Reports of Cases

OPINION OF ADVOCATE GENERAL
PITRUZZELLA
delivered on 5 September 2019[1]

Case C-156/17

Köln-Aktienfonds Deka
v
Staatssecretaris van Financiën,
Interveners:
Nederlandse Orde van Belastingadviseurs,
Loyens en Loeff NV

(Request for a preliminary ruling
from the Hoge Raad der Nederlanden (Supreme Court of the Netherlands))

(Reference for a preliminary ruling — Free movement of capital — Restrictions — Taxation of dividends received by undertakings for collective investment in transferable securities (UCITS) — Refusal of applications submitted by a non-resident UCITS for refund of dividend tax withheld on dividends received from resident companies — Requirements concerning UCITS shareholders — Proof of requirements — Indirect discrimination — Factual conditions specific to the national market — Obligation to redistribute dividends — Member States' power to impose taxes — Impossibility of, or excessive difficulty in, fulfilling the obligation — Legislation of the Member State where the non-resident UCITS is established)

1. By this reference for a preliminary ruling the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) asks the Court to rule on the compatibility of various aspects of the Netherlands rules governing the taxation of fiscal investment enterprises ('FIEs') with the free movement of capital under Article 63 TFEU.[2]

2. The questions referred for a preliminary ruling in this case were raised in proceedings between Köln-Aktienfonds Deka ('KA Deka'), an undertaking for collective investment in transferable securities (UCITS) established in Germany, and the Netherlands tax authorities concerning the latter's refusal of KA Deka's applications for the refund — under the legislation on FIEs — of dividend tax withheld from it in respect of share dividends from companies established in the Netherlands received between 2002 and 2008.

3. Following the withdrawal of the first question by the referring court, on account of the judgment of 21 June 2018, *Fidelity Funds and Others* (C-480/16, EU:C:2018:480; 'the judgment in *Fidelity Funds*' or '*Fidelity Funds*'), the request for a preliminary ruling now concerns only whether the legislation at issue is compatible with Article 63 TFEU as regards two conditions which that legislation lays down for

1 Original language: Italian.

2 The Court has already had the opportunity to address the compatibility of certain aspects of those rules, in the version in force at that time, in its judgment of 20 May 2008, *Orange European Smallcap Fund* (C-194/06, EU:C:2008:289).

being eligible for the FIE regime, the eligibility for that regime being a prerequisite for being granted a refund of withheld dividend tax, namely: on the one hand, certain requirements relating to the shareholders of the UCITS wishing to benefit from that regime and, on the other, the obligation to redistribute the profits which accrue.

4. The present case raises important and sensitive issues of coordination between, on the one hand, the Member States' power to impose taxes, which is expressed, inter alia, in the freedom to lay down the requirements deemed necessary in order to be eligible for a tax regime and, on the other, the requirement to ensure that the fundamental freedoms laid down in the FEU Treaty and, in particular, the free movement of capital, are observed.

I. Legal framework

5. The legal and tax regime governing FIEs in Netherlands law is laid down primarily in Article 28 of the Wet op de vennootschapsbelasting 1969 (the 1969 Law on corporation tax; 'the Wet Vpb'), that article being substantially amended in 2007, and in Article 10(2) of the Wet op de dividendbelasting (Law on the taxation of dividends).

6. The aim of that regime is to treat shareholders or participants in an FIE, for the purposes of taxation in the Netherlands, in the same way as natural persons who make direct investments. That regime seeks to make the tax burden on revenue from investments by FIEs as far as possible the same as that on revenue from direct investments by private individuals.

7. It is clear from the order for reference from the Hoge Raad der Nederlanden (Supreme Court of the Netherlands), that, in order to attain that aim, Netherlands law in force at the time relevant to the main proceedings established the legal and tax regime governing FIEs as follows.

8. First, under Article 28(2) of the Wet Vpb, in the version in force between 2002 and 2006, public limited companies, limited liability companies and collective investment funds which were established in the Netherlands, whose object and actual activity consisted in asset investments and which satisfied the conditions listed in that paragraph, could be classified as FIEs. [3]

9. Secondly, FIEs were — and still are — subject to a zero corporation tax rate, which amounts to an exemption from that tax.

10. Thirdly, where an FIE participated in companies established in the Netherlands and received dividends from those companies, it could claim a refund of the Netherlands tax levied on those dividends which was deducted at source by the companies making the distributions. Where, on the other hand, an FIE received dividends from companies established in other countries which were taxed in those countries, it was entitled to a concession. Those requirements are still in force.

11. Fourthly, FIEs were — and still are — required to distribute to their shareholders or participants all proceeds (both dividends and other types of proceeds) likely to be distributed, and to do so within 8 months of the end of the relevant financial year ('the redistribution obligation'). [4]

3 Following legislative changes introduced in 2007, on the one hand, the condition relating to the place of establishment was abolished and, on the other, a provision was introduced, in place of the exhaustive list of legal forms that had to be taken to be eligible for classification as an FIE, under which entities constituted pursuant to the law of a Member State of the European Union may request such classification as an FIE, provided that they 'are in any event in the same situation' and 'are comparable in terms of their nature and organisation' to public limited companies, limited liability companies or collective investment funds incorporated under Netherlands law.

4 Article 28(2)(b) of the Wet Vpb.

12. Fifthly, when they distributed dividends to their shareholders or participants, FIEs had — and still have — an obligation to deduct the Netherlands dividend tax. That deduction replaces the withheld dividend tax in respect of FIEs subsequently refunded to them. Thus, investment through an FIE is not more fiscally advantageous than direct investment.

13. Sixthly, in order to guarantee that the FIE regime was used exclusively for the types of investors for which it was intended, the relevant legislation laid down certain requirements relating to shareholders or participants which had to be satisfied by the enterprises in order to be eligible for classification as FIEs ('shareholder requirements').[5]

14. Between 2002 and 2006, the conditions to be satisfied by shareholders were laid down in Article 28(2)(c), (d), (e), (f), and (g) of the Wet Vpb. The legislation drew a distinction between enterprises whose shares or certificates of participation were officially listed on the Amsterdam stock exchange and those whose shares or certificates of participation were not.

15. More specifically, enterprises whose shares or participations were listed on the Amsterdam stock exchange were essentially excluded from the FIE regime if 45% or more of the shares or participations were held by an entity subject to a profit tax (and not by an FIE whose shares or participations were listed on the Amsterdam stock exchange), or were held by an entity subject to a profit tax on shareholders or participants. Furthermore, an enterprise could not benefit from the regime for FIEs if a natural person held, on his own, an interest in that enterprise of 25% or more.

16. The enterprises whose shares or participations were not listed on the Amsterdam stock exchange could benefit from the FIE regime, provided that, essentially, at least 75% of their shares or participations were held by natural persons, entities not subject to profit tax, such as pension funds, charitable organisations, or other FIEs. It was not possible to benefit from the FIE regime if one or more natural persons held a significant participation — that is to say at least 5% of the shares or participations — in the enterprise. If an investment enterprise held an authorisation under the Wet toezicht beleggingsinstellingen (Law on the supervision of investment funds), the prohibition relating to a significant participation yielded in favour of a rule under which no natural person could hold an interest of 25% or more in the investment enterprise.

17. In order to benefit from the FIE regime, enterprises whose shares or certificates of participation were officially listed on the Amsterdam stock exchange were, therefore, subject to less restrictive requirements than those whose shares or certificates of participation were not.

