JUDGMENT OF THE COURT (First Chamber)

1 August 2022

(Reference for a preliminary ruling – Approximation of laws – Directive 2009/65/EC – Undertakings for collective investment in transferable securities (UCITS) – Directive 2011/61/EU – Alternative investment funds – Remuneration policies and practices in respect of the senior managers of a UCITS management company or manager of an alternative investment fund – Dividends distributed to certain senior managers – Concept of 'remuneration' – Article 17(1) of the Charter of Fundamental Rights of the European Union – Right to property)

In Case C-352/20,

REQUEST for a preliminary ruling under Article 267 TFEU from the Kúria (Supreme Court, Hungary), made by decision of 2 July 2020, received at the Court on 31 July 2020, in the proceedings

HOLD Alapkezelő Befektetési Alapkezelő Zrt.

v

Magyar Nemzeti Bank,

THE COURT (First Chamber),

composed of A. Arabadjiev, President of the Chamber, K. Lenaerts, President of the Court, L. Bay Larsen, Vice-President of the Court, acting as a Judge of the First Chamber, I. Ziemele (Rapporteur) and P.G. Xuereb, Judges,

Advocate General: J. Kokott,

Registrar: I. Illéssy, Administrator,

having regard to the written procedure and further to the hearing on 28 October 2021,

after considering the observations submitted on behalf of:

– HOLD Alapkezelő Befektetési Alapkezelő Zrt., by Á.P. Baráti, T. Fehér, P. Jalsovszky and B.D. Zsibrita, ügyvédek,

– Magyar Nemzeti Bank, by T. Kende and P. Sonnevend, ügyvédek, and G. Subai, Legal Adviser,

– the Hungarian Government, by M.Z. Fehér and G. Koós, acting as Agents,

– the Polish Government, by B. Majczyna, acting as Agent,

– the European Commission, initially by L. Havas, J. Rius Riu and H. Tserepa-Lacombe, and subsequently by V. Bottka, J. Rius Riu and H. Tserepa-Lacombe, acting as Agents,

– the European Securities and Markets Authority, by G. Filippa, acting as Agent,

after hearing the Opinion of the Advocate General at the sitting on 16 December 2021,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Articles 14 to 14b of Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) (OJ 2009 L 302, p. 32), as amended by Directive 2014/91/EU of the European Parliament and of the Council of 23 July 2014 (OJ 2014 L 257, p. 186) ('Directive 2009/65'), Article 13(1) of, and points 1 and 2 of Annex II to, Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers and amending Directives 2003/41/EC and 2009/65/EC and Regulations (EC) No 1060/2009 and (EU) No 1095/2010 (OJ 2011 L 174, p. 1) and Article 2(5) of Commission Delegated Regulation (EU) 2017/565 of 25 April 2016 supplementing Directive 2014/65/EU of the European Parliament and of the Council as regards organisational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive (OJ 2017 L 87, p. 1).

2 The request has been made in proceedings between HOLD Alapkezelő Befektetési Alapkezelő Zrt. ('HOLD') and Magyar Nemzeti Bank (National Bank of Hungary) concerning a decision by which that bank imposed a penalty on HOLD for its remuneration practices.

Legal context

European Union law

Directive 2009/65

3 Article 2(1)(b) of Directive 2009/65 provides that, for the purposes of the directive, 'management company' means a company, the regular business of which is the management of undertakings for collective investment in transferable securities (UCITS) in the form of common funds or of investment companies (collective portfolio management of UCITS).

4 Article 6(3) and (4) of that directive provides:

'3. By way of derogation from paragraph 2, Member States may authorise management companies to provide, in addition to the management of UCITS, the following services:

(a) management of portfolios of investments, including those owned by pension funds, in accordance with mandates given by investors on a discretionary, client-by-client basis, where such portfolios include one or more of the instruments listed in Annex I, Section C to Directive 2004/39/EC [of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC (OJ 2004 L 145, p. 1)]; and

(b) as non-core services:

(i) investment advice concerning one or more of the instruments listed in Annex I, Section C to Directive [2004/39];

(ii) safekeeping and administration in relation to units of collective investment undertakings.

…

4. Article 2(2) and Articles 12, 13 and 19 of Directive [2004/39] shall apply to the provision of the services referred to in paragraph 3 of this Article by management companies.'

5 Article 14(1) of Directive 2009/65 is worded as follows:

'Each Member State shall draw up rules of conduct which management companies authorised in that Member State shall observe at all times. Such rules shall implement at least the principles set out in this paragraph. Those principles shall ensure that a management company:

(a) acts honestly and fairly in conducting its business activities in the best interests of the UCITS it manages and the integrity of the market;

(b) acts with due skill, care and diligence, in the best interests of the UCITS it manages and the integrity of the market;

(c) has and employs effectively the resources and procedures that are necessary for the proper performance of its business activities;

(d) tries to avoid conflicts of interests and, when they cannot be avoided, ensures that the UCITS it manages are fairly treated; and

(e) complies with all regulatory requirements applicable to the conduct of its business activities so as to promote the best interests of its investors and the integrity of the market.'

6 Article 14a of that directive provides:

'1. Member States shall require management companies to establish and apply remuneration policies and practices that are consistent with, and promote, sound and effective risk management and that neither encourage risk taking which is inconsistent with the risk profiles, rules or instruments of incorporation of the UCITS that they manage nor impair compliance with the management company's duty to act in the best interest of the UCITS.

2. The remuneration policies and practices shall include fixed and variable components of salaries and discretionary pension benefits.

3. The remuneration policies and practices shall apply to those categories of staff, including senior management, risk takers, control functions and any employee receiving total remuneration that falls within the remuneration bracket of senior management and risk takers whose professional activities have a material impact on the risk profiles of the management companies or of the UCITS that they manage.

