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**Taxation of investment vehicles and the free movement of capital**

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Restrictions on the free movement of capital may be said to exist whenever the national tax regime of an EU member state treats nonresident investment vehicles less favorably than resident vehicles. The European Court of Justice (ECJ) is currently reviewing a case (AllianzGI-Fonds Aevn) concerning provisions of Portuguese tax law that provide for such unequal treatment with respect to nationally sourced dividend income received from nonresident investment vehicles. In her Opinion of 6 May 2021, ECJ Advocate General Kokott posited – in a partial departure from previous ECJ rulings – that the Portuguese tax law provisions did not contravene EU law on the free movement of capital. Should the ECJ concur with the Advocate General’s view, this could result in an additional tax burden on investment vehicles with respect to foreign-sourced dividends. This article will demonstrate that the view of the Advocate General lacks logical consistency, and that tax provisions of the sort under discussion violate the prohibition on restricting the free movement of capital between EU member states.

**I. Introduction**

**1. Taxation of investment vehicles in Portugal**

In Portugal, certain types of associations, both with and without legal personality, are subject to corporate income tax pursuant to Article 2 of the Portuguese Corporation Tax Code (Código do Imposto sobre o Rendimento das Pessoas Coletivas – CIRC).[[1]](#footnote-1) The regular corporate income tax rate is 21% (Article 87(1) of the Portuguese Corporation Tax Code). The corporate income tax rate for nonresident corporations without a permanent establishment in Portugal is 25% (Article 87(4) of the Portuguese Corporation Tax Code).

According to Article 94(1) lit. c of the Portuguese Corporation Tax Code, corporate income tax is levied on investment income via a withholding tax deducted at source, provided the entity receiving the capital income is taxed as a corporation. The withholding tax of 25% is deducted at source (Article 94(4) of the Portuguese Corporation Tax Code) and then credited against the corporate income tax owed once the tax assessment is made (Article 94(3) (first half of sentence) of the Portuguese Corporation Tax Code). If the entity to which the capital income is credited is a nonresident and the income cannot be allocated to a resident permanent establishment, the withholding tax deducted at source settles the tax liability, according to Article 94(3) lit. b (second half of sentence) of the Portuguese Corporation Tax Code).

Pursuant to Article 14(3) of the Portuguese Corporation Tax Code, profits distributed by a corporate tax resident to a nonresident recipient are exempt from corporate income tax, provided the recipient is domiciled in another EU member state or in a country that is a member of the EEA and is obligated to provide administrative cooperation at an EU-equivalent level (Article 14(3) lit. a Nos. 1 and 2 of the Portuguese Corporation Tax Code) or in a non-EU country with which a DTA has been concluded that provides for an exchange of information (Article 14(3) lit. a No. 3 of the Portuguese Corporation Tax Code), and provided the recipient is subject to corporate income tax or an equivalent tax in such member state or country and has not been exempted therefrom (Article 14(3) lit. b of the Portuguese Corporation Tax Code). Contrary to the assumptions of the Advocate General,[[2]](#footnote-2) Article 14(3) lit. b of the Portuguese Corporation Tax Code does not stipulate that the statutory tax rate must equal at least 60% of the regular Portuguese tax rate of 21% as a global requirement. Rather, this only applies to the situations referred to in Article 14(3) lit. a of the Portuguese Corporation Tax Code,[[3]](#footnote-3) i.e. only when the dividend recipient is additionally domiciled in non-EU country with which Portugal has a DTA. In any case, exemption from Portuguese corporate income tax further requires – pursuant to Article 3 of the EU Parent-Subsidiary Directive[[4]](#footnote-4) – that the dividend recipient have held at least 5% in the distributing entity for at least 24 months consecutively at the time of distribution (Article 14(3) lit. c and d of the Portuguese Corporation Tax Code).

In 2015,[[5]](#footnote-5) the Portuguese legislator amended the law applicable to investment funds effective 1 July 2015, introducing a new taxation regime that deviated from the situation as described above. Article 22 of the Portuguese Tax Incentives Statute (Estatuto dos Benefícios Fiscais – EBF) was among the provisions revised by way of the amending legislation. Pursuant to Article 22(1) of the Portuguese Tax Incentives Statute, securities investment funds, real estate investment funds, securities investment companies and real estate investment companies established and operating under Portuguese law are only subject to corporate income tax as provided for in the further provisions of Article 22 of the Portuguese Tax Incentives Statute. Specifically, Article 22(3) of the Portuguese Tax Incentives Statute stipulates, among other things, that investment income as defined in Article 5 of the Portuguese Personal Income Tax Code (Código do Imposto sobre o Rendimento das Pessoas Singulares – CIRS) is to be excluded from the calculation of taxable income. Moreover, Article 22(10) of the Portuguese Tax Incentives Statute stipulates that income from the investment vehicles specified in Article 22(1) of the Portuguese Tax Incentives Statute is not subject to any withholding of corporate income tax at source. Instead, the investment vehicles covered by Article 22(1) of the Portuguese Tax Incentives Statute are subject to a documentary stamp tax (also known as “stamp duty”) on legal transactions pursuant to the Portuguese Documentary Stamp Tax Code (Código do Imposto do Selo – CIS). Introduced by the amending act, the new No. 29 of the *Tabela Geral* to the Portuguese Documentary Stamp Tax Code provides that the documentary stamp tax on investment vehicles which invest exclusively in money market instruments and deposits is to amount to 0.0025% per quarter; other investment vehicles are subject to a tax of 0.0125% of the net carrying amount of their assets, which includes dividends that have been received but not distributed. If an investment vehicle distributes dividends to shareholders or unitholders, they are responsible for paying tax on the dividends. In terms of substance, Portuguese law on resident investment vehicles is therefore consistent with what is likely the globally prevailing view – also practiced previously in Germany under the 2004 German Investment Tax Act (2004 InvStG)[[6]](#footnote-6) – of treating investment vehicles as pass-through entities and taxing the investment income at the level of the investor in the investment vehicle to ensure equal tax treatment with direct investors.

