Reports of Cases

JUDGMENT OF THE COURT (Second Chamber)

26 May 2016*

(Reference for a preliminary ruling — Direct taxation — Free movement of capital — Freedom to provide services — Directive 69/335/EEC — Articles 2, 4, 10 and 11 — Directive 85/611/EEC — Articles 10 and 293 EC — Annual tax on undertakings for collective investment — Double taxation — Penalties applicable to collective investment undertakings governed by foreign law)

In Case C-48/15,

REQUEST for a preliminary ruling under Article 267 TFEU from the cour d'appel de Bruxelles (Belgium), made by decision of 23 October 2014, received at the Court on 6 February 2015, in the proceedings

État belge, SPF Finances

v

NN (L) International SA, formerly ING International SA, successor to the rights and obligations of ING (L) Dynamic SA,

THE COURT (Second Chamber),

composed of M. Ilešič, President of the Chamber, C. Toader, A. Rosas, A. Prechal and E. Jarašiūnas (Rapporteur), Judges,

Advocate General: M. Bobek,

Registrar: V. Tourrès, Administrator,

having regard to the written procedure and further to the hearing on 28 October 2015,

after considering the observations submitted on behalf of:

— NN (L) International SA, by J. Malherbe and M. Bertha, avocats,

— the Belgian Government, by M. Jacobs and J.-C. Halleux, acting as Agents, and by A. Gillet, avocat,

— the European Commission, by W. Roels and C. Soulay, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 21 January 2016,

gives the following

* Language of the case: French.

Judgment

1 This request for a preliminary ruling concerns the interpretation of Articles 2, 4, 10 and 11 of Council Directive 69/335/EEC of 17 July 1969 concerning indirect taxes on the raising of capital (OJ, English Special Edition 1969 (II), p. 412), as amended by Council Directive 85/303/EEC of 10 June 1985 (OJ 1985 L 156, p. 23) ('Directive 69/335'), 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), read in conjunction with Article 10 EC and the second indent of Article 293 EC, and Articles 49 to 60 EC, read in conjunction with Article 10 EC and the second indent of Article 293 EC.

2 The request has been made in proceedings between the État belge (Belgian State), SPF Finances (Federal Public Service Finances) and NN (L) International SA, formerly ING International SA, successor to the rights and obligations of ING (L) Dynamic SA ('NN (L)'), regarding an application for reimbursement of the annual tax on undertakings for collective investment ('UCIs') amounting to EUR 185739.34, paid by the latter for the 2006 financial year.

Legal context

EU law

3 Article 2(1) of Directive 69/335, 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), provided:

'Transactions subject to capital duty shall only be taxable in the Member State in whose territory the effective centre of management of a capital company is situated at the time when such transactions take place.'

4 Article 4 of that directive provided:

'1. The following transactions shall be subject to capital duty:

(a) the formation of a capital company;

(b) the conversion into a capital company of a company, firm, association or legal person which is not a capital company;

(c) an increase in the capital of a capital company by contribution of assets of any kind;

(d) an increase in the assets of a capital company by contribution of assets of any kind, in consideration, not of shares in the capital or assets of the company, but of rights of the same kind as those of members, such as voting rights, a share in the profits or a share in the surplus upon liquidation;

(e) the transfer from a third country to a Member State of the effective centre of management of a company, firm, association or legal person, whose registered office is in a third country and which is considered in that Member State, for the purposes of charging capital duty, as a capital company;

(f) the transfer from a third country to a Member State of the registered office of a company, firm, association or legal person, whose effective centre of management is in a third country and which is considered in that Member State, for the purposes of charging capital duty, as a capital company;

(g) the transfer from a Member State to another Member State of the effective centre of management of a company, firm, association or legal person which is considered in the latter Member State, for the purposes of charging capital duty, as a capital company, but is not so considered in the other Member State;

(h) the transfer from a Member State to another Member State of the registered office of a company, firm, association or legal person, whose effective centre of management is in a third country and which is considered in the latter Member State, for the purposes of charging capital duty, as a capital company, but is not so considered in the other Member State.