18. Following the 2007 legislative amendments, the distinction between enterprises whose shares or participations are listed on the Amsterdam stock exchange and other enterprises was abolished. It is apparent from the order for reference that what is now decisive is whether the shares or participations are admitted to trading on a market in financial instruments, as provided for in the Wet op het financieel toezicht (Law on financial supervision),[6] or whether the fund or its manager holds an authorisation or is exempted from it under that law.[7]

5 Article 28(2)(c) of the Wet Vpb.

6 Specifically in Article 1:1 of that law.

7 More specifically, under Article 2:65 or Article 2:66(3) respectively of the Law on financial supervision.

II. The facts, the main proceedings and the questions referred for a preliminary ruling

19. KA Deka is an investment fund constituted under German law and established in Germany, whose activities consist in investing the fund's assets. KA Deka constitutes an UCITS within the meaning of Directives 85/611[8] and 2009/65.[9] KA Deka issues shares which are listed on the stock market in Germany. Those shares are traded via the so-called 'global stream system'. As a common fund (*Sondervermögen*), KA Deka was exempt from German tax on profits during the relevant period.

20. KA Deka made investments in companies established in the Netherlands from which it received dividends during the financial years 2002/2003 to 2007/2008. Tax by way of Netherlands dividend tax was deducted on those dividends at source at a rate of 15%.[10]

21. Since it was not subject in the Netherlands to the obligation to withhold Netherlands dividend tax referred to in point 12 above, KA Deka did not withhold that tax on the profits which it distributed.

22. KA Deka applied to the Netherlands tax authorities for a refund of the Netherlands dividend tax deducted at source in respect of the abovementioned financial years, totalling around EUR 690 000.

23. The Netherlands tax authorities rejected the applications for a refund submitted by KA Deka, which therefore brought an action before the Rechtbank Zeeland-West-Brabant (District Court of Zeeland-West-Brabant, Netherlands). Before that court, KA Deka essentially argues that its right to obtain the refunds applied for derives from Article 63 TFEU and that its situation is comparable to that of an investment fund established in the Netherlands which has the status of an FIE.

24. Since it was uncertain as to the criteria to be used in comparing KA Deka and an investment fund established in the Netherlands which has the status of an FIE, and on account of the large number of pending cases having the same subject matter, the Rechtbank Zeeland-West-Brabant decided to refer questions for a preliminary decision to the Hoge Raad der Nederlanden (Supreme Court of the Netherlands), the referring court.

25. In that regard, the referring court notes that the objective of laying down the shareholder requirements is to guarantee that use of the FIE regime is limited to the investors for which it is intended and that those requirements apply without distinction to resident and non-resident entities, irrespective of the Member State of incorporation or establishment. An investment fund established in the Netherlands must also meet the shareholder requirements in order to be recognised as an FIE. The circumstance raised by KA Deka that it is impossible for it to prove that those requirements have been met, as the 'global stream system' which it uses means that it does not know who its shareholders are, is, in the referring court's view, irrelevant. It is clear from the Court's case-law that the consequences of not being able to prove that the shareholder requirements have been met must be borne by the interested party.

26. Furthermore, as regards the redistribution obligation, the referring court asks whether, for the purposes of eligibility for FIE status, it is possible to impose on a foreign investment fund the condition that dividends received from companies established in the Netherlands must actually be redistributed, or whether it is sufficient that those dividends be included, by way of a fiction, in the tax which the Member State in which the fund is established levies on its shareholders or participants.

8 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).

9 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).

10 Under Article 13 of the tax treaty concluded on 16 June 1959 between the Federal Republic of Germany and the Netherlands, as amended most recently by the third additional protocol of 4 June 2004.

27. Since it has reasonable doubts as to the answers to be given to those questions, the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) has referred the following questions to the Court of Justice for a preliminary ruling:

'(1) Does [Article 63 TFEU] mean that an investment fund established outside the Netherlands cannot be refused, on the ground that it is not subject to an obligation to withhold Netherlands dividend tax, a refund of Netherlands dividend tax which was withheld on dividends which that investment fund received from corporate bodies established in the Netherlands, when such a refund is granted to a fiscal investment enterprise established in the Netherlands, which, subject to the withholding of Netherlands dividend tax, distributes the proceeds of its investments to its shareholders or participants on an annual basis?

(2) Does [Article 63 TFEU] mean that an investment fund established outside the Netherlands cannot be refused a refund of Netherlands dividend tax which was withheld on dividends which it received from corporate bodies established in the Netherlands on the ground that it has not proved satisfactorily that its shareholders or participants satisfy the conditions laid down in Netherlands legislation?

(3) Does [Article 63 TFEU] mean that an investment fund established outside the Netherlands cannot be refused a refund of Netherlands dividend tax which was withheld on dividends which it received from corporate bodies established in the Netherlands, on the ground that it does not distribute the proceeds of its investments in full to its shareholders or participants on an annual basis at the latest in the eighth month following the end of the financial year, even if, in the country in which that investment fund is established, under the legislation there applicable, the proceeds of its investments, to the extent to which they are not distributed, (a) are deemed to have been distributed, and/or (b) are taken into account in the tax levied in that country on the shareholders or participants as though those profits had been distributed, when such a refund is granted to a fiscal investment enterprise established in the Netherlands, which, subject to the withholding of Netherlands dividend tax, distributes the proceeds of its investments in full to its shareholders or participants on an annual basis?'

III. Proceedings before the Court

28. The order for reference was received at the Court Registry on 27 March 2017. Written observations have been submitted by KA Deka, the Nederlandse Orde van Belastingadviseurs (the Netherlands Association of Tax Advisers), Loyens en Loeff NV, the German and the Netherlands Governments, and the European Commission.

29. Following the judgment in *Fidelity Funds*, the Court Registry requested the referring court, by letter of 22 June 2018, to inform the Court whether it considered it necessary to maintain the reference for a preliminary ruling.

30. By letter of 3 December 2018, the referring court informed the Court of its intention to withdraw the first question referred for a preliminary ruling, but to maintain the second and third questions.

31. KA Deka, the Nederlandse Orde van Belastingadviseurs, Loyens en Loeff NV, the German and the Netherlands Governments, and the Commission took part in the hearing before the Court, which was held on 22 May 2019.

IV. Legal analysis

A. Preliminary observations

32. It should be observed at the outset that, following the referring court's withdrawal of the first question in the light of the *Fidelity Funds* judgment, in the present case the Court remains seised only of the second and third questions referred.

33. *Fidelity Funds* concerned Danish tax legislation on the taxation of dividends received by UCITS from Danish companies which displayed similar aspects to the Netherlands legislation at issue in the main proceedings, whose objective it essentially shared. [11]

34. In that judgment the Court ruled that Article 63 TFEU must be interpreted as precluding legislation of a Member State under which the dividends distributed by a company resident in that Member State to a non-resident UCITS are subject to withholding tax, whereas 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 shareholders, or technically calculates a minimum distribution, and withholds on that actual or notional distribution the tax payable by its shareholders.

35. The Court held, on the one hand, that national legislation of that kind constitutes a restriction on the free movement of capital, prohibited in principle by Article 63 TFEU, [12] and, on the other, that it cannot be justified by an objective difference between resident and non-resident UCITS, or by overriding reasons in the public interest and, more specifically, by the need to preserve the balanced allocation of the power to impose taxes between the Member States or the need to safeguard the coherence of a tax system. [13]

36. In its letter of 3 December 2018, the referring court informed the Court that it considers that the answer to the first question referred for a preliminary ruling, concerning the compatibility with Article 63 TFEU of legislation, such as that of the Netherlands, under which a non-resident UCITS is not granted a refund of dividend tax withheld on dividends received from resident companies but such a refund is granted to a resident UCITS, was apparent from the judgment in *Fidelity Funds*.

