JUDGMENT OF THE COURT (First Chamber)

21 May 2015 (*)

(Reference for a preliminary ruling — Free movement of capital — Derogation — Movement of capital involving the provision of financial services — National legislation providing for flat-rate taxation of investment income from holdings in foreign investment funds — Black funds)

In Case C-560/13,

REQUEST for a preliminary ruling under Article 267 TFEU from the Bundesfinanzhof (Germany), made by decision of 6 August 2013, received at the Court on 30 October 2013, in the proceedings

Finanzamt Ulm

v

Ingeborg Wagner-Raith,

intervener:

Bundesministerium der Finanzen,

THE COURT (First Chamber),

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

Advocate General: P. Mengozzi,

Registrar: K. Malacek, Administrator,

having regard to the written procedure and further to the hearing on 20 November 2014,

after considering the observations submitted on behalf of:

– Ms Wagner-Raith, by U. Ziegler, Rechtsanwalt,

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

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

– the United Kingdom Government, by S. Brighouse, acting as Agent, and K. Bacon, Barrister,

– the European Commission, by T. Scharf, A. Cordewener and W. Roels, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 18 December 2014,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 64(1) TFEU.

2 The request has been made in proceedings between Ms Wagner-Raith, who is the heir of Ms Maria Schweier, and the Finanzamt Ulm (Tax Office, Ulm) concerning the taxation of investment income from holdings in investment funds established in the Cayman Islands (an overseas territory of the United Kingdom of Great Britain and Northern Ireland).

Legal context

EU law

3 Article 1(1) of Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty [an article repealed by the Treaty of Amsterdam] (OJ 1988 L 178, p. 5) provides that, '[w]ithout prejudice to the following provisions, Member States shall abolish restrictions on movements of capital taking place between persons resident in Member States. To facilitate application of this Directive, capital movements shall be classified in accordance with the Nomenclature in Annex I.'

4 The capital movements listed in Annex I to Directive 88/361 include, in Section I, headed 'Direct investments', participation in new or existing undertakings with a view to establishing or maintaining lasting economic links.

5 Section IV of that annex, headed 'Operations in units of collective investment undertakings', includes, in part A relating to '[t]ransactions in units of collective investment undertakings', the acquisition by residents of units of foreign undertakings dealt in on a stock exchange and the acquisition by residents of units of foreign undertakings not dealt in on a stock exchange.

6 The 'explanatory notes' contained in that annex state as follows:

'For the purposes of this Nomenclature and the Directive only, the following expressions have the meanings assigned to them respectively:

Direct investments

Investments of all kinds by natural persons or commercial, industrial or financial undertakings, and which serve to establish or to maintain lasting and direct links between the person providing the capital and the entrepreneur to whom or the undertaking to which the capital is made available in order to carry on an economic activity. This concept must therefore be understood in its widest sense.

...

As regards those undertakings mentioned under I-2 of the Nomenclature which have the status of companies limited by shares, there is participation in the nature of direct investment where the block of shares held by a natural person [or] another undertaking or any other holder enables the shareholder, either pursuant to the provisions of national laws relating to companies limited by shares or otherwise, to participate effectively in the management of the company or in its control.

...'

German law

7 Paragraph 17 of the Law on the Sale of Foreign Investment Units and the Taxation of Income from

Foreign Investment Units (Gesetz über den Vertrieb ausländischer Investmentanteile und über die Besteuerung der Erträge aus ausländischen Investmentanteilen) of 28 July 1969 (BGBl. 1969 I, p. 986), in the version applicable between 1 January 2002 and 31 December 2003 ('the AuslInvestmG'), provided as follows in respect of the taxation of income from units in foreign investment funds:

'(1) Distributions on foreign investment units … shall count as income from capital assets within the meaning of Paragraph 20(1)(1) of the Law on Income Tax …

...

