JUDGMENT OF THE COURT (First Chamber)

9 October 2014 (*)

(Reference for a preliminary ruling — Free movement of capital — Article 63 TFEU — Taxation of income from investment funds — Investment fund's obligations to communicate and publish certain information — Flat-rate taxation of income from investment funds which do not comply with communication and publication obligations)

In Case C-326/12,

REQUEST for a preliminary ruling under Article 267 TFEU from the Finanzgericht Düsseldorf (Germany), made by decision of 3 May 2012, received at the Court on 10 July 2012, in the proceedings

Rita van Caster,

Patrick van Caster

v

Finanzamt Essen-Süd,

THE COURT (First Chamber),

composed of A. Tizzano, President of the Chamber, S. Rodin, A. Borg Barthet, E. Levits (Rapporteur) and M. Berger, Judges,

Advocate General: M. Wathelet,

Registrar: M. Aleksejev, Administrator,

having regard to the written procedure and further to the hearing on 9 October 2013,

after considering the observations submitted on behalf of:

– Mrs and Mr van Caster, by V. Heidelbach, Rechtsanwalt,

– the Finanzamt Essen-Süd, by U. Weise, acting as Agent,

– the German Government, by T. Henze and A. Wiedmann, acting as Agents,

– the United Kingdom Government, by C. Murrell, acting as Agent, and by R. Hill, 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 21 November 2013,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Articles 63 TFEU and 65 TFEU.

2 The request has been made in proceedings between Mrs van Caster and her son ('the van Casters'), residing in Germany, and the Finanzamt Essen-Süd ('the Finanzamt'), concerning the separate and uniform determination of the basis of assessment of their income from non-resident investment funds for the tax years 2004 to 2008.

German legal context

3 Section 1 (Paragraphs 1 to 10) of the Law on Investment Tax (Investmentsteuergesetz; 'the InvStG'), in force from 2004, sets out common rules for holdings in domestic and foreign investments.

4 Paragraph 2(1) of the InvStG provides that income from distributed holdings, income equivalent to a distribution and interim profits are considered to be, with certain exceptions, income from investor capital.

5 Paragraph 5 of that law, in the version of 15 December 2003 (BGBl. 2003 I, p. 2676), is worded as follows:

'(Basis of assessment)

(1) Paragraphs 2 and 4 shall apply only if

1. for each income distribution in relation to a holding, the investment company informs investors, in the German language, of

(a) the amount of the distribution (to at least four decimal places)

(b) the amount of income distributed (to at least four decimal places)

(c) the sums contained in the distribution, that is to say:

(aa) the income of the previous years equivalent to a distribution,

(bb) capital gains on exempt sales within the meaning of the first sentence of Paragraph 2(3), point 1, first sentence,

(cc) income within the meaning of Paragraph 3, point 40 of the Income Tax Law [(Einkommensteuergesetz)],

(dd) income within the meaning of Paragraph 8b(1) of the Corporation Tax Law, [(Körperschaftsteuergesetz)],

(ee) capital gains on sales within the meaning of Paragraph 3, point 40 of the Income Tax Law,

(ff) capital gains on sales within the meaning of Paragraph 8b(2) of the Corporation Tax Law,

(gg) income within the meaning of the second sentence of Paragraph 2(3), point 1, provided that it is not income from capital within the meaning of Paragraph 20 of the Income Tax Law,

(hh) capital gains on exempt sales within the meaning of Paragraph 2(3), point 2,

(ii) income within the meaning of Paragraph 4(1),

(jj) income within the meaning of Paragraph 4(2), for which there was no deduction under subparagraph 4,

(kk) income within the meaning of Paragraph 4(2) which, by virtue of a double taxation convention, confers a right of set-off against the income or corporation tax of tax deemed to have been paid,

(d) of the portion of the distribution conferring a right of set-off or repayment of the income tax on the capital within the meaning of

(aa) Paragraph 7(1) and (2),

(bb) Paragraph 7(3),

(e) the amount of income tax on the capital to be set-off or repaid within the meaning of

(aa) Paragraph 7(1) and (2),

(bb) Paragraph 7(3),

(f) the amount of foreign tax in respect of income within the meaning of Paragraph 4(2) included in the amounts distributed and

(aa) imputable pursuant to Paragraph 34c(1) of the Income Tax Law or pursuant to a double taxation convention,

(bb) deductible pursuant to Paragraph 34c(3) of the Income Tax Law if there was no deduction under Paragraph 4(4),

(cc) deemed to have been paid pursuant to a double taxation convention.