37. In that letter the referring court stated, however, that the second and third questions, concerning the compatibility with Article 63 TFEU of the refusal to refund the withholding tax to a non-resident UCITS pursuant to the provisions laying down respectively, on the one hand, the shareholders' requirements, as referred to in points 15 and 16 above, and, on the other, the redistribution obligation referred to in point 11 above, had not been fully answered by that judgment.

38. Consequently, the subject matter of the present case is limited to those two questions. However, in order to answer those questions I consider it appropriate first of all to analyse the principles developed in the Court's case-law regarding the free movement of capital, with particular reference to cases concerning the taxation of dividends.

11 See paragraph 52 of the judgment in *Fidelity Funds* and paragraph 6 above.

12 See paragraphs 40 to 45 of the judgment in *Fidelity Funds*.

13 See, on the one hand, paragraphs 49 to 63 of the judgment in *Fidelity Funds* and, on the other, paragraphs 66 to 76 and 77 to 86 thereof.

B. Principles of case-law concerning the free movement of capital, with particular reference to the taxation of dividends

39. As regards, first, the analysis of whether national legislation constitutes a restriction on the free movement of capital, it should be borne in mind primarily that the Court has had several occasions to point out that Member States must exercise their competence in the area of direct taxation consistently with EU law and, in particular, with the fundamental freedoms guaranteed by the TFEU. [14]

40. It is clear from the settled case-law of the Court 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. [15]

41. It is also clear from the case-law that differences in treatment based on objective criteria may de facto disadvantage cross-border situations and entail indirect discrimination contrary to the provisions on the fundamental freedoms guaranteed by the TFEU. [16]

42. In that respect, as regards the freedom to provide services the Court has held that national legislation which applies without distinction to all services, irrespective of the place of establishment of the provider, is also liable to constitute a restriction on the freedom to provide services in so far as it reserves an advantage solely to users of services which comply with certain conditions which are de facto specific to the national market and thus deny that advantage to users of other services which are essentially similar but do not comply with the specific conditions provided for in that legislation. Such legislation affects the situation of users of services as such and is thus liable to discourage them from using the services of certain providers, since the services offered by them do not comply with the conditions laid down in that legislation, thus directly affecting access to the market. [17]

43. That case-law is applicable to the free movement of capital. [18]

44. It follows that national legislation which applies without distinction to resident and non-resident entities is liable to constitute a restriction on the free movement of capital in so far as it reserves the advantage of favoured tax treatment solely to entities which comply with certain conditions which are de facto specific to the national market and thus deny the advantage of that favoured tax treatment to other entities which are essentially similar but do not comply with the specific conditions laid down in that legislation.

45. Such legislation is liable to discourage non-resident entities which do not comply with the particular conditions — specific to the national market — laid down in that legislation from making investments in the Member State in question and investors resident in that Member State from making investments in non-resident entities.

46. Secondly, it should be noted that, as regards direct taxation, the application of the provisions of the FEU Treaty concerning the fundamental freedoms must be coordinated with the Member States' power to impose taxes by virtue of their fiscal competence.

14 See, inter alia, judgment of 25 July 2018, *TTL* (C-553/16, EU:C:2018:604, paragraph 44 and the case-law cited).

15 See *Fidelity Funds*, paragraph 40 and the case-law cited therein.

16 See, inter alia, to that effect, as regards freedom of establishment, judgment of 5 February 2014, *Hervis Sport- és Divatkereskedelmi* (C-385/12, EU:C:2014:47, paragraphs 37 to 41).

17 See judgment of 8 June 2017, *Van der Weegen and Pot* (C-580/15, EU:C:2017:429, paragraph 29 and the case-law cited).

18 In that respect, see judgment of 10 November 2011, *Commission* v *Portugal* (C-212/09, EU:C:2011:717, paragraph 65) which concerns the free movement of capital and which was cited by the Court in paragraph 29 of the judgment in *Van der Weegen*, cited in the previous footnote, to establish the case-law principle expressed therein.

47. In that regard, the Court has held that it is for each Member State to organise, in compliance with EU law, its system for taxing distributed profits and, in particular, to define, for that purpose, the tax base and rate applicable to the company making the distribution and/or recipient shareholder, in so far as they are subject to the tax in that Member State,[19] provided, however, that the system in question does not entail discrimination prohibited by the FEU Treaty.[20]

48. Furthermore, in the absence of any unifying or harmonising EU measures, Member States retain the power to define, by treaty or unilaterally, the criteria for allocating their powers of taxation.[21]

49. The Court inferred from this that those powers imply, on the one hand, that a Member State is not required to adapt its own tax system to the different taxation systems of other Member States[22] and, on the other, that it cannot be required to take account, for the purposes of applying its tax law, of the possible negative results arising from particularities of legislation of another Member State. As EU law on direct taxation currently stands, the provisions of the FEU Treaty concerning the fundamental freedoms cannot be understood as meaning that a Member State is required to draw up its tax rules on the basis of those of another Member State in order to ensure, in all circumstances, taxation which removes any disparities arising from national tax rules.[23]

50. Thirdly, it is in that context that it is necessary to examine the question, extensively discussed at the hearing, of whether, in order to establish that there is a restriction of the fundamental freedoms guaranteed by the FEU Treaty where objective requirements are applicable without distinction to residents and non-residents but de facto give rise to an indirect restriction, it must be impossible for non-residents to comply with those requirements or whether, instead, it is sufficient that it is merely more difficult for them to do so.

51. Two opposing arguments on that issue have been put forward. On the one hand, the German Government argued that the issue has not been resolved by the case-law and that a restriction on the fundamental freedoms in tax matters cannot be established where it is merely more difficult for non-residents to fulfil the conditions laid down in national law, but only where that is impossible. A contrary view would interfere with the Member States' tax autonomy, as conferred by the treaties. On the other, the Commission put forward the opposite argument that it does not have to be absolutely impossible for non-residents to fulfil such conditions, in order to establish a restriction on a fundamental freedom. Instead, it is sufficient, for that purpose, for it to be more difficult for non-residents to comply with the requirements laid down in the national legislation at issue.

52. In that regard, an analysis of the relevant case-law shows that the Court has, in various cases, found that there was a restriction on the fundamental rights guaranteed by the FEU Treaty without the need for it to be absolutely impossible for non-residents to fulfil the conditions laid down in the applicable national law, including that on tax matters.

53. For example, in its judgment of 8 June 2017, *Van der Weegen and Pot* (C-580/15, EU:C:2017:429), the Court found that there was a restriction on the freedom to provide services under Article 56 TFEU even though it was not impossible, de facto or de jure, for foreign credit institutions to fulfil the conditions laid down in Belgian legislation to be eligible for the tax exemption system at issue.[24]

19 See judgment of 12 December 2006, *Test Claimants in the FII Group Litigation* (C-446/04, EU:C:2006:774, paragraph 50).

20 Judgments of 13 November 2012, *Test Claimants in the FII Group Litigation* (C-35/11, EU:C:2012:707, paragraph 40) and of 11 September 2014, *Kronos International* (C-47/12, EU:C:2014:2200, paragraph 68 and the case-law cited).

21 See, to that effect, judgments of 20 May 2008, *Orange European Smallcap Fund* (C-194/06, EU:C:2008:289, paragraph 48), and of 30 June 2016, *Riskin and Timmermans* (C-176/15, EU:C:2016:488, paragraph 29).

