Reports of Cases

OPINION OF ADVOCATE GENERAL
BOBEK
delivered on 21 January 2016[1]

Case C-48/15

État belge
v
NN (L) International, formerly ING International SA, successor to the rights and obligations of ING Dynamic SA
(Request for a preliminary ruling from the

cour d'appel de Bruxelles (Court of Appeal, Brussels, Belgium))

(Reference for a preliminary ruling — Freedom to provide services — Free movement of capital — Annual tax on undertakings for collective investment (UCIs) — Connecting factor for tax purposes — Net amounts subscribed through resident intermediaries — Comparability of foreign and Belgian UCIs — Specific sanction applicable to foreign UCIs)

I – **Introduction**

1. Since 1993, an annual tax on undertakings for collective investment (UCIs) has been levied in Belgium on the basis of the net value of the assets of these undertakings ('the annual tax'). At the time of its introduction, only Belgian UCIs were subject to the annual tax. However, in 2003, the Belgian authorities modified the criterion for taxation. They subjected to the annual tax not only Belgian UCIs, but also foreign UCIs that market their units in Belgium. For both kinds of UCIs, the annual tax is payable on the total of the net amounts 'invested' in Belgium, as on 31 December of the previous year. As well as modifying the criterion for taxation in 2003, the Belgian authorities also introduced a new specific sanction for foreign UCIs which fail to pay amounts falling due in respect of the annual tax.

2. The present request for a preliminary ruling has been made in proceedings between NN (L) International, a UCI governed by Luxembourg law, and the État belge (Belgian State). The proceedings concern the refusal by the Belgian tax authorities to reimburse the amount of the annual tax paid by NN (L) International for the year 2005. The referring court asks the Court of Justice whether EU law precludes the application of the annual tax to foreign UCIs and the imposition of a specific sanction on foreign UCIs who fail to observe this tax obligation. The questions referred

1 — Original language: English.

concern, in particular, the interpretation of Directive 69/335/EEC,[2] Directive 85/611/EEC,[3] the freedom to provide services and the free movement of capital. These questions once again provide the Court with the opportunity to address the tension between the fiscal sovereignty of Member States and Member States' obligations to comply with the fundamental freedoms guaranteed by the Treaties.

II – **Legal framework**

A – *EU law*

1. Council Directive 69/335

3. The objective of Directive 69/335 is to eliminate obstacles to the free movement of capital by harmonising indirect taxes on the raising of capital in Member States. According to Article 1 of this directive, Member States are to charge a harmonised capital duty on contributions of capital to capital companies. Article 4 of Directive 69/335 sets out two lists enumerating those transactions that shall and those that may be subject to capital duty.

4. According to the final recital of its preamble, Directive 69/335 also provides for the abolition of other indirect taxes having the same characteristics as capital duty or stamp duty. Those taxes are listed in Article 10 of the directive which provides that, apart from capital duty, Member States are precluded from charging any taxes: '(a) in respect of the transactions listed in Article 4; (b) in respect of contributions, loans or the provision of services, occurring as part of the transactions referred to in Article 4; and (c) in respect of registration or any other formality required before the commencement of business to which a company, firm, association or legal person operating from profit may be subject by reason of its legal form'.

5. Article 11 of Directive 69/335 precludes Member States from imposing any form of taxation on: '(a) the creation, issue, admission to quotation on a stock exchange, making available on the market or dealing in stocks, shares or other securities of the same type, or of the certificates representing such securities, by whomsoever issued; (b) loans, including government bonds, raised by the issue of debentures or other negotiable securities, by whomsoever issued, or any formalities relating thereto, or the creation, issue, admission to quotation on a stock exchange, making available on the market or dealing in such debentures or other negotiable securities'.

2. Council Directive 85/611

6. The purpose of Directive 85/611, as expressed in the second recital, is to coordinate national laws governing collective investment undertakings with a view to approximating the conditions of competition between those undertakings at Union level, while at the same time ensuring more effective and more uniform protection for unitholders. As stated in the fourth recital, the directive lays down common basic rules for the authorisation, supervision, structure and activities of undertakings of collective investment on transferable securities (UCITS) in the Member States, and the information they must publish.

2 — Council Directive of 17 July 1969 concerning indirect taxes on the raising of capital (OJ, English Special Edition 1969(II), p. 412). This directive was repealed by Council Directive 2008/7/EC of 12 February 2008 concerning indirect taxes on the raising of capital (OJ 2008 L 46, p. 11). For the purposes of this case, however, Directive 69/335 remains the applicable law *ratione temporis*.

3 — Council Directive 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). This directive, after having been amended on several occasions, was replaced by Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) (OJ 2009 L 302, p. 32), as amended by Directive 2014/91/EU of the European Parliament and of the Council of 23 July 2014 (OJ 2014 L 257, p. 186). Again, for the purposes of the present case, it is Directive 85/611 that was applicable at the material time.

7. Article 44(1) of Directive 85/611 provides that 'a UCITS which markets its units in another Member State must comply with the laws, regulations and administrative provisions in force in that State which do not fall within the field governed by this Directive'. Furthermore, according to Article 44(3) of the directive, the provisions referred to in Article 44(1) must be applied by the Member States without discrimination.

B – *Belgian law*

8. The annual tax on UCIs was inserted into the Inheritance Tax Code (Code des droits de succession) by the Law of 22 July 1993 relating to taxation and financial provisions.[4] Subsequently, the Programme Law of 22 December 2003,[5] which entered into force on 1 January 2004, modified the annual tax by extending its scope. On the basis of this modification, foreign UCIs marketing their units in Belgium also became subject to the annual tax under Article 161(3) of the Inheritance Tax Code in the version applicable to the facts in the main proceedings.

