Reports of Cases

OPINION OF ADVOCATE GENERAL
WATHELET
delivered on 7 August 2018[1]

**Case C-575/17**

**Sofina SA,**
**Rebelco SA,**
**Sidro SA**
**v**
**Ministre de l'Action et des Comptes publics**

(Request for a preliminary ruling from the Conseil d'État (Council of State, France))

(Reference for a preliminary ruling — Free movement of capital — Withholding tax on the gross amount of nationally sourced dividends paid to non-resident companies — Different tax treatment, based on the net result, of dividends paid to resident companies)

## I. Introduction

1. This request for a preliminary ruling concerns the interpretation of Articles 63 and 65 TFEU in the light of provisions of French law establishing withholding tax on the gross amount of dividends paid by resident companies to loss-making non-resident companies, while dividends paid to loss-making resident companies are taxed under the general rules, on their net amount, only at a later stage, if their result shows a surplus.

## II. Legal context

### A. French law

2. Under Article 38 of the code général des impôts (French General Tax Code, 'the CGI'):

'… the taxable profit is the net profit, calculated on the basis of the results of all transactions of every kind performed by undertakings, including, in particular, all transfers of assets, either during or at the end of operations.'

3. Article 39(1) of the CGI adds:

'The net profit is established after deduction of all charges …'

1 Original language: French.

4. Article 119 *bis*(2) of the CGI provides that the income referred to in Articles 108 to 117 *bis* of the CGI, including dividends, gives rise to the levying of withholding tax at the rate fixed in Article 187(1) in the case of income benefiting persons with their tax residence or seat outside France.

5. In the version applicable to the facts of this case, Article 187(1) of the CGI fixed the rate of withholding tax at 25%.

6. In the version that applied prior to 21 September 2011, Article 209(1) of the CGI stated:

'… If a loss is sustained during a financial year, it shall be treated as a charge in the following financial year and shall be deducted from the profit recorded for that year. If that profit is insufficient for the deduction to be made in full, the excess loss shall be carried forward to subsequent financial years.'

7. Since 21 September 2011, Article 209(1) has been worded as follows:

'… If a loss is sustained during a financial year, it shall be treated as a charge in the following financial year and shall be deducted from the profit recorded for that year up to a maximum amount of EUR 1 000 000 increased by 60% of the amount corresponding to the taxable profit for that year exceeding the first amount. If that profit is insufficient for the deduction to be made in full, the excess loss shall be carried forward under the same conditions to subsequent financial years. The same shall apply to the portion of the excess not eligible for deduction under the first sentence of this subparagraph.'

### B. The tax convention of 10 March 1964 between France and Belgium

8. Article 15 of the tax convention of 10 March 1964 between France and Belgium, as subsequently amended ('the France-Belgium Tax Convention'), provides as follows:

'1. Dividends originating in a Contracting State which are paid to a resident of the other Contracting State are taxable in that other State.

2. However, subject to the provisions of paragraph 3, such dividends may be taxed in the Contracting State of which the company paying the dividends is a resident, in accordance with the law of that State, but the tax so charged shall not exceed:

(a) 10% of the gross amount of the dividends if the recipient is a company which has had exclusive ownership of at least 10% of the capital of the company distributing the dividends since the beginning of the last financial year of that company closed before the distribution;

(b) 15% of the gross amount of the dividends in other cases. This paragraph shall not concern the taxation of the company in respect of the profits out of which the dividends are paid.

…'

## III. Factual background

9. Sofina SA, Rebelco SA and Sidro SA, companies incorporated under Belgian law and resident in Belgium, received between 2008 and 2011 dividends in respect of their stakes in a number of French companies in which they had minority shareholdings which did not give entitlement to the application of the regime for parent companies provided for in the CGI and Council Directive 2011/96/EU of 30 November 2011 on the common system of taxation applicable in the case of parent companies and

subsidiaries of different Member States[2] ('the Parent-Subsidiary Directive').

10. Under the combined provisions of Article 119 *bis* of the CGI and Article 15(2) of the France-Belgium Tax Convention, those dividends were subject to withholding tax at the rate of 15%.

