Reports of Cases

JUDGMENT OF THE COURT (First Chamber)

7 November 2024*

(Reference for a preliminary ruling – Article 63(1) TFEU – Free movement of capital – Restrictions – Tax legislation – Corporation tax – Taxation of dividends – Equal treatment of resident and non-resident companies – National legislation reserving to resident companies the possibility of deducting from their taxable profits relating to dividends the expenses corresponding to their commitments to their customers under 'unit-linked' insurance contracts and of offsetting in full taxation of the dividends against corporation tax)

In Case C-782/22,

REQUEST for a preliminary ruling under Article 267 TFEU from the Gerechtshof 's-Hertogenbosch (Court of Appeal, 's-Hertogenbosch, Netherlands), made by decision of 14 December 2022, received at the Court on 14 December 2022, in the proceedings

XX

v

Inspecteur van de Belastingdienst

THE COURT (First Chamber),

composed of T. von Danwitz, Vice-President of the Court, acting as President of the First Chamber, A. Arabadjiev and I. Ziemele (Rapporteur), Judges,

Advocate General: P. Pikamäe,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– XX, by R.A. van der Jagt, belastingadviseur,

– the Netherlands Government, by M.K. Bulterman and A. Hanje, acting as Agents,

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

* Language of the case: Dutch.

– the Spanish Government, by I. Herranz Elizalde, acting as Agent,

– the European Commission, by A. Ferrand and W. Roels, acting as Agents,

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

gives the following

Judgment

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

2 The request has been made in the context of a dispute between XX, a company established in the United Kingdom, and the Inspecteur van de Belastingdienst (inspector of the Tax and Customs Administration, Netherlands) concerning the refund of the dividend tax levied in the Netherlands on dividends received by that company between 2003 and 2010 ('the period at issue in the main proceedings').

Netherlands law

3 Article 3.8 of the Wet inkomstenbelasting 2001 (Law on income tax 2001), in the version applicable during the period at issue in the main proceedings, states:

'The profit from a business enterprise (profit) is the amount of the aggregate benefits that, under whatever name and in whichever forms, are derived from a business enterprise.'

4 Article 3(1) of the Wet op de vennootschapsbelasting 1969 (Law on corporation tax 1969), in the version applicable during the period at issue in the main proceedings ('the Wet Vpb 1969'), read in combination with Article 17 thereof, provides that non-resident taxpayers are subject to corporation tax in the Netherlands only to the extent that they receive income in that Member State.

5 In accordance with Article 7(1) and (2) of that law, for resident taxpayers, tax is to be levied according to the taxable base, which is made up of the taxable profits made in the course of a year, less deductible losses.

6 Article 8(1) of the same law provides that profit is to be determined in accordance, inter alia, with Article 3.8 of the Law on income tax 2001, in the version applicable during the period at issue in the main proceedings.

7 Article 25(1) of the Wet Vpb 1969 provides that dividend tax is to be regarded as an advance levy in respect of corporation tax, except where dividend tax is levied on income or gains which do not form part of the taxable profit or of the Netherlands income received during the year.

8 Article 1(1) of the Wet op de dividendbelasting 1965 (Law on the taxation of dividends 1965), in the version applicable during the period at issue in the main proceedings, provides that a direct tax known as 'dividend tax' is to be imposed on persons who, directly or on the basis of

certificates, receive income from shares or equities in public limited companies, private limited liability companies, partnerships limited by shares and other companies whose capital is divided wholly or partly into shares or equities, established in the Netherlands.

9 In accordance with Article 2 of that law, dividend tax is to be levied on income from the shares or equities referred to in Article 1 thereof.

10 Article 3(1)(a) of the same law provides that income includes direct or indirect profit distributions, however they are designated and whatever form they take, including the profit distributed upon the purchase of shares or equities, unless they are temporarily invested, in excess of the average capital released on the shares concerned.

11 Article 5 of the Law on the taxation of dividends 1965, in the version applicable during the period at issue in the main proceedings, provides that dividend tax is to amount to 15% of income.

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

12 XX is registered in the United Kingdom as an insurance undertaking and concludes with its customers, which are mainly institutional pension insurance companies and employers established in the United Kingdom, contracts referred to as 'unit-linked insurance contracts'.

