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Provisional text

JUDGMENT OF THE COURT (Fourth Chamber)

16 June 2022 (*)

(Reference for a preliminary ruling – Free movement of capital – Dividends from 'free-float' shares – Reimbursement of tax on income from capital paid by a non-resident company – Conditions – Free movement of capital – Principle of proportionality)

In Case C?572/20,

REQUEST for a preliminary ruling under Article 267 TFEU from the Finanzgericht Köln (Finance Court, Cologne, Germany), made by decision of 20 May 2020, received at the Court on 3 November 2020, in the proceedings

ACC Silicones Ltd

v

Bundeszentralamt für Steuern

THE COURT (Fourth Chamber),

composed of C. Lycourgos, President of the Chamber, S. Rodin, J.C. Bonichot (Rapporteur), L.S. Rossi and O. Spineanu-Matei, Judges,

Advocate General: A.M. Collins,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– ACC Silicones Ltd., by B. Pignot, Rechtsanwalt and A. Linn, Steuerberater,

– the German Government, by J. Möller and R. Kanitz, acting as Agents,

– the European Commission, by W. Roels and V. Uher, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 20 January 2022,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 63 TFEU.

2 The request has been made in proceedings between ACC Silicones Ltd and the Bundeszentralamt für Steuern (Federal Tax Office, Germany) concerning the reimbursement of tax on income from capital withheld at source, for the years 2006 to 2008, on dividends distributed to

that company by Ambratec GmbH, a company established in Germany.

Legal context

European Union law

3 In accordance with Article 3(1)(a) 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), as amended by Council Directive 2003/123/EC of 22 December 2003 (OJ 2004 L 7, p. 41) ('Directive 90/435'), that directive applied to parent companies holding a minimum holding in the capital of their subsidiaries of 20%, that minimum holding percentage having been reduced to 15% from 1 January 2007 and to 10% from 1 January 2009. Directive 90/435 was repealed by Council Directive 2011/96/EU of 30 November 2011 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States (OJ 2011 L 345, p. 8).

German law

4 Point 1 of Paragraph 20(1) of the Einkommensteuergesetz (Law on income tax), in the version applicable to the dispute in the main proceedings ('the EStG'), provides that income from capital includes shares of profits (dividends).

5 Point 1 of the first sentence of Paragraph 43(1) of the EStG provides that, in the case, inter alia, of income from capital within the meaning of point 1 of Paragraph 20(1) of the EStG, 'income tax is levied by deduction from the income from capital (tax on income from capital)'.

6 Under the first sentence of Article 8b(1) of the Körperschaftsteuergesetz (Law on corporation tax), in the version applicable to the dispute in the main proceedings ('the KStG'), relating to shareholdings in other companies and associations, earnings received within the meaning, inter alia, of point 1 of Paragraph 20(1), of the EStG are not to be taken into account for the purpose of determining income and are therefore not subject to corporation tax.

7 As regards the taxation of dividends distributed to a company whose registered office is in Germany, it is apparent from the combined provisions of the first sentence of Paragraph 31(1) of the KStG and point 2 of Paragraph 36(2) of the EStG that the tax on income from capital which has been levied by way of a withholding tax is set off in full against the corporation tax payable by that company and, where appropriate, may be reimbursed to it. The set-off (and reimbursement, if any) of the tax presupposes that the tax has been withheld and paid, which must be proved by submission of an administrative certificate, in accordance with Paragraph 45a(2) or (3) of the EStG.

8 As regards the taxation of dividends distributed to a company whose registered office is not established in Germany, Paragraph 32(5) of the KStG is worded as follows:

'(5) Where the corporation tax owed by the creditor on income from capital within the meaning of point 1 of Paragraph 20(1) of [the EStG] has been definitively disposed of in accordance with subparagraph 1 [hereof], the tax on income from capital which has been withheld and paid shall, on application, be reimbursed to the creditor of the income from capital in accordance with point 2 of Paragraph 36(2) of [the EStG], where

1. the creditor of the income from capital is a company subject to limited tax liability as provided for in Paragraph 2(1), which

(a) is also a company within the meaning of Article 54 [TFEU] or Article 34 of [the Agreement on the European Economic Area of 2 May 1992 (OJ 1994 L 1, p. 3)],

(b) has its registered office and centre of effective management within the territory of a Member State of the European Union or a State to which the [EEA Agreement] is applicable,

(c) is subject, in the State of its centre of effective management, to non-optional, unlimited tax liability comparable to that referred to in Paragraph 1, and is not exempt therefrom, and

2. the creditor has a direct holding in the initial capital or share capital of the debtor of the income from capital and does not meet the minimum participation threshold laid down in Paragraph 43b(2) of [the EStG].

