JUDGMENT OF THE COURT (Third Chamber)

10 February 2011 (*)

(Free movement of capital – Corporation tax – Exemption of nationally-sourced dividends – Exemption of foreign-sourced dividends only if certain conditions are complied with – Application of an imputation system to non-exempt foreign-sourced dividends – Proof required as to the foreign tax creditable)

In Joined Cases C-436/08 and C-437/08,

REFERENCES for a preliminary ruling under Article 234 EC from the Unabhängiger Finanzsenat, Außenstelle Linz (Austria), made by decisions of 29 September 2008 received at the Court on 3 October 2008, and reformulated by that tribunal on 30 October 2009, in the proceedings

Haribo Lakritzen Hans Riegel BetriebsgmbH (C-436/08),

Österreichische Salinen AG (C-437/08)

v

Finanzamt Linz,

THE COURT (Third Chamber),

composed of K. Lenaerts (Rapporteur), President of the Chamber, D. Šváby, R. Silva de Lapuerta, J. Malenovský and T. von Danwitz, Judges,

Advocate General: J. Kokott,

Registrar: K. Malacek, Administrator,

having regard to the written procedure and further to the hearing on 15 September 2010,

after considering the observations submitted on behalf of:

– Haribo Lakritzen Hans Riegel BetriebsgmbH, by R. Leitner, Wirtschaftsprüfer und Steuerberater, G. Gahleitner, Steuerberater, and B. Prechtl,

– the Austrian Government, by J. Bauer and C. Pesendorfer, acting as Agents,

– the German Government, by J. Möller and C. Blaschke, acting as Agents,

– the Italian Government, by G. Palmieri, acting as Agent, assisted by P. Gentili, avvocato dello Stato,

– the Netherlands Government, by J. Langer, C. Wissels, M. Noort and B. Koopman, acting as Agents,

– the Finnish Government, by J. Heliskoski, acting as Agent,

– the United Kingdom Government, initially by V. Jackson and subsequently by S. Hathaway and L. Seeboruth, acting as Agents, assisted by R. Hill, Barrister,

– the European Commission, by R. Lyal and W. Mölls, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 11 November 2010,

gives the following

Judgment

1 These references for a preliminary ruling concern the interpretation of European Union law.

2 The references have been made in actions brought by Haribo Lakritzen Hans Riegel BetriebsgmbH (‘Haribo’), a limited liability company governed by Austrian law, and Österreichische Salinen AG (‘Salinen’), a public limited company governed by Austrian law, against Finanzamt Linz (Tax Office, Linz) concerning the taxation in Austria of dividends received from companies established in other Member States and in non-member States.

I – National legal context

3 In order to prevent the economic double taxation of dividends distributed by a resident or non-resident company and received by a resident company, Austrian tax legislation provides, in certain circumstances, that such dividends are subject either to the ‘exemption method’, which means that the dividends received by the latter company are exempt from corporation tax, or to the ‘imputation method’, which means that the corporation tax paid on the profits underlying the dividends distributed is credited against the corporation tax payable in Austria by the company receiving the dividends.

4 Paragraph 10 of the 1988 Law on corporation tax (Körperschaftsteuergesetz 1988, BGBl. 401/1988) as amended by the 2009 Law accompanying the budget (BGBl. I, 52/2009) (‘the KStG’), which is applicable, in accordance with Paragraph 26c(16)(b) of the KStG, to all assessment procedures in progress, is worded as follows:

‘(1) Earnings from holdings shall be exempt from corporation tax. Earnings from holdings are:

1. shares of profits of any kind from holdings in domestic capital companies or domestic trade and industrial cooperatives in the form of shares in companies or cooperatives;

…

5. shares of profits … from holdings in foreign corporations which fulfil the conditions, laid down in Annex 2 to the 1988 Law on income tax, of Article 2 of Council Directive 90/435/EEC of 23 July 1990 [on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States] (OJ 1990 L 255, p. 6) and do not fall within the scope of point 7;

6. shares of profits … from holdings in corporations in [non-member] States [party to the Agreement on] the European Economic Area [of 2 May 1992 (OJ 1994 L 1, p. 1; 'the EEA Agreement')] … with whose State of establishment comprehensive procedures for mutual assistance with regard to administrative matters and enforcement exist, if the holdings do not fall within the scope of point 7;

7. shares of profits of any kind from an international inter-company holding ['international holding'] within the meaning of subparagraph 2 [below].

(2) An international holding exists where taxpayers … are proven to have, in the form of shareholdings, for an uninterrupted period of at least one year a stake of at least one tenth [in a foreign company].

…

(4) Notwithstanding subparagraph 1, point 7, shares of profits … from international holdings within the meaning of subparagraph 2 shall, in accordance with the following provisions, not be exempt from corporation tax if there are grounds for the Federal Minister for Finance so to order by regulation in order to prevent tax evasion and abuses (Paragraph 22 of the Federal Tax Code). Such grounds may be taken to exist, in particular, where:

1. the foreign corporation's main business focus lies directly or indirectly in obtaining revenue from interest, from the assignment of movable tangible or intangible assets or from the sale of holdings, and

2. the foreign corporation's income is not subject to any foreign tax comparable to Austrian corporation tax in terms of determination of the tax base or tax rates.

(5) Notwithstanding subparagraph 1, points 5 and 6, shares of profits shall not be exempt from corporation tax if one of the following conditions applies:

1. the foreign corporation is not in fact subject abroad, directly or indirectly, to any tax comparable to Austrian corporation tax;

2. the profits of the foreign corporation are subject abroad to a tax comparable to Austrian corporation tax, the applicable rate of which is more than 10 percentage points lower than Austrian corporation tax …

3. the foreign corporation enjoys a comprehensive personal or subject-based exemption abroad. …

(6) In the cases under subparagraphs 4 and 5, relief from a foreign tax corresponding to [Austrian] corporation tax is to be brought about for shares of profits in the following manner: upon an application being made, the foreign tax to be considered an advance charge on the distribution [of profits] shall be credited against the domestic corporation tax charged on shares of profits of any kind derived from the international holding. When determining the income, the foreign tax creditable shall be added to the shares of profits of any kind from the international holding.'

5 On 13 June 2008, the Bundesministerium für Finanzen (Federal Ministry of Finance) published, in response to the decisions of the Verwaltungsgerichtshof (Administrative Court) of 17 April 2008 referred to in paragraph 13 of the present judgment, a notice concerning Paragraph 10(2) of the KStG

as worded prior to the 2009 Law accompanying the budget (BMF-010216/0090-VI/6/2008). Under that provision, earnings from holdings in domestic companies were exempt from corporation tax, whilst earnings from holdings in foreign companies were exempt only if the recipient of the earnings held at least 25% of the capital of the company making the distribution.

6 In the case of dividends from holdings in foreign capital companies below the 25% threshold, the notice of 13 June 2008 provides that both the corporation tax charged on profits distributed in the State of residence of the company making the distribution and the withholding tax actually levied in that State in accordance with the relevant bilateral double taxation convention are to be credited against domestic corporation tax.

7 Within that framework, the notice states that the taxpayer must supply the following information in order for the foreign tax to be credited against the tax payable in Austria:

– the exact name of the company making the distribution in which the taxpayer has the holding;

– a precise indication of the size of the holding;

– a precise indication of the rate of corporation tax to which the company making the distribution is subject in the State in which it is established. If it is not subject to the normal tax regime of the State in which it is established (in that, for example, it has the benefit of a more favourable rate of tax, a personal tax exemption or significant tax exemptions or reductions), the rate of tax actually applicable must be given;

– an indication of the amount of corporation tax charged on the taxpayer’s holding, in the light of the above parameters;

– a precise indication of the rate of the withholding tax actually levied, restricted to the rate of withholding tax under the relevant double taxation convention;

– a calculation of the tax creditable.

8 The referring tribunal considers that the notice of 13 June 2008 remains applicable notwithstanding the legislative amendments in 2009.

II – The disputes in the main proceedings and the questions referred for a preliminary ruling

9 In the 2001 tax year, Haribo received income from a holding in an investment fund that included dividends paid by capital companies established in Member States other than the Republic of Austria and in non-member States. Salinen received similar income in the 2002 tax year. Salinen suffered an operating loss in that tax year.

10 When the Finanzamt Linz rejected their applications for the dividends from non-resident capital companies to be exempt from tax, Haribo and Salinen brought actions before the referring tribunal.

11 In its decisions of 13 January 2005, the referring tribunal held that Paragraph 10(2) of the KStG as worded prior to the 2009 Law accompanying the budget was contrary to the principle of free movement of capital in that it taxed dividends from non-resident companies, including those from companies established in non-member States, less favourably than dividends from resident companies, without

that difference in treatment being justified. Applying by analogy the taxation regime laid down in Paragraph 10(1) of the KStG for dividends from domestic capital companies, the referring tribunal treated the dividends received from capital companies established in other Member States or in non-member States as tax-exempt income.

12 The Finanzamt Linz appealed against those decisions to the Verwaltungsgerichtshof, contending in particular that holdings in domestic investment funds do not fall within Article 63 TFEU.

13 By decisions of 17 April 2008, that court held, first, that the acquisition and holding of stakes in non-resident companies that do not enable appreciable influence to be exerted on those companies fall within Article 63 TFEU, including when such stakes are held through an investment fund.

14 The Verwaltungsgerichtshof held next, like the referring tribunal, that Paragraph 10(2) of the KStG as worded prior to the 2009 Law accompanying the budget infringed the principle of free movement of capital and could therefore be applied only in a manner that was consistent with European Union law. It considered that, when a number of approaches that are consistent with European Union law exist, the approach which enables the will of the national legislature to be upheld as far as possible should be adopted.

15 In that regard, the Verwaltungsgerichtshof held that, in order to remedy the less favourable tax treatment of dividends from non-resident companies in which the shareholder had less than 25% of the capital compared with dividends from resident companies, it was appropriate to apply to that first category of dividends not the exemption method but the method consisting of crediting against the tax payable in Austria the tax that was charged on the dividends in the State of residence of the company that made the distribution.

