Provisional text

JUDGMENT OF THE COURT (Sixth Chamber)

7 September 2017 (*)

(Reference for a preliminary ruling — Direct taxation — Freedom of establishment — Free movement of capital — Withholding tax — Directive 90/435/EEC — Article 1(2) — Article 5(1) — Exemption — Dividends distributed by a resident subsidiary to a non-resident parent company controlled directly or indirectly by one or more residents of third States — Presumption — Fraud, tax evasion and abuse)

In Case C-6/16,

REQUEST for a preliminary ruling under Article 267 TFEU from the Conseil d'État (Council of State, France), made by decision of 30 December 2015, received at the Court on 6 January 2016, in the proceedings

Eqiom SAS, formerly Holcim France SAS,

Enka SA

v

Ministre des Finances et des Comptes publics,

THE COURT (Sixth Chamber),

composed of E. Regan, President of the Chamber, A. Arabadjiev and C.G. Fernlund (Rapporteur), Judges,

Advocate General: J. Kokott,

Registrar: V. Giacobbo-Peyronnel, Administrator,

having regard to the written procedure and further to the hearing on 30 November 2016,

after considering the observations submitted on behalf of:

– Eqiom SAS and Enka SA, by R. Alberti, avocat,

– the French Government, by D. Colas and S. Ghiandoni, acting as Agents,

– the Danish Government, by C. Thorning and M. Wolff, acting as Agents,

– the German Government, by T. Henze and R. Kanitz, acting as Agents,

– the Spanish Government, by A. Rubio González and V. Ester Casas, acting as Agents,

– the Italian Government, by G. Palmieri, acting as Agent, and by E. De Bonis, avvocato dello Stato,

– the European Commission, by W. Roels and L. Pamukcu, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 19 January 2017

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Articles 49 and 63 TFEU, and of Article 1(2) of Council Directive 90/435/EEC of 23 July 1990 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States (OJ 1990 L 225, p. 6), as amended by Council Directive 2003/123/EC of 22 December 2003 (OJ 2004 L 7, p. 41) (‘the Parent-Subsidiary Directive’).

2 The request has been made in proceedings between Eqiom SAS, formerly Holcim France SAS, successor in law to Euro Stockage, and Enka SA, on the one hand, and the French tax authorities, on the other hand, concerning the refusal of the latter to exempt from withholding tax dividends distributed by Euro Stockage to Enka, the parent company of Euro Stockage.

Legal context

European Union law

3 The third and fifth recitals of the Parent-Subsidiary Directive are worded as follows:

‘Whereas the existing tax provisions which govern the relations between parent companies and subsidiaries of different Member States vary appreciably from one Member State to another and are generally less advantageous than those applicable to parent companies and subsidiaries of the same Member State; whereas cooperation between companies of different Member States is thereby disadvantaged in comparison with cooperation between companies of the same Member State; whereas it is necessary to eliminate this disadvantage by the introduction of a common system in order to facilitate the grouping together of companies;

…

Whereas it is furthermore necessary, in order to ensure fiscal neutrality, that the profits which a subsidiary distributes to its parent company be exempt from withholding tax; … .’

4 Article 1 of that directive provides:

‘1. Each Member State shall apply this Directive:

– to distributions of profits received by companies of that State which come from their subsidiaries of other Member States,

– to distributions of profits by companies of that State to companies of other Member States of which they are subsidiaries.

…

2. This Directive shall not preclude the application of domestic or agreement-based provisions required for the prevention of fraud or abuse.’

5 Article 5(1) of that directive provides:

‘Profits which a subsidiary distributes to its parent company shall be exempt from withholding tax.’

French law

6 The first subparagraph of Article 119a(2) of the General Tax Code (‘the GTC’), in the version applicable to at the time of the facts of the main proceedings, provides:

‘The products referred to in Articles 108 to 117a give rise to the levying of withholding tax at a rate set by Article 187(1) where they benefit persons whose fiscal residence or seat is outside France. A decree shall lay down the terms and conditions for application of that provision.’

