Reports of Cases

JUDGMENT OF THE COURT (Third Chamber)

7 June 2012*

(Free movement of capital — Articles 63 TFEU and 65 TFEU — Severance funds — Investment of assets — Investment funds established in another Member State — Investment in such funds permitted only when they are authorised to market their units within the national territory)

In Case C-39/11,

REFERENCE for a preliminary ruling under Article 267 TFEU from the Verwaltungsgerichtshof (Austria), made by decision of 10 January 2011, received at the Court on 28 January 2011, in the proceedings

VBV — Vorsorgekasse AG

v

Finanzmarktaufsichtsbehörde (FMA),

THE COURT (Third Chamber),

composed of K. Lenaerts, President of the Chamber, J. Malenovský, R. Silva de Lapuerta, E. Juhász (Rapporteur) and G. Arestis, Judges,

Advocate General: V. Trstenjak,

Registrar: A. Impellizzeri, Administrator,

having regard to the written procedure and further to the hearing on 12 January 2012,

after considering the observations submitted on behalf of:

— VBV — Vorsorgekasse AG, by C. Leitgeb, Rechtsanwalt,

— the Finanzmarktaufsichtsbehörde (FMA), by R. Hellwagner, acting as Agent,

— the Czech Government, by M. Smolek and J. Očková, acting as Agents,

— the European Commission, by E. Montaguti and K.-P. Wojcik, acting as Agents,

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

gives the following

* Language of the case: German.

Judgment

1 This reference for a preliminary ruling concerns the interpretation of the rules of European Union law on the free movement of capital, in particular Articles 63 TFEU and 65 TFEU.

2 The reference has been made in the course of proceedings between VBV — Vorsorgekasse AG ('VBV') and the Finanzmarktaufsichtsbehörde (Financial Market Supervisory Authority; 'FMA') relating to investment in the units of an investment fund established in a Member State other than the Republic of Austria.

Legal context

European Union law

3 Article 1 of Council Directive 85/611/EEC of 20 December 1985 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) (OJ 1985 L 375, p. 3), as amended by Directive 2001/108/EC of the European Parliament and of the Council of 21 January 2002 (OJ 2002 L 41, p. 35) ('Directive 85/611'), which is part of Section I of that directive, entitled 'General provisions and scope', provides:

'1. The Member States shall apply this Directive to undertakings for collective investment in transferable securities (hereinafter referred to as UCITS) situated within their territories.

2. For the purposes of this Directive, and subject to Article 2, UCITS shall be undertakings:

— the sole object of which is the collective investment in transferable securities and/or in other liquid financial assets referred to in Article 19(1) of capital raised from the public and which operates on the principle of risk-spreading

and

— the units of which are, at the request of holders, re-purchased or redeemed, directly or indirectly, out of those undertakings' assets. Action taken by a UCITS to ensure that the stock exchange value of its units does not significantly vary from their net asset value shall be regarded as equivalent to such re-purchase or redemption.

...'

4 Article 19 of that directive, which is part of Section V thereof, entitled 'Obligations concerning the investment policies of UCITS', contains detailed provisions relating to the securities in which a UCITS may invest its assets and the conditions governing, and restrictions on, those investments.

Austrian law

5 The Law on severance and retirement funds for employed and self-employed persons (Betriebliches Mitarbeiter- und Selbständigenvorsorgegesetz, BGBl. I, 100/2002), in the version applicable at the material time (BGBl. I, 102/2007) (the 'BMSVG'), provides, in Paragraph 6(1), that, in so far as an employment relationship lasts more than one month, the employer must pay an ongoing contribution of a certain percentage of the monthly remuneration to the sickness insurance institution to which the employee is affiliated, in order for that contribution to be transferred to that employee's severance fund. Under Paragraph 14(1) of the BMSVG, where the employment relationship ends, the employee may assert his or her right to severance pay from the severance fund by which he or she is covered.

6 Under Paragraph 18(1) and (2) of the BMSVG, a severance fund must be authorised to manage and invest the contributions paid to it and, to that effect, in accordance with Paragraph 28(1) of that Law, it must establish a body for collective investment.