16 Finally, according to the Verwaltungsgerichtshof the imputation method corresponds more closely to the approach chosen by the Austrian legislature than the exemption method. When the State in which the company making the distribution is resident imposes on the dividends tax that is identical to or higher than the tax charged by the State of the shareholder, the imputation method and the exemption method lead to the same result. However, when the level of taxation applicable in the first State is lower than in the State of the shareholder, only the imputation method leads in the latter State to taxation of the same amount as the taxation applicable to nationally-sourced dividends.

17 Since the Verwaltungsgerichtshof held that the application by analogy of the exemption method laid down in Paragraph 10(2) of the KStG as worded prior to the 2009 Law accompanying the budget rendered the referring tribunal's decisions unlawful, it set aside those decisions and referred the cases back to that tribunal.

18 By decisions received at the Court on 3 October 2008, the referring tribunal asked the Court of Justice whether the exemption and imputation methods can be regarded as equivalent under European Union law.

19 Paragraph 10 of the KStG as initially worded was amended retroactively by the 2009 Law accompanying the budget. Since under that new provision the exemption method is also to apply, subject to certain conditions, to dividends which a resident company receives from non-resident companies, on 8 October 2009 the Court sent the referring tribunal a request for clarification pursuant to Article 104(5) of its Rules of Procedure. The referring tribunal was requested to explain the effect of the legislative amendment on the wording of the questions referred for a preliminary ruling.

20 In its response of 30 October 2009 to the request for clarification, the referring tribunal reformulated the questions asked in each of the cases.

21 In Case C-436/08, it explains, first of all, that under the KStG the exemption of dividends from holdings of less than 10% of the share capital of a company – that is to say, portfolio dividends – that are received from a company established in a non-member State party to the EEA Agreement is subject to the existence between the Republic of Austria and the non-member State concerned of comprehensive procedures for mutual assistance with regard to administrative matters and enforcement. Such a condition is stated not to be imposed for international holdings within the meaning of Paragraph 10(2) of the KStG.

22 The referring tribunal then states that the tax exemption of portfolio dividends received from non-resident companies established in Member States other than Austria or in a non-member State party to the EEA Agreement does not apply, in any event, in the great majority of cases because of the information which the taxpayer is required to provide to the tax authorities in order to qualify for that fiscal advantage. The taxpayer has the task of proving that the conditions laid down in Paragraph 10(5) of the KStG are not met. Thus, the taxpayer must compare taxes (Paragraph 10(5)(1) of the KStG), ascertain the applicable tax rate (Paragraph 10(5)(2) of the KStG) and the personal and subject-based exemptions of the non-resident corporation (Paragraph 10(5)(3) of the KStG), obtain the corresponding documentation and keep it available for any check by the tax authorities. In particular, the referring tribunal adds, in the case of holdings in investment funds it is virtually impossible to prove that the conditions laid down in Paragraph 10(5) of the KStG are not met.

23 The view expressed by the Verwaltungsgerichtshof in its decisions of 17 April 2008 that the exemption and imputation methods are always to be considered equivalent is not shared by the referring tribunal.

24 Finally, the referring tribunal observes that in Paragraph 10 of the KStG the legislature has not provided for a tax advantage for dividends from holdings of less than 10% of the capital of corporations established in non-member States, the threshold below which this advantage is not granted having previously been set at 25%. If this legislation were to infringe European Union law, the referring tribunal should normally apply the imputation method, in accordance with the Verwaltungsgerichtshof's decision of 17 April 2008.

25 In those circumstances, the Unabhängiger Finanzsenat, Außenstelle Linz (Independent Finance Tribunal, Linz District), decided to stay proceedings and to refer the following questions, as reformulated, to the Court for a preliminary ruling in Case C-436/08:

'1. Is [European Union] law infringed if foreign portfolio holdings from [States party to the EEA Agreement] are tax free only where procedures for mutual assistance with regard to administrative matters and enforcement exist, although exemption from tax in the case of international holdings (even for non-member-state dividends and even in the case of switchover to the imputation method) is not bound to these conditions?

2. Is [European Union] law infringed if for foreign portfolio dividends from [States of the European Union or States party to the EEA Agreement] the imputation method is to be applied in so far as the requirements for the exemption method are not met, although both the proof of the requirements for the exemption method (comparable taxation, amount of the foreign tax rate, absence of personal or subject-based exemptions of the foreign corporation) and the data

necessary for the crediting of foreign corporation tax cannot be provided by the shareholder, or can be provided only with great difficulty?

3. Is [European Union] law infringed if in the case of earnings from non-member-state holdings the law neither contains an exemption from corporation tax nor makes provision for crediting of corporation tax paid, in so far as the size of the holding is under 10% (25%), whereas earnings from domestic holdings are exempt from tax irrespective of the size of the holding?

4. (a) If Question 3 is answered in the affirmative: Is [European Union] law infringed if, in order to remove discrimination against non-member-state holdings, a national authority applies the imputation method, whereby proof of the (corporation) tax already paid abroad can, on account of the small size of the holding, not be proved or be proved only with disproportionate effort, because according to a decision of the Verwaltungsgerichtshof that result comes closest to the (hypothetical) will of the legislature, whereas in the case of simply not applying the discriminatory 10% (25%) threshold for non-member-state dividends a tax exemption would arise?

(b) If Question 4(a) is answered in the affirmative: Is [European Union] law infringed if earnings from non-member-state holdings are refused exemption in so far as the size of the holding is under 10% (25%) although the exemption of earnings in the case of holdings above 10% (25%) is not linked to the presence of comprehensive procedures for mutual assistance with regard to administrative matters and enforcement?

(c) If Question 4(a) is answered in the negative: Is [European Union] law infringed if earnings from non-member-state holdings are refused credit for foreign corporation tax in so far as the size of the holding is under 10% (25%) although crediting of tax – prescribed in particular cases – in the case of earnings from non-member-state holdings in the event of a holding above 10% (25%) is not linked to the presence of comprehensive procedures for mutual assistance with regard to administrative matters and enforcement?'

26 In Case C-437/08, the referring tribunal observes that the Verwaltungsgerichtshof's decision of 17 April 2008 leaves open the question whether the tax to be credited encompasses not only the corporation tax paid in the State in which the company making the distribution is resident but also the tax which that State has withheld at source in accordance with the relevant bilateral double taxation convention.

27 In addition, with regard to a tax year in which the resident company in receipt of the dividends has made an operating loss, the question arises whether, in order to prevent discrimination linked to the different treatment of dividends from non-resident companies compared with those from resident companies, the tax authorities should carry forward the credit for tax paid abroad to subsequent tax years.

28 In those circumstances, the Unabhängiger Finanzsenat, Außenstelle Linz, decided to stay proceedings and to refer the following questions, as reformulated, to the Court for a preliminary ruling in Case C-437/08:

'1. Is [European Union] law infringed if for foreign dividends in cases of change of method the imputation method is to be applied, but in relation to the corporation tax or withholding tax to be

credited a carrying-forward of credit to subsequent years or a credit entry in a loss year is not simultaneously allowed?

‘2. Is [European Union] law infringed if the imputation method is to be used for non-member-state dividends because that result, according to a decision of the Verwaltungsgerichtshof, comes closest to the (hypothetical) will of the legislature, but a carrying-forward of credit or a credit entry in a loss year is not simultaneously allowed?’

29 By order of the President of the Court of Justice of 16 January 2009, Cases C-436/08 and C-437/08 were joined for the purposes of the written and oral procedures and the judgment.

30 Also, in the light of the reformulation of the questions referred, in the referring tribunal’s response of 30 October 2009 to the request for clarification that had been sent to it, the Court decided on 18 November 2009 to reopen the written procedure in the present cases.

III – Consideration of the questions referred

A – The freedom at issue in the main proceedings

31 The questions asked in each of the cases do not specify any particular provision of the FEU Treaty that requires interpretation in order to enable the referring tribunal to give judgment in the main proceedings. The questions just refer generally to European Union law.

32 According to settled case-law, it is for the Court alone, where questions are formulated imprecisely, to extract from all the information provided by the national court or tribunal and from the documents in the main proceedings the points of European Union law which require interpretation, having regard to the subject-matter of those proceedings (Case C-107/98 *Teckal* [1999] ECR I-8121, paragraph 34, and Case C-57/01 *Makedoniko Metro and Michaniki* [2003] ECR I-1091, paragraph 56).

33 In this connection, it is to be noted that the tax treatment of dividends may fall within Article 49 TFEU on freedom of establishment and Article 63 TFEU on the free movement of capital (see, to this effect, Case C-446/04 *Test Claimants in the FII Group Litigation* [2006] ECR I-11753, paragraph 36).

34 As regards the question whether national legislation falls within the scope of one or other of the freedoms of movement, it is clear from what is now well established case-law that the purpose of the legislation concerned must be taken into consideration (see, to this effect, Case C-196/04 *Cadbury Schweppes and Cadbury Schweppes Overseas* [2006] ECR I-7995, paragraphs 31 to 33; Case C-452/04 *Fidium Finanz* [2006] ECR I-9521, paragraphs 34 and 44 to 49; Case C-374/04 *Test Claimants in Class IV of the ACT Group Litigation* [2006] ECR I-11673, paragraphs 37 and 38; *Test Claimants in the FII Group Litigation*, paragraph 36; and Case C-524/04 *Test Claimants in the Thin Cap Group Litigation* [2007] ECR I-2107, paragraphs 26 to 34).

35 It has already been held that national legislation intended to apply only to those shareholdings which enable the holder to exert a definite influence on a company’s decisions and to determine its activities falls within the provisions of the Treaty on freedom of establishment (see *Test Claimants in the FII Group Litigation*, paragraph 37, and Case C-81/09 *Idrima Tipou* [2010] ECR I-0000, paragraph 47). On the other hand, national provisions which apply to shareholdings acquired solely with the intention of making a financial investment without any intention to influence the management and control of the

undertaking must be examined exclusively in light of the free movement of capital (see, to this effect, *Test Claimants in the FII Group Litigation*, paragraph 38, and Case C-182/08 *Glaxo Wellcome* [2009] ECR I-8591, paragraphs 40 and 45 to 52).

