*CFE ECJ Task Force**

Opinion Statement ECJ-TF 1/2016 on the Decision of the European Court of Justice in Joined Cases *Miljoen* (Case C-10/14), *X* (Case C-14/14) and *Société Générale* (Case C-17/14) on the Netherlands Dividend Withholding Tax

1. Introduction

This is an Opinion Statement prepared by the CFE ECJ Task Force on *Miljoen and others* (Joined Cases C-10/14, C-14/14 and C-17/14),[1] in respect of which the Third Chamber of the Court of Justice of the European Union (ECJ) delivered its decision on 17 September 2015, following the Opinion of Advocate General Jääskinen of 25 June 2015.[2] The cases concern the taxation of dividends received by individual and corporate non-resident taxpayers. They answer several questions in respect of the appropriateness of levying dividend withholding taxes, such as the need to allow for an offset against ordinary income tax, the deductibility of related costs and the relevance of an offset granted by a tax treaty. After illustrating the factual background, parties' arguments and the ECJ's decision, this Opinion Statement will focus on issues that the ECJ has left open.

2. Background and Issues

The Netherlands imposes a 15% withholding tax on dividends paid by Netherlands companies to resident and non-resident taxpayers. While resident taxpayers can credit this withholding tax against their Netherlands tax and obtain a refund if it exceeds that tax, for non-residents it is a final tax. In all three cases, non-resident taxpayers requested a refund of the withholding tax, claiming the denial of a refund resulted in discrimination compared to resident taxpayers who were in a comparable situation. They argued that the denial was inconsistent with the free movement of capital. The circumstances of the taxpayers in each of the three cases differed in some respects. The main issues raised by each case were, however, the same or closely related:

- Are non-resident dividend recipients comparable to residents with respect to dividend withholding tax, even though resident taxpayers are subject to tax on a different basis? Which factors have to be taken into consideration in comparing the tax burden of the two categories of taxpayers?
- Do non-residents need to be granted the same tax-free allowance for capital assets that is available to resident taxpayers with capital income, or is such an allowance legitimately reserved to resident taxpayers and non-residents with substantially all their income in the Netherlands (who thus fall within the *Schumacker* (Case C-279/93)[3] case law)?
- Which expenses are to be taken into account for the purposes of determining taxation that would be non-discriminatory (and thus the amount of a possible refund) for non-resident taxpayers? In particular, are financing costs related to the shares directly linked to the receipt of dividends such that they should be taken into account?
- Under what circumstances can the Netherlands defend its legislation on the grounds that any disadvantage from the dividend withholding tax has effectively been neutralized by another state? Does such neutralization have to be based on a bilateral agreement with another state, when do the terms of a treaty ensure that neutralization is bilateral and what is effective neutralization?

Mr Miljoen, a Belgian resident, received dividend payments from shares he held in Netherlands companies, which were subject to the 15% final withholding tax. If he had been a Netherlands resident, he would have been able to offset this withholding tax against his normal income tax and obtain a refund of any excess. Specifically, this could have been set off against the 30% income tax levied on "box 3" capital income, which is calculated as a nominal 4% return on the average value of the taxpayer's assets and liabilities minus a tax-free capital allowance of EUR 20,014,[4] which, as was pointed out by Advocate General

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1. NL: ECJ, 17 Sept. 2015, Joined Cases C-10/14, C-14/14 and C-17/14, *Miljoen, X, Société Générale SA v. Staatssecretaris van Financiën*, ECJ Case Law IBFD.
2. NL: Opinion of Advocate General Jääskinen, 25 June 2015, Joined Cases C-10/14, C-14/14 and C-17/14, *Miljoen, X, Société Générale SA v. Staatssecretaris van Financiën*, ECJ Case Law IBFD.
3. DE: ECJ, 14 Feb. 1995, Case C-279/93, *Finanzamt Köln-Altstadt v. Roland Schumacker*, ECJ Case Law IBFD.
4. *Miljoen and others* (C-10/14, C-14/14 and C-17/14), paras. 6-13.

Jääskinen, is effectively equivalent to a 1.2% wealth tax.[5] As a non-resident, Mr Miljoen was not subject to that tax and, consequently, could not offset the withholding tax against it and had no right to a refund. The *Hoge Raad* asked the ECJ whether this could result in discrimination under the EU freedoms and under what circumstances. Essentially, the question was whether and how to compare the notional income tax imposed on a resident with the dividend withholding tax imposed on a non-resident such as Mr Miljoen.

