Reports of Cases

OPINION OF ADVOCATE GENERAL
JÄÄSKINEN
delivered on 25 June 2015[1]

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

J. B. G. T. Miljoen (C-10/14),
X (C-14/14)and
Société Générale SA (C-17/14)
v
Staatssecretaris van Financiën

(Requests for a preliminary ruling from the Hoge Raad der Nederlanden (Netherlands))

(Direct taxation — Article 63 TFEU — Free movement of capital — Restriction caused by the legislation of a Member State — Deduction at source of a tax on the income from dividends distributed by a company established in that State — Difference in treatment between resident taxpayers and non-resident taxpayers — Criteria for comparison — Taking account in the comparison of the income tax or the corporation tax against which the dividend tax is systematically offset in the case of residents only — Elements to be included in the assessment of the effective tax burden borne by those two categories of taxpayers — Possibility of neutralising the restriction by means of a convention for the avoidance of double taxation concluded with another Member State)

I – Introduction

1. The three requests for a preliminary ruling made by the Hoge Raad der Nederlanden (Netherlands)[2] concern the interpretation of Article 63 TFEU, from the perspective of the relationship between the principle of the free movement of capital between Member States laid down by that article and the content of provisions relating to direct taxation which have been adopted by a Member State. The potential tax-related obstacles which may exist in relation to that freedom have already formed the subject-matter of extensive case-law of the Court, but the particular feature of these cases is that they relate to legislation under which outbound dividends are subject to taxation in the source Member State not only where they are paid to shareholders residing within its territory but also where they are paid to shareholders residing in another Member State.

2. Those requests were made in the context of disputes between the Netherlands tax authority and three taxpayers established in another Member State, that is, respectively, two natural persons of Netherlands nationality who reside in Belgium and a company governed by French law which has its registered office in France.

1 — Original language: French.

2 — Supreme Court of the Netherlands, 'the Hoge Raad'.

3. The interested parties all complain that that authority refused to reimburse to them the tax, withheld at source, on the portfolio dividends distributed to them by Netherlands companies. They claim that, under Netherlands law, taxpayers who reside in the Netherlands have the option, in all circumstances, of deducting the tax withheld from the income tax or the corporation tax which they are required to pay, whereas non-residents are denied such an advantage. In their view, that national legislation gives rise to a difference in treatment for tax purposes which constitutes an obstacle to the free movement of capital.

4. In response, the Netherlands authorities contend that the same rules apply with respect to the taxation of income from dividends in the Netherlands, irrespective of the place of residence or establishment of the natural person or the company which receives them, and that there is no need to take into account the advantages offered only to residents in other respects. They add that, if the existence of an obstacle is nevertheless regarded as a possibility, the negative consequences of that obstacle could be neutralised by the application of a convention concluded with the Member State in which the disadvantaged party is resident, which would allow for the tax payable in, in this case, Belgium and France, to be offset.

5. In order to be able to determine whether the legislation at issue gives rise to a restriction prohibited under Article 63 TFEU, the referring court would like the Court to clarify, first, which factors are relevant for the purposes of comparing the tax situation of non-residents with that of residents in the case of national provisions such as those applicable to the disputes in the main proceedings, assuming that those situations are indeed objectively comparable. More specifically, it asks whether or not account should be taken of the option, which is restricted to residents, of systematically deducting the tax on dividends, designed as a withholding tax, that is to say a prepayment, in order to reduce the amount of another tax, respectively income tax or corporation tax, or even of obtaining a refund of that first tax in so far as the dividends are not subject to the second tax.

6. In the event that the Court rules that that possibility is decisive, it is then asked to define, secondly, the correct manner of assessing whether the effective tax burden borne by non-residents, whether natural persons or companies, is greater than that borne by residents, and in particular whether in that regard account should be taken of data such as the tax-free allowance enjoyed by residents or various costs linked to the shares from which the dividends arise.