36 In the present instance, first, both disputes in the main proceedings concern the taxation in Austria of dividends received by resident companies from holdings that they have in non-resident companies amounting to less than 10% of the latter's capital. Holdings of such a size do not confer the ability to exert a definite influence on the decisions of the companies concerned and to determine their activities.

37 Second, the national tax legislation at issue in the main proceedings draws a distinction according to whether or not dividends are nationally-sourced when they derive from holdings of less than 10% of the capital of the company making the distribution. Portfolio dividends are always exempt from corporation tax when the holdings concerned are in resident companies, pursuant to Paragraph 10(1)(1) of the KStG. By contrast, portfolio dividends benefit neither from exemption nor from a credit for the tax paid on the profits underlying the distributed dividends when the holdings concerned are in companies established in a non-member State party to the EEA Agreement with which procedures for mutual assistance with regard to administrative matters and enforcement do not exist, in accordance with Paragraph 10(1)(6) of the KStG, or in companies established in another non-member State. Portfolio dividends from other Member States or from States party to the EEA Agreement with which comprehensive procedures for mutual assistance with regard to administrative matters and enforcement do exist are subject to the imputation method and not to the exemption method when, essentially, the profits of the company making the distribution have not in fact been subject, in the State in which it is resident, to a corporation tax comparable to that applying in Austria, in accordance with Paragraph 10(5) of the KStG.

38 Accordingly, legislation such as that at issue in the main proceedings falls solely within the provisions of the Treaty on the free movement of capital.

B – The questions in Case C-436/08

1. Question 1

39 By this question, the referring tribunal seeks in essence to ascertain whether Article 63 TFEU precludes national legislation under which portfolio dividends received from companies established in States party to the EEA Agreement are exempt from tax only if a comprehensive agreement for mutual assistance with regard to administrative matters and enforcement exists, when no similar condition is imposed for 'international holdings'.

(a) Admissibility

40 The Austrian Government submits that the question is inadmissible. It states that, according to the account of the facts in the order for reference, the applicant in the main proceedings has holdings in investment funds the assets of which did not comprise shares in companies having their seat in a non-member State party to the EEA Agreement. The question therefore bears no relation to the subject-matter of the main proceedings.

41 In that regard, it should be recalled that, in proceedings under Article 267 TFEU, which are based on a clear separation of functions between the national courts and tribunals and the Court of Justice, any assessment of the facts in the case is a matter for the national court or tribunal. Similarly, it is solely for

the national court or tribunal, before which the dispute has been brought and which must assume responsibility for the forthcoming judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted concern the interpretation of European Union law, the Court is in principle bound to give a ruling (see, inter alia, Joined Cases C-261/08 and C-348/08 *Zurita García and Choque Cabrera* [2009] ECR I-10143, paragraph 34 and the case-law cited).

42 The Court may refuse to rule on a question referred for a preliminary ruling by a national court or tribunal only where it is quite obvious that the interpretation of European Union 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, Case C-379/98 *PreussenElektra* [2001] ECR I-2099, paragraph 39; Case C-390/99 *Canal Satélite Digital* [2002] ECR I-607, paragraph 19; and *Zurita García and Choque Cabrera*, paragraph 35).

43 In the order for reference, it is explained that in the relevant tax year the applicant in the main proceedings received portfolio dividends from capital companies having their seat in Member States other than the Republic of Austria and in third States. The view can be taken that, when the referring tribunal made reference to holdings in companies established in 'third States' ('Drittstaaten'), it used that term in contrast to the term 'Member States'. In those circumstances, the reference to third States is to be considered also to include the States party to the EEA Agreement.

44 Since, first, the referring tribunal has doubts as to the compatibility of the national legislation applicable to portfolio dividends from holdings in companies established in States party to the EEA Agreement and, second, the order for reference contains no indication that the applicant in the main proceedings does not have holdings in such companies, it is not obvious that the interpretation of European Union law sought is irrelevant having regard to the decision which the referring tribunal is called upon to give.

45 Consequently, the first question must be declared admissible.

(b) Substance

(i) Introductory remarks

46 Article 63(1) TFEU gives effect to the liberalisation of capital between Member States and between Member States and non-member States. To that end, it provides, in the chapter of the FEU Treaty entitled 'Capital and payments', that all restrictions on the movement of capital between Member States and between Member States and non-member States are to be prohibited.

47 By its question, the referring tribunal raises the interpretation of Article 63 TFEU for the purpose of determining the compatibility with that provision of the legislation at issue in the main proceedings, which accords to dividends from 'international holdings', that is to say, holdings of at least 10% of the capital of non-resident companies, a more favourable tax treatment than that of portfolio dividends received from companies established in non-member States party to the EEA Agreement.

48 However, as the Austrian, German and Netherlands Governments and the European Commission point out, in an instance such as that in the main proceedings, a comparison should be made between, on the

one hand, the tax treatment of portfolio dividends received from resident companies and, on the other, that of portfolio dividends received from companies established in non-member States party to the EEA Agreement. Article 63 TFEU precludes, in principle, the different treatment, in a Member State, of dividends from companies established in a non-member State compared to dividends from companies with their seat in that Member State (see the order in Joined Cases C-439/07 and C-499/07 *KBC-Bank and Beleggen, Risicokapitaal, Beheer* [2009] ECR I-4409, paragraph 71). On the other hand, the different treatment of income from one non-member State compared to income from another non-member State is not concerned, as such, by that provision.

49 In the context of the present question, it should therefore be examined whether Article 63 TFEU must be interpreted as precluding national legislation which provides that portfolio dividends from holdings in resident companies are always exempt from corporation tax, pursuant to Paragraph 10(1)(1) of the KStG, whereas, by virtue of Paragraph 10(1)(6) of the KStG, portfolio dividends from a company established in a non-member State party to the EEA Agreement enjoy that exemption only if the Republic of Austria and the non-member State concerned have concluded a comprehensive agreement for mutual assistance with regard to administrative matters and enforcement.

(ii) Existence of a restriction on the movement of capital

50 It follows from settled case-law that the measures prohibited by Article 63(1) TFEU, 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 (Case C-370/05 *Festersen* [2007] ECR I-1129, paragraph 24, and Case C-101/05 *A* [2007] ECR I-11531, paragraph 40).

51 As regards whether national legislation such as that at issue in the main proceedings constitutes a restriction on the movement of capital, in order to qualify for the exemption from corporation tax, resident companies receiving portfolio dividends from a company established in a non-member State party to the EEA Agreement are, unlike resident companies receiving portfolio dividends from resident companies, subject to an additional condition, namely the condition concerning the existence of a comprehensive agreement for mutual assistance with regard to administrative matters and enforcement between the Republic of Austria and the non-member State concerned. Given that only the States concerned can decide whether to bind themselves by means of conventions, the condition concerning the existence of a comprehensive agreement for mutual assistance with regard to administrative matters and enforcement may, de facto, entail a permanent regime of non-exemption from corporation tax for portfolio dividends from a company established in a non-member State party to the EEA Agreement (see, by analogy, Case C-72/09 *Établissements Rimbaud* [2010] ECR I-0000, paragraph 25).

52 It follows that, by reason of the conditions laid down by the legislation at issue in the main proceedings in order for portfolio dividends from companies established in non-member States party to the EEA Agreement that are received by companies established in Austria to qualify for exemption from corporation tax in Austria, investment in the former companies which might be made by the latter is less attractive than investment which might be made in a company established in Austria or another Member State. Such a difference in treatment is liable to discourage companies established in Austria from acquiring shares in companies established in non-member States party to the EEA Agreement.

53 Accordingly, that legislation constitutes a restriction on the free movement of capital between a Member State and certain non-member States, in principle prohibited by Article 63 TFEU.

54 It must, however, be examined whether that restriction on the free movement of capital can be justified in light of the provisions of the Treaty on the free movement of capital.

(iii) Possible justifications for the measure

55 Under Article 65(1)(a) TFEU, 'the provisions of Article 63 [TFEU] shall be without prejudice to the rights of Member States … to apply the relevant provisions of their tax law which distinguish between taxpayers who are not in the same situation with regard to their place of residence or with regard to the place where their capital is invested'.

56 In so far as Article 65(1)(a) TFEU is a derogation from the fundamental principle of the free movement of capital, it must be interpreted strictly. It cannot therefore be interpreted as meaning that all tax legislation which draws a distinction between taxpayers on the basis of their place of residence or the State in which they invest their capital is automatically compatible with the Treaty (see Case C-11/07 *Eckelkamp and Others* [2008] ECR I-6845, paragraph 57, and Case C-510/08 *Mattner* [2010] ECR I-0000, paragraph 32).

57 The derogation in that provision is itself limited by Article 65(3) TFEU, which provides that the national provisions referred to in Article 65(1) 'shall not constitute a means of arbitrary discrimination or a disguised restriction on the free movement of capital and payments as defined in Article 63'.

58 The differences in treatment authorised by Article 65(1)(a) TFEU must thus be distinguished from discrimination prohibited by Article 65(3). The case-law shows that, for national tax legislation such as that at issue in the main proceedings to be capable of being regarded as compatible with the provisions of the Treaty on the free movement of capital, the difference in treatment which it prescribes, between portfolio dividends from resident companies and those from companies established in a non-member State party to the EEA Agreement, must concern situations which are not objectively comparable or be justified by an overriding reason in the public interest (see Case C-35/98 *Verkooijen* [2000] ECR I-4071, paragraph 43; Case C-319/02 *Manninen* [2004] ECR I-7477, paragraph 29; Case C-512/03 *Blanckaert* [2005] ECR I-7685, paragraph 42; and Case C-540/07 *Commission* v *Italy* [2009] ECR I-10983, paragraph 49).

59 In the context of a tax rule, such as that at issue in the main proceedings, which seeks to prevent the economic double taxation of distributed profits, the situation of a corporate shareholder receiving foreign-sourced dividends is comparable to that of a corporate shareholder receiving nationally-sourced dividends in so far as, in each case, the profits made are, in principle, liable to be subject to a series of charges to tax (see *Test Claimants in the FII Group Litigation*, paragraph 62).