7 Paragraph 30 of the BMSVG, entitled 'Provisions applicable to investments', provides:

'(1) The severance fund shall manage its activities in the interest of the beneficiaries of potential rights and shall, in this respect, pay particular attention to security, to profitability and to liquidity needs and to an appropriate spread and diversification of assets.

(2) Assets allocated to a body for collective investment may be invested only in the following assets and instruments:

1. bank deposits and liquid assets;

2. loans and credit ...

3. debt securities …

4. other debt securities and equity;

5. units of investment funds in accordance with Chapters I and Ia of the 1993 Law on investment funds (Investmentfondsgesetz 1993; the "InvFG") and units in investment funds which are authorised pursuant

   (a) to Chapter II of the InvFG or

   (b) to Chapter III of the InvFG;

6. real-estate funds ...

(3) The investments referred to in subparagraph 2 may be made only under the following conditions and subject to the following restrictions:

...

(4) The investments referred to in subparagraph 2(5),

(a) must be carried out by an investment company with its seat in a Member State of the [European Economic Area] (EEA) or of the [Organisation for Economic Cooperation and Development] (OECD) …'

8 In accordance with Paragraph 32(1) of the BMSVG, the severance fund must entrust a depository bank with the custody of the transferable securities belonging to the undertaking for collective investment and with the management of the accounts which that undertaking holds. The FMA's approval is necessary to mandate a depository bank or to change banks.

9 Under Paragraph 43 of the BMSVG, the FMA must order the payment of interest in the case where the severance fund exceeds an investment limit laid down in Paragraph 30 of that Law.

10 Chapter II of the InvFG, to which Paragraph 30(2)(5)(a) of the BMSVG refers, is worded as follows:

'Chapter II

Provisions relating to the marketing of units of foreign investment funds

Scope

Paragraph 24

(1) The provisions of this chapter … apply to public offers, within the national territory, of units representing assets subject to foreign legislation which are invested according the principle of risk-spreading (units of foreign investment funds).

...

Conditions for the admissibility of a public offer

Paragraph 25

The public offer of units of investment funds shall be lawful in the case where

1. the foreign investment company indicates to the FMA a credit institution meeting the conditions in Paragraph 23(1), which it designates as a representative,

2. the fund assets are in the custody of a depositary bank or of an institution authorised to have custody of securities …

3. one or a number of credit institutions meeting the conditions in Paragraph 23(1), second subparagraph, are appointed as paying agencies, through which the unit-holders may make or receive payments; …

...

The representative

Paragraph 29

(1) The representative shall represent the foreign investment company in judicial and extra-judicial matters. It is presumed to have been authorised to receive documents addressed to the investment company, the management company, the trading company and the author of the public offer. These powers may not be restricted.

(2) The court or tribunal within the jurisdiction of which the representative is domiciled shall have jurisdiction to hear and determine actions brought against a foreign investment company, a management company or a trading company in connection with the marketing of units of foreign investment funds within the national territory, and actions brought against the public body. No agreements may be made to derogate from this rule on jurisdiction.

...

Obligation to notify

Paragraph 30

(1) The foreign investment company must notify the FMA of its intention to market units of foreign investment funds within the national territory.

(2) The following documents must be included with the notification:

[There then follows very detailed information concerning the documents and information which must accompany that notification. It is also stated that the processing of the notification is subject to payment of a charge of EUR 3 700 to the FMA, to which payment of an annual charge in the amount of EUR 1 700 is also provided for. Failure to pay the charge within the prescribed period is to constitute a ground for prohibiting marketing of the units.]

Qualifying period — Prohibition on marketing

Paragraph 31

(1) The marketing of units of foreign investment funds shall not begin until four months have expired following receipt of the complete notification, on condition that the FMA has not prohibited the commencement of that marketing. Commencement of marketing shall be prohibited if the foreign investment company does not meet the condition laid down in Paragraph 25 or does not properly effect the notification referred to in Paragraph 30.

...

Advertising measures

Paragraph 32

(1) There shall be a ban on any advertising mentioning the powers conferred on the FMA by this Law.

...'

