Reports of Cases

JUDGMENT OF THE COURT (Fifth Chamber)

20 September 2018 *

(Reference for a preliminary ruling — Articles 63 to 65 TFEU — Free movement of capital — Deduction of taxable profits — Shareholdings of a parent company in a capital company whose management and registered office are located in a non-member State — Dividends distributed to the parent company — Tax deductibility subject to stricter conditions than deduction of profits from shareholdings in a non-tax-exempt capital company governed by national law)

In Case C-685/16,

REQUEST for a preliminary ruling under Article 267 TFEU from the Finanzgericht Münster (Finance Court, Münster, Germany), made by decision of 20 September 2016, received at the Court on 27 December 2016, in the proceedings

EV

v

Finanzamt Lippstadt,

THE COURT (Fifth Chamber),

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

Advocate General: M. Wathelet,

Registrar: M. Aleksejev, Administrator,

having regard to the written procedure and further to the hearing on 30 November 2017,

after considering the observations submitted on behalf of:

– EV, by U. Hohage, Rechtsanwalt,

– the Finanzamt Lippstadt, by H.-J. Sellmann, acting as Agent,

– the German Government, by T. Henze and R. Kanitz, acting as Agents,

– the European Commission, by M. Wasmeier, W. Roels and R. Lyal, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 7 February 2018,

* Language of the case: German.

gives the following

Judgment

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

2 The request has been made in proceedings between EV, a partnership limited by shares governed by German law, and the Finanzamt Lippstadt (Central Tax Office, Lippstadt, Germany; 'the Tax Office') concerning trade tax imposed on EV.

German law

3 Paragraph 8(1)(1) to (6) of the Gesetz über die Besteuerung bei Auslandsbeziehungen (Außensteuergesetz) (Law on taxation in international contexts) of 8 September 1972 (BGBl. 1972 I, p. 1713; 'the AStG'), lists the following activities:

1.Agriculture and forestry;

2.the manufacture, treatment, processing or assembly of objects, energy production activities and the search for or exploration of natural resources,

3.the operation of credit institutions or insurance companies which use business premises for their activities (with some exceptions),

4.trade (with some exceptions),

5.services (with some exceptions),

6.leasing and rental (with some exceptions).

4 Paragraph 2 of the Gewerbesteuergesetz (Law on trade tax) of 2002, in the version deriving from the 2008 tax law of 20 December 2007 (BGBl. 2007 I, p. 3150; 'the GewStG 2002'), provides as follows:

'(1) [1]Any industrial or commercial undertaking which operates within Germany shall be subject to the trade tax. … [3]An industrial or commercial undertaking shall be regarded as operating within Germany when it maintains a permanent business establishment on German territory …

(2) [1]Activity carried out by capital companies (in particular European companies, public limited liability companies, limited liability companies and limited partnerships) … shall in all cases be regarded fully as a business undertaking. [2]If a capital company is a controlled company [(*Organgesellschaft*)] within the meaning of Paragraph 14, 17 or 18 of the Körperschaftsteuergesetz [Law on corporation tax], it shall be regarded as constituting a permanent establishment of the controlling company.'

5 By virtue of Paragraph 6 of the GewStG 2002, the basis of assessment for trade tax is the industrial or commercial profits, namely, in accordance with the first sentence of Paragraph 7 of the GewStG 2002, the profits deriving from industrial or commercial activity, calculated in accordance with the provisions of the Einkommensteuergesetz (Law on income tax; 'the EStG') or the Körperschaftsteuergesetz (Law on corporation tax; 'the KStG'), plus or minus the amounts referred to in Paragraphs 8 and 9 of the GewStG.

6 Paragraph 8 of the GewStG 2002, entitled 'Add-backs' provides as follows:

'The following amounts shall be added back to the profit from an industrial or commercial operation (Paragraph 7) if they were deducted when calculating the profit:

…

5. the surplus of shares of profits (dividends) which has not been taken into account under Paragraph 3(40) of [the EStG] or Paragraph 8b(1) of [the KStG] and income and earnings treated as such from shareholdings in a company, in an association of persons or in corporate funds within the meaning of [the KStG], provided that they do not fulfil the requirements set out in Paragraph 9(2a) or (7), after the deduction of operating expenses which are economically linked to those revenues, …

…'

7 Paragraph 9 of the GewStG 2002 governs allowances or reductions concerning profits from shareholdings in a national company, a company established in another Member State or in a non-member State.

8 First, Paragraph 9(2a) of the GewStG 2002 provides that the sum of the profit and add-backs is to be reduced by the profits from shareholdings in a capital company incorporated under national law, which is non-tax-exempt within the meaning of Paragraph 2(2) of that law, where the shareholding held at the beginning of the period in which such profits are received is at least equal to 15% of the initial capital or share capital and where that share of the profits has been taken into account for the purpose of calculating the profit in accordance with Paragraph 7 of that law. By virtue of the third sentence of Paragraph 9(2a) of the GewStG 2002, the charges directly relating to shares in the profits are to reduce the amount of the allowance in so far as the corresponding earnings from those shares are taken into account.