60 In those circumstances, Article 63 TFEU requires a Member State which has a system for preventing economic double taxation as regards dividends paid to resident companies by other resident companies to accord equivalent treatment to dividends paid to resident companies by companies established in non-member States party to the EEA Agreement (see, to this effect, *Test Claimants in the FII Group Litigation*, paragraph 72).

61 However, the national legislation at issue in the main proceedings does not provide for such equivalent treatment. Whilst that legislation systematically prevents the economic double taxation of nationally-sourced portfolio dividends received by a resident company, it neither eliminates nor mitigates such double taxation when a resident company receives portfolio dividends from a company established in a

non-member State party to the EEA Agreement with which the Republic of Austria has not concluded a comprehensive agreement for mutual assistance with regard to administrative matters and enforcement. In the latter situation, the national legislation provides neither for tax exemption of the dividends received nor for the tax paid in the non-member State concerned to be credited against the profits thereby distributed, although the need to prevent economic double taxation is the same in the case of the resident companies whether they receive dividends from resident companies or from companies established in a non-member State party to the EEA Agreement.

62 It follows that the difference in treatment, in respect of corporation tax, between nationally-sourced dividends and dividends from a company established in a non-member State party to the EEA Agreement cannot be justified by a difference in situation connected with the place where the capital has been invested.

63 It must also be examined whether the restriction resulting from national legislation such as that at issue in the main proceedings is justified by overriding reasons in the public interest (see Case C-451/05 *ELISA* [2007] ECR I-8251, paragraph 79).

64 The Austrian, German, Italian, Netherlands and United Kingdom Governments explain for this purpose that, in the absence of a framework for cooperation between the competent authorities concerned, such as that resulting from Council Directive 77/799/EEC of 19 December 1977 concerning mutual assistance by the competent authorities of the Member States in the field of direct and indirect taxation (OJ 1977 L 336, p. 15), as amended by Council Directive 92/12/EEC of 25 February 1992 (OJ 1992 L 76, p. 1) ('Directive 77/799'), a Member State is entitled to make exemption of portfolio dividends received from companies established in a non-member State party to the EEA Agreement conditional upon the existence of an agreement for mutual assistance with the non-member State concerned. They state that establishment of the tax paid by the company distributing dividends requires an exchange of information with the tax authorities of the State in which that company is established.

65 It should be borne in mind that the case-law concerning restrictions on the exercise of the freedoms of movement within the European Union cannot be transposed in its entirety to movements of capital between Member States and non-member States, since such movements take place in a different legal context (see *A*, paragraph 60, and *Commission* v *Italy*, paragraph 69).

66 In that regard, it should be observed that the framework established by Directive 77/799 for cooperation between the competent authorities of the Member States does not exist between those authorities and the competent authorities of a non-member State where that State has not entered into any undertaking of mutual assistance (*Commission* v *Italy*, paragraph 70, and *Établissements Rimbaud*, paragraph 41).

67 It follows that, where the legislation of a Member State makes the grant of a tax advantage dependent on satisfying conditions compliance with which can be verified only by obtaining information from the competent authorities of a non-member State party to the EEA Agreement, it is in principle legitimate for the Member State to refuse to grant that advantage if - in particular, because that non-member State is not bound under an agreement to provide information - it proves impossible to obtain the requisite information from it (*Établissements Rimbaud*, paragraph 44).

68 It is apparent from the legislation at issue in the main proceedings that Paragraph 10(5) of the KStG precludes the exemption of portfolio dividends from companies established in non-member States party

to the EEA Agreement when, essentially, the profits of the company making the distribution have not in fact been subject, in the non-member State concerned, to a corporation tax comparable to that applying in Austria. The view can thus be taken that the conditions for application of the tax exemption cannot be checked by the Member State concerned if the non-member State is not bound under an agreement to provide certain information to the tax authorities of that Member State.

69 It follows that legislation of a Member State, such as that at issue in the main proceedings, under which dividends received from companies established in a non-member State party to the EEA Agreement are exempt only if an agreement for mutual assistance exists with the non-member State concerned is capable of being justified by overriding reasons in the public interest that are connected with the effectiveness of fiscal supervision and combating tax evasion.

70 However, even if the restriction on a freedom of movement is appropriate to the objective pursued, it cannot go beyond what is necessary to attain that objective (see *ELISA*, paragraph 82 and the case-law cited). It must therefore be examined whether the restriction resulting from legislation such as that at issue in the main proceedings complies with the principle of proportionality.

71 In that regard, first, in light of the foregoing considerations it is in principle permissible for a Member State to make exemption of dividends from companies established in a non-member State party to the EEA Agreement conditional upon the existence of an agreement for mutual assistance concluded with that State. Thus, the proportionality of such legislation is not called into question simply because a Member State does not impose such a requirement for the exemption of dividends from holdings of 10% or more of the capital of the company making the distribution.

72 Second, under the legislation at issue in the main proceedings, portfolio dividends from companies established in a non-member State party to the EEA Agreement are exempt only if an agreement for mutual assistance exists with that State not only at the administrative level, but also with regard to enforcement.

73 However, only the existence of an agreement for mutual assistance with regard to administrative matters can be regarded as necessary for the purpose of enabling the Member State concerned to establish the actual level of taxation of the non-resident company distributing dividends. The national rule at issue concerns the taxation in Austria, by way of corporation tax, of income that resident companies receive in Austria. The recovery of such taxes by the Austrian authorities cannot require the assistance of a non-member State’s authorities.

74 The argument put forward by the Austrian Government at the hearing that enforcement assistance is necessary if the taxpayer moves away must be rejected. As the Advocate General observes in point 90 of her Opinion, moving away is too remote a possibility to be capable of justifying making the prevention of economic double taxation of portfolio dividends from a non-member State party to the EEA Agreement consistently dependent on an agreement for enforcement assistance.

75 The answer to the first question referred therefore is that Article 63 TFEU must be interpreted as precluding legislation of a Member State under which portfolio dividends from holdings in resident companies are exempt from corporation tax and portfolio dividends from companies established in non-member States party to the EEA Agreement are so exempt only if a comprehensive agreement for mutual assistance with regard to administrative matters and enforcement exists between the Member State and non-member State concerned, since only the existence of an agreement for mutual assistance

with regard to administrative matters proves necessary for the purpose of attaining the objectives of the legislation in question.

2. Question 2

(a) Introductory remarks

76 The referring tribunal points out that, under Paragraph 10 of the KStG, where a comprehensive agreement for mutual assistance exists portfolio dividends from resident companies, from companies established in other Member States and from companies established in non-member States party to the EEA Agreement enjoy a tax exemption. However, according to the referring tribunal, the tax exemption of dividends received from non-resident companies does not apply in the great majority of cases because of the information which the company receiving them is required to provide to the tax authorities in order to qualify for that advantage, and the imputation method is therefore generally applicable in the case of dividends from non-resident companies. The referring tribunal states that taxpayers find it difficult to furnish the proof relating to the foreign tax creditable.

77 By its second question, the referring tribunal thus asks, in essence, whether Article 63 TFEU precludes national legislation, such as that at issue in the main proceedings, which applies the imputation method to portfolio dividends distributed by companies established in other Member States and in non-member States party to the EEA Agreement when it is not established that the conditions for applying the tax exemption are met, whilst both the proof of the conditions for the exemption method - that is to say comparable taxation, the amount of the foreign tax rate and the absence of personal or subject-based exemptions of the foreign corporation - and the data necessary for the crediting of foreign corporation tax cannot be provided by the shareholder, or can be provided only with great difficulty.

78 The answer which the Court will be led to give must enable the referring tribunal to determine the compatibility with Article 63 TFEU of (i) the ‘switchover’ from the exemption method to the imputation method which is provided for by the national legislation at issue in the main proceedings when the recipient of dividends from non-resident companies does not have certain evidence and (ii) the application of an imputation method that would impose considerable, or even excessive, administrative burdens on the recipient.

(b) Existence of a restriction on the movement of capital

79 Under Paragraph 10(1)(1) of the KStG, portfolio dividends received from companies resident in Austria are exempt from corporation tax. Under Paragraphs 10(1)(5) and (6) and 10(5) of the KStG, economic double taxation of dividends received from companies established in Member States other than the Republic of Austria or in non-member States party to the EEA Agreement is avoided, pursuant to the tax exemption or the imputation method, only where the recipient of the dividends has evidence relating to the level of the tax to which the companies distributing such dividends are subject in the State in which they are resident.

80 The difference in treatment to which portfolio dividends are subject has the effect of discouraging companies resident in Austria from investing capital in companies established in other Member States and in non-member States party to the EEA Agreement. Since, in Austria, dividends received from companies established in other Member States and in non-member States party to the EEA Agreement receive less favourable tax treatment than dividends received from a company established in Austria,

the shares of the former companies are less attractive to investors resident in Austria than shares in companies established in Austria.

81 Legislation such as that at issue in the main proceedings therefore entails a restriction on the movement of capital between Member States and between Member States and non-member States which, in principle, is prohibited by Article 63(1) TFEU.

82 It must, however, be examined whether that restriction on the free movement of capital can be justified in light of the provisions of the Treaty on the free movement of capital.

(c) Possible justifications for the measure

83 It is clear from the case-law cited in paragraph 58 of the present judgment that, for national tax legislation such as that at issue in the main proceedings to be capable of being regarded as compatible with the provisions of the Treaty on the free movement of capital, the difference in treatment must concern situations which are not objectively comparable or be justified by an overriding reason in the public interest.

84 It should be remembered, first of all, that in the context of a tax rule, such as that at issue in the main proceedings, which seeks to prevent the economic double taxation of distributed profits, the situation of a corporate shareholder receiving foreign-sourced dividends is comparable to that of a corporate shareholder receiving nationally-sourced dividends in so far as, in each case, the profits made are, in principle, liable to be subject to a series of charges to tax (see *Test Claimants in the FII Group Litigation*, paragraph 62).