13 Under those contracts, XX invests the premiums received from its customers in order to generate a return on investment, while the insurance risk linked to the pension agreements concluded between customers and third parties is borne by the customers. The premiums received from customers are allocated to one or more baskets of unit securities linked to units of account and, in exchange, 'units' are attributed to customers. The latter are then attributed a value corresponding to the number of those units, multiplied by the value of the unit at the time at which they are entitled to a payment. That time generally corresponds to the point at which those customers are required to pay pension benefits to their insurees. Other than determining the risk profile, XX's customers have no influence on the choice of securities in which they invest and no rights over those securities, but only a derivative economic interest in the value of the securities in which units are invested.

14 XX's remuneration for the investment activities offered to its customers corresponds to a percentage of the value of the assets managed for those customers and depends in part on the returns on investment obtained.

15 During the period at issue in the main proceedings, the baskets included shares in companies established in the Netherlands. The dividends paid by those companies were subject in that Member State to dividend tax at a rate of 15%.

16 In the United Kingdom, XX is subject to income tax and cannot offset dividend tax that has been levied by the Kingdom of the Netherlands.

17 As XX's application for a refund of the dividend tax relating to the period at issue in the main proceedings in respect of the dividends received in the Netherlands as well as a subsequent complaint were rejected by the tax authorities, XX brought an action before the rechtbank Zeeland-West-Brabant (District Court, Zeeland-West-Brabant, Netherlands) which, in turn, by judgment of 24 August 2020, dismissed XX's action as unfounded.

18 XX lodged an appeal against that judgment before the Gerechtshof 's-Hertogenbosch (Court of Appeal, 's-Hertogenbosch, Netherlands), which is the referring court.

19 That court states that, as regards dividends received in the Netherlands, XX is faced with a difference in tax treatment as compared with resident taxpayers. Dividends received by XX are subject to a 15% tax on their gross amount, whereas a resident taxpayer who receives the same dividends and otherwise carries on activities comparable to those of XX is effectively not taxed on those dividends.

20 Although resident taxpayers are also subject to dividend tax, that tax constitutes for them, in accordance with Article 25(1) of the Wet Vpb 1969, an advance levy in respect of the corporation tax for which they will be liable. The dividend tax to which resident taxpayers are subject can thus be offset in full against the corporation tax due and, if the latter tax is lower than the dividend tax that has been levied, the difference is refunded to them.

21 The referring court notes that, were XX established in the Netherlands, corporation tax would be levied only on the remuneration that it receives for the services that it provides to its customers. The net corporation tax base by way of the dividends received would be nil, since, when determining profit, the increase in commitments to customers under unit-linked insurance contracts would be taken into account as expenses.

22 Although the receipt of dividends as such does not affect XX's various balance sheet items, either on the assets side or the liabilities side, there would nevertheless be a direct causal link between XX's return on investment and the changes in its commitments to customers. As dividends are distributed profits, there would be an economic link between those dividends, which form part of the return on the investments made by XX, and the changes in the level of its commitments to customers. In view of that link, were XX established in the Netherlands, it would not be subject to corporation tax on those dividends.

23 The referring court takes the view that such a difference in treatment between residents and non-residents as regards dividends received in the Netherlands is liable to constitute a restriction on the free movement of capital within the meaning of Article 63(1) TFEU. As regards the gross amount of the dividends, XX's situation is comparable with that of a resident taxpayer who receives the same dividends, since, in both cases, the Kingdom of the Netherlands taxes those dividends.

24 However, in so far as XX invests, inter alia, in shares in the Netherlands in order to cover its commitments to its customers under unit-linked contracts and as, leaving aside the remuneration that XX receives for the provision of its services and negligible costs, the returns on investment obtained entail a corresponding change in the value of its commitments to customers under those contracts, the question arises as to whether XX is also comparable with a resident recipient of dividends from the point of view of the expenses resulting from that increase in commitments to its customers.

25 The referring court considers, in essence, that the compatibility with EU law of the tax treatment of the dividends paid to XX cannot be clearly deduced from the case-law of the Court.