4. In accordance with Article 16 of Regulation (EU) No 1095/2010 [of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC (OJ 2010 L 331, p. 84)], [the European Securities and Markets Authority (ESMA)] shall issue guidelines addressed to competent authorities or to financial market participants concerning the persons referred to in paragraph 3 of this Article and the application of the principles referred to in Article 14b. Those guidelines shall take into account the principles on sound remuneration policies set out in Commission Recommendation 2009/384/EC [of 30 April 2009 on remuneration policies in the financial services sector (OJ 2009 L 120, p. 22)], the

size of the management company and the size of the UCITS that they manage, their internal organisation, and the nature, scope and complexity of their activities. …'

7 Article 14b of that directive provides:

'1. When establishing and applying the remuneration policies referred to in Article 14a, management companies shall comply with the following principles in a way and to the extent that is appropriate to their size, internal organisation and the nature, scope and complexity of their activities:

(a) the remuneration policy is consistent with and promotes sound and effective risk management and does not encourage risk taking which is inconsistent with the risk profiles, rules or instruments of incorporation of the UCITS that the management company manages;

(b) the remuneration policy is in line with the business strategy, objectives, values and interests of the management company and the UCITS that it manages and of the investors in such UCITS, and includes measures to avoid conflicts of interest;

…

(g) where remuneration is performance-related, the total amount of remuneration is based on a combination of the assessment as to the performance of the individual and of the business unit or UCITS concerned and as to their risks and of the overall results of the management company when assessing individual performance, taking into account financial and non-financial criteria;

(h) the assessment of performance is set in a multi-year framework appropriate to the holding period recommended to the investors of the UCITS managed by the management company in order to ensure that the assessment process is based on the longer-term performance of the UCITS and its investment risks and that the actual payment of performance-based components of remuneration is spread over the same period;

…

(j) fixed and variable components of total remuneration are appropriately balanced and the fixed component represents a sufficiently high proportion of the total remuneration to allow the operation of a fully flexible policy on variable remuneration components, including the possibility to pay no variable remuneration component;

…

(l) the measurement of performance used to calculate variable remuneration components or pools of variable remuneration components includes a comprehensive adjustment mechanism to integrate all relevant types of current and future risks;

(m) subject to the legal structure of the UCITS and its fund rules or instruments of incorporation, a substantial portion, and in any event at least 50%, of any variable remuneration component consists of units of the UCITS concerned, equivalent ownership interests, or share-linked instruments or equivalent non-cash instruments with equally effective incentives as any of the instruments referred to in this point, unless the management of UCITS accounts for less than 50% of the total portfolio managed by the management company, in which case the minimum of 50% does not apply.

The instruments referred to in this point shall be subject to an appropriate retention policy designed to align incentives with the interests of the management company and the UCITS that it manages and the investors of such UCITS. Member States or their competent authorities may place restrictions on the types and designs of those instruments or ban certain instruments as appropriate. This point shall apply to both the portion of the variable remuneration component deferred in line with point (n) and the portion of the variable remuneration component not deferred;

(n) a substantial portion, and in any event at least 40%, of the variable remuneration component, is deferred over a period which is appropriate in view of the holding period recommended to the investors of the UCITS concerned and is correctly aligned with the nature of the risks of the UCITS in question.

The period referred to in this point shall be at least three years; remuneration payable under deferral arrangements vests no faster than on a pro-rata basis; in the case of a variable remuneration component of a particularly high amount, at least 60% of the amount shall be deferred;

(o) the variable remuneration, including the deferred portion, is paid or vests only if it is sustainable according to the financial situation of the management company as a whole, and justified according to the performance of the business unit, the UCITS and the individual concerned.

The total variable remuneration shall generally be considerably contracted where subdued or negative financial performance of the management company or of the UCITS concerned occurs, taking into account both current compensation and reductions in payouts of amounts previously earned, including through malus or clawback arrangements;

…

(r) variable remuneration is not paid through vehicles or methods that facilitate the avoidance of the requirements laid down in this Directive.

…

3. The principles set out in paragraph 1 shall apply to any benefit of any type paid by the management company, to any amount paid directly by the UCITS itself, including performance fees, and to any transfer of units or shares of the UCITS, made for the benefit of those categories of staff, including senior management, risk takers, control functions and any employee receiving total remuneration that falls into the remuneration bracket of senior management and risk takers, whose professional activities have a material impact on their risk profile or the risk profile of the UCITS that they manage.

…'

Directive 2014/91

8 Recitals 5, 7 and 10 of Directive 2014/91 state:

'(5) When applying the principles regarding sound remuneration policies and practices established by this Directive, Member States should take into account the principles set out in Commission Recommendation [2009/384], the work of the Financial Stability Board and G-20 commitments to mitigate risk in the financial services sector.

…

(7) The principles regarding sound remuneration policies should also apply to payments made from UCITS to management companies or investment companies.

…

(10) The provisions on remuneration should be without prejudice to the full exercise of fundamental rights guaranteed by the [TEU], the [TFEU] and the Charter of Fundamental Rights of the European Union (the Charter), to general principles of national contract and labour law, applicable legislation regarding shareholders' rights and involvement and the general responsibilities of the administrative and supervisory bodies of the companies concerned, as well as to the right, where applicable, of the social partners to conclude and enforce collective agreements, in accordance with national law and practice.'

Directive 2011/61

9 Recitals 26 and 28 of Directive 2011/61 are worded as follows:

‘(26) The principles regarding sound remuneration policies set out in the Commission Recommendation [2009/384] are consistent with and complement the principles of this Directive.

…

(28) The provisions on remuneration should be without prejudice to the full exercise of fundamental rights guaranteed by the Treaties, in particular Article 153(5) TFEU, general principles of national contract and labour law, applicable legislation regarding shareholders’ rights and involvement and the general responsibilities of the administrative and supervisory bodies of the institution concerned, as well as the right, where applicable, of social partners to conclude and enforce collective agreements, in accordance with national laws and traditions.’

10 In accordance with its Article 1, Directive 2011/61 lays down the rules for the authorisation, ongoing operation and transparency of the managers of alternative investment funds which manage and/or market alternative investment funds (‘AIFs’) in the European Union.

11 Article 4(1)(b) of that directive provides that, for the purposes of the directive, AIFMs means legal persons whose regular business is managing one or more AIFs.