11 Chapter III of the InvFG sets out the provisions applicable to the marketing of investment funds that are subject to the legislation of a Member State of the EEA. In that chapter, Paragraph 33 of that Law, entitled 'Conditions', provides:

'The provisions of this chapter … shall apply to public offers, within the meaning of Paragraph 24(1), of units representing assets consisting in transferable securities, money market instruments and other liquid financial assets referred to in Article 19(1) of Directive 85/611 …, subject to the legislation of another Member State of the EEA and invested in accordance with the principle of risk-spreading (units of EEA investment funds) where the units are issued by an investment company which has its seat in another Member State and the provisions of Directive 85/611 … are satisfied.'

12 The articles of that chapter which follow contain provisions similar to those contained in Chapter II of the InvFG, set out above, with the difference, inter alia, that the amounts of the charges imposed for processing the notification and of those imposed annually are lower and the qualifying period is two months, and not four months.

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

13 VBV is an approved severance fund for the purposes of Paragraph 18 of the BMSVG, with its seat in Vienna (Austria). It is authorised to manage and invest the contributions paid to it.

14 Between November and December 2009, VBV was the subject of an on-the-spot inspection, which covered, in particular, compliance with the applicable provisions on investment set out in Paragraph 30 of the BMSVG. During that inspection, it was established that, on 22 August 2008, VBV had acquired, apparently outside Austria, for EUR 5 000 200, units of an investment fund with its seat in

Luxembourg which was constituted in the legal form of an investment company with variable capital (SICAV). At the time of that acquisition, that fund had not undergone the procedure for authorisation to market its units in Austria. By decision of the FMA of 28 June 2010, VBV was ordered, pursuant to Paragraph 43 of the BMSVG, to pay the sum of EUR 349 329.04 for having exceeded the threshold set out in Paragraph 30(2)(5)(a) of the BMSVG.

15 VBV brought an action against that decision before the Verwaltungsgerichtshof (Administrative Court) and submits that that provision of the BMSVG is contrary to the free movement of capital inasmuch as the fact of making the lawfulness of the acquisition of units in investment funds established in another Member State subject to those funds having obtained authorisation to be marketed within the national territory significantly restricts the investment opportunities of a severance fund. That restriction, it argues, is excessive and not necessary in order to achieve the objectives of that legislation. It would, in its view, be quite sufficient for the national legislature to make the acquisition of units of such investment funds subject to observance, by those funds, of certain restrictions on investment or composition of the assets and investment strategies, and not to the formal criterion of authorisation for marketing in Austria. In any event, it is not worthwhile for an investment fund established in another Member State to undergo such a long and costly authorisation procedure for the purposes of a relatively small market, such as the Austrian market.

16 In the view of the FMA, the objective pursued by the legislation at issue is to protect investors and consumers. The pursuit of that objective is, it argues, in the public interest, an interest which should be placed on the same footing as public policy. Given that part of the Austrian population is obliged, by the applicable rules of employment law, to pay contributions to severance funds and to invest their assets through them, a notification and authorisation procedure in respect of foreign investment funds is absolutely necessary in order not to jeopardise such national interests. In any event, such a procedure is standardised and consists in a formal examination requiring, inter alia, that a national representative and a national paying agency be designated and a depository bank indicated. This makes it possible to remove any legal uncertainty for the parties concerned.

17 The Verwaltungsgerichtshof appears, at first sight, to share the view that the legislation at issue contains measures which undermine the right to free movement of capital. It is, however, unsure as to whether such measures might be justified on grounds of public policy, within the meaning of Article 65(1)(b) TFEU. It is necessary, it states, to have regard to the general interest in maintaining public policy so far as concerns the security of the investment of part of the professional income of the population. If such a general interest were in fact considered to constitute a ground for justification, in the light of, inter alia, a regulated severance fund scheme relating to the future and termination of employment, it would then be necessary to assess whether such measures could be considered to be proportionate to the objectives pursued.

18 In the light of those considerations, the Verwaltungsgerichtshof decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

‘Is a provision which permits a severance fund to invest assets allocated to an undertaking for collective investment only in units of investment funds which are authorised to sell in Austria compatible with the freedom of movement of capital set out in Article 63 TFEU et seq.?’