26 In those circumstances, the Gerechtshof 's-Hertogenbosch (Regional Court of Appeal, 's-Hertogenbosch) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Does Article 63(1) TFEU preclude legislation such as that at issue, according to which dividends paid by listed and unlisted companies established in the Netherlands to a company established in another Member State that has invested, inter alia, in shares in those listed and unlisted companies to cover future payment obligations are subject to withholding tax at the rate of 15% on the gross amount of those dividend payments, whereas the tax burden on dividend payments to a company established in the Netherlands in otherwise similar circumstances would be nil, because the calculation of the basis of assessment for the tax on profits to which that company would be subject takes into account the costs that are incurred as a result of an increase in the future payment obligations of the company, which increase corresponds almost entirely to a (positive) change in the value of the investments, even though the receipt of dividends does not as such lead to a change in the value of those obligations?'

Consideration of the question referred

27 By its question, the referring court asks, in essence, whether Article 63(1) TFEU must be interpreted as precluding national legislation under which dividends distributed by a resident company to a non-resident company, which has invested in the shares of the first company in order to cover future payment commitments, are subject to a dividend tax of 15% on their gross amount, whereas dividends distributed to a resident company are subject to withholding tax which may be offset in full against the corporation tax payable by the second company and give rise to a refund, leading to the tax burden on those dividends being nil due to the taking into account, in the calculation of the second company's corporation tax base, of the costs arising from the increase in its future payment commitments.

Whether there is a restriction prohibited by Article 63(1) TFEU

28 It follows from 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 (see, inter alia, judgments of 13 November 2019, *College Pension Plan of British Columbia*, C-641/17, EU:C:2019:960, paragraph 48, and of 29 July 2024, *Keva and Others*, C-39/23, EU:C:2024:648, paragraph 40 and the case-law cited).

29 Specifically, the less favourable treatment by a Member State of dividends paid to non-resident companies, compared with the treatment of dividends paid to resident companies, is liable to deter companies established in a State other than that Member State from pursuing investments in that same Member State and, consequently, amounts to a restriction of the free movement of capital, prohibited, in principle, under Article 63(1) TFEU (see, to that effect, judgments of 13 November 2019, *College Pension Plan of British Columbia*, C-641/17, EU:C:2019:960, paragraph 49 and the case-law, and of 7 April 2022, *Veronsaajien oikeudenvalvontayksikkö (Exemption of contractual investment funds)*, C-342/20, EU:C:2022:276, paragraph 50).

30 The application to dividends paid to non-resident companies of a tax burden heavier than that borne by resident companies in respect of the same dividends constitutes such less favourable treatment. The same applies to the total or substantial exemption of dividends paid to a resident

company, whereas dividends paid to a non-resident company are subject to definitive withholding tax (see, to that effect, judgment of 13 November 2019, *College Pension Plan of British Columbia*, C-641/17, EU:C:2019:960, paragraph 50 and the case-law cited).

31 Where a dividend tax is withheld at source by a Member State on dividends distributed by companies established in that Member State, the Court has held that, for the purposes of assessing whether the legislation of a Member State is compatible with Article 63 TFEU, it is for the national court concerned, which is the only court capable of assessing the facts before it, to verify whether the application of the withholding tax on the dividends distributed to a non-resident company results in that company ultimately bearing a heavier tax burden in that same Member State than that borne by residents for the same dividends (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 48).

32 Such a verification must be carried out in the light of, on the one hand, the tax on dividends payable by the non-resident taxpayer and, on the other, the income tax or corporation tax payable by the resident taxpayer which includes in its taxable base the income from the shares from which the dividends arise (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 74).

33 In the case at hand, as the referring court notes, under the Netherlands legislation at issue in the main proceedings, both the dividends distributed to a non-resident company and those distributed to a resident company are subject to a dividend tax.

34 With regard to a non-resident company which receives dividends, that withheld tax is final, such that dividends are subject to a tax of 15% on their gross amount.

35 By contrast, for the resident company which receives dividends, it is an advance levy in respect of the corporation tax for which it will be liable and which will be able to be offset in full against it and give rise to a refund, should the dividend tax exceed the corporation tax payable by that company.

36 Consequently, according to the explanations provided by the referring court, the resident company is effectively not taxed on dividends received, since, when determining the taxable profit for corporation tax purposes, the increase in commitments to customers by way of unit-linked insurance contracts is taken into account as expenses, with the result that the net corporation tax base in respect of those dividends is nil.