11. Since the Belgian companies concerned had closed the financial years 2008 to 2011 with a negative result, they submitted claims to the French tax authorities for a refund of the tax levied. In so far as a loss-making company with its seat in France is actually taxed on French-sourced dividends only where its taxable result returns to a surplus, the Belgian companies concerned argued that they were treated less favourably than their French counterparts.

12. After those claims were refused, the Belgian companies concerned brought proceedings before the competent courts which, at both first instance and on appeal, dismissed their refund actions.

13. They therefore brought an appeal in cassation before the Conseil d'État (Council of State, France).

14. That court held, first, that the levying of withholding tax only on loss-making non-resident companies when they receive dividends from their shareholdings in French companies may result in a cash-flow disadvantage for them as compared with loss-making resident companies in receipt of dividends from their shareholdings in French companies. It nevertheless wishes to ascertain whether that fact constitutes in itself a difference in treatment characterising a restriction under Article 63 TFEU.

15. Assuming that the legislation at issue amounts to such a restriction, the Conseil d'État (Council of State) asks, secondly, whether, in the light of the objective of those provisions, namely to ensure the effective collection of tax, that restriction could be justified.

16. Thirdly, the Conseil d'État (Council of State) observes that the differences in the way the base for taxing dividends is calculated, depending on whether they are received by resident or non-resident companies, could also constitute a restriction. Where the withholding tax provided for in Article 119 *bis* of the CGI is calculated on the gross amount of dividends, the expenses linked to their actual receipt are deducted from the base for calculating the tax in the case of dividends paid to a resident company, while no such deduction is possible in the case of dividends paid to a non-resident company.

17. 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) Must Articles … 63 and 65 [TFEU] be interpreted as meaning that the cash-flow disadvantage resulting from the application of withholding tax to dividends paid to loss-making non-resident companies, while loss-making resident companies are not taxed on the amount of the dividends they receive until the year when, if at all, they return to a surplus, constitutes in itself a difference in treatment characterising a restriction on the free movement of capital?

(2) Must the potential restriction on the free movement of capital referred to in the preceding question, in view of the requirements resulting from Articles … 63 and 65 [TFEU], be regarded as being justified by the need to ensure the effective collection of tax, since non-resident companies are not subject to the supervision of the French tax authorities, or by the need to safeguard the allocation of the power to impose taxes between the Member States?

2 OJ 2011 L 345, p. 8.

(3) If application of the withholding tax at issue may in principle be allowed with regard to the free movement of capital:

– do those provisions preclude the collection of withholding tax on dividends paid by a resident company to a loss-making non-resident company of another Member State where the latter ceases to trade without returning to a surplus, while a resident company placed in that situation is not taxed on such dividends?

– must those provisions be interpreted as meaning that where taxation rules apply which treat dividends differently depending on whether they are paid to residents or non-residents, it is appropriate to compare the actual tax burden borne by each of them in respect of those dividends, so that a restriction on the free movement of capital resulting from the fact that those rules preclude for non-residents alone the deduction of expenses which are directly linked to the actual payment of the dividends may be regarded as being justified by the difference in the rate of tax between the general tax payable in a subsequent year by residents and the withholding tax levied on dividends paid to non-residents, where that difference compensates, with regard to the amount of tax paid, for the difference in the tax base?'

## IV. Procedure before the Court

18. This request for a preliminary ruling was lodged at the Court on 28 September 2017. Written observations were submitted by Sofina, the French, Belgian, German, Netherlands, Swedish and United Kingdom Governments and the European Commission.

19. A hearing took place on 25 June 2018 during which Sofina, the French, German and Swedish Governments and the Commission submitted oral observations.

## V. Assessment

### A. Preliminary remarks

20. From the outset, the national court frames its questions against the backdrop of the free movement of capital and Articles 63 and 65 TFEU, since the Belgian companies Sofina, Rebelco and Sidro received dividends in respect of minority shareholdings in French companies which did not entitle them to exercise decisive influence in the undertaking. However, the ensuing reasoning would be exactly the same if freedom of establishment were at issue, since all the dividend payments concerned were made exclusively between companies established in Member States.

