

**Case C-39/23**

**Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice**

**Date lodged:**

26 January 2023

**Referring court:**

Högsta förvaltningsdomstolen (Sweden)

**Date of the decision to refer:**

24 January 2023

**Applicants:**

KEVA

Landskapet Ålands pensionsfond

Kyrkans Centralfond

**Respondent:**

Skatteverket

---

**Subject of the action in the main proceedings**

Right to refund of Swedish withholding tax levied on the dividends of Swedish companies paid to pension institutions established in Finland.

**Subject and legal basis of the reference for a preliminary ruling**

Interpretation of the free movement of capital under Article 63 TFEU and of the case-law of the Court of Justice to clarify whether it is compatible with the free movement of capital to impose withholding tax on dividends paid to Finnish pension institutions. Article 267 TFEU.

## **Questions referred for a preliminary ruling**

Question 1: Does the fact that dividends paid by domestic companies to foreign public pension institutions are subject to withholding tax, whereas the corresponding dividends are not taxed if they accrue to the own State through its general pension funds, constitute such negative differential treatment that it entails a restriction of the free movement of capital prohibited, in principle, by Article 63 TFEU?

Question 2: If Question 1 is answered in the affirmative, what are the criteria that should be taken into account when assessing whether a foreign public pension institution is in a situation which is objectively comparable to that of the own State and its general pension funds?

Question 3: Can a possible restriction be regarded as being justified by overriding reasons of public interest?

## **Provisions of EU law and case-law of the Court of Justice relied on**

Articles 63-66 TFEU

Judgment in Case C-252/14, *Pensioenfonds Metaal en Techniek*, EU:C:2016:402, paragraphs 44, 47, 48 and 63.

## **Relevant provisions of national law**

Kupongskattelagen (Law on withholding tax) (1970:624): Articles 1, 4, 5 and 27

Inkomstskattelagen (Law on income tax) (1999:1229): Chapter 6, Articles 3, 4, 7 and 9, first paragraph; Chapter 7, Article 2, first paragraph; Chapter 2, Article 2, first paragraph

Lagen om dubbelbeskattningsavtal mellan de nordiska länderna (Law on the double taxation treaty between the Nordic countries) (1996:1512) ('the Nordic tax treaty': Articles 10(3) and 25)

## **Succinct presentation of the facts and procedure in the main proceedings**

- 1 Occupational pension insurance is on a statutory footing and compulsory in Finland. The Finnish occupational pension system is based on the employer paying contributions on behalf of the employee to a pension institution. The disputes in the main proceedings concern three pension institutions within that pension system: KEVA, Landskapet Ålands pensionsfond (the pension fund of the region of Åland) and Kyrkans Centralfond (the central fund of the Church), all of which manage or have managed funds under the statutory occupational pension insurance scheme.

- 2 KEVA is responsible for occupational pensions for employees in the municipal sector and also performs certain administrative tasks, including paying out pensions and collecting pension contributions. KEVA is a legal person governed by public law.
- 3 Landskapet Ålands pensionsfond is responsible for occupational pensions for employees of the region of Åland, but does not handle payouts. It is not a separate legal entity but is part of the region of Åland. The fund's assets are kept separate from the region's budget.
- 4 Kyrkans Centralfond was, until 1 January 2016, a pension institution for employees of the Evangelical Lutheran Church in Finland. The fund has also managed the Church's capital for other purposes, such as providing financial support to church congregations. The fund is not a separate legal entity but is part of the Evangelical Lutheran Church.
- 5 As far as taxation is concerned, KEVA is exempt from tax in Finland. Kyrkans Centralfond is, in practice, exempt from income tax in Finland. Landskapet Ålands Pensionsfond is partially exempt from tax in Finland and is not liable to tax on dividends from limited companies.
- 6 The main task of the Swedish allmänna pensionsfonderna (general pension funds; 'the GP funds') is to manage capital belonging to the income-based old-age pension that is part of the Swedish general old-age pension scheme. This in turn is part of the public and compulsory social security system. In their capacity as State authorities, the GP funds are part of the State. They are therefore covered by the State's tax exemption.
- 7 Between 2003 and 2016, the three Finnish pension institutions received dividends from Swedish companies. The dividends were subject to Swedish withholding tax. Since the dividends were not taxed in the hands of the pension institutions in Finland, the Swedish withholding tax could not be deducted in accordance with the Nordic tax treaty.
- 8 The pension institutions applied to the Skatteverket (Swedish Tax Agency) for a refund of the Swedish withholding tax plus interest. In support of their applications, the pension institutions argued that the levying of withholding tax is contrary to the free movement of capital under the FEU Treaty because they are comparable to the GP funds, which are exempt from income tax.
- 9 The Swedish Tax Agency dismissed the applications on the grounds that the situation of these pension institutions is not objectively comparable to that of the Swedish GP funds. The pension institutions appealed against the decision before the Förvaltningsrätten i Falun (Administrative Court, Falun). They then appealed that court's ruling to the Kammarrätten i Sundsvall (Administrative Court of Appeal, Sundsvall) and finally the latter court's judgment to the Högsta förvaltningsdomstolen (Supreme Administrative Court).