9. As far as the taxable amount is concerned, Article 161a of the Inheritance Tax Code states: '(1) As regards the undertakings for investment referred to in Article 161(1) and (2) [that is to say, Belgian UCIs], the tax shall be payable on the total of the net amounts invested in Belgium, as on 31 December of the previous year. … (2) As regards the undertakings for investment referred to in Article 161(3) [that is to say, foreign UCIs], the tax shall be payable on the total, as on 31 December of the previous year, of the net amounts invested in Belgium, from the time of their registration with the Banking, Finance and Insurance Commission …'.

10. According to the order for reference, the rate of the annual tax in 2006 was 0.07% of the taxable amounts.

11. Article 162 of the Inheritance Tax Code extends the applicability of the sanctions provided for in Book I of the code to the tax established by Article 161. In particular, Article 162(2) of the code, in its version applicable at the relevant time, establishes a specific sanction for foreign UCIs: they may be prohibited, by court order, from marketing their units in Belgium in the future.

III – **Facts, procedure and questions referred**

12. NN (L) International (the respondent) is an investment company with variable share capital.[6] Its registered office is in Luxembourg. According to the order for reference submitted by the cour d'appel de Bruxelles (Court of Appeal, Brussels), the respondent duly filed its annual tax declaration for the net amounts invested in Belgium in 2005. The respondent also paid the tax within the prescribed period.

13. In the proceedings at first instance, the respondent challenged the legality of the annual tax and sought the reimbursement of that tax which amounted to EUR 185739.34. The respondent maintained that the annual tax infringed Directive 69/335 and Directive 85/611, together with the provisions of the Treaty concerning the freedom to provide services and the free movement of capital. In the alternative, the respondent claimed that the annual tax was contrary to Article 22 of the Convention signed by Belgium and the Grand Duchy of Luxembourg on 17 September 1970 for the avoidance of double taxation and governing certain other issues in respect of tax on income and capital ('the Double Taxation Convention'). The court at first instance upheld the alternative claim. It stated that the annual tax infringed Article 22 of the Double Taxation Convention, considering it to be a tax

4 — Loi portant des dispositions fiscales et financières (*Moniteur belge*, 26 July 1993, p. 17350).

5 — Loi-programme (*Moniteur belge*, 31 December 2003, p. 62160).

6 — Generally referred to as a SICAV (société d'investissement à capital variable).

on wealth. Consequently, it declared that the annual tax was not payable by NN (L) International. However, the first instance court declared the plea based on the infringement of Directive 69/335 to be unfounded. It did not rule on the other pleas based on the infringement of the Treaty and Directive 85/611.

14. The Belgian tax authority brought an appeal against the first instance decision. It maintained that the tax at issue was not covered by the Double Taxation Convention and that Article 160 et seq. of the Inheritance Tax Code was compatible with the aforementioned provisions of EU law. NN (L) International sought confirmation of the first instance decision and made a cross-appeal, in the alternative, in respect of the first instance court's decision to reject the claim based on the infringement of Directive 69/335 and not to rule on the claims based on the infringement of the other provisions of EU law.

15. In those circumstances, the cour d'appel de Bruxelles (Court of Appeal, Brussels) decided to stay the proceedings and to refer the following questions for a preliminary ruling:

'(1) Must Council Directive 69/335 … concerning indirect taxes on the raising of capital, and more specifically Articles 2, 4, 10 and 11 thereof read together, be interpreted as precluding provisions of national law, such as Articles 161 and 162 of the Belgian Inheritance Tax Code, amended by the Programme Law of 22 December 2003, concerning the tax on undertakings for collective investment, in so far as that tax is imposed annually on undertakings for collective investment established as companies with share capital in another Member State and marketing their units in Belgium, on the total amount of their units subscribed in Belgium reduced by the amount of repurchases or refunds of those subscriptions, with the consequence that the sums collected in Belgium by such undertakings for collective investment are subject to that tax while they remain at the disposal of those undertakings?

(2) Must Articles 49 to 55 and 56 to [60] of the EC Treaty, read, if appropriate, in conjunction with Articles 10 and 293, second indent, of the EC Treaty be interpreted as precluding a Member State from modifying unilaterally the criterion on the basis of which a tax is imposed, as provided for by Article 161 et seq. of the Belgian Inheritance Tax Code, in order to replace a personal criterion for taxation, based on the domicile of the taxpayer and laid down in international tax law, with an alleged criterion of actual connection, which is not laid down in international tax law, account being taken of the fact that in order to establish its fiscal sovereignty the Member State adopts a specific penalty, such as that laid down by Article 162(3) of the Belgian Inheritance Tax Code, as regards foreign operators only?

(3) Must Articles 49 and 56 of the EC Treaty, read, if appropriate, in conjunction with Articles 10 and 293, second indent, of the EC Treaty, be interpreted as precluding an imposition of tax, such as that described above, which, inasmuch as it takes no account of the tax already imposed in the Member State of origin of the undertakings for collective investment established in another Member State, represents an additional pecuniary burden likely to impede the marketing of their units in Belgium?

(4) Must Council Directive 85/611 … on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities, read, if appropriate, in conjunction with Articles 10 and 293, second indent, of the EC Treaty, be interpreted as precluding an imposition of tax, as described above, inasmuch as it prejudices the principal aim of the directive of facilitating the marketing of units of undertakings for collective investment in the European Union?