7. Thirdly, the Court is asked about the circumstances in which a convention for the avoidance of double taxation, such as those concluded between the Kingdom of the Netherlands and, respectively, the Kingdom of Belgium or the French Republic, may have a corrective effect capable of neutralising the consequences of different treatment which is disadvantageous to non-residents.

8. In addition, it should be observed that neither the referring court nor the Netherlands Government relies on any overriding reason in the public interest which could, where appropriate, justify the restriction on the free movement of capital, the negative impact of which would not be remedied by such bilateral conventions in accordance with the requirements of the case-law.[3]

3 — See, inter alia, the order in *Tate & Lyle Investments* (C-384/11, EU:C:2012:463, paragraph 45) and the judgment in *Commission* v *Belgium* (C-387/11, EU:C:2012:670, paragraph 74).

II – **Netherlands legal framework**

A – *The relevant national provisions*

1. The Law on dividend tax

9. Article 1(1) of the Law of 1965 on dividend tax,[4] in the version of that law applicable to the disputes in the main proceedings ('the Law on dividend tax'), provides that 'a direct tax', called 'the dividend tax', is to be levied on 'persons who — directly or by means of certificates — receive income from shares issued by … public limited companies, private limited-liability companies, limited partnerships and other companies established in the Netherlands whose capital is wholly or partially divided into shares'.

10. Article 3(1)(a) of that law defines the basis of assessment for the dividend tax, which includes, inter alia, all 'direct or indirect profit distributions, however they are designated and whatever form they take … '. Pursuant to Article 5 of that law, the rate of that tax is 15% of the income from shares.

2. The Law on income tax

11. The Law of 2001 on income tax,[5] in the version of that law applicable to the disputes in the main proceedings in Cases C-10/14 and C-14/14 ('the Law on income tax'), defines the rules governing personal income tax.

12. Article 2.13 of that law fixes at 30% the rate of taxation applicable to the income from savings and investments, income which falls within the category of taxable income which is usually classified as 'category 3' or 'heading 3' income.

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

14. Under Article 5.2, the 'benefit derived from savings and investments' is fixed at a flat-rate of 4% of the average between 'the yield basis at the start of the calendar year (start date)' and 'the yield basis at the end of the calendar year (end date)', 'provided that that average is greater than the tax-free allowance for the assets'.

15. Article 5.3(1) defines the 'yield basis' as being 'the value of the assets less the value of the liabilities'. Paragraph 2 of that article includes amongst those 'assets', inter alia, rights in immovable or movable property and rights not relating to tangible property, such as a sum of money. Paragraph 3 of the article states that 'liabilities' are obligations having an economic value which is taken into account subject to the conditions set out therein.

16. Under Article 5.5(1), '[t]he tax-free capital allowance shall amount to EUR 20 014'. Paragraphs 2 to 4 of that article amend that rule in the specific case of a taxpayer who has a 'partner'.

17. Article 9.2(1)(b) states that the levying of the dividend tax collected is classified as a 'withholding tax', that is to say a prepayment which, by means of offsetting, is capable of reducing the income tax payable in the Netherlands.

4 — Wet op de dividendbelasting 1965 (or, in its short form, 'Wet DB 1965').

5 — Wet inkomstenbelasting 2001 (or, in its short form, 'Wet IB 2001').

3. The Law on corporation tax

18. Article 3(a) of the Law of 1969 on corporation tax,[6] in the version of that law applicable to the dispute in the main proceedings in Case C-17/14 ('the Law on corporation tax'), provides that legal persons not established in the Netherlands which receive income from the Netherlands are subject to the tax in that State as foreign taxpayers.

19. Prior to its amendment by a Law of 23 December 2009,[7] Article 25(1) of that law stated that the classification of 'withholding taxes' included, inter alia, the levying of the dividend tax forming part of the taxable profits or of the income from the Netherlands in the financial year concerned. It follows from Article 25a that, if the calculation of the tax does not result in a positive amount, the tax assessment notice is not drawn up, or is set at zero, and the withheld tax is not offset.