7 Article 119b of the GTC provides:

‘1. The withholding tax provided for in Article 119a(2) shall not be levied on dividends distributed to a legal person who satisfies the conditions set out in paragraph (2) of the present article by a company or an organisation subject to corporation tax at the normal rate.

2. In order to benefit from the exemption provided for in paragraph 1, the legal person must demonstrate to the debtor or person responsible for the payment of that income that it is indeed the beneficiary of the dividends and that it satisfies the following conditions:

(a) It shall have its effective centre of management in a Member State of the European [Union] and not be regarded, under the terms of a double taxation agreement concluded with a third State, as resident for tax purposes outside the [Union];

(b) It shall be in one of the forms included in a list established by decree of the Minister for Economic Affairs in accordance with the Annex to the [Parent-Subsidiary Directive];

(c) It shall have an interest directly and continuously for at least the previous two years, in at least 25% of the capital of the legal person which distributes the dividends, or make a commitment to continuously maintain that holding for at least two years and appoint, as in the case of turnover taxes, a representative responsible for the payment of withholding tax referred to in paragraph 1 in the event that that commitment is not respected;

The level of the holding provided for in the above subparagraph shall be reduced to 20% for dividends distributed between 1 January 2005 and 31 December 2006, to 15% for dividends distributed between 1 January 2007 and 31 December 2008 and to 10% for dividends distributed since 1 January 2009;

(d) It shall be subject, in the Member State where it has its effective centre of management, to the corporation tax of that State, without the possibility of an option or of being exempt.

…

2a. The provisions of paragraph 1 shall apply to dividends distributed to permanent establishments of legal persons which satisfy the conditions set out in paragraph 2, where those permanent establishments are located in France or in another Member State of the European [Union].

3. The provisions of paragraph 1 shall not apply where the distributed dividends are received by a legal person controlled directly or indirectly by one or more residents of States that are not members of the [Union], unless that legal person provides proof that the principal purpose or one of

the principal purposes of the chain of interests is not to take advantage of the provisions of paragraph 1.’

…’

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

8 Eqiom, formerly Holcim France, successor in law to Euro Stockage, is a subsidiary of Enka, a company governed by Luxembourg law, and is 100% owned by the latter. Enka is itself owned for more than 99% by Waverley Star Investments Ltd, a company governed by Cypriot law, which is itself wholly controlled by Campsores Holding SA, a company established in Switzerland.

9 In 2005 and 2006, Euro Stockage paid dividends to its parent company, Enka. Following the audit of Euro Stockage, the French tax authorities imposed on that company the withholding tax provided for in Article 119a(2) of the GTC.

10 Those two companies therefore applied for the exemption from withholding tax provided for in Article 119b of that code. Those authorities however refused their application on the basis of Article 119b(3) of that code which provides that such an exemption does not apply where the distributed dividends are received by a legal person controlled directly or indirectly by one or more residents of States that are not members of the Union, unless that legal person provides proof that the principal purpose or one of the principal purposes of the chain of interests is not to take advantage of the exemption.

11 Those companies brought an action before the tribunal administratif de Montreuil (Administrative Court, Montreuil, France) for exemption from the withholding tax at issue. Since their action was dismissed by judgment of 28 April 2011, they lodged an appeal against that judgment before the cour administrative d’appel de Versailles (Administrative Court of Appeal, Versailles, France), which confirmed the dismissal.

12 Those companies therefore lodged an appeal before the Conseil d’État (Council of State, France) claiming that the tax legislation at issue is incompatible with EU primary law and with the Parent-Subsidiary Directive.

13 In those circumstances, the Conseil d’État (Council of State) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

‘(1) If the national legislation of a Member State uses in domestic law the option offered by Article 1(2) of Directive 90/435, is there scope for review of the measures or agreements adopted in order to give effect to that option under EU primary law?

(2) Must the provisions of Article 1(2) of that Directive, which confer upon Member States broad discretion to determine which provisions are ‘required for the prevention of fraud or abuse’, be interpreted as precluding a Member State from adopting a mechanism aimed at excluding from the benefit of the exemption the dividends distributed to a legal person controlled directly or indirectly by one or more residents of States that are not members of the Union, unless that legal person provides proof that the principal purpose or one of the principal purposes of the chain of interests is not to benefit from the exemption?

