OPINION OF ADVOCATE GENERAL MENGOZZI
delivered on 25 May 2011 [1]

I — Introduction

1. By its action brought on 1 December 2009, the European Commission seeks a declaration that, by taxing dividends received by non-resident pension funds on Portuguese territory at a higher rate than dividends earned by resident pension funds, the Portuguese Republic has failed to fulfil its obligations under Article 63 TFEU (formerly Article 56 EC) and Article 40 of the Agreement on the European Economic Area of 2 May 1992 [2] ('the EEA Agreement').

II — Legal framework

2. Under Article 16(1) of the Estatuto dos Beneficios Fiscais (Tax Benefits Code; the 'EBF'), income earned by pension funds and entities assimilated to them, which are established and operate in accordance with Portuguese law, are exempt from the 'imposto sobre o rendimento das pessoas colectivas' (corporation tax; the 'IRC').

3. Article 16(4) of the EBF provides that in the event of non-compliance with the conditions laid down in Article 16(1), the benefit provided for is not to apply in respect of the year concerned, and the companies managing the pension and assimilated entities, including mutual associations, are to be liable as principals for taxes on the funds or assets for whose management they are responsible and must pay the tax due within the period provided for in Article 120(1) of the 'Código do Imposto sobre o rendimento das pessoas colectivas' (Code on Corporation Tax, hereinafter the 'CIRC').

4. Under Article 4(2) of the CIRC, the legal persons and other entities who have neither their headquarters nor their actual management on Portuguese territory remain taxable to IRC on income realised on Portuguese territory. Article 80(4)(c) of the CIRC specifies that the IRC is 20 %, subject, where

1 — Original language: French.
2 — OJ 1994 L 1, p. 3.

appropriate, to the application of the provisions of any double taxation agreement. [3]

5. Under Article 4(3)(c), point 3, of the CIRC, income from the investment of capital owed by a person who is domiciled, has established its headquarters or has its actual management on Portuguese territory, or income from the investment of capital the payment of which may be imputed to a permanent establishment situated in Portugal, forms part of the income of non-resident persons who are taxable in Portugal.

6. Article 88 (11) of the CIRC provides as follows:

'A tax rate of 20% shall be imposed on profits distributed by entities subject to IRC to entities qualifying for total or partial exemption, including, in this case, income on capital, where the securities giving entitlement to the profits have not remained in the continuous ownership of the same taxable person throughout the year preceding the date of their acquisition and have not been retained for the time necessary to complete this period.'

7. Article 88(12) of the CIRC states as follows:

'Any tax deducted at source shall be deducted from the amount of the tax determined in accordance with the provisions of paragraph 11. Tax deducted at source may not then be deducted under Article 90(2).'

8. Finally, Article 90(2) of the CIRC states, in regard to dividends paid to resident pension funds, that the parties paying are not required to withhold IRC tax at source where they have been provided with proof of the exemption of those funds valid until the due date for payment of the tax.

III — Pre-litigation procedure

9. On 23 March 2007, the Commission sent to the Portuguese Republic a letter of formal notice, in which it alleged that Portuguese tax provisions which treat dividends and interest earned by non-resident pension

3 — According to the Commission, not challenged by the Portuguese Republic, under such an agreement the tax rate would be reduced to 10%.

funds in Portugal unfavourably were incompatible with Article 56 EC and Article 40 of the EEA Agreement.

10. As it was not satisfied with the response of the Portuguese Republic, the Commission addressed, on 8 May 2008, a reasoned opinion to it in which it called on the Portuguese Republic to take the necessary measures to comply with the Article 56 EC and Article 40 of the EEA Agreement in regard to the legislation relating to the taxation of dividends paid to non-resident pension funds. [4]

11. In its reply dated 14 August 2008, the Portuguese Republic acknowledged that the tax system in question constituted a restriction on the free movement of capital, but it submitted that such a restriction was justified under Community law. In particular, it argued that the more favourable tax system reserved for pension funds established in Portugal is justified by the particular characteristics of national pension funds and by the specific rules to which they are subject. In its reply the Portuguese Republic highlighted the practical impossibility of verifying whether a non-resident entity meets conditions that are analogous to those required by national legislation, and dwells on the fiscal coherence of the contested scheme.