9 Paragraph 9(3) of the GewStG 2002 provides, moreover, that the sum of the profit and the add-backs is to be reduced by the part of the trade earnings of a national undertaking attributable to a permanent foreign establishment of that undertaking.

10 Second, as regards the profits from shareholdings in a company established in another Member State which fulfils the conditions laid down in Council Directive 90/435/EEC of 23 July 1990 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States (OJ 1990 L 225, p. 6), as amended by Council Directive 2006/98/EC of 20 November 2006 (OJ 2006 L 363, p. 129), the deduction may be made, in accordance with the second limb of the first sentence of Paragraph 9(7) of the GewStG 2002 where the shareholding corresponds to at least one tenth of the share capital at the beginning of the reference period.

11 Third, in accordance with the first limb of the first sentence of Paragraph 9(7) of the GewStG 2002, the sum of the profit and the add-backs is to be reduced:

'by the profits from shareholdings in a capital company whose registered office and central management and control are outside the territorial area to which this law applies, and at least 15% (subsidiary) of whose share capital the undertaking has held, without interruption, since the beginning of the reference period, and which derives its gross revenues exclusively, or almost exclusively, from activities covered by Paragraph 8(1)(1) to (6) of [the AStG], and from shareholdings in companies in which the undertaking directly holds at least a quarter of the share capital, where those shareholdings have been held without interruption for at least 12 months before the accounting date for the purpose of determining the profit and where the undertaking establishes

1. that those companies have their registered office and central management and control in the same State as the subsidiary and that their gross revenues are derived exclusively, or almost exclusively, from activities covered by Paragraph 8(1)(1) to (6) of [the AStG], or

2. that the subsidiary possesses shareholdings which are economically linked to its own activities covered by Paragraph 8(1)(1) to (6) and that the company in which the shareholding is held derives its gross revenues exclusively, or almost exclusively, from such activities,

where the shares of profits were entered in the accounts as profits (Paragraph 7); ...'

12 In that regard, the third sentence of Paragraph 9(2a) of the GewStG 2002 is applicable by analogy, by virtue of the second sentence of Paragraph 9(7) of that law.

13 It is apparent from the request for a preliminary ruling and from the observations of the German Government that a 'national holding company' refers to a subsidiary that fulfils the conditions laid down in point 1 of the first limb of the first sentence of Paragraph 9(7) of the GewStG 2002 and that a 'management holding company' refers to a subsidiary that fulfils the conditions laid down in point 2 of the first limb of the first sentence of Paragraph 9(7) of the GewStG 2002.

14 The fourth to seventh sentences of Paragraph 9(7) of the GewStG 2002 govern distributions between sub-subsidiaries with their central management and control and head office outside the territory to which that law applies as follows:

'[4]If an undertaking which, through a subsidiary, indirectly owns at least 15% of a capital company having its central management and control and its registered office outside the territory of application of this law (a sub-subsidiary) makes profits in the course of a financial year from its shareholdings in the subsidiary and if the sub-subsidiary distributes profits to the subsidiary during that financial year, the same rule shall apply, at the request of the undertaking, to the part of the profits received by it and corresponding to the distribution by the sub-subsidiary of the profits allocated to the undertaking on account of its indirect shareholding. [5]If, during the financial year concerned, the subsidiary has received other revenues additional to the shares of profits of a sub-subsidiary, the fourth sentence shall apply only to the share of the distribution allocated to the subsidiary corresponding to the proportion of those shares of profits in the sum of the profits and other revenues, within the limits of the amount of those shares of profits. [6]Application of the fourth sentence presupposes that

1. the sub-subsidiary has, in the course of the financial year during which it carried out the distribution, derived its gross revenues exclusively, or almost exclusively, from activities covered by Paragraph 8(1)(1) to (6) of [the AStG] or from shareholdings covered by the point (1) of the first sentence and that

2. the subsidiary fulfils the requirements laid down by the first sentence as regards the shareholding in the capital of the sub-subsidiary.

[7]Application of the preceding provisions requires that the undertaking provide all evidence, in particular

1. that it establish, by the submission of relevant documents, that the subsidiary derives its gross revenues exclusively, or almost exclusively, from activities covered by Paragraph 8(1)(1) to (6) of [the AStG] or from shareholdings covered by points (1) and (2) of the first sentence,

2. that it establish, by the submission of relevant documents, that the sub-subsidiary derives its gross revenues exclusively, or almost exclusively, from activities covered by Paragraph 8(1)(1) to (6) of [the AStG] or from shareholdings covered by point (1) of the first sentence,

3. that it establish the distributable profits of the subsidiary or of the sub-subsidiary by the production of balance sheets and profit and loss accounts; those documents must be presented on request with the certificate required or usually used in the State of management or registered office and drawn up by an officially recognised supervisory body or an equivalent body.'

