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**Opinion Statement ECJ-TF 1/2016
on the judgment of 17 September 2015 of the Court of Justice
of the EU in the combined Cases C-10/14, *Miljoen*, C-14/14, X,
and C-17/14, *Société Générale*, on the Dutch dividend with-
holding tax**

Prepared by the CFE ECJ Task Force

Submitted to the European Institutions in February 2016

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This is an Opinion Statement prepared by the CFE ECJ Task Force¹ on combined Cases C-10/14, C-14/14 and C-17/14, in which the 3rd Chamber of the Court of Justice of the European Union (ECJ) delivered its judgment on 17 September 2015², following the Opinion of Advocate General Jääskinen of 25 June 2015³. The cases concern the taxation of dividends received by individual and corporate non-resident taxpayers. They answer several questions in respect of 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 of a double taxation convention. After illustrating the factual background, parties' arguments and the ECJ's decision, this Opinion Statement will focus on issues the ECJ left open.

I. Background and Issues

1. The Netherlands imposes a 15% withholding tax on dividends paid by Dutch companies to resident and non-resident taxpayers. While resident taxpayers can credit this withholding tax against their Dutch 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 combined cases differed in some details. However, the main issues raised by each case were 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 when 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 allowance legitimately reserved to resident taxpayers and non-residents with substantially all their income in the Netherlands (and so fall within the *Schumacker* case law)?
 - Which expenses are to be taken into account for purposes of determining the taxation which 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 so 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 been effectively neutralised by another State? Does such neutralisation have to be based on bilateral agreement with another State, when do the terms of a treaty ensure that neutralisation is bilateral, and what is effective neutralisation?
2. Mr Miljoen, a Belgian resident, received dividend payments from shares he held in Dutch companies, which were subject to the 15% final withholding tax. If a Dutch 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

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² EU:C:2015:608.

³ EU:C:2015:429.

could have been set against the 30% income tax levied on so-called “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 € 20,014⁴ and which, as was pointed out by Advocate General Jääskinen is effectively equivalent to a 1.2% wealth tax⁵. 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.

3. Ms X, equally a Belgian resident receiving dividends from a Dutch 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 Dutch 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 Dutch withholding tax. According to the ECJ, the Hoge Raad thus asked whether such partial neutralisation could be considered sufficient to compensate for any disadvantage arising from the potentially discriminatory withholding tax⁶. 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 Dutch tax from her Belgian tax liability – and the CJEU also considered this⁷.
4. Société Générale, a company established in France, also received portfolio dividends from Dutch investments that were subject to the 15 % withholding tax. Under the France-Netherlands tax treaty, it successfully claimed to offset 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 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 the 2008 disadvantage could be treated as neutralised, even though no credit was available in 2008, on the basis that a credit carry-forward was available in France.
5. Advocate General Jääskinen proposed to answer most questions in favour of the taxpayers.
 - *Framework for determining comparability.* He rejected the Netherlands’ argument based on *Truck Center*⁸ that non-residents are not entitled to the same treatment as residents with respect to withholding tax because they are not comparable. The AG followed the Commission’s view that the statements in *Truck Center* are relevant only to 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-residents⁹. In this respect, AG Jääskinen argued that any comparison needs to pertain to

⁴ ECJ, 17 September 2015, Cases C-10/14, C-14/14 and C-17/14, *Miljoen and others*, EU:C:2015:608, paras 6-13.

⁵ Opinion of AG Jääskinen, 25 June 2015, Cases C-10/14, C-14/14 and C-17/14, *Miljoen and others*, EU:C:2015:429, para. 57.

⁶ However, the Dutch Supreme Court held that the deduction led nevertheless to a full compensation of the disadvantage caused by the different treatment of non-resident taxpayers compared to resident taxpayers. See Hoge Raad (Supreme Court) 20 December 2013, no. 12/04717 (X), published in, *inter alia*, *Beslissingen in belastingzaken Nederlandse Belastingrechtspraak (BNB)* 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 ECJ, 22 December 2008, Case C-282/07, *Truck Center*, EU:C:2008:762. See on that case also 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.