Ms X, also a Belgian resident receiving dividends from a Netherlands company subject to the 15% withholding tax, had basically the same complaint, raising the same question. An additional question arose because Ms X received partial relief from the Netherlands withholding tax in Belgium. The Belgium tax administration allowed her to deduct the withholding tax from her Belgian tax base, but not from her tax liability. The result was an effective neutralization of 25% (the applicable Belgian tax rate on the net dividend) of the Netherlands withholding tax. According to the ECJ, the *Hoge Raad* thus asked whether such partial neutralization could be considered sufficient to compensate for any disadvantage arising from the potentially discriminatory withholding tax.[6] The *Hoge Raad*'s view was that the tax treaty actually entitled her to an ordinary tax credit in Belgium – i.e. to deduct the Netherlands tax from her Belgian tax liability – and the ECJ also considered this.[7]

Société Générale, a company established in France, also received portfolio dividends from Netherlands investments that were subject to the 15% withholding tax. Under the France-Netherlands Income and Capital Tax Treaty (1973),[8] it successfully claimed an offset of that withholding tax against its French corporate tax for the years 2000 to 2007. In 2008, however, it suffered losses in France and, therefore, could not receive a credit. This raised two further issues. First, the *Hoge Raad* required clarification as to which of the deductible expenses available for resident corporations should also be available for non-residents; in particular, whether financing costs for the acquisition of the shares needed to be deductible from the tax base in the Netherlands. Second, it asked whether or not the 2008 disadvantage could be treated as neutralized, even though no credit was available in 2008, on the basis that a credit carry-forward was available in France.

Advocate General Jääskinen proposed that most of the questions be answered in favour of the taxpayers as follows:

– *Framework for determining comparability*. He rejected the Netherlands' argument based on *Truck Center* (Case C-282/07)[9] that non-residents are not entitled to the same treatment as residents with regard to withholding tax because they are not comparable. The Advocate General followed the Commission's view that the statements in *Truck Center* are relevant only in respect of arrangements for the collection of the tax and were not relevant here as the complaint was about a substantive difference in the tax charged on residents and non-residents.[10] In this respect, Advocate General Jääskinen argued that any comparison needs to pertain to "the tax burden which is ultimately borne respectively by those two categories of shareholders", both in respect of corporate and individual shareholders, regardless of the fact that the latter, if resident, do not technically pay tax on the actual dividend, but a notional income amount under "box 3".[11]

– *Tax allowances and Schumacker*. Concerning the tax-free allowance for capital assets granted to resident individual shareholders, the Advocate General referred to the decision in *Welte* (Case C-181/12)[12] in confirming that the exemption should be taken into account when making the comparison, distinguishing allowances falling within the *Schumacker* doctrine on the basis that this tax-free allowance is not related to the taxpayers' overall ability to pay, but rather the amount of capital held.[13] The Advocate General endorsed the argument of the Commission that the approach to allowances needs to be determined on the basis of the relevant provision's objective.[14]

– *Permitted expenses*. Concerning the deductibility of financing costs, the Advocate General suggested restricting such deductibility to costs that are directly linked to the holding of the shares giving rise to the dividends that are taxed in the Netherlands, while denying the deductibility of costs that are "solely economically linked" to them, but recommended leaving the decision as to which costs fall into which category to the domestic court.[15]

– *Neutralization and tax treaties*. On the question of neutralization by other states, Advocate General Jääskinen argued that established case law meant that any difference in treatment arising from the Netherlands provisions could only be justified in this

