

JUDGMENT OF THE COURT (Sixth Chamber)

12 October 2023 (*)

(Reference for a preliminary ruling – Article 56 EC – Free movement of capital – Personal income tax – Taxation of interest income from bonds and debt instruments – Interest due and paid by entities not resident in the national territory – Difference in treatment according to the place of establishment of the issuing entity and the paying entity for the interest concerned – Agreement between the European Community and the Swiss Confederation providing for measures equivalent to those laid down in Directive 2003/48/EC – Article 2(4) – Taxation of savings income in the form of interest payments from a Swiss source – Obligation to apply the same tax rates as those applied to similar domestic income)

In Case C-312/22,

REQUEST for a preliminary ruling under Article 267 TFEU from the Supremo Tribunal Administrativo (Supreme Administrative Court, Portugal), made by decision of 7 April 2022, received at the Court on 10 May 2022, in the proceedings

FL

v

Autoridade Tributária e Aduaneira,

THE COURT (Sixth Chamber),

composed of T. von Danwitz (Rapporteur), President of the Chamber, P.G. Xuereb and A. Kumin, Judges,

Advocate General: P. Pikamäe,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- FL, by D. Almeida and M. da Rosa Amaral, advogados,
- the Portuguese Government, by A. de Almeida Morgado, P. Barros da Costa and A. Rodrigues, acting as Agents,
- the European Commission, by G. Braga da Cruz and W. Roels, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

- 1 This request for a preliminary ruling concerns the interpretation of Article 56 EC and Article 2(4) of the Agreement between the European Community and the Swiss Confederation providing for measures equivalent to those laid down in Council Directive 2003/48/EC on taxation of savings income in the form of interest payments (OJ 2004 L 385, p. 30; ‘the Agreement’).

- 2 The request has been made in proceedings between FL and the Autoridade Tributária e Aduaneira (Tax and Customs Authority, Portugal) concerning the liability of natural persons to income tax on interest income from bonds and debt instruments payable by entities not resident in Portuguese territory and paid to FL in 2005 by a Swiss bank.

Legal context

European Union law

- 3 The Agreement entered into force on 1 July 2005, following the completion of the procedures provided for in Articles 17 and 18 thereof.

- 4 Under Article 1 of the Agreement, entitled ‘Retention by Swiss paying agents’:

‘1. Interest payments which are made to beneficial owners within the meaning of Article 4 who are residents of a Member State of the European Union, hereinafter referred to as “Member State”, by a paying agent established on the territory of Switzerland, shall, subject to paragraph 2 and Article 2 below, be subject to a retention from the amount of the interest payment. The rate of retention shall be 15% during the first three years from the date of application of this Agreement, 20% for the subsequent three years and 35% thereafter.

2. Interest payments made on debt-claims issued by debtors who are residents of Switzerland or pertaining to permanent establishments of non-residents located in Switzerland shall be excluded from the retention. For the purposes of this Agreement, the term “permanent establishment” shall have the meaning that it has under the relevant double taxation convention between Switzerland and the State of residence of the debtor. In the absence of such a convention, the term “permanent establishment” means a fixed place of business through which the business of a debtor is wholly or partly carried on.

...’

- 5 In accordance with Article 2 of the Agreement, entitled ‘Voluntary disclosure’:

‘1. Switzerland shall provide for a procedure which allows the beneficial owner as defined in Article 4 to avoid the retention specified in Article 1 by expressly authorising his or her paying agent in Switzerland to report the interest payments to the competent authority of that State. Such authorisation shall cover all interest payments made to the beneficial owner by that paying agent.

2. The minimum amount of information to be reported by the paying agent in case of express authorisation by the beneficial owner shall consist of:

...

3. The Swiss competent authority shall communicate the information referred to in paragraph 2 to the competent authority of the Member State of residence of the beneficial owner. ...

4. Where the beneficial owner opts for this voluntary disclosure procedure or otherwise declares his or her interest income obtained from a Swiss paying agent to the tax authorities in his or her Member State of residence, the interest income concerned shall be subject to taxation in that Member State at the same rates as those applied to similar income arising in that State.’