85 In those circumstances, Article 63 TFEU requires a Member State which has a system for preventing economic double taxation as regards dividends paid to residents by resident companies to accord equivalent treatment to dividends paid to residents by non-resident companies (see, to this effect, *Test Claimants in the FII Group Litigation*, paragraph 72).

86 It has been held that European Union law does not prohibit a Member State from preventing the imposition of a series of charges to tax on dividends received by a resident company by applying rules which exempt those dividends from tax when they are paid by a resident company, while preventing those dividends from being liable to a series of charges to tax through an imputation method when they are paid by a non-resident company, provided, however, that the tax rate applied to foreign-sourced dividends is not higher than the rate applied to nationally-sourced dividends and that the tax credit is at least equal to the amount paid in the State of the company making the distribution, up to the limit of the tax charged in the Member State of the company receiving the dividends (see *Test Claimants in the FII Group Litigation*, paragraphs 48 and 57, and the order in Case C-201/05 *Test Claimants in the CFC and Dividend Group Litigation* [2008] ECR I-2875, paragraph 39).

87 Thus, when the profits underlying foreign-sourced dividends are subject in the State of the company making the distribution to a lower level of tax than the tax levied in the Member State of the recipient company, that Member State must grant an overall tax credit corresponding to the tax paid by the company making the distribution in the State in which it is resident (*Test Claimants in the FII Group Litigation*, paragraph 51).

88 Where, conversely, those profits are subject in the State of the company making the distribution to a higher level of tax than the tax levied by the Member State of the company receiving them, that

Member State is obliged to grant a tax credit only up to the limit of the amount of corporation tax for which the company receiving the dividends is liable. It is not required to repay the difference, that is to say, the amount paid in the State of the company making the distribution which is greater than the amount of tax payable in the Member State of the company receiving it (see *Test Claimants in the FII Group Litigation*, paragraph 52).

89 In those circumstances the imputation method enables dividends from non-resident companies to be accorded treatment equivalent to that accorded, by the exemption method, to dividends paid by resident companies. Application of the imputation method to dividends from non-resident companies makes it possible to ensure that foreign-sourced and nationally-sourced portfolio dividends bear the same tax burden, in particular where the State from which the dividends come applies, in the context of corporation tax, a lower tax rate than that applicable in the Member State where the company receiving the dividends is established. In such a case, exempting dividends from non-resident companies would give taxpayers that have invested in foreign holdings an advantage compared with those having invested in domestic holdings.

90 In light of the equivalence between the exemption and imputation methods, the difficulties that the taxpayer might encounter in order to prove that the conditions for the tax exemption of dividends received from non-resident companies are met are, in principle, irrelevant when determining whether Article 63 TFEU precludes legislation such as that at issue in the main proceedings. The only consequence that those difficulties, or even impossibility for the taxpayer to furnish the proof sought, will have is that the imputation method, which is equivalent to the exemption method, will be applied to the dividends which the taxpayer receives from non-resident companies.

91 As to the administrative burden imposed on the taxpayer in order to qualify for the imputation method, it has already been held that the mere fact that, compared with an exemption system, an imputation system imposes additional administrative burdens on taxpayers cannot be regarded as a difference in treatment which is contrary to the free movement of capital (see, to this effect, *Test Claimants in the FII Group Litigation*, paragraph 53).

92 According to the referring tribunal, the administrative burden thereby imposed on a company receiving portfolio dividends by the national legislation at issue in the main proceedings could, however, prove excessive.

93 Haribo explains in this regard that, unlike portfolio dividends paid by resident companies, which are exempt, portfolio dividends paid in Austria by companies established in another Member State or in a non-member State party to the EEA Agreement and received through an investment fund are normally subject, in Austria, to corporation tax of 25% because of the excessive administrative burden imposed on the taxpayer. According to Haribo, the exemption and imputation methods are equivalent only in cases where proof of the corporation tax paid abroad can in fact be adduced or can be without disproportionate effort.

94 On the other hand, the Austrian, German, Italian, Netherlands and United Kingdom Governments and the Commission contend that the administrative burden imposed on the company receiving portfolio dividends is not excessive. The Austrian Government stresses in this regard that the notice of 13 June 2008 simplified significantly the evidence necessary in order to receive a credit for the foreign tax.

95 It must be borne in mind that the tax authorities of a Member State are entitled to require the taxpayer

to provide such proof as they may consider necessary in order to determine whether the conditions for a tax advantage provided for in the legislation at issue have been met and, consequently, whether to grant that advantage (see, to this effect, Case C-136/00 *Danner* [2002] ECR I-8147, paragraph 50; Case C-422/01 *Skandia and Ramstedt* [2003] ECR I-6817, paragraph 43; and Case C-318/07 *Persche* [2009] ECR I-359, paragraph 54).

96 Admittedly, if it were to prove that, because of an excessive administrative burden, it is in fact impossible for companies receiving portfolio dividends from companies established in Member States other than the Republic of Austria and in non-member States party to the EEA Agreement to benefit from the imputation method, the legislation would not enable the economic double taxation of such dividends to be prevented, or even to be mitigated. In circumstances of that kind, the imputation method and the exemption method, which does enable the imposition of a series of charges to tax on the dividends distributed to be avoided, cannot be considered to lead to equivalent results.

97 However, inasmuch as a Member State is, in principle, free, to avoid the imposition of a series of charges to tax on portfolio dividends received by a resident company by opting for the exemption method when the dividends are paid by a resident company and for the imputation method when they are paid by a non-resident company established in another Member State or in a non-member State party to the EEA Agreement, additional administrative burdens which are imposed on the resident company, in particular the fact that the national tax authority demands information relating to the tax that has actually been charged on the profits of the company distributing dividends in the State in which the latter is resident, are an intrinsic part of the very operation of the imputation method and cannot be regarded as excessive (see, to this effect, *Test Claimants in the FII Group Litigation*, paragraphs 48 and 53). In the absence of such information, the tax authorities of the Member State where the company receiving foreign-sourced dividends is established are not, in principle, in a position to determine the amount of corporation tax paid in the State of the company making the distribution that must be credited against the amount of tax payable by the recipient company.

98 Whilst the company receiving dividends does not itself have all the information relating to the corporation tax that has been charged on the dividends distributed by a company established in another Member State or in a non-member State party to the EEA Agreement, such information is known, in any event, to the latter company. Accordingly, any difficulty that the recipient company may have in providing the information required relating to the tax paid by the company distributing dividends is connected not to the inherent complexity of the information but to a possible lack of cooperation on the part of the company that has the information. As the Advocate General states in point 58 of her Opinion, the inadequate flow of information to the investor is not a problem for which the Member State concerned should have to answer.

99 Furthermore, as the Austrian Government observes, the notice of 13 June 2008 has simplified the evidence necessary in order to receive a credit for the foreign tax in that, when calculating the tax paid abroad, account is taken of the following formula. The profit of the company distributing dividends must be multiplied by the nominal rate of corporation tax applicable in the State where that company is established and by the holding of the recipient company in the capital of the company distributing dividends. Such a calculation requires only limited cooperation on the part of the company distributing dividends or of the investment fund when the holding concerned is possessed through such a fund.

100 Finally, as the Austrian, German, Netherlands and United Kingdom Governments and the Commission point out, the fact that, for dividends distributed by companies established in Member States other than

the Republic of Austria, the latter's tax authorities can have recourse to the mechanism of mutual assistance under Directive 77/799 does not mean that they would be required to spare the company receiving dividends the necessity of providing them with proof of the tax paid in another Member State by the company making the distribution.

101 Since Directive 77/799 provides for the possibility for national tax authorities to request information which they cannot obtain themselves, the Court has stated that the use, in Article 2(1) of Directive 77/799, of the word 'may' indicates that, whilst those authorities have the possibility of requesting information from the competent authority of another Member State, such a request does not in any way constitute an obligation. It is for each Member State to assess the specific cases in which information concerning transactions by taxable persons established in its territory is lacking and to decide whether those cases justify submitting a request for information to another Member State (Case C-184/05 *Twoh International* [2007] ECR I-7897, paragraph 32, and *Persche*, paragraph 65).

102 Consequently, Directive 77/799 does not require the Member State where the company receiving dividends is established to have recourse to the mechanism of mutual assistance for which the directive provides as soon as the information provided by that company is not sufficient to establish whether it fulfils the conditions laid down by the national legislation for application of the imputation method.

103 For the same reasons, the fact that there may be a convention for mutual assistance between the Republic of Austria and a non-member State party to the EEA Agreement giving that Member State the option to request information relevant for the purpose of applying the imputation method from the authorities of the non-member State concerned would not mean that the administrative burden imposed on the company receiving the dividends relating to proof of the tax paid in the non-member State in question is excessive.

104 In light of the foregoing, the answer to the second question referred therefore is that Article 63 TFEU must be interpreted as not precluding legislation of a Member State under which portfolio dividends which a resident company receives from another resident company are exempt from corporation tax whilst portfolio dividends which a resident company receives from a company established in another Member State or in a non-member State party to the EEA Agreement are subject to that tax, provided, however, that the tax paid in the State in which the last-mentioned company is resident is credited against the tax payable in the Member State of the recipient company and the administrative burdens imposed on the recipient company in order to qualify for such a credit are not excessive. Information demanded by the national tax authority from the company receiving dividends that relates to the tax that has actually been charged on the profits of the company distributing dividends in the State in which the latter is resident is an intrinsic part of the very operation of the imputation method and cannot be regarded as an excessive administrative burden.

3. Question 3

(a) Introductory remarks

105 By its third question, the referring tribunal asks whether Article 63 TFEU precludes national legislation, such as that at issue in the main proceedings, which, for dividends from holdings in companies established in non-member States, rules out both exemption from corporation tax and granting a credit for the corporation tax paid abroad if the company receiving the dividends holds under 10%, previously 25%, of the capital of the company distributing them, whereas dividends from holdings in resident companies are exempt irrespective of the size of the holding.