4. The Tax Code

20. Article 15 of the Tax Code[8] provides that '[t]he … withholding taxes mentioned in the tax law are offset on the basis of the tax assessment notice or, in so far as is appropriate, by a decision of the inspector which is open to appeal'. If the amount of income tax or corporation tax payable by a taxpayer is not sufficient to offset the dividend tax levied on it, the dividend tax is to be refunded to that taxpayer.

B – *The relevant international provisions*

21. The two bilateral treaties concluded by the Kingdom of the Netherlands which are applicable in Cases C-14/14 and C-17/14 were drafted in line with a model tax convention drawn up by the Organisation for Economic Cooperation and Development (OECD).[9]

1. The Belgium-Netherlands Convention

22. The convention concluded between the Kingdom of Belgium and the Kingdom of the Netherlands for the avoidance of double taxation and the prevention of tax evasion in respect of taxes on income and wealth, signed in Luxembourg on 5 June 2001 ('the Belgium-Netherlands Convention'), is referred to in Case C-14/14.

23. Article 10 of the Convention provides for a scheme which divides the taxation of dividends between those two Contracting States. Paragraph 1 of that article sets out the principle that '[d]dividends paid by a company resident in one Contracting State to a resident in the other Contracting State shall be taxable in the latter State'. Paragraph 2 adds that '[h]owever, [subject to the provisions of paragraph 3,[10]] those dividends may also be taxed in the Contracting State in which the company paying the dividends is resident, under the legislation of that State, but if the actual recipient of the dividends is a resident of the other Contracting State, the tax thus levied may not exceed: … (b) 15[%] of the gross amount of the dividends …'.

6 — Wet op de vennootschapsbelasting 1969 (or, in its short form, 'Wet Vpb 1969').

7 — Wet tot wijziging van enkele belastingwetten en enige andere wetten (Fiscale vereenvoudigingswet 2010).

8 — Deriving from the General Law on State Taxes (Algemene wet inzake rijksbelastingen or 'the AWR').

9 — OECD Model Tax Convention on Income and on Capital from 2010, various versions of which are available at the following internet address: http://www.oecd.org/ctp/treaties/oecd-model-tax-convention-available-products.htm. See, in particular, the 'commentaries on Articles 23 A and 23 B [of the model] concerning the methods for elimination of double taxation'.

10 — Under paragraph 3, '[t]he provisions of paragraph 2 shall not affect the taxation of the company in respect of the profits which are used to pay the dividends'.

24. Article 23 of that convention defines the '[m]ethods for eliminating double taxation'. Paragraph 1(b) of that article provides, 'in relation to Belgium', that, '[s]ubject to the provisions of Belgian legislation concerning the offsetting against Belgian tax of taxes paid in another country, where a resident of Belgium receives items of income which are included in his overall income subject to tax in Belgium and which consist in dividends not exempt from tax in Belgium under (c) below, … the Netherlands tax collected on that income shall be offset against the Belgian tax relating to that income'.

2. The Franco-Netherlands Convention

25. The convention concluded between the Government of the French Republic and the Government of the Kingdom of the Netherlands for the avoidance of double taxation and the prevention of tax evasion in respect of taxes on income and wealth, signed in Paris on 16 March 1973 ('the Franco-Netherlands Convention'), is referred to in Case C-17/14.

26. Article 10(1) of the Convention lays down the principle that '[d]ividends distributed by a company resident in one of the States to a resident in the other State shall be taxable in the latter State'. Paragraph 2 of that article provides for the following exception: '[h]owever, those dividends may be taxed in the State of which the company distributing the dividends is a resident and according to the laws of that State, but the tax so charged may not exceed: … (b) 15[%] of the gross amount of the dividends …'.