Portuguese law

- 6 Under Article 22 of the Código do Imposto sobre o Rendimento das Pessoas Singulares (Personal Income Tax Code), in the version applicable to the dispute in the main proceedings (‘the CIRS’):

‘1. The income subject to personal income tax is that resulting from the aggregation of income for the various categories received each year, after making the deductions and allowances provided for in the following sections.

...

3. The income received by taxable persons who do not reside in Portuguese territory and that referred to in Articles 71 and 72 shall not be aggregated for the purposes of taxation, without prejudice to the right of aggregation provided for therein.'

7 Article 71(1) and (3) of the CIRS states as follows:

'1. The income received in Portuguese territory referred to in the following paragraphs and the income referred to in Article 101(2)(b) shall be subject to a definitive retention at the rates provided for therein.

...

3. The following shall be taxed at the rate of 20%:

(a) interest on sight or term deposits, including interest from certificates of deposit;

(b) income from debt instruments, whether nominal or bearer, as well as income from carry-over operations, debt transfers, guaranteed price securities accounts or other similar or analogous transactions;

...'

8 Article 101(2)(b) of the CIRS provides:

'In the case of income subject to a retention at the rates laid down in Article 71 and, in the case referred to in paragraph (b), profits from shares payable by entities not domiciled in Portuguese territory to which the payment may be attributed:

...

(b) entities which pay, or make available to holders resident in Portuguese territory, income from securities payable by entities not domiciled in Portuguese territory to which the payment may be attributed, whether authorised by those entities or by those holders, or acting on behalf of either of them, must deduct the amount corresponding to the rate of 20% of the gross income ...'

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

9 In 2005, FL received interest income from bonds and debt instruments paid by a Swiss bank.

10 On 10 May 2006, FL submitted an income declaration relating to that interest income. By the tax notice for 2005, that interest income was aggregated with FL's other income and made subject to personal income tax at the maximum progressive rate of 40%.

11 On 31 July 2008, FL lodged an application for an *ex officio* review of that tax notice, which was rejected. On 11 January 2010, he brought an action before the Tribunal Administrativo e Fiscal de Sintra (Administrative and Tax Court, Sintra, Portugal) against that tax notice, which action that court dismissed in its entirety by a judgment of 1 November 2020.

12 FL brought an appeal against that judgment before the referring court, the Supremo Tribunal Administrativo (Supreme Administrative Court, Portugal).

13 In support of that appeal, FL submits, first of all, that the applicable Portuguese legislation infringes the free movement of capital and the freedom to provide services, in that it treats persons resident in Portugal differently according to whether the interest income which they receive derives from bonds and term deposits issued by entities established in Portugal or is paid by such entities, or whether that interest income derives from bonds and term deposits issued by entities established in third countries and is paid by such entities.

- 14 Under Articles 22, 71 and 101 of the CIRS, the interest income received from the former entities is taxed at the definitive rate of 20% while that received from the latter is subject to compulsory aggregation of income and taxed at a progressive rate of up to 40%. In so far as, under that legislation, identical income is treated differently according to whether or not it is paid by a paying agent resident in Portugal, FL considers that that legislation is liable to deter resident taxpayers from investing their capital in companies established in the European Union or outside it.
- 15 In addition, FL submits that the Portuguese legislation infringes the provisions of Directive 2003/48 and those of the Agreement which provides for equivalent measures, in that that legislation taxes income paid to it him by Swiss banks more heavily than if that income had been paid by Portuguese banks, even though he has correctly fulfilled his tax obligations in Portugal and allowed information to be exchanged between that Member State and the Swiss authorities.
- 16 Thus, the referring court asks whether that legislation is compatible with the EU rules on the free movement of capital, in particular with Article 56 EC, read in conjunction with Article 2(4) of the Agreement.
- 17 In those circumstances the Supremo Tribunal Administrativo (Supreme Administrative Court) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

‘Is it compatible with EU law for interest income from bonds and debt instruments paid by a non-resident Swiss bank [on Portuguese territory] to the appellant [in the main proceedings] in 2005 to be subject to income aggregation and therefore to be taxed at the same rate of income tax as other income, meaning that the applicable rate of tax is far higher than the (definitive) rate that would apply had the income in question been paid by a bank resident in national territory?’

