Reports of Cases

OPINION OF ADVOCATE GENERAL
PIKAMÄE
delivered on 5 June 2019 [1]

Case C-641/17

College Pension Plan of British Columbia
v
Finanzamt München III

(Request for a preliminary ruling
from the Finanzgericht München (Finance Court, Munich, Germany))

(Reference for a preliminary ruling — Direct taxation — Free movement of capital — Movement of capital between Member States and third countries — Corporation tax — Resident and non-resident pension funds — Taxation of dividends from share portfolios — Withholding tax — Setting-off of full amount of withholding tax against corporation tax — Reduction of taxable profit by means of mathematical accounting provisions intended to cover pension payments — Restriction — Comparability — Taking into account of mathematical provisions — Connection between mathematical and other technical provisions, on the one hand, and the receipt of dividends, on the other — Justification — Conventions for the avoidance of double taxation — Standstill clause — Temporal and substantive conditions)

1. By the present request for a preliminary ruling, made pursuant to Article 267 TFEU, the Finanzgericht München (Finance Court, Munich, Germany) refers two questions to the Court as to the interpretation of provisions of primary law concerning free movement of capital, namely Articles 63 to 65 TFEU.[2] What lies at the heart of this reference for a preliminary ruling is the interaction between such free movement and the content of national direct tax provisions.

2. The present request has been made in proceedings between College Pension Plan of British Columbia ('CPP'), a pension fund in the form of a trust under Canadian law, on the one hand, and the Finanzamt München (Abteilung III) (Munich Tax Office, Section III, Germany) on the other. More particularly, during the period from 2007 to 2010, the trust received, through a Canadian fiduciary, dividends from various German public limited companies, which dividends the German tax authorities refused to exempt from German tax on income from capital.

1 Original language: French.

2 Since the questions referred for a preliminary ruling relate to Articles 63 to 65 TFEU, and since those provisions are in precisely the same terms as their predecessors, Articles 56 to 58 of the Treaty establishing the European Community (EC Treaty), references will be to Articles 63 to 65 TFEU notwithstanding that part of the factual background relates to a period before 1 December 2009.

3. The Court is asked, amongst other things, to determine whether the provisions of the FEU Treaty on the free movement of capital are to be interpreted as precluding German legislation under which withholding tax on dividends can be set off, by a resident pension fund, against the corporation tax it is liable to pay, and by virtue of which, in that context, the amount of taxable profit can be reduced by reference to accounting provisions, when no such set-off is available to a non-resident pension fund. In addition, the question arises of whether the so-called 'standstill' clause in Article 64(1) TFEU is applicable.

4. The Court has previously had occasion to consider the tax system applicable to dividends paid to partially taxable pension funds, from the perspective of free movement of capital, in a number of cases.[3] While there is already a rich vein of case-law, the issues of whether or not there is a restriction, and whether resident and non-resident taxpayers are in comparable situations, can sometimes prove to be complex. The present case illustrates this very well.

I. Legal background

A. Law on the supervision of insurance bodies

5. It is apparent from the file submitted to the Court that, during the years 2007 to 2010, pension funds and their activities were governed by the Versicherungsaufsichtsgesetz (Law on the supervision of insurance bodies), in the version published on 17 December 1992 ('the VAG 1992').[4] Paragraph 112 of the VAG 1992 contained a definition of 'pension fund'. According to the documents submitted to the Court, paragraph 1 of that provision was in the following terms:

'A pension fund is a provident institution with legal capacity

'1. which provides, by capitalisation, occupational pension benefits for one or more employers in favour of their employees,

2. which cannot guarantee, by way of insurance, in relation to any of the benefits for which provision is made, the amount of that benefit or the amount of the future contributions to be paid in respect of it,

3. under which employees are entitled to the benefits in their own right, as against the pension fund, and

4. which is obliged to provide the pension benefits in the form of a lifetime annuity.'

6. The VAG 1992 was repealed by the Law on the modernisation of financial control of insurance of 1 April 2015,[5] and replaced by the VAG 2015. Paragraph 236(1) of the VAG 2015 contains a definition of 'pension fund', which is in the same terms as the definition in Paragraph 112 of the VAG 1992.

3 See, inter alia, judgments of 8 November 2012, *Commission* v *Finland* (C-342/10, EU:C:2012:688); of 22 November 2012, *Commission* v *Germany* (C-600/10, EU:C:2012:737); and of 2 June 2016, *Pensioenfonds Metaal en Techniek* (C-252/14, EU:C:2016:402).

4 German Official Journal (BGBl.) 1993 I, p. 2.

5 BGBl. 2015 I, p. 434.

B. Tax legislation relating to pension funds

7. It is apparent from the documents submitted to the Court that the German system of taxation of income from capital is laid down in the Einkommensteuergesetz (Law on Income Tax; 'the EStG'), in the version published on 19 October 2002,[6] in conjunction, as regards the taxation of legal persons, with the Körperschaftssteuergesetz (Law on corporation tax; 'the KStG'), in the version published on 15 October 2002.[7]

1. The tax system applicable to pension funds with registered offices in Germany

8. As a capital company with a registered office in Germany, a German pension fund is fully liable to corporation tax under Paragraph 1(1) No 1 of the KStG. Pursuant to Paragraph 7(1) of the KStG, its taxable income is subject to corporation tax. Pursuant to Paragraph 23 of the KStG, the profits of German pension funds are liable to corporation tax at the rate of 15%.

9. Under the first sentence of Paragraph 8(1) of the KStG, taxable income is determined in accordance with the provisions of the EStG. The combined effect of Paragraph 8(2) of the KStG and Paragraph 2(1) No 2 of the EStG is that all the income of a fully taxable pension fund is regarded as arising from industrial or commercial activity. Under Paragraph 2(2) No 1 of the EStG, the income arising from industrial or commercial activity is the profit realised during the tax year in question.

10. The tax reliefs provided for in respect of dividends and capital gains in Paragraph 8b(1) and (2) of the KStG are not applicable to pension funds, by virtue of the first and fifth sentences of Paragraph 8b(8) of the KStG.

11. Under Paragraph 20(1) of the EStG, dividends distributed out of profits are regarded as income from capital.

12. Pursuant to Paragraphs 43 and 44 of the EStG, tax on income from capital is collected by way of a withholding tax on such income, and is payable by the entity making the distribution. The amount of such tax is 25% of the gross dividends.

13. The first sentence of Paragraph 4(1) of the EStG provides that 'the profit is the difference between the assets of the undertaking at the end of the financial year and the assets of the undertaking at the end of the previous financial year, plus the value of withdrawals, less the value of contributions'.

14. Under Paragraph 5 of the EStG, the assets are valued in accordance with commercial law accounting principles. The difference is therefore calculated on the basis of a tax balance sheet, which is itself derived from the commercial balance sheet.

15. Under the first sentence of Paragraph 31(1) of the KStG, read in conjunction with Paragraph 36(2) No 2 of the EStG, tax on income from capital chargeable on dividends, which is payable by way of the withholding tax and has already been paid in the tax year, may be set off in its entirety against corporation tax.

16. The second sentence of Paragraph 36(4) of the EStG provides that 'any net surplus to the taxable person shall be paid to him after notification of the tax notice'.

6 BGBl. 2002 I, p. 4210, and BGBl. 2003 I, p. 179.

7 BGBl. 2002 I, p. 4144.

17. According to the information provided in the order for reference, for the purposes of the tax system German legislation distinguishes between profits made on own funds ('returns on accounting investments') and profits made on 'cover funds' [8] ('returns on non-accounting investments').

18. As regards returns on accounting investments, where the financial returns exceed the technical interest rate used to calculate the contributions due from members of the pension fund, those returns are directly credited to the various pension fund agreements. They increase not only the assets but also the liabilities shown on the pension fund's tax balance sheet, in particular the mathematical provisions. [9] In such a situation the profit deriving from the receipt of the dividends is completely neutralised, and there is no resultant taxable profit.

