



Court of Justice of the European Union

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Judgment in Joined Cases C-338/11 Santander Asset Management SGIIC SA v Directeur des résidents à l'étranger et des services généraux and C-339/11 to C-347/11 Santander Asset Management SGIIC SA and Others v Ministre du Budget, des Comptes publiques, de la Fonction publique et de la Réforme de l'Etat

Press and Information

EU law precludes French legislation establishing different tax rules for nationally sourced dividends received by resident and non-resident undertakings for collective investments in transferable securities (UCITS)

EU law prohibits all restrictions on the movement of capital between Member States and between Member States and third countries¹. That prohibition does not affect 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 the place where their capital is invested². However, such national provisions must not constitute a means of arbitrary discrimination or a disguised restriction of the free movement of capital and payments³.

The disputes at issue in these cases concern the French tax rules applicable to dividends distributed by companies resident in France to undertakings for collective investments in transferable securities (UCITS)⁴ which are not resident in that State. UCITS (special investment companies managed by a management company or investment company) enable any investor (shareholder) to entrust the management of his capital to a professional who is responsible for investing it on a number of given financial markets. Under French tax legislation, dividends paid to UCITS which are not resident in France are taxed at source at the rate of 25%, whereas such dividends are exempt from tax when paid to resident UCITS.

Ten UCITS from Belgium, Germany, Spain and the United States⁵ which invest *inter alia* in shares in French companies and receive dividends from those shares which are subject to withholding tax, contest the French legislation. They argue that there is a breach of the free movement of capital guaranteed by EU law.

The tribunal administratif de Montreuil (France), before which these actions were brought, asks the Court of Justice in essence whether EU law precludes French legislation which taxes nationally sourced dividends distributed to UCITS differently according to the place of residence of the recipient undertaking. In particular, as regards the taxation of dividends distributed by resident companies to non-resident UCITS, it seeks to ascertain whether, for the purpose of determining whether there may be a difference in treatment amounting to an obstacle to the free movement of capital, situations must be compared only by reference to the UCITS or whether the situation of the shareholders must also be taken into account.

¹ Article 63 of the Treaty on the Functioning of the European Union (TFEU).

² Article 65(1) TFEU.

³ Article 65(3) TFEU.

⁴ Under French law, UCITS include sociétés d'investissement à capital variable (SICAV) and fonds communs de placement (FCP).

⁵ Santander Asset Management SGIIC SA, on behalf of FIM Santander Top 25 Euro Fi; Santander Asset Management SGIIC SA, on behalf of Cartera Mobiliaria SA SICAV; Kapitalanlagegesellschaft mbH, on behalf of Alltri Inka; Allianz Global Investors Kapitalanlagegesellschaft mbH, on behalf of DBI-Fonds APT No 737; SICAV KBC Select Immo; SGSS Deutschland Kapitalanlagegesellschaft mbH; International Values Series of the DFA Investment Trust Co.; Continental Small Co. Series of the DFA Investment Trust Co.; SICAV GA Fund B; Generali Investments Deutschland Kapitalanlagegesellschaft mbH, on behalf of AMB Generali Aktien Euroland.

First, the Court points out that measures prohibited by EU law as restrictions on the free movement of capital include those which discourage non-residents from making investments in a Member State or those which discourage residents of that Member State from doing so in other States. A difference in the tax treatment of dividends according to the UCITS' place of residence may discourage, on the one hand, non-resident UCITS from investing in companies established in France and, on the other, investors resident in France from acquiring shares in non-resident UCITS. Accordingly, **the Court considers that the French legislation at issue constitutes a restriction on the free movement of capital, which is, in principle, prohibited under EU law.**

Second, the Court examines whether that restriction may be justified in the light of the provisions on the free movement of capital. It points out that different treatment may be regarded as compatible with EU law only if it concerns situations which are not objectively comparable or is justified by an overriding reason in the public interest.

For the purpose of determining whether the situations are comparable, the Court is asked whether the situation of the shareholders must be taken into account along with that of the UCITS. In reply, the Court states that it is for each Member State to organise, in compliance with EU law, its system for taxing distributed profits. However, where national tax legislation establishes a distinguishing criterion for the taxation of such profits, account must be taken of that criterion in determining whether the situations are comparable. In the present case, the French legislation establishes a relevant distinguishing criterion based on the UCITS' place of residence, in that it subjects only non-resident UCITS to withholding tax on dividends which they receive. In the light of that distinguishing criterion, the Court considers that, for the purpose of determining whether that legislation is discriminatory, the situations must be compared only by reference to the UCITS, without taking account of the situation of the shareholders. Accordingly, **the different treatment of resident UCITS and non-resident UCITS cannot be justified by a relevant difference in their situations.**

The Court also considers whether the different treatment may be justified by overriding reasons in the public interest.

One of the grounds of justification relates to the need to ensure a balanced allocation of the power to tax between the Member States. Different treatment may be accepted where the national legislation is designed to prevent conduct capable of jeopardising the right of a Member State to exercise its powers of taxation in relation to activities carried out in its territory. However, where a Member State has chosen not to tax resident UCITS in receipt of nationally sourced dividends, it cannot rely on the argument that there is a need to ensure a balanced allocation between the Member States of the power to tax in order to justify the taxation of non-resident UCITS in receipt of such income.

Similarly, the French legislation at issue cannot be justified by the need to guarantee the effectiveness of fiscal supervision, since the tax affects solely and specifically non-residents.

Lastly, the difference in treatment introduced by the French legislation cannot be justified by the need to preserve the coherence of the tax system in the absence of any direct link between the exemption from withholding tax on nationally sourced dividends received by a resident UCITS and the taxation of those dividends as income received by the shareholders.

Consequently, the Court's answer is that **EU law precludes the French legislation which taxes at source nationally sourced dividends when received by UCITS resident in another State but exempts such dividends from tax when received by UCITS resident in France.**

NOTE: A reference for a preliminary ruling allows the courts and tribunals of the Member States, in disputes which have been brought before them, to refer questions to the Court of Justice about the interpretation of European Union law or the validity of a European Union act. The Court of Justice does not decide the dispute itself. It is for the national court or tribunal to dispose of the case in accordance with the Court's decision, which is similarly binding on other national courts or tribunals before which a similar issue is raised.

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The [full text](#) of the judgment is published on the CURIA website on the day of delivery.

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