5. AG Opinion in *Miljoen and others* (C-10/14, C-14/14 and C-17/14), para. 57.
6. However, the Netherlands Supreme Court (*Hoge Raad*) held that the deduction nevertheless led to full compensation of the disadvantage caused by the different treatment of non-resident taxpayers compared to resident taxpayers. *See* NL: *Hoge Raad* (HR), 20 Dec. 2013, Case no. 12/04717 (*X*), published in, inter alia, BNB 2014/66, para. 4.1.3. The ECJ did not share this view.
7. Contrary to the opinion of the *Hoge Raad*, the Belgian tax authorities consider that there is no need to grant a tax credit under the tax treaty (which makes the tax treaty relief "[s]ubject to the provisions of Belgian legislation"), because Belgian domestic law has abolished the tax credit for dividends.
8. *Convention between the Republic of France and the Kingdom of the Netherlands for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and on Capital* (as amended through 2004) (16 Mar. 1973), Treaties IBFD.
9. BE: ECJ, 22 Dec. 2008, Case C-282/07, *Belgian State v. Truck Center SA*, ECJ Case Law IBFD. *See also* on that case, Confédération Fiscale Européenne, *Comment by the CFE Task Force on ECJ Cases on the Judgment in Belgium SPF Finance v. Truck Center SA, Case C-282/07, Judgment of 22 December 2008*, 49 Eur. Taxn. 10 (2009), Journals IBFD.
10. AG Opinion in *Miljoen and others* (C-10/14, C-14/14 and C-17/14), para. 53.
11. *Id.*, paras. 64 and 70.
12. DE: ECJ, 17 Oct. 2013, Case C-181/12, *Yvon Welte v. Finanzamt Velbert*, ECJ Case Law IBFD.
13. AG Opinion in *Miljoen and others* (C-10/14, C-14/14 and C-17/14), para. 85.
14. *Id.*, para. 83.
15. *Id.*, para. 98.

way if the relevant tax treaty neutralized the difference in treatment "in all cases".[16] A reimbursement of tax withheld would, however, only be required if the difference had not been neutralized in the individual case.[17] Finally, with regard to the possibility of a credit carry-forward in France, he suggested that in the absence of certainty, this would not permit a difference in treatment.[18]

3. The Decision of the Court

3.1. Introduction

The ECJ followed Advocate General Jääskinen's Opinion on most points and thus generally supported the position taken by the taxpayers, although it left some issues to the final determination of the *Hoge Raad*, having ruled on the issues to be taken into account. The ECJ essentially stood firmly on past case law, clarifying certain points that were previously doubtful. The ECJ also explained its existing case law concerning neutralization of differences in treatment by a tax treaty, generally holding that the relevant treaty provisions were not sufficient to neutralize the relevant differences in treatment in the cases at hand.

3.2. Framework for determining comparability

As a starting point to determining the comparability of residents and non-residents, the ECJ followed Advocate General Jääskinen's approach of considering the burden imposed by dividend withholding tax and mainstream income tax together, finding the Netherlands withholding tax to be "a prepayment of income tax under 'heading 3'" (referred to as "box 3"), or with regard to Société Générale corporation tax.[19] The ECJ left it to the referring court to decide, however, whether the combined tax burden was as much as the burden imposed by the 15% withholding tax taken on its own, explaining the factors to be taken into account in assessing the effective tax burden in each case.[20]

The ECJ then explained the key points of conducting such a comparison. The different features of the withholding tax and ordinary income/corporation tax, namely dividends actually paid from specific shares, on the one hand, and a notional return on all shares calculated on an annual basis, on the other, required a decision as to what time period and what income sources are counted for the purposes of the comparison. The ECJ stated that the comparison should be based on the taxation of a resident taxpayer: since the notional income is taxed on the basis of an annual return on all shares held, the tax burden of a non-resident has to be compared to that imposed on dividends in respect of all shares held during the year, rather than looking at dividends earned separately per share over a different time period.

While Advocate General Jääskinen had referred to the possible legislative purpose of preventing juridical double taxation, but had rejected its pertinence to the issue of objective comparability,[21] the ECJ referred to the purpose of avoiding economic double taxation as a ground to establish comparability, citing established ECJ case law according to which a Member State must alleviate such double taxation for non-residents in the same way as it does for residents, if it is from "the exercise alone by that State of its power of taxation that, irrespective of any taxation of another Member State, a risk of a series of charges to tax or economic double taxation may arise".[22]

The ECJ then dealt with the Netherlands' argument based on the Court's decision in *Truck Center*[23] concerning the objective non-comparability of the situations of residents and non-residents. According to the Netherlands government, the difference in treatment in these cases simply reflected the different positions of those taxpayers. The ECJ rejected that argument, implying that *Truck Center* could only be invoked to defend a "difference between collection arrangements" where such difference had no effect on the amount of tax paid by a non-resident compared to a resident. It also reiterated that in that case the difference in treatment did not necessarily procure an advantage for resident recipients. In the present case, however, the taxpayer's complaint related to a substantive advantage granted to resident taxpayers, which did not extend to non-resident taxpayers, when both resident and non-resident taxpayers were subjected to the same method of collecting the tax on dividends, i.e. a dividend withholding tax.