⁹ Opinion of AG Jääskinen, 25 June 2015, Cases C-10/14, C-14/14 and C-17/14, *Miljoen and others*, EU:C:2015:429, para. 53.

“the tax burden which is ultimately borne respectively by those two categories of shareholders”, both in the case 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”¹⁰.

- *Tax allowances and Schumacker*. Concerning the tax-free allowance for capital assets granted to resident individual shareholders, the AG referred to the judgment in *Welte*¹¹ to confirm 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 taxpayers’ overall ability to pay, but rather the amount of capital they hold¹². The AG endorsed the argument of the Commission that the approach to allowances needed to be determined on the basis of the relevant provision’s objective¹³.
- *Permitted expenses*. Concerning the deductibility of financing costs, the AG suggested to restrict 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, while recommending leaving the decision of which costs fall into which category to the domestic court¹⁴.
- *Neutralisation and tax treaties*. On the question of neutralisation by other States, AG Jääskinen argued that established case law meant that any difference in treatment arising from the Dutch provisions could only be justified in this way if the relevant tax treaty neutralised the difference in treatment “in all cases”¹⁵. However, a reimbursement of tax withheld would only be required if the difference had not been neutralised in the individual case¹⁶. Finally, with respect 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 treatment¹⁷.

II. The Judgment of the Court

II.1. Introduction

6. The ECJ followed the AG 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 to the Hoge Raad, having ruled on issues to take into account. The ECJ largely stood firmly on previous jurisprudence, clarifying certain points that have before been doubtful. The ECJ also explained its previous case law concerning neutralisation of differences in treatment by a tax treaty, and generally held that the relevant treaty provisions were not sufficient to neutralise the relevant differences in treatment in the cases at hand.

II.2. Framework for determining comparability

7. As a starting point to determine the comparability of residents and non-residents, the ECJ follows the AG Jääskinen’s approach of considering the burden imposed by dividend withholding tax and mainstream

¹⁰ Opinion of AG Jääskinen, 25 June 2015, Cases C-10/14, C-14/14 and C-17/14, *Miljoen and others*, EU:C:2015:429, para. 64 and 70.

¹¹ ECJ, 17 October 2013, Case C-181/12, *Welte*, EU:C:2013:662.

¹² Opinion of AG Jääskinen, 25 June 2015, Cases C-10/14, C-14/14 and C-17/14, *Miljoen and others*, EU:C:2015:429, para. 85.

¹³ Opinion of AG Jääskinen, 25 June 2015, Cases C-10/14, C-14/14 and C-17/14, *Miljoen and others*, EU:C:2015:429, para. 83.

¹⁴ Opinion of AG Jääskinen, 25 June 2015, Cases C-10/14, C-14/14 and C-17/14, *Miljoen and others*, EU:C:2015:429, para. 98.

¹⁵ Opinion of AG Jääskinen, 25 June 2015, Cases C-10/14, C-14/14 and C-17/14, *Miljoen and others*, EU:C:2015:429, para. 112.

¹⁶ Opinion of AG Jääskinen, 25 June 2015, Cases C-10/14, C-14/14 and C-17/14, *Miljoen and others*, EU:C:2015:429, para. 115.

¹⁷ Opinion of AG Jääskinen, 25 June 2015, Cases C-10/14, C-14/14 and C-17/14, *Miljoen and others*, EU:C:2015:429, para. 125.

income tax together, holding the Dutch withholding tax to be “a prepayment of income tax under ‘heading 3’” (so-called “box 3”), or in the case of Société Générale corporation tax¹⁸. 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 factors to be taken into account for the assessment of the effective tax burden in each case¹⁹.

