JUDGMENT OF THE COURT (First Chamber)

11 September 2014 (*)

(Reference for a preliminary ruling — Articles 49 TFEU and 54 TFEU — Freedom of establishment — Articles 63 TFEU and 65 TFEU — Free movement of capital — Tax legislation — Corporation tax — Legislation of a Member State designed to eliminate double taxation of distributed profits — Imputation method applied to dividends distributed by companies resident in the same Member State as the company receiving them — Exemption method applied to dividends distributed by companies resident in a different Member State from the company receiving them or in a third State — Difference in treatment of losses of the company receiving the dividends)

In Case C-47/12,

REQUEST for a preliminary ruling under Article 267 TFEU from the Finanzgericht Köln (Germany), made by decision of 6 September 2011, received at the Court on 31 January 2012, in the proceedings

Kronos International Inc.

v

Finanzamt Leverkusen,

THE COURT (First Chamber),

composed of A. Tizzano, President of the Chamber, A. Borg Barthet, J.L. da Cruz Vilaça, E. Levits (Rapporteur) and M. Berger, Judges,

Advocate General: P. Cruz Villalón,

Registrar: K. Malacek, Administrator,

having regard to the written procedure and further to the hearing on 16 May 2013,

after considering the observations submitted on behalf of:

– Kronos International Inc., by W. Meilicke and D. Rabback, Rechtsanwälte,

– Finanzamt Leverkusen, by B. Hillebrand, K. Kusch, H. Brandenberg and M. Brombach-Krüger, acting as Agents,

– the German Government, by T. Henze and K. Petersen, acting as Agents,

– the United Kingdom Government, by S. Ossowski, acting as Agent, and S. Ford, Barrister,

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

after hearing the Opinion of the Advocate General at the sitting on 7 November 2013,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Articles 49 TFEU and 54 TFEU, relating to freedom of establishment, and Articles 63 TFEU and 65 TFEU, relating to the free movement of capital.

2 The request has been made in proceedings between Kronos International Inc. (‘Kronos’), a company incorporated under the law of the State of Delaware (United States of America), and Finanzamt Leverkusen (Tax Office, Leverkusen; ‘the Finanzamt’) concerning the offsetting against German corporation tax, for the years 1991 to 2001, of the corporation tax paid abroad by the subsidiaries of Kronos that distributed dividends.

Legal context

German law

3 So far as concerns the years 1991 to 2000, Paragraph 49 of the Law on corporation tax (Körperschaftsteuergesetz, BGBl. 1991, I, p. 638; ‘the KStG 1991’) referred, for the purpose of implementation of company taxation, including the setting off, payment and refund of corporation tax, to the provisions of the Law on income tax (Einkommensteuergesetz, BGBl. 1990, I, p. 1898; ‘the EStG 1990’).

4 Paragraph 36(2)(3) of the EStG 1990 governed the ‘full set-off’ regime in the following terms:

‘(2) The following shall be set off against income tax:

...

3. corporation tax on a company or association fully subject to corporation tax in the amount of 3/7 of income within the meaning of Paragraph 20(1)(1) or (1)(2), in so far as the income does not arise from dividend distributions for which own capital within the meaning of Paragraph 30(2)(1) of the Law on corporation tax is regarded as used. The same applies to income within the meaning of Paragraph 20(2)(2)(a) which has been obtained from the first assignment by the shareholder of dividend coupons or other rights; in that case the corporation tax that may be set off shall be limited to 3/7 of the amount distributed in respect of the rights assigned. … Corporation tax shall not be set off:

...

(f) where the income has not been recorded in determining the basis of assessment;

...’

5 Paragraph 36(4) of the EStG 1990 provided:

‘If, after the calculation, there is an excess to the detriment of the taxable person, the latter (the tax debtor) must pay this amount immediately in so far as it corresponds to the income tax prepayments that have fallen due but not been made, and otherwise within a month from notification of the tax assessment (final payment). If, after the calculation, there is an excess in favour of the taxable person, it shall be paid to the taxable person after notification of the tax assessment.’

6 In the course of the change-over from the set-off regime to the ‘half-income’ regime, the German

legislature repealed Paragraph 36(2)(3) of the EStG 1990. However, it is apparent from the order for reference and from the observations of the German Government that, as a result of transitional provisions, the full set-off regime continued to apply to dividends received in 2001.