19. As regards returns on non-accounting investments, where the financial returns exceed the technical interest rate used to calculate the contributions due from members of the pension scheme, at least 90% of those returns is credited to the agreements with members. That 90% of the returns is reflected in an increase in the value of both the assets and the liabilities shown on the tax balance sheet, and in particular, in the value of the mathematical provisions it shows. This element of the profit deriving from the receipt of dividends is completely neutralised, and there is no resultant taxable profit. On the other hand, the remaining element, of up to 10% of the profits, is not credited to the various pension fund agreements, and the resultant increase in assets is not accompanied by a corresponding increase in liabilities, resulting in a profit which must be taken into account for tax purposes.

2. The tax system applicable to foreign pension funds

20. Under Paragraph 2(1) of the KStG, a foreign pension fund which does not have either its management or its registered office in Germany is partially subject to corporation tax, in respect of income arising within German territory.

21. The combined effect of Paragraph 8(1) of the KStG, Paragraph 49(1) No 5a of the EStG and Paragraph 20(1) No 1 of the EStG, is that dividends received by a foreign pension fund constitute income from capital which is subject to a limited tax obligation. Such dividends are fully taxable under the fifth sentence of Paragraph 8b(8) of the KStG.

22. In the case of a partially taxable pension fund, the tax is recovered as a withholding tax and the entity paying the dividends is obliged to deduct the tax on income from capital, which amounts in principle, under Paragraph 43(1) No 1 and Paragraph 43a(1) No 1 of the EStG, to 25% of the gross dividends.

23. Under the third sentence of Paragraph 50d(1) of the EStG, where the taxation of dividends is limited to 15% under a tax convention, and the pension fund makes a claim for reimbursement to the Bundeszentralamt für Steuern (Central Tax Office, Germany), the difference between the tax on income from capital deducted and the tax rate authorised under the relevant tax convention is reimbursed to the fund.

24. In accordance with Paragraph 32(1) No 2 of the KStG, where the person entitled to the income is partially taxable in Germany, the 15% tax on income from capital is definitive.

8 The German term used in the order for reference is 'Deckungsstock'.

9 The mathematical provisions are accounting provisions of a certain type, corresponding to reserves constituted by the pension fund in order to ensure that the retirement benefits can be paid. They must be considered in the light of Paragraph 341f of the Handelsgesetzbuch (Commercial Code).

25. According to the referring court, this means that foreign pension funds are unable to set the tax on income from capital off against corporation tax, and are likewise unable to deduct any business expenditure from their taxable income. The referring court states that the conditions for reimbursement of tax on income from capital to partially taxable companies, laid down in Paragraph 32(5) of the KStG, are not satisfied.

C. The double taxation agreement concluded between the Federal Republic of Germany and Canada

26. The Agreement between Canada and the Federal Republic of Germany for the Avoidance of Double Taxation with respect to Taxes on Income and certain other Taxes, the prevention of Fiscal Evasion and the Assistance in Tax Matters, concluded in Berlin on 19 April 2001 ('the bilateral double taxation agreement')[10] provides, in Article 10(2)(b), that the State in which the dividends originate may retain 15% of their gross amount.

27. Under Article 23(1)(a) of the bilateral double taxation agreement, Canada, as the State of residence, prevents the double taxation of dividends by means of deduction from Canadian tax.

II. The main proceedings and the questions referred for a preliminary ruling

28. The corporate object of CPP is to manage capital so as to provide for the payment of pensions to former officials of the province of British Columbia. To that end it constitutes accounting provisions in its balance sheets, corresponding to its pension guarantee commitments. CPP holds shares in German public limited companies through a portfolio management company. CPP and that fiduciary company entered into a fiduciary agreement under which the fiduciary company is obliged to follow the directions and instructions given by its principal, CPP, as regards investment decisions. In Canada, CPP is completely exempt from taxation of profits.

29. It had shareholdings of less than 1% in various German public limited companies. During the years 2007 to 2010, those shareholdings resulted in dividends being paid to CPP in the manner described in points 17 to 19 of this Opinion. In accordance with Article 10(2)(b) of the bilateral tax agreement, those dividends were subject, in respect of the tax on income from capital, to withholding tax at 15%, amounting in total to EUR 156 280.10.

30. On 23 December 2011, CPP applied to the Munich Tax Office for an exemption from tax on income from capital and for reimbursement of that amount of EUR 156 280,10, plus interest, on the ground that it was placed at a disadvantage by comparison with German pension funds, in that those funds were reimbursed in full in respect of the tax on income from capital chargeable on the dividends. By decision of 26 May 2014, the German tax authorities rejected that application.

31. An objection against that decision having been lodged and dismissed, CPP brought an action before the referring court, the Finanzgericht München (Finance Court, Munich).

32. As a preliminary point, that court states that CPP is comparable to a German pension fund within the meaning of Paragraph 236 of the VAG 2015, and in fact there is no dispute on that point. It is also common ground between the parties to the main proceedings that the shareholdings in German public limited companies, and the income which those shareholdings generate, are not to be ascribed to the fiduciary company, but to CPP as the real beneficiary.

10 BGBl. 2002 II, p. 670.

33. In the first place, the referring court explains that in the case of a resident pension fund, the corporation tax liability of the fund is based on the profit recorded in its balance sheet. The amount of such profit is affected by the receipt of dividends and the constitution of provisions, amongst other things, given that a resident pension fund may deduct provisions constituted with a view to the payment of pensions from its taxable profit. Thus, the receipt of dividends does not necessarily lead to an increase in the corporation tax due, but solely to a relatively limited increase.

34. By contrast, as regards a non-resident pension fund, the referring court notes that, where such a fund receives dividends, it is partially subject to German corporation tax. That tax is recovered in the form of a withholding tax, and the company paying the dividends must deduct the tax on income from capital which amounts, in principle, to 25% of the gross dividends, in accordance with Paragraph 43(1) No 1 and Paragraph 43a(1) No 1 of the EStG. Under Article 10(2)(b) of the double taxation agreement, the referring court observes, the tax on dividends is limited to 15%. The resulting difference between the tax on income from capital deducted and that rate of 15% is reimbursed, on request, by the Federal Central Tax Office.

35. In those circumstances, the referring court asks whether the difference in the tax treatment of non-resident pension funds, which are subject to a definitive withholding tax on dividends received, and resident pension funds, which are also subject to withholding tax on dividends, but are entitled to set such tax off against corporation tax, constitutes a restriction on the free movement of capital.

36. In the event of the Court holding that that difference in tax treatment constitutes a restriction on the free movement of capital, the referring court asks it to consider whether such a restriction could be justified.

37. In the second place, the referring court asks whether the standstill provision in Article 64(1) TFEU applies. In that regard, first, it observes that Paragraph 32(1) No 2 of the KStG, which results in the tax on income from capital of 15% being definitive where the person entitled to it is partially taxable in Germany, and which gives rise to the difference in treatment between resident and non-resident pension funds, was already in existence on 31 December 1993, in the form of Paragraph 50(1) No 2 of the KStG 1991, which was identical in wording and operation. Second, the referring court opines that it is of little significance that the rate of tax on income from capital, which, on 31 December 1993, stood at its current rate of 25%, under the combined provisions of Paragraph 43(1) No 1 and Paragraph 43a(1) No 1 of the EStG, was reduced to 20% on 1 January 2001, to be returned to 25% on 1 January 2009. The legislative amendment of 1 January 2009 replaced the various rates previously applicable to income from capital, namely 20%, 25% and 30%, with a single rate of 25%, without affecting the governing principle of the system for taxation of income from capital. Third, the referring court raises the question of whether the substantive criterion relating to the provision of financial services is satisfied. In that regard, it is necessary to determine whether there is a relationship of cause and effect linking the provision of a financial service with the movement of capital, as described in the judgment in *Wagner-Raith*,[11] in a case such as the main proceedings.