(3)(a) If the compatibility with EU law of the ‘anti-abuse’ mechanism mentioned above should have to be assessed having regard to the provisions of the Treaty too, must it be examined, having regard to the purpose of the legislation at issue, in the light of the provisions of

Article 49 TFEU, even though the company receiving the dividend distribution is controlled directly or indirectly, as a result of a chain of interests which has among its principal purposes the benefit of the exemption, by one or more residents of third States that may not avail themselves of freedom of establishment?

(b) If the answer to the preceding question is not affirmative, must that compatibility be examined in the light of the provisions of Article 63 TFEU?

(4) Must the provisions cited above be interpreted as precluding national legislation from excluding from the exemption from withholding tax the dividends paid by a company in one Member State to a company established in another Member State, if those dividends are received by a legal person controlled directly or indirectly by one or more residents of States that are not members of the European Union, unless that legal person establishes that the principal purpose or one of the principal purposes of that chain of interests is not to benefit from the exemption?'

Consideration of the questions referred

14 By its questions, which should be examined together, the referring court asks, in essence, whether, first, Article 1(2) of the Parent-Subsidiary Directive and, secondly, Article 49 or Article 63 TFEU must be interpreted as precluding national tax legislation, such as that at issue in the main proceedings, which subjects the grant of the tax advantage provided for by Article 5(1) of that directive — namely, the exemption from withholding tax of profits distributed by a resident subsidiary to a non-resident parent company, where that parent company is directly or indirectly controlled by one or more residents of third States — to the condition that that parent company establish that the principal purpose or one of the principal purposes of the chain of interests is not to take advantage of that exemption.

The applicability of the Treaty provisions

15 Given that the questions referred concern both the provisions of the Parent-Subsidiary Directive and those of the Treaty and that, according to settled case-law, any national measure in an area which has been the subject of exhaustive harmonisation at the level of the European Union must be assessed in the light of the provisions of that harmonising measure, and not in the light of the provisions of primary law (judgment of 8 March 2017, *Euro Park Service*, C-14/16, EU:C:2017:177, paragraph 19 and the case-law cited), it is necessary to determine first of all whether Article 1(2) of the Parent-Subsidiary Directive carries out such harmonisation.

16 In that regard, it should be noted that it is clear from the wording of that provision that such is not the case.

17 Article 1(2) of the Parent-Subsidiary Directive recognises solely the Member States' power to apply domestic or agreement-based provisions required for the prevention of fraud and abuse. It follows that such provisions may therefore be assessed in the light of primary EU law.

18 It follows from the above that national legislation, such as that at issue in the main proceedings, adopted in order to implement Article 1(2) of the Parent-Subsidiary Directive, may be assessed not only in the light of the provisions of that directive, but also the relevant provisions of primary law.

Article 1(2) of the Parent-Subsidiary Directive

19 First of all, it should be noted that it has not been contested, first, that the companies at issue in the main proceedings are covered by the Parent-Subsidiary Directive and, secondly, that the distributed

profit at issue in the main proceedings falls within the scope of application of Article 5(1) of that directive.

20 As is apparent from the third recital thereof, the Parent-Subsidiary Directive seeks, by the introduction of a common tax system, to eliminate any disadvantage to cooperation between companies of different Member States as compared with cooperation between companies of the same Member State and thereby to facilitate the grouping together of companies at EU level. That directive thus seeks to ensure the neutrality, from the tax point of view, of the distribution of profits by a company established in one Member State to its parent company established in another Member State (judgment of 8 March 2017, *Wereldhave Belgium and Others*, C-448/15, EU:C:2017:180, paragraph 25 and the case-law cited).

21 For that purpose, the fifth recital of that directive states that it is necessary, in order to ensure fiscal neutrality, to exempt from withholding tax profits which a subsidiary distributes to its parent company.