**2. The case of AllianzGI-Fonds Aevn**

Domiciled in Germany, AllianzGI-Fonds Aevn (hereinafter: “AEVN”) is a type of collective investment undertaking (UCITS) established under German law (*offener Investmentfonds in Vertragsform)*. The investment company that manages AEVN – Allianz Global Investors GmbH – is also domiciled in Germany. In 2015 and 2016 – the years under dispute – AEVN received dividends from companies domiciled in Portugal. AEVN was taxed in Germany for the tax years in question pursuant to the provisions of the 2004 German Investment Tax Act, according to which it was subject to corporate income tax in Germany, but was exempt from paying any such tax (Section 11(1) Sentences 1 and 2 of the 2004 German Investment Tax Act).[[7]](#footnote-7) For tax purposes, AEVN was treated as a pass-through entity. This meant that the investors were directly allocated their respective share of the fund income, and only the investors were responsible for paying the tax on that income pursuant to Section 2(1) Sentence 1 of the 2004 German Investment Tax Act.[[8]](#footnote-8)

Because it was not established or operating under Portuguese law, AEVN did not benefit from the exemption from corporate income tax on investment income provided for in Article 22(3) of the Portuguese Tax Incentives Statute and was therefore subject to the general corporate income tax regime. The fact that AEVN was exempt from corporate income tax in Germany meant that it was not eligible to take advantage of the exemption from Portuguese corporate income tax provided for in Article 14(3) of the Portuguese Corporation Tax Code. Therefore, the company distributing the dividend was required under Article 94 of the Portuguese Corporation Tax Code to deduct the withholding tax of 25% from AEVN at source, which also settled the corporate income tax obligation (likewise 25% pursuant to Article 87(4) of the Portuguese Corporation Tax Code).

Article 10(1) of the double taxation agreement (DTA) between Portugal and Germany provides that dividends paid by a company domiciled in a contracting state to a person domiciled in another contracting state may be taxed in that other state. However, Article 10(2) Sentence 1 of the Germany-Portugal DTA permits such dividends to be taxed in the contracting state in which the company paying the dividend is domiciled according to the laws of that state, provided the tax does not exceed 15% of the gross amount of the dividend and the recipient of the dividend is the beneficial owner. These provisions are consistent with Article 10(1) and Article 10(2) Sentence 1 of the OECD Model Tax Convention. Based on the DTA between Germany and Portugal, AEVN was refunded the portion of the tax withheld at source that exceeded 15%. This meant that AEVN effectively paid a withholding tax of 15% on the dividends received from Portugal. However, AEVN was able to pass on a portion of the withholding tax paid in Portugal to its investors pursuant to Section 4(2) of the 2004 German Investment Tax Act.[[9]](#footnote-9)

AEVN applied to the competent Portuguese tax authority for reimbursement of the withholding tax deducted at source but not reimbursed, but its application was denied. AEVN then pursued its claim by filing an action with the Portuguese Tax Arbitration Court (*Tribunal Arbitral Tributário*). In a decision dated 9 July 2019,[[10]](#footnote-10) the Portuguese Tax Arbitration Court petitioned the ECJ for a preliminary ruling – as provided for in Article 267 of the Treaty on the Functioning of the European Union (TFEU) – concerning the compatibility of the Portuguese tax provisions at issue with primary EU law, especially as regards the free movement of capital provided for in Article 63 of the TFEU.

**II. The opinion of Advocate General Kokott delivered on 6 May 2021**

Advocate General Kokott took a position on the matter in an Opinion delivered on 6 May 2021.[[11]](#footnote-11) AEVN’s only interests in the Portuguese companies were in the form of free float shares. It held no interests in those companies that would have enabled it to exert control on a reliable basis. Therefore, as the Advocate General stated in line with ECJ case law,[[12]](#footnote-12) it is not freedom of establishment within the meaning of Article 49 of the TFEU that is at issue, but rather the free movement of capital within the meaning of Article 63 of the TFEU.[[13]](#footnote-13) The Advocate General assumed in the case of AEVN – as opposed to the Fidelity Funds[[14]](#footnote-14) case also brought before the ECJ – that the matter did not involve a full tax exemption for resident investment vehicles while subjecting nonresident investment vehicles to taxation, but rather – as in the case of Pensioenfonds Metaal en Techniek[[15]](#footnote-15) – a mere difference in taxation techniques.[[16]](#footnote-16)

In the view of the Advocate General, the differing taxation techniques foreseen by Portuguese law can only be seen as restricting the free movement of capital if they result in a less favorable taxation of nonresident investment vehicles compared with resident investment vehicles for the tax year in question.[[17]](#footnote-17) Such a comparison would also have to consider whether the withholding tax paid by an investment vehicle in Portugal is accounted for when taxing the vehicle’s German investors, according to AG Kokott. If so, she adds, then the condition of less favorable taxation has already not been met in the case of AEVN and thus there is no restriction on the free movement of capital.

However, the Advocate General regards any such restriction that might arise from the Portuguese tax provisions at issue as justified. Regarding the question of justification for a restriction on the free movement of capital, the Advocate General[[18]](#footnote-18) interprets Article 65 of the TFEU[[19]](#footnote-19) as having lowered the level of protection afforded to the free movement of capital compared with restrictions based on tax law provisions such that the free movement of capital is now given less weight in light of the EU’s differentiation objectives than other fundamental rights, thus making it easier to justify restrictions on the free movement of capital based on tax law provisions linked to resident status.

As the Advocate General stated in reference to the ECJ ruling concerning Pensioenfonds Metaal en Techniek,[[20]](#footnote-20) the application of different taxation techniques to resident and nonresident investment vehicles is justified firstly by the fact that their taxpayer situations are not comparable.[[21]](#footnote-21) This is because exempting resident investment vehicles from the withholding tax on dividends is intended to ensure on the one hand that when an investment vehicle distributes dividends, those dividends are not taxed until they reach the investor in the investment vehicle in order to ensure equal treatment with direct investors, according to AG Kokott, who further states that subjecting the entire net assets of an investment vehicle to the documentary stamp tax ensures that the Portuguese revenue authority receives tax revenues in a moderate scope even if the investment vehicle does not distribute a dividend. By contrast, the AG opines that such a documentary stamp tax cannot be charged to nonresident investment vehicles because pursuant to the DTA with Germany, Portugal is only entitled to levy tax on distributed dividends; moreover, it is not possible to access a nonresident investment vehicle’s entire assets, most of which are typically held abroad.

In the view of the Advocate General, subjecting nationally sourced dividends to withholding tax (only) in the case of nonresident investment vehicles is further justified by the objective of maintaining a balance of power between member states as regards the right to impose taxes in the face of overriding public interest.[[22]](#footnote-22) This is because Portugal has a justified interest in subjecting profits generated in its territory to domestic taxation.

Furthermore, according to AG Kokott, deducting a withholding tax at source in the case of nonresident investment vehicles is justified by the objective of “avoidance of non-taxation” as a manifestation of the need to ensure efficiency in the collection of tax.[[23]](#footnote-23) To such extent, the Advocate General refers to the fact that the objective of avoiding a “double non-taxation” situation in which profits are not taxed anywhere is also acknowledged as an overriding public interest in the EU’s Anti-Tax Avoidance Directive (ATAD)[[24]](#footnote-24) and in the Second Pillar of the OECD’s recommendations on combatting tax avoidance.[[25]](#footnote-25)

Finally, the AG argues that preserving a cohesive tax system also counts as a justifying circumstance[[26]](#footnote-26) given that the advantages of exempting a resident investment vehicle from withholding tax are directly linked to the disadvantages associated with paying the documentary stamp tax on an investment vehicle’s entire net assets – which cannot occur in the case of nonresident investment vehicles.