21. The questions referred by the national court indicate that there are two differences under French law in the tax treatment of dividends, depending on whether they are paid by resident companies to other resident companies or to non-resident companies:

– dividends paid to loss-making resident companies will be taxed only if and when their result shows or returns to a surplus, while French law imposes withholding tax on dividends paid by resident companies to non-resident companies even if the latter are loss-making. The former might therefore never be taxed and, if they are, they will in any event benefit from a cash-flow advantage since the withholding tax on dividends paid to non-resident companies will necessarily be levied, whether during the same financial year or not, before the dividends paid to resident companies are taxed. That first difference in treatment is the subject of the first and second questions referred and the first part of the third question referred;

– the basis for calculating the taxation of dividends is different, since the withholding tax on dividends paid to non-resident companies is levied on the gross amount of dividends, while dividends paid to resident companies are taxed on their net amounts, the expenses of receiving those dividends being eligible for a deduction that does not apply in the case of dividends paid to non-resident companies. That difference in treatment is the subject of the second part of the third question referred.

22. I will deal first of all with the first and second questions referred and with the first part of the third question, after which I will address the remainder of the third question.

## B. First and second questions referred and the third part of the third question referred

### *1. The case-law of the Court on the taxation of 'outgoing' dividends*

23. The Court has abundant case-law tackling the issue of the different tax treatment of dividends depending on whether the resident company making the distribution (a subsidiary, for example) pays them to a resident shareholder (a parent company, for example) or a non-resident shareholder. In the latter situation, we speak of 'outgoing dividends'.

24. According to the Court, 'the less favourable treatment by a Member State of dividends paid to non-resident [taxpayers], compared to the treatment of dividends paid to resident [taxpayers], is liable to deter companies established in a Member State other than that first Member State from pursuing investments in that same first Member State and, consequently, amounts to a restriction of the free movement of capital, prohibited, in principle, under Article 63 TFEU'.[3]

25. Once a Member State, unilaterally or by way of a convention, taxes not only resident shareholders but also non-resident shareholders in respect of dividends received from a resident company, the position of non-resident shareholders is comparable to that of resident shareholders.[4]

26. In so far as the respective situations of shareholders are therefore comparable, national legislation 'amounts to a discriminatory measure which is incompatible with the [TFEU], in that it imposes a heavier tax burden on dividends paid by resident subsidiaries to [non-resident] parent companies than that imposed on dividends paid to [resident] parent companies'.[5]

27. That is so a fortiori if the dividends which do not leave the Member State are taxable later than outgoing dividends or are totally exempt while outgoing dividends are taxed.[6]

28. Very often, the State of residence of the distributing company levies withholding tax on outgoing dividends. However, it is not that particular withholding tax levied only on dividends paid to non-resident shareholders which constitutes as such a restriction on the free movement of capital, because it is simply a procedure for charging tax.[7] What matters is the difference in the overall tax treatment of the two categories of dividends.

3 Judgment of 2 June 2016, *Pensioenfonds Metaal en Techniek* (C-252/14, EU:C:2016:402, paragraph 28 and the case-law cited).

4 See judgments of 12 December 2006, *Test Claimants in Class IV of the ACT Group Litigation* (C-374/04, EU:C:2006:773, paragraph 68); of 14 December 2006, *Denkavit Internationaal and Denkavit France* (C-170/05, EU:C:2006:783, paragraph 35); of 8 November 2007, *Amurta* (C-379/05, EU:C:2007:655, paragraph 38); of 20 May 2008, *Orange European Smallcap Fund* (C-194/06, EU:C:2008:289, paragraphs 78 and 79); and of 10 May 2012, *Santander Asset Management SGIIC and Others* (C-338/11 to C-347/11, EU:C:2012:286, paragraph 44).

5 Judgment of 14 December 2006, *Denkavit Internationaal and Denkavit France* (C-170/05, EU:C:2006:783, paragraph 39).

6 See judgments of 8 November 2007, *Amurta* (C-379/05, EU:C:2007:655, paragraph 61), and of 18 June 2009, *Aberdeen Property Fininvest Alpha* (C-303/07, EU:C:2009:377, paragraph 76).

7 See judgments of 22 December 2008, *Truck Center* (C-282/07, EU:C:2008:762, paragraphs 38 to 50), and of 10 May 2012, *Santander Asset Management SGIIC and Others* (C-338/11 to C-347/11, EU:C:2012:286, paragraph 43).