15 In accordance with Paragraph 8b(1) of the KStG, relating to shareholdings in other companies and associations, earnings received within the meaning, inter alia, of Paragraph 20(1)(1) of the EStG are not to be taken into account for the purpose of determining income.

16 As regards the calculation of the income of a single taxable entity (*Organschaft*), point 2 of the first sentence of Paragraph 15 of the KStG provides that, by derogation from the general rules, Paragraph 8b(1) to (6) of the KStG is not applicable to the controlled company (*Organgesellschaft*).

17 Paragraph 20(1)(1) of the EStG stipulates that income from capital includes shares of profits (dividends) from shares which confer a right to share in the profits and in the proceeds of the liquidation of a capital company.

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

18 EV produces motor vehicle parts and is the parent company of an international group of companies. Its subsidiaries, in turn, hold shares in several other companies.

19 During the 2009 tax year, EV, as the controlling company, and Reinhold Poersch GmbH ('R GmbH') formed a taxable entity for trade tax purposes, within the meaning of German tax legislation. EV owned 100% of the capital of R GmbH.

20 R GmbH in turn held 100% of the capital of Hella Asia Pacific Pty Ltd ('HAP Ltd'), a capital company incorporated under Australian law having its registered office in Australia. In 2009, HAP Ltd received dividends of up to 556 000 Australian dollars (AUD) (approximately EUR 337 584) from its subsidiary Hella Philippinen Inc. ('H Inc.').

21 HAP Ltd distributed an amount of AUD 45 287 000 (approximately EUR 27 496 685) in the same year to its shareholder, R GmbH. The amount distributed consisted of profits brought forward which had accumulated over a number of previous financial years and a distribution of the profits referred to in the above paragraph which HAP Ltd had received from H Inc.

22 In 2012, a tax inspection of R GmbH was carried out relating to the 2006 to 2009 tax years. The inspectors found that the dividends obtained by R GmbH should have been tax exempt for EV under Paragraph 8b(1) of the KStG and 5% of the earnings should be added back to the income of the company at a flat rate under Paragraph 8b(5) of the same law as non-deductible operating expenses.

23 The Tax Office endorsed the findings of the inspectors and considered that it was necessary, in accordance with Paragraph 8(5) of the GewStG 2002 to add back the dividends paid by HAP Ltd to R GmbH to the operating result of EV, after deduction of the profits distributed by H Inc. to HAP Ltd.

24 According to the Tax Office, the distribution of profits by HAP Ltd did not satisfy the conditions laid down in the first sentence of Paragraph 9(7) of GewStG 2002 to the requisite legal standard in order to benefit from an exception to the add-back principle.

25 First, the Tax Office considered that HAP Ltd, as a subsidiary, was a holding company which did not derive income from specific activities covered by Paragraph 8(1)(1) to (6) of the AStG, with the result that it could not be regarded as a 'management holding company', as referred to in point 2 of the first

limb of the first sentence of Paragraph 9(7) of the GewStG 2002. Second, nor could it be considered a 'national holding company', which benefits from a more favourable regime under point 1 of the first limb of the first sentence of Paragraph 9(7) of the GewStG 2002, because it held shares in sub-subsidiaries established outside Australian territory.

26 By contrast, the Tax Office considered that the amount distributed by H Inc. to HAP Ltd and then distributed by the latter to R GmbH was covered by the fourth sentence et seq. of Paragraph 9(7) of the GewStG 2002 and could enjoy the preferential regime of a sub-subsidiary. Consequently, the dividends paid by H Inc. were not added back to the profit of R GmbH.

27 On the basis of those considerations, the Tax Office issued a tax notice on 13 November 2012, in which the dividends paid by HAP Ltd to R GmbH, after deduction of the dividends paid by H Inc. to HAP Ltd were added back, at a rate of 95%, in accordance with the GewStG 2002, to the operating result of EV as the controlling company. EV's claim against that tax notice was rejected by decision of 8 November 2013.

28 It is in that context that EV brought an action before the referring court, the Finanzgericht Münster (Finance Court, Münster, Germany), claiming inter alia that the dividends of foreign origin were subject to discriminatory treatment contrary to EU law and that the dividends distributed by Hap Ltd and R GmbH should have been deducted from EV's trade earnings in their entirety.

29 In those circumstances, the Finanzgericht Münster (Finance Court, Münster) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Are the provisions regarding the free movement of capital and payment transactions in Article 63 et seq. of the Treaty on the Functioning of the European Union to be interpreted as precluding Paragraph 9(7) of [the GewStG 2002] in so far as those provisions cause the trade tax deduction of the profit and add-backs by the amount of the profits from shares in a capital company whose management and registered office are located outside the Federal Republic of Germany to be tied to stricter requirements than for the deduction of the profit and the add-backs by the amount of the profits from shares in a non-tax-exempt domestic capital company or by that part of the trade earnings of a domestic undertaking allocated to a permanent establishment not located in Germany?'