3.3. Allowances and *Schumacker*

The ECJ further held that the tax-free allowance granted to all resident taxpayers earning "box 3" income must be extended in full to non-resident taxpayers who are subject to tax, since it is granted "to all resident taxpayers, irrespective of their personal situation".[24] The ECJ thereby distinguished allowances that would constitute "an individual advantage connected with the personal situation of the taxpayer",[25] which – by implication – would not have to be so extended.

3.4. Permitted expenses

On the deductibility of business expenses of non-resident companies, such as Société Générale, the ECJ also agreed with Advocate General Jääskinen and, relying on its decision in *Commission v. Germany* (Case C-600/10),[26] said that expenses not directly linked to the actual payment of the dividends that are subject to tax should not be taken into account in making the comparison.[27] The ECJ went on to specify that neither that part of the purchase price of the shares that represents an upcoming dividend (which

16. *Id.*, para. 112.
17. *Id.*, para. 115.
18. *Id.*, para. 125.
19. *Miljoen and others* (C-10/14, C-14/14 and C-17/14), paras. 46-47.
20. *Id.*, paras. 48-49.
21. AG Opinion in *Miljoen and others* (C-10/14, C-14/14 and C-17/14), para. 61.
22. *Miljoen and others* (C-10/14, C-14/14 and C-17/14), para. 68.
23. *Truck Center* (C-282/07).
24. *Miljoen and others* (C-10/14, C-14/14 and C-17/14), para. 53.
25. *Id.*, para. 53.
26. DE: ECJ, 22 Nov. 2012, Case C-600/10, *European Commission v. Federal Republic of Germany*, ECJ Case Law IBFD.
27. *Miljoen and others* (C-10/14, C-14/14 and C-17/14), paras. 58-59.

can be deducted when calculating the tax base and so effectively eliminate tax on the dividend), nor financing costs, both of which concern ownership of shares as such, are "directly linked" in that way to the actual dividends from those shares. It held that those are thus excluded when comparing the effective tax burden imposed on residents and non-residents.[28]

3.5. Neutralization and tax treaties

On the question of a possible "justification based on the application of a convention for the avoidance of double taxation"[29] (i.e. the "neutralization" argument), the ECJ explained its established case law. Citing *Amurta* (Case C-379/05),[30] it held that a Member State "cannot rely on the existence of a tax advantage granted unilaterally by another Member State",[31] but "might succeed in ensuring compliance with its obligations under the Treaty by concluding a convention for the avoidance of double taxation",[32] where "that application of such a convention [allows for] the effects of the difference in treatment under national legislation to be compensated for",[33] which requires the "tax withheld at source [to] be set off against the tax due in the other Member State in the full amount of the difference in treatment".[34]

In the case of *X*, the ECJ held that the set off granted by Belgium for Netherlands withholding tax was both unilateral and partial and could thus not justify the difference in treatment.[35]

In the case of *Société Générale*, the ECJ distinguished between the years 2000 to 2007, when the Netherlands tax was fully credited against French tax, and the year 2008, when there was no French tax and thus no credit. With regard to the former, the ECJ held that "the restriction alleged was entirely neutralised by the fact that, in France, the tax on dividends […] [was] offset in full", relieving the Netherlands from any obligation to provide a refund.[36] With regard to the latter, the ECJ held that there was still a restriction where "the full amount of the tax on dividends paid in the Netherlands may not be neutralised", which was for the national court to ascertain.[37] The ECJ, however, declined to answer the question concerning the possible compensatory effect granted through a credit carry-forward, since the availability of such carry-forward had not been examined by the domestic courts, rendering it a hypothetical question.[38]

28. *Id.*, para. 60.
29. *Id.*, para. 75.
30. NL: ECJ, 8 Nov. 2007, Case C-379/05, *Amurta SGPS v. Inspecteur van de Belastingdienst/Amsterdam*, ECJ Case Law IBFD.
31. *Miljoen and others* (C-10/14, C-14/14 and C-17/14), para. 77.
32. *Id.*, para. 78.
33. *Id.*, para. 79.
34. *Id.*, para. 79, citing ES: ECJ, 3 June 2010, Case C-487/08, *European Commission v. Kingdom of Spain*, para. 59, ECJ Case Law IBFD.
35. *Id.*, paras. 81-84.
36. *Id.*, para. 85.
37. *Id.*, para. 86.
38. *Id.*, para. 88.