12 Article 6(4) and (6) of that directive provides:

‘4. By way of derogation from paragraph 2, Member States may authorise an external AIFM to provide the following services:

(a) management of portfolios of investments, including those owned by pension funds and institutions for occupational retirement provision in accordance with Article 19(1) of Directive 2003/41/EC [of the European Parliament and of the Council of 3 June 2003 on the activities and supervision of institutions for occupational retirement provision (OJ 2003 L 235, p. 10)], in accordance with mandates given by investors on a discretionary, client-by-client basis;

(b) non-core services comprising:

(i) investment advice;

(ii) safe-keeping and administration in relation to shares or units of collective investment undertakings;

(iii) reception and transmission of orders in relation to financial instruments.

…

6. Article 2(2) and Articles 12, 13 and 19 of Directive [2004/39] shall apply to the provision of the services referred to in paragraph 4 of this Article by AIFMs.'

13 Article 13 of Directive 2011/61 is worded as follows:

'1. Member States shall require AIFMs to have remuneration policies and practices for those categories of staff, including senior management, risk takers, control functions, and any employees receiving total remuneration that takes them into the same remuneration bracket as senior management and risk takers, whose professional activities have a material impact on the risk profiles of the AIFMs or of the AIFs they manage, that are consistent with and promote sound and effective risk management and do not encourage risk-taking which is inconsistent with the risk profiles, rules or instruments of incorporation of the AIFs they manage.

The AIFMs shall determine the remuneration policies and practices in accordance with Annex II.

…'

14 Annex II to that directive, headed 'Remuneration policy', provides:

'1. When establishing and applying the total remuneration policies, inclusive of salaries and discretionary pension benefits, for those categories of staff, including senior management, risk takers, control functions and any employee receiving total remuneration that takes them into the same remuneration bracket as senior management and risk takers, whose professional activities have a material impact on the risk profiles of the AIFMs or of AIFs they manage, AIFMs shall comply with the following principles in a way and to the extent that is appropriate to their size, internal organisation and the nature, scope and complexity of their activities:

(a) the remuneration policy is consistent with and promotes sound and effective risk management and does not encourage risk-taking which is inconsistent with the risk profiles, rules or instruments of incorporation of the AIFs they manage;

(b) the remuneration policy is in line with the business strategy, objectives, values and interests of the AIFM and the AIFs it manages or the investors of such AIFs, and includes measures to avoid conflicts of interest;

…

(g) where remuneration is performance related, the total amount of remuneration is based on a combination of the assessment of the performance of the individual and of the business unit or AIF concerned and of the overall results of the AIFM, and when assessing individual performance, financial as well as non-financial criteria are taken into account;

(h) the assessment of performance is set in a multi-year framework appropriate to the life-cycle of the AIFs managed by the AIFM in order to ensure that the assessment process is based on longer term performance and that the actual payment of performance-based components of remuneration is spread over a period which takes account of the redemption policy of the AIFs it manages and their investment risks;

…

(j) fixed and variable components of total remuneration are appropriately balanced and the fixed component represents a sufficiently high proportion of the total remuneration to allow the operation of a fully flexible policy, on variable remuneration components, including the possibility to pay no variable remuneration component;

…

(l) the measurement of performance used to calculate variable remuneration components or pools of variable remuneration components includes a comprehensive adjustment mechanism to integrate all relevant types of current and future risks;

(m) subject to the legal structure of the AIF and its rules or instruments of incorporation, a substantial portion, and in any event at least 50% of any variable remuneration consists of units or shares of the AIF concerned, or equivalent ownership interests, or share-linked instruments or equivalent non-cash instruments, unless the management of AIFs accounts for less than 50% of the total portfolio managed by the AIFM, in which case the minimum of 50% does not apply.

The instruments referred to in this point shall be subject to an appropriate retention policy designed to align incentives with the interests of the AIFM and the AIFs it manages and the investors of such AIFs. Member States or their competent authorities may place restrictions on the types and designs of those instruments or ban certain instruments as appropriate. This point shall be applied to both the portion of the variable remuneration component deferred in line with point (n) and the portion of the variable remuneration component not deferred;

(n) a substantial portion, and in any event at least 40%, of the variable remuneration component, is deferred over a period which is appropriate in view of the life cycle and redemption policy of the AIF concerned and is correctly aligned with the nature of the risks of the AIF in question.

The period referred to in this point shall be at least three to [five] years unless the life cycle of the AIF concerned is shorter; remuneration payable under deferral arrangements vests no faster than on a pro-rata basis; in the case of a variable remuneration component of a particularly high amount, at least 60% of the amount is deferred;

(o) the variable remuneration, including the deferred portion, is paid or vests only if it is sustainable according to the financial situation of the AIFM as a whole, and justified according to the performance of the business unit, the AIF and the individual concerned.

The total variable remuneration shall generally be considerably contracted where subdued or negative financial performance of the AIFM or of the AIF concerned occurs, taking into account both current compensation and reductions in payouts of amounts previously earned, including through malus or clawback arrangements;

…

(r) variable remuneration is not paid through vehicles or methods that facilitate the avoidance of the requirements of this Directive.

2. The principles set out in paragraph 1 shall apply to remuneration of any type paid by the AIFM, to any amount paid directly by the AIF itself, including carried interest, and to any transfer of units or shares of the AIF, made to the benefits of those categories of staff, including senior management, risk takers, control functions and any employee receiving total remuneration that takes them into the same remuneration bracket as senior management and risk takers, whose professional activities have a material impact on their risk profile or the risk profiles of the AIF that they manage.

…’

Delegated Regulation 2017/565

15 Article 1(1) of Delegated Regulation 2017/565 provides:

‘Chapter II, and Sections 1 to 4, Articles 59(4) and 60 and Sections 6 and 8 of Chapter III and, to the extent they relate to those provisions, Chapter I and Section 9 of Chapter III and Chapter IV of this Regulation shall apply to management

companies in accordance with Article 6(4) of Directive [2009/65] and Article 6(6) of Directive [2011/61].'

16 Article 2(5) of the delegated regulation, in Chapter I thereof, headed 'Scope and definitions', provides:

'For the purposes of this Regulation, the following definitions shall apply:

…

(5) "remuneration" means all forms of payments or financial or non-financial benefits provided directly or indirectly by firms to relevant persons in the provision of investment or ancillary services to clients;

…'

Recommendation 2009/384

17 Recitals 1 to 3 of Recommendation 2009/384 state:

'(1) Excessive risk-taking in the financial services industry … has contributed to the failure of financial undertakings and to systemic problems in the Member States and globally. These problems have spread to the rest of the economy and led to high costs for society.