**Main arguments of the parties**

- 10 The pension institutions argue that the Swedish levying of withholding tax on dividends from Sweden to Finnish public law pension institutions is contrary to the free movement of capital under Article 63 TFEU. Finnish public law pension institutions should be compared with the Swedish GP funds. Since the Finnish pension institutions are exempt from Finnish income tax, they cannot deduct the Swedish withholding tax in Finland. Finnish public law pension institutions are thus placed at a disadvantage compared to the Swedish GP funds, which entails a restriction of the free movement of capital under the FEU Treaty. That restriction cannot be justified.
- 11 The Finnish public pension institutions are of the view that they should be placed on an equal footing with the Swedish GP funds. The Swedish and Finnish pension systems have the same type of legal constitution and structure, are financed in the same way and have the same social function and purpose. Moreover, the institutions of the pension systems function in almost exactly the same way. In the same way as the Swedish GP funds are part of the Swedish State, Landskapet Ålands pensionsfond and Kyrkans Centralfond are part of the region of Åland and the Evangelical Lutheran Church, respectively. KEVA has its own legal personality, but that does not preclude it from being treated in the same way as the GP funds, since comparability must be considered as a whole, that is to say, based on the function and purpose of the institutions and the activities they carry out.
- 12 The Swedish Tax Agency argues that the Finnish pension institutions and the Swedish GP funds are not in objectively comparable situations. The GP funds are not independent legal persons, each authority being an emanation of the State as a legal person. State authorities are therefore not independent legal entities, but are merely part of the legal entity of the State. Even if the Finnish pension institutions and the GP funds were to be regarded as carrying on their activities under similar conditions in terms of organisation, function and purpose, they cannot be regarded as being in objectively comparable situations with regard to the activities of the State and the purpose of the State tax exemption.
- 13 The rationale for the State's tax exemption lies in the fact that taxation does not bring any funds to the public purse but requires extensive administration. The purpose of the tax exemption is thus entirely different from avoiding or alleviating economic double taxation.

**Brief summary of the reasons for the reference for a preliminary ruling**

- 14 The Commission initiated infringement proceedings against Sweden and, in a reasoned opinion of 2 December 2021, argued that it is contrary to Article 63 TFEU that dividends paid to the GP funds are not taxed in Sweden while withholding tax is levied on dividends paid to comparable public pension institutions established in other Member States.

- 15 The Court of Justice ruled in Case C-252/14 that a difference in treatment of dividends paid to resident and non-resident pension funds resulting in the latter being taxed more heavily constitutes a restriction of the free movement of capital prohibited, in principle, by Article 63 TFEU. In that case, the Court of Justice found that the situation of foreign pension funds was not comparable to that of national pension funds.
- 16 In that instance, however, the subjects concerned were private-law entities, and, since the present cases involve public-law entities, the judgment in Case C-252/14 does not provide any direct guidance.
- 17 Nor is there any other Court of Justice ruling that clarifies whether Article 63 TFEU precludes dividends paid by a national company to a foreign public pension institution from being subject to withholding tax when the corresponding dividends are not taxed if they accrue to the own State through its general pension funds.
- 18 The sub-questions that need to be examined are whether the application of the Swedish rules implies a negative differential treatment of the foreign pension institutions, if in that case those situations are objectively comparable, and, if so, whether the difference in treatment is justified by overriding reasons of public interest.
- 19 There are various ways of looking at these questions, as is evidenced by the positions of the parties and by the correspondence between the Commission and the Swedish Government. On the question of whether there is negative differential treatment, the Swedish Government submits, for example, that the State's choice not to tax itself is simply an instrument for avoiding a circularity of State resources for the financing of the Swedish social security system. It does not bring any real financial benefit to the State, since the same result could have been achieved by another instrument, for example through the allocation of State resources. According to the Swedish Government, a different approach would mean in practice that any taxation of other Member States could be challenged on the ground of the free movement of capital, which, in that government's view, goes far beyond Article 63 TFEU.
- 20 The Commission takes the view that, as regards the objective of reducing the need to allocate to the State authorities the taxes they would be required to pay if they were not exempt, institutions which are regulated in the same way and have the same mission in other Member States are in a situation which is objectively comparable to that of the AP funds.
- 21 On the other hand, it can be argued, as the Swedish Government does, that there is no common obligation under EU law for the Member States to contribute to the financing of each other's social security systems. There is no situation in which a foreign public pension institution could de facto have the same task as the AP funds in the Swedish social security system. Consequently, a foreign public

pension institution can never be in a situation which is objectively comparable to that of the Swedish State and its AP funds.

- 22 Furthermore, if the Swedish Government's approach is not accepted, the question arises as to what would then be required for the situations to be comparable. The Commission points out, in that regard, that public pension institutions from other Member States are treated less favourably regardless of their activities and objectives or how they are regulated, organised and financed. This can be understood as meaning that, in the Commission's view, it is factors of this kind that should be taken into account when assessing whether the situations are comparable. The Högsta förvaltningsdomstolen (Supreme Administrative Court) seeks guidance as to whether it is those criteria – and/or other criteria – that should be decisive in such an assessment.
- 23 The question is also whether the comparison should be made with the Swedish State as such or only with the AP funds themselves. For example, is it relevant to the evaluation in the individual case that the Finnish pension institutions also perform certain other tasks than the Swedish AP funds? The AP funds are not in charge of collecting pension contributions or paying out pensions, but have the sole task of administering funds under the insurance scheme for income-based old-age pensions. These other tasks, however, are performed by other authorities within the Swedish State, which also benefit from the tax exemption of the latter.
- 24 As regards the question of whether a possible difference in treatment is justified by overriding reasons of public interest, it should be noted, as the Commission has done, that the Court of Justice has consistently rejected the possibility that a loss of income or administrative difficulties constitute valid reasons for a restriction on the freedom of movement. The Swedish Government, for its part, considers that the difference in treatment is justified by the need to safeguard the Swedish social policy objective and its financing.