JUDGMENT OF THE COURT (Third Chamber)

17 September 2015 (*)

(Reference for a preliminary ruling — Direct taxation — Articles 63 TFEU and 65 TFEU — Free movement of capital — Taxation of dividends from portfolios of shares — Withholding tax — Restriction — Final tax burden — Factors for comparing the tax burdens of resident and non-resident taxpayers — Comparability — Taking into account income tax or corporation tax — Conventions for the avoidance of double taxation — Neutralisation of the restriction by means of a convention)

In Joined Cases C-10/14, C-14/14 and C-17/14,

REQUESTS for a preliminary ruling under Article 267 TFEU from the Supreme Court (Hoge Raad der Nederlanden, Netherlands), made by decisions of 20 December 2013, received at the Court on 13 January 2014, 15 January 2014 and 16 January 2014, in the proceedings

J. B. G. T. Miljoen (C-10/14),

X (C-14/14),

Société Générale SA (C-17/14)

v

Staatssecretaris van Financiën,

THE COURT (Third Chamber),

composed of A. Ó Caoimh (Rapporteur), acting as President of the Third Chamber, K. Lenaerts, Vice-President of the Court, acting as a Judge of the Third Chamber, C. Toader, E. Jarašiūnas and C.G. Fernlund, Judges,

Advocate General: N. Jääskinen,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 18 March 2015,

after considering the observations submitted on behalf of:

– Mr Miljoen, by E. Nijkeuter,

– X, by N. de Haan, G. Meussen and S. Baum-Sillé, advocaten,

– Société Générale SA, by M. Sanders and A. Breuer, advocaten,

– the Netherlands Government, by M. Bulterman, M. Gijzen and M. de Ree, acting as Agents, and by I. Siemonsma and H. Guiljam,

– the German Government, by T. Henze and K. Petersen, acting as Agents,

– the Swedish Government, by A. Falk C. Meyer-Seitz, U. Persson, N. Otte Widgren, K. Sparrman, L. Swedenborg, E. Karlsson and F. Sjövall, acting as Agents,

– the United Kingdom Government, by J. Beeko, acting as Agent, and by S. Ford, Barrister-at-Law,

– the European Commission, by W. Roels and A. Cordewener, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 25 June 2015,

gives the following

Judgment

1 These requests for a preliminary ruling concern the interpretation of Article 63 TFEU.

2 The references have been made in proceedings between Mr Miljoen, X and Société Générale SA (‘Société Générale’) and the Staatssecretaris van Financiën (State Secretary for Finance), concerning withholding tax levied by that authority on Netherland-sourced dividends distributed to the appellants in the main proceedings.

Legal context

Netherlands law

The Law on the taxation of dividends

3 Article 1 of the Law on the taxation of dividends (Wet op de dividendbelasting), in the version applicable to the facts in the main proceedings, is worded as follows:

‘1. Under the name of “tax on dividends”, a direct tax shall be charged on persons who — directly or by means of certificates — receive income from shares in, dividend-right certificates of and loans, as referred to in Article 10(1)(d) of the Corporation Tax Law of 1969 [Wet op de Vennootschapsbelasting 1969 (‘the Corporation Tax Law’], from public limited liability companies, private limited liability companies, limited partnerships and other companies established in the Netherlands whose capital is wholly or partially divided into shares.’

2. For the purposes of applying the present law, the certificates of ownership of unit trusts referred to in Article 2(3) of the [the Corporation Tax Law] shall be treated as shares in companies whose capital is wholly or partially divided into shares, and the trusts shall be treated as companies.

...’

4 Under Article 5 of the Law on the taxation of dividends, that tax is charged at 15% of the yield.

5 Article 10(1) of that law provides:

‘A legal person established in the Netherlands and not subject to corporation tax may ask the tax inspector to take a decision, against which a complaint may be lodged, to reimburse the dividend tax withheld during a calendar year ...’

The IT Law 2001

6 The Income Tax Law of 2001 (Wet Inkomstenbelasting 2001), in the version applicable to the main proceedings ('IT Law 2001'), defines the rules governing personal income tax.

7 Article 2.13 of that law sets at 30% the rate of taxation on income from savings and investments, income which falls within the category of taxable income classified in 'box 3' or 'heading 3'.

8 Article 5.1 of that law states that the taxable income from savings and investments is made up of 'the benefit derived from savings and investments, minus the personal deduction'.

9 Under Article 5.2 of the IT Law 2001, the yield from savings and investments is set at a flat rate of 4% on the average of the yield basis at the start of the calendar year and the yield basis at the end of the calendar year in so far as that average is greater than the tax-free allowance for capital assets.

10 Article 5.3(1) of the IT Law 2001 provides that the yield basis is 'the value of the assets less the value of the liabilities'. In Article 5.3(2) of the IT Law 2001, assets are defined as:

'a. immovable property;

b. rights relating directly or indirectly to immovable property;

c. movable property not used or consumed for personal purposes by the taxpayer or persons forming part of his household, and movable property used or consumed for personal purposes, but which nevertheless serves primarily as an investment;

d. rights in movable property;

e. rights in intangible property, such as money;

f. other property rights which have a market value.'

11 It is stipulated in Article 5.3(3) of the IT Law 2001 that 'liabilities are obligations which have a market value'.

12 Article 5.5 of the IT Law 2001, entitled 'Tax-free capital allowance', provides in paragraph 1 that the tax-free allowance for capital assets is EUR 20 014. Paragraphs 2 to 4 of that article adjust that rule in the specific case of a taxpayer who has a partner.

13 Article 5.19(1) of the IT Law 2001, relating to the valuation of assets and liabilities, states that these are to be taken into consideration at their market value.

14 Article 7.1 of the IT Law 2001 provides:

'For a foreign taxpayer, income tax shall be levied on:

...

b. taxable income from a material interest in a company established in the Netherlands, and

...

which he received during a calendar year.'