37 In that regard, the Netherlands Government disputes the referring court's assertion that the tax burden on dividends distributed to resident companies is nil and submits that the burden represented by the 15% tax on gross dividends to which the dividends paid to non-resident companies are subject must be compared with the tax burden resulting from the levying on net dividends of the corporation tax to which the dividends paid to resident companies are subject, which ranged from 20% to 34% during the period at issue in the main proceedings.

38 It should however be recalled that, as far as the interpretation of national provisions is concerned, the Court is in principle required to rely on the description given in the order for reference. According to settled case-law, the Court does not have jurisdiction to interpret the internal law of a Member State (see, to that effect, judgment of 5 December 2023, *Deutsche Wohnen*, C-807/21, EU:C:2023:950, paragraph 36 and the case-law cited).

39 Therefore, it is appropriate to rely on the premiss set out by the referring court and to consider that, even where a withholding tax is levied both on dividends paid to resident companies and on dividends paid to non-resident companies, the application of the mechanism for offsetting the dividend tax against the corporation tax payable by the resident company – and for the refund of that tax, in the event that the corporation tax payable is lower than the dividend tax withheld – provided for by the Netherlands legislation at issue in the main proceedings, combined with the method of calculating the resident company's taxable base allowing for the deduction of expenses relating to the increase in commitments to customers by way of unit-linked contracts, results in the dividends paid to resident companies being exempt from tax.

40 It follows that dividends paid to non-resident companies are treated less favourably for tax purposes than dividends paid to resident companies, in so far as the former are subject to a final tax rate of 15%, whereas the latter are ultimately exempt from tax.

41 Such unfavourable treatment of dividends by a Member State is liable to deter non-resident companies from making investments in that Member State and, consequently, constitutes a restriction on the free movement of capital prohibited, in principle, by Article 63(1) TFEU.

42 That being said, pursuant to Article 65(1)(a) TFEU, Article 63 TFEU is 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.

43 It is apparent from settled case-law that Article 65(1)(a) TFEU, in so far as it is a derogation from the fundamental principle of the free movement of capital, must be interpreted strictly. That provision cannot therefore be interpreted as meaning that all tax legislation which draws a distinction between taxpayers based on their place of residence or the State in which they invest their capital is automatically compatible with the FEU Treaty (judgment of 7 April 2022, *Veronsaajien oikeudenvalvontayksikkö (Exemption of contractual investment funds)*, C-342/20, EU:C:2022:276, paragraph 67 and the case-law cited).

44 The differences in treatment permitted by Article 65(1)(a) TFEU must not constitute, according to Article 65(3) TFEU, a means of arbitrary discrimination or a disguised restriction. The Court has held, consequently, that such differences in treatment are permitted only when they concern situations which are not objectively comparable or, otherwise, when they are justified by an overriding reason in the public interest (judgment of 7 April 2022, *Veronsaajien oikeudenvalvontayksikkö (Exemption of contractual investment funds)*, C-342/20, EU:C:2022:276, paragraph 68 and the case-law cited).

Whether situations are objectively comparable

45 It follows from the Court's case-law, first, that the comparability or otherwise of a cross-border situation with a domestic situation must be examined having regard to the objective pursued by the national legislation at issue and to the purpose and content of that legislation, and, second, that only the relevant distinguishing criteria established by that legislation must be taken into account for the purpose of assessing whether the difference in treatment resulting from such legislation reflects a difference in objective situation (see, to that effect, judgment of 29 July 2024, *Keva and Others*, C-39/23, EU:C:2024:648, paragraph 51 and the case-law cited).

46 In that regard, the referring court asks whether XX is in a situation comparable with that of a resident company receiving dividends from the point of view of the expenses resulting from the increase in commitments to customers under unit-linked insurance contracts, which increase is a consequence of the realisation of profits by the companies in whose shares XX has invested.

47 It should be noted that that court does not specify the specific objective that the Netherlands legislation at issue in the main proceedings pursues by allowing the resident company to deduct from the taxable base the expenses resulting from the increase in commitments to the customers of such a company that has concluded contracts such as those at issue in the main proceedings, merely observing that that deduction is made in respect of costs incurred.