22 On that basis, in order to avoid double taxation, Article 5(1) of that directive establishes the principle that withholding taxes on profits distributed by a subsidiary established in one Member State to its parent company established in another Member State are prohibited (see, in that regard, judgments of 17 October 1996, *Denkavit and Others*, C-283/94, C-291/94 and C-292/94, EU:C:1996:387, paragraph 22, and of 25 September 2003, *Océ van der Grinten*, C-58/01, EU:C:2003:495, paragraph 83).

23 By precluding Member States from imposing withholding tax on the profits distributed by a resident subsidiary to its non-resident parent company, Article 5(1) of the Parent-Subsidiary Directive limits the powers of the Member States regarding the taxation of profits distributed by companies established in their territory to companies established in another Member State (see, to that effect, judgment of 1 October 2009, *Gaz de France — Berliner Investissement*, C-247/08, EU:C:2009:600, paragraph 38).

24 The Member States cannot, therefore, unilaterally introduce restrictive measures and subject the right to exemption from withholding tax provided by Article 5(1) of that directive to various conditions (see, to that effect, order of 4 June 2009, *KBC Bank and Beleggen, Risicokapitaal, Beheer*, C-439/07 and C-499/07, EU:C:2009:339, paragraph 38 and the case-law cited).

25 However, Article 1(2) of the Parent-Subsidiary Directive provides that that directive does not preclude the application of domestic or agreement-based provisions required for the prevention of fraud and abuse.

26 As the Advocate General stated in points 24 and 25 of her Opinion, although Article 1(2) of the Parent-Subsidiary Directive reflects the general principle of EU law that no one may benefit from the rights stemming from the legal system of the European Union for abusive or fraudulent ends, it must nevertheless, in so far as it constitutes a derogation from the tax rules established by that directive, be interpreted strictly (see, to that effect, judgment of 25 September 2003, *Océ van der Grinten*, C-58/01, EU:C:2003:495, paragraph 86).

27 Therefore, the power conferred on the Member States by Article 1(2) of the Parent-Subsidiary Directive to apply, in the field governed by that directive, domestic or agreement-based provisions in order to prevent fraud and abuse cannot be given an interpretation going beyond the actual terms of that provision (see, to that effect, judgment of 25 September 2003, *Océ van der Grinten*, C-58/01, EU:C:2003:495, paragraph 86).

28 In that regard, it must be noted that it follows from the wording of that provision that it allows solely the application of domestic or agreement-based provisions ‘required’ for that purpose.

29 The question then arises whether national tax legislation, such as that at issue in the main proceedings, satisfies that requirement of necessity.

30 In that context, it should be noted that, in order for national legislation to be regarded as seeking to prevent tax evasion and abuses, its specific objective must be to prevent conduct involving the creation of wholly artificial arrangements which do not reflect economic reality, the purpose of which is unduly to obtain a tax advantage (see, to that effect, judgments of 12 September 2006, *Cadbury Schweppes and Cadbury Schweppes Overseas*, C-196/04, EU:C:2006:544, paragraph 55, and of 5 July 2012, *SIAT*, C-318/10, EU:C:2012:415, paragraph 40).

31 Therefore, a general presumption of fraud and abuse cannot justify either a fiscal measure which compromises the objectives of a directive, or a fiscal measure which prejudices the enjoyment of a fundamental freedom guaranteed by the treaties (judgments of 26 September 2000, *Commission* v *Belgium*, C-478/98, EU:C:2000:497, paragraph 45 and the case-law cited, and of 5 July 2012, *SIAT*, C-318/10, EU:C:2012:415, paragraph 38).

32 In order to determine whether an operation pursues an objective of fraud and abuse, the competent national authorities may not confine themselves to applying predetermined general criteria, but must carry out an individual examination of the whole operation at issue. The imposition of a general tax measure automatically excluding certain categories of taxpayers from the tax advantage, without the tax authorities being obliged to provide even *prima facie* evidence of fraud and abuse, would go further than is necessary for preventing fraud and abuse (see, to that effect, judgment of 8 March 2017, *Euro Park Service*, C-14/16, EU:C:2017:177, paragraphs 55 and 56).