2. The following transactions may, to the extent that they were taxed at the rate of 1% as at 1 July 1984, continue to be subject to capital duty:

(a) an increase in the capital of a capital company by capitalisation of profits or of permanent or temporary reserves;

(b) an increase in the assets of a capital company through the provision of services by a member which do not entail an increase in the company's capital, but which do result in variation in the rights in the company or which may increase the value of the company's shares;

(c) a loan taken up by a capital company, if the creditor is entitled to a share in the profits of the company;

(d) a loan taken up by a capital company with a member or a member's spouse or child, or a loan taken up with a third party, if it is guaranteed by a member, on condition that such loans have the same function as an increase in the company's capital;

…'

5 According to Article 10 of that directive:

'Apart from capital duty, Member States shall not charge, with regard to companies, firms, associations or legal persons operating for profit, any taxes whatsoever:

(a) in respect of the transactions referred to 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;

(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 for profit may be subject by reason of its legal form.'

6 Article 11 of the same directive provided:

‘Member States shall not subject to any form of taxation whatsoever:

(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.’

7 The second to fourth recitals of Directive 85/611, repealed 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) stated:

‘whereas national laws governing [UCIs] should be coordinated with a view to approximating the conditions of competition between those undertakings at Community level, while at the same time ensuring more effective and more uniform protection for unit-holders; whereas such coordination will make it easier for a [UCI] situated in one Member State to market its units in other Member States;

whereas the attainment of these objectives will facilitate the removal of the restrictions on the free circulation of the units of [UCIs] in the Community, and such coordination will help to bring about a European capital market;

whereas, having regard to these objectives, it is desirable that common basic rules be established for the authorisation, supervision, structure and activities of [UCIs] situated in the Member States and the information they must publish;

…’

8 Article 44 of Directive 85/611 reads as follows:

‘1. [An undertaking for collective investment in transferable securities (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.

…

3. The provisions referred to in paragraphs 1 and 2 must be applied without discrimination.’

Belgian law

9 The Inheritance Tax Code, as amended by the Programme Law of 22 December 2003 (*Moniteur belge* of 31 December 2003, p. 62160, ‘the Inheritance Tax Code’) includes Book II*a*, entitled ‘Annual tax on [UCIs], credit institutions and insurance undertakings’ (‘the annual tax on UCIs’). First of all applicable only to UCIs under Belgian law, that tax was extended to UCIs governed by foreign law marketing their units in Belgium by that Programme Law, which entered into force on 1 January 2004.

10 Article 133 *ter* of the Inheritance Tax Code provides that, in addition to banning certain persons from practising their profession on one of the grounds on infringement laid down in certain provisions of the Code for periods of three months to five years, the court may shut down, also for periods of three months to five years, establishments of the company, group or undertaking of which the convicted person is a director, member or employee.

11 As set out in Article 161 of the Inheritance Tax Code:

'The following shall be subject to an annual tax from 1 January following their registration with the Banking, Finance and Insurance Commission:

1. [UCIs] constituted under statute, as referred to in points 1 and 2 of the first subparagraph of Article 108 of the law of 4 December 1990 on financial transactions and financial markets;

2. management companies responsible for managing [UCIs] constituted in accordance with contract law, as referred to in points 1 and 2 of the first subparagraph of Article 108 of the law of 4 December 1990 on financial transactions and financial markets;

3. [UCIs] governed by foreign law referred to in Article 137 of the law of 4 December 1990 on financial transactions and financial markets, with the exception of undertakings for investment in debt security;

…'

12 Article 161*a* of that code states:

'(1) As regards the investment undertaking referred to in Article 161(1) and (2), the tax shall be payable on the total, as at 31 December of the previous year, of the net amounts invested in Belgium.

For the purposes of the first paragraph:

1. Shares that are acquired abroad on behalf of a resident of the Kingdom of Belgium shall be considered to have been invested in Belgium;

2. Where the investment undertaking has failed to provide the authority with the information that is relevant and necessary for payment of the tax, and without prejudice to the application of Article 162, the tax shall be payable on the total value of the assets managed as at 31 December of the previous year. The King may determine what information is relevant and necessary for the payment of the tax.

(2) As regards the investment undertakings referred to in Article 161(3), the tax shall be payable on the total as at 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.