The question referred

Preliminary observation

19 The file submitted to the Court does not show that the undertaking for collective investment which must be established by a severance fund, pursuant to the legislation at issue in the main proceedings, constitutes a UCITS within the meaning of Directive 85/611. In addition, such an undertaking for collective investment does not appear to fulfil the conditions set out in the definition of a UCITS in Article 1(2) of that directive, in particular in the second indent of that provision. The Court therefore starts from the premiss that such an undertaking does not constitute a UCITS.

20 The Court's examination will thus essentially be based on the provisions of the Treaty relating to the free movement of capital.

The question referred

21 First of all, it is common ground that the acquisition of units of an investment fund constitutes a direct investment in the form of participation in a financial undertaking by means of a shareholding and, consequently, a movement of capital for the purposes of Article 63 TFEU, as has been, moreover, stated in point IV of the nomenclature set out in Annex I to Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty [Article repealed by the Treaty of Amsterdam] (OJ 1988 L 178, p. 5) and in the explanatory notes appearing in that annex (see, with regard to the ownership of shares and the acquisition of securities, Case C-483/99 *Commission* v *France* [2002] ECR I-4781, paragraph 37, and Case C-503/99 *Commission* v *Belgium* [2002] ECR I-4809, paragraph 38).

22 Secondly, the legislation at issue in the main proceedings, inter alia Paragraph 30(2)(5)(a) and (b) of the BMSVG, by the reference made to Chapters I and III of the InvFG, makes the investment of assets of severance funds in units of investment funds based in both non-member countries and Member States subject to the condition that those investment funds have obtained authorisation to market their units within the national territory and, under Paragraph 43 of the BMSVG, the failure to observe that condition exposes those severance funds to the payment of interest.

23 In this respect, it cannot be argued that the legislation at issue in the main proceedings requires such funds to undergo, in fact, not an authorisation procedure, but a straightforward notification procedure.

24 On this issue, it is important to note that the referring court itself describes that procedure as 'authorisation'. In addition, the European Commission correctly observes that the purpose of the notification is to allow the FMA to examine whether the substantive conditions laid down in that legislation have been satisfied in the instant case, with the result that that procedure must necessarily be categorised, in legal terms, as 'approval' or 'authorisation'. Moreover, even if it were to be assumed that that procedure formally corresponds to a notification, the conditions which must be fulfilled, inter alia the administrative and financial charges, the designation of a national representative and the designation of a national paying agency which must be a credit institution of the Member State concerned, go significantly beyond the requirements which normally characterise a notification procedure.

25 In accordance with the Court's settled case-law, legislation such as that at issue in the main proceedings is, first, likely to deter and, in fact, prevent, by reason of the financial penalty provided for, severance funds from investing their assets in the investment funds established in another Member State and must therefore be classified as a restriction on the movement of capital within the meaning of Article 63(1) TFEU, in principle prohibited by that provision (see, to that effect, Case C-478/98 *Commission* v *Belgium* [2000] ECR I-7587, paragraph 18, and Case C-171/08 *Commission* v *Portugal* [2010] ECR I-6813, paragraph 50 and the case-law cited).

26 Secondly, the legislation at issue in the main proceedings also has a restrictive effect with regard to investment funds established in other Member States in so far as it obliges them, if they wish to sell their units, to undergo the procedure for authorisation within the national territory provided for by that legislation.

27 Such legislation obliges investment funds established in other Member States to undergo an authorisation procedure in Austria, while those funds, lawfully established and approved in the Member State in which they have their seat, hope to be able legitimately to attract capital from other Member States. That requirement therefore constitutes an impediment to cross-border movements of capital.

28 As regards justification for that impediment, the Court has repeatedly held that the free movement of capital may be limited by national legislation only if this is justified by one of the reasons mentioned in Article 65 TFEU or by overriding reasons in the public interest within the meaning of the Court's case-law (see, to that effect, Case C-271/09 *Commission* v *Poland* [2011] ECR I-13613, paragraph 55 and the case-law cited).

