

ECJ Preliminary Ruling Request: *Finanzamt für Großbetriebe* (Case C-602/23) – Verwaltungsgerichtshof Submits Referral on Taxation of Foreign Investment Funds

19 December 2023

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The Austrian Verwaltungsgerichtshof made reference to the Court of Justice of the European Union (ECJ) on 3 October 2023 for a preliminary ruling in the case *Finanzamt für Großbetriebe* (Case C-602/23) on the rules for taxation of foreign investment funds.

The Verwaltungsgerichtshof requested the ECJ to answer the following questions:

1. Does a provision such as paragraph 188 of the Investmentfondsgesetz 2011 (Law on Investment Funds 2011, "the InvFG 2011"), which has the effect of precluding foreign entities that are comparable to a domestic corporation from receiving a refund of income tax in Austria if they correspond in substance to a UCITS within the meaning of Directive 2009/65/EC, and are therefore not permitted to operate as a corporation in Austria because only the legal form of a transparent special fund is provided for in respect of such entities in Austria, constitute a restriction on the free movement of capital within the meaning of article 63 of the TFEU?
2. If that question is answered in the affirmative: is there an objectively comparable situation between, on the one hand, a domestic corporation that invests its assets in accordance with the principles of risk spreading, but does not constitute a UCITS due to the fact that funds are not raised from the public, and is thus permitted to operate as a corporation even in the domestic market and, on the other hand, a foreign investment fund company which would constitute a UCITS according to the domestic principles – on account of the fact that funds are raised from the public – and is therefore not permitted to operate as a corporation in the domestic market?
3. If that question is answered in the affirmative: does preservation of the balanced allocation of the power to impose taxes constitute a ground of justification for a restriction on the free movement of capital in view of the fact that paragraphs 186 and 188 of the InvFG 2011 seek to ensure that neither a domestic mutual fund nor a foreign mutual fund can produce a tax shielding effect vis-à-vis the unit-holders and that, consequently, relief from income tax is to be provided only at the level of the unit-holders in those cases in which Austria has waived its taxing right under the terms of a double taxation agreement?

Austria; European Union - ECJ Preliminary Ruling Request: Finanzamt für Großbetriebe (Case C-602/23) – Verwaltungsgerichtshof Submits Referral on Taxation of Foreign Investment Funds (19 Dec. 2023), News IBFD.

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