33 In the present case, it should be noted that the legislation at issue in the main proceedings is not specifically designed to exclude from the benefit of a tax advantage purely artificial arrangements designed to unduly benefit from that advantage, but covers, in general, any situation where a company directly or indirectly controlled by residents of third States has its registered office, for any reason whatsoever, outside France.

34 As the Advocate General stated in points 27 and 28 of her Opinion, the mere fact that a company residing in the European Union is directly or indirectly controlled by residents of third States does not, in itself, indicate the existence of a purely artificial arrangement which does not reflect economic reality and whose purpose is unduly to obtain a tax advantage.

35 Moreover, it should be pointed out that such a company is, in any event, subject to the tax legislation of the Member State in which it is established (see, to that effect, judgment of 12 December 2002, *Lankhorst-Hohorst*, C-324/00, EU:C:2002:749, paragraph 37 and the case-law cited).

36 Therefore, by subjecting the exemption from withholding tax of profits distributed by a resident subsidiary to its non-resident parent company to the condition that that parent company establish that the principal purpose or one of the principal purposes of the chain of interests is not to take advantage of that exemption, without the tax authorities being required to provide even *prima facie* evidence of fraud and abuse, the legislation at issue in the main proceedings introduces a general presumption of fraud and abuse and undermines the objective pursued by the Parent-Subsidiary Directive, namely the prevention of double taxation of profits distributed by a subsidiary to its parent company.

37 That interpretation is not undermined by the fact that the parent company at issue is directly or indirectly controlled by one or more residents of third States. In that regard, it suffices to note that it does not follow from any provision of the Parent-Subsidiary Directive that the origin of the shareholders of companies resident in the European Union affects the right of those companies to rely on tax advantages provided for by that directive.

38 In the light of the above considerations, it must be held that Article 1(2) of the Parent-Subsidiary Directive must be interpreted as precluding national tax legislation, such as that at issue in the main proceedings, which subjects the grant of the tax advantage provided for by Article 5(1) of that directive — namely, the exemption from withholding tax of profits distributed by a resident subsidiary to a non-resident parent company, where that parent company is directly or indirectly controlled by one or more residents of third States — to the condition that that parent company establish that the principal purpose or one of the principal purposes of the chain of interests is not to take advantage of that exemption.

The applicable freedom

39 It is apparent from the Court's case-law that the issue of the tax treatment of dividends equally may fall within the scope of freedom of establishment as well as within the free movement of capital (judgment of 15 September 2011, *Accor*, C-310/09, EU:C:2011:581, paragraph 30 and the case-law cited).

40 As regards the question whether national legislation falls within the scope of one or other of the freedoms of movement, the purpose of the legislation concerned must be taken into consideration (judgment of 15 September 2011, *Accor*, C-310/09, EU:C:2011:581, paragraph 31 and the case-law cited).

41 In that regard, the Court has already held that national legislation intended to apply only to those shareholdings which enable the holder to exert a definite influence on a company's decisions and to determine its activities falls within the provisions of the Treaty on freedom of establishment. However, national provisions which apply to shareholdings acquired solely with the intention of making a financial investment without any intention to influence the management and control of the undertaking must be examined exclusively in light of the free movement of capital (judgment of 15 September 2011, *Accor*, C-310/09, EU:C:2011:581, paragraph 32 and the case-law cited).

42 In the present case, it is apparent from the order for reference that the tax legislation at issue in the main proceedings was applicable in 2005 and 2006 to companies holding at least 20% of the capital of their subsidiaries. By contrast, that order contains no information concerning the purpose of that legislation.

43 As the Advocate General noted in point 42 of her Opinion, such a shareholding does not necessarily imply that the company holding those shares exercises a definite influence over the decisions of the company distributing the dividends (see, to that effect, judgment of 13 April 2000, *Baars*, C-251/98, EU:C:2000:205, paragraph 20).

44 In such circumstances, it is necessary to take account of the facts of the case in point in order to determine whether the situation to which the dispute in the main proceedings relates falls within the scope of one or other of those freedoms of movement (see, to that effect, judgment of 13 November 2012, *Test Claimants in the FII Group Litigation*, C-35/11, EU:C:2012:707, paragraphs 93 and 94).