29 It must be stated in this regard, first, that the legislation at issue in the main proceedings cannot be justified by reliance on grounds of public policy or public security, as provided for in Article 65(1)(b) TFEU. In accordance with settled case-law, such grounds may be relied on only if there is a genuine and sufficiently serious threat to a fundamental interest of society and, moreover, those grounds must not serve purely economic ends (see, to that effect, Case 30/77 *Bouchereau* [1977] ECR 1999, paragraph 35, and Case C-54/99 *Église de scientologie* [2000] ECR I-1335, paragraph 17 and the case-law cited).

30 With regard, secondly, to the argument that the restrictions in question are justified under Article 65(1)(b) TFEU, which provides that 'Article 63 shall be without prejudice to the right of Member States … to take all requisite measures to prevent infringements of national law and regulations, in particular in the field of … the prudential supervision of financial institutions', suffice it to state that, while the national provisions at issue may lay down the substantive content of the prudential rules applicable to the undertakings for collective investment created by the severance funds, they are not, by contrast, in any way whatsoever designed to prevent infringement of the laws and regulations in the field of the prudential supervision of financial institutions. Those provisions cannot, therefore, come within the exception laid down in that article (see, to that effect, *Commission* v *Poland*, paragraph 56).

31 So far as concerns, third, the alleged justification in terms of overriding reasons in the public interest, it is necessary to recognise that the need to guarantee the stability and security of the assets administered by an undertaking for collective investment created by a severance fund, in particular by the adoption of prudential rules, constitutes an imperative reason of public interest which is capable of justifying restrictions on the free movement of capital (see, by analogy, with regard to pension funds, *Commission* v *Poland*, paragraph 57).

32 However, national legislation such as that at issue in the main proceedings, which requires an investment fund established in another Member State to undergo the procedure for authorisation to market its units within the national territory, goes far beyond what is necessary to attain the objective of scrutiny pursued. Firstly, as is apparent from the file submitted to the Court, a severance fund has already been subject to scrutiny in order to gain authorisation to carry out its activities and is subject to special supervision, on a continuous basis, with regard to its financial management.

33 Secondly, a national supervisory authority, such as the FMA, can legitimately require a severance fund to provide, even at regular intervals, all necessary information concerning the composition of the capital and the value of the assets of an investment fund established in another Member State in which that severance fund intends to invest, or in which it has already invested, part of its assets, information which is, moreover, compulsorily available in the Member State in which that investment fund is established.

34 As a result of those considerations, the conclusion must be drawn that legislation such as that at issue in the main proceedings contains measures which are disproportionate in relation to the objective of scrutiny pursued.

35 The same considerations leading to the finding that such legislation is disproportionate in nature apply, fourth, with regard to reliance on the protection of beneficiaries of payments under a severance fund in their capacity as consumers as constituting an overriding reason in the public interest within the meaning of the Court's case-law.

36 Lastly, it must be observed that the scheme established by the BMSVG is not part of the Austrian social security system. It is apparent from the file submitted to the Court that that scheme is operated on the basis of the principle of capitalisation, under which the payments, by the employer, of a percentage of the gross remuneration of the worker concerned to the severance fund serve to finance the allowance paid to that latter in the event of the termination of his or her employment relationship. In the context of that scheme, the employee's sickness insurance institution intervenes only as an intermediary. Consequently, that scheme cannot, notwithstanding its social objective, be regarded, in the light of European Union law, as forming part of the social security system of a Member State (see, by analogy, *Commission* v *Poland*, paragraph 40).

37 Thus, the issue of whether the financial equilibrium of such a system would be significantly affected does not arise, with the result that Article 153(4) TFEU cannot be relied on as justification for legislation such as that at issue in the main proceedings.

38 Having regard to all of the foregoing considerations, the answer to the question referred is that Article 63(1) TFEU must be interpreted as precluding national legislation which does not permit a severance fund, or the undertaking for collective investment created by that severance fund to manage its assets, to invest those assets in units of an investment fund established in another Member State unless that investment fund has been authorised to market its units within the national territory.

Costs

39 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Third Chamber) hereby rules:

Article 63(1) TFEU must be interpreted as precluding national legislation which does not permit a severance fund, or the undertaking for collective investment created by that severance fund to manage its assets, to invest those assets in units of an investment fund established in another Member State unless that investment fund has been authorised to market its units within the national territory.

[Signatures]