38. In those circumstances, the Finanzgericht München (Finance Court, Munich, Germany) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

‘(1) Does the freedom of movement of capital under Article 63(1) TFEU in conjunction with Article 65 TFEU preclude legislation of a Member State under which a non-resident institution operating an occupational pension scheme whose essential structure is similar to a German pension fund does not receive any relief from tax on income from capital in respect of dividends received, whereas such dividend distributions to domestic pension funds do not result in any increase in their corporation tax liability, or only a comparatively small one, because the latter are

11 Judgment of 21 May 2015 (C-560/13, EU:C:2015:347, paragraphs 39 and 44).

able to reduce their taxable profit in a tax assessment procedure by deducting the amounts reserved to meet their pension payment obligations and to neutralise the tax on income from capital through a set-off, and also receive a refund in the event that the amount of corporation tax payable is less than the amount set-off?

(2) If the answer to Question 1 is yes: is the restriction of the free movement of capital through Paragraph 32(1) No 2 of the [KStG] permissible with respect to third countries under Article 63 TFEU in conjunction with Article 64(1) TFEU because it relates to the provision of financial services?'

III. Procedure before the Court

39. Written observations were submitted by CPP, the Munich Tax Office, the German Government and the European Commission. CPP, the German Government and the European Commission also presented oral argument at the hearing on 20 March 2019.

IV. Analysis

40. At the outset, the first observation to be made is that the fundamental freedom which is relevant to the present dispute is clearly the free movement of capital. The Court has recently reiterated that the movements of capital covered by Article 63 TFEU include, in particular, direct investments in the form of participation in an undertaking through the holding of shares which confers the possibility of effectively participating in its management and control ('direct' investments) and the acquisition of shares on the capital market solely with the intention of making a financial investment without any intention of influencing the management and control of the undertaking ('portfolio' investments).[12] Furthermore, it has already been clearly established in the case-law that 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.[13],[14] In the present case, it is not disputed that the financial investments were made without any intention to influence the management and control of the undertaking, the Canadian pension fund having shareholdings of less than 1% in various German public limited companies. Thus, it is the provisions on the free movement of capital, and particularly Articles 63 to 65 TFEU, which apply in a situation such as that at issue in the main proceedings.

41. Second, it seems to me that the question of the applicability of the standstill clause in Article 64(1) TFEU should be considered after the question whether the legislation at issue constitutes a restriction on the free movement of capital within the meaning of Article 63(1) TFEU. Article 64(1) TFEU makes reference to 'restrictions', which suggests that, before it can be applied, it is necessary to characterise the national legislation and determine whether the system for which that legislation provides constitutes a restriction.[15] I therefore propose to examine the questions referred for a preliminary ruling in the order in which they were submitted.

12 See, to that effect, judgment of 26 February 2019, *X (Controlled companies established in third countries)* (C-135/17, EU:C:2019:136, paragraph 26 and the case-law cited).

13 See, inter alia, judgment of 24 November 2016, *SECIL* (C-464/14, EU:C:2016:896, paragraph 33 and the case-law cited).

14 Indeed, in a situation analogous to the main proceedings, in the judgment of 10 April 2014, *Emerging Markets Series of DFA Investment Trust Company* (C-190/12, EU:C:2014:249, paragraph 34), the Court of Justice stated that the determination of whether the legislation at issue falls within the scope of Article 63 TFEU requires an examination not of the nature of the exemption provided for by that legislation or how the business undertaken by an investment fund is to be categorised, but rather of the form of the investment made by the investment funds in resident companies.

15 I note in this regard that in the recent judgment of 26 February 2019, *X (Controlled companies established in third countries)* (C-135/17, EU:C:2019:136), the Court chose to examine the questions in the inverse order, first considering the legislation at issue by reference to Article 64(1) TFEU, and then by reference to Article 63(1) TFEU.

A. The first question referred

42. By its first question, the referring court asks, in essence, whether Articles 63 and 65 TFEU are to be interpreted as precluding legislation of a Member State which imposes a withholding tax on dividends distributed by a resident company to resident and non-resident pension funds, with provision for that tax to be set off in full against corporation tax only where the pension fund is resident, while for non-resident pension funds the withholding tax of 25% is definitive as to 3/5 (15%), with two fifths (10%) being reimbursable on request.

43. In order to answer that question, I propose to begin by considering whether there is a restriction on the free movement of capital within the meaning of Article 63 TFEU, and then to address, if necessary, the question whether such a restriction is permissible.

1. Whether there is a restriction on the free movement of capital

44. Restrictions on the movement of capital are, according to settled case-law, all measures which are such as to discourage non-resident taxpayers from making investments in a Member State or to discourage taxpayers resident in that Member State from doing so in other States.[16] More specifically, the less favourable treatment by a Member State of dividends paid to non-resident companies, compared to the treatment of dividends paid to resident companies, is liable to deter companies established in a Member State other than that first Member State from pursuing investments in that same first Member State and, consequently, amounts to a restriction of the free movement of capital, prohibited, in principle, under Article 63 TFEU.[17]

45. In the present case, the national legislation at issue in the main proceedings provides for a two-stage tax treatment. At the first stage, dividends paid to a resident pension fund and dividends paid to a non-resident pension fund are both subject to a withholding tax. In that respect, as regards dividends paid to non-resident pension funds, and according to the information provided in the order for reference, the withholding tax is definitively payable to the extent of 3/5 (15%), under Paragraph 32(1) No 2 of the KStG, two fifths (10%) being reimbursed as described in point 23 of this Opinion. Accordingly, the dividends at issue in the main proceedings were subject to a withholding tax of 15%. By contrast, as regards withholding tax on dividends paid to a resident pension fund, it is apparent from the explanatory material supplied by the referring court that this amounts to 25%.

46. At the second stage, pension funds are subject to two different systems of taxation in respect of dividends received. In the case of a non-resident pension fund, the tax on income from capital on such dividends becomes definitive. By contrast, dividends paid to resident pension funds are incorporated in the pension fund's balance sheet, which is subsequently used to determine the taxable profit, on which corporation tax will be charged at the rate of 15%.[18] When that tax becomes payable, the tax on income from capital can be set off in its entirety against the amount due. The referring court states that, by virtue of the combined provisions of Paragraph 31 of the KStG and Paragraph 36(2) No 2 of the EStG, 'the tax on income from capital which has been deducted from the

16 Judgments of 10 May 2012, *Santander Asset Management SGIIC and Others* (C-338/11 to C-347/11, EU:C:2012:286, paragraph 15); of 17 September 2015, *Miljoen and Others* (C-10/14, C-14/14 and C-17/14, EU:C:2015:608, paragraph 44); and of 2 June 2016, *Pensioenfonds Metaal en Techniek* (C-252/14, EU:C:2016:402, paragraph 27).

17 See, inter alia, judgment of 2 June 2016, *Pensioenfonds Metaal en Techniek*, C-252/14 (EU:C:2016:402, paragraph 28 and the case-law cited).