15 Article 9.2 of the IT Law 2001, relating to prepayments which can be charged, provides in paragraph 1 that, for resident taxpayers, the tax on dividends is a prepayment. Paragraph 8 of that article provides that, for foreign taxpayers, 'the tax on dividends levied on items which make up the

overall income shall be treated as a prepayment’.

The Corporation Tax Law

16 Under Article 17(3)(a) of the Corporation Tax Law, in the version applicable to the main proceedings, Netherlands income is the sum total of the taxable profits from a Netherlands undertaking, that is to say all the benefits derived from an undertaking or part of an undertaking operated in a permanent establishment in the Netherlands or through a permanent representative established in the Netherlands (Netherlands undertaking).

17 Article 25 of that law is worded as follows:

‘1. Withholding taxes shall mean the tax levied on dividends, with the exception of the tax levied in accordance with Article 12(1) of the [Law on the taxation of dividends] and the tax levied on the winnings from games of chance, in so far as those taxes are levied on the returns or winnings which are not part of taxable profits or Netherlands income for the year.

2. Notwithstanding the provisions of paragraph 1, the tax on dividends shall not be taken into account as a withholding tax where the taxpayer from whom the tax on dividends is withheld is not also the actual beneficiary of the yield from which the tax on dividends is withheld. A person who, in the context of the yield of which he is the beneficiary, provided consideration as part of a series of transactions shall not be considered to be the actual beneficiary, in which case it may be assumed that:

a. the income benefited, totally or partially, directly or indirectly, a natural or legal person who is less entitled to a reduction, reimbursement or offsetting of the tax on dividends than the person who provided the consideration; and that

b. that natural or legal person retains or obtains, directly or indirectly, a position in shares, dividend rights certificates or loans referred to in Article 10(1)(d) of the [Corporation Tax Law] comparable to the position which he held in those shares, participation certificates or loans before the beginning of the series of transactions.

3. For the purposes of paragraph 2:

a. there can also be a series of transactions where the transactions are carried out on a regulated market for the purposes of Article 1(1) of the Law on financial supervision or on a regulated stock exchange located or active in a non-Member State of the European Union;

b. a transaction concerning the mere purchase of one or more dividend coupons or the creation of short-term dividend rights in shares shall be treated as a series of transactions.

4. The tax on dividends, which by virtue of Article 9.2(4) of the [IT Law 2001] is not taken into account as a prepayment, is to be considered to be a prepayment by a credit institution covered by Article 19g(3) of the Wages Tax Law of 1964, if that institution transfers an amount equivalent to that tax on dividends to a blocked account of a person for whom that tax on dividends is not taken into account as a prepayment. The tax on dividends, which by virtue of Article 9.2(4) of the [IT Law 2001] is not taken into account as a prepayment, is considered to be a prepayment by the manager of an investment undertaking covered by Article 19g(3) of the Wages Tax Law of 1964, if that manager allocates an amount equivalent to the tax on dividends to the acquisition of one or more blocked participation rights in that undertaking for the benefit of the person for whom that tax on dividends is not taken into account as a prepayment.’

The General Law on State Taxation

18 Article 15 of the General Law on State taxation (Algemene wet inzake rijksbelastingen), in the version applicable to the main proceedings, provides that the prepayment (the tax withheld) may be set against the tax on overall income. Where the tax on overall income is not sufficient to offset the tax on dividends which has been withheld at source, the tax on dividends is to be reimbursed.

The Belgium-Netherlands Convention

19 The Convention between the Kingdom of Belgium and the Kingdom of the Netherlands for the avoidance of double taxation and the prevention of tax evasion in respect of taxes on income and capital, signed in Luxembourg on 5 June 2001 ('the Belgium-Netherlands Convention'), provides in Article 10:

'1. Dividends paid by a company resident in one contracting State to a person resident in the other contracting State may be taxed in that other State.

2. However, such dividends may also be taxed in the contracting State of which the company paying the dividends is a resident and according to the laws of that State, but if the actual beneficiary of the dividends is a resident of the other contracting State the tax so charged shall not exceed:

...

(b) 15% of the gross amount of the dividends …'

20 Article 23 of that convention, entitled 'Methods for eliminating double taxation', provides in paragraph 1(b):

'Subject to the provisions of Belgian legislation concerning the offsetting against Belgian tax of taxes paid in another country, where a resident of Belgium receives items of income which are included in his overall income subject to tax in Belgium and which consist in dividends not exempt from tax in Belgium under (c) below, interest, or charges covered by Article 12(5), the Netherlands tax levied on that income shall be offset against the Belgian tax relating to that income.'

The Franco-Netherlands Convention

21 The Convention between the Government of the French Republic and the Government of the Kingdom of the Netherlands for the avoidance of double taxation and the prevention of tax evasion in respect of taxes on income and capital, signed in Paris on 16 March 1973 ('the Franco-Netherlands Convention), provides in Article 10:

'1. Dividends paid by a company resident in one contracting State to a resident of the other contracting State may be taxed in that other State.

2. Nevertheless, those dividends may be taxed in the State in which the company paying the dividends has its seat and under the laws of that State, but the tax so payable may not exceed:

...

b) 15% of the gross amount of the dividends ...'

22 Article 24 of that convention is entitled 'Provisions for eliminating double taxation'. Article 24B(b) provides:

‘With regard to the income referred to [in Article] 10 … on which the Netherlands tax was charged in accordance with the provisions of [that article], France grants persons resident in France who receive such income a tax credit of an amount equal to the Netherlands tax.

That tax credit, which may not exceed the amount of tax levied in France on the income in question, shall be offset against the taxes referred to in Article 2(3)(b), within the bases in which that income is included.’