(g) the amount of the deduction for depreciation or diminution of substance pursuant to the first sentence of Paragraph 3(3),

(h) the amount of the reduction in corporation tax claimed by the distributing company under Paragraph 37(3) of the Corporation Tax Law;

2. the investment company shall send to the investors, in the German language, for the income equivalent to a distribution, the information referred to in point 1 in respect of a holding in an investment, not later than four months after the end of the accounting year in which it is deemed to have been paid;

3. the investment company shall publish the information referred to in points 1 and 2, together with the annual report within the meaning of Paragraph 45(1) and Paragraph 122(1) and (2) of the Law on Investments [(Investmentgesetz)] in the electronic bulletin of official announcements; the information must be accompanied by a certificate issued by a person authorised to provide professional assistance pursuant to Paragraph 3 of the Law on the profession of tax advisor [(Steuerberatungsgesetz)], of an officially recognised audit agency or similar agency, confirming that the information was established in accordance with the rules of German tax law; paragraph 323 of the Commercial Code [(Handelsgesetzbuch)] shall

apply, *mutatis mutandis*. If the statement of account is not published in the electronic bulletin of official announcements in accordance with the Law on Investments, the reference under which the statement of account is published in the German language must also be given;

4. the foreign investment company shall calculate and state, together with the redemption price, the total income deemed to have been paid after 31 December 1993 to the holder of units in foreign investments on which tax has not yet been paid;

5. the foreign investment company shall, at the request of the central federal tax office, provide comprehensive proof to that office, within three months, of the veracity of the information set out in points 1, 2 and 4. If the certificates are drawn up in a foreign language, a certified translation into German may be required. If the foreign investment company gives information of an incorrect amount, it must take account of the difference in the amount on its own initiative or where so requested by the federal finance office in the notice for the current year.

If the information referred to in point 1(c) or (f) is not available, the income shall be taxed in accordance with the first sentence of Paragraph 2(1), and Paragraph 4 shall not apply. …'

6 Paragraph 6 of the InvStG, entitled 'Taxation in the event of failure of notification' provides, in the version in force from 9 December 2004 (BGBl. 2004 I, p. 3310):

'If the requirements of Paragraph 5(1) are not fulfilled, the investor shall be taxed on the distributions of income from units, the interim profit and 70% of the capital gains arising from the difference between the first fixed redemption price in a calendar year and the last fixed redemption price in the same year; the tax shall relate to not less than 6% of the last fixed redemption price in a calendar year. If a redemption price is not fixed, the stock exchange or market price shall be used. …'

7 According to the information from the German Government, Paragraphs 5 and 6 of the InvStG have subsequently been amended several times: However, those amendments do not have any impact on the dispute in the main proceedings.

The main proceedings and the question referred

8 The van Casters own units in non-resident capital investment funds held on deposit with a Belgian bank.

9 From 2003, the income from those capital investments was uniformly and individually determined in respect of the van Casters and half of that income was imputed to each of them.

10 For the financial years 2003 to 2006, all the units held by the van Casters were either in so-called 'black' funds, the taxation of which, until 2003, was governed by Paragraph 18(3) of the Law on the Sale of Foreign Investment Units and on the Taxation of Income from Foreign Investment Units (Gesetz über den Vertrieb ausländischer Investmentanteile und über die Besteuerung der Erträge aus ausländischen Investmentanteilen, AuslInvestmG BGBl. 1998 I, p. 2820), or units in so-called non-transparent funds, the taxation of which, from 2004, was governed by Paragraph 6 of the InvStG.