18 In its written observations, CPP states that a solidarity surcharge of 5.5% is payable in addition to the corporation tax, bringing the overall tax burden to 15.825%. I note however that, in the request for a preliminary ruling, the referring court's reasoning is based on corporation tax of 15%. For the purposes of this Opinion, I will proceed on the basis of a rate of 15%.

dividends paid to pension funds can be set off in its entirety against the corporation tax payable'[19] and, in accordance with the second sentence of Paragraph 36(4) of the EStG, 'where the tax on income from capital deducted exceeds the corporation tax determined, it shall be reimbursed to the national pension fund'.[20]

47. As the referring court explains, the German pension fund may reduce the amount of profit subject to corporation tax by taking provisions for pension commitments into account, and may also set off, against its corporation tax liability, the tax on income from capital which has been withheld. Accordingly, it seems to me that in the present case, the restriction on the free movement of capital which is alleged could result from either of these two quite distinct tax mechanisms provided for by the national legislation. It could result from the fact that the amount of profit which is liable to corporation tax depends, in part, on the provisions constituted by the pension fund, which reduce the taxable amount of such profit. Equally, the restriction could result from the fact that the resident pension fund can set off, against corporation tax, the tax on income from capital which it has paid, and obtain reimbursement of any surplus. I propose to examine these mechanisms in order to identify which of the two (if not both) underlies the restriction which is alleged.

48. As regards the provisions constituted by the pension fund, the referring court explains that a mathematical provision is a specific type of provision against uncertain debts, made in anticipation of the occupational pension benefits which the fund will be obliged to provide to its members in the future. It states that as a result of the provisions, which are constituted by the pension fund and appear on the liabilities side of its balance sheet, and more specifically the mathematical provisions constituted with a view to the fund's pension commitments, the taxable profit used to determine the amount of corporation tax payable may be 'relatively low'.

49. Thus, according to the explanatory information in the order for reference, the payment of dividends does not generally lead to an increase in the taxable profit determined by reference to the balance sheet, because there is an increase in the liabilities side of the balance sheet, relating in particular to the mathematical provisions, which matches the increase in the assets.[21] The taxable profits increase only where the returns are not credited to members' agreements, in which case they will be reflected in an increase in the assets of the pension fund, with no corresponding increase in the liabilities. That situation arises in the event that 10% of the returns are not credited to members' agreements, as described in point 19 of this Opinion. In such a case, the residual proportion of 10% of the returns is not credited to members, and accordingly there will be no increase in the mathematical provisions. Equally, the residual proportion of the returns which is not credited to members' agreements will not therefore increase the amount of the pension benefits to be paid to members on maturity (or in other words when they retire).

50. It follows that in general, leaving aside the situation where the residual portion of 10% of the returns is not credited to members' agreements, dividends received by a resident pension fund are so credited, with the result that there is no increase, or only a very modest increase, in the profits liable to corporation tax.

19 The referring court also states that 'tax on income from capital is set off in its entirety against the corporation tax payable by fully taxable German pension funds'.

20 In its written observations, CPP states that both the tax on income from capital and the solidarity surcharge on the dividends can be set off against the pension fund's corporation tax liability. There is nothing to that effect in the request for a preliminary ruling, however. For the purposes of this Opinion, I will proceed on the basis of a tax on income from capital, which can be set off, amounting to 25% of gross dividends.

21 The referring court states that 'dividend income received by German pension funds does not generally give rise to a taxable profit, because of the corresponding increase in provisions for pension commitments' and that, since such funds 'are taxed on the basis of their profits (which is to say, after deduction of business expenses), they normally pay only a relatively low amount of corporation tax, because in general, dividends received are matched by increases in the provisions'.

51. Turning to the extent to which an increase in provisions can affect the effective tax burden on dividends paid, I note, first of all, that in cases concerning 'outgoing' dividends and withholding tax, the Court has examined the treatment of the dividends rather than the treatment of the taxable profits. [22]

52. In relation to the treatment of the dividends, it is necessary to determine the effective tax burden resulting from their being subject to tax on income from capital at 25%, as well as corporation tax at 15%. In my view, this approach — that of determining whether there is a restriction on the free movement of capital by examining the effective tax burden — finds support in the case-law of the Court. First, in several cases concerning the taxation of dividends, the Court has left it to the national court to determine whether non-resident taxpayers ultimately bear a heavier tax burden in the State in which the withholding tax is payable than do resident taxpayers, on dividends of the same kind. [23] Second, in the judgment in *Hirvonen*, [24] the Court held, essentially, that the taxation of the gross income of a partially taxable person is compatible with EU law provided that it does not result in an overall tax burden greater that that placed on net income at the rate applicable to fully taxable persons. [25] Finally, in the *Sofina* judgment, the Court recently held that 'the financial year in which the distribution of … dividends occurs must be taken into account in order to compare the tax burden on such dividends and that on dividends paid to a resident company'. [26]

53. In the present case, I note that the order for reference does not contain the figures which would be necessary to determine the effective tax burden on dividends which are subject to both tax on income from capital and corporation tax.

54. That being so, I have attempted to determine the tax burden on the basis of the material in the file. It appears from my calculations that the maximum effective tax burden on dividends received by a resident pension fund is 11.25% of gross dividends. [27] Thus, regardless of the value of the provisions, the effective rate will always be less than the rate of 15% applicable to dividends received by a non-resident pension fund. This means that the effective tax burdens on dividends paid to resident and to non-resident pension funds will always be unequal. [28] I therefore consider that, in the circumstances of the main proceedings, the size of the provisions has no bearing on whether there is a restriction on free movement of capital.

55. In other words, it seems to me that the ability to reduce taxable profits by reference to accounting provisions does undoubtedly make it possible to reduce the amount due by way of corporation tax. Nonetheless, it does not appear to be that reduction which gives rise to the restriction on the free movement of capital, which exists regardless of the size of the provisions constituted by the resident pension fund. It is however for the national court to verify that that is the case, since only the national court can determine the effective tax burden on dividends paid, respectively, to resident and non-resident pension funds.

22 See judgments of 22 November 2012, *Commission* v *Germany* (C-600/10, not published, EU:C:2012:737, paragraph 15), and of 8 November 2012 *Commission* v *Finland* (C-342/10, EU:C:2012:688, paragraph 33).

23 See, to that effect, judgments of 2 June 2016, *Pensioenfonds Metaal en Techniek* (C-252/14, EU:C:2016:402, paragraph 34); of 17 September 2015, *Miljoen and Others* (C-10/14, C-14/14 and C-17/14, EU:C:2015:608, paragraph 48); and of 19 January 2006, *Bouanich*, (C-265/04, EU:C:2006:51, paragraph 33).

24 Judgment of 19 November 2015, *Hirvonen* (C-632/13, EU:C:2015:765, paragraphs 44 and 48).

25 Furthermore, the heavier tax burden approach has also been used in inheritance tax matters. In its judgment of 31 March 2011, *Schröder* (C-450/09, EU:C:2011:198, paragraph 40), concerning the taxation of inheritances, the Court ruled that allowing a deduction from the amount taxable in respect of immovable property, dependent on the place of residence of the deceased and the beneficiary at the time of death, would lead to a heavier effective tax burden than would be borne by at least one resident and would, therefore, reduce the value of the inheritance.

26 Judgment of 22 November 2018, *Sofina and Others* (C-575/17, EU:C:2018:943, paragraph 31).

27 If X is the value of the gross dividends paid, the value of the net dividends received by a resident pension fund is X - (0.25X). Applying a corporation tax rate of 15% will result in (X - (0.25X)) × 0.15; which amounts to an effective rate of 11.25%.

28 At the hearing, the German Government confirmed, in its reply to a question from the Court, that, so far as the ultimate tax burden is concerned, there is a difference in treatment between resident and non-resident pension funds.

