moving the level of taxation from the vehicle to the shareholder.

63 In those circumstances, it must be held that giving only resident UCITS the possibility of obtaining an exemption from withholding tax is not justified by an objective difference in situation between those UCITS and UCITS resident in a Member State other than the Kingdom of Denmark.

64 Such a restriction is permissible only if it is justified by overriding reasons in the public interest, if it is appropriate for ensuring the attainment of the objective that it pursues and does not go beyond what is necessary in order to attain it (judgment of 24 November 2016, *SECIL*, C?464/14, EU:C:2016:896, paragraph 56).

65 The Governments that have submitted observations to the Court consider that the restriction on the free movement of capital at issue in the main proceedings is justified by the need to preserve the coherence of the Danish tax system. The Danish and Netherlands Governments consider, in addition, that the restriction is justified by the need to ensure the balanced allocation of the power to impose taxes between the Member States.

66 It is necessary to examine, in the first place, whether the fact that a Member State gives only resident UCITS the possibility of obtaining an exemption from withholding tax on dividends distributed by resident companies can be justified by the need to preserve the balanced allocation of the power to impose taxes between the Member States.

67 The Danish and Netherlands Governments claim, in that regard, that requiring the Kingdom of Denmark to grant an exemption from withholding tax on dividends distributed to non-resident UCITS, when it is unable to levy tax on the distribution of dividends to members, would in effect force the State that is the source of those dividends not to exercise its power of taxation in relation to income generated on its territory.

68 According to those Governments, collecting taxes on dividends and excluding non-resident UCITS from the exemption at issue in the main proceedings ensures a balanced allocation of the power to impose taxes and does not go beyond what is necessary in view of the fact that the Kingdom of Denmark does not collect taxes more than once on dividends distributed to non-resident UCITS and that the transfer of the tax to the distribution made by those undertakings is not possible.

69 In this connection, it is true that the preservation of the allocation of the power to impose taxes between Member States may constitute an overriding reason in the public interest justifying a restriction on the exercise of freedom of movement within the European Union (judgment of 12 December 2013, *Imfeld and Garcet*, C?303/12, EU:C:2013:822, paragraph 68 and the case-law cited).

70 Such justification may be accepted, in particular, where the system in question is designed to prevent conduct capable of jeopardising the right of a Member State to exercise its powers of taxation in relation to activities carried out in its territory (judgment of 10 May 2012, *Santander Asset Management SGIIC and Others*, C?338/11 to C?347/11, EU:C:2012:286, paragraph 47 and the case-law cited).

71 However, the Court has already held that, where a Member State has chosen, as in the situation at issue in the main proceedings, not to tax resident UCITS in receipt of nationally-sourced dividends, it cannot rely on the argument that there is a need to ensure a balanced allocation between the Member States of the power to tax in order to justify the taxation of non-resident UCITS in receipt of such income (judgment of 10 May 2012, *Santander Asset Management SGIIC and Others*, C?338/11 to C?347/11, EU:C:2012:286, paragraph 48 and the case-law cited).

72 Moreover, dividends distributed by companies resident in Denmark to non-resident UCITS have already been subject to taxation in the Kingdom of Denmark in respect of the distributing company's profits.

73 The fact that the taxation of dividends is deferred to the level of resident UCITS' shareholders cannot justify the restriction at issue in the main proceedings.

74 As has been noted in paragraph 61 of the present judgment, the Kingdom of Denmark has power to levy tax on the resident members of non-resident UCITS.

75 Moreover, the fact that a Member State levies withholding tax on dividends distributed to non-resident UCITS, because it is impossible to levy tax on all the distributions made by those UCITS, in reality does not prevent conduct capable of jeopardising the right of a Member State to exercise its powers of taxation in relation to activities carried out in its territory, but, rather, compensates for the lack of a power of taxation resulting from the balanced allocation of such powers between Member States.

76 The need to preserve such allocation cannot, therefore, be relied on in order to justify the restriction on the free movement of capital at issue in the main proceedings.

77 In the second place, it should be ascertained whether, as the Governments that have submitted observations to the Court claim, the restriction resulting from the application of the tax legislation at issue in the main proceedings can be justified by the need to safeguard the coherence of the Danish tax system.