(2) Whilst not the main cause of the financial crisis that unfolded in 2007 and 2008, there is a widespread consensus that inappropriate remuneration practices in the financial services industry also induced excessive risk-taking and thus contributed to significant losses of major financial undertakings.

(3) Remuneration practices in a large part of the financial services industry have been running counter to effective and sound risk management. These practices tended to reward short-term profit and gave staff incentives to pursue unduly risky activities which provided higher income in the short term while exposing financial undertakings to higher potential losses in the longer term.'

ESMA Guidelines

18 The ESMA documents entitled 'Guidelines on sound remuneration policies under the AIFMD' (ESMA/2013/232) of 3 July 2013 ('the AIFM guidelines') and 'Guidelines on sound remuneration policies under [Directive 2009/65]' (ESMA/2016/575) of 14 October 2016 ('the UCITS guidelines') apply to, respectively, managers of alternative investment funds ('AIFMs') and to management companies within the meaning of Article 2(1)(b) of Directive 2009/65 and competent authorities.

19 Points 10 and 17 of the AIFM guidelines are worded as follows:

‘10. Solely for the purposes of the guidelines and Annex II to [Directive 2011/61], remuneration consists of

(i) all forms of payments or benefits paid by the AIFM,

(ii) any amount paid by the [alternative investment fund (AIF)] itself, including carried interest, and

…,

in exchange for professional services rendered by the AIFM identified staff.

For the purpose of item (ii) of this paragraph, whenever payments, excluding reimbursements of costs and expenses, are made directly by the AIF to the AIFM for the benefit of the relevant categories of staff of the AIFM for professional services rendered, which may otherwise result in a circumvention of the relevant remuneration rules, they should be considered remuneration for the purpose of the guidelines and Annex II to [Directive 2011/61].

…

17. Consideration should also be given to the position of partnerships and similar structures. Dividends or similar distributions that partners receive as owners of an AIFM are not covered by these guidelines, unless the material outcome of the payment of such dividends results in a circumvention of the relevant remuneration rules, any intention to circumvent such rules being irrelevant for such purpose.’

20 According to points 11 and 15 of the UCITS guidelines:

‘11. Solely for the purposes of the guidelines and Article 14b of [Directive 2009/65], remuneration consists of one or more of the following:

(i) all forms of payments or benefits paid by the management company,

(ii) any amount paid by the UCITS itself, including any portion of performance fees that are paid directly or indirectly for the benefit of identified staff, or

…

in exchange for professional services rendered by the management company’s identified staff.

Whenever payments, excluding reimbursements of costs and expenses, are made directly by the UCITS to the management company for the benefit of the relevant

categories of staff of the management company, or directly by the UCITS to the relevant categories of staff of the management company, for professional services rendered, which may otherwise result in a circumvention of the relevant remuneration rules, they should be considered remuneration for the purpose of the guidelines and Article 14b of [Directive 2009/65].

…

15. Consideration should also be given to the position of partnerships and similar structures. Dividends or similar distributions that partners receive as owners of a management company are not covered by these guidelines, unless the material outcome of the payment of such dividends results in a circumvention of the relevant remuneration rules, any intention to circumvent such rules being irrelevant for such purpose.'

Hungarian law

The law on collective investments

21 Directives 2009/65 and 2011/61 were transposed into Hungarian law by a kollektív befektetési formákról és kezelőikről, valamint egyes pénzügyi tárgyú törvények módosításáról szóló 2014. évi XVI. törvény (Law No XVI of 2014 on collective investment funds and their managers and amending certain laws on financial transactions; 'the law on collective investments'). Article 26/A of that law provides:

'UCITS managers shall implement remuneration practices and policies that are consistent with, and promote, effective and sound risk management and that comply with the principles set out in Annex 13.'

22 Article 33 of that law provides:

'AIFMs shall implement remuneration practices and policies that are consistent with, and promote, effective and sound risk management and that comply with the principles set out in Annex 13.'

23 Annex 13 to the law on collective investments, relating to remuneration policies, is worded in the same terms, with minor amendments, as Article 14b of Directive 2009/65 and Annex II to Directive 2011/61.

The recommendations of the National Bank of Hungary

24 A javadalmazási politika alkalmazásáról szóló 3/2017. (II. 9.) MNB ajánlás (Recommendation No 3 of the National Bank of Hungary of 9 February 2017 on the implementation of remuneration policies) states, in point 11:

‘Where the employees of the organisations to which the remuneration policy is applied also have a majority shareholding in that organisation or in one of its subsidiaries, the remuneration policy must be defined taking into consideration that special circumstance. The establishment must guarantee, for every employee, that the remuneration policy complies with the requirements of the relevant provisions of [Law No CCXXXVII of 2013 on credit institutions and financial undertakings] and [Law No CXXXVIII of 2007 on investment undertakings and commodity exchange operators and on the rules governing their activities] and with the content of the present recommendation.’

25 Az alternatív befektetési alapkezelők által alkalmazandó javadalmazási politikáról szóló 4/2018. (I. 16.) MNB ajánlás (Recommendation No 4 of the National Bank of Hungary of 16 January 2018 on the remuneration policy to be implemented by AIFMs) states, in point 8:

‘The expectations set out in the present recommendation do not concern, in principle, the dividends paid to the owner of the AIFM or payments which amount to dividends, unless this results, in practice, in the circumvention of the relevant remuneration rules, irrespective of whether the purpose of a payment was to circumvent the rules.’

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

26 HOLD, the applicant in the main proceedings, is a company authorised by the National Bank of Hungary and the regular business of which is the management of UCITS and AIFs.

27 Since 20 March 2014, HOLD has applied a remuneration policy to certain categories of its staff. The employees to which the policy applies include those holding the office of, respectively, managing director, investment manager and portfolio manager, who hold shares in HOLD’s capital in the form of ordinary shares and preference shares. In addition, two of those employees are single shareholders of two unlisted limited companies which hold shares issued by HOLD. During the 2015 to 2018 financial years, HOLD paid dividends on the preference shares and the ordinary shares to the employees and companies concerned.