45 As regards the facts at issue in the main proceedings, it is apparent from the documents submitted to the Court that, at the time of the facts, Enka held the entire capital of its French subsidiary, Euro

Stockage.

46 It must therefore be concluded that such a holding granted Enka a certain influence over the decisions of Euro Stockage, allowing it to determine its activities. Therefore, the national provisions applicable to those holdings must be examined in the light of freedom of establishment.

47 In that context, it is necessary to point out that, contrary to what is contended by the French Government, the fact that a parent company residing in a Member State other than the French Republic is directly or indirectly controlled by one or more residents of third States does not deprive that company of the right to rely on that freedom.

48 The Court has already ruled that it does not follow from any provision of European Union law that the origin of the shareholders, be they natural or legal persons, of companies resident in the European Union affects that right, since the status of being a European Union company is based, under Article 54 TFEU, on the location of the corporate seat and the legal order where the company is incorporated, not on the nationality of its shareholders (judgment of 1 April 2014, *Felixstowe Dock and Railway Company and Others*, C-80/12, EU:C:2014:200, paragraph 40).

49 In the main proceedings, it is not disputed that the parent company is a company established in the Union. Consequently, that company may rely on freedom of establishment.

50 That assessment cannot be called into question by the considerations in paragraphs 99 and 100 of the judgment of 13 March 2007, *Test Claimants in the Thin Cap Group Litigation* (C-524/04, EU:C:2007:161), since, unlike the situation at issue in that case, in the main proceedings, the parent company controls its subsidiary.

51 In view of the above, it is necessary to answer the questions referred in the light of freedom of establishment.

Freedom on establishment

52 Freedom of establishment, which Article 49 TFEU grants to European Union nationals, includes the right for them to take up and pursue activities as self-employed persons and to set up and manage undertakings under the conditions laid down for its own nationals by the law of the Member State where such establishment is effected. It entails, in accordance with Article 54 TFEU, for companies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the European Union, the right to exercise their activity in the Member State concerned through a subsidiary, a branch or an agency (judgment of 17 July 2014, *Nordea Bank Danmark*, C-48/13, EU:C:2014:2087, paragraph 17 and the case-law cited).

53 As regards treatment in the host Member State, the case-law of the Court holds that, since the second sentence of the first paragraph of Article 49 TFEU expressly leaves economic operators free to choose the appropriate legal form in which to pursue their activities in another Member State, that freedom of choice must not be limited by discriminatory tax provisions (judgment of 17 May 2017, *X*, C-68/15, EU:C:2017:379, paragraph 40 and the case-law cited).

54 Moreover, all measures which prohibit, impede or render less attractive the exercise of freedom of establishment must be considered to be restrictions on that freedom (judgment of 8 March 2017, *Euro Park Service*, C-14/16, EU:C:2017:177, paragraph 59 and the case-law cited).

55 It is apparent from the documents submitted to the Court that it is solely where a resident

subsidiary distributes profits to a non-resident parent company, which is directly or indirectly controlled by one or more residents of third States, that the exemption from withholding tax is subject to the condition that that parent company establish that the principal purpose or one of the principal purposes of the chain of interests is not to take advantage of that exemption. By contrast, where such a subsidiary distributes profits to a resident parent company, also directly or indirectly controlled by one or more residents of third States, that resident parent company may benefit from that exemption without being subject to such a condition.

56 Such a difference in treatment is likely to dissuade a non-resident parent company from exercising an activity in France through a subsidiary established in that Member State and constitutes, therefore, an impediment to the freedom of establishment.

57 That restriction is permissible only if it relates to situations which are not objectively comparable or if it is justified by overriding reasons in the public interest recognised by EU law. It is further necessary, in such a case, that the restriction be appropriate for ensuring the attainment of the objective that it pursues and not go beyond what is necessary to attain it (judgment of 17 December 2015, *Timac Agro Deutschland*, C-388/14, EU:C:2015:829 paragraphs 26 and 29 and the case-law cited).