29. In several cases, the Court has found that a restriction on the free movement of capital existed where the Member State of the distributing company levied withholding tax both on outgoing dividends and dividends which do not leave its territory. That occurred in the case giving rise to the judgment of 20 October 2011, *Commission* v *Germany* (C-284/09, EU:C:2011:670), where withholding tax was levied on all dividends distributed by a company established in Germany but only resident companies had the benefit of a tax credit, which was even refunded if the definitive income tax was less than the tax credit, while, as regards non-resident companies, withholding tax was definitively levied.

30. The same happened in the case giving rise to the order of 12 July 2012, *Tate & Lyle Investments* (C-384/11, not published, EU:C:2012:463), where resident recipients of dividends were subject to withholding tax that could be offset and was refundable while withholding tax was definitive for non-residents.

31. A further example can be found in the case giving rise to the judgment of 17 September 2015, *Miljoen and Others* (C-10/14, C-14/14 and C-17/14, EU:C:2015:608), where resident taxpayers benefited from a refund of withholding tax or a deduction mechanism while, for non-resident taxpayers, the withholding was a definitive tax.

32. In other words, as the Court held in its judgment of 10 May 2012, *Santander Asset Management SGIIC and Others* (C-338/11 to C-347/11, EU:C:2012:286), 'Articles 63 TFEU and 65 TFEU must be interpreted as precluding the legislation of a Member State which provides for the taxation, by means of withholding tax, of nationally sourced dividends when they are received by [taxpayers] resident in another State, *whereas such dividends are exempt from tax when received by [taxpayers] resident in the Member State in question*'.[8]

### *2. Application of the case-law to the main proceedings*

#### *(a) Whether there is a restriction on the free movement of capital*

33. The French legislation at issue in the main proceedings levies tax on dividends paid to loss-making non-resident companies through withholding tax, while dividends paid to resident companies will only be subject to tax, if at all and in any event at a later stage, through corporation tax for the financial year in which they show a surplus.

34. Although there is no formal exemption for dividends paid to loss-making resident companies, the taxation of dividends paid to them is only a possibility for a future point in time which may, or may not, materialise, since the resident company in receipt of those dividends might never show a surplus and might even cease trading.[9]

35. Consequently, in this case, dividends paid to loss-making non-resident companies are clearly taxed less favourably, since dividends paid to resident companies might never be taxed and, if they are, they will only be taxed at a later stage, leading to a cash-flow disadvantage for loss-making non-resident companies, a situation which the national court expressly referred to in its first question.

8 Paragraph 55 of that judgment. Emphasis added.

9 It is true that the Court has held that even if dividends received by a parent company are not subject to tax for the financial year in the course of which they were distributed, 'th[e] reduction of losses of the parent company [up to the amount of the dividends received] may have the effect that the parent company is subject indirectly to taxation on those dividends in subsequent tax years when its results are positive' (see judgment of 12 February 2009, *Cobelfret*, C-138/07, EU:C:2009:82, paragraph 40). However, by admitting the existence of the possibility of taxation in a subsequent tax year, the Court dealt with an entirely different issue, namely the possibility of economic double taxation for dividends distributed by a non-resident company and received by a resident company which had already been taxed upon distribution (see judgment of 10 February 2011, *Haribo Lakritzen Hans Riegel and Österreichische Salinen*, C-436/08 and C-437/08, EU:C:2011:61, paragraph 158). Such a possibility was found to be contrary to the Parent-Subsidiary Directive.

36. To conclude in that regard, I consider that the system established by the legislation of a Member State such as that at issue in the main proceedings constitutes a restriction on the free movement of capital prohibited in principle by Article 63 TFEU.

### *(b) Whether the situations are comparable and whether there is an overriding reason in the public interest capable of justifying the free movement of capital*

37. Under Article 65(1)(a) TFEU, Article 63 TFEU is to be without prejudice to the right of the Member States to apply the relevant provisions of their tax law which distinguish between taxpayers who are not in the same situation with regard to their place of residence or with regard to the place where their capital is invested.

38. As mentioned in point 26 of this Opinion, the case-law of the Court is clear: as soon as a Member State taxes not only resident shareholders but also non-resident shareholders in respect of dividends received from a resident company, the situation of non-resident shareholders is comparable to that of resident shareholders.