(3) Subparagraphs 1 to 2a shall apply only:

1. (a) where the foreign investment company has notified the authority of its intention to sell foreign investment units falling within the scope of this Law by way of public offer, public advertising or by similar means … or

   (b) where foreign investment units which are admitted to official trading or to the regulated market on a German stock exchange are not sold by way of public offer, public advertising or by similar means other than the announcements prescribed by the stock exchange (Paragraph 1(2)), and the foreign investment company has appointed an agent having a place of establishment or residence falling within the area covered by this Law who is able to represent it in its relations with the tax authorities and before the courts exercising fiscal jurisdiction, and

2. where the foreign investment company notifies the holders of foreign investment units in German on the occasion of every distribution … [of the amount of the distribution per unit and of certain amounts included in that distribution]

...

and furnishes proof of the accuracy of that information on request.'

8 Paragraph 18 of the AuslInvestmG, in the version in force between 30 December 1993 and 31 December 2000, provided:

'(1) If the conditions laid down in Paragraph 17 are not satisfied, distributions on foreign investment units … shall count as income from capital assets within the meaning of Paragraph 20(1)(1) of the Law on Income Tax …

(2) Proof shall be furnished of the bases of assessment referred to in subparagraph 1. Documents serving as evidence shall be drafted in the German language or be accompanied by a German translation. The foreign investment company shall appoint an agent having a place of establishment or residence falling within the area covered by this Law who is able to represent it in its relations with the tax authorities and before the courts exercising fiscal jurisdiction.

(3) If proof is not duly furnished or no agent is appointed, the recipient shall be deemed to have received the distributions on foreign investment units as well as 90% of the positive difference between the first redemption price established in the calendar year and the last redemption price established in the calendar year; he shall be deemed to have received at least 10% of the final redemption price established in the calendar year. ...'

9 The Law on Investment Management Companies (Gesetz über Kapitalanlagegesellschaften), in the

version applicable to national investment funds during the period at issue in the main proceedings, provided in essence that unit-holders were to be taxed in accordance with the ‘principle of transparency’, that is to say, treated as if they had themselves directly earned the income derived from the collective portfolio.

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

10 In the years 1997 to 2003, Ms Schweier had an account with LGT Bank AG (‘LGT’) in Liechtenstein, containing, inter alia, holdings in investment funds which were established in the Cayman Islands. Those investment funds, which did not comply with the obligations regarding notification, authorisation and proof laid down in Paragraph 17(3) of the AuslInvestmG and which had not appointed an agent pursuant to the third sentence of Paragraph 18(2) of the AuslInvestmG, were, for that reason, regarded in Germany as ‘black’ funds, to which Paragraph 18(3) of the AuslInvestmG was liable to be applied.

11 In 2008, Ms Schweier informed the Finanzamt Ulm for the first time that in the years in question she had received investment income from, inter alia, the account which she held with LGT. She thus declared that income to that tax authority by means of amended tax returns, after calculating its amount on the basis of the documents that LGT had made available to her, and then she determined a lump sum in respect of each of the tax years at issue pursuant to Paragraph 18(3) of the AuslInvestmG.

12 The tax authority concerned amended Ms Schweier’s tax notices for those tax years, determining the amount of investment income from the holdings at issue as being EUR 44 970.69 for 1997, EUR 63 779.07 for 1998, EUR 106 826.16 for 1999, EUR 94 999.24 for 2000, EUR 96 055.10 for 2001, EUR 100 157.99 for 2002 and EUR 116 823.07 for 2003, that is to say, a total of EUR 623 611.32.

13 Ms Schweier lodged an objection against that additional tax, arguing that the flat-rate taxation provided for in Paragraph 18(3) of the AuslInvestmG was incompatible with the principle of the free movement of capital. According to her, the additional taxation had to be based only on actual earnings, the amount of which had to be evaluated. Ms Schweier asked for her investment income to be taxed under Paragraph 18(1) of the AuslInvestmG and made available to the tax authority concerned the documents and the calculations necessary for that purpose.

14 After the Finanzamt Ulm dismissed that objection, Ms Schweier brought an action before the Finanzgericht Baden-Württemberg (Finance Court, Baden-Württemberg, Germany). By judgment of 27 February 2012, that court essentially upheld the action, holding that Paragraph 18(3) of the AuslInvestmG infringed the principle of the free movement of capital; it consequently ruled that the investment income actually received by Ms Schweier in respect of the holdings in question was, for each of the tax years in question, lower than the sum determined in accordance with Paragraph 18(3) of the AuslInvestmG and amounted to a total of EUR 260 872.97. The Finanzamt Ulm brought an appeal on a point of law against that judgment before the Bundesfinanzhof (Federal Finance Court).