Sentence 1 shall apply only in so far as

1. reimbursement of the tax on income from capital in question is not available under any other provision,

2. the income from capital would not be taken into account in the calculation of income, in accordance with Paragraph 8b(1),

3. the income from capital is not attributed, under provisions in another country, to any person who would not be entitled to reimbursement pursuant to this subparagraph if he or she were to receive the income from capital directly,

4. a right to full or partial reimbursement of the tax on income from capital would not be excluded if Paragraph 50d(3) of [the EStG] were applied mutatis mutandis, and

5. the creditor or a shareholder having a direct or indirect equity holding in the creditor cannot offset the tax on income from capital or deduct it as an operating cost or as work-related outgoings; the possibility of carrying forward a set-off shall be treated as a set-off.

The creditor of the income from capital shall provide proof of compliance with the conditions of reimbursement. In particular, he or she shall prove, by way of a certificate from the tax authorities of his or her country of residence, that he or she is regarded as being resident for tax purposes in that country, is subject to unlimited corporation tax liability there, is not exempt from corporation tax and is the actual recipient of the income from capital. The certificate from the foreign tax administration shall show that the German tax on income from capital cannot be offset, deducted or carried forward and that no set-off, deduction or carry-forward has actually taken place either. The tax on income from capital shall be reimbursed in relation to all income from capital received in a calendar year within the meaning of the first sentence on the basis of an exemption notice as provided for in the third sentence of Paragraph 155(1) of the Abgabenordnung [(German Tax Code)].'

The double taxation convention

9 The Convention of 26 November 1964 between the Federal Republic of Germany and the United Kingdom of Great Britain and Northern Ireland for the avoidance of double taxation and the prevention of fiscal evasion, as amended by the protocol of 23 March 1970 (BGBl. 1966 II, p. 359; BGBl. 1967 II, p. 828, BGBl. 1971 II, p. 46; 'the double taxation convention') provides in Article VI(1):

'(1) Dividends paid by a company resident in one of the territories to a resident of the other territory may also be taxed in the former territory. Tax shall not, however, be charged in that former territory at a rate in excess of 15 per cent on the gross amount of such dividends provided that those dividends either are subject to tax in the other territory or, being dividends paid by a company which is resident in the United Kingdom, are exempt from Federal Republic tax under the provisions of sub-paragraph (a) of paragraph (2) of Article XVIII.'

10 Article XVIII(1)(a) of that convention is worded as follows:

'(1) Subject to the provisions of the law of the United Kingdom regarding the allowance as a credit against United Kingdom tax of tax payable in a territory outside the United Kingdom (which shall not affect the general principle hereof):

(a) Federal Republic [of Germany] tax payable under the laws of the Federal Republic [of Germany] and in accordance with this Convention, whether directly or by deduction, on profits, income or chargeable gains from sources within the Federal Republic [of Germany] (excluding in the case of a dividend, tax payable in respect of the profits out of which the dividend is paid) shall be allowed as a credit against any United Kingdom tax computed by reference to the same profits, income or chargeable gains by reference to which the Federal Republic [of Germany] tax is computed.'

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

11 ACC Silicones Ltd is a company established in the United Kingdom which held, between 2006 and 2008, 5.26% of the share capital in Ambratec, a company established in Germany. ACC Silicones was itself 100% owned by another company, established in the United Kingdom and listed on the stock exchange.

12 Between 2006 and 2008, Ambratec distributed dividends to ACC Silicones, from which tax at source was levied on income from capital at the rate of 20%, plus the solidarity levy at the rate of 5.5%.

13 On 29 December 2009, ACC Silicones applied for reimbursement of the tax thus paid. It requested, first, to limit the rate of withholding tax to 15% on the basis, inter alia, of Article VI(1) of the double taxation convention. Relying on the fundamental freedoms of the internal market, and in particular on the free movement of capital, it requested, secondly, reimbursement of the balance of the sums paid.