4. Comments

4.1. Framework for determining comparability

The present case clarifies the ECJ's assessment of (dividend) withholding taxes within the European Union. Most notably, it firmly rejects the Member States' reliance on the ECJ's earlier decision in *Truck Center* to justify a different tax burden imposed on non-residents as compared to resident taxpayers. Following *Miljoen and others*, it is clear that *Truck Center* can only be invoked if the source state legislation affects only the collection of tax and, at the same time, does not necessarily procure an advantage for residents. It is also notable that the ECJ tested the situations' objective comparability as part of a justification analysis rather than a preliminary question to establish the existence of a relevant different treatment, as Advocate General Jääskinen had done in his Opinion.

Advocate General Jääskinen found that non-residents suffered a heavier tax burden and his view was that that was sufficient to establish a restriction. The ECJ, however, took a more conventional approach and also considered whether residents and non-residents are comparable in light of the purpose of the legislation. As the purpose of the legislation was to prevent double taxation, and the Netherlands taxed both residents and non-residents on Netherlands dividends, the ECJ concluded that they were comparable. Accordingly, if there was a heavier tax burden for non-residents, there was a restriction. It is striking that both Advocate General Jääskinen and the ECJ focused on whether the legislation had the practical effect of ultimately placing a heavier tax burden on non-residents[39] even though different taxes were applicable domestically and cross-border. Whereas non-resident individual portfolio investors were only taxed by way of a dividend withholding tax on the dividends received, resident individuals were also taxed on notional income under the personal income tax regime under which they could set off the dividend withholding tax. To the extent that the dividend withholding tax exceeded the personal income tax due, the excess would be refunded through a personal income tax assessment. The position for corporate taxpayers was similar. It would be consistent with this analysis for the ECJ to take into account any combination of taxes when determining whether there was a heavier tax burden.

4.2. Allowances and *Schumacker*

With regard to the nature of the capital allowance granted to resident taxpayers, the ECJ clarifies the scope of the exception from that rule – effective comparability of resident and non-resident taxpayers – as established in *Schumacker* and subsequent case law. The ECJ distinguishes the capital allowance in the Netherlands, which is assumed to be directly connected to the ownership of taxable capital and which thus had to be taken into account for purposes of determining a non-discriminatory tax burden, from a personal allowance, which only the residence state must grant. This is a significant result, as it

39. AG Opinion in *Miljoen and others* (C-10/14, C-14/14 and C-17/14), para. 55.

confirms the decision of the ECJ in *Welte* and narrows the application of the *Schumacker* exception from comparability.[40] In any event, the decision of the ECJ seems to imply that for an advantage to fall within the scope of *Schumacker* it is not sufficient for it to be in some way connected with personal circumstances. Where the advantage is not solely based on personal circumstances, but also connected to the earning of a specific type of income, it seems to continue to fall under the more general approach. Although the ECJ deals with this question in only one paragraph and thus does not very clearly explain its reasoning, it can be understood from Advocate General Jääskinen's Opinion, to which the ECJ explicitly referred.[41]

4.3. Permitted expenses

On the deductibility of expenses connected to dividends, the ECJ came to the conclusion that only expenses that are directly linked to dividend payments needed to be taken into account, but did not provide independent reasons for that result. Instead, the ECJ relied on previous case law where the deduction of such directly linked expenses had been required, but without an argument why other causally linked expenses should be ineligible. The two cases cited by the ECJ do not provide very strong support: in *Schröder* (Case C-450/09), directly related expenses were mentioned merely as an example.[42] In *Commission v. Germany*, the Commission had itself claimed that a direct link existed and the ECJ rejected its claim since the existence of that direct link was not proven.[43] The ECJ went on to dismiss the claim for a deduction of any costs, such as financing costs, because these "concern ownership of the shares per se, and therefore […] are also not directly linked to the actual payment of the dividends".[44]