(5) Must Articles 49 and 56 of the EC Treaty be interpreted as precluding the administrative burdens incurred by the levying of taxation such as that described above on undertakings for collective investment that market their units in Belgium?

(6) Must Articles 49 and 56 of the EC Treaty be interpreted as precluding a provision of national law, such as Article 162(2) of the Belgian Inheritance Tax Code, inasmuch as that provision imposes a specific penalty on undertakings for collective investment established in another Member State that market their units in Belgium, namely the prohibition, ordered by a court, of making future investments of its units in Belgium in the event of failure to submit their declarations by 31 March each year or if they fail to pay the tax described above?'

16. Written observations were submitted by NN (L) International, the Belgian Government and the European Commission. The parties participating in the written stage presented oral argument at the hearing on 28 October 2015.

IV – **Assessment**

A – *Admissibility of the questions referred*

17. In its written observations, the Belgian Government submits that the fourth, fifth and sixth questions referred to the Court are inadmissible. As regards the fourth question, the government takes the view that the order for reference fails to set out any specific reasons for which the annual tax should be considered to be contrary to Directive 85/611. Concerning the fifth question, the Belgian Government contends that the referring court has not indicated any provisions of national law which impose administrative burdens and furthermore that it has not provided any information on the consequent discrimination that would ensue with regard to foreign UCIs. The latter argument is also made by the Commission in its observations, albeit without formally challenging the admissibility of the question. In addition, the Belgian Government considers the fifth question to be irrelevant for the purposes of the resolution of the dispute in the main proceedings. Finally, the Belgian Government also pleads the inadmissibility of the sixth question on the basis that Article 162(2) of the Inheritance Tax Code does not come within the scope of the case before the national court. It has no bearing on the purpose of the main proceedings. Moreover, the application of a sanction against NN (L) International in the future is purely hypothetical.

18. According to established case-law,[7] questions on the interpretation of EU law referred by national courts enjoy a presumption of relevance. The Court may refuse to rule on a question referred by a national court only where it is quite obvious that the interpretation of EU law sought bears no relation to the actual facts or the purpose of the main action, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it.

19. Applying these criteria to the present case, I am of the opinion that the pleas of inadmissibility concerning questions four and six should be rejected. I agree, however, with the Belgian Government that question five ought to be rejected as inadmissible.

20. It is true that the fourth question, as framed by the referring court, does not identify a specific provision of Directive 85/611 for which an interpretation is sought. It merely refers to the directive as such and its objectives. However, according to established case-law,[8] where questions are worded in imprecise terms, it is for the Court to extract from all of the information provided to it by the national court and from the documents concerning the main proceedings, the elements of EU law

7 — See, recently, judgment in *Pujante Rivera* (C-422/14, EU:C:2015:743, paragraph 20 and the case-law cited).

8 — Judgments in *Haug-Adrion* (251/83, EU:C:1984:397, paragraph 9); *Arcaro* (C-168/95, EU:C:1996:363, paragraph 21); *Teckal* (C-107/98, EU:C:1999:562, paragraph 34); and *ČEZ* (C-115/08, EU:C:2009:660, paragraph 81).

that need to be interpreted, having regard to the subject matter of the dispute. In the present case, the fact that the question only contains a general reference to Directive 85/611 does not prevent the Court from providing the national court with the elements of interpretation of EU law which may enable it to rule on the case before it.

21. As regards the sixth question, it cannot be maintained that it is irrelevant for the purposes of the main proceedings. NN (L) International contests in the main proceedings the legality of Article 160 et seq. of the Inheritance Tax Code, that is to say, the articles which contain the regime applicable to the annual tax under Belgian law. The referring court is therefore called on to give a ruling in proceedings concerning the legality of the annual tax regime, including the specific sanctions to be imposed on non-resident UCIs according to Article 162(2) of the Inheritance Tax Code. This question cannot therefore be considered as hypothetical or devoid of relevance for the resolution of the case in the main proceedings.

22. Furthermore, the fact that sanctions established by national law have not been imposed on the specific facts of a case has not prevented the Court from answering a preliminary question in the past.[9] The Court has often been confronted with questions that contained elements referring to uncertain events or situations of eventual occurrence and has declared these questions to be admissible as long as they were relevant to the purpose of the main proceedings.[10] Put metaphorically, if the core of the dispute is actual and real, the referring court ought to be entitled to query the Court about the potential edges of that core. This is even more so if these edges cut, as in the case of sanctions.

23. For these reasons, the concerns expressed by the Belgian Government with respect to the admissibility of questions four and six should be rejected.

24. The fifth question presents a different situation. According to settled case-law[11] and also Article 94 of the Rules of Procedure of the Court of Justice, the need to provide an interpretation of EU law which will be of use to the national court makes it necessary for that court to define the factual and legal context of the questions it is asking or, at the very least, to explain the factual circumstances on which those questions are based. The information contained in the order for reference serves not only to enable the Court to give helpful answers, but also to allow the governments of Member States and other interested parties to submit observations in accordance with Article 23 of the Statute of the Court of Justice of the European Union.[12]

25. In the present case, there is nothing in the order for reference which would allow the Court to identify precisely what these 'administrative burdens' mentioned by the national court in question five are supposed to be. The same uncertainty is reflected in the observations of the parties: the Belgian Government assumes that the notion of 'administrative burdens' refers to the obligation to file a tax declaration with the competent authorities. This assumption is shared by the Commission. On the other hand, NN (L) International, which does not give any views on this issue in their written observations, briefly stated at the hearing that 'administrative burdens' are to be understood as referring to the internal costs of collecting the relevant information about the identity and place of residence of unitholders.