7 Paragraph 26(7) of the KStG 1991, in the version applicable until 1993, and Paragraph 8b(5) of the KStG in the version applicable from 1994 (‘the KStG 1994’), provided as follows:

‘If dividends distributed by a foreign company are, pursuant to a double taxation convention, exempt from corporation tax subject to a condition requiring a minimum shareholding, the exemption shall apply irrespective of the minimum shareholding laid down in the agreement if the shareholding amounts to at least 10%.’

Double taxation conventions

8 Under the double taxation conventions concluded with the Kingdom of Denmark, the French Republic, the United Kingdom, the Kingdom of the Netherlands and Canada, the Federal Republic of Germany is required to exempt from German tax dividends which derive from shareholdings reaching or exceeding a certain threshold and which are taxable in the State of the company making the distribution.

9 In the majority of cases the shareholding threshold indicated was 10%. However, the convention with the United Kingdom laid down a threshold of 25%; the convention with Canada did likewise for the year 2000, whilst for 2001 the threshold applicable was 10%.

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

10 Kronos is a holding company of a group of companies. Its registered office is in the United States and its management is in Germany, where it has had a branch and been entered in the commercial register since 1989. Kronos was set up in order to undertake the integrated management of the group’s European and Canadian subsidiaries. Since 1989 it has held 99.95% of the shares in the German company Kronos Titan GmbH. Control and profit-transfer agreements existed with the latter and with other German companies.

11 In the period to which the main proceedings relate, namely the years 1991 to 2001, Kronos had direct shareholdings in the following companies:

– Société Industrielle du Titane (France), a shareholding of between 92.941% and 93.771% between 1991 and 2001;

– Kronos Norge (Norway), a 100% shareholding between 1991 and 1998;

– Kronos UK Ltd (United Kingdom), a 100% shareholding between 1991 and 2001;

– Kronos Europa SA (Belgium), a shareholding of between 98.4% and 100% between 1991 and 1998;

– Kronos Denmark ApS (Denmark), a 100% shareholding between 1999 and 2001; and

– Kronos Canada Inc. (Canada), a 100% shareholding between 1991 and 2001.

12 During 2000 and 2001, Kronos had indirect shareholdings in Europa SA (Belgium) and Kronos Norge (Norway) through its wholly-owned subsidiary Kronos Denmark ApS (Denmark). The shareholdings of Kronos Denmark ApS in the group’s Belgian and Norwegian companies were

99.99% and 100% respectively.

13 The corporation tax payable by Kronos in Germany in respect of the years 1991 to 2001 was set out in notices of assessment, in some cases rectified, that were issued between 2004 and 2010. Taking account of losses or carried-forward losses of between roughly DEM 150 million and 840 million, those notices set the amount of corporation tax for 1991, by reason of the payment of dividends, at EUR 4 190 788.57 and for 1992, also by reason of the payment of dividends, at EUR 2 050 183.81. For each of the years 1993 to 2001, on the other hand, the amount of tax was nil.

14 The dividends paid by foreign subsidiaries, which were exempt from tax pursuant to the double taxation convention applicable in each case, were not taken into account in the calculation of the relevant basis for the notices of assessment and statements of losses.

15 In this context, Kronos requested that the corporation tax and tax on capital income paid by its subsidiaries and second-tier subsidiaries established in other Member States (Belgium, France and the United Kingdom) and third States (Canada and Norway) between 1991 and 2001 be set off against the corporation tax for which it was liable in Germany, as such setting off had, where appropriate, to result in a tax refund.

16 By decision of 15 December 2005, the Finanzamt refused that application. The refusal was founded on Paragraph 36(2)(3)(f) of the EStG 1990 in conjunction with Paragraph 49(1) of the KStG 1991, under which corporation tax on dividends can be set off only where the dividends are recorded as taxable income. As the foreign-sourced dividends were exempt by virtue of Paragraph 26(7) of the KStG 1991 so far as concerns the years 1991 to 1993 and Paragraph 8b(5) of the KStG 1994 for the following years, they could not be taken into account as taxable income when determining the amount of tax.

17 By decision of 10 January 2007 the Finanzamt dismissed as unfounded the objection lodged by Kronos as regards the notice relating to the statement of account and to offsetting of the tax credit in respect of corporation tax for the year 1994.

18 On 7 February 2007, Kronos brought an action before the Finanzgericht Köln (Finance Court, Cologne) for the annulment of that decision and an action for failure to act concerning the statement of account for corporation tax for the years 1991 to 1993 and 1995 to 2001.