22 See, to that effect, judgment of 10 June 2015, *X* (C-686/13, EU:C:2015:375, paragraphs 33 and 34 and the case-law cited).

23 See, to that effect, judgment of 23 October 2008, *Krankenheim Ruhesitz am Wannsee-Seniorenheimstatt* (C-157/07, EU:C:2008:588, paragraphs 49 and 50 and the case-law cited).

24 See, in particular, paragraphs 31 to 35 of the judgment.

54. Similarly, in its judgment of 9 October 2014, *van Caster* (C-326/12, EU:C:2014:2269), the Court found that there was a restriction on the free movement of capital where it was not impossible for non-resident funds to comply with the obligations laid down in national tax legislation. [25]

55. However, that case-law also shows that the Court did not consider that the mere existence of greater difficulty for non-residents to comply with requirements of national law applicable without distinction was sufficient to constitute a restriction on the fundamental freedoms guaranteed by the FEU Treaty. In keeping with the concept of restriction, [26] the level of difficulty must be such as to discourage the exercise of those freedoms.

56. As regards the German Government's reliance on the Member States' tax autonomy, I concur with the Commission's view, referred to by that government, that when it comes to assessing a tax in the context of the freedoms of the internal market a more flexible approach is needed since the application of any tax is, in principle, liable to hinder or discourage economic activity and thus the mere imposition of a tax could potentially constitute a restriction. [27]

57. However, it is only in cases where a tax is levied in neither an overtly nor covertly discriminatory manner and is as such levied on all EU citizens in the same way or on all operators in a comparable situation that there is, in principle, no situation relevant to EU law. Where, on the other hand, the application of the criteria laid down in national tax legislation results in more unfavourable treatment for non-residents than for residents, the tax autonomy of Member States is limited by the rules of the FEU Treaty on fundamental freedoms. [28]

58. I would add, in that connection, that the need to respect the fundamental freedoms guaranteed by the FEU Treaty, which limits the exercise of Member States' tax autonomy, means that when they establish, in the exercise of that autonomy, the conditions governing eligibility for a favoured tax regime, they may not lay down requirements which are impossible or excessively difficult for non-residents to comply with.

59. In my view, this means that, in applying the requirement laid down in national law governing eligibility for a favoured tax regime, where it is demonstrated that it is impossible or excessively difficult for a non-resident to comply with that requirement, the Member State in question will not be able to apply differential treatment on grounds of non-compliance with that requirement, where, under the law of the Member State of residence of the person concerned, that requirement can be deemed to have been complied with.

60. In such cases, it will, however, be for the non-resident concerned to demonstrate to the tax authorities of the Member State in question both that it is impossible or excessively difficult for it to comply precisely with the requirement laid down in the national legislation at issue and that it substantially complies with that requirement under the national legislation of its Member State of residence or establishment.

25 The outcome of the analysis of this case-law is not, in my view, contradicted by the judgment of 14 April 2016, *Sparkasse Allgäu* (C-522/14, EU:C:2016:253) to which the German Government referred at the hearing. In that judgment the Court held that Article 49 TFEU does not preclude legislation of a Member State which requires credit institutions having their head office in that Member State to notify the national authorities of assets held or managed at their dependent branches established in another Member State in the event of the death of the owner of those assets who is resident in the first Member State, in the case where there is no similar notification obligation in that second Member State and credit institutions there are subject to banking secrecy, breach of which constitutes a criminal offence. In that judgment the Court essentially recognised the freedom of Member States to apply to non-independent branches operating abroad of national credit institutions an obligation with the objective of ensuring the effectiveness of fiscal supervision (see, specifically, paragraph 29 of that judgment).

26 With regard to the concept of restriction on the free movement of capital, see point 40 above.

27 At the hearing the German Government expressly referred to the observations submitted by the Commission in pending case C-565/18, *Société Générale*.

28 See points 39 and 47, *in fine*, above and the case-law referred to therein.

61. Lastly, as regards, fourthly, the possible existence of justifications, it should recalled that, under Article 65(1)(a) TFEU, Article 63 TFEU is nonetheless to be without prejudice to the right of Member States to apply the relevant provisions of their tax law which distinguish between taxpayers who are not in the same situation with regard to their place of residence or with regard to the place where their capital is invested.

62. In that respect, it follows from settled case-law that, since that provision constitutes 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 any tax law which differentiates between taxpayers according to where they reside or the Member 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]'.[29]

63. 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 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.[30]

64. The overriding reasons in the public interest which the Court has recognised in its case-law include, inter alia, the need to preserve the balanced allocation of the power to impose taxes between the Member States,[31] the need to safeguard the coherence of the tax system,[32] the need to guarantee the effectiveness of fiscal supervision,[33] as well as the professional rules intended to protect recipients of services, the good reputation of the financial sector, and consumer protection.[34]

65. It is in the light of those principles of case-law that the second and third questions raised by the referring court must be answered.

C. The second question referred

66. By its second question, the referring court asks, in essence, whether Article 63 TFEU is to be interpreted as precluding national legislation of a Member State, such as that at issue in the main proceedings, under which a non-resident UCITS is refused a refund of dividend tax which was withheld on dividends which it received from entities established in that Member State on the ground that it has not proved that certain requirements regarding shareholder structure laid down in the legislation of that Member State have been satisfied.

29 See *Fidelity Funds*, paragraph 47 and the case-law cited.

30 See *Fidelity Funds*, paragraph 48 and the case-law cited.

31 See, *ex multis*, judgment of 10 April 2014, *Emerging Markets Series of DFA Investment Trust Company* (C-190/12, EU:C:2014:249, paragraph 99 and the case-law cited).

32 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).

33 See, *ex multis*, judgment of 9 October 2014, *van Caster* (C-326/12, EU:C:2014:2269, paragraph 46 and the case-law cited).

34 Judgment of 14 February 2019, *Milivojević* (C-630/17, EU:C:2019:123 paragraph 71 and the case-law cited).

67. As can be seen from the description of the national legislation at issue in the main proceedings given by the referring court, in order to be able to obtain a refund of withheld dividend tax, in the case of dividends received from participations in companies established in the Netherlands, a UCITS which wished to benefit from FIE status had to prove that it complied with the shareholder requirements set out in points 14 to 16 above, laid down in the legislation in force during the period relevant to the main proceedings.

68. It is clear once again from the order for reference that the objective of the shareholder requirements was to ensure that the FIE regime was used exclusively for the types of investors for which it was intended. They were, therefore, essentially anti-abuse provisions.

69. As formulated, the question raised by the referring court concerns whether the requirement to *prove* that the shareholder requirements have been met was compatible with Article 63 TFEU, not whether the requirements as such were compatible with that provision.

70. In that regard, it should be observed that the Court ruled that it is inherent in the principle of the tax autonomy of Member States, referred to in points 47 to 49 above, that they determine, according to their own national system, the evidence required in order to benefit from a given tax regime. [35]

71. It follows that the tax authorities of a Member State are entitled to require the taxpayer to provide such proof as they may consider necessary in order to determine whether the conditions for a tax advantage provided for in the legislation at issue have been met and, consequently, whether or not to grant that advantage. [36]

72. Nevertheless, the exercise of that tax autonomy by the Member States must be carried out in accordance with the requirements of EU law, in particular those imposed by the Treaty provisions on the free movement of capital, [37] which means that potential non-resident beneficiaries may not be subject to excessive administrative burdens that make it impossible for them de facto to benefit from the tax regime in question. [38]

73. In that sense, a critical view has to be taken of the obligation to provide proof if the reason for which it cannot be complied with resides in the fact that proof is required according to a domestic model which is not appropriate for foreign situations, even though such proof is not absolutely necessary. [39]

74. In the present case, it is apparent from the order for reference that KA Deka is unable to prove that it complies with the shareholder requirements, as laid down in the relevant legislation, on account of the trading system that it has chosen, namely the 'global stream system', which does not let it know who its shareholders are.