AG Kokott further maintains that restricting the option of claiming exemption from withholding tax to resident investment vehicles does not go beyond what is necessary to achieve the objectives referred to above.[[27]](#footnote-27) Specifically, she states that allowing nonresident investment vehicles to opt to pay the documentary stamp tax on their total net assets would not be a less severe form of taxation because the investment vehicle would then have the extra task of preparing financial statements and calculating the net carrying amount of its assets in accordance with Portuguese law. Not only that, but it is considerably more difficult for the Portuguese revenue authority to tax nonresident investment vehicles, the AG continues. AG Kokott adds that [the] public interests [of guaranteeing a minimum level of taxation, effectively enforcing taxation claims and appropriately allocating the power to impose taxes] should be given special weight as they serve to “finance the State budget” as opposed to the additional tax burden placed on nonresident investment vehicles, which is low as they are not subject to the documentary stamp tax. It is also possible to lower the total tax burden based on the option afforded to investors of offsetting the withholding tax paid by the investment vehicle in Portugal against the tax owed in Germany, according to the AG.

**III. Position taken by the author**

**1. Restrictions on the free movement of capital**

Article 63(1) of the TFEU prohibits all restrictions on the free movement of capital and thus any actions that would discourage either nonresident investors from investing in an EU member state or residents of an EU member state from investing in another member state.[[28]](#footnote-28) As the ECJ has repeatedly ruled[[29]](#footnote-29) – yet again in the case of Fidelity Funds[[30]](#footnote-30) – restrictions on the free movement of capital can easily be said to exist whenever dividends paid by a resident company to a nonresident investment vehicle are subject to withholding tax, while resident investment vehicles are fully exempt from any withholding tax. According to the provisions of Portuguese tax law relevant to the AEVN case, resident investment vehicles are fully exempt from corporate income tax on dividends received. However, resident investment vehicles are required to pay a documentary stamp tax on their entire net assets. The question therefore arises as to whether it should have been presumed that resident investment vehicles are fully tax exempt (as in the case of Fidelity Funds), or if what is involved is merely an application of different taxation techniques (as in the case of Pensioenfonds Metaal en Techniek[[31]](#footnote-31)). The latter reflects the assumption of the Advocate General.

In the case of Pensioenfonds Metaal en Techniek, two different taxation techniques were indeed involved: Under Swedish law at that time, dividends paid by a resident company to a nonresident pension fund – the ECJ case involved a Dutch pension fund – were subjected to a 30% withholding tax deducted at source, which in that specific case was reduced to 15% based on the applicable DTA. By contrast, resident pension funds were charged a flat-rate income tax of 15% of the fund’s fictitious *income*, calculated on the basis of net assets using specific rules. Thus in the case of Pensioenfonds Metaal en Techniek, resident pension funds were in fact not fully exempt from income tax. Rather, they were subjected to a flat-rate income tax based on their – albeit only fictitious – income, which included any dividend income. That flat-rate income tax was comparable to the withholding tax on dividends with respect to both the rate applied and the KPI taken as a basis for calculation.

By contrast, the documentary stamp tax levied under Portuguese law is a completely independent tax on net assets that differs significantly from a withholding tax on dividends in terms of both rate (a maximum of 0.0125% rather than 15%) and the KPI taken as the basis for calculation (*assets* rather than income). The documentary stamp tax does not serve as a replacement for taxing dividends received at investor level after distribution by an investment vehicle – which of course continues to occur – but rather is levied *in addition to* such tax. Therefore, it must be assumed that resident investment vehicles are fully exempt from paying corporate income tax on dividends received,[[32]](#footnote-32) meaning that – as with the ECJ’s ruling in the Fidelity case – there is a clear obstacle to the free movement of capital.

Notwithstanding the foregoing, a restriction on the free movement of capital can be assumed on the basis of the Advocate General’s view that a mere difference in taxation techniques was involved. The case of Pensioenfonds Metaal en Techniek also demonstrates how using different taxation techniques can lead to lower taxes for resident pension funds one year and higher taxes another year. As the ECJ appropriately ruled, restrictions on the free movement of capital can already be said to exist whenever the application of different taxation regimes to different tax years *could* lead to dividends paid out to nonresident pension funds being subject to higher taxes than dividends paid out to resident pension funds.[[33]](#footnote-33) Moreover, the ECJ has expressly held that an assessment of whether dividends distributed to nonresident pension funds are treated unfavorably must be made separately for each tax year, and therefore any unfavorable treatment of dividends paid out to nonresident investment vehicles in one tax year cannot be compensated by means of more favorable treatment of those dividends in another tax year.[[34]](#footnote-34) Because the provisions of Portuguese tax law could lead to a more unfavorable tax treatment for AEVN compared with resident investment vehicles, at least for specific tax years, this also constitutes a restriction on the free movement of capital as defined in Article 63 of the TFEU, according to the ECJ rulings described.

Contrary to the view of the Advocate General, any (limited) crediting of the Portuguese tax to German vehicle investors in accordance with Section 4(2) of the 2004 German Investment Tax Act alters nothing as regards these findings. In the Amurta decision, the ECJ held that a unilateral crediting by the dividend recipient’s member state of the withholding tax levied by the member state of the dividend payer did not suffice to eliminate any restriction on the free movement of capital for which the latter member state was responsible.[[35]](#footnote-35) In the Santander and Emerging Markets cases, the ECJ additionally ruled that in the event of provisions that – as with Portuguese law – make different tax treatments solely dependent on whether an investment vehicle is resident or not, without considering how the investor is taxed, a determination should be made solely at the level of the investment vehicle in principle and that the investor level should be disregarded as concerns the question of whether unequal tax treatment exists.[[36]](#footnote-36)

**2. Justification for such restrictions**

**a) The provisions of Article 65 of the TFEU**

We now come to the question of justification for restrictions on the free movement of capital. It is indeed the case that Article 65(1) lit. a of the TFEU provides that Article 63 of the TFEU applies without prejudice to the rights of member states to implement their own tax law provisions, even if this results in different treatment for taxpayers who are not in the same situation with regard to their place of residence or the place where their capital is invested. However, Article 65(3) of the TFEU makes it clear that application of any such tax law provisions may neither be used as a means of arbitrary discrimination nor as a disguised restriction on the free movement of capital and payments. The ECJ is therefore correct in adopting a narrow interpretation of Article 65(1) lit. a of the TFEU. National tax legislation can only be regarded as being compatible with the free movement of capital if any difference in tax treatment foreseen under such national legislation concerns situations that are not objectively comparable or if the tax law provisions are justified by overriding public interest.[[37]](#footnote-37)

When applying such a narrow interpretation, as is called for based on the accurate view taken by the ECJ, Article 65(1) lit. a of the TFEU cannot be read – contrary to the view of the Advocate General – as signifying that the level of protection afforded to the free movement of capital has lessened in comparison with other fundamental rights as a result of [national] tax law provisions.[[38]](#footnote-38) There are no indications in ECJ case law that the ECJ places lower requirements on justifying restrictions based on tax law provisions than on justifying restrictions in the free movement of capital. To the contrary, the ECJ has consistently applied the same standard to the free movement of capital as to other fundamental rights.