14 By decision of 7 October 2010, the Federal Tax Office granted the first part of that claim and reimbursed to ACC Silicones the withholding tax in excess of the rate of 15% provided for in the double taxation convention. By decisions of 8 June 2015, however, it refused to reimburse to that company the balance of the tax paid, on the ground that the conditions laid down in Paragraph 32(5) of the KStG, which are intended to take account of the judgment of 20 October 2011, *Commission* v *Germany* (C?284/09, EU:C:2011:670), were not satisfied.

15 After unsuccessfully seeking reimbursement of the tax paid, ACC Silicones brought an action against the decisions of 8 June 2015 before the referring court, the Finanzgericht Köln (Finance Court, Cologne, Germany), claiming that it fulfilled the conditions for that repayment and, in particular, that it had provided the evidence required by Paragraph 32(5) of the KStG.

16 The referring court takes the view that ACC Silicones satisfies the conditions laid down by national legislation, with the exception of that laid down in point 5 of the second sentence of Paragraph 32(5) of the KStG, which provides that reimbursement is to be refused if the tax on income from capital withheld at source may be set off by the creditor or the direct or indirect

shareholder of the creditor, or if it may be deducted as an operating cost or work-related outgoings, the mere possibility of carrying forward the set-off being treated as a set-off. It follows from that provision that reimbursement may be granted only where the disadvantage to non-resident dividend recipients as compared with resident dividend recipients cannot be equalised by set-off, deduction from the basis of assessment or carry-forward of the set-off in the other country.

17 The referring court states that, under the fifth sentence of Paragraph 32(5) of the KStG, ACC Silicones must prove that that condition is met by submitting a certificate from the foreign tax authorities establishing that the German tax on income from capital cannot be set off, deducted or carried forward and that no set-off, deduction or carry-forward has actually been made.

18 According to the referring court, it is impossible to ensure that that condition is met in the present case. The treatment of tax on income from capital withheld at source by the Federal Republic of Germany in respect of the company established in the United Kingdom quoted on the stock exchange which held 100% of ACC Silicones' capital in the years 2006 to 2008 is not materially verifiable, with the result that ACC Silicones' claim would be bound to fail.

19 In those circumstances, the referring court has doubts as to whether the requirements laid down in point 5 of the second sentence and in the fifth sentence of Paragraph 32(5) of the KStG are compatible with the free movement of capital.

20 It asks, in the first place, whether the fact that the reimbursement of tax on income from capital to non-resident companies receiving dividends from shareholdings below the thresholds laid down by Directive 90/435 ('dividends from "free-float" shares') is subject to stricter conditions than the reimbursement of that tax to resident companies is contrary to the free movement of capital. The referring court points out that, under Paragraph 32(5) of the KStG, non-resident companies may not be reimbursed from the tax withheld at source on such dividends received from German companies unless that tax cannot be offset or carried forward as a set-off in their favour or that of their direct or indirect shareholders, or deducted as an operating cost or work-related outgoings, which it is for them to prove by means of a certificate from the foreign tax authorities. However, such a high standard is not required in the case of resident companies. More specifically, the referring court asks whether the restriction on capital movements introduced, in its view, by the German legislation is justified, in particular in the light of the criteria laid down by the Court in its judgment of 8 November 2007, *Amurta* (C?379/05, EU:C:2007:655).

21 In the second place, in the event that that is the case, the referring court asks whether the principle of proportionality and the principle of effectiveness preclude a national provision requiring non-resident companies, in order to prove the fact referred to in the preceding paragraph above, to produce a certificate from the foreign tax authorities to the effect that the tax on income from capital withheld at source cannot be set off, or its set off carried forward in favour of such companies or in that of their direct or indirect shareholders, or cannot be deducted, and that tax has not been set off, carried forward or deducted in practice either.

22 In those circumstances the Finanzgericht Köln (Finance Court, Cologne) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Does Article 56 EC (now Article 63 TFEU) preclude a national tax provision, such as that at issue in the main proceedings, which, for the purposes of the reimbursement of tax on income from capital, requires a company resident abroad which receives dividends from equity holdings and does not meet the minimum equity holding threshold laid down in Article 3(1)(a) of [Directive 90/435] to prove, by means of a certificate from the foreign tax administration, not only that neither that company nor a shareholder with a direct or indirect equity holding in that company can offset the tax on income from capital or deduct it as an operating cost or as work-related outgoings, but also that no offset, deduction or carry-forward has actually taken place either, in the case where such proof is not required, for the purposes of the reimbursement of tax on income from capital, from a company with the same level of equity holding which is resident in national territory?