19 As the national proceedings currently stand, Kronos claims the setting off of a total amount of EUR 201 966 724 paid in foreign corporation tax. This amount includes, first, the tax paid by Kronos's subsidiaries in France for the years 1991 to 2001, in the United Kingdom for the years 1997 and 1999 and in Canada for the years 2000 and 2001, totalling EUR 78 501 794. Second, Kronos's claim concerns the setting off against the dividends which it received from its Danish subsidiary in 2000 and 2001 of the corporation tax paid by the Belgian and Norwegian second-tier subsidiaries, that is to say, a sum totalling EUR 123 448 418, and the setting off of the Danish corporation tax amounting to EUR 16 512.

20 In addition, Kronos claims the setting off of a sum of EUR 1 795 525 in tax on capital income concerning the subsidiaries established in France and the United Kingdom if the income from the dividends fell to be treated as taxable.

21 In those circumstances, the Finanzgericht Köln decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Is the exclusion of the set-off of corporation tax as a consequence of the tax exemption of dividend distributions by capital companies in third countries to German capital companies,

for which the German legislation requires only that the capital company receiving the dividends has a holding of not less than 10% in the distributing company, subject only to freedom of establishment within the meaning of Article 49 TFEU in conjunction with Article 54 TFEU or also to the free movement of capital within the meaning of Articles 63 TFEU to 65 TFEU, if the actual holding of the capital company receiving the dividends is 100%?

(2) Are the provisions concerning freedom of establishment (now Article 49 TFEU) and, as the case may be, also concerning the free movement of capital (Article 67 EEC/EC until 1993, now Articles 63 TFEU to 65 TFEU) to be interpreted as meaning that they preclude a provision which, where the dividends of foreign subsidiaries are exempt from tax, excludes the set-off and refund of corporation tax on those dividend distributions even where the parent company makes a loss, if, for distributions by German subsidiaries, there is provision for relief by setting off corporation tax?

(3) Are the provisions concerning freedom of establishment (now Article 49 TFEU) and, as the case may be, also concerning the free movement of capital (Article 67 EEC/EC until 1993, now Articles 63 TFEU to 65 TFEU) to be interpreted as meaning that they preclude a provision which excludes the set-off and refund of corporation tax on dividends of second and third-tier subsidiaries which are exempted from tax in the country of the subsidiary and which are (re)distributed to the German parent company and likewise exempted from tax in Germany, but in the case of purely domestic situations, as the case may be by means of the set-off of corporation tax on the second-tier subsidiary's dividends in the hands of the subsidiary and the set-off of corporation tax on the subsidiary's dividends in the hands of the parent company, enables a refund in the event of a loss by the parent company?

(4) If the provisions on the free movement of capital are also applicable, a further question, depending on the reply to question 2, arises with regard to the Canadian dividends:

Is the present Article 64(1) TFEU to be understood as meaning that it permits the application by the Federal Republic of Germany of German legislation, and provisions of double taxation conventions, which have remained unchanged in substance since 31 December 1993 and, therefore, that it permits the continuing exclusion of the offsetting of Canadian corporation tax on dividends exempted from tax in Germany?'

Consideration of the questions referred

Question 1

Preliminary observations

22 Although the referring court mentions in the wording of its first question only dividends distributed by companies established in a third State, it is apparent from the order for reference that the scope of this question extends to dividends distributed by companies established in Member States other than the Federal Republic of Germany.

23 Under Paragraph 36(2)(3)(f) of the EStG 1990, corporation tax is not to be set off where the income has not been recorded in determining the basis of assessment.

24 In the main proceedings, the dividends distributed by companies resident in another Member State or a third State were not recorded in determining the basis of assessment of the company receiving those dividends because the exemption method prescribed by the double taxation conventions

concluded by the Federal Republic of Germany was applied to them.

25 In this connection, the referring court observes that the provisions relevant to the procedure for determining the amount of tax, which result from the double tax conventions and, as the case may be, from Paragraph 26(7) of the KStG 1991, for the years 1991 to 1993, and Paragraph 8b(5) of the KStG 1994, for the years 1994 to 2000, do not apply only to shareholdings permitting a determining influence to be exerted over the decisions of the company concerned and that, in establishing a threshold of 10%, the German legislature did not target large shareholdings, in the sense of dominant influence.

26 The referring court also states that throughout the period to which the main proceedings relate Kronos had shareholdings of roughly 93% to 100% in the various subsidiaries that paid dividends.

27 Finally, it is to be noted that, according to the information provided by the referring court, Kronos's registered office is in the United States and its management is in Germany, where it has a branch and is entered in the commercial register. It is not disputed that Kronos is a company formed in accordance with the legislation of the State of Delaware. The German Government points out in this regard that, as set out in Article XXV(5) of the Treaty of Friendship, Commerce and Navigation between the Federal Republic of Germany and the United States of America of 29 October 1954 (BGBl. 1956 II, p. 487), companies constituted under American law must be recognised as such in Germany.