Consideration of the question referred

Preliminary observations

30 First, it must be noted that, although the question referred for a preliminary ruling includes any capital company whose management and registered office are located outside the Federal Republic of Germany, it is common ground that the dispute in the main proceedings concerns the treatment of profits received by a company whose management and registered office are located in a non-member State, namely Australia.

31 In those circumstances, the question referred for a preliminary ruling must be understood to relate solely to the treatment of profits distributed by companies whose management and registered office are located in non-member States, without encompassing cases in which profits are distributed by companies whose management and registered office are located in another Member State.

32 Next, it is necessary to examine whether Article 63 TFEU may be relied on in a situation, such as that at issue in the main proceedings, which concerns the difference in treatment of profits distributed to a resident company by a subsidiary established in a non-member State compared with the treatment of profits distributed by resident subsidiaries of a resident company.

33 In that regard, it follows from the Court's case-law that the tax treatment of dividends may fall within the scope of Article 49 TFEU on the freedom of establishment and Article 63 TFEU on the free movement of capital. As regards the question whether national legislation falls within the scope of one or other of the freedoms of movement, the purpose of the legislation concerned must be taken into consideration (judgment of 24 November 2016, *SECIL*, C-464/14, EU:C:2016:896, paragraph 31 and the case-law cited).

34 National legislation intended to apply only to those shareholdings which enable the holder to exert a definite influence on a company's decisions and to determine its activities falls within the scope of Article 49 TFEU on freedom of establishment (judgment of 24 November 2016, *SECIL*, C-464/14, EU:C:2016:896, paragraph 32 and the case-law cited).

35 By contrast, 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 (judgment of 24 November 2016, *SECIL*, C-464/14, EU:C:2016:896, paragraph 33 and the case-law cited).

36 The Court has held that, in a context relative to the tax treatment of dividends originating in a non-member State, it is sufficient to examine the purpose of national legislation in order to determine whether the tax treatment of such dividends falls within the scope of the provisions of the Treaty on the free movement of capital (judgment of 24 November 2016, *SECIL*, C-464/14, EU:C:2016:896, paragraph 34 and the case-law cited).

37 In that regard, the Court has stated that national legislation relating to the tax treatment of dividends which does not apply exclusively to situations in which the parent company exercises decisive influence over the company paying the dividends must be assessed in the light of Article 63 TFEU. A company established in a Member State may therefore rely on that provision in order to call into question the legality of such legislation, irrespective of the size of its shareholding in the company paying dividends established in a non-member State (judgment of 24 November 2016, *SECIL*, C-464/14, EU:C:2016:896, paragraph 35 and the case-law cited).

38 In the present case, Paragraph 9(7) of the GewStG 2002 subjects the deduction of dividends obtained by resident companies from their subsidiaries established in non-member States to the condition that the shareholding of the resident company in the subsidiary must correspond, from the start of the reference period, without interruption, to at least 15%.

39 In that regard, the referring court and the German Government note that such a 15% shareholding allows certain rights granted to minority shareholders to be exercised, in accordance with German company law. However, it does not follow from that situation that Paragraph 9(7) of the GewStG 2002 solely concerns shareholdings conferring a definite influence over the decisions of the company distributing dividends.

40 The Court has previously held that holding at least 15% of the share capital of a subsidiary does not necessarily imply that the company holding those shares exercises a definite influence over the decisions of the company distributing the dividends (see, to that effect, judgment of 20 December 2017, *Deister Holding and Juhler Holding*, C-504/16 and C-613/16, EU:C:2017:1009, paragraphs 79 and 80 and the case-law cited).

41 Consequently, it must be held that Paragraph 9(7) of the GewStG 2002 does not apply solely to situations in which the parent company has a shareholding that is likely to allow it to exercise a definite influence over the decisions of its subsidiary and to determine its activities.

42 Accordingly, that legislation must be assessed in the light of Article 63 TFEU.

43 Admittedly, in the present case, by virtue of Paragraph 9(7) of the GewStG 2002, in order for the parent company to be able to claim a deduction of the dividends distributed by its subsidiary established outside German territory, in addition to the abovementioned threshold of 15%, that subsidiary must derive its gross revenues exclusively or almost exclusively from activities covered by Paragraph 8(1)(1) to (6) of the AStG or from shareholdings in sub-subsidiaries in which that subsidiary owns at least 25% of the capital, provided that certain conditions are fulfilled.

44 The existence of that secondary 25% threshold relating to the subsidiary's shareholding in the sub-subsidiary does not however call into question the finding in paragraph 41 of the present judgment.

45 First, as is apparent from the case-law recalled in paragraphs 34 and 35 of the present judgment, in order to determine whether the national legislation in question falls within the scope of freedom of establishment or of free movement of capital, it is necessary to examine the nature of the parent company's shareholding in the distributing subsidiary to which that legislation may apply.