The requirement for a direct link to only the actual payment of the dividend is surprising because previous case law suggested that a non-resident taxpayer was entitled to deduct the same expenses as a resident taxpayer where connected to the creation of taxable income. For example, in *Scorpio* (Case C-290/04), the Court held that "economically connected business expenses" are expenses that are directly linked to the economic activity that generated the taxable income.[45] In *Scorpio*, the Court decided that in terms of the retention of tax at source, reported direct expenses must be taken into account. Expenses that are not directly linked to the economic activity that generated the taxable income can be taken into account in a refund procedure.[46] It is also clear that the ECJ only requires a deduction of directly related expenses to the extent they are deductible for resident taxpayers. So why the distinction? The Opinion of Advocate General Jääskinen provides an instructive explanation. The Advocate General, who came to the same conclusion as the ECJ, explained the reasons for a limited deductibility by pointing out the different situations with regard to the Netherlands' power to tax concerning different types of income generated by the holding of Netherlands shares. A taxing right of the Netherlands exists only in respect of dividends flowing from such shares, but not capital gains. As non-residents are only comparable to residents to the extent that the Member State exercises a taxing right over their income, no comparability exists with regard to the latter. This situation requires a distinction to be made between costs that are more closely related to capital gains and costs more closely related to dividends, even though that distinction may not necessarily exist in a purely domestic situation.[47]

4.4. Neutralization and tax treaties

The final comment concerns the ECJ's approach to the "neutralization" argument. The ECJ's reasoning is fully consistent with its previous case law and affirms both the requirement for a tax credit to be granted on the basis of a bilateral obligation and the condition for such a credit to fully offset the relevant difference in treatment.

The ECJ, however, failed to elaborate on why the set-off granted by Belgium in the case of *X* was considered to be a "unilateral" advantage and thus not qualifying as a defence for the Netherlands. In paragraph 81 of the decision, the ECJ pointed out that "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

40. It has been pointed out that the allowance is clearly connected with personal circumstances, i.e. that it is intended to take into account the situation of small savers and investors (*see* legislative history: Explanatory memorandum (*Memorie van toelichting*), Second Chamber Documents (*Kamerstukken* II) 1998/99, 26 727, No. 3, pp. 237–238). It should also be noted that, in previous case law, the Netherlands Supreme Court, taking into account the aim of the allowance, decided that the allowance was generally linked with the ability-to-pay principle. Therefore, the tax-free capital allowance could only be awarded to non-residents if they met the criteria of the *Schumacker* doctrine (Case C-279/93) (*see* NL: HR, 9 Dec. 2011, Case no. 10/01409, BNB 2012/44 and NL: HR, 9 Dec. 2011, Case no. 10/03765, BNB 2012/45). Notably, when the Netherlands Supreme Court raised the question of whether the tax-free capital allowance should be taken into account when comparing the effective tax rates, it did not refer to its own case law on the character of the tax-free capital allowance, but did refer to *Welte* (C-181/12).
41. *SeeMiljoen and others* (C-10/14, C-14/14 and C-17/14), para. 53, citing AG Opinion in *Miljoen and others* (C-10/14, C-14/14 and C-17/14), para. 83. *See further*, in particular, para. 86 of the AG Opinion in *Miljoen and others* (C-10/14, C-14/14 and C-17/14).
42. DE: ECJ, 31 Mar. 2011, Case C-450/09, *Ulrich Schröder v. Finanzamt Hameln*, para. 40, ECJ Case Law IBFD ("expenses, such as business expenses which are directly linked to an activity which has generated taxable income").
43. *Commission v. Germany* (C-600/10), paras. 18-20.
44. *Miljoen and others* (C-10/14, C-14/14 and C-17/14), para. 60. However, under Netherlands tax law, the approach for linking expenses to income is different. Under NL: Corporate Income Tax Act (CITA) 1969, residents are taxed on their *net income*, i.e. income after deduction of direct and indirect business expenses causally linked to the income (*see* arts. 7-15a CITA 1969. Based on these provisions, certain expenses are not deductible, but these non-deductible expenses are not relevant to the present case). Furthermore, it must be noted that the Netherlands Supreme Court decided in NL: HR, 17 June 2011, Case no. 10/00076, BNB 2012/23, that "costs" are current expenses and that in respect of interest income received, the interest paid on loans taken up to finance the acquisition of debt claim receivables qualifies as a current expense. As consequence, the interest paid was deductible as a cost from the interest received. By analogy, under Netherlands tax law, interest paid on loans taken up to finance the acquisition of shares should be deductible as a cost from dividends received as well.
45. *See* DE: ECJ, 3 Oct. 2006, Case C-290/04, *FKP Scorpio Konzertproduktionen GmbH v. Finanzamt Hamburg-Eimsbüttel,* para. 44, ECJ Case Law IBFD. *See also*, FI: ECJ, 8 Nov. 2012, Case C-342/10, *European Commission v. Republic of Finland*, paras. 25-26, ECJ Case Law IBFD.
46. *See Scorpio* (C-290/04), paras. 50-51.
47. AG Opinion in *Miljoen and others* (C-10/14, C-14/14 and C-17/14), paras. 95-96.