The actions in the main proceedings and the questions referred for a preliminary ruling

Case C-10/14

23 Mr Miljoen, a Netherlands national residing in Belgium, owned shares in three Netherlands listed companies.

24 In 2007 dividends in the sum of EUR 4 852 were paid to Mr Miljoen in respect of those shares. That amount was subject to the tax on dividends in the Netherlands at the rate of 15%, in the sum of EUR 729.

25 In his tax return relating to income tax for 2007 in the Netherlands, Mr Miljoen declared overall income of EUR 0 and made no mention of the amount of the tax on dividends to be offset against income tax.

26 As a result of that tax return, the Netherlands tax authorities issued an income tax demand. Mr Miljoen lodged a complaint with those authorities against that demand and requested reimbursement of the tax on dividends in the sum of EUR 438 on the ground that, as a non-resident taxpayer, he had suffered discriminatory treatment prohibited by Article 63 TFEU. Following that complaint, the tax authorities adopted a decision upholding that tax demand.

27 Mr Miljoen brought an action against that decision before the District Court, Breda (Rechtbank te Breda) which related, inter alia, to the question whether the different tax treatment between residents and non-residents which he alleges constitutes a restriction on the free movement of capital for the purposes of Article 63 TFEU. That court held that, in the case before it, there was no restriction, and Mr Miljoen then lodged an appeal on a point of law before the Supreme Court.

Case C-14/14

28 X, a Netherlands national residing in Belgium, owned two of the 95 shares in the capital of A Holding BV, a company established in the Netherlands, corresponding to 2.1% of that capital. In 2007 dividends totalling EUR 107 372 were paid in respect of her shareholding. From that amount, the sum of EUR 16 105.80 was withheld in respect of tax on dividends.

29 As a Belgian resident, X was charged personal income tax in Belgium at a rate of 25%, amounting to EUR 22 816.22, on the net amount of the dividends. However, as regards that tax, she was able to obtain a partial deduction of the tax on dividends paid in the Netherlands. It is indicated in the court file that the sum of EUR 4 026 was repaid to her in that respect.

30 X lodged a complaint with the Netherlands tax authorities against the withholding of the tax on dividends on the ground that she had suffered discriminatory treatment as a non-resident taxpayer. The tax authorities dismissed that complaint by decision of 29 March 2010.

31 X brought actions before the District Court, Breda against that decision. That court held that those

actions were in part well-founded. X and the State Secretary for Finance lodged appeals against that court's decision before the Court of Appeal, Hertogenbosch (Gerechtshof te's Hertogenbosch), which, in its judgment, partly upheld the lower court's decision. X and the State Secretary for Finance then lodged appeals on points of law before the referring court.

Case C-17/14

32 Société Générale is a company established in France. Through its investment funds, also established in France, it owned, between the years 2000 and 2008, blocks of shares representing less than 5% of the capital of Netherlands listed companies. Dividends were paid to Société Générale during those years, after the Netherlands tax authorities withheld 15% for tax on dividends.

33 For the years 2000 to 2007, Société Générale was allowed to offset the full amount of the tax on dividends withheld in the Netherlands against the corporation tax paid in France.

34 When Société Générale suffered losses in 2008, the tax on dividends withheld in the Netherlands that year was not offset against the corporation tax paid in France. Société Générale submits that it must be reimbursed for the full amount of the tax on dividends withheld in the Netherlands, given that companies resident in that Member State have the right to deduct that tax from corporation tax, an option which is not open to non-resident shareholders. Société Générale claims that it therefore suffered discriminatory treatment as a non-resident taxpayer.

35 As regards the claim to be allowed to offset or to be reimbursed for the tax on dividends withheld in 2007 and 2008, the District Court, Haarlem (Rechtbank te Haarlem) dismissed the action brought by Société Générale on the ground that, in relation to the financial year 2007, the French tax authorities had offset the full amount of the Netherlands tax on dividends against the full amount of the corporation tax and that, in relation to the financial year 2008, Société Générale had failed to demonstrate that the Netherlands tax levied on the dividends was higher than it would have been in a domestic situation. The Court of Appeal, Amsterdam (Gerechtshof te Amsterdam) also considered that the comparison between the tax situation of a resident taxpayer and that of a non-resident taxpayer had to be limited to the tax on dividends and that it had not been demonstrated that Société Générale's liability for the tax on dividends differed from that of a resident taxpayer. Société Générale brought an appeal on a point of law against the judgment of the Court of Appeal, Amsterdam.

The questions referred for a preliminary ruling

36 In the three cases in the main proceedings, the referring court asks whether national legislation imposes a difference in tax treatment between natural persons or companies who are non-resident shareholders and receive dividends subject to a withholding tax and natural persons or companies who are resident shareholders and whose dividends are also subject to that withholding tax, but who may offset the tax withheld against their income tax or against corporation tax, and whether that legislation constitutes a restriction on the free movement of capital.

37 In particular, the referring court explains that the tax on dividends is applied to resident shareholders and to non-resident shareholders at the same flat rate. For non-resident shareholders, it is a final tax, while in the case of resident shareholders the tax on dividends is offset against income tax or corporation tax. The referring court states that, for the purpose of determining whether the situations of residents and non-residents are comparable, the question whether that set-off must be taken into account is of vital importance.

38 The referring court also seeks guidance on how to evaluate the taxable base of income tax in the event that that set-off should be taken into account.

39 Should the Court decide that it is appropriate to compare the situations of resident shareholders and non-resident shareholders with regard to income tax, the referring court seeks guidance, in the first place, on the relevant reference period for making that comparison. A Netherlands resident is taxed on a flat-rate basis in respect of the tax on dividends, including the years in which he does not receive dividends. Thus, the referring court seeks to establish whether it is appropriate to assess the Netherlands tax burden by taking into account taxes levied on all the dividends from Netherlands shares paid to a non-resident during a reference period of one or more years, or by taking into account separately, for each Netherlands undertaking paying dividends, the taxes levied on dividends paid during that reference period. In the second place, in Case C-14/14, the referring court asks whether it is appropriate to take into account, for the purposes of that comparison, the capital tax exemption benefitting resident taxpayers provided for in Article 5.5 of the IT Law 2001. In the third place, in Case C-17/14, the referring court asks whether it is appropriate to take into account, for the same purposes, all expenses which are economically linked to the shares from which the dividends arise or, otherwise, any deduction of the dividend included in the purchase price of the shares and any financing charges resulting from ownership of the shares concerned.