For the purposes of the first paragraph:

1. The shares that have been invested abroad by a financial intermediary may not be deducted from the gross amounts invested in Belgium in the event of purchase by a financial intermediary in Belgium;

2. When the investment body has failed to provide the authority with the information that is relevant and necessary for the payment of the tax, and without prejudice to the application of Article 162, the tax shall be payable on the total, as at 31 December of the previous year, of the gross amounts invested in Belgium. The King may determine what information is relevant and necessary for the payment of the tax.

…'

13 Article 162 of that code, in its version in force at the material time, provided:

'The provisions of Book I relating to evidence of failure to declare assets, limitation periods, surrender, criminal proceedings and penalties are applicable to the tax established by Article 161.

When the undertakings for collective investment referred to in paragraph 3 of Article 161 contravene the provisions of the present book, the court may prohibit them from marketing units in Belgium in the future. Notice of that ban shall be served on the investment body, on the Banking, Finance and Insurance Commission and on the body designated in Belgium by the investment body for the purpose of ensuring payments to unit holders, the sale or the purchase of units and the dissemination of information in at least one of the languages of the country.'

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

14 NN (L), a company established in Luxembourg, lodged an annual tax declaration in respect of the tax on UCIs for the financial year 2006, which covered the net amounts invested in Belgium as at 31 December 2005, and paid that tax, amounting to EUR 185739.34, within the statutory time-limit. It then brought proceedings before the tribunal de première instance de Bruxelles (Court of First Instance, Brussels, Belgium) in order to contest the lawfulness of that tax in the light of Directive 69/335, Articles 56 to 60 EC, Directive 85/611 and Article 10 EC as well as, in the alternative, Article 22 of the Convention between the Kingdom of Belgium and the Grand Duchy of Luxembourg for the avoidance of double taxation and regulating certain other questions on taxes on income and capital, signed in Luxembourg on 17 September 1970 ('the Belgian-Luxembourg convention').

15 By judgment of 23 November 2011, the tribunal de première instance de Bruxelles rejected the complaint alleging infringement of Directive 69/335, but granted NN (L)'s application, upholding the complaint submitted by NN (L) in the alternative, alleging infringement of the Belgian-Luxembourg convention.

16 The État belge, SPF Finances lodged an appeal against that judgment before the referring court, from which it seeks a declaration that the annual tax on UCIs is not covered by the Belgian-Luxembourg convention, that Articles 160 et seq. of the Inheritance Tax Code are compatible with EU law and that that tax, which was duly levied, cannot be repaid.

17 NN (L) sought confirmation of the judgment under appeal. In the alternative, it brought a cross-appeal, in so far as the court of first instance rejected the complaint alleging infringement of Directive 69/335 and did not rule on the other complaints alleging infringement of other provisions of EU law. In that regard, NN (L) invited the referring court to refer the matter to the Court of Justice for a preliminary ruling.

18 The referring court states that, whatever the classification given to the annual tax on UCIs for the purpose of determining whether or not it falls within the scope of the Belgian-Luxembourg convention, that tax does not escape the general prohibition of limitations on freedom of movement and the possibility cannot be ruled out a priori that the provisions of Directive 69/335 apply to that tax.

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

'1. Must Directive 69/335 and more specifically Articles 2, 4, 10 and 11 thereof read together, be interpreted as precluding provisions of national law, such as Articles 161 to 162 of the Inheritance Tax Code concerning the tax on UCIs, in so far as that tax is imposed annually on UCIs 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 UCIs are subject to that tax while they remain at the disposal of those UCIs?

2. Must Articles 49 to 55 and 56 to 60 EC, read, if appropriate, in conjunction with Articles 10 EC and 293, second indent, EC be interpreted as precluding a Member State modifying unilaterally the criterion on the basis of which a tax is imposed, as provided for by Article 161 et seq. of the 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(2) of the Inheritance Tax Code, as regards foreign operators only?

3. Must Articles 49 and 56 EC, read, if appropriate, in conjunction with Articles 10 and 293, second indent, EC, be interpreted as precluding the 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 UCIs established in another Member State, represents an additional pecuniary burden likely to impede the marketing of their units in Belgium?