28 Accordingly, the first question must be understood as being designed to ascertain whether the compatibility with EU law of national rules, such as those at issue in the main proceedings, under which a company resident in a Member State cannot set off corporation tax paid in another Member State or in a third State by capital companies distributing dividends, because of the exemption of those dividends from tax in the first Member State when they stem from shareholdings representing at least 10% of the capital of the company making the distribution and, in the case in point, the actual shareholding of the capital company receiving the dividends exceeds 90% and the recipient company has been incorporated in accordance with the law of a third State, must be assessed in the light of Articles 49 TFEU and 54 TFEU or rather Articles 63 TFEU and 65 TFEU.

The freedom at issue

29 It is apparent from the Court's settled case-law 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 (judgments in *Haribo Lakritzen Hans Riegel and Österreichische Salinen*, C-436/08 and C-437/08, EU:C:2011:61, paragraph 33; *Accor*, C-310/09, EU:C:2011:581, paragraph 30; and *Test Claimants in the FII Group Litigation*, C-35/11, EU:C:2012:707, paragraph 89).

30 As regards the question whether national legislation falls within the scope of one or other of the freedoms of movement, it is clear from well-established case-law that the purpose of the legislation concerned must be taken into consideration (judgment in *Test Claimants in the FII Group Litigation*, EU:C:2012:707, paragraph 90 and the case-law cited).

31 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 scope of Article 49 TFEU on freedom of establishment (see judgments in *Test Claimants in the FII Group Litigation*, C-446/04, EU:C:2006:774, paragraph 37; *Idryma Typou*, C-81/09, EU:C:2010:622, paragraph 47; *Accor*, EU:C:2011:581, paragraph 32; *Scheunemann*, C-31/11, EU:C:2012:481, paragraph 23; and *Test Claimants in the FII Group Litigation*, EU:C:2012:707, paragraph 91).

32 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 (judgments in *Haribo Lakritzen Hans Riegel and Österreichische Salinen*, EU:C:2011:61, paragraph 35; *Accor*, EU:C:2011:581, paragraph 32; *Scheunemann*, EU:C:2012:481, paragraph 23; and *Test Claimants in the FII Group Litigation*, EU:C:2012:707, paragraph 92).

33 In the main proceedings, it follows from the double taxation conventions concluded by the Federal Republic of Germany with the Kingdom of Denmark, the French Republic and — so far as concerns the 2001 tax year — Canada, and from application of Paragraph 8b(5) of the KStG 1994 in conjunction with the double taxation conventions concluded by the Federal Republic of Germany with the United Kingdom and with Canada, so far as concerns the 2000 tax year, that dividends paid to companies resident in Germany by companies resident in those other States are exempt from German corporation tax when the shareholding of the company receiving the dividend in the company distributing it reaches the threshold of 10%.

34 Such a threshold admittedly serves to exclude from the scope of the exemption shareholdings acquired solely with the intention of making a financial investment without any intention to influence the management and control of the undertaking.

35 However, contrary to the German Government's submissions, such a threshold does not in itself make the exemption applicable only to those shareholdings which enable the holder to exert a definite influence on a company's decisions and to determine its activities. The Court has already held that a holding of such a size does not necessarily mean that the holder exerts a definite influence on the decisions of the company of which it is a shareholder (see, to this effect, judgment in *ITELCAR and Fazenda Pública*, C-282/12, EU:C:2013:629, paragraph 22).

36 Consequently, the national rules at issue in the main proceedings apply not only to dividends received by a resident company on the basis of a shareholding that confers definite influence over the decisions of the company distributing the dividends and enables its activities to be determined, but also to dividends received on the basis of a shareholding not conferring such influence.

37 In the case of legislation from whose purpose it cannot be determined whether it falls predominantly within the scope of Article 49 TFEU or Article 63 TFEU, the Court has already held that, in so far as the national legislation relates to dividends which originate in a Member State, account should be taken of the facts of the case in point in order to determine whether the situation to which the dispute in the main proceedings relates falls within the scope of Article 49 TFEU or of Article 63 TFEU (see, to this effect, judgments in *Test Claimants in the FII Group Litigation*, EU:C:2012:707, paragraphs 93 and 94 and the case-law cited; *Beker*, C-168/11, EU:C:2013:117, paragraphs 27 and 28; and *Bouanich*, C-375/12, EU:C:2014:138, paragraph 30).