15 In the appeal on a point of law, the Finanzamt Ulm submits that Paragraph 18(3) of the AuslInvestmG must apply to the main proceedings, as that provision is covered by the standstill clause laid down in Article 64(1) TFEU. First, since the conduct of an investment fund is inextricably linked with the taxation of the investors who have holdings in that fund, Paragraph 18(3) of the AuslInvestmG is directed at not only the investors but also the investment funds themselves and therefore relates to the provision of financial services within the meaning of

Article 64(1) TFEU. Second, participation in an investment fund is a direct investment.

16 According to the referring court, the flat-rate taxation provided for in Paragraph 18(3) of the AuslInvestmG is liable to deter German investors from investing in funds which do not satisfy the requirements laid down in Paragraphs 17 and 18(1) of the AuslInvestmG, since that flat-rate taxation is, generally, greater than the taxation borne by investors with holdings in resident funds who do not provide proof of the income which they derive from them. In addition, it is not possible for a person possessing holdings in a 'black' fund to provide proof of the amount of income actually received and thereby to avoid that flat-rate taxation, whereas the Law on Investment Management Companies does not provide for flat-rate taxation of that kind in the case of investment in a resident fund.

17 The referring court explains that, essentially, the rule laid down in Paragraph 18(3) of the AuslInvestmG and applied by the Finanzamt Ulm to Ms Schweier in respect of the period in question already existed on 31 December 1993. It adds that the investment funds in which Ms Schweier possessed holdings had to be regarded as originating from a third country, since those funds had been set up on the basis of the rules governing authorisation and supervision in force in the Cayman Islands and the investment fund management companies concerned had their seat there.

18 However, the referring court doubts that the substantive conditions for applying Article 64(1) TFEU are met and that Paragraph 18(3) of the AuslInvestmG relates to the provision of financial services or to direct investment.

19 In those circumstances, the Bundesfinanzhof decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) In the case of holdings in third-country funds, does the free movement of capital provided for in Article [63 TFEU] not preclude national legislation (in this instance Paragraph 18(3) of the AuslInvestmG) which provides that, in certain circumstances, national investors in foreign investment funds are deemed to have received, in addition to distributions, notional earnings in the amount of 90% of the difference between the first and the last redemption price of the year, but of at least 10% of the final redemption price (or of the stock exchange or market value), because that legislation, which has remained essentially unchanged since 31 December 1993, is concerned with the provision of financial services within the meaning of the rule on the protection of established rights contained in Article [64(1) TFEU]?

If the answer to Question 1 is in the negative:

(2) Does the holding in such an investment fund established in a third country always constitute a direct investment within the meaning of Article [64(1) TFEU] or is the answer to this question dependent on whether, under the national law of the State in which the investment fund is established or on other grounds, the holding allows the investor to be actually involved in the management or control of the investment fund?'

Consideration of the questions referred

Question 1

20 By its first question, the referring court asks, in essence, whether Article 64 TFEU must be interpreted as meaning that national legislation, such as that at issue in the main proceedings, which provides for flat-rate taxation of the income of holders of units in a non-resident investment fund when the latter has not fulfilled certain statutory obligations constitutes a measure which relates to

movement of capital involving the provision of financial services within the meaning of that article.

21 Article 64(1) TFEU sets out an exhaustive list of capital movements to which Article 63(1) TFEU is liable not to apply and, as a derogation from the fundamental principle of the free movement of capital, it must be interpreted strictly (see judgment in Case C-181/12 *Welte*, EU:C:2013:662, paragraph 29).

22 It must therefore be determined whether the legislation at issue in the main proceedings relates to capital movements and, if so, whether those capital movements involve the provision of financial services.

23 In the absence of a definition of 'movement of capital' in the FEU Treaty, the Court has recognised the nomenclature that constitutes Annex I to Directive 88/361 as having indicative value, it being understood that, as pointed out in the introduction to that annex, the list which it contains is not exhaustive (see inter alia, to this effect, judgments in *van Hilten-van der Heijden*, C-513/03, EU:C:2006:131, paragraph 39; *Missionswerk Werner Heukelbach*, C-25/10, EU:C:2011:65, paragraph 15; and *Welte*, C-181/12, EU:C:2013:662, paragraph 20).