11 Over the financial years 2007 and 2008, the van Casters reported earnings from units in six investment funds, three of which were 'non-transparent' funds.

12 The van Casters declared the income from their units in those investment funds by way of an estimate or valuation, on the basis of justifications attached to their declaration or information taken from a stock exchange newspaper. For 2003 to 2008, they accordingly declared income of EUR 8 435.43, EUR 10 500.94, EUR 12 318.18, EUR 13 263.04, EUR 12 672.46 and EUR 14 272.88, respectively, coming to a total of EUR 71 462.93.

13 The Finanzamt Essen-Süd assessed the income from non-transparent funds on a flat-rate basis in accordance with the rule laid down in Paragraph 6 of the InvStG. According to the Finanzamt's calculations the income earned by the van Casters for 2003 to 2008 amounted to EUR 38 503.53, EUR 32 691.41, EUR 63 603.62, EUR 49 463.21, EUR 37 045.03 and EUR 25 139.27, respectively, coming to a total of EUR 246 446.07.

14 The van Casters contested the Finanzamt's decision before the Finanzgericht Düsseldorf (Finance Court, Düsseldorf). At the hearing before the referring court, the parties to the main proceedings agreed that the income in 2003 should be held to be 4% of the redemption price established on 31 December 2003, that is to say, EUR 19 848.07.

15 With regard to the financial years 2004 to 2008, the van Casters asked that the tax assessment notices be amended and that the basis of assessment of the income relating to those years be determined on the basis of the amounts declared, since the applicants claim that Article 6 of the InvStG is contrary to the provisions of the FEU Treaty on the free movement of capital.

16 The Finanzgericht Düsseldorf considers that, although the flat-rate tax mechanism under Paragraph 6 of the InvStG applies equally to non-transparent resident and non-resident investment funds, that provision could lead to indirect discrimination against non-transparent resident funds, since resident funds generally meet the requirements of Paragraph 5(1) of the InvStG, whereas that would generally not be the case in respect of non-resident funds.

17 Accordingly, the Finanzgericht Düsseldorf decided to stay proceedings and to refer the following question to the Court for a preliminary ruling:

'Does the flat-rate taxation of income from so-called non-transparent (domestic and) foreign investment funds under Paragraph 6 of [the InvStG] infringe EU law [Article 63 TFEU] because it amounts to a disguised restriction on the free movement of capital [Article 65(3) TFEU]?

The question referred for a preliminary ruling

Preliminary observations

18 It is apparent from the documents before the Court that, depending on how the investment company meets the requirements set out in Paragraph 5(1) of the InvStG, investors are subject to three distinct taxation regimes.

19 Where an investment company provides all the information referred to in Paragraph 5(1) of the InvStG in the manner and within the time limits prescribed, the income from holdings in investment funds is subject to the general rules of so-called transparent taxation, in accordance with the first sentence of Paragraph 2(1) and Paragraph 4 of the InvStG.

20 Where the investment company has neither published nor declared the information prescribed in Paragraph 5(1), point 1(c) and (f) of the InvStG, the holdings in the fund may, in accordance with the second sentence of Paragraph 5(1) thereof, be subject to the so-called semi-transparent tax regime. That calculation method means that the earnings for which certain information has not been

provided are not included in the basis of assessment of the taxpayer's income.

21 Where the conditions of Paragraph 5(1) of the InvStG are not met, the holdings in investment funds are taxed at a flat-rate under Paragraph 6 of the InvStG and the taxpayer is required to pay tax on an amount determined in accordance with the calculation methods laid down in that paragraph.

22 Paragraph 5(1) of the InvStG lays down, first, at points 1 to 3 thereof, obligations relating to the communication to shareholders, in the German language, of the information prescribed by that article and publication in the electronic federal bulletin of official announcements accompanied by a certificate issued by a professional authorised by law to provide tax advisory services confirming that the information was established in accordance with German tax law rules, which apply to all resident and non-resident investment companies and, second, at points 4 and 5 thereof, additional obligations, which apply only to non-resident investment companies.