38 As regards, on the other hand, the tax treatment of dividends originating in a third country, the Court has held that it is sufficient to examine the purpose of national legislation in order to determine whether the tax treatment of such dividends falls within the scope of the provisions of the FEU Treaty on the free movement of capital, as national legislation relating to the tax treatment of dividends originating in third countries is not capable of falling within the scope of Article 49 TFEU (see, to this effect, judgment in *Test Claimants in the FII Group Litigation*, EU:C:2012:707, paragraphs 96 and 97).

39 The Court has thus held that a company that is resident in a Member State and has a shareholding in a company resident in a third country giving it definite influence over the decisions of the latter company and enabling it to determine its activities may rely upon Article 63 TFEU in order to call

into question the consistency with that provision of legislation of that Member State which relates to the tax treatment of dividends originating in the third country and does not apply exclusively to situations in which the parent company exercises decisive influence over the company distributing the dividends (see judgment in *Test Claimants in the FII Group Litigation*, EU:C:2012:707, paragraph 104).

40 It follows that, where the national legislation relating to the treatment of dividends is not intended to apply exclusively to situations in which the parent company exercises decisive influence over the company distributing the dividends, account must be taken of the size of the shareholding of the company receiving the dividend in the company distributing it, in so far as both Article 49 TFEU and Article 63 TFEU may be relied upon in that instance and it can be determined in the light of the shareholding's size that the situation envisaged falls within the scope of one or the other of the freedoms respectively laid down by those two provisions of EU law.

41 In so far as, in view of the fact that the company distributing the dividends is located in a third State, only the free movement of capital may be relied upon against the national legislation relating to the treatment of the dividends distributed by it, account does not have to be taken of the size of the shareholdings in the company making the distribution. A company resident in a Member State may rely on Article 63 TFEU in order to call into question the legality of such rules irrespective of the extent of its shareholding in the company distributing dividends established in a third country (see, to this effect, judgment in *Test Claimants in the FII Group Litigation*, EU:C:2012:707, paragraphs 99 and 104).

42 This reasoning is also applicable, by analogy, where solely the free movement of capital may be relied upon given the limits of the personal scope of freedom of establishment.

43 That is so in a situation such as that at issue in the main proceedings, where the company receiving the dividends is a company formed in accordance with the law of a third State.

44 The Treaty rules concerning freedom of establishment apply only to nationals of a Member State of the European Union (see, to this effect, judgment in *Ferrer Laderer*, C-147/91, EU:C:1992:278, paragraph 9).

45 In accordance with Article 54 TFEU, companies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the European Union are to be treated, for the purposes of the provisions of the Treaty on freedom of establishment, in the same way as natural persons who are nationals of Member States (judgment in *National Grid Indus*, C-371/10, EU:C:2011:785, paragraph 25).

46 Therefore, a company or firm which is not formed in accordance with the law of a Member State cannot enjoy freedom of establishment.

47 This finding is not called into question by Kronos's argument that a company of a third State cannot be discriminated against for tax purposes as against a company incorporated under German law and must, therefore, be able to rely on the freedom enshrined in Article 49 TFEU.

48 In the absence of a uniform definition in EU law of the companies which may enjoy the right of establishment on the basis of a single connecting factor determining the national law applicable to a company, the question whether Article 49 TFEU applies to a company which seeks to rely on the fundamental freedom enshrined in that article is a preliminary matter which, as EU law now stands, can only be resolved by the applicable national law (see *Cartesio*, C-210/06, EU:C:2008:723, paragraph 109, and *National Grid Indus*, EU:C:2011:75, paragraph 26).

49 A Member State thus has the power to define the connecting factor required of a company if it is to be regarded as incorporated under its national law and as such capable of enjoying the right of establishment (see, to this effect, judgments in *Cartesio*, EU:C:2008:723, paragraph 110, and *National Grid Indus*, EU:C:2011:785, paragraph 27).

50 However, a Member State cannot unilaterally extend the personal scope of the chapter of the Treaty relating to freedom of establishment, the objective of which is to secure freedom of establishment solely for nationals of Member States (see, to this effect, order in *Lasertec*, C-492/04, EU:C:2007:273, paragraph 27).

51 It must therefore be concluded that, in a situation such as that at issue in the main proceedings, where freedom of establishment cannot be relied upon because of the connection of the company receiving the dividends to the legal system of a third State, national rules which relate to the tax treatment of dividends originating in another Member State or in a third State and do not apply exclusively to situations in which the parent company exercises decisive influence over the company distributing the dividends must be assessed in the light of Article 63 TFEU.