39. The difference in treatment created by the French legislation at issue in the main proceedings 'cannot [therefore] be justified by a relevant difference in their situations'.[10]

### *(c) Justification*

40. Two grounds of justification were put before the Court by the French Government, namely the need to safeguard the balanced allocation between the Member States of the power to impose taxes and the need to ensure the effective collection of tax.

41. Although the need to safeguard the balanced allocation between the Member States of the power to impose taxes may be accepted, in particular, where the system in question is designed to prevent conduct capable of jeopardising the right of a Member State to exercise its powers of taxation in relation to activities carried out in its territory,[11] I note, first of all, that in so far as the French legislation at issue in the main proceedings results in outgoing dividends being taxed less favourably compared to dividends paid to residents (at least a cash-flow disadvantage), the French Government does not explain why such taxation is necessary to ensure a balanced allocation between the Member States of the power to impose taxes when that aim may be attained by non-discriminatory measures such as, for example, the levying of withholding tax on dividends paid to both residents and non-residents.

42. Furthermore, to the extent that the French legislation at issue in the main proceedings may lead to the exemption of dividends paid to resident companies, it should be observed that where a Member State has chosen not to tax residents in receipt of nationally sourced dividends, it cannot rely on the argument that there is a need to ensure a balanced allocation between the Member States of the power to impose taxes in order to justify the taxation of non-residents in receipt of such income.[12]

43. Lastly, I note that the French Republic has indeed exercised its power to impose taxes on dividends paid to non-resident companies which had no possibility of opting for another national tax system, allegedly giving them more favourable tax arrangements for those dividends.

10 Judgment of 10 May 2012, *Santander Asset Management SGIIC and Others* (C-338/11 to C-347/11, EU:C:2012:286, paragraph 44).

11 See judgment of 10 May 2012, *Santander Asset Management SGIIC and Others* (C-338/11 to C-347/11, EU:C:2012:286, paragraph 47 and the case-law cited).

12 See judgment of 10 May 2012, *Santander Asset Management SGIIC and Others* (C-338/11 to C-347/11, EU:C:2012:286, paragraph 48 and the case-law cited).

44. The French legislation at issue in the main proceedings also cannot be justified by the need to ensure the effective collection of tax, as that justification cannot justify taxation which affects, in all material respects, non-residents alone. [13]

45. For those reasons, I propose that the Court answer the first and second questions referred and the first part of the third question referred as follows: Articles 63 and 65 TFEU must be interpreted as precluding legislation of a Member State which levies tax on dividends paid to loss-making non-resident companies through withholding tax, while resident companies are not taxed on the amount of nationally sourced dividends for as long as they record losses.

## C. Second part of the third question referred

46. By the second part of the third question referred, the national court seeks to ascertain whether, having regard to the actual tax burden on dividends paid to residents and on dividends paid to non-residents, a restriction on the free movement of capital resulting from national legislation precluding for non-residents alone the deduction of expenses directly linked to the receipt of dividends may be justified by the difference between the general tax rate (33.33%) charged to residents in a subsequent financial year [14] and the withholding tax (15%) levied on dividends paid to non-residents, where that difference compensates, with regard to the amount of tax paid, for the difference in the tax base.

### *1. Admissibility*

47. It is settled case-law that questions referred for a preliminary ruling by a court of a Member State concerning EU law enjoy a presumption of relevance so that the Court is entitled to refuse to answer them only where it is quite obvious that the interpretation, or the determination of validity, of a rule of EU law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it. [15]

48. According to the United Kingdom, that question is hypothetical since the Belgian companies at issue in the main proceedings have not identified any expenses directly linked to the receipt of dividends which they were not allowed to deduct when calculating the amount of withholding tax. It claims that the second part of the third question is therefore irrelevant to the resolution of the action pending before the national court.

49. At the hearing, Sofina argued that it, together with Rebelco and Sidro, actually applied for the deduction from the dividend tax base of all expenses linked to their portfolio management activities, namely all expenses necessary for the acquisition, maintenance and management of their shares in French companies and all outlays which necessarily result from the holding of those shares.

50. Given that a claim for deduction was made, I consider that the second part of the third question referred is not irrelevant.

13 See, by analogy, judgment of 10 May 2012, *Santander Asset Management SGIIC and Others* (C-338/11 to C-347/11, EU:C:2012:286, paragraph 49).