**b) Objective comparability of the taxpayer situation with regard to resident and nonresident investment vehicles**

In the case of AEVN, the Advocate General assumed – with reference to the ECJ’s ruling on Pensioenfonds Metaal en Techniek[[39]](#footnote-39) – that resident and nonresident investment vehicles are not in a comparable taxpayer situation because the latter cannot be subjected to the documentary stamp tax on their entire assets. This interpretation on the part of the Advocate General must also be rejected.

As regards the question of whether a purely domestic matter can be compared with a cross-border matter, it is imperative that the intention of the national tax law provision be examined.[[40]](#footnote-40) In the case of Pensioenfonds Metaal en Techniek, the purpose of the flat tax assessed on resident pension funds with a fictitious income, calculated from their total net assets, was to ensure a neutral, cyclically independent taxation of pension funds regardless of the composition of the fund’s assets and the income generated therefrom. No such taxation linked to total assets was possible in the case of nonresident pension funds, given that Sweden only was only able to tax pension fund assets located in Sweden. Since this meant that resident and nonresident pension funds were not in an objectively comparable situation, the ECJ allowed the restriction on the free movement of capital arising from the difference in taxation – but only under the condition that nonresident pension funds were able to deduct any operating expenses that are directly associated with the receipt of dividends whenever resident pension funds are permitted such deductions.[[41]](#footnote-41)

In the case of AEVN, however, the documentary stamp tax is not a tax on fictitious income in lieu of taxing the actual dividend income received by resident investment vehicles. Rather, the documentary stamp tax is assessed *in addition to* taxing the actual dividend income at shareholder or unitholder level, which continues to occur, and is intended to ensure that the Portuguese revenue authority still receives moderate tax revenues even if no distributions are made. This intention, which is much more specific than in the case of Pensioenfonds Metaal en Techniek, can most certainly be achieved with respect to nonresident pension funds, at least where assets located in Portugal are concerned. Therefore, contrary to the view of the Advocate General, such nonresident vehicles are in a similar taxpayer situation as resident investment vehicles.

This is all the more the case if, in line with the view taken here, one also applies the assumption of full tax exemption for the resident investment vehicle to AEVN, as in the case of Fidelity Funds[[42]](#footnote-42). In that case as well, by completely exempting resident investment vehicles from dividend taxation with the resulting shift in taxation to the level of the vehicle investor, the Danish legislator intended to avoid double taxation, i.e. taxation at both investment vehicle and investor level, in order to ensure equal treatment of indirect investments via an investment vehicle with direct investments. As regards the existence of a comparable taxpayer situation between resident and nonresident investment vehicles, the ECJ already considered it sufficient in the case of Fidelity Funds that Denmark exercised its right to tax the dividend income paid to resident companies by nonresident investment vehicles, because the risk of double taxation, i.e. at both investment vehicle and investor level, also arose with respect to those vehicles.[[43]](#footnote-43) Kokott still subscribed to that view in her book on EU tax law.[[44]](#footnote-44)

The Portuguese tax provisions are also undoubtably aimed at preventing taxation at both vehicle and investor level by exempting dividend income received by resident investment vehicles from corporate income tax – which the Portuguese revenue authority quite appropriately considers separately from its documentary stamp tax. By exercising its power of taxation with respect to domestic dividend income received from nonresident investment vehicles, Portugal has ensured objective equivalency for these two taxpayer situations.

**c) Preserving the cohesion of the tax system**

Based on the foregoing arguments, it cannot be said that the taxpayer situations are not objectively comparable. Now, the question arises as to whether the Portuguese approach can be justified by overriding public interest. One possible justifying circumstance for tax provisions that limit fundamental rights could be an intention to preserve the cohesion of the national tax system by offsetting tax advantages and disadvantages that are in close and direct correlation with each other.[[45]](#footnote-45) The Advocate General agreed with this justifying circumstance in the case of AEVN.

However, the arguments of the Advocate General lack logical consistency here too. This is because the advantage of tax exemption at the level of the *resident* investment vehicle can at most be seen as corresponding with the disadvantage of taxation at shareholder/unitholder level. Only that disadvantage can take the place, so to speak, of taxing dividends at the level of the investment vehicle, for which reason a direct correlation can at most be said to exist with the exemption from withholding tax in this context.[[46]](#footnote-46) Even such a correlation would appear doubtful, however. Portuguese law does not make tax exemptions for investment vehicles dependent on subsequent distribution to and taxation of investors, even though earlier ECJ rulings required this for a direct connection to be considered to exist.[[47]](#footnote-47) In any case, the documentary stamp tax is a fully independent tax on net assets. The documentary stamp tax does not take the place of taxing received dividends either, which continues to occur at the level of the investor. Instead, the documentary stamp tax is levied in addition to such tax.

In this respect as well, the case of AEVN differs from the Fidelity Funds case, in which the ECJ upheld a justifying circumstance in principle with a view to cohesion.[[48]](#footnote-48) In the case of Fidelity Funds, the Danish legislator required – in addition to [Danish] residency for the investment vehicle – that a minimum distribution be made to investors, including the accompanying retention of withholding tax, for an investment vehicle to be exempted from dividend taxation.[[49]](#footnote-49) This was intended to ensure that the dividends were actually taxed at investor level in accordance with the decision of the Danish legislator to shift dividend taxation to the investor. To such extent, this in fact represents a disadvantage that is directly linked to the exemption for dividend taxation at the level of the investment vehicle. By contrast, the Portuguese documentary stamp tax is a separate, additional tax charged at investment vehicle level and therefore most certainly does not serve to ensure taxation at investor level.

In addition, in the case of Fidelity Funds the ECJ appropriately held that it was not necessary to exclude nonresident investment vehicles from withholding tax exemptions from the outset in order to achieve the objective of ensuring dividend taxation at the level of the shareholder or unitholder, but rather that it would suffice to link such exemptions to the minimum distribution requirement, even in the case of nonresident investment vehicles.[[50]](#footnote-50) This secured the right of the Danish authority to tax resident investors in investment vehicles.[[51]](#footnote-51) It is true that this was not sufficient to guarantee that investors domiciled abroad would also be taxed – a situation that Denmark was prepared to accept, however, based on its decision to shift taxation to the level of the investor.[[52]](#footnote-52)

Even if – contrary to the view expressed in this article – one were to follow the Advocate General’s line of reasoning that the documentary stamp tax is a disadvantage that correlates directly with the advantage of exemption from corporate income tax, it would still be sufficient as regards maintaining cohesion if nonresident investment vehicles were to be subjected to the documentary stamp tax, or at least granted such an option. In the case of AEVN as well, the fact that the documentary stamp tax would only cover investment vehicle assets located in Portugal would be an acceptable consequence of shifting taxation to investor level.