8. The ECJ then explained key points of how to conduct such 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 purposes of the comparison. The ECJ said 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 of all shares held during the year, rather than looking at dividends earned separately per share over a different time period.
9. While AG Jääskinen had referred to the possible legislative purpose of preventing juridical double taxation, but had rejected its pertinence for the situations’ objective comparability²⁰, the ECJ referred to the purpose of avoiding economic double taxation as a ground to establish comparability, citing its established case law according to which a Member State must alleviate such double taxation for non-residents in the same way that 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”²¹.
10. The ECJ then dealt with the Netherlands’ argument based on the Court’s decision in *Truck Center*²² concerning the objective non-comparability of residents’ and non-residents’ situations. According to the Dutch 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 repeated that in that case the difference in treatment did not necessarily procure an advantage for resident recipients. However in the present case, the taxpayers 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.

II.3. Allowances and *Schumacker*

11. 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”²³. The ECJ thereby drew a distinction to allowances that would constitute “an individual advantage connected with the personal situation of the taxpayer”²⁴, which – by implication – would not have to be so extended.

¹⁸ ECJ, 17 September 2015, Cases C-10/14, C-14/14 and C-17/14, *Miljoen and others*, EU:C:2015:608, para. 46-47.

¹⁹ ECJ, 17 September 2015, Cases C-10/14, C-14/14 and C-17/14, *Miljoen and others*, EU:C:2015:608, para. 48-49.

²⁰ Opinion of AG Jääskinen, 25 June 2015, Cases C-10/14, C-14/14 and C-17/14, *Miljoen and others*, EU:C:2015:429, para. 61

²¹ ECJ, 17 September 2015, Cases C-10/14, C-14/14 and C-17/14, *Miljoen and others*, EU:C:2015:608, para. 68.

²² ECJ, 22 December 2008, Case C-282/07, *Truck Center*, EU:C:2008:762.

²³ ECJ, 17 September 2015, Cases C-10/14, C-14/14 and C-17/14, *Miljoen and others*, EU:C:2015:608, para. 53.

²⁴ ECJ, 17 September 2015, Cases C-10/14, C-14/14 and C-17/14, *Miljoen and others*, EU:C:2015:608, para. 53.

II.4. Permitted expenses

12. On the deductibility of business expenses for non-resident companies such as Société Générale, the ECJ also agreed with AG Jääskinen and, relying on its decision in *Commission v Germany*²⁵, 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 comparison²⁶. The ECJ went on to specify that neither the part of the purchase price of shares that represents an upcoming dividend (which can be deducted when calculating the taxable 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-residents²⁷.

II.5. Neutralisation and tax treaties

13. On the question of a possible “justification based on the application of a convention for the avoidance of double taxation”²⁸ (i.e., the “neutralisation”-argument), the ECJ explained its established case law. Citing *Amurta*²⁹, it held that a Member State “cannot rely on the existence of a tax advantage granted unilaterally by another Member State”³⁰, but “might succeed in ensuring compliance with its obligations under the Treaty by concluding a convention for the avoidance of double taxation”³¹, where “that application of such a convention [allows] the effects of the difference in treatment under national legislation to be compensated for”³², 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”³³.

14. In the case of Ms X, the ECJ held that the set-off granted by Belgium for Dutch withholding tax was both only unilateral and partial and could thus not justify the difference in treatment³⁴.

15. In the case of Société Générale, the ECJ distinguished between the years 2000 to 2007, when the Dutch tax was fully credited against French tax, and the year 2008, when there was no French tax and so no credit. With respect to the former, the ECJ held that “the restriction alleged was entirely neutralised by the fact that, in France, the tax on dividends [...] were offset in full”, relieving the Netherlands from any obligation to give a refund³⁵. With respect 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 ascertain³⁶. However, the ECJ 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 question³⁷.

²⁵ ECJ, 22 November 2012, Case C-600/10, *Commission v Germany*, EU:C:2012:737.

²⁶ ECJ, 17 September 2015, Cases C-10/14, C-14/14 and C-17/14, *Miljoen and others*, EU:C:2015:608, para. 58-59.

²⁷ ECJ, 17 September 2015, Cases C-10/14, C-14/14 and C-17/14, *Miljoen and others*, EU:C:2015:608, para. 60.