46 Second, the secondary threshold of 25%, referred to in Paragraph 9(7) of the GewStG 2002, is established under the alternative conditions relating to the income that the subsidiary distributes to the parent company. In a situation which does not concern company structures on several levels or in a situation where the parent company owns at least 15% of the subsidiary and where the latter derives its gross revenues exclusively or almost exclusively from activities covered by Paragraph 8(1)(1) to (6) of the AStG, that threshold is not intended to apply. Consequently, even if the subsidiary must be taken into account in the assessment referred to in paragraph 45 of the present judgment, it cannot call into question the fact that Paragraph 9(7) of the GewStG 2002 does not apply solely to situations in which the parent company has a shareholding that is likely to allow it to exercise a definite influence over the decisions of its subsidiary and to determine its activities.

47 Consequently, Article 63 TFEU may be relied on in a situation, such as that at issue in the main proceedings, which concerns the difference in treatment of profits distributed to a resident company by a subsidiary established in a non-member State compared with the treatment of profits distributed by resident subsidiaries of a resident company.

48 Finally, it should be noted that the question raised concerns the comparison between the treatment of profits distributed to resident parent companies by subsidiaries established in non-member States in relation not only to the treatment of profits distributed to resident parent companies by resident subsidiaries but also to the treatment of the trade earnings of a resident company allocated to a permanent establishment not located in national territory.

49 The comparison between the tax treatment, first, of profits distributed to resident parent companies by their subsidiaries established in non-member States and, second, of the trade earnings of a resident company allocated to a permanent establishment located outside national territory would entail examining whether legislation, such as that at issue in the main proceedings, introduces a difference in treatment which dissuades a resident company from carrying out its business outside its State of residence via a subsidiary rather than a permanent establishment.

50 In that regard, it must be noted that it is from Article 49 TFEU on freedom of establishment, which applies to those companies by virtue of Article 54 TFEU, and not from Article 63 TFEU, on free movement of capital, that companies which have their registered office, central administration or principal place of business in the European Union, derive the right to exercise their activity in other Member States through a subsidiary, branch or agency.

51 The Court has held that even though, according to their wording, the provisions of EU law on freedom of establishment are aimed at ensuring that foreign nationals are treated in the host Member State in the same way as nationals of that State, they also prohibit the Member State of origin from hindering

the establishment in another Member State of one of its nationals or of a company incorporated under its legislation (judgments of 23 November 2017, *A*, C-292/16, EU:C:2017:888, paragraph 24, and of 12 June 2018, *Bevola and Jens W. Trock*, C-650/16, EU:C:2018:424, paragraph 16).

52 However, the chapter of the Treaty on freedom of establishment does not contain any provision which extends the application of its provisions to situations concerning the establishment of a company of a Member State in a non-member State or the establishment of a company of a non-member State in a Member State (see, to that effect, judgment of 13 November 2012, *Test Claimants in the FII Group Litigation*, C-35/11, EU:C:2012:707, paragraph 97 and the case-law cited).

53 Accordingly, neither Article 63 TFEU nor Article 49 TFEU is intended to apply to a situation in which national legislation establishes a difference in tax treatment between the trade earnings of a resident company allocated to a permanent establishment located outside national territory and the profits of a subsidiary located in a non-member State.

54 Consequently, it is only necessary to examine below, whether Articles 63 to 65 TFEU must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which subjects a deduction of profits from shareholdings in a capital company with its management and head office in a non-member State to stricter conditions than a deduction of profits from shareholdings in a non-exempt capital company governed by national law.

The existence of a restriction

55 It follows from the Court's settled case-law that the measures prohibited by Article 63(1) TFEU as restrictions on the movement of capital include those that are such as to discourage non-residents from making investments in a Member State or to discourage that Member State's residents from doing so in other States (judgment of 2 June 2016, *Pensioenfonds Metaal en Techniek*, C-252/14, EU:C:2016:402, paragraph 27 and the case-law cited).

56 In the present case, the legislation at issue in the main proceedings provides for different treatment of dividends distributed by a resident company and dividends distributed by a company established in a non-member State.

57 As the referring court states, by virtue of the first sentence of Paragraph 9(2a) of the GewStG 2002, when a resident company receives dividends from another resident company, which are subject to tax, the trade tax reduction presupposes only ownership of at least 15% of the share capital of the distributing company at the start of the tax period and taking the profit obtained through those shareholdings into account for the purpose of determining the taxable profit.

58 By contrast, as regards the distributions made by a company established in a non-member State, under the first sentence of Paragraph 9(7) of the GewStG 2002, a shareholding of at least 15% must be owned from the start of the reference period, without interruption, and, in addition, the gross revenues must come from certain active sources of income, that is to say only those deriving from the sole activities referred to in Paragraph 8(1)(1) to (6) of the AStG, or it must be proved that the income relates to sub-subsidiaries in which the subsidiary own at least 25% of the capital, that the subsidiary constitutes a national holding company or a management holding company, and that the sub-subsidiary, in any event, derives its gross revenues almost exclusively from the economic activities referred to in Paragraph 8(1)(1) to (6) of the AStG.