48 It follows from the Court's settled case-law that, in relation to expenses such as business expenses which are directly linked to an activity that has generated taxable income in a Member State, residents and non-residents of that State are in a comparable situation (see, inter alia, judgments of 24 February 2015, *Grünewald*, C-559/13, EU:C:2015:109, paragraph 29; of 8 November 2012, *Commission* v *Finland*, C-342/10, EU:C:2012:688, paragraph 37; of 17 September 2015, *Miljoen and Others*, C-10/14, C-14/14 and C-17/14, EU:C:2015:608, paragraph 57; and of 13 November 2019, *College Pension Plan of British Columbia*, C-641/17, EU:C:2019:960, paragraph 74).

49 In accordance with the case-law of the Court, expenses occasioned by the activity in question are directly linked to that activity and are accordingly necessary in order to carry out that activity (judgments of 24 February 2015, *Grünewald*, C-559/13, EU:C:2015:109, paragraph 30 and the case-law cited; of 13 July 2016, *Brisal and KBC Finance Ireland*, C-18/15, EU:C:2016:549, paragraph 46; and of 6 December 2018, *Montag*, C-480/17, EU:C:2018:987, paragraph 33).

50 The Court has held that, as regards income received in the form of dividends, such a direct link exists only in the case of expenses directly linked to the actual receipt of the dividends (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, paragraphs 58 and 59).

51 Thus, no such link exists as regards the deduction of the dividend included in the purchase price of the shares, the purpose of such a deduction being to establish the actual purchase price of the shares, or as regards the financing costs, as those concern ownership per se of the shares giving rise to the dividends (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 60).

52 It is true that it does not seem possible for the increase in commitments to customers to be linked to the actual receipt of the dividends, within the meaning of the case-law cited in paragraph 50 of the present judgment.

53 However, that fact alone does not support the conclusion that the situations of resident and non-resident dividend recipients are incomparable in the light of the Netherlands legislation at issue in the main proceedings.

54 Indeed, in paragraphs 55 and 81 of the judgment of 13 November 2019, *College Pension Plan of British Columbia* (C-641/17, EU:C:2019:960), which was delivered after the judgment of 17 September 2015, *Miljoen and Others* (C-10/14, C-14/14 and C-17/14, EU:C:2015:608), the Court held, in essence, that a non-resident pension fund, which allocates the dividends received to provisions for pensions that it will have to pay in the future, intentionally or pursuant to the

law in force in its State of residence, was in a situation comparable to that of a resident pension fund in the light of national legislation by virtue of which, for the calculation of corporation tax, the receipt of dividends by such a resident pension fund results in a very small increase in its taxable profit, and even, in certain cases, in no increase in that profit. The Court in fact noted, in that paragraph 55, that such a receipt had the effect of increasing the technical provisions in due proportion and that the taxable profit of the resident pension fund concerned increased only where the returns on non-accounting investments were not credited to the various agreements of the latter pension fund.

55 In paragraphs 79 and 80 of the judgment of 13 November 2019, *College Pension Plan of British Columbia* (C-641/17, EU:C:2019:960), the Court considered, first, that there was, in the case which gave rise to that judgment, a causal link between the receipt of dividends, the increase in mathematical provisions and other items on the liabilities side and the absence of any increase in the taxable amount of the resident fund, and, second, that such national legislation allowing complete or almost complete exemption from tax of dividends paid to resident pension funds thus facilitated the accumulation of the capital of such funds, while all pension funds are, in principle, required to invest insurance premiums on the capital market in order to generate income in the form of dividends that enable them to meet their future obligations under insurance contracts.

56 The Court has thus found that the obligations of pension funds, relating to the investment of insurance premiums and the allocation of dividends received to make provision for pensions, may serve as a basis for comparability between resident and non-resident pension funds in the light of national legislation which, by means of the method of calculating the basis of assessment to corporation tax, allows complete or almost complete exemption from tax of dividends received by a resident pension fund, where there is a causal link between the receipt of dividends and the expenses constituted by those obligations and arising from the activity of such funds.

57 In the case at hand, the referring court notes that, while a company such as XX is not a pension fund, its activity is nevertheless characterised by the fact that it invests, particularly in shares in the Netherlands, in order to cover its commitments to its clients under unit-linked contracts and that the returns on investment obtained by that company entail a corresponding change in the value of its commitments to clients under those contracts.