4 — As stated in the originating application, the Commission has withdrawn its claim relating to the tax treatment of interest at the time of the reasoned opinion, which, it explains, are the subject of separate infringement proceedings.

IV — Procedure before the Court and forms of order sought

12. By application lodged with the Registry of the Court on 1 December 2009, the Commission brought the present action, in which it claims that the Court should:

— declare that, by taxing dividends received by non-resident pension funds at a rate higher than that charged on dividends received by pension funds established in Portuguese territory, the Portuguese Republic has failed to fulfil its obligations under Article 63 TFEU and Article 40 of the EEA Agreement:

— order the Portuguese Republic to pay the costs.

13. The Portuguese Republic contends that the Court should dismiss the application and order the Commission to pay the costs.

14. By document filed at the Registry of the Court on 8 April 2010, and on the basis of the third paragraph of Article 40 of the Statute of the Court of Justice of the European Union and Article 93 of its Rules of Procedure, the EFTA Surveillance Authority applied to intervene in this case in support of the form of order sought by the Commission.

15. By order of 15 July 2010, the President of the Court rejected that request.

16. The Commission and the Portuguese Republic presented oral argument at the hearing on 24 March 2011.

V — Analysis

17. Before examining the restrictive nature of the regime as well as the justifications pleaded by the Portuguese Republic, I should like to offer some observations on the subject-matter of the failure to fulfil obligations alleged by the Commission, an issue which was specifically discussed at the hearing before the Court.

A — *Subject matter of the alleged failure to fulfil obligations*

18. As indicated by the Commission, the present action for failure to fulfil obligations concerns the difference in treatment under the Portuguese tax system of dividends received by pension funds according to the place where such funds are established. Thus, dividends paid by Portuguese companies to pension funds established and operating in accordance with Portuguese legislation are entirely exempt from IRC, whereas similar dividends paid to non-resident pension funds are subject to a maximum rate of 20% on dividends paid.

19. The Commission regards this difference in treatment as a restriction on the free movement of capital, inasmuch as investment by non-resident pension funds in Portuguese companies is made less attractive.

20. The Portuguese Republic argues that the subject-matter of the alleged failure to fulfil obligations is formulated too generally. Indeed, according to Article 88(11) of the CIRC, profits distributed by Portuguese entities liable to IRC to pension funds are taxed at a rate of 20% if the shares giving rise to dividends have not remained in the continuous ownership of the same taxable person during the year preceding taxation thereof and will not be retained for the time necessary to complete that period. This rate is the same as the tax on non-resident pension funds. Therefore, the Portuguese Republic deduces that the alleged failure to fulfil obligations should have been limited to shares held by a retirement fund for a period *exceeding* one year.

21. I am not persuaded by the Portuguese Republic's objection.

22. Indeed, it is clear from the wording of the operative part of the originating application that the failure to fulfil obligations does not relate to the legislative provisions that tax

dividends distributed by Portuguese companies to resident and non-resident pension funds at the same rate of 20%, such as those applying to shares retained for a period of less than one year.

23. Therefore, the form of order sought by the Commission does not extend to situations in which the taxation of dividends paid to resident pension funds and that paid to non-resident pension funds is the same.

B — *Whether there is a restriction on movements of capital*

24. As a preliminary matter, may I observe that Article 63(1) TFEU prohibits all restrictions on movements of capital between Member States.

25. So, measures, including tax measures, adopted by a Member State which are likely to deter non-residents from making investments in its territory constitute such restrictions. [5]

26. In the present case, while dividends paid to non-resident pension funds are subject to a 20% deduction at source, there is no such deduction in respect of dividends paid to Portuguese pension funds. Investment in the capital of Portuguese companies is therefore undeniably rendered less attractive to non-resident funds than to resident funds, since all such funds are in a comparable situation under the Portuguese legislation, because the Portuguese Republic, as the Member State where the income arises, exercises its tax jurisdiction in respect of dividends distributed to those funds irrespective of their place of establishment.

27. In addition, I would observe that the Portuguese Republic does not contest the allegation of less favourable treatment.

28. Hence, I consider that the tax regime in question constitutes a restriction on movements of capital prohibited, in principle, by Article 63(1) TFEU.