Consideration of the question referred

- 18 By its question, the referring court asks, in essence, whether Article 56 EC and Article 2(4) of the Agreement must be interpreted as precluding legislation of a Member State which subjects interest income received by taxpayers of that Member State to a progressive tax rate of up to 40% where that interest income is derived from bonds and debt instrument issued by an entity of another Member State or of a third State such as the Swiss Confederation and is paid by such an entity, whereas, where such interest income derives from bonds and debt instruments issued by an entity in their Member State of residence and is paid by such an entity, it is taxed at a lower definitive rate of 20%.

Free movement of capital

- 19 It must be stated at the outset that national legislation such as that at issue in the main proceedings, which concerns the tax treatment of interest income from bonds and debt instruments received by natural persons from investments made by them, falls within the scope of the free movement of capital.
- 20 Such legislation is also liable to affect the freedom to provide services, as the appellant in the main proceedings and the European Commission observe, in that it may have effects on financial services concerning those bonds and debt instruments offered through an intermediary in another Member State.
- 21 However, where a national measure relates to the freedom to provide services and the free movement of capital at the same time, the Court will in principle examine the measure in dispute in relation to only one of those two fundamental freedoms if it appears, in the circumstances of the case in the main proceedings, that one of them is entirely secondary in relation to the other and may be considered together with it (judgment of 30 April 2020, *Société Générale*, C-565/18, EU:C:2020:318, paragraph 19 and the case-law cited).
- 22 In the present case, the freedom to provide services appears to be secondary in relation to the free movement of capital and may be considered together with it. The national legislation at issue in the main proceedings relates to the consequences for a resident taxpayer of the exercise of the free movement of capital. It is precisely the exercise of that latter fundamental freedom which may result,

for the person concerned, in the need to elect an intermediary for the payment of interest income from the bonds and debt instruments concerned, in order to benefit, as is apparent from the request for a preliminary ruling, from the definitive tax rate of 20% on that interest income. The choice of that intermediary and, consequently, the issues concerning the freedom to provide services are, in such a context, the inevitable consequence of the tax treatment of that interest income (see, to that effect, judgment of 1 July 2010, *Dijkman and Dijkman-Lavaleije*, C-233/09, EU:C:2010:397, paragraphs 34 and 35).

23 That said, it follows from settled case-law that the measures prohibited by Article 56(1) EC, as restrictions on the movement of capital, include those which 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 (judgments of 25 January 2007, *Festersen*, C-370/05, EU:C:2007:59, paragraph 24, and of 18 December 2007, *A*, C-101/05, EU:C:2007:804, paragraph 40).

24 In the present case, it is apparent from the information set out in the request for a preliminary ruling that the national legislation at issue in the main proceedings subjects interest income from bonds and debt instruments issued in Portugal, which is paid in that Member State and received by a natural person resident in that Member State, to a definitive tax rate of 20%.

25 By contrast, where that interest income arises from bonds and debt instruments issued in another Member State or in a third State, it is aggregated with that person's other income and subject to a progressive rate of tax of up to 40%, unless it is paid through an intermediary established in Portugal, in which case it may also benefit from the definitive tax rate of 20%.

26 Furthermore, if that interest income is derived from bonds and debt instruments issued by an entity from another Member State or from a third State and is paid by an intermediary who is also non-resident, the same interest income cannot, according to the same information, benefit from the definitive rate of 20%.

27 It is apparent from the information set out in paragraphs 24 to 26 of the present judgment that interest income from bonds and debt instruments issued in a State other than the Portuguese Republic is placed at a disadvantage by comparison with interest income from bonds and debt instruments issued in that Member State.

28 That national legislation thus introduces a difference in treatment according to the place of investment of the capital, which has the effect of dissuading a taxpayer resident in Portugal from investing his capital in another State and of impeding the raising of capital in Portugal (see, to that effect, judgment of 1 July 2010, *Dijkman and Dijkman-Lavaleije*, C-233/09, EU:C:2010:397, paragraph 31 and the case-law cited).