58 The referring court also considers that there is a direct causal link between the return on investment and the changes in its commitments and that it is precisely because of that link that a resident company is not taxed on those dividends by way of corporation tax, since they constitute distributed profits and since there is an economic link between those dividends and the change in the level of commitments to customers.

59 If it transpires, however, having regard to the specific purpose of the investment activities, that the national legislation recognises such a direct link between the dividends received by resident companies and the change in the level of commitments to the customers of those companies, which it is for the referring court to determine, it would have to be held that a non-resident company is in a situation objectively comparable with that of a resident company as regards dividends from Netherlands sources, since such a non-resident company pursues the same activity and the dividends received by it result in the change in the level of commitments to its customers.

60 Moreover, if a direct link is recognised by the national legislation between the dividends received by resident companies and the change in the level of commitments to the customers of those companies, which may be deducted from the basis of assessment to corporation tax, it is for the referring court to examine whether such a mechanism is not intended as a pure and simple exemption from taxation of the dividends distributed to resident companies concluding unit-linked contracts (see, to that effect, judgment of 8 November 2012, *Commission* v *Finland*, C-342/10, EU:C:2012:688, paragraph 42).

61 In that regard, it must be borne in mind that, according to the settled case-law of the Court, as soon as a Member State, either unilaterally or by way of a convention, imposes a charge to tax on the income not only of resident taxpayers but also of non-resident taxpayers from dividends which they receive from a resident company, the situation of those non-resident taxpayers becomes comparable to that of resident taxpayers (judgments of 17 September 2015, *Miljoen and Others*, C-10/14, C-14/14 and C-17/14, EU:C:2015:608, paragraph 67, and of 13 November 2019, *College Pension Plan of British Columbia*, C-641/17, EU:C:2019:960, paragraph 66 and the case-law cited).

62 It is the exercise alone 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 taxpayers receiving dividends not to be subject to a restriction on the free movement of capital prohibited in principle by Article 63(1) TFEU, the State in which the company paying the dividend 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 taxpayers are subject to the same treatment as resident taxpayers (judgment of 17 September 2015, *Miljoen and Others*, C-10/14, C-14/14 and C-17/14, EU:C:2015:608, paragraph 68 and the case-law cited).

63 Were the referring court to find that a non-resident company is in a situation objectively comparable with that of a resident company, it would be necessary, in accordance with the case-law cited in paragraph 44 of the present judgment, to examine whether the difference in treatment at issue in the main proceedings is capable, as the case may be, of being justified by overriding reasons in the public interest.

Whether there is an overriding reason in the public interest

64 It should be noted at the outset that no such reasons were put forward either in the request for a preliminary ruling or by the Netherlands Government. In those circumstances, it is for the referring court, as appropriate, to examine whether there is any justification in the light of the objectives pursued by the national legislation at issue in the main proceedings.

65 That being said, in its written observations, the German Government considers that, in the case at hand, any restriction on the free movement of capital is justified by the need to preserve both the allocation of powers of taxation between the Member States and the coherence of the national tax system. In order to provide a useful answer enabling the referring court to resolve the dispute before it, it is appropriate to examine whether those overriding reasons in the public interest may justify such a restriction.

66 The German Government maintains, first, that the non-deductibility of the expenses relating to the increase in payment commitments arising from contracts for the investment of insurance contributions serves to preserve the allocation of powers of taxation agreed between the States, since it could be assumed that XX may deduct, in its State of residence, the fiscal expenses linked

to the increase in commitments to its customers on account of the link with the activity of investing insurance contributions on behalf of occupational pension schemes, and the remuneration arising therefrom. An additional deduction when taxing dividend income in the Netherlands would therefore result in a double tax advantage, contrary to the allocation of powers of taxation made.

67 Second, there is a correlation between the tax advantage concerned and the offsetting of that advantage by a specific tax levy, enabling the justification based on the need to preserve the coherence of the tax system of the Member State concerned to be used. After all, XX's fiscal expenses resulting, where appropriate, from the increase in commitments to customers is directly linked to the remuneration which it received for the investment of insurance contributions and which is not subject to taxation in the Netherlands. The ruling out of the deductibility of any expenses linked to the increase in commitments to customers, in the context of taxation of the dividends received by XX, thus follows a symmetrical logic and constitutes the counterpart of the non-taxation of remuneration from the investment of insurance contributions.