27. The method adopted for 'eliminating double taxation' in the latter situation is that of granting a tax credit in the State of residence of the recipient of the dividends, as provided for in Article 24 of that convention. Paragraph B(b) of that article states that, '[w]ith regard to the income referred to [inter alia in Article 10] on which the Netherlands tax was charged in accordance with the provisions of [that article], France grants persons resident in France who receive such income a tax credit of an amount equal to the Netherlands tax'. It is specified therein that '[t]hat tax credit, which may not exceed the amount of the tax collected in France on the income in question, shall be offset against the taxes referred to in Article 2(3)(b)[[11]], within the bases in which that income is included'.

III – **The disputes in the main proceedings, the questions referred for a preliminary ruling and the procedure before the Court**

28. The common features of the three disputes in the main proceedings are that each of the applicants received portfolio dividends which were distributed to them by Netherlands companies but is resident in a Member State other than the Kingdom of the Netherlands. The amounts paid were subject to a withholding tax, at a rate of 15%, in accordance with the Netherlands Law on dividend tax. The tax withheld could potentially be offset against the taxes payable in the State in which the persons concerned are resident under the applicable conventions for the avoidance of double taxation.

29. More specifically, it is clear from the file relating to *Case C-10/14* that Mr Miljoen is a Netherlands national residing in Belgium who held shares in three funds which are quoted on the stock exchange in the Netherlands and which had paid dividends to him, on which an amount of EUR 729 was levied in respect of the Netherlands dividend tax payable for the year 2007.

11 — Under this provision, '[t]he taxes to which the Convention applies are … [w]ith regard to France: income tax; corporation tax; …, including all tax withheld and all prepayments or advance payments with respect to the abovementioned taxes'.

30. According to his tax return relating to the income tax collected in the Netherlands in 2007, the individual in question declared a global income of zero and made no mention of the dividend tax to be deducted as a prepayment because he did not consider that he would be taxable in that Member State. The Netherlands tax authority issued an income tax assessment notice in line with that return. On 22 January 2010, Mr Miljoen lodged an objection against that notice and, unsuccessfully, sought a partial refund, in the amount of EUR 438, [12] of the dividend tax which had been levied on him.

31. The dispute was brought before the Rechtbank te Breda; it related, inter alia, to the question whether, as had been claimed by Mr Miljoen, the difference in treatment for tax purposes between shareholders residing in the Netherlands and shareholders not residing there constituted a restriction on the free movement of capital prohibited by Article 63 TFEU. By judgment of 27 March 2012, the Rechtbank te Breda dismissed that action, on the ground that the withholding of the dividend tax complained of was not contrary to EU law. [13] Mr Miljoen lodged an appeal on a point of law against that judgment before the Hoge Raad.

32. In *Case C-14/14*, Ms X is a Netherlands national residing in Belgium who held share certificates in a company established in the Netherlands. In 2007, dividends were paid to her on six occasions, from which EUR 16 105.80 was withheld in respect of the Netherlands dividend tax. For that same year, Ms X was subject, in Belgium, to personal income tax amounting to 25% of the net amount of the dividends thus received, [14] that is approximately EUR 22 816. The referring court makes clear that Belgian law did not allow the dividend tax paid in the Netherlands to be deducted from the amount of tax payable in Belgium.

33. The Netherlands tax authority dismissed Ms X's objection that the dividend tax withheld at source was contrary to EU law because only taxpayers residing in the Netherlands can in any circumstances offset or be refunded the Netherlands dividend tax levied on them, whereas that tax cannot be offset in Belgium. The Rechtbank te Breda found that the various actions brought against that administrative decision were well founded in part. On appeal, the Gerechtshof te 's-Hertogenbosch partially upheld the judgment of the Rechtbank te Breda by judgment of 29 August 2012, [15] against which Ms X and the Netherlands tax authority brought proceedings in cassation before the Hoge Raad.

34. In Case C-17/14, Société Générale SA ('Société Générale') is a company governed by French law established in France. It held blocks of shares in Netherlands listed companies which, between 2000 and 2008, yielded for it dividends totalling several hundreds of thousands of euros. That income was subject each year to a withholding tax of 15% in respect of the Netherlands dividend tax. [16] For the years 2000 to 2007, the company in question was able to deduct from the corporation tax payable in France all the dividend tax paid in the Netherlands, but such offsetting was not possible for 2008, on account of the losses that it had made in France.