29. In so far as the provisions of Article 40 of the EEA Agreement have the same legal scope as the substantially identical provisions of Article 63(1) TFEU, the

5 — See, in particular, in this connection, Cases C-101/05 *A* [2007] ECR I-11531, paragraph 40; C-487/08 *Commission* v *Spain* [2010] ECR I-4843, paragraph 43; and Joined Cases C-436/08 and C-437/08 *Haribo Lakritzen Hans Riegel and Österreichische Salinen* [2011] ECR I-0305 paragraph 50.

above considerations can be applied *mutatis mutandis* to Article 40. [6]

30. It therefore remains for me to examine the justification advanced by the Portuguese Republic.

C — *The justifications relied on by the Portuguese Republic*

31. The Portuguese Republic broadly invokes two sets of pleas by way of justification for the restriction on the movements of capital set out above, namely the need to maintain the coherence of the tax system and the need to ensure effective fiscal supervision.

1. Coherence of the tax system

32. According to the Portuguese Republic, the tax system relating to pension funds is justified under an extensive application of the principle of fiscal coherence. Thus, the exemption of the income of Portuguese pension funds is offset by tax imposed on pensions paid to beneficiaries residing in Portugal by way of personal income tax. In the pensions field, such an interpretation is necessary in order to obviate any risk of damaging the financial equilibrium of the social security system. The Portuguese Republic refers in its pleadings to the 'EET' principle (exemption of contributions to pension funds, exemption of income received and of capital gains realised by the pension funds, and taxation of pensions paid to natural persons). The system is ultimately intended to channel savings into instruments for the financing of pensions by preventing double taxation of such income.

33. The Commission replies that, having regard to the Court's case-law, such a justification cannot be accepted in the present case.

34. I share the view taken by the Commission.

35. In this regard, I note that since the judgments in *Bachmann* and *Commission* v *Belgium*, [7] the Court has acknowledged that the need to maintain the coherence of a tax system is likely to justify rules of such a nature

6 — See in this connection the judgment in Case C-20/09 *Commission* v *Portugal* [2011] ECR I-2637, paragraph 68, and case-law therein cited.

7 — Case C-204/90 *Bachmann* [1992] ECR I-249 and Case C-300/90 *Commission* v *Belgium* [1992] ECR I-305.

as to restrict the exercise of the freedoms of movement guaranteed by the Treaty. [8]

36. However, according to settled case-law, for an argument based on such justification to succeed, the Court requires that a direct link be established between the tax advantage concerned and the offsetting of that advantage by a particular tax levy, the direct nature of this link being assessed in the light of the objective of the legislation in question. [9]

37. Until the judgment in *Manninen* , [10] the Court interpreted the concept of direct link as requiring that the deduction and the levy be effected in the context of the same tax and in respect of the same taxpayer. [11]

38. As I have already stated in my Opinion in the *Columbus Container Services* case, [12] since its judgment in *Manninen* the Court has attenuated the rigidity of the interpretation of the concept of direct link based on the criteria of the same tax and the same taxpayer, which previously prevailed in the case-law.

39. It is in this context that the Portuguese Republic proposes that the Court should adopt a 'broad' view of the justification based on the coherence of the tax system.

40. The Portuguese Republic is fully aware that if one follows the pre-*Manninen* case-law, there is clearly no direct link in the present case. Indeed, the tax disadvantage to pension funds not established in Portugal and the exemption of retirement pensions paid to retired natural persons affect two different taxpayers pursuant to two distinct taxes: the first is the taxation of a legal person's profits and the second the taxation of a natural person's income.

41. In any event, even under the post-*Manninen* case law, there is no direct link in the present case.

8 — See *Bachmann* (paragraph 28) and *Commission* v *Belgium* (paragraph 21), as well as Cases C-471/04 *Keller Holding* [2006] ECR I-2107, paragraph 40 and C-379/05 *Amurta*, [2001] ECR I-9569, paragraph 46.

9 — See, inter alia, Cases C-319/02 *Manninen* [1998] ECR I-74 paragraphs 42 and 43; C-293/06 *Deutsche Shell* [1998] ECR I-1129, paragraph 37; C-418/07 *Papillon* [1998] ECR I-8947, paragraph 44; C-303/07 *Aberdeen Property Fininvest Alpha* [1998] ECR I-5145, paragraph 72; and C-233/09 *Dijkman and Dijkman-Lavaleije* ECR I-6649, paragraph 55.

10 — Cited above.