59 As the German Government maintained in its written observations, the deduction provided for in Paragraph 9(7) of the GewStG 2002 is subject to stricter conditions than the deduction provided for in Paragraph 9(2a) of that law.

60 However, according to that government, Paragraph 9(7) of the GewStG 2002 does not entail restriction of the free movement of capital but, on the contrary, establishes equal treatment of income which it classifies as 'passive', that is to say, in general, income from asset management which is not subject to trade tax and therefore does not give rise to a right to deduction. In this respect, that provision provides that certain asset management activities of a company established in a non-member State cannot give rise to such a right of deduction. Conversely, that means that certain 'active' activities, that is to say commercial activities and therefore, in principle, activities subject to trade tax, of the foreign company would give rise to the deduction.

61 It must however be noted, in that regard, that, first, the German Government itself acknowledges, as regards dividends distributed by resident companies, that the deduction does not depend on the type of activity performed by the capital company distributing those dividends.

62 Second, Paragraph 9(7) of the GewStG 2002, lays down other more restrictive conditions for resident companies concerning distributions of dividends from subsidiaries established in non-member States, such as having a shareholding of at least 15% without interruption, during the reference period in the distributing companies established in non-member States, and not merely at the start of that period, and conditions relating to sub-subsidiaries distributing dividends to subsidiaries.

63 Consequently, it must be held that, by submitting the tax deductibility of dividends paid by subsidiaries established in non-member States to stricter conditions than those applying to dividends paid by resident companies, the legislation at issue in the main proceedings is likely to dissuade resident parent companies from investing their capital in subsidiaries established in non-member States. To the extent that the income from capital originating in non-member States receives less favourable tax treatment than dividends distributed by resident companies, the shares of companies established in non-member States are less attractive to resident investors than those of resident companies (see, by analogy, judgment of 24 November 2016, *SECIL*, C-464/14, EU:C:2016:896, paragraph 50 and the case-law cited).

64 Such legislation constitutes, consequently, a restriction on the movement of capital between Member States and non-member States, prohibited, in principle, by Article 63 TFEU.

The application of Article 64(1) TFEU

65 The Tax Office and the German Government maintain, however, that the Federal Republic of Germany is justified in maintaining such a restriction under Article 64(1) TFEU.

66 According to Article 64(1) TFEU, the provisions of Article 63 are without prejudice to the application to non-member States of any restrictions which existed on 31 December 1993 under national or EU 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.

67 Although the concept of 'direct investment' is not defined by the Treaty, it has nevertheless been defined in the nomenclature of the capital movements set out in Annex I to Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty (article repealed by the Treaty of Amsterdam) (OJ 1988 L 178, p. 5). As the list of 'direct investments' in the first section of that nomenclature and the relative explanatory notes show, that concept concerns investments of any kind undertaken by natural or legal persons and which serve to establish or maintain lasting and direct links between the persons providing the capital and the undertakings to which that capital is made available in order to carry out an economic activity (judgment of 24 November 2016, *SECIL*, C-464/14, EU:C:2016:896, paragraph 75 and the case-law cited).

68 As regards shareholdings in new or existing undertakings, constituted as companies limited by shares, as the explanatory notes mentioned in the previous paragraph confirm, the objective of establishing or maintaining lasting economic links presupposes that the shares held by the shareholder enable him, either pursuant to the provisions of the national laws relating to companies limited by shares or in some other way, to participate effectively in the management of that company or in its control (judgment of 24 November 2016, *SECIL*, C‑464/14, EU:C:2016:896, paragraph 76 and the case-law cited).

69 It follows from the case-law of the Court that the restrictions on capital movements involving establishment or direct investment within the meaning of Article 64(1) TFEU extend not only to national measures which, in their application to capital movements to or from non-member States, restrict establishment or investment, but also to those which restrict payments of dividends deriving from them (judgment of 24 November 2016, *SECIL*, C‑464/14, EU:C:2016:896, paragraph 77 and the case-law cited).

70 It follows that a restriction on capital movements, such as a less favourable tax treatment of foreign-sourced dividends, comes within the scope of Article 64(1) TFEU, inasmuch as it relates to holdings acquired with a view to establishing or maintaining lasting and direct economic links between the shareholder and the company concerned and which allow the shareholder to participate effectively in the management of the company or in its control (judgment of 24 November 2016, *SECIL*, C‑464/14, EU:C:2016:896, paragraph 78 and the case-law cited).