75. It would thus appear that in this case the problem arises in a purely factual context. Even if such proof should ultimately be impossible because the UCITS is not in a position, de facto, to obtain that information, I consider that this must nevertheless be attributed to its sphere. [40]

35 See, to that effect, judgment of 30 June 2011, *Meilicke and Others* (C-262/09, EU:C:2011:438, paragraph 37).

36 See judgments of 10 February 2011, *Haribo* (C-436/08 and C-437/08, EU:C:2011:61, paragraph 95 and the case-law cited) and of 30 June 2011, *Meilicke and Others* (C-262/09, EU:C:2011:438, paragraph 45).

37 As regards, specifically, proving compliance with the conditions laid down in tax legislation, judgment of 30 June 2011, *Meilicke and Others* (C-262/09, EU:C:2011:438, paragraph 45).

38 See, to that effect, judgments of 10 February 2011, *Haribo* (C-436/08 and C-437/08, EU:C:2011:61, paragraphs 96 and 97), and of 30 June 2011, *Meilicke and Others* (C-262/09, EU:C:2011:438, paragraph 46).

39 See, to that effect, the Opinion of Advocate General Kokott in *Haribo* (C-436/08 and C-437/08, EU:C:2010:668, paragraph 54).

40 See, to that effect, the Opinion of Advocate General Kokott in *Haribo* (C-436/08 and C-437/08, EU:C:2010:668, paragraph 58).

76. Consequently, in the absence of information from the party concerned, the tax authorities in question may, in my view, refuse the tax benefit applied for. As the Court has previously found, the inadequate flow of information to the person concerned is not, in principle, a problem for which the Member State concerned should have to answer.[41] In other words, as the referring court pointed out, it is the party concerned which must bear the consequences of its inability to prove that the requirements laid down by the relevant national tax legislation are complied with.

77. That said, three considerations still appear, however, to be relevant in that respect.

78. First, it has been argued before the Court that to provide the tax authorities with the information necessary to comply with the shareholder requirements is legally impossible on account of the legislation on the protection of personal data.

79. In that regard I would observe, first of all, that the drawing up of a list containing information about the persons holding shares or participating in the UCITS (such as the names of natural persons holding shares or participations in the UCITS) and the communication thereof to the Netherlands tax authorities constitute 'processing of personal data' within the meaning of Article 2(b) of Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data,[42] which was applicable during the period relevant to the main proceedings.

80. In that regard, it should further be noted that Article 7(e) of that directive states that the processing of personal data is lawful if it is 'necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller or in a third party to whom the data are disclosed'.

81. It is clear from the Court's case-law that the collection of taxes, for the purposes of which the documents concerning shareholders or participants of the UCTIS concerned are drawn up and communicated to the tax authorities, must be regarded as a task carried out in the public interest within the meaning of that provision,[43] so that it can be deemed to be covered by the exhaustive and restrictive list of cases in which the processing of personal data can be regarded as being lawful under Article 7 of Directive 95/46.[44]

82. Secondly, it should be noted that it has been argued before the Court that, in practice, the Netherlands tax authorities ask only non-resident UCITS and not resident UCITS for the information for monitoring compliance with shareholders requirements. It is for the national court to ascertain whether that is so, but it is clear that, if that is actually the case, discriminatory application of such a kind to the detriment of non-resident UCITS would pose clear problems as regards compatibility with EU law.

83. Thirdly, it must be ascertained whether or not the provisions in force during the period relevant to the main proceedings, which laid down the shareholder requirements governing eligibility for FIE status, constitute, as such, a restriction on the free movement of capital within the meaning of Article 63 TFEU, as set out in point 40 above.

41 See, to that effect, judgments of del 10 February 2011, *Haribo* (C-436/08 and C-437/08, EU:C:2011:61, paragraph 98), and of 30 June 2011, *Meilicke and Others* (C-262/09, EU:C:2011:438, paragraph 48).

42 OJ 1995 L 281, p. 31. See, in that regard, judgment of 27 September 2017, *Puškár* (C-73/16, EU:C:2017:725, paragraph 103).

43 Judgment of 27 September 2017, *Puškár* (C-73/16, EU:C:2017:725, paragraph 108).

44 Ibid., paragraph 105 and the case-law cited.

84. In that respect, I should observe, first of all, that it would appear from the description given by the national court that, with the caveat of what was noted in point 82 above, those provisions were applicable without distinction to resident and non-resident UCITS, both of which had to comply with those requirements in order to be eligible for the FIE regime.

85. Nevertheless, applying the case-law principles set out in points 42 to 45 above, it must be ascertained whether the provisions laying down the shareholder requirements, although applicable without distinction, relate to special conditions specific to the national market with the effect of deterring non-resident UCITS which are unable to satisfy those conditions from making investments in the Netherlands and investors resident in the Netherlands from making investments in non-resident UCITS.

86. In that regard, I note that in the version in force prior to the legislative changes introduced in 2007, the provisions in question drew a distinction between enterprises whose shares or participations were listed on the Amsterdam stock exchange and enterprises whose shares or participations were not. The former were subject to the shareholder requirements referred to in point 15 above, which were less stringent than the requirements referred to in point 16 above, which, however, the second type of enterprise had to comply with in order to be eligible for FIE status.

87. That difference in treatment based on the criterion relating to listing on the Amsterdam stock exchange is puzzling. It is not clear why that criterion would be relevant as regards making the UCITS subject to less stringent requirements for access to the FIE regime. The application of such a criterion could in fact result in the benefit of the FIE status being accessible in a favoured, if not exclusive, manner, to resident entities, which are the only ones able to comply with those requirements, depriving substantially similar non-resident entities of the possibility of benefiting from favoured tax treatment. If that were the case, the provisions at issue would constitute a restriction in the terms referred to in points 44 and 45 above.

88. However, I consider that the file before the Court does not contain sufficient information to reach a conclusion on that point. It will, therefore, be for the referring court to determine whether or not the provisions in question constitute a restriction on the free movement of capital. In particular, it will be appropriate, inter alia, to determine whether, during the relevant period, the vast majority of the UCITS listed on the Amsterdam stock exchange were actually established in the Netherlands so that conditions governing access to the FIE regime which are more favourable to those enterprises de facto constitute a requirement that discriminates against non-resident UCITS. It may also be appropriate to determine whether the necessary requirements for listing on the Amsterdam stock exchange were, during the relevant period, such that it was de facto more difficult for UCITS not resident in the Netherlands to comply with those requirements and be listed on the Amsterdam stock exchange.

89. Ultimately, the referring court will have to determine whether the application in a specific case of the shareholder requirements was not a covert means of introducing an unjustified difference in treatment between resident and non-resident enterprises.