9 — See the judgment in *P and S* (C-579/13, EU:C:2015:369). In his Opinion in this case, Advocate General Szpunar stated that it was apparent from both the order for reference and the observations submitted by the parties that no fine had been imposed on the applicants (C-579/13, EU:C:2015:39, point 99).

10 — See, inter alia, and by analogy, judgments in *X and Y* (C-200/98, EU:C:1999:566, paragraphs 21 and 22); *Bosman* (C-415/93, EU:C:1995:463, paragraph 65); and *Gauweiler and Others* (C-62/14, EU:C:2015:400, paragraphs 28 and 29).

11 — See, inter alia, judgment in *Mulders* (C-548/11, EU:C:2013:249, paragraph 28 and the case-law cited).

12 — See, inter alia, order in *Mlamali* (C-257/13, EU:C:2013:763, paragraph 24 and the case-law cited).

26. In sum, the Court does not have before it either the factual or legal context to assess the 'administrative burdens'. The parties did not engage with this question properly. It is for these reasons that I believe that the fifth question ought to be declared inadmissible.

B – *Assessment of the questions referred*

27. At the outset, it is necessary to highlight that the cour d'appel de Bruxelles (Court of Appeal, Brussels) has referred the six questions to the Court before it decides on the classification of the tax for the purpose of the applicability of the Double Taxation Convention. The Court is therefore not asked to offer an interpretation as to the classification of the annual tax. The analysis of the tax undertaken in the present Opinion in order to determine its compatibility with relevant provisions of EU law does not prejudice the determination of the nature of the tax for the purposes of the application of the Double Taxation Convention. This is a task for the national court.

28. My substantive assessment of the questions referred proceeds as follows: first, the compatibility of the annual tax with secondary EU law will be addressed (questions one and four). Second, the annual tax will be analysed as to its compatibility with primary law, that is to say, Treaty-based fundamental freedoms (questions two and three). Third, I shall consider the specific sanctions imposed solely on foreign UCIs and their compatibility with primary EU law (question six).

1. Question one: Directive 69/335

29. By its first question, the cour d'appel de Bruxelles (Court of Appeal, Brussels) asks whether Articles 2, 4, 10 and 11 of Directive 69/335 are to be interpreted as precluding a tax on foreign UCIs such as the Belgian annual tax. All the parties which have submitted observations to the Court concur that the first question should be answered in the negative because Directive 69/335 is not applicable to the annual tax.

30. I agree.

31. The purpose of Directive 69/335 is to abolish indirect taxes, other than capital duty, which have the same characteristics as that duty, namely those applied to the transactions covered by that directive. [13]

32. In the present case, the base of the annual tax consists of the net amounts invested in Belgium as on 31 December of the previous year. It is evident from the legislative history referred to in the Belgian Government's written observations that the concept of 'net amounts invested' should be understood as referring to the total assets of UCIs less the amount of repurchases. The concept of amounts invested 'in Belgium' refers to transfers (subscriptions, sales) made in Belgium through an intermediary financial institution. [14] The Belgian Government also observes that the net asset value of UCIs is influenced by factors such as the amount of subscriptions, refunds and debts, changes in the value of underlying assets, revenues and expenses.

33. It is thus apparent that such a tax does not relate to any of the types of transactions subject to capital duty under Article 4 of Directive 69/335. As has already been noted by the Court, all such transactions involve the transfer of capital or assets to a capital company in the taxing Member State, or result in an effective increase in the company's capital or assets. [15] Equally, the annual tax does not fall within the scope of the prohibition laid down in Article 10 of the directive, since it does not

13 — Judgment in *Optiver and Others* (C-22/03, EU:C:2005:143, paragraph 27).

14 — Chambre des représentants de Belgique, Projet de loi-programme, 2003-2004, 51-0473/001, p. 157.

15 — Judgment in *Nonwoven* (C-4/97, EU:C:1998:507, paragraph 20).

correspond to any of the taxable transactions listed in Article 4 to which Article 10(a) and (b) of the directive refers. Similarly, the annual tax is not connected to registration or any other formality required before the commencement of business, in the sense of Article 10(c) of the directive. Finally, the annual tax also does not relate to any of the transactions covered by Article 11 of the directive.

34. It is therefore evident that the annual tax does not fall within the material scope of application of Directive 69/335. Directive 69/335 is thus not applicable to the case before the referring court. I therefore propose to the Court that the first question should be answered in the negative: Council Directive 69/335 does not preclude the levying of a tax on UCIs established in another Member State such as the annual tax on UCIs at issue in the main proceedings.

2. Question four: Directive 85/611

35. By its fourth question, the referring court seeks to ascertain whether Directive 85/611 should be interpreted as precluding the imposition of a tax, such as the annual tax, because it prejudices the principal aim of that directive of facilitating the marketing of units of undertakings for collective investment in transferable securities ('UCITS') in the European Union.

36. On this question NN (L) International argues that the annual tax impedes the fulfilment of the objectives of Directive 85/611. Conversely, the Belgian Government submits that Directive 85/611 leaves the powers of the Member States untouched in the field of taxation. In the same vein, the Commission contends that Directive 85/611 does not contain any provision on taxation and thus does not have any bearing on the present case.