is carried out under Belgian law".[48] Immediately after this statement, the decision concludes that: "[s]ince that set-off is granted unilaterally by the Kingdom of Belgium [...] the Netherlands cannot rely on that same convention in order to claim that it has neutralized the restriction in question".[49] The reason for this could be either that article 23(1) of the Belgian-Netherlands Income and Capital Tax Treaty (2001)[50] does not provide for an unconditional credit obligation, but makes the granting of relief (and not merely the procedure) "subject to the provisions of Belgian legislation concerning the offsetting against Belgian tax of taxes paid in another country", or that the offset actually granted by Belgium was not in line with the requirements of the tax treaty and thus by definition "unilateral" (tax treaty override).[51] The reason matters: If such conditionality in the tax treaty provision itself rendered any relief "unilateral", the defence would always be unavailable to Member States that have included a reference to domestic law in their tax treaties, regardless of whether the (conditional) obligation for a complete tax credit was actually met. It should be noted that such a reference was not included in the France-Netherlands Income and Capital Tax Treaty (1973) that was relevant in the *Société Générale* case. In that case, the Court accepted, based on an autonomously formulated tax treaty provision, an ordinary tax credit leading to an actual full credit and, therefore, neutralization in the years concerned.[52]

If the reason for a qualification being "unilateral" is based on incompatibility with the tax treaty, by contrast, a credit that is granted in fulfilment of such an obligation would be "bilateral" and thus – in principle – qualify as a justification ground.

The Commentary on the OECD Model (2014)[53] discusses a number of different approaches to tax credits for dividends. A "full" tax credit can be used against tax on any income, while an "ordinary" credit can only be used in respect of the income suffering foreign tax. The ECJ, in *Société Générale*, has (finally) made it clear that neutralization does not necessarily require a full tax credit. Rather, an ordinary tax credit can also achieve neutralization if it, in fact, leads to a full credit of the source state tax in the state of residence of the taxpayer (i.e. a set-off for the full amount of the difference in treatment arising under source state legislation).[54,55] In this way, the Court has (re) connected its case law with common tax treaty practice. Restricting neutralization to treaties with "full tax credits" would practically void that concept, as ordinary tax credits are much more common.

Further, the ECJ did not resolve the question concerning the effect of a credit carry-forward on the neutralization defence, since the question was "hypothetical" in the absence of a concrete examination of that issue by the lower courts in the Netherlands. This leaves open the possibility that the ECJ might consider it sufficient to receive a "full offset" over time in the state of residence, irrespective of any cash flow disadvantage that might arise from a mere carry-forward. A full offset would perhaps require, however, that such carry-forward be granted in respect of all cases of credit excess on the basis of an obligation provided for in the tax treaty (which is currently not the situation in any Member State). Even then it should, at most, be considered sufficient where the credit granted included interest for its delayed availability, and even then not all liquidity problems might be resolved. It should also be noted that in the *Société Générale* case, the general rule is that the source state has to remove the discriminatory taxation unless, by way of exception, this taxation is completely neutralized by the residence state. It is rather uncertain, however, whether the tax credit can be realized at all in the future. The establishment of the internal market would not be enhanced if the source state could rely on a potential carry-forward of the excess tax credit in the residence state. The disadvantageous tax treatment in the source state would, for the time being, not contribute to a level playing field for non-resident and resident portfolio shareholders because the non-resident portfolio shareholder would be taxed more heavily than the source state resident portfolio shareholder.