106 The threshold of 25% to which the referring tribunal makes reference in its question relates to Paragraph 10 of the KStG as worded before the legislative amendment in 2009. However, it is apparent from the case-file that Paragraph 10(1)(7), (2) and (4) of the KStG, which are applicable retroactively to the disputes in the main proceedings, provide that dividends from a holding in a company established in a non-member State are either exempt from corporation tax in Austria or benefit from a credit for the tax paid abroad when the holding in question amounts to at least 10% of the capital of that company.

107 As regards holdings below this threshold, the national legislation at issue in the main proceedings draws a distinction, for portfolio dividends from companies established in non-member States, between States party to the EEA Agreement and other non-member States. Whilst portfolio dividends from companies established in a non-member State party to the EEA Agreement with which the Republic of Austria has concluded a comprehensive agreement for mutual assistance with regard to administrative matters and enforcement are exempt from corporation tax or benefit from a credit for the tax paid in the relevant non-member State party to the EEA Agreement in which the company distributing dividends is established, the same is not true for portfolio dividends from companies established in other non-member States.

108 Since the tax treatment of dividends from companies established in States party to the EEA Agreement is covered by the first question submitted, the referring tribunal must be considered to be seeking to ascertain by its third question whether Article 63 TFEU precludes legislation, such as that at issue in the main proceedings, under which portfolio dividends from holdings in companies established in non-member States other than States party to the EEA Agreement are neither exempt nor subject to a regime providing for a credit for foreign tax paid, whereas dividends from similar holdings in resident companies are always exempt.

(b) Existence of a restriction on the movement of capital

109 National legislation such as that at issue in the main proceedings has the effect of discouraging companies established in Austria from investing their capital in companies established in non-member States other than States party to the EEA Agreement. Since dividends that the latter companies pay to companies established in Austria receive less favourable tax treatment than dividends distributed by a company established in Austria, the shares of companies established in non-member States are less attractive to investors resident in Austria than shares in companies established in Austria (see, to this effect, *Test Claimants in the FII Group Litigation*, paragraph 166, and *A*, paragraph 42).

110 Legislation such as that at issue in the main proceedings therefore entails a restriction on the movement of capital between Member States and the non-member States concerned which, in principle, is prohibited by Article 63(1) TFEU.

111 It must, however, be examined, whether that restriction on the free movement of capital can be justified in light of the provisions of the Treaty on the free movement of capital.

(c) Possible justifications for the measure

112 As has been recalled in paragraphs 58 and 83 of the present judgment, for national tax legislation such as that at issue in the main proceedings to be capable of being regarded as compatible with the provisions of the Treaty on the free movement of capital, the difference in treatment must concern situations which are not objectively comparable or be justified by an overriding reason in the public interest.

113 In the context of a tax rule, such as that at issue in the main proceedings, which seeks to prevent the economic double taxation of distributed profits, the situation of a corporate shareholder receiving dividends from non-member States is comparable to that of a corporate shareholder receiving nationally-sourced dividends in so far as, in each case, the profits made are, in principle, liable to be subject to a series of charges to tax (*Test Claimants in the FII Group Litigation*, paragraph 62).

114 In those circumstances, Article 63 TFEU requires a Member State which has a system for preventing economic double taxation as regards dividends paid to resident companies by other resident companies to accord equivalent treatment to dividends paid to resident companies by companies established in a non-member State other than a State party to the EEA Agreement (see, to this effect, *Test Claimants in the FII Group Litigation*, paragraph 72).

115 However, the national legislation at issue in the main proceedings does not provide for such equivalent treatment. Whilst that legislation systematically prevents the economic double taxation of nationally-sourced portfolio dividends received by a resident company, it neither eliminates nor mitigates such double taxation when a resident company receives portfolio dividends from a company established in a non-member State other than a State party to the EEA Agreement.

116 It follows that the difference in treatment, in respect of corporation tax, of dividends received by resident companies according to the dividends' source cannot be justified by a difference in situation connected with the place where the capital is invested.

117 It must also be examined whether the restriction resulting from legislation such as that at issue in the main proceedings is justified by overriding reasons in the public interest (see *ELISA*, paragraph 79).

118 According to the Austrian, German, Italian, Finnish and Netherlands Governments, while a restriction on the movement of capital from non-member States may be justified, the same does not apply when that restriction concerns capital movements between Member States (see *Test Claimants in the FII Group Litigation*, paragraph 171, and *A*, paragraph 37). Those governments take the view that the need to ensure a balanced allocation of the power to tax in relations between Member States and non-member States other than States party to the EEA Agreement can constitute an overriding reason in the public interest that relieves Member States of the need to give dividends sourced from such non-member States the same tax treatment as dividends from resident companies. They explain that, whilst the Member States are obliged to accord a company established in another Member State the same tax advantages as those that they accord to companies established in their territory, no such obligation exists between the Member States of the European Union and non-member States in respect of companies established in their respective territories. If Article 63 TFEU were to be considered to oblige a Member State to treat dividends from non-member States other than States party to the EEA Agreement in the same way as dividends paid by resident companies, the Member States' freedom of action for negotiating tax conventions and thereby ensuring themselves a balanced allocation of the power to tax in their relationships with the non-member States would in practice become non-existent.

119 It is to be recalled that the case-law concerning restrictions on the exercise of the freedoms of movement within the European Union cannot be transposed in its entirety to movements of capital between Member States and non-member States, since such movements take place in a different legal context (*Établissements Rimbaud*, paragraph 40 and the case-law cited).

120 Accordingly, it may be that a Member State will be able to demonstrate that a restriction on the

movement of capital to or from non-member States is justified for a particular reason in circumstances where that reason would not constitute a valid justification for a restriction on capital movements between Member States (*A*, paragraphs 36 and 37; order in *Test Claimants in the CFC and Dividend Group Litigation*, paragraph 93; and order in *KBC Bank and Beleggen, Risicokapitaal, Beheer*, paragraph 73).

121 It has already been recognised that a restriction on the exercise of a freedom of movement within the European Union can be justified in order to safeguard the allocation of the power to impose taxes between the Member States (see, to this effect, Case C-446/03 *Marks & Spencer* [2005] ECR I-10837, paragraph 45; Case C-231/05 *Oy AA* [2007] ECR I-6373, paragraph 51; and Case C-414/06 *LidlBelgium* [2008] ECR I-3601, paragraph 42). Such a justification, which constitutes an overriding reason in the public interest, can therefore, *a fortiori*, be recognised in the Member States' relations with non-member States.

122 However, in order for the difference in treatment between nationally-sourced dividends and dividends from a non-member State other than a State party to the EEA Agreement to be justified by an overriding reason in the public interest of this kind, the difference must be appropriate for attaining the objective invoked and must not go beyond what is necessary to attain it (see Case C-250/95 *Futura Participations and Singer* [1997] ECR I-2471, paragraph 26; Case C-9/02 *de Lasteyrie du Saillant* [2004] ECR I-2409, paragraph 49; and *Marks & Spencer*, paragraph 35).

123 Treatment of portfolio dividends received by a resident company in the same way whether they come from another resident company or from a company established in a non-member State other than a State party to the EEA Agreement would not result in income normally taxable in the Member State where the recipient company is resident being transferred to the non-member State concerned (see, to this effect, *Glaxo Wellcome*, paragraph 87). As the Advocate General states in point 120 of her Opinion, the main proceedings concern not the power to impose taxes in respect of economic activities carried on in national territory, but taxation of foreign income.

124 That being so, the difference in treatment between portfolio dividends according to whether they are nationally-sourced or foreign-sourced cannot be justified in light of the need to safeguard the allocation of the power to impose taxes between Member States and non-member States other than States party to the EEA Agreement.

125 It is true that exemption of portfolio dividends distributed by companies established in a non-member State other than a State party to the EEA Agreement, or granting a credit for the tax paid in that State, would result for the Republic of Austria in a reduction in its own revenue from corporation tax.

126 However, it has been consistently held that a reduction in tax revenue cannot be regarded as an overriding reason in the public interest which may be relied on to justify a measure which is, in principle, contrary to a fundamental freedom (see, inter alia, *Manninen*, paragraph 49, and Case C-386/04 *Centro di Musicologia Walter Stauffer* [2006] ECR I-8203, paragraph 59).

127 As regards the lack of reciprocity in relations between Member States and non-member States, it is to be remembered that, when the principle of free movement of capital was extended, pursuant to Article 56(1) EC, now Article 63(1) TFEU, to movement of capital between non-member States and the Member States, the latter chose to enshrine that principle in the same article and in the same terms for movements of capital taking place within the European Union and those relating to relations with

non-member States (*A*, paragraph 31).

128 That being so, a lack of reciprocity in relations between Member States and non-member States other than States party to the EEA Agreement cannot justify a restriction on the movement of capital between Member States and those non-member States.

129 The Austrian Government contends, next, that its tax regime is justified by the need to guarantee the effectiveness of fiscal supervision since the relevant double taxation conventions with non-member States do not guarantee the same level of exchange of information with the competent authorities of the States concerned as that provided for, by Directive 77/799, between the authorities of the Member States.

130 It is to be remembered that the framework established by Directive 77/799 for cooperation between the competent authorities of the Member States does not exist between those authorities and the competent authorities of a non-member State where that State has not entered into any undertaking of mutual assistance (see *Commission* v *Italy*, paragraph 70, and *Établissements Rimbaud*, paragraph 41).

131 It follows that, where legislation of a Member State makes the grant of a tax advantage dependent on satisfying conditions compliance with which can be verified only by obtaining information from the competent authorities of a non-member State other than a State party to the EEA Agreement, it is in principle legitimate for the Member State to refuse to grant that advantage if - in particular, because that non-member State is not bound under an agreement to provide information - it proves impossible to obtain the requisite information from it (see, by analogy, *Établissements Rimbaud*, paragraph 44).

132 However, the national legislation at issue in the main proceedings does not provide that any exemption of portfolio dividends received from a company established in a non-member State other than a State party to the EEA Agreement, or any credit for the tax paid in such a non-member State, is conditional upon the existence of an agreement for mutual assistance between the Member State and the relevant non-member State. Under Paragraph 10 of the KStG, portfolio dividends from non-member States other than States party to the EEA Agreement are always subject to corporation tax in Austria and the national legislation at issue does not provide for any tax advantage for such dividends in order to prevent their economic double taxation.