²⁸ ECJ, 17 September 2015, Cases C-10/14, C-14/14 and C-17/14, *Miljoen and others*, EU:C:2015:608, para. 75.

²⁹ Case C-379/05, *Amurta*, EU:C:2007:655.

³⁰ ECJ, 17 September 2015, Cases C-10/14, C-14/14 and C-17/14, *Miljoen and others*, EU:C:2015:608, para. 77.

³¹ ECJ, 17 September 2015, Cases C-10/14, C-14/14 and C-17/14, *Miljoen and others*, EU:C:2015:608, para. 78.

³² Cases C-10/14, C-14/14 and C-17/14, *Miljoen and others*, EU:C:2015:608, para. 79.

³³ ECJ, 17 September 2015, Cases C-10/14, C-14/14 and C-17/14, *Miljoen and others*, EU:C:2015:608, para. 79, citing ECJ, 3 June 2010, Case C-487/08, *Commission v. Spain*, EU:C:2010:310, para. 59.

³⁴ ECJ, 17 September 2015, Cases C-10/14, C-14/14 and C-17/14, *Miljoen and others*, EU:C:2015:608, paras 81-84.

³⁵ ECJ, 17 September 2015, Cases C-10/14, C-14/14 and C-17/14, *Miljoen and others*, EU:C:2015:608, para. 85.

³⁶ ECJ, 17 September 2015, Cases C-10/14, C-14/14 and C-17/14, *Miljoen and others*, EU:C:2015:608, para. 86.

³⁷ ECJ, 17 September 2015, Cases C-10/14, C-14/14 and C-17/14, *Miljoen and others*, EU:C:2015:608, para. 88.

III. Comments

III.1. Framework for determining comparability

16. The present case clarifies the ECJ's assessment of (dividend) withholding taxes within the EU. Most notably, it firmly rejects the Member States' reliance on its earlier decision in *Truck Center* to justify a different tax burden imposed on non-residents as compared to resident taxpayers. Following *Miljoen*, 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 relevantly different treatment, as AG Jääskinen had done in his opinion.
17. AG Jääskinen identified that non-residents suffered a heavier tax burden and his view was that was sufficient to establish a restriction. However the ECJ took a more conventional analysis 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 Dutch 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 AG Jääskinen and the ECJ focused on whether the legislation had the practical effect of ultimately placing a heavier tax burden on non-residents³⁸ even though different taxes were applicable domestically and cross-border. Whereas non-resident individual portfolio investors were only taxed with a dividend withholding tax on the dividends received, resident individuals were also taxed on a notional income under the personal income tax under which they could set-off the dividend withholding tax. As far as the dividend withholding tax would exceed the personal income tax due, the excess would be refunded through a personal income tax assessment. The position for corporates 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.

III.2. Allowances and *Schumacker*

18. 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 it has been 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 was thus necessary to be taken into account for purposes of determining a non-discriminatory tax burden, from the case of a personal allowance, which only the residence state must grant. This is a significant result, as it confirms the decision of the ECJ in *Welte* and narrows the application of the *Schumacker* exception from comparability³⁹. In any case, 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

³⁸ Opinion of AG Jääskinen, 25 June 2015, Cases C-10/14, C-14/14 and C-17/14, *Miljoen and others*, EU:C:2015:429, para. 55.

³⁹ 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 (in Dutch: Memorie van toelichting), Second Chamber Documents (in Dutch: Kamerstukken II) 1998/99, 26 727, No. 3, pp. 237–238). It should also be noted that, in previous case law, the Dutch 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 (see *Hoge Raad* 9 December 2011, no. 10/01409, *BNB* 2012/44 and *Hoge Raad* 9 December 2011, no. 10/03765, *BNB* 2012/45). Notably, when the Dutch 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, whereas it did refer to the *Welte* case.

with personal circumstances. Where the advantage is not solely based on these, 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 the AG Jääskinen's opinion, to which the ECJ explicitly referred⁴⁰.