37. I share the view expressed by the Commission and the Belgian Government.

38. Directive 85/611 coordinates national laws governing UCITS. Its objective is facilitating the free movement of the units of collective investment undertakings in the Union. The degree of coordination contemplated by the directive is nevertheless limited. It only lays down basic common rules concerning the authorisation, supervision, structure and activities of UCITS in the Member States, as well as the information they must publish.[16] In particular, Directive 85/611 was adopted on the basis of Article 57(2) of the EEC Treaty (now, after amendment, Article 53 TFEU). The latter does not touch upon the taxation of UCITS by the Member States.

39. Admittedly, Article 44 of Directive 85/611 states that UCITS marketing their units in other Member States must comply with the laws, regulations and administrative provisions in force in those States which do not fall within the field governed by that directive. Furthermore, according to Article 44(3) of the directive, such provisions must be applied by the Member States without discrimination.

40. Article 44 of the directive recalls the overarching and general prohibition of discrimination on the basis of nationality or place of incorporation. It cannot be understood, however, as extending the material scope of application of Directive 85/611.

41. First, Article 44 should be read in the context of Directive 85/611 as a whole: whereas the coordination established by that directive is based on the principle of home state control and mutual recognition,[17] Article 44(1) recognises and preserves the powers of host Member States in the fields not covered by the directive. Against that background, Article 44 can be best understood as reaffirming the powers of the Member State in all those areas not expressly covered by the directive, including taxation.

16 — See recitals 2, 3 and 4 of Directive 85/611.

17 — See Opinion of Advocate General Jääskinen in *Gruslin* (C-88/13, EU:C:2014:79, 4).

42. Second, and more importantly, notwithstanding the interpretation of the scope of Article 44(1), the non-discrimination rule contained in Article 44(3) of Directive 85/611, to which NN (L) International refers, can be considered as a restatement of the non-discrimination principle already provided for in the Treaties. Therefore, the assessment of whether the annual tax and the specific sanction for non-resident UCIs involve discrimination should instead be undertaken within the framework of the Treaty provisions relating to the fundamental freedoms.

43. Directive 85/611 is therefore of no avail in the present case. The general and, by definition, rather abstract obligation of sincere cooperation set out in Article 10 EC (replaced, in substance, by Article 4(3) TEU), does not alter this conclusion. [18] Nor does Article 293 EC (repealed by the Treaty of Lisbon). The Court has established that the latter provision is not intended to lay down a legal rule directly applicable as such, but merely defines a number of matters on which the Member States are to enter into negotiations with each other so far as is necessary. In this line of argument, the Court has repeatedly stated that even if the abolition of double taxation is included among the objectives of the Treaty, that provision cannot itself confer any justiciable rights on individuals which they can rely on before national courts. [19]

44. I therefore propose that the Court's reply to the fourth question should be that Council Directive 85/611 should be interpreted as not precluding the imposition of a tax, such as the annual tax on UCIs at issue in the main proceedings.

3. Questions two and three: compatibility of the annual tax with the fundamental freedoms

45. By its second and third questions, which I consider appropriate to examine together, the referring court asks in essence whether the imposition of the annual tax on foreign UCIs is precluded by the applicable provisions of the Treaty concerning the freedom to provide services and the free movement of capital, read in conjunction with Articles 10 and 293 EC. The doubts of the referring court arise, in particular, from the fact that the Belgian authorities have replaced the criterion for taxation previously based on the residence of the taxpayer with a criterion based on 'actual connection'. Furthermore, the Belgian authorities have introduced a specific sanction applicable only to foreign operators.

a) The applicable freedom

46. The national court refers in its questions to Articles 49 to 55 and Articles 56 to 60 EC (now Articles 56 TFEU to 62 TFEU, Articles 63 TFEU to 66 TFEU and Article 75 TFEU) without specifying how each of these provisions is applicable to the case in the main proceedings. However, as the Commission points out, it is apparent that the relevant provisions which were applicable at the relevant time are Articles 49, 56 and 58 EC (now Articles 56 TFEU, 63 TFEU and 65 TFEU).

47. As established by the Court, in order to determine which fundamental freedom the national legislation falls within the scope of, the purpose of the legislation concerned must be taken into consideration. [20]

18 — See, to that effect, judgments in *Deutsche Grammophon Gesellschaft* (78/70, EU:C:1971:59, paragraph 5); *Riseria Geddo* (2/73, EU:C:1973:89, paragraph 4); and order in *Levy and Sebbag* (C-540/11, EU:C:2012:581, paragraphs 26 and 28). See also judgment in *3M Italia* (C-417/10, EU:C:2012:184, paragraph 30 et seq.).

19 — See, inter alia, judgment in *Gilly* (C-336/96, EU:C:1998:221, paragraph 16) and order in *Levy and Sebbag* (C-540/11, EU:C:2012:581, paragraph 27).

20 — See, for example, judgments in *Test Claimants in the FII Group Litigation* (C-35/11, EU:C:2012:707, paragraph 90) and *Wagner-Raith* (C-560/13, EU:C:2015:347, paragraph 31).