**d) Preserving a balanced allocation of the power to impose taxes**

In addition, the ECJ regards tax provisions that limit fundamental rights as justified if they are intended to preserve a balanced allocation of the power to impose taxes between member states.[[53]](#footnote-53) In the case of Fidelity Funds, however[[54]](#footnote-54) – as in other decisions[[55]](#footnote-55) – the ECJ correctly held that member states could not take recourse to that justifying circumstance for limiting fundamental rights if they have chosen not to tax resident investment vehicles in receipt of nationally sourced dividends, especially considering that the profits from which the dividends are distributed are already subject to domestic taxation at the level of the resident company distributing the dividend.[[56]](#footnote-56) Contrary to the assumption of the Advocate General,[[57]](#footnote-57) that ruling is indeed relevant to the present case, irrespective of the fact that resident investment vehicles are already charged a documentary stamp tax. This is because the documentary stamp tax is levied on the net assets of an investment vehicle, and not on the dividends collected by that vehicle. It can thus be presumed that those dividends are not subject to any tax whatsoever at the level of the investment vehicle. Not only that, but the profits from which the companies domiciled in Portugal distribute dividends are already subject to Portuguese corporate income tax at company level, as is also the case with AEVN. This ensures Portugal’s right to protect its tax revenue.

**e) Avoidance of non-taxation**

Finally, the Advocate General advances the justifying circumstance of ensuring effective tax collection, which according to the AG encompasses the objective of “avoidance of non-taxation”. Elsewhere, the Advocate General posits that “financing the State budget” is a key public interest matter because the State cannot perform its tasks or fulfill its functions without a sufficient tax basis.[[58]](#footnote-58) This claim on the part of the Advocate General must be vehemently opposed.

It is certainly true that the ECJ has included the objective of ensuring effective fiscal supervision among the overriding public interests that could justify a restriction on fundamental rights arising from tax law provisions.[[59]](#footnote-59) However, no ECJ rulings to date have ever held that the objective of “avoiding non-taxation” was a part of effective fiscal supervision. To such extent, the Advocate General has created a fully new justifying circumstance – one that has never been recognized in ECJ case law and finds no mention in Kokott’s own book on EU tax law either.[[60]](#footnote-60)

The Advocate General points out that the objective of avoiding non-taxation, i.e. ensuring a global minimum corporate tax rate, has recently been advanced by both the G20 and the OECD and was included in Pillar Two of the OECD/G20’s anti-avoidance recommendations[[61]](#footnote-61) in the form of Global anti-Base Erosion (GLOBE) rules. However, the Advocate General’s arguments fail in several respects. The OECD and the G20 are not identical with the EU, nor are OECD/G20 recommendations binding on the EU or its member states. Moreover, regulated investment and pension funds are specifically excluded from the GloBE rules on global minimum corporate tax.[[62]](#footnote-62)

Contrary to the view of the Advocate General, the avoidance of non-taxation and the related objective of ensuring sufficient tax revenue for individual EU member states is not a legitimate objective under the laws of the European Union. Especially in the realm of direct taxes – which is what is concerned in the case of AEVN – regulatory power remains with the member state in question. Thus in principle the member states have full authority to design their tax law provisions such as to ensure sufficient tax revenue. The EU has no such authority in this respect. This is not altered by the fact that the European legislator has been taking on such authority for itself to an increasing extent, for example in the Anti-Tax Avoidance Directive[[63]](#footnote-63) referred to by the Advocate General as well as in the Council Directive mandating automatic exchanges of information in respect of cross-border tax-planning arrangements.[[64]](#footnote-64) Both directives stem from Article 115 of the TFEU, which requires that enacted legislation have a direct impact on the establishment or the functioning of the single market. However, securing the tax revenues of the various *national* fiscal authorities bears no relation to the single market, for which reason Article 115 of the TFEU cannot be said to provide a basis for enacting directives with that objective.[[65]](#footnote-65) Irrespective of this, the directives mentioned are both secondary EU law. Therefore, no justifying circumstances for restrictions on the fundamental rights that are entrenched in primary EU law can be derived from those directives based on the hierarchy of legislation alone. Generally speaking – as Kokott herself admits elsewhere[[66]](#footnote-66) – mere fiscal interests and the objective of avoiding insufficient tax revenues are not sufficient to justify a restriction on fundamental rights, as the ECJ has consistently ruled.[[67]](#footnote-67) Therefore, there is no basis whatsoever in EU law for “avoidance of non-taxation” – a notion conjured up by the Advocate General – to qualify as a justifying circumstance.

**IV. Conclusion**

The arguments put forward by Advocate General Kokott in the matter of AllianzGI-Fonds Aevn are not convincing. What is especially concerning is the Advocate General’s attempt to create an entirely new justifying circumstance termed “avoidance of non-taxation” in order to make a statement, as it were, as her term of office nears the end. Such a justifying circumstance could ultimately be used to condone any and all restrictions in the free movement of capital based on the relation of national tax law provisions to those of other EU or EEA members with lower tax rates, which would undermine that fundamental right. Based on well-established ECJ case law, the provisions of Portuguese tax law at issue here violate the prohibition on restricting the free movement of capital by excluding nonresident investment vehicles from the corporate income tax exemption on nationally sourced dividends that is afforded to resident investment vehicles.

The formerly applicable German provision (Section 11(1) Sentence 2 of the 2004 German Investment Tax Act) also limited any exemption from corporate income and local business tax to resident investment vehicles, for which reason it likewise violated the prohibition on restricting the free movement of capital, in line with what has been put forward here concerning the parallel provisions of Portuguese law.[[68]](#footnote-68) Therefore, the ECJ will in all probability declare Section 11(1) Sentence 2 of the 2004 German Investment Tax Act to be in contravention of EU law in the preliminary ruling proceedings pending before the ECJ[[69]](#footnote-69) based on an order for referral from the German Federal Fiscal Court[[70]](#footnote-70) of 18 December 2019. According to the 2018 German Investment Tax Act, dividends paid by resident companies are subject to a final withholding tax on capital income of 15% with respect to both resident and nonresident investment vehicles (Section 6(2), Section 6(3) Sentence 1 No. 1, and Sections 7(1) and 7(2) of the 2018 German Investment Tax Act). This eliminates at least that source of unequal treatment that was problematic for the free movement of capital.[[71]](#footnote-71)

Were the ECJ to concur with the view of the Advocate General, which deviates in key aspects from established ECJ case law, this would lastingly weaken the European Union as a business location for investment vehicles. However, one would not only hope but expect the ECJ to remain true to the line it has taken thus far and deem the Portuguese tax law provisions to be in contravention of EU law.