40 Furthermore, in Cases C-14/14 and C-17/14, the referring court asks whether the discriminatory nature of a withholding tax may effectively be neutralised by a convention for the avoidance of double taxation, such as those at issue in the main proceedings, which either provides for a reduction of the tax in the Member State of residence by offsetting the tax withheld at source against that tax, or provides that the tax payable by a non-resident taxpayer is not higher than the tax which a resident taxpayer must pay.

41 In those circumstances, the Supreme Court decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

– in Case C-10/14:

‘(1) Does the application of Article 63 TFEU require the comparison of a non-resident with a resident, in a case such as the present in which tax on dividends was withheld on a dividend payment by the source State, to be extended to the income tax payable on the dividend income, against which, in the case of residents, the tax on dividends is set off?

(2) If the answer to Question 1 is in the affirmative, in the assessment as to whether the effective tax burden for a non-resident is heavier than the tax burden for a resident, should a comparison be made between the Netherlands tax on dividends, withheld in respect of the non-resident, and the Netherlands income tax payable by a resident, calculated in respect of the notional income which, in the year in which the dividends were received, is attributable to the total holding of investment shares in Netherlands companies, or does EU law require that a different standard of comparison be taken into account?’

– in Case C-14/14:

‘(1) Does the application of Article 63 TFEU require the comparison of a non-resident with a resident, in a case such as the present in which tax on dividends was withheld on a dividend payment by the source State, to be extended to the income tax payable on the dividend income, against which, in the case of residents, the dividend tax is set off?

(2) If the answer to Question 1 is in the affirmative, in the assessment as to whether the effective

tax burden for a non-resident is heavier than the tax burden for a resident, should a comparison be made between the Netherlands tax on dividends, withheld in respect of the non-resident, and the Netherlands income tax payable by a resident, calculated in respect of the flat-rate income which, in the year in which the dividends were received, is attributable to the total holding of investment shares in Netherlands companies, or does EU law require that a different standard of comparison be taken into account? Must the tax free capital allowance which applies to residents be taken into account when making that comparison, and if so, to what extent (judgment in *Welte*, C-181/12, EU:C:2013:662)?

(3) If Question 1 is to be answered in the affirmative, is it sufficient, in the assessment as to whether a potentially discriminatory withholding tax levied at source is effectively neutralised on the basis of a convention for the avoidance of double taxation concluded by the source State, that (i) the double taxation convention concerned makes provision for a tax reduction in the State of residence by offsetting the withholding tax levied at source and that, although that option is not unconditional, (ii) in the case in question the tax reduction granted by the State of residence, by levying tax only on the net dividend received, offsets in full the discriminatory portion of the withholding tax levied at source?'

– in Case C-17/14:

'(1) Does the application of Article 63 TFEU require the comparison of a non-resident with a resident, in a case in which tax on dividends is withheld on a dividend payment by the source State, to be extended to the corporation tax against which the dividend tax is set off in the case of residents?

(2) (a) If the answer to Question 1 is in the affirmative, should account be taken, in making that comparison, of all the expenses which are economically linked to the shares from which the dividends arise?

(2) (b) If the answer to the previous question is in the negative, should account then be taken of any deduction of the dividend included in the purchase price of the shares and any financing charges resulting from ownership of the shares concerned?

(3) If the answer to Question 1 is in the affirmative, is it sufficient, in the assessment as to whether a potentially discriminatory withholding tax levied at source is effectively neutralised on the basis of a convention for the avoidance of double taxation concluded by the source State, that (i) the double taxation convention concerned contains a provision in that regard, and that, although that option is not unconditional, (ii) in the case in question it has the result that the Netherlands tax burden for a non-resident is not heavier than that for a resident? In the case of insufficient offsetting in the year in which the dividends are distributed, is it relevant for the purposes of the assessment of that neutralising effect that there is a possibility that a deficit may be carried forward and that the set-off may be utilised effectively in subsequent years?'

42 By decisions of the President of the Court of 2 April 2014, Cases C-10/14, C-14/14 and C-17/14 were joined for the purposes of the written and oral procedure and the judgment.

Consideration of the questions referred

43 By its questions, which it is appropriate to consider together, the referring court asks in essence whether Articles 63 TFEU and 65 TFEU must be interpreted as precluding legislation of a Member

State, such as that at issue in the main proceedings, which imposes a withholding tax on dividends paid by a resident company, both to resident taxpayers and non-resident taxpayers, by making provision for a mechanism for deducting or reimbursing the tax withheld solely for resident taxpayers, while for non-resident taxpayers, both natural persons and companies, the tax withheld is a final tax.

The existence of a restriction on the free movement of capital for the purposes of Article 63(1) TFEU

44 According to settled case-law of the Court, the measures prohibited by Article 63(1) TFEU as restrictions on the movement of capital include those that are such as to discourage non-residents from making investments in a Member State or to discourage that Member State's residents from doing so in other States (judgment in *Santander Asset Management SGIIC and Others*, C-338/11 to C-347/11, EU:C:2012:286, paragraph 15 and the case-law cited).

45 As regards the question whether the legislation of a Member State such as that at issue in the main proceedings constitutes a restriction on the movement of capital, it should be noted that, under that legislation, dividends paid to a non-resident taxpayer and those paid to a resident taxpayer are subject to a withholding tax of 15%. However, with regard to a non-resident taxpayer receiving dividends, the withheld tax is final, whereas for a resident taxpayer receiving dividends, whether a natural person or a company, the withheld tax is a prepayment of, respectively, the natural person's income tax or the company's corporation tax.