11 — See, inter alia, Cases C-251/98 *Baars* [2000] ECR I-2787, paragraph 40; C-35/98 *Verkooijen* [1998] ECR I-4071, paragraphs 57 and 58; C-168/01 *Bosal* [1998] ECR I-9409, paragraphs 29 and 30; and C-315/02 *Lenz* [2000] ECR I-7063, paragraph 36.

12 — Point 189 of the Opinion delivered on 29 March 2007 in Case C-298/05 [2007] ECR I-10451.

42. In this regard, I note that the scheme and purpose of the tax regime at issue rests on the exemption of resident pension funds, so that sums intended to be paid to pensioners are not taxed twice, which they would otherwise be if the pension funds were taxed and then the payment to natural persons of the retirement pension was taxed.

43. The exemption of pension funds is common practice in the Member States, and is encouraged by Article 4 of the model convention of the Organization of Economic Cooperation and Development, which refers to the exemption for pension trusts or charities. Most Member States tax occupational pensions according to the EET system (exempt contributions, exempt investment income and capital gains tax and taxation of pensions). The EET system thus allows abatements during the building up of the pension reserve and taxes the benefits of pensioners that will be paid out upon their retirement.

44. According to the Portuguese Republic, it is inherent in the scheme and purpose of the regime that the tax exemption of income accruing to the funds applies only to resident pension funds because, overall, the pensions subsequently taxed derive mainly from investments made and income generated by the pension funds which are not taxed by the Portuguese Republic.

45. However, I fail to see why the internal coherence of the Portuguese national system could be affected by the extension of the tax exemption enjoyed by resident pension funds to pension funds established in other Member States. In my view, the consistency of the national tax system can be perfectly well preserved by granting the tax advantage to non-resident pension funds. [13]

46. In this regard, I would add that such an extension could, on the contrary, strengthen the coherence of the national system where non-resident pension funds pay pensions to natural persons resident in Portugal, who, in the absence of such an extension, are subject to double taxation.

47. In addition, the Portuguese Republic, despite a question on this point at the hearing, has been unable to explain why it accepts a breach of the alleged coherence of its national system by according the same treatment to dividends paid to resident and non-resident pension funds which hold shares in Portuguese companies for a period of

13 — See, by analogy, *Lenz* (paragraph 38) and *Manninen* (paragraph 46). See also my Opinion in *Columbus Container Services* (paragraph 194).

less than a year, pursuant to Article 88(11) of the CIRC.

48. For these reasons, I believe that the justification based on maintenance of the coherence of the tax system cannot be upheld in this case.

2. Maintaining effective fiscal controls

49. The Portuguese Republic also argues that the limitation of the exemption from IRC to resident pension funds is based on requirements relating to the effectiveness of fiscal controls. The legal conditions to qualify for this exemption require the funds benefiting to be directly controlled by the Portuguese tax authorities.

50. Thus, Portuguese funds are subject not only to requirements as to prudential management and investor protection that are especially strict under Directive 2003/41/EC, [14] but also to additional conditions specific to Portuguese law, in particular with regard to financial responsibility. In this connection, the Portuguese Republic insists that the regime of primary responsibility for tax debt established by Article 16(4) of the EBF is not likely to be activated in the case of non-resident pension funds.

51. Supervision of these matters is particularly complex and requires the Portuguese tax authorities to be able to communicate directly with the retirement fund qualifying for the exemption from IRC. In particular, in the event of non-compliance with the requirements of the Portuguese legislation relating to exemption from IRC, direct surveillance of the funds is essential to ensure repayment of the amounts due by way of the IRC. Such control would be impossible to ensure in regard to pension funds established in another Member State, and a fortiori in an EEA Member State, since the provisions of EU law on cooperation in tax matters are not applicable in the context of the EEA agreement.

52. In the Commission's view, the arguments of the Portuguese Republic should be rejected. The tax scheme at issue restricts the benefit of the exemption from IRC to resident pension funds, without allowing non-resident funds the possibility of proving that they offer guarantees equivalent to those to which resident funds are subject. Therefore, in order to secure attainment of the objectives mentioned by the Portuguese Republic, it would be sufficient to ask non-resident pension funds to provide evidence of their status and

14 — **Directive 2003/41/EC of the European Parliament and of the Council of 3 June 2003 on the activities and supervision of institutions for occupational retirement provision (OJ 2003 L 235, p. 10).**

of the legal framework in which they operate, as the mechanisms for cooperation and mutual assistance provided for by EU law and also by multilateral and bilateral agreements with regard to the States of the EEA enable the Portuguese authorities to carry out the necessary checks and indeed to recover tax debts owed.