1. The Portuguese tax laws cited in this article can be found at https://info.portaldasfinancas.gov.pt/pt/informacao\_fiscal/codigos\_tributarios/Pages/default-com-pdf.aspx. [↑](#footnote-ref-1)
2. Cf. AG Kokott, 6 May 2021 – Case C-545/19, BeckRS 2021, 9884, margin no. 10. [↑](#footnote-ref-2)
3. Original Portuguese: “nas situações previstas na subalínea 3) da alínea anterior”. [↑](#footnote-ref-3)
4. Cf. Council Directive 2011/96/EU of 30 November 2011 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States, OJEU No. L 345 of 29 December 2011, p. 8. [↑](#footnote-ref-4)
5. Cf. Decreto-Lei No. 7/2015 of 13 January 2015, Diário da República, 1a série, No. 8 of 13 January 2015, p. 380. [↑](#footnote-ref-5)
6. More on this in Part I No. 2 below. [↑](#footnote-ref-6)
7. Cf. Bannes/Holle, FR 2016 p. 661. [↑](#footnote-ref-7)
8. More information on the current taxation of investors in an investment vehicle pursuant to the 2004 German Investment Tax Act can be found in: Berger/Steck/Lübbehüsen, *German Investment Act/German Investment Tax Act*, 2010, before Section 1 InvStG, margin no. 36 ff.; also in Bannes/Holle, FR 2016 p. 661 f. [↑](#footnote-ref-8)
9. Cf. Stock/Oberhofer in: Berger/Steck/Lübbehüsen, *German Investment Act/German Investment Tax Act*, 2010, Section 4 of the German Investment Tax Act, margin no. 36 ff. [↑](#footnote-ref-9)
10. Available at: https://curia.europa.eu/juris/document/document.jsf?text=&docid=240845&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=2460087 [↑](#footnote-ref-10)
11. Cf. AG Kokott, 6 May 2021 – Case C-545/19, BeckRS 2021, 9884. [↑](#footnote-ref-11)
12. Cf. ECJ of 12 September 2006 – Case C-196/04, Cadbury Schweppes, NZG 2006 p. 835, margin no. 31; ECJ of 21 January 2010 – Case C-311/08, SGI, IStR 2010 p. 144, margin no. 27 f.; ECJ of 21 October 2010 – Case C-81/09, Idryma Typou, NZG 2011 p. 183, margin no. 47; ECJ of 10 February 2011 – Cases C-436/08, C-437/08, Haribo und Österreichische Salinen, ECJE 2011 p. I-355, margin no. 34 ff.; ECJ of 19 July 2012 – Case C-31/11, Scheunemann, DStR 2012 p. 1508, margin no. 23 ff.; ECJ of 14 September 2017 – Case C-628/15, The Trustees of the BT Pension Scheme, DStRE 2018 p. 417, margin no. 30. [↑](#footnote-ref-12)
13. Cf. AG Kokott, 6 May 2021 – Case C-545/19, BeckRS 2021, 9884, margin no. 32. [↑](#footnote-ref-13)
14. Cf. ECJ of 21 June 2018 – Case C-480/16, Fidelity Funds, IStR 2018 p. 590; more on this in Part III Nos. 1 and 2 hereof. [↑](#footnote-ref-14)
15. Cf. ECJ of 2 June 2016 – Case C-252/14, Pensioenfonds Metaal en Techniek, BeckRS 2016, 81090; more on this in Part III Nos. 1 and 2 hereof. [↑](#footnote-ref-15)
16. Cf. AG Kokott, 6 May 2021 – Case C-545/19, BeckRS 2021, 9884, margin nos. 43, 46 and 48 f. [↑](#footnote-ref-16)
17. Cf. AG Kokott, 6 May 2021 – Case C-545/19, BeckRS 2021, 9884, margin no. 58 ff. [↑](#footnote-ref-17)
18. Cf. AG Kokott, 6 May 2021 – Case C-545/19, BeckRS 2021, 9884, margin no. 71. [↑](#footnote-ref-18)
19. More on this in Part III No. 2 lit. a hereof. [↑](#footnote-ref-19)
20. Cf. ECJ of 2 June 2016 – Case C-252/14, Pensioenfonds Metaal en Techniek, BeckRS 2016, 81090. [↑](#footnote-ref-20)
21. Cf. AG Kokott, 6 May 2021 – Case C-545/19, BeckRS 2021, 9884, margin no. 73 ff. [↑](#footnote-ref-21)
22. Cf. AG Kokott, 6 May 2021 – Case C-545/19, BeckRS 2021, 9884, margin no. 87 ff. [↑](#footnote-ref-22)
23. Cf. AG Kokott, 6 May 2021 – Case C-545/19, BeckRS 2021, 9884, margin no. 91 ff. [↑](#footnote-ref-23)
24. Cf. Council Directive (EU) 2016/1164 of 12 July 2016, OJEU No. L 193 of 19 July 2016, p. 1. [↑](#footnote-ref-24)
25. Cf. OECD/G20: *Tax Challenges Arising from Digitalisation – Report on Pillar Two Blueprint*, 2020, available at https://www.oecd.org/tax/beps/tax-challenges-arising-from-digitalisation-report-on-pillar-two-blueprint-abb4c3d1-en.htm. [↑](#footnote-ref-25)
26. Cf. AG Kokott, 6 May 2021 – Case C-545/19, BeckRS 2021, 9884, margin no. 98 ff. [↑](#footnote-ref-26)
27. Cf. AG Kokott, 6 May 2021 – Case C-545/19, BeckRS 2021, 9884, margin no. 103 ff. [↑](#footnote-ref-27)
28. Cf. (for example) ECJ of 10 May 2012 – Case C-338/11, Santander, IStR 2012 p. 432, margin no. 15; ECJ of 2 June 2016 – Case C-252/14, Pensioenfonds Metaal en Techniek, BeckRS 2016, 81090, margin no. 27; ECJ of 21 June 2018 – Case C-480/16, Fidelity Funds, IStR 2018 p. 590, margin no. 40; ECJ of 13 November 2019 – Case C-641/17, College Pension Plan of British Columbia, DStR 2019 p. 2463, margin no. 48; ECJ of 30 January 2020 – Case C-156/17, Köln-Aktienfonds Deka, IStR 2020 p. 226, margin no. 49. [↑](#footnote-ref-28)