23 The referring court did not specify the obligations which the non-resident investment funds at issue in the main proceedings failed to observe, but it is apparent from the reasons for the request for a preliminary ruling that the referring court questions, in particular, whether those provisions of German law, which are applicable without distinction to resident and non-resident investment funds alike, are compatible with the principle of free movement of capital.

24 In those circumstances, it must be considered that by its question, the referring court asks, in essence, whether Article 63 TFEU must be interpreted as precluding national legislation such as that at issue in the main proceedings which provides that the failure by a non-resident investment fund to comply with the obligations to communicate and publish certain information prescribed by that legislation, which are applicable without distinction to resident and non-resident investment funds alike, resulting in the flat-rate taxation of the income that the taxpayer earns from that investment fund.

The existence of a restriction

25 It follows from the Court's settled case-law that the measures prohibited by Article 63(1) TFEU, as restrictions on the movement of capital, include those that are such as to discourage non-residents from making investments in a Member State or to discourage that Member State's residents from doing so in other States (see judgment in C-338/11 to C-347/11 *Santander Asset Management SGIIC and Others*, EU:C:2012:286, paragraph 15 and the case-law cited, and judgment in C-375/12 *Bouanich*, EU:C:2014:138, paragraph 43).

26 In this case, it should be noted that the national legislation at issue in the main proceedings is characterised by the fact that the consequences of non-compliance by investment funds with the obligations of communication and publication under Paragraph 5(1) of the InvStG are borne by taxpayers who invest in those funds.

27 The flat-rate tax, applied in case of non-compliance with these obligations, involves calculating a minimum basis of assessment corresponding to 6% of the redemption price at the end of the calendar year, regardless of whether the value of the investment share has increased or decreased during the year in question.

28 Such a flat-rate calculation may result in an overstatement of the taxpayer's real income, especially, as noted by the Advocate General in point 43 of his Opinion, where interest rates remain low over a long period. The German Government also itself admits that the minimum basis of assessment corresponding to 6% of the redemption price will, at times of low interest rates, often be higher than that based on the actual income yielded by the fund concerned.

29 It is true that it cannot be ruled out that in years when investment funds generate particularly high income, the flat-rate tax could be more favourable than the general transparent tax regime, or that the income thus calculated could be achieved on average where investments are held over a long period, as the Finanzamt and the German Government respectively contend.

30 However, it must be noted, first, that the application of the flat-rate tax does not vary depending on how long the unit is held.

31 Second, it is clear from the Court's settled case-law that unfavourable tax treatment contrary to a fundamental freedom cannot be justified by the existence of other tax advantages, even supposing that such advantages exist (see judgment in C-182/06 *Lakebrink and Peters-Lakebrink*, EU:C:2007:452, paragraph 24 and the case-law cited).

32 It must, therefore, be held that a flat-rate tax, such as that resulting from the application of Paragraph 6 of the InvStG is likely to be disadvantageous to the taxpayer.

33 In such circumstances, it is apparent from the legislation at issue in the main proceedings that a taxpayer, who invested in a fund which does not meet the obligations under Paragraph 5(1) of the InvStG, cannot provide evidence or information to demonstrate his actual income.

34 Such a flat-rate tax is, therefore, likely to deter such a taxpayer from investing in funds which do not satisfy the obligations under that provision of national law.

35 As the German Government stated at the hearing, choosing to comply or not with these obligations is a matter for investment funds and depends, in particular, on their desire to obtain clients in Germany.

36 Accordingly, by their nature, those obligations are unlikely to be complied with by an investment fund which is not active in the German market and does not actively target that market. As noted by the Advocate General in point 42 of his Opinion, such a fund has little incentive to comply with such requirements.

37 Since such funds are generally non-resident funds, it should be noted that the national legislation at issue in the main proceedings is likely to deter a German investor from acquiring holdings in a non-resident investment fund, since such an investment is likely to expose such an investor to a disadvantageous flat-rate tax without offering him the opportunity to produce evidence or information which could demonstrate the actual size of that investor's income.