28 By decision of 11 April 2019, the National Bank of Hungary, in its capacity as supervisory authority, inter alia, called on HOLD to implement a remuneration policy and practices that complied with the requirements of the law on collective investments. It considered that the dividends paid directly and indirectly to the employees concerned could, by their very nature, lead to those persons having an interest in HOLD generating short-term profits and thereby being induced to take risks that are not compatible with the risk profile of the investment funds managed

by HOLD or with its management rules and the interests of the funds' shareholders, with the result that the rules for the payment of those dividends had to be regarded as a way of circumventing the rules on deferred payment of performance-based remuneration. As a result, the National Bank of Hungary imposed a fine on HOLD.

29 That company brought an action before the Fővárosi Törvényszék (Budapest High Court, Hungary) against that decision, arguing that the dividends did not constitute 'variable remuneration' and did not come within the scope of its remuneration policy. According to HOLD, the variable part of the remuneration is the amount paid to employees for their professional services on the basis of performance criteria, whereas the dividend comes under a shareholder's right to property, irrespective of the activity carried on for the company, of his or her post and of his or her individual performance. Moreover, the employees concerned, as majority shareholders, have an interest in the long-term results of the trade activities of the applicant in the main proceedings, contrary to the claim of the National Bank of Hungary that the payment of dividends could encourage them to seek short-term profits.

30 The Fővárosi Törvényszék (Budapest High Court) dismissed the action on the ground that the dividends paid to the employees concerned can be treated as remuneration, even though, formally, they do not constitute payment in exchange for services rendered. Those dividends, which are considerably higher than fixed and variable remuneration, give rise, according to the Budapest High Court, to an interest on the part of those employees in the short-term profits of the investment fund, which encourages risk-taking that is incompatible with the interests of investors and constitutes a means of payment making it possible to circumvent the applicable remuneration policy rules.

31 According to that court, HOLD should have deferred the payment of at least 40% of the dividends paid on the preference shares at issue, adjusting that payment to the life cycle of the investment funds managed and to the reimbursements of the fund units and spreading it over at least three years. That court considers, in addition, that the remuneration policy also applies to the dividends paid to the companies controlled by the employees concerned, as that payment is also in the financial interest of those employees.

32 The Kúria (Supreme Court, Hungary), before whom an appeal was brought by the applicant in the main proceedings, states that it must determine, inter alia, whether the dividends paid directly and indirectly to the employees concerned are covered by a remuneration policy within the meaning of Annex 13 to the law on collective investments. The 'double' status of the employees concerned, as both shareholders and employees responsible for the financial efficiency of the applicant in the main proceedings and for the implementation of that applicant's remuneration policy, is a decisive factor and raises the question whether it is necessary, in order to assess whether the principles governing remuneration policy have been complied with, to

examine as a whole the amounts paid to those employees in the context of their employment relationship and the amounts paid to them directly or indirectly due to their status as shareholders.

33 In those circumstances, considering it necessary to obtain an interpretation of Articles 14 to 14b of Directive 2009/65, of recital 28 and Article 13(1) of, and points 1 and 2 of Annex II to, Directive 2011/61 and of Article 2(5) of Delegated Regulation 2017/565, the Kúria (Supreme Court) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Are the dividends distributed to [the employees concerned of the applicant in the main proceedings]

(a) directly, by virtue of their right to property as holders of preference shares with preferential rights to dividends issued by the investment fund manager, and

(b) [indirectly through] single-member companies of which they are the owners, by virtue of preference shares with preferential rights to dividends [issued by the applicant in the main proceedings] which those companies hold

covered by the investment fund managers' remuneration policies?'

Procedure before the Court

34 By letter of the Court Registry of 9 September 2021, ESMA was requested, under the second paragraph of Article 24 of the Statute of the Court of Justice of the European Union, to participate in the hearing in order to answer the written questions asked by the Court. ESMA replied by submitting written observations, on which the participants in the hearing had the opportunity to comment.

Consideration of the question referred

35 As a preliminary point, it should be noted that the question asked by the referring court concerns, inter alia, Article 2(5) of Delegated Regulation 2017/565. In that connection, it must be stated that it is apparent from a combined reading of Article 1(1) of that delegated regulation and of Article 6(4) of Directive 2009/65 and Article 6(6) of Directive 2011/61 that that delegated regulation is applicable to UCITS management companies and AIFMs only in so far as those companies and managers are authorised to provide the services referred to in Article 6(3) of Directive 2009/65 and Article 6(4) of Directive 2011/61 respectively.

36 It is not apparent from the case file before the Court that HOLD has been authorised to provide such services. As Delegated Regulation 2017/565 has no relevance for

the subject matter of the dispute in the main proceedings, there is therefore no need to provide an interpretation of its Article 2(5).

37 Thus, the referring court must be understood as asking, in essence, whether Articles 14 to 14b of Directive 2009/65 and Article 13(1) of, and points 1 and 2 of Annex II to, Directive 2011/61 must be interpreted as meaning that the provisions relating to remuneration policies and practices are applicable to the dividends paid by a company, the regular business of which is the management of UCITS and AIFs, directly or indirectly to those of its employees who perform the duties of managing director, investment manager or portfolio manager by virtue of their right to property in respect of the shares of that company.

38 It must be borne in mind that, in accordance with Article 14a(1) to (3) of Directive 2009/65 and Article 13(1) of Directive 2011/61, Member States are to require management companies and AIFMs, respectively, to establish and apply remuneration policies and practices that are consistent with, and promote, sound and effective risk management and do not encourage risk-taking which is inconsistent with the risk profiles, rules or instruments of incorporation of the UCITS or AIFs being managed.

39 Regarding the personal scope of those remuneration practices and policies, Article 14a(3) of Directive 2009/65 and Article 13(1) of Directive 2011/61 provide that they apply to categories of staff, including senior management, risk takers, control functions and any employee receiving total remuneration that falls within the remuneration bracket of senior management and risk takers whose professional activities have a material impact on the risk profiles of the management companies or of the UCITS or AIFs that they manage.