90. In that respect, it should also be noted, on the one hand, that the Netherlands Government put forward no overriding reason in the public interest which could justify laying down the criterion relating to listing on the Amsterdam stock exchange in order to make UCITS subject to less stringent requirements for access to the FIE regime and, on the other, that, following the 2017 legislative changes, use of the criterion relating to listing on the Amsterdam stock exchange was abolished and replaced by an outwardly more neutral criterion.[45]

45 See point 18 above. However, the Court does not have precise information on this new criterion.

91. In the light of all the above considerations, I consider that the answer to the second question raised by the referring court is that Article 63 TFEU must be interpreted as not precluding legislation of a Member State, such as that at issue in the main proceedings, under which a non-resident UCITS is refused a refund of dividend tax which was withheld on dividends which it received from entities established in that Member State on the ground that that UCITS has not proved that it satisfied certain conditions governing shareholder structure laid down in the legislation of that Member State, provided that (i) the tax authorities require that resident and non-resident UCITS comply with shareholder requirements in the same way and (ii) the difference in treatment based on the criterion relating to listing on the Stock Exchange of a Member State, in this case the Amsterdam Stock Exchange, does not de facto constitute favoured treatment for enterprises resident in that Member State, a matter which is for the referring court to determine.

D. The third question referred

92. By its third question, the referring court asks whether Article 63 TFEU is to be interpreted as precluding legislation of a Member State, such as that at issue in the main proceedings, under which a non-resident UCITS is refused a refund of dividend tax which was withheld on dividends which it received from entities established in that Member State on the ground that that UCITS has failed to fulfil the obligation to distribute to its shareholders or participants the proceeds distributed by entities resident in that Member State, within 8 months of the end of the financial year. That is also the case if, under the legislation of the Member State in which the non-resident UCITS is established, those proceeds are deemed to have been distributed or are included in the tax which the Member State of residence of the UCITS levies on those shareholders or participants as if they had been distributed. By contrast, the refund in question is granted to a resident UCITS which fulfils that obligation, subject to the withholding of the dividend tax at issue of the Member State.

93. This question raises a number of sensitive issues relating to the determination of the limits which the Member States' power of taxation and their power to determine the conditions governing the national tax systems, referred to in points 47 to 49 above, encounter as a result of the need to ensure the exercise of the fundamental freedoms guaranteed by the FEU Treaty and, in this case, the free movement of capital.

94. The obligation to redistribute proceeds, referred to in the third question, is connected to the objective pursued by the FIE regime concerned. As noted in point 6 above, that regime aims to treat operators who invest via an FIE in the same way as persons who make direct investments, thereby avoiding the risk of double taxation which could occur if the distributed dividends were subject to a levy on the UCITS concerned and the participants thereof. The FIE regime is based on two mechanisms: on the one hand, the exemption from the dividend tax for FIEs which is effected by refunding the dividend tax withheld on dividends received from Netherlands companies and, on the other, the obligation to redistribute proceeds.

95. As the Netherlands Government explained in its written observations, the redistribution obligation is closely connected to the obligation, referred to in point 12 above, on the FIEs to levy, at the time the proceeds are distributed, the withheld Netherlands dividend tax payable by their shareholders and participants. The levying of the dividend tax is thus moved from the level of the FIE to the level of the shareholders or participants of those funds.

96. The redistribution obligation applies without distinction to both Netherlands and non-resident UCITS and is an obligation *actually* to redistribute the proceeds.

97. The referring court's uncertainty arose with regard to the refusal to refund to KA Deka the withholding tax on dividends paid to it by companies established in the Netherlands on the ground of the failure to fulfil that obligation concerning actual redistribution. Such uncertainty is connected with the legislation of Germany, the Member State where KA Deka is established. The tax legislation in force in Germany during the period relevant to the main proceedings deemed that a (theoretical) minimum amount of dividends should be distributed to natural persons holding participations in a UCITS and provided, in the event that that minimum amount was not actually reached, for consideration to be taken of notional additional amounts. [46]

98. In the course of proceedings two opposing arguments were put forward as to whether or not, in the light of such legislation of the Member State in which the non-resident UCITS is resident, the abovementioned refusal to refund the withholding tax, on the ground of failure to comply with the requirement relating to actual distribution, constitutes a restriction contrary to Article 63 TFEU.

99. On the one hand, KA Deka, supported by the Nederlandse Orde van Belastingadviseurs and the company Loyens en Loeff, submits that, according to Court's case-law, a non-resident UCITS must have the opportunity of proving that it satisfies, in its Member State of establishment, equivalent conditions to those applicable in the Netherlands. [47] Since in German law non-distributed proceeds were taxed at participant level as if they had been distributed, there is, in the present case, a condition equivalent to the redistribution obligation laid down in Netherlands law. On the other hand, to require that the conditions laid down by the national legislation at issue and in that of the Member State of establishment of the non-resident UCITS be absolutely identical in order to be eligible for the favourable tax regime would be tantamount to adversely affecting the free movement of capital because a foreign fund, as part of another legal system, could in practice never fulfil the conditions laid down in the Netherlands legislation.

100. The Commission essentially follows that position and considers that the refusal to take into account, for the purposes of refunding the withholding tax on dividends, the distribution obligations laid down in the Member State in which the non-resident UCITS is established, which are comparable, if not identical, to those laid down in the national legislation at issue, must be regarded as inconsistent with Article 63 TFEU.

101. On the other hand, however, the German Government considers that the provisions of the FEU Treaty concerning fundamental freedoms cannot require a Member State, such as the Netherlands in this case, to take account of the tax legislation of another Member State, such as German legislation in this case. In support of its argument, that government refers to the case-law, referred to in point 49 above, according to which a Member State is not required to adapt its own tax system to the different taxation systems of other Member States or take account, for the purposes of applying its tax law, of the possible negative results arising from particularities of legislation of another Member State.

46 More specifically, it is clear from the description in the order for reference that in the German tax system, during the relevant period, it was considered that, for the purposes of determining the taxable amount, a minimum (theoretical) amount of dividends was distributed to individual participants in a common investment fund. If the dividends actually distributed did not allow that minimum amount to be reached, the taxable amount was increased by taking account of additional notional amounts (called '*ausschuttungsgleiche Erträge*'). On the basis of the taxable amount thus determined, individuals who had holdings in a UCITS enjoyed an exemption equal to half that taxable amount. Until 2004, the German legislation of that time permitted an individual participant in an UCITS to offset in full the dividend tax withheld in the Netherlands payable by the investment fund against the German tax levied on half of the abovementioned taxable amount. Following a legislative change, that possibility of offsetting was limited from 2004 to 2008 to half the Netherlands tax withheld at source and, moreover, such offsetting was no longer possible if the UCITS had decided to deduct from the dividend the foreign tax levied at source.

47 KA Deka refers to the judgment of 6 October 2011, *Commission* v *Portugal* (C-493/09, EU:C:2011:635, paragraph 46).

102. As regards the Netherlands Government, in its written observations it put forward an argument which is substantially equivalent to that of the German Government. However, at the hearing that government appears to have qualified its position, maintaining that account can be taken of measures of another Member State which lead to a result comparable to the Netherlands legislation, for example if the non-resident UCITS were deemed in its Member State of residence, on the basis of a legislative fiction, to have distributed an amount of dividends equivalent to that which a resident UCITS would have had to distribute in order to qualify for FIE status.

103. This is the context in which the third question raised by the referring court should be assessed.

1. The existence of a restriction on the free movement of capital

104. It is necessary, first of all, to ascertain whether or not, in a case such as that pending before the referring court, the refusal by the national tax authorities to refund the withholding tax to a non-resident UCITS, which has not fulfilled the obligation relating to actual redistribution of proceeds laid down in national legislation but in whose Member State such proceeds are deemed to have been distributed or are included in the tax which the Member State levies on its shareholders or participants, constitutes a restriction on the free movement of capital within the meaning of Article 63 TFEU.