56. Moreover, it seems to me that support for this approach may well be found in the argument put forward by CPP, to the effect that the reduction of taxable profits is intended to avoid economic double taxation of dividends. CPP contends that the legislature adopted Paragraph 8(8) of the KStG with a view to neutralising and, in practice, exempting dividends, by providing for the technical provisions to be taken into account for tax purposes. It must be noted however that the 'neutralisation' or 'exemption' of dividends paid to the pension fund relates only to corporation tax. Thus, this mechanism does not appear to affect the tax which has already been paid in respect of tax on income from capital and which can be set off in full. [29]

57. In this regard, it seems to me that the circumstances of the present case differ from those which gave rise to the judgment in *Commission* v *Finland*, [30] which is cited by the referring court. In that judgment, the Court held that national legislation under which, in practice, dividends received by resident pension funds were exempt or virtually exempt from income tax, the legislation providing expressly for the deductibility of accounting provisions, while dividends received by non-resident pension funds were taxed at a rate of 19.5% under national legislation, or 15% or less under double taxation conventions concluded by the Republic of Finland, constituted a restriction within the meaning of Article 63 TFEU. [31] However, in the main proceedings, dividends are subject to the withholding tax by which tax on income from capital is collected whether they are received by a resident or a non-resident pension fund. Neither the existence nor the amount of the withholding tax is affected by the constitution of provisions. While there is a reduction in taxable profits and, in practice, a virtual exemption of the tax due on the dividends paid to a resident pension fund, these matters relate only to corporation tax on the pension fund's profits; they do not concern tax on income from capital, which is fully recoverable.

58. I therefore propose that the Court should hold, in the present case, that it is the second mechanism behind the alleged restriction, namely the setting-off against corporation tax of the full amount of tax on income from capital, with reimbursement of any surplus, which constitutes a restriction on the free movement of capital.

59. As I have already stated, I consider that it is for the referring court to determine whether and to what extent the effective tax burden is lower than that borne by dividends paid to a non-resident pension fund, which are subject to withholding tax at 15% under the bilateral double taxation agreement.

60. If the referring court reaches the conclusion that dividends received by a resident pension fund are virtually exempt from tax on income from capital, as a result of the full set-off, that would seem to demonstrate that dividends paid to a non-resident pension fund are subject to a greater effective tax burden. It follows that such dividends are treated more favourably than those received by a non-resident pension fund. Such differential tax treatment of pension funds, according to their place of residence, is liable to deter non-resident funds from investing in companies established in Germany. In such circumstances, non-resident pension funds are unable to recover the tax paid by way of withholding tax, and there is therefore a restriction on the free movement of capital which is, in principle, prohibited by Article 63(1) TFEU.

29 By virtue of the Paragraph 31 of the KStG, in conjunction with Paragraph 36(2) No 2 of the EStG.

30 Judgment of 8 November 2012 (C-342/10, EU:C:2012:688).

31 It appears to me that, in that case, dividends paid by resident companies to resident pension funds were taxed as to 75% at a rate of 26%. Thus, the dividends were de facto taxable in their entirety at a rate of 19.5%. The Court held that that legislation constituted a restriction within the meaning of Article 63 TFEU.

2. Whether the restriction is permissible

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

62. In so far as that provision is a derogation from the fundamental principle of the free movement of capital, it must be interpreted strictly. It cannot therefore be interpreted as meaning that all tax legislation which draws a distinction between taxpayers on the basis of their place of residence or the Member State in which they invest their capital is automatically compatible with the FEU Treaty. The derogation in Article 65(1)(a) TFEU is itself limited by Article 65(3) TFEU, which provides that the national provisions referred to in paragraph 1 of that article 'shall not constitute a means of arbitrary discrimination or a disguised restriction on the free movement of capital and payments as defined in Article 63 [TFEU].[32]

63. A distinction must, therefore, be made between differences in treatment authorised by Article 65(1)(a) TFEU, and discrimination prohibited by Article 65(3) TFEU.[33] The case-law of the Court shows that, for national tax legislation such as that at issue in the main proceedings to be capable of being regarded as compatible with the provisions of the Treaty on the free movement of capital, it is necessary that the difference in treatment concern situations which are not objectively comparable or be justified by an overriding reason in the public interest.[34]

(a) Whether the situations at issue in the main proceedings are comparable

64. According to settled case-law, the comparability of a cross-border situation with an internal one must be examined having regard to the aim pursued by the national provisions at issue as well as their purpose and content.[35] Furthermore, only the relevant distinguishing criteria established by the legislation in question must be taken into account in determining whether the difference in treatment resulting from that legislation reflects situations which are objectively different.[36]

65. I note that the request for a preliminary ruling does not contain any explanation as to the aim pursued by the legislation at issue in the main proceedings. In those circumstances, I propose to examine the arguments advanced by the parties to this reference for a preliminary ruling. In the light of those arguments, in considering the comparability of the situations of resident and non-resident pension funds I will have regard to three particular matters: (1) the aim pursued by the German legislation as regards obligations to members; (2) the alleged application of different taxation arrangements in relation to the two categories of pension fund, and (3) the taking into account of expenses directly linked to the receipt of dividends.

32 See, to that effect, judgments of 17 October 2013, *Welte* (C-181/12, EU:C:2013:662, paragraphs 42 and 43 and the case-law cited); of 17 September 2015, *Miljoen and Others* (C-10/14, C-14/14 to C-17/14, EU:C:2015:608, paragraph 63), and of 22 November 2018, *Sofina and Others* (C-575/17, EU:C:2018:943, paragraph 45).

33 See, in particular, judgments of 22 November 2018, *Sofina and Others* (C-575/17, EU:C:2018:943, paragraph 46); of 20 September 2018, *EV* (C-685/16, EU:C:2018:743, paragraph 87); of 21 June 2018, *Fidelity Funds and Others* (C-480/16, EU:C:2018:480, paragraph 48); and of 17 September 2015, *Miljoen and Others* (C-10/14, C-14/14 and C-17/14, EU:C:2015:608, paragraph 64).

34 See, in particular, judgments of 10 May 2012, *Santander Asset Management SGIIC and Others* (C-338/11 to C-347/11, EU:C:2012:286, paragraph 23 and the case-law cited); and of 17 September 2015, *Miljoen and Others* (C-10/14, C-14/14 and C-17/14, EU:C:2015:608, paragraph 64).

35 See, in particular, judgments of 20 September 2018, *EV* (C-685/16, EU:C:2018:743, paragraph 88); of 21 June 2018, *Fidelity Funds and Others* (C-480/16, EU:C:2018:480, paragraph 50); and of 2 June 2016, *Pensioenfonds Metaal en Techniek* (C-252/14, EU:C:2016:402, paragraph 48 and the case-law cited).

36 Judgments of 10 May 2012, *Santander Asset Management SGIIC and Others* (C-338/11 to C-347/11, EU:C:2012:286, paragraph 28), and of 2 June 2016, *Pensioenfonds Metaal en Techniek* (C-252/14, EU:C:2016:402, paragraph 49).

(1) Obligations to members

66. CPP states that all pension funds, whether resident or non-resident, are required to invest the insurance premiums on the capital market in order to generate dividends which enable them to meet their obligations to members. Germany therefore exempts them from tax, in so far as the dividends paid are used to meet those obligations. CPP argues that whereas the national legislation applicable to resident pension funds takes account of the fact that the dividends received are ultimately returned to members, and accordingly exempts pension-fund dividends from tax, that legislation takes no account of the fact that pension funds in third countries are, in principle, subject to the same obligation.

67. The Commission contends that the purpose of exempting German pension funds from tax on income from capital imposed on dividends distributed to them is to enable them to build up sufficient capital to cover the payment of future pensions. Dividends paid are therefore exempted from tax on income from capital, provided that they are used to constitute technical provisions. By contrast, a non-resident pension fund, even if it can prove that it uses the dividends received to constitute provisions, has a definitive liability for German tax on income from capital, to the extent provided for by the relevant bilateral double taxation agreement.