(2) In the event that the answer to the first question is in the negative: Do the principles of proportionality and effectiveness preclude the requirement of a certificate as referred to in the first question in the case where it is effectively impossible for a company in receipt of dividends from so-called "free-float" shares which is resident abroad to provide such a certificate?'

Consideration of the questions referred

Admissibility

23 The German Government observes that the dispute in the main proceedings concerns only the tax treatment of dividends from 'free-float' shares paid to a company established in another Member State of the European Union. In those circumstances, it considers that the questions referred are inadmissible in so far as they concern the reimbursement of withholding tax on income from capital levied on dividends paid to companies in non-Member States.

24 According to settled case-law, requests to the Court for a preliminary ruling enjoy a presumption of relevance. The Court may refuse to rule on a question referred by a national court for a preliminary ruling only where it is quite obvious that the interpretation of EU law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (judgment of 24 November 2020, *Openbaar Ministerie (Forgery of documents)*, C?510/19, EU:C:2020:953, paragraph 26 and the case-law cited).

25 In the present case, according to the referring court, if the national legislation at issue applies to companies with their registered office or centre of effective management in the territory of a Member State of the European Union or the European Economic Area, it should also apply to companies with their registered office or centre of effective management in third countries.

26 It should be noted in that regard that the compatibility with EU law of the detailed rules for the reimbursement of withholding tax on dividends distributed to companies established in third countries should give rise to a specific assessment in so far as, although Article 63(1) TFEU generally prohibits restrictions on the movement of capital, including between Member States and third countries, the case-law concerning restrictions on the free movement of capital within the European Union cannot be transposed in its entirety to movements of capital between Member States and third countries, since such movements take place in a different legal context (see, to that effect, judgment of 26 February 2019, *X (Controlled companies established in third countries)*, C?135/17, EU:C:2019:136, paragraph 90 and the case-law cited).

27 However, it is apparent from the request for a preliminary ruling that the dispute in the main proceedings concerns only the reimbursement of withholding tax on income from capital paid on German dividends paid to a non-resident company established in the United Kingdom, when that Member State was a Member State of the European Union.

28 It follows that, as the Advocate General observed in point 30 of his Opinion, the question as to whether, in the case of dividends distributed to companies established in a third country, the conditions laid down by the German legislation at issue for obtaining reimbursement of withholding tax on income from capital are contrary to the EU rules on free movement of capital bears no relation to the subject matter of the main proceedings.

29 The request for a preliminary ruling is therefore, to that extent, inadmissible.

The first question

30 By its first question, the referring court asks, in essence, whether Article 63 TFEU must be interpreted as precluding a provision of a Member State's tax legislation which makes the reimbursement of tax on income from capital paid on dividends from 'free-float' shares received by a company established in another Member State subject to proof that that tax cannot be set off or its set-off cannot be carried forward in favour of that company, or in favour of its direct or indirect shareholders, nor deducted by that company as work-related outgoings or an operating cost, whereas such a condition is not provided for as regards reimbursement of tax paid on income from capital by a resident company receiving the same type of income.

31 According to the settled case-law of the Court, measures, inter alia, which are such as to discourage non-residents from making investments in a Member State or to discourage that Member State's residents from doing so in other States constitute restrictions on the free movement of capital (judgment of 22 November 2018, *Sofina and Others*, C?575/17, EU:C:2018:943, paragraph 23 and the case-law cited).

32 In respect of shareholdings which are below the thresholds fixed by Directive 90/435, it is for the Member States to determine whether, and to what extent, economic double taxation of or a series of charges to tax on distributed profits is to be avoided and, for that purpose, to establish, either unilaterally or through double taxation conventions concluded with other Member States, procedures intended to prevent or mitigate such economic double taxation or series of charges to tax, without nevertheless that authorising them to impose measures contrary to the freedoms of movement (see, to that effect, judgments of 12 December 2006, *Test Claimants in Class IV of the ACT Group Litigation*, C?374/04, EU:C:2006:773, paragraph 54, and of 8 November 2007, *Amurta*, C?379/05, EU:C:2007:655, paragraph 24).