105. In that regard, I would recall that any measure that makes the cross-border transfer of capital more difficult or less attractive and is, therefore, liable to deter the investor constitutes a restriction on the free movement of capital. [48]

106. In the present case, although the obligation relating to actual redistribution applies without distinction to resident and non-resident UCITS, it is, in my view, likely to have restrictive effects in regard of certain categories of non-resident UCITS.

107. The application in a specific case of such an obligation results in different treatment for tax purposes being imposed, on the one hand, on a resident UCITS [49] which has fulfilled the obligation relating to actual redistribution and, on the other, a non-resident UCITS which has not formally fulfilled that obligation, since it is impossible or excessively difficult for it to do so, [50] but whose proceeds are deemed to have been distributed, under the law of its Member State of establishment and are therefore taxed there. The former UCITS will receive a refund of withholding tax on dividends received from the companies established in the Netherlands, but the latter will not receive such a refund.

108. Such differential treatment is likely to deter non-resident UCITS for which it is impossible or excessively difficult to fulfil the obligation relating to actual redistribution, but whose proceeds are deemed to have been distributed under the law of its Member State of establishment and are therefore taxed there, from making investments in companies established in the Netherlands. The UCITS belonging to that category, unlike resident UCITS, will never be able to obtain a refund of

48 See the Opinion of Advocate General Kokott in *Manninen* (C-319/02, EU:C:2004:164, point 28) with reference to the judgment of 16 March 1999, *Trummer and Mayer* (C-222/97, EU:C:1999:143, paragraph 26). See also Opinion of Advocate General Mengozzi in *Amurta* (C-379/05, EU:C:2007:323, point 28).

49 Since the requirement applies without distinction, a non-resident UCITS could in theory also fulfil the obligation relating to actual redistribution. During the hearing, however, it was pointed out that, in practice, virtually no foreign UCITS had ever managed to obtain FIE status.

50 This could be the case, for example, as a result of conflict or incompatibility with the legislation of the Member State in which the UCITS is established. At the hearing various examples of that kind of situation were provided.

withholding tax on dividends received from companies established in the Netherlands. In cases of this kind, such differential treatment is also likely to deter persons resident in the Netherlands from making investments in such enterprises,[51] since those investments will be less attractive than acquiring shares or participations in resident UCITS.

109. In line with what was stated in point 60 above, in cases of this kind it will be for the non-resident UCITS to prove to the tax authorities of the Member State in question, first, that it is impossible or excessively difficult for it to satisfy precisely the requirement laid down in the national legislation at issue, that is to say in the present case the obligation relating to the actual redistribution of the proceeds and, secondly, that that requirement is substantially complied with under the national law of its Member State of establishment, that is to say in the present case that such proceeds are deemed under that law to have been distributed and are subject to tax there.

110. It follows, in my view, that the national legislation at issue in the main proceedings constitutes a restriction on the free movement of capital, which is prohibited as a matter of principle by Article 63 TFEU.

2. The comparability of the situations at issue in the main proceedings

111. However, the fundamental issue in the present case is ascertaining whether the two situations referred to in point 107 above, namely that of a resident UCITS which has fulfilled the obligation relating to actual redistribution and that of a non-resident UCITS, for which it is impossible or excessively difficult to fulfil that obligation and in whose Member State of establishment proceeds are deemed to have been distributed and are, therefore, taxed there, are objectively comparable. If that were not the case, in accordance with the principles mentioned in points 61 to 63 above, the fact of excluding the second category of UCITS from a refund of the withholding tax could be regarded as justified by an objective difference between the situations of the two categories of UCITS at issue.[52]

112. A simple answer to that question would be to conclude that there is an objective difference between the situations: the UCITS which have fulfilled the obligation relating to actual redistribution, which is laid down in the Netherlands by virtue of its tax autonomy under EU law, are in a situation objectively different from the UCITS which have not fulfilled the requirement, which would justify the different tax treatment.

113. However, I consider that, in the light of the considerations set out in points 58 to 60 above, the issue merits more detailed examination.

114. In that regard, it is settled case-law of the Court 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.[53]

115. It is, therefore, in the light of the aim of the FIE regime to which, as has been stated, the obligation relating to actual redistribution is linked,[54] that the comparability of the two situations in question, referred to in point 111 above, should be assessed.

51 See, to that effect, *Fidelity Funds*, paragraphs 42 to 44 and the case-law cited.

52 See, to that effect, *Fidelity Funds*, paragraph 49.

53 See *Fidelity Funds*, paragraph 50 and the case-law cited therein.

54 See points 94 and 95 above.

116. That regime fundamentally pursues the aim of avoiding, in respect of the types of investors at which it is addressed, double taxation of dividends received from companies established in the Netherlands, by moving taxation from the level of the UCITS to that of its shareholders or participants.

117. In that respect, I consider, first, that as regards the UCITS' receipt of dividends from Netherlands companies, the two situations at issue are objectively comparable in relation to the aim pursued by the national provisions in question.

118. When they receive such dividends, both a resident and a non-resident UCITS are initially subject, under Netherlands legislation, to withholding tax on dividends (which will then, eventually, be refunded).

119. In that regard, the Court has held that 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, including dividends, which they receive from a resident company, the situation of those non-resident companies becomes comparable to that of resident companies.[55]

120. 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.[56]

121. As the Netherlands chose to exercise its powers of taxation on the income, and more specifically dividends, received by non-resident UCITS, the latter are consequently in a situation comparable to that of UCITS resident in the Netherlands as regards the risk of economic double taxation of dividends received from companies resident in the Netherlands.[57]

122. However, it is necessary, secondly, to assess the comparability of the two situations in question as regards the moving of the taxation of dividends received from Netherlands companies from the level of the UCITS to that of their shareholders or participants.

123. However, in this respect also the two situations in question are, in my view, objectively comparable with regard to the aim of avoiding double taxation of the dividends of companies established in the Netherlands.

124. A resident UCITS which, in accordance with the obligation relating to actual redistribution, distributes all its proceeds — arising from the receipt of dividends from companies established in the Netherlands — is in a situation comparable to that of a non-resident UCITS which has been unable to fulfil that obligation because it was impossible or excessive difficulty to do so, but whose proceeds — from dividends of companies established in the Netherlands — are, in its Member State of establishment, deemed to have been distributed to its shareholders or participants, within a period reasonably comparable to that laid down in the national legislation at issue, and taxed there with regard to them.

55 See, to that effect, *Fidelity Funds*, paragraph 54 and the case-law cited.

56 Ibid., paragraph 55, and the case-law cited.

57 See, to that effect, *Fidelity Funds*, paragraph 56, and the case-law cited.

125. In both cases, the UCITS' proceeds from dividends received from companies established in the Netherlands will be taxed at the level of the UCITS' shareholder or participant, on account of the tax choice made by the Netherlands. From that point of view, those two situations would appear, therefore, to be objectively comparable.

126. To maintain taxation of dividends received from Netherlands companies only in respect of a non-resident UCITS, by refusing to refund it the withholding tax on those dividends, where, even though that UCITS did not actually distribute the proceeds from those dividends, as it was impossible or excessively difficult to fulfil the obligation relating to actual redistribution, such proceeds are, in its Member State of establishment, deemed to have been distributed and are taxed with regard to its shareholder or participant, would, therefore, appear to constitute different treatment of comparable situations, which is contrary also to the aim of the legislation at issue to avoid double taxation.