71 In that regard, the Court has held that the fact that national legislation imposing a restriction on movements of capital involving direct investment may also apply to other situations is not such as to preclude Article 64(1) TFEU from being applicable in the circumstances which it covers (see, to that effect, judgment of 15 February 2017, *X*, C‑317/15, EU:C:2017:119, paragraph 21).

72 In the present case, it must be held that the case in the main proceedings concerns the tax treatment of dividends received by EV as the controlling company from its shareholdings of 100% in a company governed by German law, which, in turn, owned 100% of the shares in HAP Ltd, which is the source of the distributions which should be added back according to the Tax Office. That shareholding is such as to enable the shareholder to participate effectively in the management of the distributing company or its control and can, therefore, be regarded as a direct investment.

73 As regards the temporal criterion laid down by Article 64(1) TFEU, it is apparent from the Court's settled case-law that while it is, in principle, for the national court to determine the content of the legislation which existed on a date laid down by an EU measure, it is for the Court of Justice to provide guidance on interpreting the concept of EU law which constitutes the basis of a derogation under EU law for national legislation 'existing' on a particular date (judgment of 10 April 2014, *Emerging Markets Series of DFA Investment Trust Company*, C‑190/12, EU:C:2014:249, paragraph 47 and the case-law cited).

74 The words 'restrictions which exist on 31 December 1993' in Article 64(1) TFEU presuppose that the legal provisions relating to the restriction in question have formed part of the legal order of the Member State concerned continuously since that date. If that were not the case, a Member State could, at any time, reintroduce restrictions on the movement of capital to or from non-member States which existed as part of the national legal order on 31 December 1993 but had not been maintained (judgment of 5 May 2011, *Prunus and Polonium*, C‑384/09, EU:C:2011:276, paragraph 34 and the case-law cited).

75 In that context, the Court has held that any national measure adopted after a date thus fixed is not, by that fact alone, automatically excluded from the derogation laid down in the EU measure in question. A provision which is, in essence, identical to the previous legislation, or limited to reducing or eliminating an obstacle to the exercise of rights and freedoms established by EU law in the earlier

legislation, will be covered by the derogation. By contrast, legislation based on an approach which differs from that of the previous law and establishes new procedures cannot be treated as legislation existing at the date fixed in the EU measure in question (judgment of 10 April 2014, *Emerging Markets Series of DFA Investment Trust Company*, C-190/12, EU:C:2014:249, paragraph 48 and the case-law cited).

76 In the present case, it follows from the order for reference, first, that the national legislature, under a reform concerning the taxation of undertakings of 14 August 2007, raised the shareholding threshold required for a deduction under Paragraph 9(7) of the GewStG 2002 from 10% to 15%.

77 Accordingly, one of the conditions for application of the deduction was changed, thereby reducing, as the Advocate General has observed in point 89 of his Opinion, the scope of the deduction provided for in Paragraph 9(7) of the GewStG 2002.

78 Next, it follows from the request for a preliminary ruling — and it is acknowledged by the German Government — that, after 31 December 1993, the German legislature amended the scope of the deduction granted, in the sense that it was no longer calculated on the gross dividend but on the net dividend. The scope of the deduction was, therefore, also reduced.

79 Finally, the referring court states that the overall legislative context of Paragraph 9(7) of the GewStG 2002 was substantially amended by the Gesetz zur Senkung der Steuersätze und zur Reform der Unternehmensbesteuerung (Steuersenkungsgesetz) (Law on the reduction of tax rates and the reform of the taxation of undertakings (Law on tax reduction)) of 23 October 2000 (BGBl. 2000 I, p. 1433). The introduction of the 50% income allowance scheme by this new law meant that dividends paid under the new scheme were in principle exempt from trade tax, on condition that they fulfilled the conditions set out in Paragraph 9(7) of the GewStG 2002, whereas, under the previous scheme, dividends received by legal persons were, in principle subject to the tax and Paragraph 9(7) of the GewStG 2002 constituted an exception.

80 In that regard, it must be recalled that, Article 64(1) TFEU, in so far as it is an exception to the fundamental principle of the free movement of capital, must be interpreted strictly (judgment of 17 October 2013, *Welte*, C-181/12, EU:C:2013:662, paragraph 29).

81 Consequently, the conditions which national legislation must fulfil in order to be regarded as 'existing' on 31 December 1993, notwithstanding an amendment to national law after that date, must also be interpreted strictly.

82 The restriction of the scope of the deduction provided for in Paragraph 9(7) of the GewStG 2002, both personal and material, combined with the change in the context of the overall legislation, referred to in paragraph 79 of the present judgment, contradicts the assertion of the German Government that the national legislation at issue in the main proceedings has, in essence, remained the same, despite the legislative amendments made between 31 December 1993 and the adoption of that provision of national law.

83 Consequently, a restriction on the free movement of capital, such as under Paragraph 9(7) of the GewStG 2002, cannot fall outside the scope of the rule in Article 63(1) TFEU on the basis of Article 64(1) TFEU.