33 As the Court has already held in its judgment of 20 October 2011, *Commission* v *Germany* (C?284/09, EU:C:2011:670, paragraphs 72 and 73), national legislation which provides, with regard to holdings which do not fall within the scope of Directive 90/435, for reimbursement of the withholding tax levied on dividends paid to resident companies, whereas no possibility of reimbursement is provided for in respect of the withholding tax levied on dividends paid to companies situated in other Member States, without that difference in treatment being neutralised by means of a convention, establishes a restriction on the free movement of capital.

34 The same is true of national legislation which extends such a possibility of reimbursement to withholding tax levied on dividends paid to non-resident companies established in other Member States, but subjects it to additional conditions as against those laid down for the reimbursement of the withholding tax levied on dividends paid to resident companies, without that difference in treatment being neutralised by means of a convention. Such legislation has the effect of making it more difficult for non-resident companies to exercise the right to reimbursement than for resident companies, and therefore of subjecting dividends paid to them to less favourable tax treatment than dividends paid to resident companies.

35 It is apparent from the request for a preliminary ruling that, under the national legislation at issue, the conditions under which the tax on income from capital withheld at source on dividends from ‘free-float’ shares may be reimbursed vary depending on whether the recipient of those dividends is a resident company or a non-resident company.

36 According to the evidence submitted to the Court, in the case of a resident company, the withholding tax is set off in full against the corporation tax payable by the latter and the remainder is, where appropriate, reimbursed to it. By contrast, in the case of a non-resident company, the reimbursement of tax on income from capital is subject to the condition that that tax cannot be set off or its set-off be carried forward in favour of that company or in favour of its direct or indirect shareholders, nor can it be deducted as an operating cost or work-related outgoings in favour of that company.

37 It should be recalled that, in accordance with Article 65(1) TFEU, such a difference in treatment is permissible only if it relates to situations which are not objectively comparable or if it is justified by an overriding reason in the public interest (see, to that effect, judgment of 30 April 2020, *Société Générale*, C?565/18, EU:C:2020:318, paragraph 24).

38 In order to establish whether discrimination exists, the comparability of a cross-border situation with an internal situation within a Member State must be examined having regard to the aim pursued by the national provisions at issue (judgment of 30 April 2020, *Société Générale*, C?565/18, EU:C:2020:318, paragraph 26 and the case-law cited), which, in the present case, as stated by the referring court, consists of preventing the double taxation of or a series of charges to tax on profits.

39 It is true that, from the point of view of measures laid down by a Member State in order to attain such an objective, resident companies receiving dividends are not necessarily in a situation which is comparable to that of non-resident companies receiving dividends which are established in another Member State (judgment of 20 October 2011, *Commission* v *Germany*, C?284/09, EU:C:2011:670, paragraph 55 and the case-law cited).

40 However, where a Member State, either unilaterally or by way of a convention, imposes a charge to tax on the income not only of resident companies but also of non-resident companies from dividends which they receive from a resident company, the situation of those non-resident companies becomes comparable to that of resident companies (judgment of 20 October 2011, *Commission* v *Germany*, C?284/09, EU:C:2011:670, paragraph 56 and the case-law cited).

41 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 is obliged to ensure that, under the procedures laid down by its national law in order to prevent or mitigate a series of liabilities to tax or economic double taxation, non-resident companies are subject to the same treatment as resident companies (judgment of 20 October 2011, *Commission* v *Germany*, C?284/09, EU:C:2011:670, paragraph 57 and the case-law cited).

42 In the present case, it is apparent from the evidence submitted to the Court that the Federal Republic of Germany chose to exercise its power of taxation over all dividends from ‘free-float’ shares, whether those dividends are paid to resident companies or to companies established in other Member States. Those two categories of company are, for that reason alone, in a comparable situation as regards the risk of economic double taxation or of a series of charges to

tax on those dividends. They must therefore be subject to equivalent treatment (see, to that effect, judgment of 20 October 2011, *Commission* v *Germany*, C?248/09, EU:C:2011:670, paragraph 58 and the case-law cited).