46 With regard, first, to dividends paid to a natural person resident in the Netherlands, it is apparent from the documents before the Court that the withholding tax is a prepayment of income tax under 'heading 3', the rate of which is set at 30% and the taxable base of which corresponds to the return fixed on a flat-rate basis at 4% of the average value of the shares less the value of any liabilities calculated at the beginning and at the end of the calendar year in question. It is also apparent from those documents that a resident may be refunded the tax withheld either by deducting that prepayment from his income tax or by being reimbursed for the tax withheld at source where the amount of the income tax for which he is liable is lower than the withholding tax.

47 Secondly, with regard to dividends paid to a company established in the Netherlands, it is clear from those documents that such a company is taxed on dividends, after expenses have been deducted, at a rate of 25.5% for the highest tax band. In such a case, that company may, in accordance with Article 25 of the Corporation Tax Law, offset the tax on dividends, withheld as a prepayment, against corporation tax for which it is liable in the Netherlands. Where the amount of the corporation tax is not sufficient to offset the amount of the tax on dividends, that company may obtain a refund of that tax. Conversely, where the company holding the shares is non-resident, the tax on dividends, withheld as an advance payment, is final.

48 For the purposes of assessing whether the legislation of a Member State, such as that at issue in the main proceedings, is compatible with Article 63 TFEU, it is for the referring court, which is the only court capable of assessing the facts before it, to verify whether, in relation to the dividends at issue, the application to the appellants in the main proceedings of the withholding tax of 15% provided for by national legislation results in those appellants ultimately bearing a heavier tax burden in the Netherlands than that borne by residents for the same dividends.

49 In that regard, the referring court seeks guidance on the factors which it must take into account for the purposes of comparing the respective tax burdens of residents and non-residents in the Member State in which the dividends are paid, and to that end it distinguishes between the burdens of taxpaying natural persons (Cases C-10/14 and C-14/14) and those of companies (Case C-17/14).

The factors to be taken into consideration for the purposes of comparing the tax burden of taxpaying natural persons who are residents and that of taxpaying natural persons who are non-residents

50 In Cases C-10/14 and C-14/14, for the purposes of comparing the final tax burdens of resident and non-resident taxpayers, the referring court seeks guidance, first, on the length, of one year or more, of the reference period. Next, the referring court asks whether it is appropriate to take into account dividends received during that period, either as a whole, by including all the shares which the taxpayer owns in Netherlands companies, or separately, distinguished by which Netherlands company distributed them. Finally, in Case C-14/14, the referring court wishes to know whether the capital exempted from income tax must be taken into account.

51 First, as regards the length of the reference period for the purposes of comparing the final tax burdens of resident taxpayers and non-resident taxpayers who are natural persons, it must be noted that, as regards residents, the period taken into account for taxation is that of a calendar year, in accordance with Article 5.2 of the IT Law 2001. Therefore, that period must be used for the purposes of the comparison.

52 Secondly, as regards taking into account, as a whole or separately, the dividends received during that period for the purpose of comparing the final tax burdens of resident and non-resident taxpayers, it is apparent from the documents before the Court that resident natural persons are taxed on the basis of the notional yield from all shares held in Netherlands companies. Therefore, it is necessary to take into account those shares as a whole in order to compare those burdens.

53 Thirdly, with regard to the issue whether, for those purposes, the capital exempted from income tax must be taken into account, the national legislation applicable in Case C-14/14 provides that the yield, which is set in accordance with Article 5.2 of the IT Law 2001 on a notional basis, is withheld only if it is higher than the capital exempted from that tax, which is EUR 20 014. In that regard, it must be stated that an exemption, such as the one at issue in the main proceedings, which is an advantage granted to all resident taxpayers, irrespective of their personal situation, does not constitute an individual advantage connected with the personal situation of the taxpayer. As the Advocate General stated in point 83 of his Opinion, since such an exemption alters the tax base of the income received by resident taxpayers, it is necessary to take that into account for the purposes of comparing the final tax burdens of resident taxpayers and those of non-resident taxpayers.

54 It follows from the foregoing that, in circumstances such as those at issue in the main proceedings, the tax burden of taxpaying natural persons who are residents and that of non-residents relating to the taxation of income from shares held in Netherlands companies must be assessed over a calendar year by taking into consideration the dividends as a whole, whilst taking account of the exemption of capital provided for under national legislation.

The factors to be taken into account for the purposes of comparing the tax burden of resident companies and that of non-resident companies

55 In Case C-17/14, for the purposes of comparing the tax burden of resident companies and that of non-resident companies, the referring court seeks guidance on whether account should be taken of all expenses which are economically linked to the shares from which the dividends arise or, otherwise, whether the taxable income should have deducted from it either the dividend included in the purchase price of the shares or the possible financing charges resulting from ownership of the shares concerned.

56 Société Générale claims that, in the case of hedging, it is not only the direct expenses attributable

to the dividends which must be taken into account, but also the negative effects of rates and transactions on shareholdings and positions other than those from which the dividends arise, but with which there is nonetheless a connection.

57 In that regard, it is settled case-law of the Court, in relation to expenses such as business expenses which are directly linked to an activity that has generated taxable income in a Member State, that residents and non-residents of that State are in a comparable situation, with the result that legislation of that State which denies non-residents, in matters of taxation, the right to deduct such expenses, while, on the other hand, allowing residents to do so, risks operating mainly to the detriment of nationals of other Member States and therefore constitutes indirect discrimination on grounds of nationality (judgment in *Schröder*, C-450/09, EU:C:2011:198, paragraph 40 and the case-law cited).

58 In particular, as regards income received in the form of dividends, such a link exists only if those expenses, which may in some circumstances be directly linked to a sum paid in connection with a securities transaction, are directly linked to the actual payment of that income (see, to that effect, judgment in *Commission* v *Germany*, C-600/10, EU:C:2012:737, paragraph 20).