84 It is, nevertheless, necessary to examine the extent to which such a restriction may be justified in the light of other provisions of the Treaty.

The existence of a justification

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

86 In so far as that provision is a derogation from the fundamental principle of the free movement of capital, it must be interpreted strictly. Accordingly, it cannot be interpreted as meaning that all tax legislation which draws a distinction between taxpayers on the basis of their place of residence or the State in which they invest their capital is automatically compatible with the FEU Treaty. Indeed, 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]' (judgment of 10 April 2014, *Emerging Markets Series of DFA Investment Trust Company*, C-190/12, EU:C:2014:249, paragraphs 55 and 56 and the case-law cited).

87 A distinction must, therefore, be made between the differences in treatment authorised by Article 65(1)(a) TFEU and discrimination prohibited by Article 65(3) TFEU. According to the Court's case-law, 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 concerning the free movement of capital, the difference in treatment must concern situations that are not objectively comparable or must be justified by an overriding reason in the public interest (judgment 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).

Whether the situations are objectively comparable

88 In that regard, it is clear from the Court's case-law that 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 (judgment of 2 June 2016, *Pensioenfonds Metaal en Techniek*, C-252/14, EU:C:2016:402, paragraph 48 and the case-law cited).

89 Moreover, 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 an objectively different situation (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).

90 As has already been stated in paragraphs 56 to 58 of the present judgment, the national legislation at issue in the main proceedings provides for different treatment of dividends depending on whether they are paid by a resident company or a company established in a non-member State.

91 The German Government maintains that income from a shareholding in a foreign company is not in principle subject to trade tax at an earlier stage, unlike that from a resident company.

92 With regard to national legislation, such as that in the main proceedings, which seeks to prevent double taxation by authorising the deduction from the trade tax base of dividends from shareholdings in one or more capital companies, the situation of a company receiving dividends distributed by resident companies is comparable to that of a company receiving income from shareholdings from non-resident companies (see, by analogy, judgments of 12 December 2006, *Test Claimants in the FII Group Litigation*, C-446/04, EU:C:2006:774, paragraph 62, and of 10 February 2011, *Haribo Lakritzen Hans Riegel and Österreichische Salinen*, C-436/08 and C-437/08, EU:C:2011:61, paragraph 113).

93 In those circumstances, it follows from the foregoing that companies receiving dividends paid by companies established in the same Member State are, in the light of the national legislation at issue in the main proceedings, in a situation comparable to those which receive dividends from companies with their head office in a non-Member State.

An overriding reason in the public interest

94 The German Government submits that the national legislation at issue in the main proceedings is intended to combat abusive tax arrangements. The deduction provided for in Paragraph 9(7) of the GewStG 2002 would only benefit actual distributions and would prevent deductions from being made using shell companies.

95 In that context, it should be noted that, in order for national legislation to be regarded as seeking to prevent tax evasion and abuses, its specific objective must be to prevent conduct involving the creation of wholly artificial arrangements which do not reflect economic reality, the purpose of which is unduly to obtain a tax advantage (judgments of 5 July 2012, *SIAT*, C-318/10, EU:C:2012:415, paragraph 40, and of 7 September 2017, *Eqiom and Enka*, C-6/16, EU:C:2017:641, paragraph 30 and the case-law cited).

96 However, a general presumption of fraud and abuse cannot justify a measure which prejudices the enjoyment of a fundamental freedom guaranteed by the Treaty and the mere fact that the company distributing the dividends is located in a non-member State cannot set up a general presumption of tax evasion (see, to that effect, judgment of 19 July 2012, *A*, C-48/11, EU:C:2012:485, paragraph 32 and the case-law cited).

97 In the present case, the precise identification of the type of abuse that the tax legislation at issue in the main proceedings seeks to prevent is not apparent either from the file submitted to the Court or the explanations provided by the German Government.

98 In any event, the conditions for application of the deduction provided for in Paragraph 9(7) of the GewStG 2002, under which it is necessary to take into account, as regards subsidiaries acting as a holding company, the nature of the activity of their sub-subsidiaries, meaning that the subsidiary must be capable of being classified as a 'management holding company' or a 'national holding company' in the sense described in paragraph 13 of the present judgment, introduce, concerning companies established in non-Member States, an irrebuttable presumption of abuse.

99 That legislation cannot therefore be justified by the need to prevent abuse and tax evasion.

100 In the light of the foregoing the answer to the question is that Articles 63 to 65 TFEU must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which subjects a deduction of profits from shareholdings in a capital company with its management and head office in a non-member State to stricter conditions than a deduction of profits from shareholdings in a non-exempt capital company governed by national law.

Costs

101 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 (Fifth Chamber) hereby rules:

Articles 63 to 65 TFEU must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which subjects a deduction of profits from shareholdings in a capital company with its management and head office in a non-member State to stricter conditions than a deduction of profits from shareholdings in a non-exempt capital company governed by national law.

[Signatures]