43 In order to demonstrate that that is the case here, the German Government refers to the double taxation convention.

44 In that regard, it must be borne in mind that, although a Member State cannot rely on an advantage granted unilaterally by another Member State in order to escape its obligations under the Treaty, the objective of ensuring equivalent treatment of dividends paid to resident and non-resident companies may be attained by means of a double taxation convention concluded with another Member State (see, to that effect, judgment of 8 November 2007, *Amurta*, C?379/05, EU:C:2007:655, paragraphs 78 and 79 and the case-law cited), provided that its application enables the effects of the difference in treatment under national legislation to be compensated for in full.

45 The difference in treatment between dividends distributed to non-resident companies and those distributed to resident companies does not disappear unless the tax withheld at source under that legislation can be set off against the tax due in the other Member State in the full amount of the difference in treatment arising under the national legislation (judgment of 17 September 2015, *Miljoen and Others*, C?10/14, C?14/14 and C?17/14, EU:C:2015:608, paragraph 79 and the case-law cited).

46 According to the information provided to the Court, under the double taxation convention, the rate of the withholding tax levied by the Federal Republic of Germany on dividends from 'free-float' shares paid to a company located in the United Kingdom is limited to 15% and that withholding tax may be allowed as a credit against British tax. However, under Article XVIII (1)(a) of that convention, that credit is limited to United Kingdom tax computed by reference to the same profits or income taken into account for the purposes of computing the German tax.

47 Such a mechanism does not seem capable of guaranteeing in all cases that the difference in treatment resulting from the national legislation will be compensated for, such compensation being possible only where the amount of United Kingdom tax calculated on the dividends distributed is at least equal to the amount of the withholding tax levied by the Federal Republic of Germany (see, to that effect, judgments of 20 October 2011, *Commission* v *Germany*, C?284/09, EU:C:2011:670, paragraphs 67 and 68, and of 17 September 2015, *Miljoen and Others*, C?10/14, C?14/14 and C?17/14, EU:C:2015:608, paragraph 86).

48 Given that the withholding tax is not reimbursed, only the set-off in full of that tax against the tax payable in the Member State in which it is established by the non-resident company receiving the dividends would make it possible to eliminate the difference in treatment resulting from national legislation, without it being necessary to take into consideration any possibilities of set off at the level of the direct or indirect shareholders of that company, a point of which, moreover, account is not taken by the German legislation with regard to resident companies.

49 That difference in treatment cannot be neutralised entirely either by the deduction of withholding tax from the basis of assessment of the tax payable in the Member State in which the company receiving the dividends is established as an operating cost or work-related outgoings, or by the possibility for that company to carry forward a set-off. That possibility is always uncertain, whereas resident companies benefit from the immediate set-off and, where appropriate, reimbursement of the excess withholding tax (see, to that effect, judgment of 17 September 2015, *Miljoen and Others*, C?10/14, C?14/14 and C?17/14, EU:C:2015:608, paragraph 83, and, by analogy, judgment of 22 November 2018, *Sofina and Others*, C?575/17, EU:C:2018:943,

paragraphs 28 to 34).

50 Subject to the verifications to be carried out by the referring court, legislation such as that at issue in the main proceedings, which makes the reimbursement of withholding tax on income from capital subject to stricter conditions where the recipient of the dividends is a non-resident company than in the case of a resident company, without that difference in treatment being neutralised by means of a convention, is liable to deter companies established in other Member States from investing in companies of the Member State concerned and may also constitute an obstacle to the raising of capital by resident companies from companies established in other Member States. It therefore constitutes a restriction on the free movement of capital, prohibited in principle by Article 63(1) TFEU.

51 According to the Court’s settled case-law, such a restriction is nevertheless permissible if it is justified by an overriding reason in the public interest, is appropriate for securing the attainment of the objective pursued and does not go beyond what is necessary in order to attain it (judgments of 26 February 2019, *X (Controlled companies established in third countries)*, C?135/17, EU:C:2019:136, paragraph 70, and of 30 January 2020, *Köln-Aktienfonds Deka*, C?156/17, EU:C:2020:51, paragraph 83 and the case-law cited).

52 According to the German Government, the national legislation at issue is justified by the objective of safeguarding the balanced allocation of the power to tax between the Member States and by the need to avoid withholding tax being taken into account twice.