40 The referring court does not express any doubt that the employees, in the context of the dispute in the main proceedings, come within the personal scope of the remuneration policies and practices as defined in Article 14a(3) of Directive 2009/65 and Article 13(1) of Directive 2011/61. However, it is uncertain as to the material scope of those policies and practices and, in particular, as to whether, in order to assess compliance with the provisions relating to those policies and practices, it is appropriate to take into consideration the amounts that the company, the regular business of which is the management of UCITS and AIFs, pays directly or indirectly to those employees, in the form of dividends, by virtue of their right to property in respect of the shares of that company.

41 In that connection, regarding the interpretation of the concept of ‘remuneration’, for the purposes of applying Directives 2009/65 and 2011/61, it should be borne in mind, first, that the terms of a provision of EU law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an autonomous and uniform interpretation throughout the European Union (judgment of 22 June 2021, *Latvijas*

Republikas Saeima (Penalty points), C-439/19, EU:C:2021:504, paragraph 81 and the case-law cited).

42 Secondly, the interpretation of a provision of EU law requires account to be taken not only of its wording, but also of its context, and the objectives and purpose pursued by the act of which it forms part (judgment of 15 March 2022, *Autorité des marchés financiers*, C-302/20, EU:C:2022:190, paragraph 63).

43 Although it provides that Member States are to require UCITS management companies and AIFMs to establish and apply remuneration policies and practices, Directives 2009/65 and 2011/61 do not make any reference to national law regarding the scope of the term 'remuneration'.

44 As regards the wording of Article 14a(1) of Directive 2009/65 and that of Article 13(1) of Directive 2011/61, it must be stated that the concept of 'remuneration' is not defined therein. According to its ordinary meaning, however, that concept covers the payment of money or the provision of a benefit in kind in consideration for work done or services rendered.

45 Article 14a(2) of Directive 2009/65 provides that remuneration policies and practices cover the fixed and variable components of salaries and discretionary pension benefits. It is follows also from point 1 of Annex II to Directive 2011/61 that the total remuneration policies include salaries and discretionary pension benefits.

46 The listing of those two categories in the wording of those provisions does not however exclude the application of those policies and practices to forms of payment other than salaries and discretionary pension benefits.

47 As regards the context of those provisions, it must be noted that it is apparent from Article 14b(3) of Directive 2009/65 and point 2 of Annex II to Directive 2011/61 that the principles relating to remuneration policy apply, respectively, to any payments or benefits of any type paid by the UCITS management company or AIFM and to any amount paid directly by the UCITS or AIF itself, including performance fees, and to any transfer of units or shares of the UCITS and carried interest, and to any transfer of units or shares of the AIF made for the benefit of the categories of staff which come within the personal scope of those policies.

48 The remuneration policies are thus intended to apply to any payment or other advantage paid in consideration for professional services rendered by the employees of UCITS management companies or AIFMs which come within the personal scope of those policies.

49 Admittedly, dividends such as those at issue in the main proceedings are not paid by way of such consideration, but by virtue of a right derived from ownership of the shares in the company, the regular business of which is the management of UCITS and AIFs.

50 However, in accordance with 14b(1)(r) of Directive 2009/65 and point 1(r) of Annex II to Directive 2011/61, variable remuneration must not be paid through vehicles or methods that facilitate the avoidance of the requirements of the directives.

51 It follows that the provisions of Directives 2009/65 and 2011/61 relating to remuneration policies and practices must apply to the payment of dividends on shares which, even though it is not consideration for professional services rendered, is nevertheless of such a nature as to encourage the employees concerned of the UCITS management company or the AIFM to take risks which are inconsistent with the risk profiles, rules or instruments of incorporation of the UCITS or AIFs managed by that company or manager, or which are detrimental to the interests of those UCITS or AIFs or persons that have invested therein, thereby facilitating the circumvention of the requirements flowing from those provisions.

52 As observed by the Advocate General, in essence, in points 34 and 41 of her Opinion, that interpretation is necessary in the light of the objectives of those directives, namely (i) the protection of investors, in particular where their interests may conflict with those of fund managers as regards both risk and the durability of investment decisions and (ii) the stability of the financial system.

53 Moreover, it follows from recitals 1 to 3 of Recommendation 2009/384 that inappropriate remuneration practices in the financial services industry, which tended to reward short-term profit and gave staff in financial institutions an incentive to pursue unduly risky activities which, although they provided higher income in the short term, exposed the institutions in question to higher potential losses in the long term, induced excessive risk-taking and thus contributed to significant losses of major financial undertakings. According to recital 5 of Directive 2014/91 and recital 26 of Directive 2011/61, consideration should be given to Recommendation 2009/384 when implementing the remuneration policies and practices established by Directives 2009/65 and 2011/61.

54 As recalled in paragraph 38 of the present judgment, the remuneration policies and practices governed by Directives 2009/65 and 2011/61 are intended, in that context, to promote sound and effective risk management and not to encourage risk-taking which is inconsistent with the risk profiles, rules or instruments of incorporation of the UCITS or AIFs.

55 In order to implement those objectives, Directives 2009/65 and 2011/61 – more specifically, Article 14b(1)(m) of the first directive and point 1(m) of Annex II to the second directive – provide that remuneration policies must contain mechanisms designed to align incentives with the interests of, respectively, the management company and the UCITS it manages or the AIFM and the AIFs it manages, and the interests of the investors of such UCITS or AIFs.

56 Thus, first, in order not to favour a variable remuneration method that might encourage the seeking of short-term performance, Article 14b(1)(j) of Directive 2009/65 and point 1(j) of Annex II to Directive 2011/61, without defining the ratio of the variable component to the fixed component of the total remuneration, provide that those components are to be 'appropriately balanced', so that 'the fixed component represents a sufficiently high proportion of the total remuneration'.

57 Next, Article 14b(1)(m) of Directive 2009/65 and point 1(m) of Annex II to Directive 2011/61 provide that a portion of at least 50% of any variable remuneration component must consist, in principle, of units of the UCITS or AIF concerned, which must be, moreover, subject to an appropriate retention policy.