29 In so far as the Portuguese Government claims that a resident taxpayer in FL's situation had the possibility, under Article 101(2)(b) of the CIRS, of benefiting from the definitive rate of 20% on interest income from bonds and debt instruments and which is paid by a non-resident entity, by instructing it to retain that interest income at source, it must be observed, first, that that possibility is not mentioned by the referring court. Second, even such a possibility would not affect the finding made in the previous paragraph of the present judgment, since the need to carry out such a formality concerns only interest income from bonds and debt instruments issued by non-resident entities and which is paid by such entities, and not interest income from bonds and debt instruments issued by entities resident in Portugal or which is paid by such entities.

30 It follows that national legislation such as that at issue in the main proceedings constitutes a restriction on the free movement of capital prohibited, in principle, by Article 56(1) EC.

31 The Portuguese Government also refers, in that regard, to the standstill clause in Article 57(1) EC, which is also not mentioned by the referring court. However, that government does not provide sufficient evidence of compliance with the substantive and temporal criteria laid down by that clause, all of which must be satisfied in order for it to apply. It is therefore for that court to determine whether or not all of those criteria are satisfied in the case of the national legislation at issue in the main proceedings, having regard to the settled case-law of the Court of Justice (see, *inter alia*, judgments of

10 April 2014, *Emerging Markets Series of DFA Investment Trust Company*, C-190/12, EU:C:2014:249, paragraph 53, and of 13 November 2019, *College Pension Plan of British Columbia*, C-641/17, EU:C:2019:960, paragraphs 91 to 94, 100, 101, 104 and 105 and the case-law cited).

- 32 Since it does not appear, in the light of the documents before the Court, that the restriction on the free movement of capital brought about by the national legislation at issue in the main proceedings falls outside the scope of Article 56(1) EC on the basis of Article 57(1) EC, it is necessary to examine to what extent that restriction may be justified in the light of the provisions of the EC Treaty.
- 33 In that regard, Article 58(1)(a) EC provides that ‘Article 56 EC 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’.
- 34 In so far as that provision of Article 58 EC derogates 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 Treaty (judgment of 17 October 2013, *Welte*, C-181/12, EU:C:2013:662, paragraph 42 and the case-law cited).
- 35 The derogation provided for in Article 58(1)(a) EC is itself limited by Article 58(3) EC, 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 56 [EC]’ (judgment of 17 October 2013, *Welte*, C-181/12, EU:C:2013:662, paragraph 43 and the case-law cited).
- 36 A distinction must therefore be made between different treatment permitted under Article 58(1)(a) EC and arbitrary discrimination prohibited under Article 58(3) EC. It is settled case-law 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 EC Treaty on the free movement of capital, the difference in treatment must concern situations which are not objectively comparable or be justified by an overriding reason in the public interest (see, to that effect, judgments of 17 October 2013, *Welte*, C-181/12, EU:C:2013:662, paragraph 44 and the case-law cited, and of 17 March 2022, *AllianzGI-Fonds AEVN*, C-545/19, EU:C:2022:193, paragraph 42).
- 37 In the present case, as regards the objective comparability of the situations, in the context of the national legislation at issue in the main proceedings, a taxpayer resident in Portugal who receives interest income from investments made in another State, such as interest income from bonds and debt instruments, is just as liable to tax on that interest income in his or her Member State of residence as a taxpayer resident in Portugal who receives income from investments of the same kind made in the latter Member State (see, to that effect, judgment of 1 July 2010, *Dijkman and Dijkman-Lavaleije*, C-233/09, EU:C:2010:397, paragraph 45).
- 38 In that context, the fact that that interest income is subject to different tax rates depending on whether it is generated or paid in their Member State of residence or generated and paid in another State gives rise to the difference in treatment at issue in the main proceedings, but does not reflect a difference in the situation of the taxpayers concerned as regards personal income tax (see, to that effect, judgment of 1 July 2010, *Dijkman and Dijkman-Lavaleije*, C-233/09, EU:C:2010:397, paragraph 46).
- 39 It follows that the difference in treatment introduced by the national legislation at issue in the main proceedings concerns objectively comparable situations.
- 40 As to whether that difference in treatment could be justified by an overriding reason in the public interest, it is sufficient to note that neither the referring court nor the Portuguese Government has relied on the existence of such overriding reasons in the public interest.
- 41 In the light of the foregoing considerations, the answer to the first part of the question referred is that Article 56 EC must be interpreted as precluding legislation of a Member State which subjects interest income received by taxpayers of that Member State to a progressive tax rate of up to 40% where that

interest income is derived from bonds and debt instruments issued by an entity of another Member State or of a third State such as the Swiss Confederation and paid by such an entity, whereas, where such interest income derives from bonds and debt instruments issued by an entity in their Member State of residence and which is paid by such an entity, it is taxed at a lower definitive rate of 20%.