78 According to those Governments, there is a direct link between the exemption from withholding tax as regards dividends paid to resident UCITS and the obligation of those UCITS to deduct withholding tax on dividends that they distribute to their members.

79 In that regard, it must be recalled that the Court has previously held that the need to safeguard the coherence of a tax system may justify rules that are liable to restrict fundamental freedoms (judgment of 10 May 2012, *Santander Asset Management SGIIC and Others*, C?338/11 to C?347/11, EU:C:2012:286, paragraph 50 and the case-law cited).

80 However, for an argument based on such a justification to succeed, according to settled case-law, a direct link must be established between the tax advantage concerned and the compensating of that advantage by a particular tax levy, with the direct nature of that link falling to be examined in the light of the objective pursued by the rules in question (judgment of 10 May 2012, *Santander Asset Management SGIIC and Others*, C?338/11 to C?347/11, EU:C:2012:286, paragraph 51 and the case-law cited).

81 In that regard, as has been noted in paragraphs 29 to 31 of the present judgment, a UCITS may be exempted from withholding tax on dividends distributed by a company resident in Denmark, provided that (i) it is itself resident in Denmark and also (ii) it makes a minimum

distribution or calculates a minimum distribution, from which tax is deducted at source.

82 As the Advocate General has noted in point 72 of his Opinion, the national legislation at issue in the main proceedings makes the exemption from withholding tax for UCITS resident in Denmark conditional on an actual or notional minimum distribution to their members, who are liable to withholding tax, deducted on their behalf by those undertakings. The advantage thereby granted to UCITS resident in Denmark, in the form of an exemption from withholding tax, is, in principle, offset by the taxation of the dividends, redistributed by those undertakings, in the hands of their members.

83 It must also be determined whether or not giving only UCITS resident in Denmark the possibility of obtaining the exemption from withholding tax goes beyond what is necessary in order to safeguard the coherence of the tax system at issue in the main proceedings.

84 As the Advocate General has observed in point 80 of his Opinion, the internal coherence of the tax system at issue in the main proceedings could be maintained if UCITS resident in a Member State other than the Kingdom of Denmark, which satisfy the conditions of Article 16 C of the ligningslov, were eligible for exemption from withholding tax, provided that the Danish tax authorities ensure, with the full cooperation of such UCITS, that the latter pay a tax that is equivalent to the tax which Danish Article 16 C funds are required to retain, as a withholding tax, on the minimum distribution calculated in accordance with that provision. Allowing such UCITS to enjoy that exemption, under those conditions, would be less restrictive than the current system.

85 Furthermore, refusal to grant UCITS which are resident in a Member State other than the Kingdom of Denmark and which satisfy the conditions of Article 16 C of the ligningslov exemption from withholding tax leads to a series of charges to tax on the dividends paid to their members resident in Denmark, which runs precisely counter to the objective pursued by the national legislation.

86 Consequently, it must be held that the restriction resulting from the application of the tax legislation at issue in the main proceedings cannot be justified by the need to safeguard the coherence of the tax system.

87 In the light of the foregoing, the answer to the question referred is that Article 63 TFEU must be interpreted as precluding legislation of a Member State, such as that at issue in the main proceedings, under which the dividends distributed by a company resident in that Member State to a non-resident UCITS are subject to withholding tax, while dividends distributed to a UCITS resident in that same Member State are exempt from such tax, provided that the undertaking makes a minimum distribution to its members, or technically calculates a minimum distribution, and withholds on that actual or notional distribution the tax payable by its members.

Costs

88 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:

Article 63 TFEU must be interpreted as precluding legislation of a Member State, such as that at issue in the main proceedings, under which the dividends distributed by a company resident in that Member State to a non-resident undertaking for collective investment in transferable securities (UCITS) are subject to withholding tax, while dividends distributed to a UCITS resident in that same Member State are exempt from such tax, provided that that undertaking makes a minimum distribution to its members, or technically calculates a

minimum distribution, and withholds on that actual or notional distribution the tax payable by its members.

[Signatures]

* Language of the case: Danish.