53. For my part, I agree in substance with the arguments deployed by the Commission.

54. In fact, as the Commission rightly states, under the pretext of maintaining the efficacy of fiscal controls, the Portuguese Republic is denying to non-resident pension funds any possibility of demonstrating that they can meet the conditions laid down by the CIRC to qualify for the tax exemption granted to resident pension funds.

55. However, I note that, on several occasions, the Court has held that national legislation which *absolutely* prevents the taxpayer from submitting evidence that he could satisfy the requirements imposed by the Member State from which he is asking to benefit from a tax advantage cannot be justified in the name of effectiveness of fiscal supervision. [15] It cannot be excluded a priori that the taxpayer is able to provide relevant documentary evidence enabling the tax authorities of the Member State of taxation to ascertain, clearly and precisely, that the conditions laid down by it have been met. [16]

56. This assessment also extends to taxable persons resident in the EEA States.

57. Indeed, in the first place, with specific regard to the argument of the Portuguese Republic on compliance with the requirements of Directive 2003/41, it is to be noted that pension funds established in the Member States of the European Union and the EEA States must comply with those provisions [17] and are therefore perfectly able to obtain from their respective supervisory authorities the necessary documents certifying that they meet the guarantees required by the Portuguese legislation.

15 — See, in this sense, Cases C-39/04 *Laboratoires Fournier* [2005] ECR I-2057, paragraph 25; C-386/04 *Centro di Stauffer* [1998] ECR I-8203, paragraph 49; and C-318/07 *Persche* [1998] ECR I-359, paragraph 60.

16 — See, in this sense, *Laboratories Fournier*, cited above (paragraph 25) and C-451/05 *ELISA* [2001] ECR I-8251, paragraph 96.

17 — With regard to the latter, Directive 2003/41 was extended to the Republic of Iceland, the Principality of Liechtenstein and the Kingdom of Norway by decision no. 88/2006 of the EEA Joint Committee of the July 7 2006 amending Annex IX (Financial Services) of the EEA Agreement (OJ 2006 L 289, p. 26).

58. Secondly, in regard to the other conditions, except that concerning principal liability for the tax debt, the Portuguese Republic merely points to the general requirements listed by Decree-law No 12/2006 of January 20, 2006, which transposes Directive 2003/41 and was notified, as such, by the Portuguese authorities to the Commission.

59. I do not therefore see what is to prevent the Portuguese authorities from requesting that non-resident retirement funds obtain the information necessary for them to be able to grant the same benefit of the tax exemption to those funds as they do to pension funds established in Portugal.

60. I would add that, although the Commission and the Portuguese Republic argued for some time about the applicability of Directive 77/799/EEC [18] its provisions appear to me to have little application in a situation such as the present case.

61. In fact, the conditions compliance with which is required by the Portuguese authorities to grant the exemption in question concern not the tax position of non-resident pension funds in the respective Member States in which they are established but the economic activity of those funds, in particular information relating to their prudential supervision and diversification of their assets. Hence Directive 77/799, which concerns the exchange of information in the field of taxation between tax authorities of the Member States, does not in my view constitute the appropriate legal framework for obtaining the information required by the Portuguese legislation.

62. Assuming that to be the case, I fail to see why, as regards relations with the other Member States, such information could not be obtained by the Portuguese tax authorities. In the case of the EEA States, it is true that Directive 77/799 does not apply. However, this alone is not enough to support the view that the restrictions provided for by the Portuguese legislation are justified. Indeed, in accordance with the Court's case law and specifically the recent judgment in *Haribo Lakritzen Hans Riegel and Österreichische Salinen*, [19] the Portuguese legislation does not even provide for the possibility that an exemption of dividends received by non-resident pension funds may be granted when

18 — 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 (OJ 1977 L 336, p. 15).

19 — Cited above (paragraphs 132 and 133).

there is a mutual assistance agreement between the Portuguese Republic and the EEA States. [20]

63. Thirdly, with regard to the condition relating to primary responsibility for tax debt established in Article 16(4) of the EFB, it is important to make the following observations.