14 I recall that it is possible that tax might never be charged.

15 See judgments of 26 February 2013, *Melloni* (C-399/11, EU:C:2013:107, paragraph 29 and the case-law cited), and of 16 June 2015, *Gauweiler and Others* (C-62/14, EU:C:2015:400, paragraph 25).

51. However, it is for the national court to verify whether the expenses covered by the claim for deduction are expenses which are deductible for resident companies in receipt of nationally sourced dividends [16] and are *directly related* to the actual receipt of the income at issue in the main proceedings. [17]

### *2. Substance*

#### *(a) Whether there is a restriction on the free movement of capital*

52. As the Commission observes, the national court correctly assumes that the refusal to allow the deduction of expenses directly linked to the receipt of outgoing dividends, when such deduction is possible for dividends paid to resident companies, constitutes a restriction on the free movement of capital. [18] A difference in treatment of that kind is liable to deter companies established in other Member States from investing in French companies.

#### *(b) Justification*

##### *(1) Whether the situations are comparable*

53. It should be noted that 'the Court has previously held that, in relation to professional expenses directly linked to an activity that has generated taxable income in a Member State, residents and non-residents of that State are in a comparable situation'. [19]

54. To that effect, it has ruled that if the taxation method applied to residents allows for the deduction of expenses directly linked to the receipt of dividends, 'it should also be admissible to take into consideration such expenses in respect of non-resident[s]'. [20]

55. In that situation, such a restriction on the free movement of capital 'cannot be justified by the fact that [non-residents] are subject to a tax rate which is lower than the rate for [residents]'. [21] There is therefore no need to compare the actual tax burden on dividends paid to residents and that on dividends paid to non-residents since even though the taxation rate for non-residents is lower than for residents, the amount of deductible expenses to which residents are entitled is uncertain and there is nothing to suggest that it would be equal to the difference resulting from the taxation of residents compared with the taxation of non-residents.

16 See judgments of 31 March 2011, *Schröder* (C-450/09, EU:C:2011:198, paragraph 40); of 17 September 2015, *Miljoen and Others* (C-10/14, C-14/14 and C-17/14, EU:C:2015:608, paragraph 57); and of 13 July 2016, *Brisal and KBC Finance Ireland* (C-18/15, EU:C:2016:549, paragraphs 44 and 45).

17 See judgments of 22 November 2012, *Commission* v *Germany* (C-600/10, not published, EU:C:2012:737, paragraph 20); of 17 September 2015, *Miljoen and Others* (C-10/14, C-14/14 and C-17/14, EU:C:2015:608, paragraphs 58 and 59); and of 13 July 2016, *Brisal and KBC Finance Ireland* (C-18/15, EU:C:2016:549, paragraph 46).

18 See judgments of 31 March 2011, *Schröder* (C-450/09, EU:C:2011:198, paragraph 40), and of 17 September 2015, *Miljoen and Others* (C-10/14, C-14/14 and C-17/14, EU:C:2015:608, paragraph 57).

19 Judgment of 2 June 2016, *Pensioenfonds Metaal en Techniek* (C-252/14, EU:C:2016:402, paragraph 64 and the case-law cited).

20 Judgment of 2 June 2016, *Pensioenfonds Metaal en Techniek* (C-252/14, EU:C:2016:402, paragraph 65). Also see, to that effect, judgments of 12 June 2003, *Gerritse* (C-234/01, EU:C:2003:340, paragraphs 27 and 28); of 15 February 2007, *Centro Equestre da Lezíria Grande* (C-345/04, EU:C:2007:96, paragraph 23); of 8 November 2012, *Commission* v *Finland* (C-342/10, EU:C:2012:688, paragraph 37 (this judgment concerns dividends)); and of 13 July 2016, *Brisal and KBC Finance Ireland* (C-18/15, EU:C:2016:549, paragraph 45).