48. The national legislation at issue in the main proceedings establishes an annual tax on UCIs on the basis of their net asset value multiplied by the number of units subscribed for in the taxing Member State. The annual tax could therefore be considered as liable potentially to hinder both the free movement of capital as well as the freedom to provide services. However, it has to be noted that the Court will examine a measure in dispute in relation to only one of those two freedoms, if it appears that one of them is entirely secondary to the other.[21] In order to carry out this assessment, in the absence of a definition of 'movement of capital' in the EC Treaty, the Court has held that Annex I to Directive 88/361[22] contains a non-exhaustive list which is of indicative value as it cites transactions which may constitute the movement of capital.[23] For the purposes of the present case, it is noteworthy that the acquisition by residents of units of foreign undertakings dealt in or not dealt in on a stock exchange is listed among the capital movements set out in part A of Section IV of that annex, which explicitly refers to '[t]ransactions in units of collective investment undertakings'.[24]

49. In the present case it is apparent that the annual tax is linked to the acquisition by residents of units of collective investment in the sense of the nomenclature featuring in Annex I to Directive 88/361. Therefore, as NN (L) International has submitted in its written observations, the annual tax can be considered to be primarily concerned with free movement of capital.[25]

50. Consequently, I am of the view that, in the circumstances of the present case, for the purpose of the assessment of the compatibility of the annual tax with the Treaties, the predominant analysis should be of the free movement of capital rather than the freedom to provide services.[26]

b) Whether the tax constitutes a restriction to free movement of capital

51. NN (L) International claims that the connecting factor used by the applicable Belgian legislation disregards the internationally accepted criteria for taxation. Moreover, the respondent submits that the annual tax entails a restriction on the free movement of capital. This is because it imposes a financial burden on UCIs that may impact the unitholders' profits. Therefore in the respondent's view, the annual tax is liable to deter or to limit foreign UCIs from marketing their units in Belgium, particularly taking into account that UCIs based in Luxembourg are already subjected to a subscription tax in that Member State. The Commission, however, maintains that the annual tax does not constitute discriminatory treatment per se because the Belgian UCIs are subjected to the same tax treatment.[27] The Belgian Government argues that it is necessary to recognise the principle of Member State sovereignty in the field of taxation and recalls that double taxation is a consequence of the simultaneous exercise of fiscal sovereignty. Furthermore, the whole purpose of applying the annual tax to foreign UCIs is precisely to ensure that there is 'a level playing field' among the different investment products on the Belgian market.

21 — See, for example, judgments in *Dijkman and Dijkman-Lavaleije* (C-233/09, EU:C:2010:397, paragraph 33) and *Fidium Finanz* (C-452/04, EU:C:2006:631, paragraph 34).

22 — Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty (repealed by the Treaty of Amsterdam) (OJ 1988 L 178, p. 5).

23 — Judgment in *Wagner-Raith* (C-560/13, EU:C:2015:347, paragraph 23 and the case-law cited).

24 — Judgments in *VBV - Vorsorgekasse* (C-39/11, EU:C:2012:327, paragraph 21) and *Wagner-Raith* (C-560/13, EU:C:2015:347, paragraph 24).

25 — See, *mutatis mutandi*, judgment in *Wagner-Raith* (C-560/13, EU:C:2015:347, paragraph 25).

26 — It might be added that the analysis from the point of view of the freedom to provide services would not lead to a different conclusion in the light of the methodological uniformity of the assessment to be carried out under these fundamental freedoms. See, to that effect, judgment in *Gebhard* (C-55/94, EU:C:1995:411, paragraph 37). For a joint examination of national measures under Articles 21 TFEU, 45 TFEU, 49 TFEU, 56 TFEU and 63 TFEU, see judgment in *Libert and Others* (C-197/11 and C-203/11, EU:C:2013:288, paragraph 37 et seq.). See also, regarding the freedom of establishment and the free movement of capital, judgments in *Columbus Container Services* (C-298/05, EU:C:2007:754, paragraph 56); *Test Claimants in Class IV of the ACT Group Litigation* (C-374/04, EU:C:2006:773, paragraph 93); and *Test Claimants in the FII Group Litigation* (C-446/04, EU:C:2006:774, paragraph 60).

27 — The Commission reserves its position on the tax rate applicable to certain UCIs according to Article 161 *ter* (5), with regard to which it has announced its intention to start infringement proceedings (http://europa.eu/rapid/press-release_IP-14-1144_en.htm). This provision is however not addressed by the national court and thus remains outside the scope of the present case.

52. First of all, it must be pointed out that taxation of UCIs is not harmonised in the European Union. In fact, Member States' taxation in this area diverges to a considerable extent.[28] Taking this reality into account, the starting as well as the overall guiding point of the analysis must be the acknowledgement that the taxation of UCIs falls within the competence of the Member States and that, logically, there will be differences from one Member State to the next.

53. However, as the Court has established,[29] there is a limit to this aspect of the Member States' competence: national tax rules cannot constitute a restriction on the fundamental freedoms. The measures prohibited by Article 56(1) EC (now Article 63(1) TFEU) that is to say, those which constitute restrictions on the movement of capital, include those which are liable 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.[30]

54. Applying these principles to the specific field of taxation, the Court has often found a restriction prohibited by Article 56(1) EC in cases where the national measures entailed different treatment of residents and non-residents.[31] Conversely, where the tax rule did not make any distinction between taxable subjects deemed to be in comparable situations and did not entail any disadvantage,[32] the Court has rejected the existence of such a restriction.[33]

55. In the circumstances of the present case, it is apparent that the national legislation is, as the Commission has submitted, applied without distinction to resident and non-resident UCIs. In addition, the application of the annual tax does not result in foreign UCIs ultimately bearing a heavier tax burden in Belgium than that borne by Belgian UCIs.

56. NN (L) International contends, however, that the application of the annual tax to foreign UCIs results in prohibited discrimination because the situations of resident and non-resident UCIs, which are not in comparable situations, are treated equally.