29. Cf. (for example) ECJ of 8 November 2007 – Case C-379/05, Amurta, ECJE 2007 p. I-9594, margin no. 27 f.; ECJ of 10 May 2012 – Case C-338/11, Santander, IStR 2012 p. 432, margin no. 16 ff.; ECJ of 10 April 2014 – Case C‑190/12, Emerging Markets, IStR 2014 p. 334, margin no. 40 ff.; ECJ of 13 November 2019 – Case C-641/17, College Pension Plan of British Columbia, DStR 2019 p. 2463, margin nos. 50, 58 and 60. [↑](#footnote-ref-29)
30. Cf. ECJ of 21 June 2018 – Case C-480/16, Fidelity Funds, IStR 2018 p. 590, margin no. 42 ff. [↑](#footnote-ref-30)
31. Cf. ECJ of 2 June 2016 – Case C-252/14, Pensioenfonds Metaal en Techniek, BeckRS 2016, 81090. [↑](#footnote-ref-31)
32. Cf. ECJ of 13 November 2019 – Case C-641/17, College Pension Plan of British Columbia, DStR 2019 p. 2463, margin no. 71 f.: In this case, the relevant provisions of the German tax code resulted in dividends paid to resident pension funds being either fully or partially tax exempt, meaning that it is not merely different [tax] collection modalities that are concerned. [↑](#footnote-ref-32)
33. Cf. ECJ of 2 June 2016 – Case C-252/14, Pensioenfonds Metaal en Techniek, BeckRS 2016, 81090, margin no. 28 ff. [↑](#footnote-ref-33)
34. Cf. ECJ of 2 June 2016 – Case C-252/14, Pensioenfonds Metaal en Techniek, BeckRS 2016, 81090, margin nos. 39 and 41. [↑](#footnote-ref-34)
35. Cf. ECJ of 8 November 2007 – Case C-379/05, Amurta, ECJE 2007 p. I-9594, margin no. 75 ff. [↑](#footnote-ref-35)
36. Cf. ECJ of 10 May 2012 – Case C-338/11, Santander, IStR 2012 p. 432, margin no. 28; ibid ECJ of 10 April 2014 – Case C‑190/12, Emerging Markets, IStR 2014 p. 334, margin no. 63 f.; Kleinert (assenting), IStR 2020 p. 210 (213 f.); Wünsche/Brielmaier, BB 2012 p. 2467 (2469); alternate opinion by the Tax Court of Münster of 20 April 2017 – 10 K 3059/14 K, BeckRS 2017, 113310. [↑](#footnote-ref-36)
37. Cf. ECJ of 8 November 2007 – Case C-379/05, Amurta, ECJE 2007 p. I-9594, margin no. 32; ECJ of 10 May 2012 – Case C-338/11, Santander, IStR 2012 p. 432, margin no. 21 ff.; ECJ of 2 June 2016 – Case C-252/14, Pensioenfonds Metaal en Techniek, BeckRS 2016, 81090, margin no. 46 f.; ECJ of 21 June 2018 – Case C-480/16, Fidelity Funds, IStR 2018 p. 590, margin no. 47 f.; ECJ of 29 April 2021 – Case C-480/19, E, BeckRS 2021, 8923, margin no. 29 f. [↑](#footnote-ref-37)
38. This interpretation has in fact already been expressed by Kokott in *Das Steuerrecht der EU*, 2018, Section 3 margin no. 94. [↑](#footnote-ref-38)
39. Cf. ECJ of 2 June 2016 – Case C-252/14, Pensioenfonds Metaal en Techniek, BeckRS 2016, 81090. [↑](#footnote-ref-39)
40. Cf. ECJ of 2 June 2016 – Case C-252/14, Pensioenfonds Metaal en Techniek, BeckRS 2016, 81090, margin no. 48; ECJ of 21 June 2018 – Case C-480/16, Fidelity Funds, IStR 2018 p. 590, margin no. 50; ECJ of 29 April 2021 – Case C-480/19, E, BeckRS 2021, 8923, margin no. 49; ECJ of 13 November 2019 – Case C-641/17, College Pension Plan of British Columbia, DStR 2019 p. 2463, margin no. 65. [↑](#footnote-ref-40)
41. Cf. ECJ of 2 June 2016 – Case C-252/14, Pensioenfonds Metaal en Techniek, BeckRS 2016, 81090, margin no. 51 ff.; also Forchhammer, ISR 2017 p. 117 (123 f.). [↑](#footnote-ref-41)
42. Cf. ECJ of 21 June 2018 – Case C-480/16, Fidelity Funds, IStR 2018 p. 590. [↑](#footnote-ref-42)
43. Cf. ECJ of 21 June 2018 – Case C-480/16, Fidelity Funds, IStR 2018 p. 590, margin no. 52 ff.; also ECJ of 8 November 2007 – Case C-379/05, Amurta, ECJE 2007 p. I-9594, margin no. 38 ff.; ECJ of 18 June 2009 – Case C-303/07, Aberdeen Property Fininvest Alpha, ECJE 2009 p. I-5159, margin no. 43 f.; ECJ of 10 May 2012 – Case C-338/11, Santander, IStR 2012 p. 432, margin no. 27 ff. [↑](#footnote-ref-43)
44. Cf. Kokott, *Das Steuerrecht der EU*, 2018, Section 2 margin no. 201. [↑](#footnote-ref-44)
45. Cf. ECJ of 11 August 1995 – Case C-80/94, Wielockx, ECJE 1995 p. I-2493, margin no. 23 ff.; ECJ of 11 March 2004 – Case C-9/02, de Lasteyrie du Saillant, ECJE 2004 p. I-2409, margin no. 62 ff.; ECJ of 15 July 2004 – Case C-315/02, Lenz, ECJE 2004 p. I-7063, margin no. 34 ff.; ECJ of 8 November 2007 – Case C-379/05, Amurta, ECJE 2007 p. I-9594, margin no. 46; ECJ of 27 November 2008 – Case C-418/07, ECJE 2008 p. I-8947, Papillon, IStR 2009 p. 66, margin no. 43 f. [↑](#footnote-ref-45)
46. Cf. in this respect Bannes/Holle, FR 2016 p. 661 (666); alternate opinion – completely rejecting consideration at shareholder level – Wünsche/Brielmaier, BB 2012 p. 2467 (2472). [↑](#footnote-ref-46)
47. Cf. ECJ of 18 June 2009 – Case C-303/07, Aberdeen Property Fininvest Alpha, ECJE 2009 p. I-5159, margin no. 72 ff.; ECJ of 10 May 2012 – Case C-338/11, Santander, IStR 2012 p. 432, margin no. 51 ff.; ECJ of 10 April 2014 – Case C‑190/12, Emerging Markets, IStR 2014 p. 334, margin no. 92 ff.; additionally v. Brocke/Auer, IWB 2012 p. 457 (462 f.); Kleinert, IStR 2020 p. 210 (218 ff.); Wünsche/Brielmaier, BB 2012 p. 2467 (2470); even stricter ECJ of 8 November 2007 – Case C-379/05, Amurta, ECJE 2007 p. I-9594, margin no. 48 ff. [↑](#footnote-ref-47)