21 See judgment of 13 July 2016, *Brisal and KBC Finance Ireland* (C-18/15, EU:C:2016:549, paragraph 33).

*(2) Overriding reasons in the public interest*

56. The French Government submits that the levying of tax on the gross amount of dividends paid to a non-resident company without it being possible to deduct expenses directly linked to their receipt (unlike the case of dividends paid to a resident company) which are taxed on their net amount is justified by the need to ensure the effective collection of tax. [22]

57. It should be recalled from the outset that although the Court has held that such an objective constitutes an overriding reason in the public interest capable of justifying a restriction on the freedom to provide services established by the tax legislation of a Member State, [23] that restriction must still be applied in such a way as to ensure achievement of the aim pursued and not go beyond what is necessary for that purpose. [24] Those principles are clearly applicable to the present case, which concerns the free movement of capital.

58. In this case, the French Government relies on paragraphs 46 and 47 of the judgment of 19 November 2015, *Hirvonen* (C-632/13, EU:C:2015:765), to argue that the refusal to allow the deduction of expenses must be accepted as an element inherent in the taxation at source regime, since it seeks both to simplify the task of the tax authorities of the source Member State and ease the burden on the non-resident taxpayer. Thus, the French Government notes, the tax authorities no longer have to collect the tax from the non-resident and that taxpayer is no longer required to cooperate, in that he is not required to make himself familiar with the French tax system in order to be able to submit a tax return to the French tax authorities for the income he obtains in France. Lastly, according to the French Government, the deduction of expenses linked to the receipt of dividends would run counter to the simplification sought by the taxation at source regime, since withholding tax is levied on the distributing company which cannot know what expenses were incurred by the non-resident in connection with the receipt of dividends.

59. In my view, that line of argument cannot succeed.

60. In the first place, besides the fact that the judgment of 19 November 2015, *Hirvonen* (C-632/13, EU:C:2015:765), departed from the judgments of 18 March 2010, *Gielen* (C-440/08, EU:C:2010:148), and of 28 February 2013, *Beker and Beker* (C-168/11, EU:C:2013:117), in which the Court refused to accept as justification for discrimination the fact that national legislation offered non-resident taxpayers, on request, an alternative taxation regime compatible with EU law, the case it dealt with involved a completely different situation to the one at issue here. [25]

61. At issue in the case giving rise to the judgment of 19 November 2015, *Hirvonen* (C-632/13, EU:C:2015:765), was a Swedish law the objective of which was to eliminate the restriction on non-resident taxable persons found in the judgment of 1 July 2004, *Wallentin* (C-169/03, EU:C:2004:403), by allowing them to opt for an ordinary taxation regime established for residents or for a taxation at source regime designed for non-residents.

22 That justification is similar to the one relating to the need to ensure the effectiveness of fiscal supervision, an overriding reason in the public interest which has often come under the Court's scrutiny in cases involving the free movement of capital. Regarding transfers of capital between Member States, that justification was consistently rejected when Council Directive 77/799/EEC of 19 December 1977 concerning mutual assistance by the competent authorities of the Member States in the field of direct taxation (OJ 1977 L 336, p. 15) was applicable (see, to that effect, judgments of 23 January 2014, *Commission* v *Belgium*, C-296/12, EU:C:2014:24, paragraphs 42 to 45, and of 6 June 2013, *Commission* v *Belgium*, C-383/10, EU:C:2013:364, paragraphs 50 to 60). The same is currently true of Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC (OJ 2011 L 64, p. 1).

23 See, in particular, judgments of 3 October 2006, *FKP Scorpio Konzertproduktionen* (C-290/04, EU:C:2006:630, paragraphs 35 and 36), and of 13 July 2016, *Brisal and KBC Finance Ireland* (C-18/15, EU:C:2016:549, paragraph 39).

24 See judgment of 18 October 2012, *X* (C-498/10, EU:C:2012:635, paragraph 36 and the case-law cited).

25 See judgment of 19 November 2015, *Hirvonen* (C-632/13, EU:C:2015:765, paragraphs 37 to 40).

62. Having found that the latter regime was more favourable overall for non-residents,[26] the Court then held that 'in matters of taxation of income, the refusal to grant non-resident taxpayers who obtain the majority of their income from the source State and who have opted for the taxation at source regime the same personal deductions as those granted to resident taxpayers under the ordinary taxation regime, does not constitute discrimination contrary to Article 21 TFEU where the non-resident taxpayers are not subject to an overall tax burden greater than that placed on resident taxpayers and on persons in a similar situation whose circumstances are comparable to those of non-resident taxpayers'.[27]