4. Must Directive 85/611, read, if appropriate, in conjunction with Articles 10 and 293, second indent, EC, be interpreted as precluding the imposition of tax, as described above, inasmuch as it prejudices the principal aim of the directive of facilitating the marketing of units of UCIs in the European Union?

5. Must Articles 49 and 56 EC be interpreted as precluding administrative charges incurred by the levying of taxation such as that described above on UCIs established in another Member State that market their units in Belgium?

6. Must Articles 49 and 56 EC be interpreted as precluding a provision of national law, such as Article 162(2) of the Inheritance Tax Code, inasmuch as that provision imposes a specific penalty on UCIs 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?'

Consideration of the questions referred

The admissibility of the fifth question

20 The Belgian Government considers that the fifth question is irrelevant for the purposes of the resolution of the dispute in the main proceedings and is therefore inadmissible. It observes, in addition, that the referring court does not identify with any precision the provisions of national law which impose administrative burdens or the discrimination to which UCIs governed by foreign law are subject in that connection as compared with UCIs governed by Belgian law.

21 It should be observed that, since questions concerning EU law enjoy a presumption of relevance, the Court may refuse to give a ruling on a question referred by a national court only where it is quite obvious that the interpretation, or the determination of validity, of a rule of EU law that is sought bears no relation to the actual facts of the main action or its purpose, 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 (see, inter alia, judgment of 16 June 2015 in *Gauweiler and Others*, C-62/14, EU:C:2015:400, paragraph 25).

22 As regards that factual and legal material, Article 94 of the Rules of Procedure of the Court provides that the request for a preliminary ruling must contain inter alia a summary of the subject-matter of the dispute and the relevant findings of fact or, at least, an account of the facts on which the questions are based, the content of any national provisions applicable to the dispute in the main proceedings, and a statement of the reasons which prompted the referring court or tribunal to inquire about the interpretation of certain provisions of EU law, and the relationship between those provisions and the national legislation applicable to the main proceedings.

23 In the present case, the order for reference does not indicate the administrative burdens to which UCIs governed by foreign law are subject and does not specify the provisions of national law under which or on account of which those burdens are imposed or the reasons why the referring court raises the question in that regard of the interpretation of EU law. In those circumstances, the Court does not have sufficient factual or legal material before it to give a useful answer to the fifth question, which must therefore be declared inadmissible.

The first question

24 By its first question, the referring court essentially asks whether Articles 2, 4, 10 and 11 of Directive 69/335 must be interpreted as precluding legislation of a Member State which imposes an annual tax on UCIs, such as that at issue in the main proceedings, which levies that tax on UCIs governed by foreign law marketing units in that Member State.

25 In that regard, it should be stated that the annual tax on UCIs does not correspond to any of the transactions subject to capital duty pursuant to Article 4 of Directive 69/335 which, as the Court observed in paragraph 20 of the judgment of 27 October 1998 in *Nonwoven* (C-4/97, EU:C:1998:507), are characterised by the transfer of capital or assets to a company with share capital in the taxing Member State or take form of an actual increase in the company's capital or assets, which is obviously not the case with the 'net amounts invested in Belgium' to which that tax applies. Nor does such a tax come under those prohibited by Article 10 of Directive 69/335 since (i) it does not correspond to any of the taxable transactions listed in Article 4 of that directive, to which Article 10(a) and (b) of the directive referred, and (ii) it has no link with registration or any other formality required before the commencement of business within the meaning of Article 10(c) of that directive. Likewise, that tax by no means corresponds to any of the transactions subject to Article 11 of the directive.

26 Consequently, the annual tax on UCIs does not fall within the scope of Directive 69/335. That directive therefore does not preclude UCIs governed by foreign law being subject to such a tax.

27 Therefore, the answer to the first question is that Articles 2, 4, 10 and 11 of Directive 69/335 must be interpreted as not precluding legislation of a Member State imposing an annual tax on UCIs, such as the tax at issue in the main proceedings, which makes UCIs governed by foreign law marketing units in that Member State subject to that tax.

The fourth question

28 By its fourth question, the referring court essentially asks whether Directive 85/611, read, if appropriate, in conjunction with Article 10 EC and Article 293, second indent, EC, must be interpreted as precluding the legislation of a Member State imposing an annual tax on UCIs, such as the tax at issue in the main proceedings, which makes UCIs governed by foreign law marketing units in that Member State subject to that tax.