58 Last, Article 14b(1)(n) and (o) of Directive 2009/65 and point 1(n) and (o) of Annex II to Directive 2011/61 provide, first, that at least 40% of the variable remuneration component must be deferred over a 'period which is appropriate' of at least three years and, second, that the variable remuneration, including the deferred portion, must be paid or vests only if it is sustainable according to the financial situation of the management company or manager as a whole, and justified according to the performance of the business unit, the UCITS, the AIF and the person concerned.

59 In that regard, as observed by the Advocate General in points 62 and 63 of her Opinion, those provisions are intended to bring the interests of the employees concerned closer to those of the investors and to ensure that the employees concerned are also affected by any losses by UCITS and AIFs that may occur and do not participate merely in the profits. In addition, those provisions are intended to ensure that a short-term increase in value that dissipates within the holding period recommended to UCITS investors or the life cycle and repayment policy of the AIF concerned does not prematurely and thus unfairly confer an advantage on the employees of the UCITS management company or AIFM.

60 In order to ensure that the objectives of Directives 2009/65 and 2011/61 are achieved and their usefulness is preserved, the provisions of those directives governing remuneration must be applicable to any payment or benefit that a UCITS management company or AIFM makes or pays to employees which come within the personal scope of those provisions where that payment or benefit, even if it does not constitute remuneration in consideration for professional services rendered, is nonetheless of such a nature as to encourage those employees to take risks such as

those described in paragraph 51 of the present judgment and thereby facilitate the circumvention of the requirements flowing from those provisions.

61 That interpretation is, moreover, supported by point 17 of the AIFM guidelines and point 15 of the UCITS guidelines, according to which dividends or similar distributions that partners receive as owners of an AIFM or of a UCITS management company are not covered by those guidelines, unless the material outcome of the payment of such dividends results in a circumvention of the relevant remuneration rules, it being irrelevant in that respect whether there was any intention to circumvent those rules.

62 It follows that, when employees of a company, the regular business of which is the management of UCITS and AIFs, who come within the personal scope of the provisions of Directives 2009/65 and 2011/61 concerning remuneration, receive, directly or indirectly, dividends from that company, it must be ascertained whether the policy for payment of those dividends constitutes a policy of such a nature as that referred to in paragraph 60 of the present judgment.

63 As regards dividends paid by a company, the regular business of which is the management of UCITS and AIFs, to its employees who hold shares in that company acquired as an investment and not in consideration for professional services rendered, it must be stressed that the mere fact that the profits of that company are impacted by the profits of the UCITS and AIFs managed by the company is not, as emphasised by the Advocate General in points 48 and 49 of her Opinion, in itself sufficient for it to be considered that those employees would thereby be driven to take decisions that might adversely affect the healthy and balanced management of those investment funds or the interests of the persons who have invested in those funds.

64 By contrast, it must be ascertained whether there is a connection between the profits generated by the UCITS and AIFs, the profits generated by the company, the regular business of which is the management of UCITS and AIFs, and the amounts paid by that company to its employees as dividends of the shares they hold in that company such that those employees have an interest in those UCITS and AIFs generating the highest possible profits in the short term.

65 This would arise, for example, in the case of a mechanism where a performance fee is paid by the UCITS or the AIF to the company, the regular business of which is the management of UCITS and AIFs, where a target return during a given reference period is exceeded and where that fee is redistributed, in whole or in part, by that company as dividends to the employees concerned or to the companies controlled by those employees, irrespective of the results generated by the UCITS or AIF after that period and, in particular, of the losses incurred by the UCITS or AIF. Such a mechanism would indeed provide an incentive for those employees to adopt decisions such as those referred to in paragraph 63 of the present judgment.

66 It is for the referring court to ascertain, in the main proceedings, whether a connection as described in paragraph 64 of the present judgment exists and to verify – in the light of, inter alia, that potential connection, but also of (i) the size of the shareholding of the employees concerned, directly or via companies controlled by them, in the capital of the company, the regular business of which is the management of UCITS and AIFs, (ii) the voting rights attached to those shares, (iii) the type of shares held in that company, (iv) the policy and decision-making process relating to the distribution of the profits of that company, and (v) the potentially minor nature, compared with the professional services rendered, of the amount of the fixed remuneration paid by that company to its employees – whether those employees thus find themselves induced to take excessive risks such as those described in paragraph 51 of the present judgment, which would therefore be such as to facilitate the circumvention of the requirements in Directives 2009/65 and 2011/61 regarding remuneration policies and practices.

67 If, in the light of the criteria set out in the previous paragraph, it should prove to be the case that the dividend payment policy of the company, the regular business of which is the management of UCITS and AIFs, to its employees coming within the personal scope of the provisions of Directives 2009/65 and 2011/61 regarding remuneration does give rise to such an incentive, that payment must be subject to the principles governing remuneration practices and policies, in particular those recalled in paragraphs 56 to 58 of the present judgment, given that, according to recital 7 of Directive 2014/91, those principles can be applied to payments made by the UCITS to the company which manages them.

68 Relying on recital 10 of Directive 2014/91 and recital 28 of Directive 2011/61, HOLD argues, in essence, that that interpretation is contrary to the shareholders' right to property, enshrined in Article 17(1) of the Charter of Fundamental Rights of the European Union ('the Charter').

69 It must be borne in mind that, under Article 51(1) of the Charter, its provisions are addressed to the institutions, bodies, offices and agencies of the European Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing EU law. Therefore, first, the interpretation of Directives 2009/65 and 2011/61 must comply with the Charter. Second, and given that the review by the national authorities of the compliance of a company, the regular business of which is the management of UCITS and AIFs, with the principles set out in national legislation transposing those directives, which govern remuneration policies and practices, constitutes an implementation of EU law for the purposes of Article 51 of the Charter, the Charter is applicable in the main proceedings.

70 In that connection, it should be noted that, under Article 17(1) of the Charter, everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law,

subject to fair compensation being paid in good time for their loss. The use of property may be regulated by law in so far as is necessary for the general interest.

71 Moreover, in accordance with Article 52(1) of the Charter, any limitation on the exercise of the rights and freedoms recognised by the Charter must be provided for by law and respect the essence of those rights and freedoms, and, subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.