127. The conclusion regarding the comparability of the two situations at issue is not called into question by the fact that the non-resident UCITS is not subject to the obligation to withhold Netherlands tax on the proceeds which it pays to its shareholders or participants, a tax which is withheld as a result of the application of the obligation relating to the actual redistribution of proceeds from the dividends of Netherlands companies. This fact does not constitute an objective difference in situation which could justify different treatment between the two situations at issue as regards the refund of the withholding tax on dividends of Netherlands companies received by the UCITS.

128. According to the case-law, when the aim of the fiscal legislation at issue 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 shareholders' income that must be considered decisive, not the method of taxation used. [58]

129. The impossibility of taxing non-resident participants [59] on proceeds distributed by non-resident UCITS, derived from dividends received from Netherlands companies, is merely the logical consequence of the choice made by the Netherlands, in accordance with its tax autonomy, to move the level of taxation from the investment vehicle to the shareholder. [60]

130. That impossibility, resulting from an autonomous choice of the Member State, is not, therefore, due to an objective difference in situation and will not, therefore, where the conditions referred to in point 111 above are satisfied, justify different tax treatment regarding the refund of the withheld tax on dividends at the level of investment vehicles as between resident and non-resident UCITS on the ground that the latter are not subject to the obligation to levy tax on the dividends of Netherlands companies received by their shareholders or participants and those dividends thereby avoid taxation in the case of non-resident shareholders or participants.

131. I would note, lastly, that the Court has already expressly considered, in paragraph 84 of its judgment in *Fidelity Funds*, the possibility that the tax authorities of the Member State in question (in this case the Kingdom of the Netherlands) may, instead of the withholding tax on proceeds paid to participants such as that referred to in point 12 above, take account of the tax paid by a non-resident UCITS to the tax authorities of its Member State of establishment in accordance with its tax legislation, in order to allow that UCITS to benefit from the exemption in its favour (which corresponds to the refund, relevant in this case) of the withholding tax on dividends.

58 See *Fidelity Funds*, paragraph 60.

59 The Netherlands may in any event exercise its power of taxation over resident participants of non-resident UCITS despite the fact that the non-resident UCITS is not subject to the obligation to withhold tax on proceeds distributed by it.

60 See, to that effect, *Fidelity Funds*, paragraph 62.

132. In my view, it follows from the foregoing that the two situations described in points 107 and 111 above are objectively comparable.

3. Whether the restriction is justified

133. The Netherlands has put forward no overriding reason in the public interest to justify the legislation at issue. In that regard, I also consider that the considerations which the Court set out in *Fidelity Funds* — which, as has been pointed out, concerned legislation quite similar to that at issue in the main proceedings — regarding the justifications relating to the need to preserve the balanced allocation of the power to impose taxes between the Member States [61] and the need to safeguard the coherence of the tax system [62] are essentially applicable to the situation in the present case.

134. As regards, first, the balanced allocation of the power to impose taxes between the Member States, it is clear from the case-law that, where a Member State has chosen — as in the situation at issue in the main proceedings, in application of the refund of the withholding tax on dividends received from Netherlands companies — 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, [63] that is to say, in the present case, the dividends received from companies established in the Netherlands.

135. Moreover, to allow a Member State to levy withholding tax on dividends distributed to non-resident UCITS, without refunding it to them because it is impossible to levy tax on all the distributions made by those UCITS, would not in reality 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, compensate for the lack of a power of taxation resulting from the balanced allocation of such powers of taxation between Member States. [64]

136. As regards, secondly, the need to safeguard the coherence of the tax system, it is clear from paragraph 84 of the judgment in *Fidelity Funds* that the internal coherence of the tax system at issue in the main proceedings could be maintained by a less restrictive measure than the refusal to refund the withholding tax.

137. This would be the case if the UCITS resident in a Member State other than the Kingdom of the Netherlands, for which it is impossible or excessively difficult to fulfil the obligation relating to actual redistribution, but in whose Member State of establishment the proceeds are deemed to have been distributed and are taxed in respect of their shareholders of participants, were eligible for a refund of the withholding tax, provided that the Netherlands authorities ascertained, with the full cooperation of those UCITS, that they levy or pay, in their Member State of establishment, a tax equivalent to the Netherlands dividend tax that the resident fund must, in accordance with the obligation referred to in point 12 above, pay, as withholding tax, on the proceeds paid to their shareholders or participants. Allowing such UCITS to obtain that refund would, in such circumstances, constitute a less restrictive measure than the current system.

138. It follows that the restriction resulting from the application of the legislation at issue in the main proceedings cannot be justified either by the need to preserve the balanced allocation of the power to impose taxes between the Member States or the need to safeguard the coherence of the tax system.

61 See paragraphs 66 to 76 of the judgment in *Fidelity Funds*.

62 See paragraphs 77 to 86 of the judgment in *Fidelity Funds*.

63 See paragraph 71 of the judgment in *Fidelity Funds* and the 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 therein).

64 *Fidelity Funds*, paragraph 75.

139. In the light of the foregoing, I consider that the answer to the third question raised by the referring court is that Article 63 TFEU must be interpreted as precluding national legislation of a Member State, such as that at issue in the main proceedings, under which a non-resident UCITS is refused a refund of tax on dividends, withheld on dividends received by entities established in that Member State, on the ground that that UCITS has failed to fulfil the obligation, laid down in the tax legislation of that Member State, to distribute to its shareholders or participants the proceeds distributed by entities resident in that Member State, within 8 months of the end of the financial year, provided that it is proven that it is impossible or excessively difficult for such a non-resident UCITS to fulfil that obligation and, under the legislation of the Member State in which the non-resident UCITS is established, such proceeds are deemed to have been distributed or are included in the tax which the Member State in which the UCITS resides levies on those shareholders or participants as if they had been distributed, whilst the refund in question is granted to a resident UCITS which fulfils that obligation, subject to the withholding of the dividend tax at issue of the Member State.

V. Conclusion

140. On the basis of the foregoing considerations, I propose that the Court should answer the second and third questions referred by the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) as follows:

(1) Article 63 TFEU must be interpreted as not precluding legislation of a Member State, such as that at issue in the main proceedings, under which a non-resident UCITS is refused a refund of dividend tax which was withheld on dividends which it received from entities established in that Member State on the ground that that UCITS has not proved that it satisfied certain conditions governing shareholder structure laid down in the legislation of that Member State, provided that (i) the tax authorities require that resident and non-resident UCITS comply with shareholder requirements in the same way and (ii) the difference in treatment based on the criterion relating to listing on the Stock Exchange of a Member State, in this case the Amsterdam Stock Exchange, does not de facto constitute favoured treatment for enterprises resident in that Member State, a matter which is for the referring court to determine;

(2) Article 63 TFEU must be interpreted as precluding national legislation of a Member State, such as that at issue in the main proceedings, under which a non-resident UCITS is refused a refund of tax on dividends, withheld on dividends received by entities established in that Member State, on the ground that that UCITS has failed to fulfil the obligation, laid down in the tax legislation of that Member State, to distribute to its shareholders or participants the proceeds distributed by entities resident in that Member State, within 8 months of the end of the financial year, provided that it is proven that it is impossible or excessively difficult for such a non-resident UCITS to fulfil that obligation and, under the legislation of the Member State in which the non-resident UCITS is established, such proceeds are deemed to have been distributed or are included in the tax which the Member State in which the UCITS resides levies on those shareholders or participants as if they had been distributed, whilst the refund in question is granted to a resident UCITS which fulfils that obligation, subject to the withholding of the dividend tax at issue of the Member State.