53 It is apparent from the case-law of the Court that safeguarding the balanced allocation between the Member States of the power to tax is one of the overriding reasons in the public interest capable of justifying a restriction on the free movement of capital, such as a national measure intended to prevent conduct liable to jeopardise the right of a Member State to exercise its powers of taxation in relation to activities carried out in its territory (see, to that effect, judgments of 10 February 2011, *Haribo Lakritzen Hans Riegel and Österreichische Salinen*, C?436/08 and C?437/08, EU:C:2011:61, paragraph 121, and of 10 April 2014, *Emerging Markets Series of DFA Investment Trust Company*, C?190/12, EU:C:2014:249, paragraph 98).

54 However, such a ground cannot justify the taxation of non-resident companies receiving dividends by a Member State which has chosen not to tax resident companies in respect of that type of income (see, to that effect, judgment of 20 October 2011, *Commission* v *Germany*, C?284/09, EU:C:2011:670, paragraph 78 and the case-law cited).

55 In the present case, although the Federal Republic of Germany chose to exercise its powers of taxation in respect of all dividends from ‘free-float’ shares, it also chose, according to the evidence submitted to the Court, to neutralise in full the burden of the withholding tax on those dividends when they are paid to resident companies. In those circumstances, the safeguarding of the balanced allocation between the Member States of the power to tax cannot justify the taxation of companies established in other Member States in respect of that type of income.

56 As regards the justification relating to the need to avoid withholding tax being taken into account twice in the case of companies receiving dividends established in other Member States or their direct or indirect shareholders, it should be noted that the obligation imposed on companies receiving dividends established in other Member States to prove that the withholding tax has not been set off or its set-off carried forward in their favour or in that of their direct or indirect shareholders, and has not been deducted either as work-related outgoings or an operating cost, has no equivalent as regards resident companies. However, there is nothing which precludes those companies from also being held by non-resident shareholders subject to national legislation which allows the withholding tax levied on the company receiving the dividends to be taken into

account at the shareholders’ level. The possibility of the withholding tax being taken into account twice cannot therefore be ruled out as regards resident companies, since the fact that the German legislation authorises withholding tax to be taken into account only at the level of the company receiving the dividends is irrelevant in that regard.

57 It should be borne in mind that, in order to be regarded as appropriate for securing the attainment of the objective pursued, a measure must reflect a concern to attain that objective in a consistent and systematic manner (see, inter alia, to that effect, in relation to freedom of establishment, judgment of 14 November 2018, *Memoria and Dall’Antonia*, C?342/17, EU:C:2018:906, paragraph 52 and the case-law cited, and, in relation to the freedom to provide services, judgment of 3 February 2021, *Fussl Modestraße Mayr*, C?555/19, EU:C:2021:89, paragraph 59 and the case-law cited).

58 As the Advocate General in essence observed, in point 69 of his Opinion, that is not the case, in the light of the objective of avoiding the tax paid being taken into account twice, as regards national legislation which makes the reimbursement of withholding tax on dividends from ‘free-float’ shares subject to stricter conditions where the companies receiving dividends are established in other Member States than in the case of resident companies, while there is nothing to preclude withholding tax being taken into account twice so far as concerns resident companies. Such legislation therefore cannot, on any view, be justified by the need to prevent the tax withheld at source being taken into account twice.

59 In the light of all the foregoing considerations, the answer to be given to the referring court is that Article 63 TFEU must be interpreted as precluding a provision of a Member State’s tax legislation which makes the reimbursement of tax on income from capital paid on dividends from ‘free-float’ shares received by a company established in another Member State subject to proof that that tax cannot be set off or its set-off carried forward in favour of that company, or in favour of its direct or indirect shareholders, nor deducted by that company as work-related outgoings or an operating cost, whereas such a condition is not provided for as regards reimbursement of tax on income from capital paid by a resident company receiving the same type of income.

The second question

60 In view of the answer given to the first question, there is no need to examine the second question.

Costs

61 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 (Fourth Chamber) hereby rules:

Article 63 TFEU must be interpreted as precluding a provision of a Member State’s tax legislation which makes the reimbursement of tax on income from capital paid on dividends from shareholdings below the thresholds laid down by 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, as amended by Council Directive 2003/123/EC of 22 December 2003, received by a company established in another Member State subject to proof that that tax cannot be set off or its set-off carried forward in favour of that company, or in favour of its direct or indirect shareholders, nor deducted by that company as work-related outgoings or an operating cost, whereas such a condition is not provided for as regards reimbursement of tax on income from capital paid by a resident

company receiving the same type of income.

[Signatures]

*	Language of the case: German.