29 The Belgian Government takes the view that that question is inadmissible because the referring court does not state the articles of Directive 85/611 which it seeks to have interpreted or the reasons why it is unsure as to the interpretation of that directive.

30 However, it is apparent from the wording of that question that the referring court is uncertain whether Directive 85/611, read in conjunction with Article 10 EC and Article 293, second indent, EC, precludes taxation such as the annual tax on UCIs, in so far as it prejudices the principal aim of that directive of facilitating the marketing of the units of UCITS in the European Union. That information is sufficient to enable the Court to provide the referring court with interpretative guidance which will assist it in resolving the dispute in the main proceedings. The question is therefore admissible.

31 As for the substance, it follows from the second to fourth recitals of Directive 85/611 that, in order to ensure that UCITS units are marketed freely within the European Union, that directive sought to coordinate national laws governing UCITS, in order, first, to approximate, within the European Union, the conditions of competition between those undertakings, and, secondly, to ensure more effective and more uniform protection for unit-holders. To that end, that directive established common basic rules governing the authorisation, supervision, structure and activities of UCITS and the information which they must publish (judgment of 11 September 2014 in *Gruslin*, C-88/13, EU:C:2014:2205, paragraph 33).

32 It is clear that the taxation of UCITS did not fall within the area governed by Directive 85/611, which did not contain any provision relating to that area. Nevertheless, Article 44(3) of that directive required that the laws, regulations and administrative provisions applicable in a Member State to UCITS which did not fall within the field governed by that directive had to be applied in a non-discriminatory way.

33 It follows that the annual tax on UCIs does not fall within the area governed by Directive 85/611 and that, since Article 10 EC and Article 293, second indent, EC cannot alter that finding, nor does that directive preclude UCIs governed by foreign law being subject to such a tax, provided that the provisions relating thereto are applied in a non-discriminatory way, which will be examined in the second, third and sixth questions.

34 Consequently, the answer to the fourth question is that Directive 85/611, read, if appropriate, in conjunction with Article 10 EC and Article 293, second indent, EC, must be interpreted as not precluding the legislation of a Member State imposing an annual tax on UCIs, such as the tax at issue in the main proceedings, which makes UCIs governed by foreign law marketing units in that Member State subject to that tax, provided that that legislation is applied in a non-discriminatory way.

The second and third questions

35 The second and third questions, which it is appropriate to examine together, relate (i) to Articles 49 to 60 EC, read, if appropriate, in conjunction with Article 10 EC and Article 293, second indent, EC, and (ii) Articles 49 and 56 EC, read, if appropriate, in conjunction with Article 10 EC and Article 293, second indent, EC. However, it must be observed that only Articles 49 and 56 EC are relevant for the purposes of answering those questions.

36 First, Articles 50 to 55, 57, 59 and 60 EC clearly have nothing to do with the questions of the referring court regarding the compatibility of the annual tax on UCIs with the freedom to provide services and the free movement of capital.

37 Secondly, Article 58 EC is of no help in answering those questions, since that tax is imposed without distinction on UCIs governed by Belgian law and on UCIs governed by foreign law.

38 Thirdly, Article 10 EC, which sets out a general obligation of the Member States, cannot be interpreted as giving rise to any independent obligations on Member States beyond those arising from Articles 49, 56 and 293 EC. As for the latter article, Article 293 EC 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. Although the elimination of double taxation within the European Union is thus included amongst the objectives of the EC Treaty, it is clear from the wording of that provision that it cannot itself confer on individuals any rights on which they might be able to rely before their national courts (see, to that effect, order of 19 September 2012 in *Levy and Sebbag*, C-540/11, not published, EU:C:2012:581, paragraphs 26 and 27 and the case-law cited).

39 In addition, it should be observed that, when a national measure concerns both the freedom to provide services and the free movement of capital, the Court will in principle examine the measure in dispute in relation to only one of those two freedoms if it appears, in the circumstances of the case, that one of them is entirely secondary in relation to the other and may be considered together with it (see, to that effect, judgments of 3 October 2006 in *Fidium Finanz*, C-452/04, EU:C:2006:631, paragraph 34, and 1 July 2010 in *Dijkman and Dijkman-Lavaleije*, C-233/09, EU:C:2010:397, paragraph 33).