38 Such legislation constitutes, therefore, a restriction on the free movement of capital which is prohibited, in principle, by Article 63 TFEU.

Justification for the restriction on the free movement of capital

39 However, according to the Court's well-established case-law, national measures capable of hindering the exercise of the fundamental freedoms guaranteed by the Treaty or of making it less attractive may be allowed only if they pursue a legitimate objective in the public interest, are appropriate to ensuring the attainment of that objective, and do not go beyond what is necessary to attain the objective pursued (see, inter alia, judgment in C-296/12 *Commission* v *Belgium*, EU:C:2014:24, paragraph 32 and the case-law cited).

40 According to the Finanzamt and the German Government, the legislation at issue in the main proceedings is justified, first, by the need to safeguard the balanced allocation of the power to impose taxes between Member States.

41 In that regard, it should be recalled that the preservation of the balanced allocation between Member States of the power to tax is a legitimate objective recognised by the Court (see judgment in C-371/10, *National Grid Indus*, EU:C:2011:785, paragraph 45 and the case-law cited), since it may be accepted as a justification for a restriction, in particular, where the system in question is designed to prevent conduct capable of jeopardising the right of a Member State to exercise its fiscal jurisdiction in relation to activities carried out in its territory (see, in particular, judgments in *Santander Asset Management SGIIC and Others*, EU:C:2012:286, paragraph 47, and C-350/11 *Argenta Spaarbank*, EU:C:2013:447, paragraph 53 and the case-law cited).

42 The national legislation at issue in the main proceedings is intended, as the Finanzamt and the German Government argue, to ensure uniform treatment, in terms of taxation, first, between German taxpayers who have made direct investments in shares or bonds and those who have acquired holdings in investment funds and also, second, between the German taxpayers who have invested in resident funds and those who have invested in non-resident funds, while respecting the principle of equal taxation.

43 The purpose of that national legislation is not to prevent conduct capable of jeopardising the power of the Federal Republic of Germany to tax the activities within its territory or to tax the income of its residents acquired in another Member State.

44 Therefore, as regards the conditions for the application of the national legislation, the question of the allocation of the power to impose taxes between Member States does not arise.

45 Second, the Finanzamt, the German Government and the United Kingdom Government consider that the national legislation at issue is justified by the need to ensure effective fiscal supervision. The German Government states that that legislation is also justified by the need to ensure effective tax collection.

46 As the Court has already held, overriding reasons in the public interest capable of justifying a restriction on the exercise of freedom of movement guaranteed by the Treaty include both the need to guarantee the effectiveness of fiscal supervision (see, to that effect, judgments in C-101/05 *A*, EU:C:2007:804, paragraph 55; C-155/08 and C-157/08 *X-van Schoot and Passenheim*, EU:C:2009:368, paragraph 55; C-262/09 *Meilicke*, EU:C:2011:438, paragraph 41, and C-318/10 *SIAT*, EU:C:2012:415, paragraph 36) and the need to ensure effective collection of tax (see, to that effect, judgments in C-269/09 *Commission* v *Spain* EU:C:2012:439, paragraph 64; C-498/10 *X*, EU:C:2012:635, paragraph 39, and C-53/13 and C-80/13 *Strojírny Prostějov et ACO Industries Tábor*, EU:C:2014:2011, paragraph 46).

47 It is inherent in the principle of the fiscal autonomy of Member States that they determine the evidence that must be provided and the formal and material conditions which must be respected to enable the tax authorities to establish correctly the tax owed on the income earned from investment funds (see, by analogy, judgment in *Meilicke and Others*, EU:C:2011:438, paragraph 37).

48 As regards the case in the main proceedings, the national legislation at issue is predicated on the principle that only the investment funds themselves are capable of providing the information necessary for determining the basis of assessment of taxpayers who acquired holdings in these funds, since that information can only take the form of a publication in the electronic federal bulletin of official announcements accompanied by a certificate issued by a professional authorised by law to provide tax advisory services confirming that the information was established in accordance with German tax law rules.