III.3. Permitted expenses

19. 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 any self-standing reasoning 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*, directly related expenses were mentioned merely as an example⁴¹. In *Commission v. Germany*, the Commission had itself claimed that a direct link existed and the ECJ rejected its claim since it had not proven the existence of that direct link⁴². 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”⁴³.
20. 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 these are connected with the creation of taxable income. For example, in the *Scorpio* case, the Court held that “economically connected business expenses” are expenses that are directly linked to the economic activity that generated the taxable income⁴⁴. In the *Scorpio* case, the Court decided that at the retention of tax at source, reported direct expenses must be taken into account. Expenses that are not directly linked to economic activity that generated the taxable income can be taken into account in a refund procedure⁴⁵. It is also clear that the ECJ only requires the deduction of directly related expenses only to the extent to which they are deductible for resident taxpayers. So why the distinction? The opinion of AG Jääskinen provides an instructive explanation. The AG, who came to the same conclusion as the ECJ, explained the reasons for a limited deductibility by pointing out the different situations with respect to the Netherlands' power to tax concerning different types of income generated by the holding of Dutch shares. A taxing right of the Netherlands exists only with respect to dividends flowing from such shares, but not with respect to 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

⁴⁰ See ECJ, 17 September 2015, Cases C-10/14, C-14/14 and C-17/14, *Miljoen and others*, EU:C:2015:608, para. 53, citing Opinion of AG Jääskinen, 25 June 2015, Cases C-10/14, C-14/14 and C-17/14, *Miljoen and others*, EU:C:2015:429, para. 83. See further especially para. 86 of the AG's opinion.

⁴¹ ECJ, 31 March 2011, Case C-450/09, *Schröder*, EU:C:2011:198, para. 40 (“[...] expenses, such as business expenses which are directly linked to an activity which has generated taxable income [...]”).

⁴² ECJ, 22 November 2012, Case C-600/10, *Commission v. Germany*, EU:C:2012:737, paras 18-20.

⁴³ ECJ, 17 September 2015, Cases C-10/14, C-14/14 and C-17/14, *Miljoen and others*, EU:C:2015:608, para. 60. However, under Dutch tax law the approach to link expenses with income is different. Under the 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 for the present case). Furthermore, it must be noted that the Dutch Supreme Court has decided in Hoge Raad 17 June 2011, 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 claims receivables qualify as current expenses. As consequence, the interest paid was deductible as costs from the interest received. By analogy, under Dutch tax law, interest paid on loans taken up to finance the acquisition of shares should be deductible as costs from dividends received as well.

⁴⁴ See ECJ, 3 October 2006, C-290/04, *Scorpio* [2006] ECR I-09461, para. 44. See also, ECJ, 8 November 2012, C-342/10, *Commission/Finland* [2012] EU:C:2012:688, para. 25-26

⁴⁵ See ECJ, 3 October 2006, C-290/04, *Scorpio* [2006] ECR I-09461, paras 50-51.

with respect to the latter. This situation requires a distinction to be made between costs that are closer related to capital gains and costs that are closer related to dividends, even though that distinction may not necessarily exist in a purely domestic situation⁴⁶.

III.4. Neutralisation and tax treaties

21. The final comment concerns the ECJ's approach to the "neutralisation" argument. The ECJ's reasoning described above 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 credit to fully offset the relevant difference in treatment.

22. However, the ECJ failed to elaborate why the set-off granted by Belgium in the case of X was considered to be a "unilateral" advantage and thus not qualifying as defence for the Netherlands. In paragraph 81 of the judgment, 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 is carried out under Belgian law"⁴⁷. Immediately after this statement, the judgment concludes: "Since 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"⁴⁸. The reason for this could be either that Article 23(1) of the Belgian-Dutch tax treaty 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)⁴⁹. 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 which have included a reference to domestic law in their DTCs, 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 Netherlands-France DTC which was the relevant DTC in the *Société Générale* case. In that case, the Court accepted, based on an autonomously formulated DTC provision, an ordinary tax credit leading to an actual full credit and therefore neutralization in the years concerned⁵⁰.