40 However, as the Advocate General observed in points 48 and 49 of his Opinion, the annual tax on UCIs, in so far as it is levied on the net assets of UCIs governed by foreign law, is linked to the acquisition by residents of units of foreign undertakings which may or may not be dealt in on a stock exchange. That transaction is one of the capital movements set out in part A, relating to '[t]ransactions in units of [UCIs]' of Section IV of Annex I to 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), entitled 'Operations in units of [UCIs]', the indicative value of which was acknowledged by the Court (see, to that effect, judgments of 7 June 2012 in *VBV — Vorsorgekasse*, C-39/11, EU:C:2012:327, paragraph 21, and 21 May 2015 in *Wagner-Raith*, C-560/13, EU:C:2015:347, paragraphs 23 and 24). Such a tax therefore comes under the free movement of capital.

41 Although the freedom to provide services is also liable to be affected by taxation such as the annual tax on UCIs, in so far as the latter may have effects on the financial services offered in Belgium by UCIs governed by foreign law, that freedom is secondary in relation to the free movement of capital and may be considered together with it.

42 In those circumstances, by its second and third questions, the referring court must be regarded as essentially asking whether Article 56 EC must be interpreted as precluding legislation of a Member State imposing an annual tax on UCIs, such as the tax at issue in the main proceedings, which makes UCIs governed by foreign law marketing units in that Member State subject to that tax.

43 In that regard, it should be observed that, according to the settled case-law of the Court, the Member States must exercise their competence in the area of direct taxation consistently with EU law and, in particular, with the fundamental freedoms guaranteed by the Treaty (see, inter alia, judgment of 23 February 2016 in *Commission* v *Hungary*, C-179/14, EU:C:2016:108, paragraph 171 and the case-law cited).

44 As regards the free movement of capital, it also follows from the Court's settled case-law that the measures prohibited by Article 56(1) EC, as restrictions on the movement of capital, include those which are such as to discourage non-residents from making investments in a Member State or to discourage that Member State's residents from doing so in other States (see, to that effect, judgment of 10 February 2011 in *Haribo Lakritzen Hans Riegel and Österreichische Salinen*, C-436/08 and C-437/08, EU:C:2011:61, paragraph 50 and the case-law cited).

45 In the present case, NN (L), which takes the view that, by imposing the annual tax on UCIs on UCIs governed by foreign law, the Kingdom of Belgium exercises extraterritorial tax jurisdiction contrary to international tax practice, submits that that tax is discriminatory and constitutes a restriction to the free movement of capital, in so far as UCIs governed by Belgian law and UCIs governed by foreign law are to be treated in the same way for tax purposes, even though they are in a situation which is not objectively comparable. Unlike UCIs governed by Belgian law, UCIs governed by foreign law are constituted in accordance with foreign law, are not resident in Belgium and both their capital and the place in which their capital is invested are abroad. Moreover, that tax constitutes an additional financial burden on UCIs governed by foreign law, which is in addition to, so far as concerns UCIs governed by Luxembourg law, a subscription tax, which reduces the profitability of the units to the detriment of all the — Belgian or foreign — unit holders, discourages subscription to such units and, consequently, disadvantages UCIs governed by foreign law in relation to those governed by Belgian law.

46 However, it should be noted that, since the annual tax on UCIs applies without distinction to all UCIs, irrespective of whether they are governed by Belgian law or foreign law, the only objective difference between situations of those two categories of UCIs, in terms of their liability to that tax, resides in the fact that, for UCIs governed by foreign law, the annual tax on UCIs is in addition to the taxation to which they may be subject in the Member State in which they are established.