52 Consequently, a company incorporated in accordance with the law of a third State that is resident in a Member State may, irrespective of the extent of its shareholding in the company distributing dividends resident in another Member State or in a third country, rely upon that provision in order to call the legality of such rules into question.

53 It should also be noted that the Court has held that, since the Treaty does not extend freedom of establishment to third countries, it is important to ensure that the interpretation of Article 63(1) TFEU as regards relations with third countries does not enable economic operators who do not fall within the limits of the territorial scope of freedom of establishment to profit from that freedom (judgment in *Test Claimants in the FII Group Litigation*, EU:C:2012:707, paragraph 100).

54 However, as the Advocate General has, in essence, observed in point 64 of his Opinion, such a risk does not exist in a situation such as that at issue in the main proceedings. The German rules do not relate to the conditions for access of a company from that Member State to the market in a third country or of a company from a third country to the market in that Member State. Those rules concern only the tax treatment of dividends which derive from investments made by the recipient of the dividends in a company resident in another Member State or in a third country.

55 Accordingly, the answer to the first question is that the compatibility with EU law of national rules, such as those at issue in the main proceedings, under which a company resident in a Member State cannot set off corporation tax paid in another Member State or in a third State by capital companies distributing dividends, because of the exemption of those dividends from tax in the first Member State when they stem from shareholdings representing at least 10% of the capital of the company making the distribution and, in the case in point, the actual shareholding of the capital company receiving the dividends exceeds 90% and the recipient company has been incorporated in accordance with the law of a third State, must be assessed in the light of Articles 63 TFEU and 65 TFEU.

Question 2

56 By its second question, the referring court asks, in essence, whether Article 49 TFEU and, as the case may be, Article 63 TFEU must be interpreted as precluding application of the exemption method to dividends distributed by companies resident in other Member States and in third States, when the imputation method is applied to dividends distributed by companies resident in the same Member State as the company receiving them and, if the latter company records losses, the

imputation method results in the tax paid by the resident company that made the distribution being fully or partially refunded.

57 In view of the answer given to the first question, the second question must be considered solely from the point of view of the free movement of capital.

58 Kronos contends that, because of the refund of tax paid by the company distributing the dividends, investment in a resident company is more advantageous than investment in a non-resident company in a situation where the company receiving the dividends makes losses.

59 It further submits that the imputation regime would not be equivalent to the exemption regime if account were also taken of the taxation of the dividends in Germany when redistributed to shareholders.

60 In this context, it should be recalled first of all that the referring court alone can determine the subject-matter of the questions which it proposes to refer to the Court (judgment in *Kersbergen-Lap and Dams-Schipper*, C-154/05, EU:C:2006:449, paragraph 21).

61 By its second question, the referring court asks the Court not about the effects of the tax treatment of the dividends distributed by the resident and non-resident companies on the shareholders of the company receiving them if they are redistributed to those shareholders, but only about the effects of the tax treatment of the dividends so far as concerns the company receiving them.

62 The request for a preliminary ruling does not contain an indication that the shareholders' situation was considered relevant by the referring court, information relating to the tax treatment of any dividends redistributed by the company receiving them, or information regarding the effects that application of the exemption and imputation methods at the level of that company has on the tax situation of its shareholders.

63 Furthermore, the Court has already held that the tax situation of an investment vehicle's shareholders is irrelevant for the purpose of determining whether or not national legislation is discriminatory when the distinguishing criterion for determining the tax treatment applicable, established by the national legislation at issue, is not the tax situation of the shareholder but solely the status of the investment vehicle, namely whether or not it is resident (see, to this effect, judgment in *Santander Asset Management SGIIC and Others*, C-338/11 to C-347/11, EU:C:2012:286, paragraphs 28 and 41).

64 The national tax rules at issue in the main proceedings establish a distinguishing criterion founded on the taking into account of an item of income when the basis of assessment is determined, resulting in different treatment of dividends depending on where the company distributing them is resident.

65 That having been clarified, in order to answer the question referred it is to be recalled 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 (see judgments in *Test Claimants in the FII Group Litigation*, EU:C:2006:774, paragraph 72; *Haribo Lakritzen Hans Riegel and Österreichische Salinen*, EU:C:2011:61, paragraph 156; and *Test Claimants in the FII Group Litigation*, EU:C:2012:707, paragraph 38).

66 The Court has also held that a Member State is, in principle, free to prevent the imposition of a series of charges to tax on 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. Those two methods are in fact equivalent 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 (judgment in *Test Claimants in the FII Group Litigation*, EU:C:2012:707, paragraph 39 and the case-law cited).