68. In that regard, subject to the checks to be carried out by the referring court, it seems to me from the file submitted to the Court that the German legislation at issue in the main proceedings, which practically exempts dividends paid to a resident pension fund from tax, pursues the aim of supporting pension funds in securing their position by amassing company capital sufficient to cover their future pension commitments. By contrast, as regards dividends distributed to a non-resident pension fund, even if they are used for that same purpose, the tax on income from capital paid by way of withholding tax is a definitive tax, and there is no such virtual exemption.[37] From that perspective, I consider that resident and non-resident pension funds have common objectives and must therefore be treated as being in similar situations.

69. Furthermore, if the referring court considers that the national legislation at issue in the main proceedings pursues the aim of ensuring an equal tax burden for resident and non-resident pension funds investing in companies established in Germany, taking account in particular of the fact that dividends paid to a resident pension fund are subject to two cumulative taxes (tax on income from capital and corporation tax), whereas dividends received by a non-resident pension fund are subject only to tax on income from capital, it is settled case-law that, as soon as a Member State, either unilaterally or by way of a convention, imposes a charge to tax on the income not only of resident companies but also of non-resident companies, in respect of income they receive from a resident company, the situation of those non-resident companies becomes comparable to that of resident companies.[38]

70. It is solely because of the exercise by that State of its power of taxation that, irrespective of any taxation in another Member State, a risk of a series of charges to tax or economic double taxation may arise. In such a case, in order for non-resident companies receiving dividends not to be subject to a restriction on the free movement of capital prohibited, in principle, by Article 63 TFEU, the State in which the company making the distribution is resident must ensure that, under the procedures laid down by its national law in order to prevent or mitigate the imposition of a series of charges to tax or economic double taxation, non-resident companies are subject to the same treatment as resident companies.[39]

37 See, by analogy, judgment of 2 June 2016, *Pensioenfonds Metaal en Techniek* (C-252/14, EU:C:2016:402, paragraph 50).

38 See, to that effect, judgments of 21 June 2018, *Fidelity Funds and Others* (C-480/16, EU:C:2018:480, paragraph 54); of 25 October 2012, *Commission* v *Belgium* (C-387/11, EU:C:2012:670, paragraph 49 and the case-law cited), and of 14 December 2006, *Denkavit Internationaal and Denkavit France* (C-170/05, EU:C:2006:783, paragraph 35).

39 See, by analogy, judgment of 21 June 2018, *Fidelity Funds and Others* (C-480/16, EU:C:2018:480,paragraph 55 and the case-law cited).

71. In the present case, since Germany has chosen to exercise its powers of taxation over the income received by non-resident pension funds, those funds are in a situation comparable to that of pension funds resident in Germany as regards the risk of economic double taxation of dividends paid by companies resident in Germany. [40]

(2) The alleged application of different tax arrangements

72. The German Government submits that resident pension funds and non-resident pension funds are not in objectively comparable situations, on the basis that the two categories of pension fund are subject to different taxation arrangements within the meaning of the judgment in *Truck Center*. [41]

73. In that regard, I note that it is apparent from paragraphs 41 and 46 of that judgment that a difference in treatment, consisting in the application of different taxation procedures or arrangements on the basis of the place of residence of the company receiving the income in question, relates to situations which are not objectively comparable.

74. In the present case, I propose that the Court should not apply the rule in *Truck Center* for the following reasons. First, that judgment is often relied upon by governments of Member States seeking to defend national legislation which results in the situations of resident taxpayers being treated differently from those of non-residents. [42] It has however been affirmed, so far as I am aware, only once. [43] Recently, the Court has narrowed its scope once again, holding that it relates only to arrangements for the collection of tax which differ on the basis of the place of residence of the recipient of nationally sourced dividends. [44]

75. Second, I note that this case-law has been heavily criticised by academics, [45] and that there are inevitable difficulties in applying it. [46]

76. In that regard, it seems to me that to take the use of different tax arrangements as the criterion for assessing whether the situation of a resident taxpayer is comparable to that of a non-resident taxpayer involves circular reasoning. In general, residents and non-residents are subject to different tax arrangements. The judgment merely affirms that the situations are different because resident and non-resident taxpayers are different. [47] Thus, in the main proceedings, resident pension funds are 'fully

40 See, by analogy, judgments of 20 October 2011, *Commission* v *Germany* (C-284/09, EU:C:2011:670, paragraph 58), and of 10 May 2012, *Santander Asset Management SGIIC and Others* (C-338/11 to C-347/11, EU:C:2012:286, paragraph 42).

41 Judgment of 22 December 2008, *Truck Center* (C-282/07, EU:C:2008:762).

42 See, inter alia, judgments of 26 February 2019, *N Luxembourg 1 and Others* (C-115/16, C-118/16, C-119/16 and C-299/16, EU:C:2019:134, point 163); of 22 November 2018, *Sofina and Others* (C-575/17, EU:C:2018:943, paragraph 48); of 17 September 2015, *Miljoen and Others* (C-10/14, C-14/14 and C-17/14, EU:C:2015:608); of 19 June 2014, *Strojírny Prostějov and ACO Industries Tábo* (C-53/13 and C-80/13, EU:C:2014:2011); of 12 July 2012, *Commission* v *Spain* (C-269/09, EU:C:2012:439); of 10 May 2012, *Santander Asset Management SGIIC and Others* (C-338/11 to C-347/11, EU:C:2012:286); of 1 July 2010, *Dijkman and Dijkman-Lavaleije* (C-233/09, EU:C:2010:397); and of 3 June 2010, *Commission* v *Spain* (C-487/08, EU:C:2010:310).

43 Judgment of 18 October 2012, *X* (C-498/10, EU:C:2012:635, paragraph 26).

44 Judgment of 22 November 2018, *Sofina and Others* (C-575/17, EU:C:2018:943, paragraph 52).

45 See Beretta, G., 'The Brisal and KBC Finance Decision: Once Again the CJEU Assesses the Compatibility with EU Law of Gross Withholding Taxation of Non-residents', *EC Tax Review*, 2007, pages 193 to 200; Lang, M., 'Recent Case Law of the ECJ in Direct Taxation: Trends, Tensions, and Contradictions', *EC Tax Review*, 2009, pages 100 to 101; *CFE ECJ Task Force*, 'Comment by the CFE Task Force on ECJ Cases on the Judgment in *Belgium SPF Finance* v. *Truck Center SA*', No. 158, and De Broe, L., Bammens, N., 'Truck Center Belgian Withholding Tax on Interest Payments to Non-resident Companies Does Not Violate EC Law: A Critical Look at the ECJ's Judgment in Truck Center', *EC Tax Review*, 2009, pages 131 to 137.

46 This is well illustrated by the case that gave rise to the judgment of 13 July 2016, *Brisal and KBC Finance Ireland* (C-18/15, EU:C:2016:549). In that case, the Tribunal Administrativo e Fiscal de Sintra (Administrative and Tax Tribunal of Sintra, Portugal) applied the judgment of 22 December 2008, *Truck Center* (C-282/07, EU:C:2008:762), whereas, in its request for a preliminary ruling, the Supremo Tribunal Administrativo (Supreme Administrative Court, Portugal) had taken the view that there was no need to refer to that judgment.

47 *CFE ECJ Task Force*, 'Comment by the CFE Task Force on ECJ Cases on the Judgment in *Belgium SPF Finance* v. *Truck Center SA*' No. 158, paragraph 18.

taxable'[48], whereas the income of foreign pension funds is subject only to a 'limited' fiscal obligation, relating solely to income arising in Germany.[49] In my opinion, the different tax arrangements simply reflect this difference. That, however, does not mean that the national legislation at issue automatically falls outside the scope of free movement of capital.