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

23. The Commentary to the OECD Model Tax Convention 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 tax⁵¹. The ECJ in *Société Générale* has (finally) made it clear that neutralisation does not necessarily require a full tax credit. Rather an ordinary tax credit can also achieve neutralisation 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 in the full amount of the difference in treatment arising under

⁴⁶ Opinion of AG Jääskinen, 25 June 2015, Cases C-10/14, C-14/14 and C-17/14, *Miljoen and others*, EU:C:2015:429, para. 95-96.

⁴⁷ ECJ, 17 September 2015, Cases C-10/14, C-14/14 and C-17/14, *Miljoen and others*, EU:C:2015:608, para. 81.

⁴⁸ ECJ, 17 September 2015, Cases C-10/14, C-14/14 and C-17/14, *Miljoen and others*, EU:C:2015:608, para. 82.

⁴⁹ As noted above, contrary to the opinion of the Hoge Raad, 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 Belgium domestic law has abolished the tax credit for dividends.

⁵⁰ ECJ, 17 September 2015, Cases C-10/14, C-14/14 and C-17/14, *Miljoen and others*, EU:C:2015:608, para. 85.

⁵¹ Art 23 para. 16 OECD MC Comm.

source State legislation⁵²)⁵³. In this way, the Court has (re)connected its case law with common tax treaty practice. Restricting neutralisation to treaties with “full tax credits” would make that concept nearly void, as ordinary tax credits are much more common.

24. 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 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 for all cases of credit excess on the basis of an obligation provided for in the tax treaty (which is currently not the case 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 solved. 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. However, it is rather uncertain 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.
25. Lastly, the consequence of a partial offset by a credit granted in another country on a bilateral basis remains unanswered by the ECJ’s judgment. Although it clarified that in this case “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 sufficient⁵⁴. If, e.g., the source State levies a 15% discriminatory withholding tax and the residence State would give a tax treaty credit for 5%, would the source State be in line with EU law if it reimburses the difference, i.e., 10%? Or is “neutralisation” 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 discriminatory tax? While the AG did not address this question either, his arguments 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 any credit actually provided into account⁵⁵.

IV. The Statement

⁵² See for that standard ECJ, 17 September 2015, Cases C-10/14, C-14/14 and C-17/14, *Miljoen and others*, EU:C:2015:608, para. 79.

⁵³ ECJ, 17 September 2015, Cases C-10/14, C-14/14 and C-17/14, *Miljoen and others*, EU:C:2015:608, para. 85.

⁵⁴ The answer is, in our view, also not conclusively solved by paras 82 to 84 of the judgment which deal with the deduction of the Dutch withholding tax from the Belgian tax base, as the ECJ links that problem 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 ECJ, 17 September 2015, Cases C-10/14, C-14/14 and C-17/14, *Miljoen and others*, EU:C:2015:608, paras 82 to 84.

⁵⁴ Opinion of AG Jääskinen, 25 June 2015, Cases C-10/14, C-14/14 and C-17/14, *Miljoen and others*, EU:C:2015:429, para. 115. with 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 ECJ, 17 September 2015, Cases C-10/14, C-14/14 and C-17/14, *Miljoen and others*, EU:C:2015:608, paras 82 to 84.

⁵⁵ Opinion of AG Jääskinen, 25 June 2015, Cases C-10/14, C-14/14 and C-17/14, *Miljoen and others*, EU:C:2015:429, para. 115.

26. 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 amount 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, which continue to suffer from withholding taxes imposed by several Member States.
27. The Confédération Fiscale Européenne further welcomes the various clarifications in this respect, particularly concerning the meaning of the *Truck Center* judgment, the definition of personal allowances within the scope of the *Schumacker* judgment and its case law on the possible neutralisation of disadvantages by way of bilateral tax treaties.
28. 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 neutralisation 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.
29. 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.