57. I do not agree. It is indeed true that on a general level, ever since Aristotle at the latest, injustice is believed to arise not only when similar situations are treated differently, but also when objectively different situations are treated alike.[34] The problem is that on a concrete level and in this particular case, I am not convinced by the arguments put forward by NN (L) International suggesting that the situations of foreign and Belgian UCIs are not comparable with regard to the payment of the annual tax.

58. Admittedly, according to settled case-law in the field of direct taxation such as income tax and wealth tax, where objective differences between taxable persons may have a bearing, residents and non-residents in the State of taxation have often been deemed not to be in a comparable situation with regard to the application of certain tax advantages and regimes.[35] This cannot, however, be

28 — See, for example, Adema, R., *UCITS and Taxation. Towards Harmonization of the Taxation of UCITS*, Kluwer Law International, 2009.

29 — See, for example, judgment in *Commission* v *Hungary* (C-253/09, EU:C:2011:795, paragraph 42 and the case-law cited).

30 — Judgment in *van Caster* (C-326/12, EU:C:2014:2269, paragraph 25 and the case-law cited).

31 — For recent case-law, see for example judgments in *Grünewald* (C-559/13, EU:C:2015:109, paragraphs 20 and 21); *Bouanich* (C-375/12, EU:C:2014:138, paragraphs 55 and 56); *DMC* (C-164/12, EU:C:2014:20, paragraphs 40 and 43); and *van Caster* (C-326/12, EU:C:2014:2269, paragraphs 36 and 37).

32 — See, for example, judgment in *Viacom Outdoor* (C-134/03, EU:C:2005:94, paragraph 37).

33 — See, for example, judgments in *X* (C-686/13, EU:C:2015:375, paragraph 32 et seq.); *Columbus Container Services* (C-298/05, EU:C:2007:754, paragraphs 39 and 40); and *Kerckhaert and Morres* (C-513/04, EU:C:2006:713, paragraph 17 et seq.).

34 — *Aristotle's Nicomachean Ethics. A New Translation*, by Bartlett, R.C., and Collins, S.D., University of Chicago Press, 2011, Book V.3, 1131a20.

35 — As Advocate General Wathelet has recently highlighted in his Opinion in *Timac Agro Deutschland* (C-388/14, EU:C:2015:533, point 33), cases where the non-comparability of residents and non-residents has lead the Court to find differential treatment not discriminatory are scarce. See, for example, judgments in *Schumacker* (C-279/93, EU:C:1995:31, paragraph 31); *D.* (C-376/03, EU:C:2005:424, paragraph 31 et seq.); and *Truck Center* (C-282/07, EU:C:2008:762, paragraph 41 et seq.). This is not however the case with regard to other taxation systems which do not take into account the objective differences between taxable persons. See, to that effect, judgments in *Commission* v *Belgium* (C-250/08, EU:C:2011:793, paragraphs 57 and 58) and *Commission* v *Hungary* (C-253/09, EU:C:2011:795, paragraphs 56 and 57).

stretched as far as to mandate universal differential treatment between resident and non-resident operators, thus compelling Member States to carve out a special tax regime for non-residents. Hence, in order to ascertain whether the situations of resident and non-resident taxpayers are comparable, it is necessary to assess their objective situations in light of their position with regard to the tax scheme at issue. Belgian legislation subjects the net asset value of UCIs marketed on its territory in the previous calendar year to the same type of tax. Domestic and foreign undertakings engaged in the same economic activity are thus subject to same conditions.

59. The element upon which NN (L) International relies in order to argue that the situations of foreign and Belgian UCIs are not comparable is the fact that UCIs resident in Luxembourg are already subjected to a subscription tax in that Member State. However, the Court has consistently ruled that the disadvantages which arise from the parallel exercise of tax competences by different Member States do not constitute restrictions on the freedom of movement to the extent that such an exercise is not discriminatory.[36] Accordingly, Member States are not obliged to adapt their tax systems to those of other Member States in order to eliminate double taxation.[37]

60. For the purposes of taxing economic activity on the territory of Belgium, domestic and foreign UCIs are fully comparable. The only difference arises with regard to the area which has been expressly left out: the parallel exercise of taxing powers of the Member States. Thus, in my opinion, the impugned tax regime cannot constitute a restriction on the free movement of capital.

61. Finally, recalling the arguments already put forward in point 43 of this Opinion, recourse to Article 10 EC (replaced, in substance, by Article 4(3) TEU) and Article 293 EC (repealed by the Treaty of Lisbon) cannot lead to a different conclusion.

62. I therefore suggest that the Court should answer the second and third questions by declaring that Article 56(1) EC does not preclude tax legislation of a Member State such as the legislation at issue in the main proceedings, which subjects resident and non-resident UCIs to an annual tax on the basis of the net amounts subscribed in its territory.

4. The specific sanction applicable only to foreign UCIs

63. By its sixth question, the referring court asks whether Articles 49, 56 and 58 EC must be interpreted as precluding Article 162(2) of the Belgian Inheritance Tax Code. This provision imposes a specific sanction on UCIs established in another Member State which market their units in Belgium: if they fail to submit their tax declarations within the prescribed period or if they fail to pay the annual tax, they may be prohibited, by a court order, from marketing their units in Belgium 'in the future'.