77. I therefore propose that the Court should not apply the rule in *Truck Center*[50] in the present case. It would in fact be open to the Court to hold that the national legislation at issue is not limited to procedures for charging tax, but confers a substantial tax advantage on resident pension funds which is not granted to non-resident pension funds.[51] That approach is also suggested by the recent judgment in *N Luxembourg 1 and Others*, in which the Court held that the fact of not having to make a tax payment until a date appreciably later than the date for payment of tax withheld at source in the event of payment of interest by a resident company to a non-resident company constituted an advantage, such that the rule in *Truck Center* was not applicable.[52]

(3) The taking into account of costs directly connected to the receipt of dividends

78. Both the Munich Tax Office and the German Government submit in their written observations that there is no direct connection between, on the one hand, the receipt of dividend income and, on the other, the constitution of the mathematical and other technical provisions, such that the situations in question are not comparable.

79. In this regard, according to settled case-law, resident and non-resident taxpayers are in a comparable situation as regards costs directly connected to the activity which gives rise to the taxable profits.[53] To that effect, the Court has ruled that if the taxation method applicable to residents allows the deduction of expenses directly connected to the receipt of dividends, 'it should also be admissible to take into consideration such expenses in respect of non-resident[s]'.[54]

80. I consider however that that case-law is not relevant to the present case, for two reasons. First, that case-law relates to expenses which are directly connected to the receipt of income.[55] In the present case, it seems clear that the provisions constituted by the pension fund cannot be characterised as 'expenses connected to the receipt of income'. Second, the case-law relating to the taking into account of expenses directly connected to the receipt of dividends applies only in cases where the grant of the tax advantage, be it exemption or deduction of tax withheld at source, is linked to the calculation of the tax base, notably because it is reflected in expenses shown on a tax balance sheet; that is not the case here. It seems to me that, in the present case, the restriction on the free movement of capital does not result from the fact that the provisions are deducted in the calculation of the tax base, but from the fact that the full amount of the withholding tax is set off after the tax base has been established. I therefore propose that the Court should hold that this case-law is not relevant to a tax system providing for the unlimited set-off at issue in the present case.

48 In accordance with Paragraph 1(1) (1) of the KStG.

49 In accordance with the combined provisions of Paragraph 8(1) of the KStG, Paragraph 49(1) No 5a of the EStG and Paragraph 20(1) No 1 of the EStG.

50 Judgment of 22 December 2008 (C-282/07, EU:C:2008:762).

51 See, by analogy, judgment of 17 September 2015, *Miljoen and Others* (C-10/14, C-14/14 and C-17/14, EU:C:2015:608, paragraph 53).

52 See, to that effect, judgment of 26 February 2019, *N Luxembourg 1 and Others* (C-115/16, C-118/16, C-119/16 and C-299/16, EU:C:2019:134, paragraphs 164 and 165).

53 Judgments of 12 June 2003, *Gerritse* (C-234/01, EU:C:2003:340); of 3 October 2006, *FKP Scorpio Konzertproduktionen* (C-290/04, EU:C:2006:630); and of 15 February 2007, *Centro Equestre da Lezíria Grande* (C-345/04, EU:C:2007:96).

54 Judgment of 2 June 2016, *Pensioenfonds Metaal en Techniek* (C-252/14, EU:C:2016:402, paragraph 65).

55 Indeed, in paragraph 20 of the judgment of 22 November 2012, *Commission* v *Germany* (C-600/10, not published, EU:C:2012:737), concerning German legislation on the deduction of operating costs connected to the receipt of dividends and interest received in Germany, the Court stated that 'the Commission has not adduced any evidence to show that [bank charges and similar transaction costs] even if they can, where appropriate, be directly linked to a sum paid in connection with a securities transaction … are also and necessarily directly connected to the actual payment of income in the form of dividends or interest'.

81. If the Court nevertheless decides to examine whether there is a connection between the constitution of provisions and the receipt of dividend income, I take the view that such a connection can be established only in respect of that part of the provisions which results directly from the receipt of dividends. In accordance with case-law of the Court, expenses occasioned by the activity which generated taxable income are directly linked to that activity and are accordingly necessary in order to carry it out.[56] In the present case, the activity which generated the income was the receipt of dividends and the expenses occasioned by that activity are those connected to the receipt of such dividends. The provisions constitute expenditure relating to the activity of insurance.

82. In that regard, as the German Government essentially argued, the provisions must be constituted regardless of whether the revenue is dividend income or contributions paid by members. The necessity for the provisions is connected to the activity of insurance, and they must enable the pension fund to meet its obligations in respect of future benefits. The reason for their existence lies in the pension commitments of the fund, not in the amount of income generated. Indeed, even where the pension fund does not achieve any return on its investments, it is still required, under national law, to constitute provisions in order to meet its commitments. By analogy, as regards the system of provisions relating to occupational pension and life assurance institutions, the EU legislature recognises the importance of provisions, but nevertheless leaves the Member States a broad discretion as to how they are established.[57] I therefore consider that, in principle, the pension fund provisions are not directly connected to the dividends received.

83. I also bear very much in mind the argument put forward by the Munich Tax Office, based on national case-law concerning a health insurance company. Under that case-law, with regard to expenses resulting from the allocation of funds to mathematical and other provisions, there is no causal link between such expenses and returns on investments, which are to be attributed in the first instance to the activity of insurance carried out within the national territory. The obligation to constitute mathematical and other technical provisions is a consequence of having the status of insurance company. Although that judgment concerns health insurance companies, I see no reason why the situation of the pension funds should be different. I would therefore tend to think that that approach could be applied, by analogy, to the present case.[58]

84. Consequently, I find it difficult to see how the fact that the provisions constituted by the pension funds are taken into account can, in itself, constitute a restriction on the free movement of capital.

85. CPP submits that, since the dividends are used to constitute the provisions, they lead to an increase in those provisions which, in turn, reduce taxable income. In that regard, as stated in points 18 and 19 of this Opinion, it is apparent from the request for a preliminary ruling that accounting and non-accounting investments, except for the residual 10%, increase the provisions. Thus, it seems to me that a proportion of those provisions may arise simply from the payment of dividends. However, in my opinion it is impossible for the Court to determine what, under the national system, that

56 See, inter alia, judgment of 6 December 2018, *Montag* (C-480/17, EU:C:2018:987, paragraph 33 and the case-law cited).

57 Thus, Directive 2003/41/EC of the European Parliament and of the Council of 3 June 2003 on the activities and supervision of institutions for occupational retirement provision (OJ 2003 L 235, p. 10) states in recital 26 that a 'prudent calculation of technical provisions is an essential condition to ensure that obligations to pay retirement benefits can be met', and that 'the maximum interest rates should be chosen prudently according to any relevant national rules'. According to recital 27 of that directive, Member States should have the possibility of making the calculation of technical provisions subject to additional and more detailed rules than those laid down in the directive. Furthermore, as regards life assurance, recitals 35 and 36 of Directive 2002/83/EC of the European Parliament and of the Council of 5 November 2002 concerning life assurance (OJ 2002 L 345, p. 1), state that it 'is necessary from the point of view of the protection of lives assured that every assurance undertaking should establish adequate technical provisions' and that, as regards rules limiting the rate of interest used in calculating the technical provisions, 'it seems appropriate to leave Member States a free choice as to the method to be used'. Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II) (OJ 2009 L 335, p. 1), which replaces Directive 2002/83, states similar principles.

58 Judgment of 6 April 2016 (No I R 61/14) of the Bundesfinanzhof (Federal Finance Court, Germany).

proportion is. That determination is therefore a matter for the referring court, which must, amongst other things, establish what proportion of the provisions is 'directly related' to the receipt of dividends. Provisions which have no connection with the receipt of dividends must, in any event, be excluded in making that determination.

86. In conclusion, the national legislation at issue in the main proceedings cannot, in my view, be upheld on the ground that it applies to objectively different situations. It is therefore necessary to examine whether that legislation can be justified by an overriding reason in the public interest.