59 It follows that only expenses which are directly linked to the actual payment of the dividends must be taken into account for the purposes of comparing the tax burden of companies.

60 The expenses identified by the referring court in its reference for a preliminary ruling in Case C-17/14 do not have such a link. As regards, first, the deduction of the dividend included in the purchase price of the shares, it is apparent from the documents before the Court that the purpose of that deduction is to establish the actual purchase price of the shares. That deduction does not, therefore, concern expenses which are directly linked to the actual payment of the dividends arising from those shares. Secondly, the financing costs also mentioned by the referring court concern ownership of the shares *per se*, and therefore they are also not directly linked to the actual payment of the dividends arising from those shares.

61 In conclusion, in the event that the referring court were to conclude in the actions in the main proceedings that the application of a withholding tax of 15% on the dividends of non-resident taxpayers results in them having to bear in the Netherlands a final tax burden which is greater than that borne by residents for the same dividends, the view must be taken that such a difference in the tax treatment of taxpayers on the basis of place of residence is liable to deter non-resident taxpayers from investing in companies established in the Netherlands, and therefore constitutes a restriction on the free movement of capital, which is in principle prohibited by Article 63 TFEU.

The existence of a justification for the restriction on the free movement of capital under Article 65 TFEU

62 Article 65(1)(a) TFEU states that ‘[t]he provisions of Article 63 [TFEU] shall be without prejudice to the right of Member States ... to apply the relevant provisions of their tax law which distinguish between taxpayers who are not in the same situation with regard to their place of residence or with regard to the place where their capital is invested.’

63 Since that provision derogates from the fundamental principle of the free movement of capital, it must be interpreted strictly. It cannot therefore be interpreted as meaning that all tax legislation which draws a distinction between taxpayers on the basis of their place of residence or the Member State in which they invest their capital is automatically compatible with the FEU Treaty. The derogation in Article 65(1)(a) TFEU is itself limited by Article 65(3) TFEU, which provides that the national provisions referred to in paragraph 1 of that Article ‘shall not constitute a means of

arbitrary discrimination or a disguised restriction on the free movement of capital and payments as defined in Article 63 [TFEU]' (see, to that effect, judgment in *Welte*, C-181/12, EU:C:2013:662, paragraphs 42 and 43 and the case-law cited).

64 A distinction must therefore be made between the differences in treatment authorised by Article 65(1)(a) TFEU and discrimination prohibited by Article 65(3) TFEU. It is clear from the Court's case-law that, before national tax legislation such as that at issue in the main proceedings can be regarded as compatible with the provisions of the Treaty on the free movement of capital, the difference in treatment must concern situations which are not objectively comparable or be justified by an overriding reason in the public interest (see judgment in *Santander Asset Management SGIIC and Others*, C-338/11 to C-347/11, EU:C:2012:286, paragraph 23 and the case-law cited).

Comparability of the situations in question

65 For the purposes of assessing the comparability of the situations, the referring court seeks guidance on whether account should be taken solely of the tax on dividends withheld at source, or also income tax or corporation tax against which the tax on dividends is offset for resident taxpayers.

66 The Netherlands, Swedish and United Kingdom governments submit that, as regards income tax and corporation tax, the taxation of a non-resident's dividends can be distinguished objectively from the taxation of a resident's dividends, in that a resident taxpayer is taxed on his total income while a non-resident is taxed, in the Member State from which the dividends are paid, only on income arising from the dividends paid in that Member State.

67 In that respect, it must be noted that, in accordance with the case-law of the Court, as soon as a Member State, either unilaterally or by way of a convention, imposes a charge to tax on the income, not only of resident taxpayers, but also of non-resident taxpayers, from dividends which they receive from a resident company, the situation of those non-resident taxpayers becomes comparable to that of the resident taxpayers (see, to that effect, judgments in *Denkavit Internationaal and Denkavit France*, C-170/05, EU:C:2006:783, paragraph 35; *Commission* v *Italy*, C-540/07, EU:C:2009:717, paragraph 52; *Commission* v *Spain*, C-487/08, EU:C:2010:310, paragraph 51; *Commission* v *Germany*, C-284/09, EU:C:2011:670, paragraph 56; and order in *Tate & Lyle Investments*, C-384/11, EU:C:2012:463, paragraph 31).

68 It is the exercise alone by that State of its power of taxation that, irrespective of any taxation in another Member State, a risk of a series of charges to tax or economic double taxation may arise. In such a case, in order for non-resident taxpayers receiving dividends not to be subject to a restriction on the free movement of capital prohibited in principle by Article 63 TFEU, the State in which the company paying the dividend is resident is obliged to ensure that, under the procedures laid down by its national law in order to prevent or mitigate a series of liabilities to tax or economic double taxation, non-resident taxpayers are subject to the same treatment as resident taxpayers (see, to that effect, order in *Tate & Lyle Investments*, C-384/11, EU:C:2012:463, paragraph 32 and the case-law cited).

69 In the actions in the main proceedings, the Kingdom of the Netherlands clearly chose to exercise its power of taxation over dividends paid by resident companies to taxpayers residing in other Member States. Non-resident taxpayers in receipt of those dividends thus find themselves in a situation comparable to that of resident taxpayers as regards the risk of a series of charges to tax on dividends paid by resident companies (see, by analogy, judgments in *Commission* v *Spain*, C-487/08, EU:C:2010:310, paragraph 53; *Commission* v *Germany*, C-284/09, EU:C:2011:670, paragraph 58; and order in *Tate & Lyle Investments*, C-384/11, EU:C:2012:463, paragraph 33).