133 In those circumstances, the difference which exists, as regards cooperation between tax authorities, between the situation obtaining, on the one hand, between Member States within the European Union and, on the other hand, between Member States and non-member States cannot justify a different tax treatment of nationally-sourced portfolio dividends and portfolio dividends from non-member States other than States party to the EEA Agreement.

134 Finally, the Austrian Government states that, if the legislation at issue in the main proceedings were contrary to the free movement of capital, it should be ascertained whether the holdings in companies established in non-member States should be classified as direct investments for the purposes of Article 64(1) TFEU, since, in that case, the national rules may be considered to have already existed on 31 December 1993. Those rules may therefore in that case be considered justified by the ‘standstill’ clause in Article 64(1) TFEU.

135 Under Article 64(1) TFEU, the provisions of Article 63 TFEU are to be without prejudice to the application to non-member States of any restrictions which existed on 31 December 1993 under national or European Union law adopted in respect of the movement of capital to or from non-member

States involving direct investment.

136 It follows that where, before 31 December 1993, a Member State has adopted legislation which contains restrictions on capital movements to or from non-member States which are prohibited by Article 63 TFEU and, after that date, adopts measures which, while also constituting a restriction on such movements, are essentially identical to the previous legislation or do no more than restrict or abolish an obstacle to the exercise of the European Union rights and freedoms arising under that previous legislation, Article 63 TFEU does not preclude the application of those measures to non-member States when they apply to capital movements involving direct investment (*Test Claimants in the FII Group Litigation*, paragraph 196).

137 It has already been held that holdings in a company which are not acquired with a view to the establishment or maintenance of lasting and direct economic links between the shareholder and that company and do not allow the shareholder to participate effectively in the management of that company or in its control cannot be regarded as direct investments (*Test Claimants in the FII Group Litigation*, paragraph 196). Since the legislation under examination in the context of the present question concerns only holdings of less than 10% of the share capital of the company making the distribution, it must be held not to fall within the scope *ratione materiae* of Article 64(1) TFEU.

138 In light of all the foregoing considerations, the answer to the third question referred therefore is that Article 63 TFEU must be interpreted as precluding national legislation which, in order to prevent economic double taxation, exempts portfolio dividends received by a resident company and distributed by another resident company from corporation tax and which, for dividends distributed by a company established in a non-member State other than a State party to the EEA Agreement, provides neither for exemption of the dividends nor for a system under which a credit is granted for the tax that the company making the distribution pays in the State in which it is resident.

4. Question 4

139 By its fourth question, the referring tribunal seeks, in essence, to ascertain whether Article 63 TFEU precludes a national authority from applying the imputation method in the case of portfolio dividends from companies established in a non-member State party to the EEA Agreement with which the Republic of Austria has not concluded a comprehensive agreement with regard to administrative matters and enforcement or in another non-member State - despite the fact that that method results in an allegedly excessive administrative burden for the recipient of the dividends - on the ground that application of that method, according to a decision of the Verwaltungsgerichtshof, comes closest to the will of the legislature, when inapplicability of the 10% threshold for holdings would give rise to a tax exemption and therefore automatically prevent economic double taxation for portfolio dividends from companies established in the non-member States.

140 It should be recalled that the Verwaltungsgerichtshof held that, in order to remedy the less favourable tax treatment of dividends from non-resident companies compared with dividends from resident companies, it was appropriate to apply to that first category of dividends not the exemption method but the method consisting of crediting against the tax payable in Austria the tax charged on the dividends in the State of residence of the company that made the distribution.

141 As has been pointed out in paragraph 86 of the present judgment, European Union law does not prohibit a Member State from preventing the imposition of a series of charges to tax on dividends

received by a resident company by applying rules which exempt those dividends from tax when they are paid by a resident company, while preventing those dividends from being liable to a series of charges to tax through an imputation system when they are paid by a non-resident company, provided, however, that the tax rate applied to foreign-sourced dividends is not higher than the rate applied to nationally-sourced dividends and that the tax credit is at least equal to the amount paid in the State of the company making the distribution, up to the limit of the tax charged in the Member State of the company receiving the dividends.

142 Also, when introducing mechanisms designed to prevent or mitigate distributed profits being liable to a series of charges to tax, it is in principle for Member States to determine the category of taxpayers entitled to benefit from those mechanisms and, for that purpose, to set thresholds based on the shareholdings which taxpayers have in the companies making the distributions (*Test Claimants in the FII Group Litigation*, paragraph 67).

143 Article 63 TFEU therefore does not preclude the practice of a national tax authority which, for dividends from certain non-member States, applies the imputation method where the holding of the recipient company in the capital of the company making the distribution is below a certain threshold and the exemption method above that threshold, whilst it systematically applies the exemption method for nationally-sourced dividends, provided, however, that the mechanisms in question designed to prevent or mitigate distributed profits being liable to a series of charges to tax lead to equivalent results.

144 The allegedly excessive administrative burden that application of the imputation method involves has already been examined in paragraphs 92 to 99 and 104 of the present judgment.

145 The referring tribunal, by Question 4(b) and (c), also asks the Court whether Article 63 TFEU would preclude national legislation or a national practice under which the imputation method would apply in respect of portfolio dividends distributed by a company established in a non-member State other than a State party to the EEA Agreement only if an agreement for mutual assistance with the non-member State concerned exists.

146 However, such a question is purely hypothetical and therefore inadmissible (see Joined Cases C-188/10 and C-189/10 *Melki and Abdeli* [2010] ECR I-0000, paragraph 27 and the case-law cited).

147 The answer to the fourth question referred therefore is that Article 63 TFEU does not preclude the practice of a national tax authority which, for dividends from certain non-member States, applies the imputation method where the holding of the recipient company in the capital of the company making the distribution is below a certain threshold and the exemption method above that threshold, whilst it systematically applies the exemption method for nationally-sourced dividends, provided, however, that the mechanisms in question designed to prevent or mitigate distributed profits being liable to a series of charges to tax lead to equivalent results. The fact that the national tax authority demands information from the company receiving dividends relating to the tax that has actually been charged on the profits of the company distributing them in the non-member State in which the latter is resident is an intrinsic part of the very operation of the imputation method and does not affect, as such, the equivalence between the exemption and imputation methods.

C – The questions in Case C-437/08

148 By its questions in Case C-437/08, the referring tribunal asks, in essence, first, whether Article 63 TFEU precludes national legislation, such as that at issue in the main proceedings, which provides that

under certain conditions the imputation method is to be applied to dividends from a company established in another Member State or in a non-member State, whereas nationally-sourced dividends are always exempt from corporation tax, and which, in respect of tax years in which the company receiving the dividends has recorded an operating loss, does not provide for any carrying-forward of the credit to the following tax years.

149 Second, the referring tribunal seeks to ascertain whether Article 63 TFEU obliges a Member State to take into account, when applying the imputation method to foreign-sourced dividends, not only of the corporation tax paid in the State where the company distributing dividends is established but also the tax withheld at source in that State.

1. Admissibility

150 The Austrian Government submits that the questions bear no relation to the main proceedings since the latter concern only the 2002 tax year, namely the tax year in which the operating loss was suffered. Any carrying-forward of the credit for the tax paid abroad can only concern subsequent tax years.

151 That line of argument must be rejected.

152 Even though the main proceedings concern only taxation in respect of the 2002 tax year, that is to say, the year in which Salinen suffered losses, the referring tribunal seeks to ascertain, by its questions, whether application, in respect of that tax year, of the imputation method to the dividends which that company receives from a non-resident company can be regarded as equivalent to exemption of those dividends from tax. It also asks whether that application of the imputation method is compatible with Article 63 TFEU should the method not allow the recipient company to carry forward to subsequent tax years the tax paid in the State in which the company distributing dividends is resident.

153 Accordingly, the questions referred in Case C-437/08 are admissible.

2. Substance

154 Having regard to the questions asked by the referring tribunal, it should be examined, first, whether Article 63 TFEU obliges a Member State which applies the imputation method for dividends distributed by non-resident companies and the exemption method for dividends from resident companies to provide for the credit for the tax paid to be carried forward where the recipient company records an operating loss in respect of the tax year in which it receives the dividends.

155 The Austrian Government submits that Article 63 TFEU does not require it to provide for such carrying-forward. It states that, where profits are subject in the State in which the company making the distribution is resident to a higher level of tax than the tax levied by the State of the company receiving them, the latter State is obliged to grant a tax credit only up to the limit of the amount of corporation tax for which the company receiving the dividends is liable (*Test Claimants in the FII Group Litigation*, paragraph 52); likewise, where no domestic tax is paid on the dividends received because the company receiving them suffers a loss in the year of the distribution, the State of the recipient company is not obliged to grant a tax credit, either for the tax year corresponding to that year or, *a fortiori*, for subsequent tax years.

156 In that regard, it is to be remembered that Article 63 TFEU requires a Member State which has a system for preventing economic double taxation as regards dividends paid to resident companies by

other resident companies to accord equivalent treatment to dividends paid to resident companies by non-resident companies (*Test Claimants in the FII Group Litigation*, paragraph 72).

157 In the main proceedings, it is apparent from Paragraph 10(6) of the KStG that, under the imputation system concerned, dividends distributed by non-resident companies are included in the tax base of the company receiving them, thereby reducing, when a loss is recorded for the tax year in question, the amount of that loss by the amount of the dividends received. The amount of the loss that can be carried forward to subsequent tax years is thus reduced to the same extent. By contrast, dividends from resident companies, which are exempt, do not affect the tax base of the company receiving the dividends or, therefore, any losses that it may be able to carry forward.

158 It follows that, even if dividends distributed by a non-resident company and received by a resident company do not have corporation tax charged on them in the Member State where the latter company is established in respect of the tax year in which those dividends have been received, the reduction of the losses of the company receiving the dividends is liable to result for that company, if the credit for the tax paid by the company making the distribution is not carried forward, in economic double taxation on the dividends in subsequent tax years when its results are positive (see, to this effect, Case C-138/07 *Cobelfret* [2009] ECR I-731, paragraphs 39 and 40, and the order in *KBC-Bank and Beleggen, Risicokapitaal, Beheer*, paragraphs 39 and 40). By contrast, there is no risk of economic double taxation for nationally-sourced dividends, because the exemption method is applied to them.