Lastly, the consequence of a partial offset by a credit granted in another country on a bilateral basis remains unanswered by the ECJ's decision. Although it clarified that, in this instance "the difference in treatment [...] does not disappear", thus requiring the source state to abolish that difference, it is not clear whether this requires a full refund or whether a partial refund of the excess of the difference in treatment over the amount of the tax credit provided would be sufficient.[56] If, for example, the source state levies a 15% discriminatory withholding tax and the residence state would provide a tax treaty credit of 5%, would the source state be in line with EU law if it reimburses the difference, i.e. 10%? Or is "neutralization" an "all-or-nothing" approach where the source state has to give a full refund if the residence state does not give a credit for the full amount of the discriminatory tax? While the Advocate General also did not address this question, his argu-

48. *Miljoen and others* (C-10/14, C-14/14 and C-17/14), para. 81.
49. Id., para. 82.
50. *Convention between the Kingdom of Belgium and the Kingdom of the Netherlands for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and on Capital* (unofficial translation) (5 June 2001) (as amended through 2009), Treaties IBFD.
51. As noted above, contrary to the opinion of the *Hoge Raad*, Belgium tax authorities consider that there is no need to grant a tax credit under the tax treaty (which makes the tax treaty relief "[s]ubject to the provisions of Belgian legislation"), because Belgium domestic law has abolished the tax credit for dividends.
52. *Miljoen and others* (C-10/14, C-14/14 and C-17/14), para. 85.
53. *OECD Model Tax Convention on Income and Capital: Commentary on Article 23* para. 16 (15 July 2014), Models IBFD.
54. *See*, for that standard, *Miljoen and others* (C-10/14, C-14/14 and C-17/14), para. 79.
55. *Id.*, para. 85.
56. The answer is, in the authors' view, also not conclusively resolved by paras. 82 to 84 of the decision, which deal with the deduction of the Netherlands withholding tax from the Belgian tax base, as the ECJ links that problem to the nature of the relief in Belgium and concludes that such deduction from the tax base is not enough to justify the restriction; *see Miljoen and others* (C-10/14, C-14/14 and C-17/14), paras. 82-84. AG Opinion in *Miljoen and others* (C-10/14, C-14/14 and C-17/14), para. 115, refers to the unilateral nature of the relief in Belgium and concludes that such deduction from the tax base is not enough to be considered to justify the restriction; *see Miljoen and others* (C-10/14, C-14/14 and C-17/14), paras. 82-84.

ments concerning the situation of actual full compensation despite the other state's bilateral obligation being limited to an ordinary credit suggest that only the reimbursement of any remaining difference is necessary, taking into account any credit actually provided.[57]

5. The Statement

The Confédération Fiscale Européenne welcomes the ECJ's decision in the case, which strongly affirms the right of non-resident taxpayers not to be taxed at a higher overall level than resident taxpayers, even where the systems of taxation differ between both types of taxpayers in other respects. This will lead to significant improvement of the situation for cross-border portfolio investors, who continue to suffer from withholding taxes imposed by several Member States.

The Confédération Fiscale Européenne further welcomes the various clarifications in this respect, particularly concerning the meaning of the *Truck Center* decision, the definition of personal allowances within the scope of the *Schumacker* decision and its case law on the possible neutralization of disadvantages by way of bilateral tax treaties.

The Confédération Fiscale Européenne notes that, despite these clarifications, uncertainty continues to persist with regard to the significance of a credit carry-forward granted by a residence state for a possible neutralization of disadvantages, which the ECJ did not directly address, and with respect to the need for reimbursement of withholding taxes where (only) a partial offset in the residence state is available.

The Confédération Fiscale Européenne wishes to take the opportunity to urge the Member States and the European Institutions to continue to work on improving procedures with regard to relief from withholding taxation in the source state under tax treaties and EU law.

57. Advocate General Opinion in *Miljoen and others* (C-10/14, C-14/14 and C-17/14), para. 115.