(b) Whether there is an overriding reason in the public interest

87. According to the referring court, the difference in treatment which results from the German legislation is not justified by the principle of territoriality, by the need to preserve the coherence of the tax system, by the concern to ensure a balanced allocation of the power to impose taxes as between Member States, or by the effectiveness of fiscal supervision.

88. It is undoubtedly true that, in accordance with settled case-law, those justifications can be accepted as legitimate objectives recognised by the Court.[59] Nevertheless, in the present case, I do not consider that a difference of treatment between resident and non-resident pension funds can be justified by any of those objectives. Since the parties concerned have not argued the point, there is no need for me to go into further detail in this Opinion.

89. In the light of the foregoing, I consider that the restriction on the free movement of capital resulting from the German legislation, which prevents non-residents (and only non-residents) from deducting expenses directly connected to the receipt of dividends, cannot be justified either on the basis that the situations in question are not comparable, or on the basis of an overriding reason in the public interest.

B. The second question

90. By its second question, the referring court asks whether the restriction resulting from the fact that dividends received by non-resident pension funds are definitively subject to withholding tax, while German pension funds are, in practice, virtually exempted, could be permitted under Article 64(1) TFEU.

91. Pursuant to Article 64(1) TFEU, a Member State may, in relations with third countries, apply restrictions on movements of capital which come within the substantive scope of that provision, even if they contravene the principle of the free movement of capital laid down under Article 63(1) TFEU, provided that those restrictions already existed on 31 December 1993.[60]

92. Thus, Article 64(1) TFEU provides that 'the provisions of Article 63 [TFEU] shall be without prejudice to the application to third countries of any restrictions which exist on 31 December 1993 under national or Union law adopted in respect of the movement of capital to or from third countries involving direct investment — including in real estate — establishment, the provision of financial services or the admission of securities to capital markets'. It is necessary to examine whether the German legislation at issue satisfies the two cumulative conditions of that provision, namely the temporal condition and the substantive condition.

59 See, inter alia, judgment of 12 July 2012, *Commission* v *Spain* (C-269/09, EU:C:2012:439, paragraphs 63 to 90 and the case-law cited).

60 See, to that effect, judgments of 12 December 2006, *Test Claimants in the FII Group Litigation* (C-446/04, EU:C:2006:774, paragraph 187); of 24 May 2007, *Holböck* (C-157/05, EU:C:2007:297, paragraph 39); of 24 November 2016, *SECIL* (C-464/14, EU:C:2016:896, paragraph 86); and of 26 February 2019, *X (Controlled companies established in third countries)* (C-135/17, EU:C:2019:136, paragraph 27).

93. To deal firstly with the temporal scope of Article 64(1) TFEU, it is apparent from the request for a preliminary ruling that the German provision which makes the withholding tax definitive as regards foreign pension funds, and allows the tax on income from capital to be set off in its entirety against corporation tax, namely Paragraph 32(1) No 2 of the KStG, is identical in both wording and in effect to the version in force on 31 December 1993.

94. In that regard, I take the view that for the purposes of determining whether the restriction at issue has existed since 31 December 1993, it is the very substance of the tax mechanism underlying the restriction that is required to have been in existence since that date. Viewed from that perspective, the temporal condition appears to be satisfied in the main proceedings.

95. First, the referring court states that 'the procedure for setting off against corporation tax was applicable, as at 31 December 1993, to fully taxable persons'. Second, the fact that the rate of tax has varied since that date does not, as I see it, mean that the very substance of the tax mechanism has changed. Third, in my view, it matters little that the German legislature only recognised the existence of German pension funds in 2002, by laying down specific rules for them. The fact that the personal scope of the tax mechanism may have changed, or in other words that the number of taxable persons subject to that mechanism may have increased or decreased, is of no relevance in determining whether the very substance of the tax mechanism has changed. I therefore take the view that, in the main proceedings, the very substance of the tax mechanism at issue — the mechanism giving rise to the restriction — as set out in the request for a preliminary ruling, has not changed since 31 December 1993.

96. Turning, secondly, to the substantive scope of Article 64(1) TFEU, the Court recently observed, in its judgment in *X (Controlled companies established in third countries)*,[61] that it is apparent from the very wording of that provision that, while restrictions on movements of capital to or from third countries involving direct investments fall within the substantive scope of that clause, portfolio investments are not included in the movements of capital that are the subject of that clause. Since the main proceedings concern portfolio investments,[62] they cannot fall within the meaning of 'direct investment' in that provision.

97. The question remains as to whether the main proceedings concern 'movement of capital … involving … the provision of financial services', within the meaning of Article 64(1) TFEU.

98. In that regard, it should be noted that 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.[63] The scope of that provision is defined by reference to the categories of capital movements which are capable of being subject to restrictions.[64]

61 Judgment of 26 February 2019 (C-135/17, EU:C:2019:136, paragraph 28).

62 Point 40 of this Opinion.

63 See, to that effect, judgment of 21 May 2015, *Wagner-Raith* (C-560/13, EU:C:2015:347, paragraphs 39, 43 to 45), in which the Court held that the national measure must relate to capital movements that have a sufficiently close link with the provision of financial services and that, 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.

64 Judgment of 15 February 2017, *X* (C-317/15, EU:C:2017:119, paragraph 33 and the case-law cited).

99. Furthermore, I take the view that the expression 'movement of capital … involving … the provision of financial services', in Article 64(1) TFEU, must be interpreted strictly, as relating to a restrictive measure concerning movements of capital entailing the provision of services, and not to the services provided in themselves. As Advocate General Mengozzi pointed out in his Opinion in *Emerging Markets Series of DFA Investment Trust Company*, that provision refers in its wording, to movements of capital 'involving', that is to say, entailing the provision of financial services. [65]

100. In the present case, the type of capital movement in question is the payment of dividends to a pension fund. I am of the opinion that, where a pension fund receives dividends, there is no causal link between the capital movements and the provision of financial services, as the situation concerns the direct acquisition of shareholdings by an investor wishing to diversify its assets and achieve a better distribution of risk. As the Commission has pointed out, the acquisition of shareholdings by a pension fund and the dividends which it receives as a result serve the purpose, first and foremost, of preservation of its assets through greater diversification and better distribution of risk and of the provisions it constitutes, in order to ensure that it can meet its pension commitments to its members.

101. Lastly, the restriction at issue lies in the use of the full set-off mechanism which relates to the taxation of dividends received by resident pension funds, and is not available to non-resident pension funds. The restriction does not relate to movements of capital connected to the provision of financial services by the pension fund to its members.

102. I therefore take the view that the standstill provision in Article 64(1) TFEU does not apply to the restriction arising from the German legislation at issue in the main proceedings.

V. Conclusion

103. In the light of the foregoing considerations, I propose that the Court should answer the questions referred by the Finanzgericht München (Finance Court, Munich, Germany) as follows:

(1) Articles 63 and 65 TFEU are to be interpreted as precluding legislation of a Member State which imposes a withholding tax on dividends paid by a resident company to resident and non-resident pension funds, while providing for a mechanism, available only to resident pension funds, by which the full amount of that tax can be set off against corporation tax, and which, consequently, has the effect of virtually exempting such dividends from any taxation, whereas, as regards non-resident pension funds, the withholding tax is a definitive tax, since the effective tax burden borne by non-resident pension funds in relation to those dividends, in that State, is greater than that borne by resident pension funds, which is a matter for the referring court to verify in the main proceedings.

(2) Article 64(1) TFEU is to be interpreted as meaning that national legislation, such as that at issue in the main proceedings, which has not fundamentally been amended since 31 December 1993, and which provides for tax on income from capital to be set off in full against corporation tax, does not fall within the provision of financial services within the meaning of that provision.

65 See, in general, the Opinion of Advocate General Mengozzi of 6 November 2013 in *Emerging Markets Series of DFA Investment Trust Company* (C-190/12, EU:C:2013:710, points 73 to 80).