24 The acquisition by residents of units of foreign undertakings dealt in or not dealt in on a stock exchange is among the capital movements set out in part A, relating to '[t]ransactions in units of collective investment undertakings' of Section IV ('Operations in units of collective investment undertakings') of Annex I to Directive 88/361.

25 Although the receipt of dividends from a collective investment undertaking is not expressly mentioned in that nomenclature as a 'capital movement', it may be linked to the acquisition by residents of units of foreign undertakings dealt in or not dealt in on a stock exchange and, therefore, is indissociable from a capital movement (see, to this effect, judgment in *Verkooijen*, C-35/98, EU:C:2000:294, paragraph 29).

26 Consequently, national legislation, such as that at issue in the main proceedings, which regulates taxation of the income of investors who possess holdings in collective investment undertakings, by laying down methods of taxation that differ according to whether the non-resident investment fund concerned complies with Paragraphs 17(3) and 18(2) of the AuslInvestmG, constitutes a measure which relates to capital movements within the meaning of that nomenclature.

27 It must therefore be determined whether the capital movements to which legislation such as that at issue in the main proceedings relates involve the provision of financial services within the meaning of Article 64(1) TFEU.

28 It is necessary, in the first place, to examine the argument, put forward by the referring court and the European Commission in particular, that only measures which are directly intended for the financial service providers as such and which govern the carrying out and supervision of their financial transactions and their authorisation or liquidation can fall within Article 64(1) TFEU, which is not so in the case of rules relating to taxation of investors.

29 In that regard, it is appropriate, first of all, to recall the demarcation between the Treaty provisions relating to the freedom to provide services and those governing the free movement of capital.

30 The Court has already held that it is apparent from the wording of Article 56 TFEU and Article 63 TFEU, and the position which they occupy in two different chapters of Title IV of the Treaty, that, although closely linked, those provisions were designed to regulate different situations and they each have their own field of application (see, to this effect, judgment in *Fidium Finanz*, C-452/04,

EU:C:2006:631, paragraph 28).

31 It is apparent from settled case-law of the Court that, in order to determine whether national legislation falls within the scope of one or other of the fundamental freedoms guaranteed by the Treaty, the purpose of the legislation concerned must be taken into consideration (see, to this effect, judgments in *Holböck*, C-157/05, EU:C:2007:297, paragraph 22 and the case-law cited; *Dijkman and Dijkman-Lavaleije*, C-233/09, EU:C:2010:397, paragraph 26; and *Test Claimants in the FII Group Litigation*, C-35/11, EU:C:2012:707, paragraph 90).

32 As the Advocate General has observed, in essence, in point 67 of his Opinion, national legislation whose purpose relates principally to the provision of financial services falls within the Treaty provisions relating to the freedom to provide services, even though it could result in or involve capital movements.

33 Indeed, the Court has already held that national rules whereby a Member State makes the granting of credit on a commercial basis, on national territory, by a company established in a third country subject to prior authorisation, and which thus impede access to the financial market for that company, affect primarily the exercise of the freedom to provide services within the meaning of Article 56 TFEU et seq. (judgment in *Fidium Finanz*, C-452/04, EU:C:2006:631, paragraphs 49 and 50).

34 On the other hand, national measures whose purpose relates at least principally to capital movements fall within the field of application of Article 64(1) TFEU.

35 That being so, to require, in order for measures to fall within Article 64(1) TFEU, that they relate directly to the financial service providers as such and that they govern the carrying out and supervision of their financial transactions and their authorisation or liquidation would effectively call into question the demarcation between the Treaty provisions relating to the freedom to provide services and those governing the free movement of capital.

36 The interpretation that Article 64(1) TFEU is not intended to cover situations falling within the freedom to provide services is also confirmed by the fact that, in contrast to the chapter concerning the free movement of capital, the chapter regulating the freedom to provide services does not contain any provision which enables service providers who are nationals of third countries and established outside the European Union to rely on those provisions, as the objective of the latter chapter is to secure the freedom to provide services for nationals of Member States (judgment in *Fidium Finanz*, C-452/04, EU:C:2006:631, paragraph 25).