64. According to the Portuguese Republic, once it is established that the various conditions to which the tax benefit is subject are no longer fulfilled, the benefit ceases to be granted, and the pension fund managers then become principally liable for the tax debt incurred by the funds that they manage. According to the defendant Member State, it would be impossible to recover such a debt from non-resident fund managers.

65. I am not persuaded by that line of argument.

66. First of all, I have difficulty in grasping how a mechanism intended for the recovery of tax claims could guarantee the effectiveness of fiscal controls, inasmuch as such a mechanism does not play any part in ensuring the fiscal controls instituted by the national authorities. Indeed, in my view, the recovery of tax debts is not concerned with the efficacy of fiscal control operations but with the means of enforcement available to the tax authorities.

67. Next, as the Commission rightly argued in its pleadings, without issue being taken on this point by the Portuguese Republic, the Portuguese authorities may perfectly well have recourse, in their relations with the tax authorities of other Member States, to the mechanism provided by in Directive 2008/55/EEC, [21] in order to obtain assistance for the recovery of tax debts arising in Portugal.

68. That directive in fact allows Member States to address to the competent authorities of the other Member States any request for debt recovery relating to all charges, taxes and duties whatever they may be, including

20 — It should be noted that the Commission has mentioned the existence of such clauses in regard to relations between the Portuguese Republic and the Republic of Iceland and the Kingdom of Norway respectively.

21 — Council Directive 2008/55 of 26 May 2008 on mutual assistance for the recovery of claims relating to certain levies, duties, taxes and other measures (OJ 2008 L 150, p. 28). Although this directive was adopted in the course of the infringement proceedings, its content was none the less applicable at the time of the initiation of the pre-litigation procedure. In fact, Directive 2008/55 is simply the 'codified' version of Directive 76/308/EEC of the Council, of 15 March 1976 on mutual assistance for the recovery of claims resulting from operations forming part of the system of financing the European Agricultural Guidance and Guarantee Fund, and of the agricultural levies and of customs duties (OJ 1976 L 73, p. 18), as amended by Council Directive 2001/44/EC of 15 June 2001 (OJ 2001 L 175, p. 17), which was to be transposed by 30 June 2002.

taxes on income collected by a Member State or for its account, and to exchange any information likely to be relevant to the recovery of such a claim. [22]

69. Finally, with regard to the situation of the EEA States, while it is true that, as the Commission has acknowledged, Directive 2008/55 was not extended to the EEA agreement, I none the less believe that an absolute prohibition on non-resident retirement funds benefiting from the tax exemption granted to Portuguese retirement funds is disproportionate with regard to the alleged difficulties in recovering the tax debt in the EEA States.

70. As the Commission has suggested, other less restrictive measures may be introduced to ensure the recovery of such tax claims. It is thus possible for the Portuguese tax authorities to ensure at the outset that the funds established in the EEA States which seek the benefit of the exemption can grant the necessary financial guarantees. Alternatively, it might be possible to establish a regime for recovering unpaid tax debts after the event by means of a levy on the profits in future tax years of the Portuguese company owned by the non-resident fund in question, where the conditions imposed by the Portuguese legislation are not observed.

71. Nor, therefore, may the restriction on the free movement of capital be justified on the ground of maintenance of effective fiscal controls.

72. In the light of all these considerations, the Portuguese legislation in question in my view constitutes a restriction on the free movement of capital which cannot be justified.

73. Accordingly, I propose that the action brought by the Commission should be upheld.

74. Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. The Commission has requested that the Portuguese Republic be ordered to pay the costs. In these circumstances, if the Court agrees with my proposal that this application should be granted, it will therefore be appropriate to order the Portuguese Republic to pay the costs.

22 — See, in particular, Articles 2 and 4 of Directive 2008/55.

VI — Conclusion

75. In the light of the foregoing considerations, I propose that the Court should declare as follows:

‘(1) By taxing dividends received by pension funds established in the Member States and in the States parties to the agreement on the European Economic Area of 2 May 1992 at a higher rate than dividends received by pension funds established in Portugal, the Portuguese Republic has failed to fulfil its obligations under Article 63 TFEU and Article 40 of the Agreement on the European Economic Area;

(2) the Portuguese Republic is ordered to pay the costs.