67 By analogy, a Member State is, in principle, also free to prevent the imposition of a series of charges to tax on dividends received by a resident company by opting for the imputation method when the dividends are paid by a resident company and for the exemption method when they are paid by a non-resident company.

68 Since EU 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 (judgments in *Kerckhaert and Morres*, C-513/04, EU:C:2006:713, paragraph 22, and *Banco Bilbao Vizcaya Argentaria*, C-157/10, EU:C:2011:813, paragraph 31 and the case-law cited), each Member State remains free to organise its system for taxing distributed profits, provided, however, that the system in question does not entail discrimination prohibited by the Treaty (judgment in *Test Claimants in the FII Group Litigation*, EU:C:2012:707, paragraph 40).

69 Whatever the mechanism adopted for preventing or mitigating the imposition of a series of charges to tax or economic double taxation, the freedoms of movement guaranteed by the Treaty preclude a Member State from treating foreign-sourced dividends less favourably than nationally-sourced dividends, unless such a difference in treatment concerns situations which are not objectively comparable or is justified by overriding reasons in the public interest (see, to this effect, judgments in *Lenz*, C-315/02, EU:C:2004:446, paragraphs 20 to 49; *Manninen*, C-319/02, EU:C:2004:484, paragraphs 20 to 55; and *Test Claimants in the FII Group Litigation*, EU:C:2006:774, paragraph 46).

70 As has been pointed out in paragraph 64 of the present judgment, dividends received by a company resident in Germany were subject, during the period relevant to the dispute in the main proceedings, to different treatment depending on where the company distributing them was resident.

71 Dividends distributed by companies resident in Germany were taxed in that Member State and the corporation tax relating to the dividends distributed that was paid by the company making the distribution was partially set off when the recipient company did not distribute the dividends and fully set off when it did redistribute them.

72 In a situation such as that at issue in the main proceedings, where the company receiving the dividends had in addition made losses, the dividend paid by a resident company was taken into account when determining the amount of tax of the company receiving it, which meant that the losses were partially or fully set off and, therefore, were reduced or were precluded from being carried forward to a subsequent year or back to a previous one. When the income from the dividends paid by resident companies did not exceed the losses recorded by the company receiving them, the tax payable by the latter was nil and the tax credit in respect of the tax on the dividends distributed by the German subsidiary was refunded.

73 On the other hand, dividends distributed by a company resident in another Member State or in a third State were exempt from tax in Germany and were not taken into account when determining the amount of tax of the company receiving them. Therefore, they had no effect either on the basis of assessment of the company receiving them or on any losses that it might be able to carry forward or back.

74 Furthermore, since the company receiving the dividends did not pay any tax in Germany in respect of them, irrespective of the rate of the tax to which the underlying profits were subject in the hands of the company making the distribution and of the amount which the latter had actually paid in respect of that tax, the exemption method, in some circumstances, enabled the benefit of lower taxation in the State of the company distributing the dividends to be preserved.

75 As is apparent from the order for reference, the resident company receiving the dividends was, in addition, spared the entire administrative burden inherent in the imputation method.

76 Finally, as dividends distributed by non-resident companies were not taken into account when determining the amount of tax payable by the company receiving them, the exemption method had the effect that, in a context where the company receiving dividends recorded losses or could, for the tax year concerned, claim previous losses, the dividends distributed did not suffer economic double taxation either.

77 The exemption method and the fact that the exempt dividends have no effect on the amount of the losses of the company receiving them eliminate the risk of double taxation of those dividends so far as concerns the company receiving them in the State of residence.

78 Consequently, application of the exemption method in respect of dividends received from non-resident companies does not result, from the point of view of the objective, pursued by the national rules at issue in the main proceedings, of preventing double economic taxation, in less favourable treatment of those dividends compared with dividends distributed by resident companies.

79 In a situation where the company receiving the dividends records losses, such as that at issue in the main proceedings, the refunding of the tax paid by the company distributing them could be regarded as a tax-flow advantage.

80 It is true that it follows from the Court's case-law that the exclusion of a cash-flow advantage in a cross-border situation where it is available in an equivalent domestic situation is a restriction on the free movement of capital (see, by analogy, judgment in *Commission* v *Spain*, C-269/09, EU:C:2012:439, paragraph 59 and the case-law cited).

81 However, in the context of the main proceedings, the refusal to grant a refund and the difference in treatment thus established can be explained by an objective difference in situation. In relation to refund of the tax paid by the company distributing the dividends, such as the refund requested by Kronos, a company receiving foreign-sourced dividends is not in a situation comparable to that of a company receiving nationally-sourced dividends.