48. Cf. ECJ of 21 June 2018 – Case C-480/16, Fidelity Funds, IStR 2018 p. 590, margin no. 79 ff. [↑](#footnote-ref-48)
49. Cf. ECJ of 30 January 2020 – Case C-156/17, Köln-Aktienfonds Deka, IStR 2020 p. 226, margin no. 68 ff. regarding the question of admissibility of dividend distribution requirements under EU law. [↑](#footnote-ref-49)
50. Cf. ECJ of 21 June 2018 – Case C-480/16, Fidelity Funds, IStR 2018 p. 590, margin no. 84. [↑](#footnote-ref-50)
51. Cf. ECJ of 21 June 2018 – Case C-480/16, Fidelity Funds, IStR 2018 p. 590, margin no. 61, 74. [↑](#footnote-ref-51)
52. Cf. ECJ of 21 June 2018 – Case C-480/16, Fidelity Funds, IStR 2018 p. 590, margin no. 62. [↑](#footnote-ref-52)
53. Cf. ECJ of 13 December 2005 – Case C-446/03, Marks & Spencer, ECJE 2005 p. I-10837, margin no. 45 ff.; ECJ of 18 July 2007 – Case C-231/05, Oy AA, ECJE 2007 p. I-6373, margin no. 54 ff.; ECJ of 15 May 2008 – C-414/06, Lidl Belgium, ECJE 2008 p. I-3601, margin no. 31 ff.; ECJ of 25 February 2010 – Case C-337/08, X Holding, DStR 2010 p. 427, margin no. 28 f. [↑](#footnote-ref-53)
54. Cf. ECJ of 21 June 2018 – Case C-480/16, Fidelity Funds, IStR 2018 p. 590, margin no. 71 f. [↑](#footnote-ref-54)
55. Cf. ECJ of 8 November 2007 – Case C-379/05, Amurta, ECJE 2007 p. I-9594, margin no. 59; ECJ of 18 June 2009 – Case C-303/07, Aberdeen Property Fininvest Alpha, ECJE 2009 p. I-5159, margin no. 67, 70; ECJ of 10 May 2012 – Case C-338/11, Santander, IStR 2012 p. 432, margin no. 48; ECJ of 10 April 2014 – Case C‑190/12, Emerging Markets, IStR 2014 p. 334, margin no. 99; ECJ of 13 November 2019 – Case C-641/17, College Pension Plan of British Columbia, DStR 2019 p. 2463, margin no. 85. [↑](#footnote-ref-55)
56. Cf. Kleinert, IStR 2020 p. 210 (220). [↑](#footnote-ref-56)
57. Cf. AG Kokott, 6 May 2021 – Case C-545/19, BeckRS 2021, 9884, margin no. 89. [↑](#footnote-ref-57)
58. Cf. AG Kokott, 6 May 2021 – Case C-545/19, BeckRS 2021, 9884, margin no. 107. [↑](#footnote-ref-58)
59. Cf. ECJ of 15 May 1997 – Case C-250/95, Futura Participations, EuGHE 1997, I-2492, margin no. 31, 36; ECJ of 27 January 2009 – Case C-318/07, Persche, EuGHE 2009, I-359, margin no. 52. [↑](#footnote-ref-59)
60. Cf. Kokott, *Das Steuerrecht der EU*, 2018, Section 5 margin nos. 40 ff. and 56 ff.: No objective of “avoiding non-taxation” is mentioned anywhere as a sub-category of the justifying circumstance of ensuring efficient taxation/tax collection. [↑](#footnote-ref-60)
61. Cf. OECD/G20, loc. cit. (Fn. 25). [↑](#footnote-ref-61)
62. Cf. OECD/G20, loc. cit. (Fn. 25), margin nos. 13, 41 and 71 ff. [↑](#footnote-ref-62)
63. Cf. Part II above and Fn. 24. [↑](#footnote-ref-63)
64. Cf. Council Directive (EU) 2018/822 of 25 May 2018, OJEU No. L 39 of 6 June 2018 p. 1; more in Stöber, BB 2018 p. 1559 (1564 ff.). [↑](#footnote-ref-64)
65. Cf. Stöber, BB 2018 p. 1559 (1566 f.); Stöber, BB 2020 p. 983 (987). [↑](#footnote-ref-65)
66. Cf. Kokott, *Das Steuerrecht der EU*, 2018, Section 5 margin no. 105. [↑](#footnote-ref-66)
67. Cf. ECJ of 8 March 2001 – Case C-397/98, Metallgesellschaft und Hoechst, ECJE 2001 p. I-1760, margin no. 59; ECJ of 11 March 2004 – Case C-9/02, Lasteyrie du Saillant, ECJE 2004 p. I-2409 = DB 2004 p. 686, margin no. 60; ECJ of 10 April 2014 – Case C‑190/12, Emerging Markets, IStR 2014 p. 334, margin no. 102. [↑](#footnote-ref-67)
68. Ibid in English: Berger/Steck/Lübbehüsen, *German Investment Act/German Investment Tax Act*, 2010, Section 11 InvStG margin no. 27 ff.; Kleinert, IStR 2020 p. 210 (212 ff.); Schönbach/Gnutzmann, BB-Special 1/2010 p. 30 (32 f.); Schwenk/Faber, ISR 2018 p. 319 (320 f.); Steinmüller, in: Musil/Weber-Grellet, *Europäisches Steuerrecht*, 2019, Section 11 InvStG margin no. 40 ff.; Zetzsche, IStR 2015 p. 8 (9 ff.); alternate opinion. Bannes/Holle, FR 2016 p. 661 (663 ff.); also the Münster Tax Court of 20 April 2017 – 10 K 3059/14 K, BeckRS 2017, 113310, which affirmed the compliance of nonresident special real estate funds with EU law in special cases; also a similar tendency expressed by the German Federal Fiscal Court of 18 December 2019 – I R 33/17, IStR 2020 p. 889, margin no. 39 ff. [↑](#footnote-ref-68)
69. Cf. Case C-537/20. [↑](#footnote-ref-69)
70. Cf. German Federal Fiscal Court of 18 December 2019 – I R 33/17, IStR 2020 p. 889. [↑](#footnote-ref-70)
71. Cf. Herr/Stiefel, IStR 2019 p. 929 (930 ff.) regarding the concerns that nonetheless exist about conformity of the 2018 German Investment Tax Act with EU law. [↑](#footnote-ref-71)