58 As regards the comparability of the situation of a resident company and that of a non-resident company in receipt of dividends from a resident subsidiary, it should be noted that the exemption of profits distributed by a subsidiary to its parent company from withholding tax seeks, as was mentioned in paragraph 22 of the present judgment, to avoid double taxation or a series of charges to tax on those profits.

59 Although the Court considered, as regards measures provided for by a Member State in order to prevent or mitigate a series of liabilities to tax or the double taxation of profits distributed by a resident company, that the resident shareholders receiving dividends are not necessarily in a situation which is comparable to that of shareholders receiving dividends who are resident in another Member State, it also stated that, since a Member State exercises its power to tax not only over the income of resident shareholders, but also over that of non-resident shareholders, from dividends which they receive from a resident company, the situation of those non-resident shareholders becomes comparable to that of the resident shareholders (judgment of 14 December 2006, *Denkavit Internationaal and Denkavit France*, C-170/05, EU:C:2006:783, paragraphs 34 and 35 and the case-law cited).

60 In the main proceedings, since the French Republic has chosen to exercise its tax jurisdiction over the profits distributed by the resident subsidiary to the non-resident parent company, it must be concluded that that non-resident parent company is in a situation comparable to that of a resident parent company.

61 As regards the justification for and the proportionality of the impediment, the French Republic contends that it is justified both by the objective of combating fraud and tax evasion and by that seeking to safeguard a balanced allocation of taxation powers between the Member States.

62 In particular, that Member State contends that the national legislation at issue in the main proceedings seeks to prevent the practice known as ‘treaty shopping’ which consists in the preparation of arrangements by which companies established in a third State avoid the application of withholding tax to domestic-source dividends provided for by French law or the convention between the third State and the French Republic in order to be subject to lower tax rates provided for by the convention between another Member State and that third State, by means of the exemption from withholding tax between Member States provided for by the Parent-Subsidiary

Directive.

63 In that regard, it should be noted, first, that the objectives of combating fraud and tax evasion and of seeking to safeguard a balanced allocation of taxation powers between the Member States are connected (judgment of 17 December 2015, *Timac Agro Deutschland*, C-388/14, EU:C:2015:829, point 47 and the case-law cited) and, secondly, because they constitute overriding reasons in the public interest, they are capable of justifying a restriction on the exercise of freedom of movement guaranteed by the Treaty (judgment of 8 March 2017, *Euro Park Service*, C-14/16, EU:C:2017:177, paragraph 65 and the case-law cited).

64 However, it must be noted that the objective of combating fraud and tax evasion, whether it is relied on under Article 1(2) of the Parent-Subsidiary Directive or as justification for an exception to primary law, has the same scope. Therefore, the findings set out in paragraphs 30 to 36 of the present judgment also apply with regard to that freedom.

65 Therefore, the objective of combating fraud and tax evasion invoked by the French Republic in the main proceedings cannot justify an impediment to the freedom of establishment.

66 In the light of the foregoing considerations, the answer to the questions referred is that Article 1(2) of the Parent-Subsidiary Directive, first, and Article 49 TFEU, secondly, must be interpreted as precluding national tax legislation, such as that at issue in the main proceedings, which subjects the grant of the tax advantage provided for by Article 5(1) of that directive — namely, the exemption from withholding tax of profits distributed by a resident subsidiary to a non-resident parent company, where that parent company is directly or indirectly controlled by one or more residents of third States — to the condition that that parent company establish that the principal purpose or one of the principal purposes of the chain of interests is not to take advantage of that exemption.

Costs

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

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

Article 1(2) of Council Directive 90/435/EEC of 23 July 1990 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States, as amended by Council Directive 2003/123/EC of 22 December 2003, first, and Article 49 TFEU, secondly, must be interpreted as precluding national tax legislation, such as that at issue in the main proceedings, which subjects the grant of the tax advantage provided for by Article 5(1) of that directive — namely, the exemption from withholding tax of profits distributed by a resident subsidiary to a non-resident parent company, where that parent company is directly or indirectly controlled by one or more residents of third States — to the condition that that parent company establish that the principal purpose or one of the principal purposes of the chain of interests is not to take advantage of that exemption.

[Signatures]

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* Language of the case: French.