49 The legislation of a Member State which indiscriminately prevents taxpayers who have acquired

holdings in non-resident investment funds from adducing evidence which satisfies criteria, in particular those of presentation, other than those laid down for national investments by the first Member State, goes beyond what is necessary to ensure effective fiscal supervision (see, to that effect, judgment in *Meilicke and Others*, EU:C:2011:438, paragraph 43).

50 It is not a priori inconceivable that those taxpayers may be able to provide relevant documentary evidence enabling the tax authorities of the Member State of taxation to ascertain, clearly and precisely, the information required to establish correctly the taxation of the income from investment funds (see, by analogy, judgment in *Meilicke and Others*, EU:C:2011:438, paragraph 44).

51 While German taxpayers themselves may not have all of the information required by the InvStG it is conceivable that they can obtain that information from the non-resident investment fund concerned and send it to the German tax authorities.

52 The content, the form and the degree of detail which the information submitted by the German taxpayer who acquired holdings in a non-resident investment funds must satisfy in order to take advantage of the transparent tax must be determined by the tax authorities in order to enable them to apply the tax properly (see, by analogy, judgment in *Meilicke and Others*, EU:C:2011:438, paragraph 45).

53 It is true, as the Finanzamt and the German Government contend, that the publication of information on tax bases and their verification by a professional authorised by law to provide tax advisory services confirming that the information was established in accordance with German tax law rules guarantees the uniform taxation of taxpayers who have acquired holdings in the same investment fund.

54 However, as pointed out by the European Commission, such uniformity could be achieved by an internal exchange of information among the German tax authorities.

55 Moreover, the tax authorities concerned have the power, pursuant to 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 taxation and taxation of insurance premiums (OJ 1977 L 336, p. 15), as amended by Council Directive 2004/106/EC of 16 November 2004 (OJ 2004 L 359, p. 30), in force at the material time, and Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799 (OJ 2011 L 64, p. 1) to request information from the authorities of another Member State for the purposes of obtaining all the information that may be necessary to effect a correct assessment of a taxpayer's tax liability (see, to that effect, judgments in *Haribo Lakritzen Hans Riegel and Österreichische Salinen*, EU:C:2011:61, paragraph 101, and *Meilicke and Others*, EU:C:2011:438, paragraph 51).

56 As regards the administrative burden on the tax authorities of the Member States of taxation that would result from taxpayers being allowed the opportunity to provide the information to demonstrate their income, it should be noted that administrative disadvantages are not alone sufficient to justify a barrier to the free movement of capital (see, to that effect, judgments in C-334/02 *Commission* v *France*, EU:C:2004:129, paragraph 29; C-386/04 *Centro di Musicologia Walter Stauffer*, EU:C:2006:568, paragraph 48, and C-418/07 *Papillon*, EU:C:2008:659, paragraph 54).

57 Consequently, national legislation, such as that at issue in the main proceedings, cannot be justified by the need to ensure effective fiscal supervision and effective tax collection, since it does not allow the taxpayer to provide evidence or information allowing him to prove his actual income.

58 It follows from all of the foregoing considerations that the answer to the question referred is that Article 63 TFEU must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which provides that the failure by a non-resident investment fund to comply with the obligations to communicate and publish certain information required by that legislation, which are applicable without distinction to resident and non-resident investment funds alike, resulting in the flat-rate taxation of the income which the taxpayer earns from that investment fund, since that legislation does not allow the taxpayer to provide evidence or information that could prove the actual size of that income.

Costs

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

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

Article 63 TFEU must be interpreted as precluding national legislation such as that at issue in the main proceedings which provides that the failure by a non-resident investment fund to comply with the obligations to communicate and publish certain information required by that legislation, which are applicable without distinction to resident and non-resident investment funds alike, resulting in the flat-rate taxation of the income which the taxpayer earns from that investment fund, since that legislation does not allow the taxpayer to provide evidence or information that could prove the actual size of that income.

[Signatures]

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* Language of the case: German.