64. NN (L) International and the Commission submit that the sanction imposed by Article 162(2) of the Belgian Inheritance Tax Code constitutes discrimination based on the place of establishment, since a similar sanction does not exist for Belgian UCIs. The Commission stated at the hearing that it intends to launch infringement proceedings on this issue. Conversely, the Belgian Government contends that there is an equivalent sanction for national UCIs. It is Article 133 *ter* of the Inheritance Tax Code which establishes, inter alia, the possibility of shutting down the establishments of an undertaking if a manager, member or employee of that undertaking has been convicted for contravening the provisions of the Inheritance Tax Code. The Belgian Government confirmed at the hearing that the sanctions contained in Article 133 *ter* can also be applied to foreign UCIs. However, according to the Belgian Government, it is very difficult to enforce these or other kinds of sanctions,

36 — See, to that effect, for example, judgments in *Kerckhaert and Morres* (C-513/04, EU:C:2006:713, paragraph 20); *Banco Bilbao Vizcaya Argentaria* (C-157/10, EU:C:2011:813, paragraph 38); and *Damseaux* (C-128/08, EU:C:2009:471, paragraph 27).

37 — See, for example, judgments in *Block* (C-67/08, EU:C:2009:92, paragraph 31); *X* (C-302/12, EU:C:2013:756, paragraph 29); and *Damseaux* (C-128/08, EU:C:2009:471, paragraph 33 et seq.).

such as pecuniary sanctions, against foreign UCIs. For this reason, a specific sanction for foreign UCIs was deemed to be necessary. That government also contends that the different treatment for Belgian and foreign UCIs is permitted under Article 58 EC and is justified because of the need to ensure the effectiveness of tax control and the recovery of the tax.

65. The specific sanction provided for in Article 162(2) of the Inheritance Tax Code gives courts the power to prohibit UCIs established in other Member States from carrying out their activities in Belgium, even if they may lawfully continue with the same activities in their Member State of origin. For this reason, the specific sanction imposed by Belgium only on foreign UCIs should rather be examined in the light of the freedom to provide services enshrined in Article 49 EC. [38]

66. It should be pointed out that the sanction in Article 162(2) of the Inheritance Tax Code, that is to say, the sanction applicable to foreign UCIs, and the sanctions in Article 133 *ter* of the code, namely those generally applicable, are different as to their nature and seriousness. First, the sanctions in Article 133 *ter* of the Inheritance Tax Code may be imposed only following the conviction of certain persons for fraudulent infringements of the Code. By contrast, for the sanction under Article 162(2) to be triggered, no intent (fraud) is required — negligence appears to be enough. Second, concerning the temporal scope of the sanctions, Article 133 *ter* provides that the sanctions contained therein may only be imposed, following the final judgment of a court, for a period of between three months and five years. This is not however the case with the duration of the sanction that may be imposed under Article 162(2), for which there is no statutory time limitation. A foreign UCI could therefore be prohibited from marketing its units in Belgium for an indefinite period of time.

67. Thus, it is quite clear that these two regimes of sanctions differ considerably as to the type of behaviour they criminalise and as to the severity and length of the prohibitions they impose. Consequently, the sanction provided for in Article 162(2) of the Belgian Inheritance Tax Code entails a difference in treatment solely on the basis of the place of establishment. It therefore amounts to direct discrimination which is contrary to Article 49 EC.

68. An examination of the Belgian national provisions from the point of view of the free movement of capital, with particular regard to the exceptions contained in Article 58 EC which is invoked by the Belgian Government, does not lead to a different conclusion.

69. Article 58(1)(a) EC states that Article 56 EC is 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. However, according to Article 58(3) EC, the national measures to which this provision refers must not constitute a means of arbitrary discrimination or a disguised restriction on the free movement of capital. It is true that such measures may be justified by an overriding reason in the public interest. They must not, however, go beyond what is necessary to attain the objectives which are adduced by the Member State. [39]

70. In my view, a sanction that is potentially unlimited in time has, by its very nature, serious difficulties in satisfying the requirements of proportionality, in particular the element of necessity.

71. For these reasons, I suggest that Article 49 EC does preclude a sanction such as that provided for in Article 162(2) of the Belgian Inheritance Tax Code, consisting of a potential prohibition, by court order, on the marketing of units in the territory of a Member State in the future, which is applicable only to foreign UCIs.

38 — See, for example, judgment in *Liga Portuguesa de Futebol Profissional and Bwin International* (C-42/07, EU:C:2009:519, paragraphs 48, 51 and 52).

39 — See judgment in *Commission* v *Belgium* (C-478/98, EU:C:2000:497, paragraph paragraph 41).

V – **Conclusion**

72. In view of the foregoing, I recommend to the Court to answer the questions referred to it by the cour d'appel de Bruxelles (Court of Appeal, Brussels) as follows:

Council Directive 69/335 of 17 July 1969 concerning indirect taxes on the raising of capital does not preclude the levying of a tax on UCIs established in another Member State such as the annual tax on UCIs at issue in the main proceedings.

Council Directive 85/611 of 20 December 1985 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities should be interpreted as not precluding the imposition of a tax, such as the annual tax on UCIs at issue in the main proceedings.

Article 56(1) EC does not preclude tax legislation of a Member State such as the legislation at issue in the main proceedings, which subjects resident and non-resident UCIs to an annual tax on the basis of the net amounts subscribed in its territory.

Article 49 EC does preclude a sanction such as that provided for in Article 162(2) of the Belgian Inheritance Tax Code, consisting of a potential prohibition, by court order, on the marketing of units in the territory of a Member State in the future, which is applicable only to foreign UCIs.