82 The difference between those situations stems, first, from the fact that the Federal Republic of Germany, following the conclusion of double taxation conventions with other Member States and with third States, waived the exercise of its powers of taxation over the dividends distributed by companies resident in those States.

83 The Court has already held that the free movement of capital, enshrined in Article 63(1) TFEU, cannot have the effect of requiring Member States to go beyond the cancelling of national income tax payable by a shareholder in respect of foreign-sourced dividends received and to reimburse a sum whose origin is in the tax system of another Member State (see, by analogy, judgment in *Test Claimants in the FII Group Litigation*, EU:C:2006:774, paragraph 52), if the first Member State is not to see its fiscal autonomy limited by the exercise of the fiscal power of the other Member State (see, in particular, judgment in *Meilicke and Others*, C-262/09, EU:C:2011:438, paragraph 33 and

the case-law cited).

84 Furthermore, the Court has ruled that the status of Member State of residence of the company receiving dividends cannot entail the obligation for that Member State to offset a fiscal disadvantage arising where a series of charges to tax is imposed entirely by the Member State in which the company distributing those dividends is established, in so far as the dividends received are neither taxed nor taken into account in a different way by the first Member State as regards investment enterprises established in that State (judgment in *Orange European Smallcap Fund*, C-194/06, EU:C:2008:289, paragraph 41).

85 Consequently, in a situation where the Member State does not exercise its powers of taxation over the incoming dividends — either by taxing them or by taking them into account in a different way — as regards the company receiving them, its obligations, as the Member State of residence of the company receiving the dividends, do not go so far as to require it offset the tax burden resulting from the exercise of the tax powers of another Member State or of a third State.

86 It follows that the obligations of the Member State of residence of the company receiving dividends when it does not exercise its own powers of taxation over those dividends differ, as regards treatment of the taxation carried out by another Member State, from the obligations owed by it when it elects to tax those dividends and must consequently take into account, within the limits of its own taxation, the tax burden resulting from the exercise of the tax powers of the other Member State.

87 Second, the refund requested by Kronos constitutes, in the context of the imputation method, the logical complement of taking the dividends into account and of the previous reduction of the losses that can be carried forward. Without such a refund, the taking of the dividends into account and the reduction of the losses of the company receiving them are liable to result in economic double taxation of those dividends in subsequent tax years when the results of the company receiving the dividends are positive (see, to this effect, judgment in *Cobelfret*, C-138/07, EU:C:2009:82, paragraphs 39 and 40, and order in *KBC Bank and Beleggen, Risicokapitaal, Beheer*, C-439/07 and C-499/07, EU:C:2009:339, paragraphs 39 and 40).

88 By contrast, in the context of the exemption method, as the losses are not reduced, there is no risk of economic double taxation of the dividends received. The lack of a refund is counterbalanced by not taking the dividends into account when determining the basis of assessment.

89 Accordingly, the answer to the second question is that Article 63 TFEU must be interpreted as not precluding application of the exemption method to dividends distributed by companies resident in other Member States and in third States, when the imputation method is applied to dividends distributed by companies resident in the same Member State as the company receiving them and, if the latter company records losses, the imputation method results in the tax paid by the resident company that made the distribution being fully or partially refunded.

Questions 3 and 4

90 In view of the answer given to the second question, there is no need to answer the third and fourth questions.

Costs

91 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring court, the decision on costs is a matter for that court. Costs incurred in

submitting observations to the Court, other than the costs of those parties, are not recoverable.

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

1. **The compatibility with EU law of national rules, such as those at issue in the main proceedings, under which a company resident in a Member State cannot set off corporation tax paid in another Member State or in a third State by capital companies distributing dividends, because of the exemption of those dividends from tax in the first Member State when they stem from shareholdings representing at least 10% of the capital of the company making the distribution and, in the case in point, the actual shareholding of the capital company receiving the dividends exceeds 90% and the recipient company has been incorporated in accordance with the law of a third State, must be assessed in the light of Articles 63 TFEU and 65 TFEU.**

2. **Article 63 TFEU must be interpreted as not precluding application of the exemption method to dividends distributed by companies resident in other Member States and in third States, when the imputation method is applied to dividends distributed by companies resident in the same Member State as the company receiving them and, if the latter company records losses, the imputation method results in the tax paid by the resident company that made the distribution being fully or partially refunded.**

[Signatures]

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* Language of the case: German.