37 By contrast, it is apparent from Articles 63 TFEU and 64(1) TFEU that any restriction on the movement of capital involving the provision of financial services is in principle prohibited between Member States and third countries, unless such a restriction existed, under national or EU law, on 31 December 1993 or, as the case may be, 31 December 1999.

38 Accordingly, on account of the differences that exist between the provisions relating to the freedom to provide services and those relating to the free movement of capital, as regards their respective territorial and personal scope, the situations referred to in Article 64(1) TFEU are necessarily other than those referred to in Article 56 TFEU et seq.

39 Next, as the Advocate General has observed in point 74 of his Opinion, the decisive criterion for the application of Article 64(1) TFEU is concerned with the causal link between the capital movements and the provision of financial services and not with the personal scope of the contested national measure or its relationship with the provider, rather than the recipient, of such services. As

has already been pointed out in paragraph 21 of the present judgment, the field of application of Article 64(1) TFEU is defined by reference to the categories of capital movements which are capable of being subject to restrictions.

40 Consequently, the fact that a national measure concerns first and foremost the investor and not the provider of a financial service cannot prevent that measure from falling within Article 64(1) TFEU.

41 Finally, contrary to the Commission's submissions, it is clear from the Court's settled case-law that the tax legislation of the Member States is capable of falling within Article 64(1) TFEU (see, inter alia, judgments in *Test Claimants in the FII Group Litigation*, C-446/04, EU:C:2006:774, paragraphs 174 to 196; *Holböck*, C-157/05, EU:C:2007:297, paragraphs 37 to 45; and *Prunus and Polonium*, C-384/09, EU:C:2011:276, paragraphs 27 to 37).

42 In the second place, as regards the scope of the derogation laid down in Article 64(1) TFEU, it should be borne in mind that the strict interpretation of that derogation is intended to preserve the practical effect of Article 63 TFEU.

43 Accordingly, in order to be capable of being covered by that derogation, the national measure must relate to capital movements that have a sufficiently close link with the provision of financial services.

44 As the Advocate General has stated in point 74 of his Opinion, in order for there to be a sufficiently close link, it is necessary that a causal link exists between the movement of capital and the provision of financial services.

45 It follows that national legislation which, in applying to capital movements to or from third countries, restricts the provision of financial services falls within Article 64(1) TFEU (see, by analogy with capital movements involving direct investment or establishment within the meaning of Article 64(1) TFEU, judgments in *Test Claimants in the FII Group Litigation*, C-446/04, EU:C:2006:774, paragraph 183, and *Holböck*, C-157/05, EU:C:2007:297, paragraph 36).

46 In the present instance, the acquisition of units in investment funds situated in the Cayman Islands and the receipt of the dividends deriving from them involve the existence of financial services provided by those investment funds to the investor concerned. Such investment may be distinguished from direct acquisition of company shares on the market by an investor in that, as a result of those services, the investor can benefit, in particular, from increased asset diversification and better spreading of risk.

47 National legislation such as that at issue in the main proceedings, which provides for flat-rate taxation, combined with the investor's inability to be taxed on the income which he has actually received, when the non-resident investment fund does not fulfil the conditions laid down in Paragraphs 17(3) and 18(2) of the AuslInvestmG, is liable to deter resident investors from acquiring units in non-resident investment funds and therefore results in those investors having recourse to the services of such funds less frequently.

48 Consequently, having regard to all the foregoing, the answer to the first question is that Article 64 TFEU must be interpreted as meaning that national legislation, such as that at issue in the main proceedings, which provides for flat-rate taxation of the income of holders of units in a non-resident investment fund when the latter has not fulfilled certain statutory obligations constitutes a measure which relates to movement of capital involving the provision of financial services within the meaning of that article.

Question 2

49 Given the answer to the first question, there is no need to answer the second question.

Costs

50 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 64 TFEU must be interpreted as meaning that national legislation, such as that at issue in the main proceedings, which provides for flat-rate taxation of the income of holders of units in a non-resident investment fund when the latter has not fulfilled certain statutory obligations constitutes a measure which relates to movement of capital involving the provision of financial services within the meaning of that article.

[Signatures]

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* Language of the case: German.