47 The Court has held on many occasions that, in the absence of harmonisation at EU level, the disadvantages which could arise from the parallel exercise of tax competences by different Member States, to the extent that such an exercise is not discriminatory, do not constitute restrictions on the freedom of movement (judgments of 8 December 2011 in *Banco Bilbao Vizcaya Argentaria*, C-157/10, EU:C:2011:813, paragraph 38 and the case-law cited, and 21 November 2013 in *X*, C-302/12, EU:C:2013:756, paragraph 28) and, moreover, the Member States are not obliged to adapt their own tax systems to the different tax systems of other Member States, in order inter alia to eliminate double taxation (see, to that effect, judgment of 12 February 2009 in *Block*, C-67/08, EU:C:2009:92, paragraph 31).

48 It follows that the annual tax on UCIs cannot be considered to be a restriction on the free movement of capital.

49 Consequently, the answer to the second and third questions is that Article 56 EC must be interpreted as not precluding the legislation of a Member State imposing an annual tax on UCIs, such as the tax at issue in the main proceedings, which makes UCIs governed by foreign law marketing units in that Member State subject to that tax.

The sixth question

50 By its sixth question, the referring court essentially asks whether Articles 49 EC and 56 EC must be interpreted as precluding a national provision such as Article 162(2) of the Inheritance Tax Code, by which a Member State imposes a specific penalty, namely the prohibition, ordered by a court, of making future investments of its units in that Member State on UCIs governed by foreign law in the event of non-compliance by the latter with the obligation to file the annual declaration necessary for the recovery of a tax on UCIs or in the event of non-payment of that tax.

51 The Belgian Government submits that that question is also inadmissible. According to the Belgian Government, since the subject of the dispute in the main proceedings is not the penalty laid down in Article 162(2) of the Inheritance Tax Code but the reimbursement of the annual tax on UCIs paid by NN (L) for the financial year 2006, that question has no connection with the subject-matter of that dispute and the question whether a penalty will be imposed on that company in the future is hypothetical.

52 However, it is apparent from the order for reference that NN (L) disputes, in the main proceedings, the lawfulness of the tax imposed on it, arguing, inter alia, that the provisions of the Inheritance Tax Code governing the annual tax on UCIs, including those relating to penalties, are not consistent with EU law. The question asked by the referring court is not therefore clearly unrelated to the subject-matter of the dispute in the main proceedings. As for the hypothetical nature of the penalty, a party cannot be required to infringe national law and, as a result, have a penalty imposed on it in order for it to be able to invoke a breach of EU law before the national court (see, to that effect, judgment of 13 March 2007 in *Unibet*, C-432/05, EU:C:2007:163, paragraph 64). The sixth question is therefore admissible.

53 In so far as it consists in prohibiting UCIs governed by foreign law from marketing units in Belgium, the penalty provided for in Article 162(2) of the Inheritance Tax Code must, as the Advocate General stated in point 65 of his Opinion, be examined in the light of the rules relating to the freedom to provide services.

54 As regards that penalty, the Belgian Government stated, in its written observations and at the hearing before the Court, that it echoes the penalty provided for in Article 133 *ter* of the Inheritance Tax Code, to which Article 161(1) of that code refers and which applies both to UCIs under Belgian law and to UCIs under foreign law.

55 However, contrary to that Government's submissions, the penalty provided for in Article 133 *ter* of the Inheritance Tax Code and that provided for in Article 162(2) of the code cannot be considered to be equivalent, even though the former may involve the closure of a UCI established in Belgium, while the latter does not prevent a UCI governed by foreign law carrying out its activities elsewhere. First of all, as the Belgian Government stated at the hearing before the Court, those penalties do not penalise the same facts. Next, unlike the second of those penalties, the former can be imposed only after the conviction of certain persons for infringements of the Inheritance Tax Code, whereas the second penalty may be imposed on a UCI governed by foreign law which failed to submit the annual declaration or which did not pay the tax. Lastly, the second of those penalties, which does not preclude the first, is not — unlike the first — limited in time.

56 Thus, the system of penalties provided for under Belgian law appears harsher with regard to UCIs governed by foreign law than it is with regard to UCIs governed by Belgian law which fail to comply with the same statutory obligations. Such a difference in treatment, based on the place of establishment, is such as to dissuade UCIs governed by foreign law from marketing units in Belgium. They therefore constitute a restriction on the freedom to provide services.