159 Where national legislation, such as that at issue in the main proceedings, does not provide for the credit for the corporation tax paid in the State where the company distributing the dividends is established to be carried forward, foreign-sourced dividends suffer, in a system such as that at issue in the main proceedings, higher taxation than that resulting from application of the exemption method for nationally-sourced dividends.

160 In light of what is stated in paragraph 156 of the present judgment, Article 63 TFEU must be considered to preclude such legislation.

161 Contrary to the Austrian Government's assertions, legislation such as that at issue in the main proceedings cannot be justified by the fact that, when applying the imputation method, a Member State is required to grant a tax credit only up to the limit of the amount of corporation tax for which the companies receiving the dividends are liable (see *Test Claimants in the FII Group Litigation*, paragraphs 50 and 52).

162 It is true that, according to the case-law, equivalence between the exemption method and the imputation method does not require that, under the latter method, a tax credit be granted for dividends from non-resident companies that exceeds the level of national taxation (*Test Claimants in the FII Group Litigation*, paragraphs 50 and 52). Grant of a tax credit up to the limit of the amount of corporation tax for which the companies receiving the dividends are liable is sufficient to eliminate economic double taxation of the dividends distributed.

163 However, as is clear from paragraph 158 of the present judgment, national legislation which, for dividends from non-residents companies, does not allow the credit for the tax paid abroad to be carried forward, whilst exempting nationally-sourced dividends from corporation tax, does not prevent economic double taxation in respect of the foreign-sourced dividends.

164 Since, in the context of a tax rule which seeks to prevent or to mitigate the double taxation of distributed profits, the situation of a company receiving foreign-sourced dividends is comparable to that of a company receiving nationally-sourced dividends in so far as, in each case, the profits made are, in principle, liable to be subject to a series of charges to tax (see *Test Claimants in the FII Group Litigation*, paragraph 62), a difference in treatment, such as that at issue in the main proceedings, between nationally-sourced dividends, on the one hand, and foreign-sourced dividends, on the other, cannot be justified by a difference in situation connected with the place where the capital is invested.

165 Finally, and contrary to the Italian Government's assertions, the difference in treatment at issue in the main proceedings cannot be justified by the need to prevent artificial arrangements from being set up, within a group of companies to which the company receiving the dividends and the non-resident company distributing them belong, to alter the source of the dividends with the sole purpose of obtaining tax advantages. Suffice it to state that the national measure at issue in the main proceedings, which restricts the free movement of capital, does not specifically target wholly artificial arrangements which do not reflect economic reality and whose only purpose would be to obtain a tax advantage (see, to this effect, *Glaxo Wellcome*, paragraph 89 and the case-law cited). Furthermore, as the Advocate General observes in point 160 of her Opinion, the existence of wholly artificial arrangements within a group of companies appears to be ruled out in an instance such as that in the main proceedings, since Salinen received dividends from holdings that constituted less than 10% of the capital of the company making the distribution and were held collectively with other investors through a domestic investment fund.

166 Second, with regard to whether, when applying the imputation method, account must be taken of the tax withheld at source in the State of the company making the distribution, it should be noted that such tax creates the conditions for juridical double taxation unless a credit is granted for it in the State where the company receiving the dividends concerned is established.

167 It must be remembered that it is for each Member State to organise, in compliance with European Union law, its system for taxing distributed profits and, in that context, to define the tax base and the tax rate which apply to the shareholder receiving them (see, in particular, *Test Claimants in Class IV of the ACT Group Litigation*, paragraph 50; *Test Claimants in the FII Group Litigation*, paragraph 47; and Case C-194/06 *Orange European Smallcap Fund* [2008] ECR I-3747, paragraph 30).

168 It follows that dividends distributed by a company established in one Member State to a shareholder resident in another Member State are liable to be subject to juridical double taxation where the two Member States choose to exercise their fiscal competence and to subject those dividends to taxation in the hands of the shareholder (Case C-128/08 *Damseaux* [2009] ECR I-6823, paragraph 26).

169 However, the Court has already ruled that the disadvantages which may arise from the parallel exercise of powers of taxation by different Member States, in so far as such an exercise is not discriminatory, do not constitute restrictions prohibited by the Treaty (Case C-487/08 *Commission* v *Spain* [2010] ECR I-0000, paragraph 56 and the case-law cited).

170 Since European Union law, as it currently stands, does not lay down any general criteria for the attribution of areas of competence between the Member States in relation to the elimination of double taxation within the European Union, the fact that both the Member State in which the dividends are paid and the Member State in which the shareholder is resident are liable to tax those dividends does not mean that the Member State of residence is obliged, under European Union law, to prevent the

disadvantages which could arise from the exercise of competence thus attributed by the two Member States (see *Damseaux*, paragraphs 30 and 34, and Case C-96/08 *CIBA* [2010] ECR I-0000, paragraphs 27 and 28).

171 Accordingly, Article 63 cannot be interpreted as obliging a Member State to provide, in its tax legislation, that a credit is to be granted for the withholding tax levied on dividends in another Member State in order to prevent the juridical double taxation – resulting from the parallel exercise by the Member States concerned of their respective powers of taxation – of the dividends received by a company established in the first Member State (see, to this effect, Case C-513/04 *Kerckhaert and Morres* [2006] ECR I-10967, paragraphs 22 to 24).

172 The same finding is called for *a fortiori* where the juridical double taxation results from the parallel exercise by a Member State and a non-member State of their respective powers of taxation, as follows from paragraphs 119 and 120 of the present judgment.

173 In light of all those considerations, the answer to the questions referred is that Article 63 TFEU must be interpreted as:

– precluding national legislation which grants resident companies the possibility of carrying losses suffered in a tax year forward to subsequent tax years and which prevents the economic double taxation of dividends by applying the exemption method to nationally-sourced dividends, whereas it applies the imputation method to dividends distributed by companies established in another Member State or in a non-member State, in so far as, when the imputation method is applied, such legislation does not allow the credit for the corporation tax paid in the State where the company distributing dividends is established to be carried forward to the following tax years if the recipient company has recorded an operating loss for the tax year in which it received the foreign-sourced dividends, and

– not obliging a Member State to provide, in its tax legislation, that a credit is to be granted for the withholding tax levied on dividends in another Member State or in a non-member State in order to prevent the juridical double taxation – resulting from the parallel exercise by the States concerned of their respective powers of taxation – of the dividends received by a company established in the first Member State.

IV – Costs

174 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring tribunal, the decision on costs is a matter for that tribunal. 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:

1. **Article 63 TFEU must be interpreted as precluding legislation of a Member State under which portfolio dividends from holdings in resident companies are exempt from corporation tax and portfolio dividends from companies established in non-member States party to the Agreement on the European Economic Area of 2 May 1992 are so exempt only if a comprehensive agreement for mutual assistance with regard to administrative matters and**

enforcement exists between the Member State and non-member State concerned, since only the existence of an agreement for mutual assistance with regard to administrative matters proves necessary for the purpose of attaining the objectives of the legislation in question.

2. **Article 63 TFEU must be interpreted as not precluding legislation of a Member State under which portfolio dividends which a resident company receives from another resident company are exempt from corporation tax whilst portfolio dividends which a resident company receives from a company established in another Member State or in a non-member State party to the Agreement on the European Economic Area of 2 May 1992 are subject to that tax, provided, however, that the tax paid in the State in which the last-mentioned company is resident is credited against the tax payable in the Member State of the recipient company and the administrative burdens imposed on the recipient company in order to qualify for such a credit are not excessive. Information demanded by the national tax authority from the company receiving dividends that relates to the tax that has actually been charged on the profits of the company distributing dividends in the State in which the latter is resident is an intrinsic part of the very operation of the imputation method and cannot be regarded as an excessive administrative burden.**

3. **Article 63 TFEU must be interpreted as precluding national legislation which, in order to prevent economic double taxation, exempts portfolio dividends received by a resident company and distributed by another resident company from corporation tax and which, for dividends distributed by a company established in a non-member State other than a State party to the Agreement on the European Economic Area of 2 May 1992, provides neither for exemption of the dividends nor for a system under which a credit is granted for the tax that the company making the distribution pays in the State in which it is resident.**

4. **Article 63 TFEU does not preclude the practice of a national tax authority which, for dividends from certain non-member States, applies the imputation method where the holding of the recipient company in the capital of the company making the distribution is below a certain threshold and the exemption method above that threshold, whilst it systematically applies the exemption method for nationally-sourced dividends, provided, however, that the mechanisms in question designed to prevent or mitigate distributed profits being liable to a series of charges to tax lead to equivalent results. The fact that the national tax authority demands information from the company receiving dividends relating to the tax that has actually been charged on the profits of the company distributing them in the non-member State in which the latter is resident is an intrinsic part of the very operation of the imputation method and does not affect, as such, the equivalence between the exemption and imputation methods.**

5. **Article 63 TFEU must be interpreted as:**

   – **precluding national legislation which grants resident companies the possibility of carrying losses suffered in a tax year forward to subsequent tax years and which prevents the economic double taxation of dividends by applying the exemption method to nationally-sourced dividends, whereas it applies the imputation method to dividends distributed by companies established in another Member State or in a non-member State, in so far as, when the imputation method is applied, such legislation does not allow the credit for the corporation tax paid in the State where the**

company distributing dividends is established to be carried forward to the following tax years if the recipient company has recorded an operating loss for the tax year in which it received the foreign-sourced dividends, and

– **not obliging a Member State to provide, in its tax legislation, that a credit is to be granted for the withholding tax levied on dividends in another Member State or in a non-member State in order to prevent the juridical double taxation - resulting from the parallel exercise by the States concerned of their respective powers of taxation - of the dividends received by a company established in the first Member State.**

[Signatures]

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* Language of the case: German.