70 The argument of the governments which submitted observations to the Court relying on the judgment in *Truck Center* (C-282/07, EU:C:2008:762), to the effect that the difference in treatment of resident taxpayers and non-resident taxpayers simply reflects the difference between the situations in which those taxpayers find themselves, where resident taxpayers may offset the tax on dividends against another tax, while that tax on dividends is a final tax for non-resident taxpayers, must be rejected. It is true that in the circumstances of that judgment the Court allowed the application, to recipients of income from capital, of different taxation arrangements, depending on whether those recipients are residents or non-residents, since that difference in treatment relates to situations which are not objectively comparable (see, to that effect, judgment in *Truck Center*, C-282/07, EU:C:2008:762, paragraph 41). Since that difference in treatment does not necessarily procure an advantage for resident recipients, the Court held that it did not constitute a restriction on freedom of establishment (see, to that effect, judgment in *Truck Center*, C-282/07, EU:C:2008:762, paragraphs 49 and 50).

71 However, it must be observed, first, that in the actions in the main proceedings the restriction alleged does not arise from a difference between the collection arrangements applied to resident taxpayers and those applied to non-resident taxpayers, but stems from an advantage granted to resident taxpayers which does not extend to non-resident taxpayers.

72 Secondly, in *Truck Center* (C-282/07, EU:C:2008:762), the withholding tax in question was levied solely on interest paid to non-resident recipient companies. However, in the actions in the main proceedings, the applicable legislation subjects both resident taxpayers and non-resident taxpayers to the same method of collecting the tax on dividends, that is to say withholding the tax.

73 Accordingly, in circumstances such as those at issue in the main proceedings, the different treatment of resident taxpayers liable to pay income tax or corporation tax and non-resident taxpayers who are subject to a withholding tax in respect of dividends cannot be justified by a difference in their situations which is relevant to the application of Article 65(1)(a) TFEU. In order to apply that provision, it is not sufficient merely to take into account the tax on dividends, as such, and the analysis must incorporate all taxation relating to the income of natural persons or the profits of companies arising from the ownership of shares in companies established in the Netherlands.

74 Therefore, where a tax on dividends is withheld at source by a Member State on dividends paid by companies established in that Member State, the comparison between the tax treatment of a non-resident taxpayer and that of a resident taxpayer must be made in the light of, on the one hand, the tax on dividends payable by the non-resident taxpayer and, on the other, the income tax or corporation tax payable by the resident taxpayer which includes in its taxable base the income from the shares from which the dividends arise.

Justification based on the application of a convention for the avoidance of double taxation

75 By its three questions in Cases C-14/14 and C-17/14, the referring court, in essence, seeks guidance on whether any restriction on the free movement of capital may be justified by the neutralising effect of a legal provision of the Member State of residence of the taxpayer or by a bilateral convention for the avoidance of double taxation concluded by that Member State and the Member State from which the dividends are paid. Furthermore, in Case C-17/14, the referring court asks, for the purposes of assessing whether the effects of such a restriction are neutralised by such a convention, whether, in a situation where the disadvantage of a non-resident cannot be offset in the year in which the dividends were paid, there is a possibility of offsetting that disadvantage in subsequent years.

76 It should be recalled that, in the absence of any unifying or harmonising measures of the European

Union, the Member States retain the power to define, by treaty or unilaterally, the criteria for allocating their powers of taxation, particularly with a view to eliminating double taxation, and that preservation of that allocation is a legitimate objective recognised by the Court (see, inter alia, judgment in *Nordea Bank Danmark*, C-48/13, EU:C:2014:2087, paragraph 27 and the case-law cited).

77 The Court has previously held that a Member State cannot rely on the existence of a tax advantage granted unilaterally by another Member State in order to escape its obligations under the Treaty (judgment in *Amurta*, C-379/05, EU:C:2007:655, paragraph 78).

78 On the other hand, the possibility cannot be excluded that a Member State might succeed in ensuring compliance with its obligations under the Treaty by concluding a convention for the avoidance of double taxation with another Member State (judgments in *Test Claimants in Class IV of the ACT Group Litigation*, C-374/04, EU:C:2006:773, paragraph 71; *Amurta*, C-379/05, EU:C:2007:655, paragraph 79, and *Commission* v *Spain*, C-487/08, EU:C:2010:310, paragraph 58).

79 It is necessary for that purpose that application of such a convention should allow the effects of the difference in treatment under national legislation to be compensated for. Thus, the Court has held that the difference in treatment between dividends distributed to companies established in other Member States and those distributed to resident companies does not disappear unless the tax withheld at source under national legislation can be set off against the tax due in the other Member State in the full amount of the difference in treatment arising under the national legislation (see judgment in *Commission* v *Spain*, C-487/08, EU:C:2010:310, paragraph 59 and the case-law cited).

80 In that regard, it must be recalled that the Court has held that in order to attain the objective of neutralisation, the application of the method of deduction should enable the tax on dividends levied by the Member State from which the dividends are paid to be deducted in its entirety from the tax due in the Member State of residence of the taxpayer receiving those dividends in such a way that, if those dividends are ultimately taxed more heavily than the dividends paid to taxpayers residing in the Member State from which those dividends are paid, that heavier tax burden may no longer be attributed to that Member State, but to the State of residence of the recipient taxpayer which exercised its power to impose taxes (see, to that effect, judgment in *Commission* v *Spain*, C-487/08, EU:C:2010:310, paragraph 60).

81 In the present case, with regard to the situation at issue in Case C-14/14 arising from the application of the Belgium-Netherlands Convention, it is common ground that, under Article 23(1) of that convention, it is for the Belgian authorities to offset taxes paid in the Netherlands and that is carried out under Belgian law.

82 Since that set-off is granted unilaterally by the Kingdom of Belgium, then under the case-law set out in paragraph 77 above, the Kingdom of the Netherlands cannot rely on that same convention in order to claim that it has neutralised the restriction in question.