68 In the first place, 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 (judgment of 16 June 2022, *ACC Silicones*, C-572/20, EU:C:2022:469, paragraph 53 and the case-law cited).

69 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 (judgment of 16 June 2022, *ACC Silicones*, C-572/20, EU:C:2022:469, paragraph 54 and the case-law cited).

70 In the present case, although the Kingdom of the Netherlands chose to exercise its powers of taxation in respect of all dividends received by both resident and non-resident companies, that Member State also decided, as is apparent from the file before 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 (see, to that effect, judgment of 16 June 2022, *ACC Silicones*, C-572/20, EU:C:2022:469, paragraph 55).

71 In the second place, to the extent that, in the context of the argument relating to the allocation of powers of taxation between the Member States, the German Government is in fact relying on the desire to prevent the double deduction of expenses, it is important to note that a Member State is entitled to verify that expenses borne from dividends, the deduction of which is thus applied for, cannot be regarded, in another Member State, as burdening other income – such as the income from the remuneration paid by the company's customers for the investments made – and that they are not, on that basis, deducted from that income in that other Member State.

72 However, by merely relying on, without further clarification, the potential risk that, in a situation such as that at issue in the main proceedings, expenses borne from dividends may be deducted a second time in the State of residence of the company receiving them, without establishing how that risk was not prevented by the implementation of the provisions of Council Directive 77/799/EEC of 19 December 1977 concerning mutual assistance by the competent authorities of

the Member States in the field of direct taxation and taxation of insurance premiums (OJ 1977 L 336, p. 15), as amended by Council Directive 2004/106/EC of 16 November 2004 (OJ 2004 L 359, p. 30), in force during the period at issue in the main proceedings, the German Government does not make it possible for the Court to assess the scope of that argument (see, to that effect, judgments of 24 February 2015, *Grünewald*, C-559/13, EU:C:2015:109, paragraph 52, and of 13 July 2016, *Brisal and KBC Finance Ireland*, C-18/15, EU:C:2016:549, paragraph 38).

73 In the third place, as regards the argument based on the need to preserve the coherence of the tax system of the Kingdom of the Netherlands, it is appropriate to point out that that argument is based on the premiss that the expenses relating to the increase in commitments to customers are not directly linked to the activity which generated taxable income, in the form of dividends, in that Member State, but relate to the remuneration received by the company receiving the dividends, from its customers for the investments that it has made for them. In the case of a non-resident company such as XX, such remuneration is not taxable in the Netherlands.

74 However, as is apparent from paragraph 59 of the present judgment, a non-resident company is in a situation comparable with that of a resident company as regards the taking into account of the expenses relating to the increase in commitments to customers only in so far as the tax system of the Member State of residence of the company distributing those dividends recognises a direct link between those dividends and those expenses. The Kingdom of the Netherlands has the power to tax dividends from Netherlands sources distributed to both resident and non-resident companies.

75 The need to preserve the allocation of powers of taxation between the Member States, to prevent expenses being taken into account twice and to preserve the coherence of the national tax system cannot, therefore, be relied on in order to justify the restriction on the free movement of capital at issue in the main proceedings.

76 In the light of all the foregoing reasons, the answer to the question referred is that Article 63(1) TFEU must be interpreted as precluding national legislation under which dividends distributed by a resident company to a non-resident company, which has invested in the shares of the first company in order to cover future payment commitments, are subject to a dividend tax of 15% on their gross amount, whereas dividends distributed to a resident company are subject to withholding tax which may be offset in full against the corporation tax payable by the second company and give rise to a refund, leading to the tax burden on those dividends being nil due to the taking into account, in the calculation of the second company's corporation tax base, of the costs arising from the increase in its future payment commitments.

Costs

77 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring 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 (First Chamber) hereby rules:

Article 63(1) TFEU must be interpreted as precluding national legislation under which dividends distributed by a resident company to a non-resident company, which has invested in the shares of the first company in order to cover future payment commitments,

are subject to a dividend tax of 15% on their gross amount, whereas dividends distributed to a resident company are subject to withholding tax which may be offset in full against the corporation tax payable by the second company and give rise to a refund, leading to the tax burden on those dividends being nil due to the taking into account, in the calculation of the second company's corporation tax base, of the costs arising from the increase in its future payment commitments.

[Signatures]