63. In my view, the case-law flowing from the judgments of 18 March 2010, *Gielen* (C-440/08, EU:C:2010:148), and of 28 February 2013, *Beker and Beker* (C-168/11, EU:C:2013:117), should be upheld. Furthermore, the Court's reasoning in its judgment of 19 November 2015, *Hirvonen* (C-632/13, EU:C:2015:765), strikes me as questionable in so far as the existence or otherwise of discrimination does not depend on the overall outcome for the taxpayer and 'a difference in treatment as between the two categories of taxpayer may constitute discrimination for the purposes of the FEU Treaty where there is no objective difference between those categories such as to justify different treatment in that regard'.[28]

64. That said, I assume that the position taken by the Court in its judgment of 19 November 2015, *Hirvonen* (C-632/13, EU:C:2015:765), was probably dictated by the concern that a non-resident taxable person should not be allowed to cherry pick, or to claim to his benefit, the most favourable elements of two separate taxation regimes. Thus, although the Court relied on the fact that the taxation regime applicable to non-residents was more favourable overall than the regime reserved in principle for residents, that was because Swedish law allowed non-resident taxpayers to opt entirely for the taxation regime applicable to residents.[29]

65. However, the French legislation at issue in the main proceedings does not offer any choice to non-residents. Consequently, by claiming the deduction of expenses directly linked to the receipt of dividends available to residents, non-residents are not cherry picking, but rather seeking equal treatment.

66. In the second place, although the deduction by non-residents of expenses directly linked to the receipt of dividends gives rise to an administrative burden for the French tax authorities, that also applies, *mutatis mutandis*, in the case of residents.[30]

67. In the third place, as the Court pointed out in paragraph 43 of its judgment of 13 July 2016, *Brisal and KBC Finance Ireland* (C-18/15, EU:C:2016:549), it is for the non-resident taxpayer in receipt of dividends 'to decide whether it is appropriate to invest resources in drawing up and translating documents intended to demonstrate the genuineness and the actual amount of the business expenses which it seeks to deduct'.

68. In the fourth and last place, although I accept that it would not be very effective to ask the company distributing dividends to deduct expenses directly linked to their receipt by non-resident taxpayers, the Court has previously held that the right to deduct may also arise after the levying of withholding tax in the form of a partial refund of the tax withheld at source.[31]

26 See judgment of 19 November 2015, *Hirvonen* (C-632/13, EU:C:2015:765, paragraph 43).

27 Judgment of 19 November 2015, *Hirvonen* (C-632/13, EU:C:2015:765, paragraph 49).

28 See judgment of 18 March 2010, *Gielen* (C-440/08, EU:C:2010:148, paragraph 44 and the case-law cited).

29 See, to that effect, points 40 to 43 of my Opinion in *Hünnebeck* (C-479/14, EU:C:2016:100).

30 See, to that effect, judgment of 13 July 2016, *Brisal and KBC Finance Ireland* (C-18/15, EU:C:2016:549, paragraph 41).

31 See judgment of 13 July 2016, *Brisal and KBC Finance Ireland* (C-18/15, EU:C:2016:549, paragraph 42).

69. For those reasons, I propose that the Court answer the second part of the third question referred as follows: a restriction on the free movement of capital resulting from national legislation such as that at issue in this case, which precludes for non-residents alone the deduction of expenses directly linked to the receipt of dividends, cannot be justified by the difference between the general tax rate charged to residents in a subsequent year and the withholding tax levied on dividends paid to non-residents, or by the need to ensure the effective collection of tax.

## VI. Conclusion

70. In the light of the foregoing, I propose that the Court answer the questions referred for a preliminary ruling by the Conseil d'État (Council of State, France) as follows:

(1) Articles 63 and 65 TFEU must be interpreted as precluding legislation of a Member State which levies tax on dividends paid to loss-making non-resident companies through withholding tax, while resident companies are not taxed on the amount of nationally sourced dividends for as long as they record losses.

(2) A restriction on the free movement of capital resulting from national legislation which precludes for non-residents alone the deduction of expenses directly linked to the receipt of dividends cannot be justified by the difference between the general tax rate charged to residents in a subsequent year and the withholding tax levied on dividends paid to non-residents, or by the need to ensure the effective collection of tax.