72 In the first place, regarding whether Article 17(1) of the Charter is applicable to the ownership of shares and the right to receive dividends of those shares, it must be stated that the protection afforded by that provision concerns rights with an asset value creating an established legal position under the legal system concerned, enabling the holder to exercise those rights autonomously and for his or her own benefit (judgment of 5 May 2022, *BPC Lux 2 and Others*, C-83/20, EU:C:2022:346, paragraph 39 and the case-law cited).

73 The shares in a company, the regular business of which is the management of UCITS and AIFs, such as those at issue in the main proceedings, have an asset value which confers an established legal position on their holder and enables that holder to exercise the rights which flow from it. They therefore come within the scope of Article 17(1) of the Charter.

74 In the second place, it must be observed that the interpretation of Directives 2009/65 and 2011/61 resulting from paragraphs 41 to 67 of the present judgment does not call into question the right to property of the employees concerned in respect of the shares of the company, the regular business of which is the management of UCITS and AIFs and for which they work, and therefore does not constitute a deprivation of property for the purposes of the second sentence of Article 17(1) of the Charter.

75 The fact remains that the application, which correlates with that interpretation, of the principles set out in paragraph 67 of the present judgment to share dividends constitutes a regulation of the use of property within the meaning of the third sentence of Article 17(1) of the Charter capable of impairing the exercise of that right to property and, more specifically, the possibility for the shareholder employees concerned of deriving a benefit from that property, having regard, inter alia, to the rules relating to retention and payment deferral mentioned in paragraphs 57 and 58 of this judgment.

76 In that regard, it is clear from a combined reading of the third sentence of Article 17(1) and Article 52(1) of the Charter that the use of property may be regulated by law in so far as is necessary in the general interest and in compliance

with the conditions set out in the second of those provisions and recalled in paragraph 71 of the present judgment.

77 In the present case, the limitations on the rights of the shareholders which would result from the application of the principles governing remuneration policies and practices to the payment of dividends by a company, the regular business of which is the management of UCITS and AIFs, to some of its employees flow from Directives 2009/65 and 2011/61 and from national legislation transposing those directives. They are therefore provided for by law within the meaning of Article 52(1) of the Charter.

78 Since the application of the rules relating to retention and payment deferral referred to in paragraphs 57 and 58 of the present judgment does not lead to a deprivation of property, but constitutes a regulation of the use of property, as observed in paragraphs 74 and 75 of the present judgment, it cannot be regarded as impairing the very substance of the right to property (see, to that effect, judgment of 5 May 2022, *BPC Lux 2 and Others*, C-83/20, EU:C:2022:346, paragraph 53).

79 As regards the objectives pursued by the provisions of Directives 2009/65 and 2011/61 concerning remuneration policies and practices, in particular the rules on retention and deferral, the Court observes in paragraph 52 of the present judgment that those objectives are to protect investors and to ensure the stability of the financial system. Excessive risk-taking, which those provisions seek to discourage, may not only be detrimental to the interests of the UCITS or AIF but may also give rise to systemic problems in the financial industry.

80 In that regard, it must be borne in mind that the Court has ruled that the protection of investors is an objective of general interest pursued by the European Union (see, to that effect, judgment of 5 May 2022, *Banco Santander (Resolution of Banco Popular)*, C-410/20, EU:C:2022:351, paragraph 36 and the case-law cited). The same is true of the objectives of ensuring the stability of the banking and financial system and preventing a systemic risk (judgment of 16 July 2020, *Adusbef and Others*, C-686/18, EU:C:2020:567, paragraph 92 and the case-law cited).

81 In the present case, the limitations on the rights of the shareholders which would result from the application of the principles governing remuneration policies and practices to the payment of dividends by a company, the regular business of which is the management of UCITS and AIFs, to some of its employees do indeed meet objectives of general interest recognised by the European Union for the purposes of the third sentence of Article 17(1) and Article 52(1) of the Charter.

82 Last, inasmuch as such an application is limited to situations in which a policy of payment of share dividends to employees who come within the personal scope of the provisions of Directives 2009/65 and 2011/61 relating to remuneration policies

and practices is of such a nature as to induce those employees to take excessive risks detrimental to the interests of the UCITS and AIFs concerned and to those of their investors and is therefore capable of facilitating the circumvention of the requirements flowing from those provisions, those limitations appear to be proportionate to the objectives pursued by those provisions.

83 Having regard to the foregoing, the answer to the question referred is that Articles 14 to 14b of Directive 2009/65 and Article 13(1) of, and points 1 and 2 of Annex II to, Directive 2011/61 must be interpreted as meaning that the provisions relating to remuneration policies and practices are applicable to the dividends paid by a company, the regular business of which is the management of UCITS and AIFs, directly or indirectly to those of its employees who perform the duties of managing director, investment manager or portfolio manager by virtue of their right to property in respect of the shares of that company, where the payment policy of those dividends is such as to induce those employees to take excessive risks which are detrimental to the interests of the UCITS or AIFs managed by that company and to the interests of their investors, and is thus capable of facilitating the circumvention of the requirements flowing from those provisions.

Costs

84 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 (First Chamber) hereby rules:

Articles 14 to 14b of Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS), as amended by Directive 2014/91/EU of the European Parliament and of the Council of 23 July 2014, Article 13(1) of, and points 1 and 2 of Annex II to, Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers and amending Directives 2003/41/EC and 2009/65/EC and Regulations (EC) No 1060/2009 and (EU) No 1095/2010,

must be interpreted as meaning that:

the provisions relating to remuneration policies and practices are applicable to the dividends paid by a company, the regular business of which is the management of undertakings for collective investment in transferable

securities (UCITS) and Alternative Investment Funds (AIFs), directly or indirectly to those of its employees who perform the duties of managing director, investment manager or portfolio manager by virtue of their right to property in respect of the shares of that company, where the payment policy of those dividends is such as to induce those employees to take excessive risks which are detrimental to the interests of the UCITS or AIFs managed by that company and to the interests of their investors and is thus capable of facilitating the circumvention of the requirements flowing from those provisions.