83 Furthermore, it is apparent from the documents before the Court that, although Belgian legislation allows the deduction, as an expense, of tax paid abroad from the taxable base of income before applying a tax rate of 25% to the net amount of the dividends received by a taxpayer established in Belgium, such a deduction does not entirely compensate for the effects of any restriction on the free movement of capital in the Member State from which the dividends were paid. In that respect, at the hearing before the Court in Case C-14/14, X claimed to have been reimbursed for approximately one quarter of the tax on dividends which she paid in the Netherlands.

84 Accordingly, in circumstances such as those at issue in Case C-14/14, the alleged restriction on the free movement of capital cannot be considered to be justified by the effects of the Belgium-Netherlands Convention.

85 With regard to the situation at issue in Case C-17/14, arising from the application of the Franco-Netherlands Convention, it is apparent from the documents before the Court that the restriction alleged was entirely neutralised by the fact that, in France, the tax on dividends for the tax years 2000 to 2007 inclusive were offset in full. Therefore, the questions referred by the referring court concern only the tax treatment of the tax on dividends paid in the Netherlands by Société Générale for the year 2008.

86 In that regard, it is apparent from the first subparagraph of Article 24B(b) of that convention that, in relation to the dividends on which the Netherlands tax was charged, the French Republic grants resident taxpayers who received such income a tax credit of an amount equal to the Netherlands tax. Since the second subparagraph of that provision provides that that tax credit may not exceed the amount of the tax levied in France on the income in question, it is possible that the full amount of the tax on dividends paid in the Netherlands may not be neutralised, which does not satisfy the requirements arising out of the case-law of the Court cited in paragraph 79 above. However, it is for the national court to ascertain whether that is so in the case in the main proceedings.

87 Accordingly, in circumstances such as those at issue in Case C-17/14, and without prejudice to the determination to be made by the referring court, the alleged restriction on the free movement of capital cannot be regarded as justified by the effects of the Belgium-Netherlands Convention.

88 Finally, with regard to the issue whether, in cases where the tax on dividends withheld in the Member State from which the dividends were paid cannot be offset in full in the Member State of residence of the taxpayer for the year in which those dividends were paid, the possibility of offsetting that tax in subsequent years may have the effect of neutralising the effects of a restriction, it must be observed that, in its request for a preliminary ruling, the referring court states that the issue whether an entitlement to such offsetting was open to Société Générale in France as regards the Netherlands tax paid for the year 2008 could be validly relied on was not examined before the lower courts. In those circumstances, that question must be regarded as hypothetical and is, therefore, inadmissible (judgment in *Pohotovost'*, C-470/12, EU:C:2014:101, paragraph 27 and the case-law cited).

89 Furthermore, it must be recalled that, where a convention on double taxation does not make it possible to neutralise the effects of the restriction on the free movement of capital in question, that restriction may, in some circumstances, still be justified by overriding reasons in the public interest (see, inter alia, order in *Tate & Lyle Investments*, C-384/11, EU:C:2012:463, paragraph 45 and the case-law cited). It must, however, be pointed out that, in the actions in the main proceedings, neither the referring court nor the Netherlands Government set out such reasons.

90 In those circumstances, the answer to the questions referred is that Articles 63 TFEU and 65 TFEU must be interpreted as precluding legislation of a Member State which imposes a withholding tax on dividends paid by a resident company both to resident taxpayers and non-resident taxpayers and provides a mechanism for deducting or reimbursing the tax withheld only for resident taxpayers, while for non-resident taxpayers, both natural persons and companies, the tax withheld is a final tax, in so far as the final tax burden relating to those dividends, borne in that Member State by non-resident taxpayers, is greater than that borne by resident taxpayers, which it is for the referring court to determine in the main proceedings. For the purposes of determining those tax burdens, the referring court must take account, in Cases C-10/14 and C-14/14, of the taxation of residents in

relation to all shares held in Netherlands companies in the calendar year, of capital which is exempt from tax under national legislation, and, in Case C-17/14, of expenses which are directly linked to the actual payment of the dividends.

If the existence of a restriction on the movement of capital is established, it may be justified by the effects of a bilateral convention for the avoidance of double taxation concluded by the Member State of residence and the Member State in which the dividends are paid, provided that the difference in treatment, relating to the taxation of dividends, between taxpayers residing in the latter Member State and those residing in other Member States, ceases to exist. In circumstances such as those at issue in Cases C-14/14 and C-17/14, and without prejudice to the determinations to be made by the referring court, the restriction on the free movement of capital, if established, cannot be regarded as justified.

Costs

91 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring 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 (Third Chamber) hereby rules:

Articles 63 TFEU and 65 TFEU must be interpreted as precluding legislation of a Member State which imposes a withholding tax on dividends distributed by a resident company both to resident taxpayers and non-resident taxpayers and provides a mechanism for deducting or reimbursing the tax withheld only for resident taxpayers, while for non-resident taxpayers, both natural persons and companies, the tax withheld is a final tax, in so far as the final tax burden relating to those dividends, borne in that Member State by non-resident taxpayers, is greater than that borne by resident taxpayers, which it is for the referring court to determine in the main proceedings. For the purposes of determining those tax burdens, the referring court must take account, in Cases C-10/14 and C-14/14, of the taxation of residents in relation to all shares held in Netherlands companies in the calendar year, of capital which is exempt from tax under national legislation, and in Case C-17/14, of expenses which are directly linked to the actual payment of the dividends.

If the existence of a restriction on the movement of capital is established, it may be justified by the effects of a bilateral convention for the avoidance of double taxation concluded by the Member State of residence and the Member State in which the dividends are paid, provided that the difference in treatment, relating to the taxation of dividends, between taxpayers residing in the latter Member State and those residing in other Member States ceases to exist. In circumstances such as those at issue in Cases C-14/14 and C-17/14, and without prejudice to the determinations to be made by the referring court, the restriction on the free movement of capital, if established, cannot be regarded as justified.

[Signatures]

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* Language of the case: Dutch.