The Agreement

- 42 Under Article 2(4) of the Agreement, where the beneficial owner opts for the voluntary disclosure procedure or otherwise declares his or her interest income obtained from a Swiss paying agent to the tax authorities in his or her Member State of residence, the interest income concerned shall be subject to taxation in that Member State at the same rates as those applied to similar income arising in that State.
- 43 In that regard, it should be noted, as the Commission did, that a number of conditions must be satisfied in order for that provision to be applicable to the situation at issue in the main proceedings.
- 44 First of all, since the Agreement entered into force on 1 July 2005, it concerns only interest income paid from that date.
- 45 Next, as is apparent from Article 1(1) and (2) of the Agreement, read in conjunction with Article 2(1) and (4) thereof, the payments concerned must not relate to interest income on claims ‘issued by debtors who are residents of Switzerland or pertaining to permanent establishments of non-residents located in Switzerland’.
- 46 In such a situation, that interest income is excluded, under Article 1(2) of the Agreement, from the retention from the amount of the interest payment provided for in Article 1(1), ‘subject to paragraph 2 and Article 2’ of the Agreement. It follows from Article 2(1) and (4) of the Agreement that the beneficial owner must have opted for the voluntary disclosure procedure which the Swiss Confederation is required to provide in order to avoid the retention referred to in Article 1 thereof, or to have declared his interest income to the tax authorities of his State of residence.
- 47 Finally, it follows from Article 2(4) that the beneficial owner of the interest income concerned must have opted for that voluntary disclosure procedure or have made a declaration in some other way to the tax authorities of his or her Member State of residence.
- 48 Since the information set out in the request for a preliminary ruling does not make it possible to establish, in the present case, that all the conditions necessary for the applicability of Article 2(4) of the Agreement are satisfied as regards the situation at issue in the main proceedings, it is for the referring court to carry out the necessary verifications in that regard.
- 49 In the light of the foregoing considerations, the answer to the second part of the question referred is that Article 2(4) of the Agreement, read in conjunction with Article 1(2) thereof, must be interpreted as precluding legislation of a Member State subjecting interest income received, from 1 July 2005, by taxpayers of that Member State who have opted for the voluntary disclosure procedure or otherwise declared that interest income to the tax authorities of their Member State of residence, in so far as it is not excluded from the retention under Article 1(2), to a progressive tax rate of up to 40% where that interest income is derived from bonds and debt instruments paid by a Swiss paying agent, whereas, where the same interest income is paid by a resident paying agent, it is taxed at a lower definitive rate of 20%.

Costs

- 50 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Sixth Chamber) hereby rules:

1. Article 56 EC

must be interpreted as precluding legislation of a Member State which subjects interest income received by taxpayers of that Member State to a progressive tax rate of up to 40% where that interest income is derived from bonds and debt instruments issued by an entity of another Member State or of a third State such as the Swiss Confederation and paid by such an entity, whereas, where such interest income derives from bonds and debt instruments issued and paid by an entity in their Member State of residence, it is taxed at a lower definitive rate of 20%.

2. Article 2(4) of the Agreement between the European Community and the Swiss Confederation providing for measures equivalent to those laid down in Council Directive 2003/48/EC on taxation of savings income in the form of interest payments, read in conjunction with Article 1(2) thereof,

must be interpreted as precluding legislation of a Member State subjecting interest income received, from 1 July 2005, by taxpayers of that Member State who have opted for the voluntary disclosure procedure or otherwise declared that interest income to the tax authorities of their Member State of residence, in so far as it is not excluded from the retention under Article 1(2), to a progressive tax rate of up to 40% where that interest income is derived from bonds and debt instruments paid by a Swiss paying agent, whereas, where the same interest income is paid by a resident paying agent, it is taxed at a lower definitive rate of 20%.

[Signatures]

* Language of the case: Portuguese.