57 In order to justify that different treatment, the Belgian Government asserts that the prohibitions on engaging in a professional activity or decisions to close the undertaking which employs the employee or manager convicted under Article 133 *ter* and Article 162(1) of the Inheritance Tax Code are difficult to apply to UCIs governed by foreign law which market their units by having recourse to a financial intermediary in Belgium, because such UCIs are not resident in that country, and that other penalties, such as financial penalties, are also difficult to enforce abroad.

58 It should be observed in that regard that a restriction on the freedom to provide services may be accepted only if it is justified by overriding reasons in the public interest. Even if that were so, application of that restriction would still have to be such as to ensure achievement of the aim pursued and not go beyond what is necessary for that purpose (judgment of 18 October 2012 in *X*, C-498/10, EU:C:2012:635, paragraph 36 and the case-law cited).

59 The Court has already held that the need to ensure the effective collection of a tax may constitute an overriding reason in the public interest capable of justifying a restriction on the freedom to provide services (judgments of 18 October 2012 in *X*, C-498/10, EU:C:2012:635, paragraph 39, and 19 June 2014 in *Strojírny Prostějov and ACO Industries Tábor*, C-53/13 and C-80/13, EU:C:2014:2011, paragraph 46). It has also observed that the imposition of penalties, including criminal penalties, may be considered to be necessary in order to ensure compliance with national rules, subject, however, to the condition that the nature and amount of the penalty imposed is in each individual case proportionate to the gravity of the infringement which it is designed to penalise (judgment of 3 December 2014 in *De Clercq and Others*, C-315/13, EU:C:2014:2408, paragraph 73 and the case-law cited).

60 In the present case, the possibility of imposing a penalty on UCIs governed by foreign law which failed to comply with the obligation to file a declaration and the payment obligation would appear to be justified by the need to ensure collection of the annual tax on UCIs and appropriate for ensuring that that objective is attained.

61 However, even if it is subject to assessment by a court, a penalty consisting of prohibiting such UCIs from marketing units in Belgium in the future, such as that laid down in Article 162(2) of the Inheritance Tax Code, goes beyond what is necessary to attain that objective, since that provision does not limit the duration of such a prohibition and does not provide for the possibility of modifying it or of imposing other less restrictive penalties, depending on the seriousness of the infringement committed.

62 Consequently, the answer to the sixth question is that Article 49 EC must be interpreted as precluding a national provision, such as Article 162(2) of the Inheritance Tax Code, by which a Member State imposes a specific penalty, namely the prohibition, ordered by a court, of making future investments of its units in that Member State, on UCIs governed by foreign law in the event of non-compliance by the latter with the obligation to file the annual declaration necessary for the recovery of a tax on UCIs or in the event of non-payment of that tax.

Costs

63 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 (Second Chamber) hereby rules:

1. **Articles 2, 4, 10 and 11 of Council Directive 69/335/EEC of 17 July 1969 concerning indirect taxes on the raising of capital, as amended by Council Directive 85/303/EEC of 10 June 1985, must be interpreted as not precluding legislation of a Member State imposing an annual tax on undertakings for collective investment, such as the tax at issue in the main proceedings, which makes undertakings for collective investment governed by foreign law marketing units in that Member State subject to that tax.**

2. **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), read, if appropriate, in conjunction with Article 10 EC and Article 293, second indent, EC, must be interpreted as not precluding the legislation of a Member State imposing an annual tax on UCIs, such as the tax at issue in the main proceedings, which makes UCIs governed by foreign law marketing units in that Member State subject to that tax, provided that that legislation is applied in a non-discriminatory way.**

3. **Article 56 EC must be interpreted as not precluding the legislation of a Member State imposing an annual tax on UCIs, such as the tax at issue in the main proceedings, which makes UCIs governed by foreign law marketing units in that Member State subject to that tax.**

4. **Article 49 EC must be interpreted as precluding a national provision, such as Article 162(2) of the Inheritance Tax Code, as amended by the Programme Law of 22 December 2003, by which a Member State imposes a specific penalty, namely the prohibition, ordered by a court, of making future investments of its units in that Member State, on UCIs governed by foreign law in the event of non-compliance by the latter with the obligation to file the annual declaration necessary for the recovery of a tax on UCIs or in the event of non-payment of that tax.**

[Signatures]