12 — The method of calculating that amount is set out in the written observations submitted by Mr Miljoen (paragraph 5.2.1) and, critically, in the Opinion relating to the dispute in the main proceedings delivered by Advocate General Wattel on behalf of the Public Prosecutor at the Hoge Raad ('the Opinion of the Advocate General of the Hoge Raad') on 9 January 2013, which is annexed to the order for reference in Case C-10/14 (points 1.1, 1.5 and 2.3).

13 — The statement of reasons for that judgment is summarised in the order for reference relating to Case C-10/14 (see paragraph 3.2) and its full version is annexed to that order.

14 — That net amount was calculated to be EUR 91 266.20, that is the total amount of the dividends distributed in the Netherlands (EUR 107 372) minus the Netherlands dividend tax deducted at source (EUR 16 105.80).

15 — The statement of reasons for that judgment is summarised in the order for reference relating to Case C-14/14 (see paragraphs 3.6.1 and 3.6.2) and its full version is annexed to that order.

16 — The exact figures are stated in the Opinion relating to the dispute in the main proceedings delivered by the Advocate General of the Hoge Raad on 12 February 2013, which is annexed to the order for reference in Case C-17/14 (paragraph 2.3).

35. The Netherlands tax authority refused to grant the various applications made by Société Générale to offset or be reimbursed the dividend tax levied on it;[17] those applications were based on the fact that undertakings established in the Netherlands are entitled to deduct the dividend tax paid in that State from the corporation tax also payable there, whereas that option is not systematically available to non-resident shareholders.

36. The Rechtbank te Haarlem found that only one of the four actions brought against those administrative decisions was well founded. The matter having been brought before it on appeal by Société Générale and the Netherlands tax authority, the Gerechtshof te Amsterdam, by judgment of 24 May 2012,[18] set aside in part and upheld in part the judgments given by the Rechtbank te Haarlem. Société Générale brought proceedings in cassation against that judgment before the Hoge Raad.

37. It is in that context that, by orders of 20 December 2013, received at the Court on 13 January 2014 (C-10/14), 15 January 2014 (C-14/14) and 16 January 2014 (C-17/14) respectively, the Hoge Raad der Nederlanden decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

— in Case C-10/14:

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

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

— in Case C-14/14:

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

(2) If the answer to Question 1 is in the affirmative, in the assessment as to whether the effective tax burden for a non-resident is heavier than the tax burden for a resident, should a comparison be made between the Netherlands dividend tax withheld in respect of the non-resident and the Netherlands income tax payable by a resident, calculated in respect of the flat-rate income which, in the year in which the dividends were received, is attributable to the total holding of investment shares in Netherlands companies, or does EU law require that a different standard of comparison be taken into account? Must the *tax-free capital allowance* which applies to residents also *be taken into account* when making that comparison, and, if so, *to what extent* (see the judgment of the Court of Justice of 17 October 2013 in *Welte*, C-181/12, EU:C:2013:662)?

17 — The details of those applications are reproduced in the order for reference relating to Case C-17/14 (see paragraph 1.1 et seq.).

18 — The statement of reasons for that judgment is summarised in the order for reference relating to Case C-17/14 (see paragraphs 1.4 and 3.2.2 et seq.) and its full version is annexed to that order.

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

— in Case C-17/14:

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

(2) (a) If the answer to Question 1 is in the affirmative, should account be taken, in making that comparison, of all the costs which, in an economic sense, are connected with the shares from which the dividend arises?

(b) If the answer to the previous question is in the negative, should account then be taken of a possible write-off of a bought dividend and of a possible financing burden resulting from ownership of the shares concerned?

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

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

39. Mr Miljoen, Ms X and Société Générale have submitted written observations to the Court concerning each of the cases relating to them respectively. The written observations of the Netherlands and United Kingdom Governments and of the European Commission relate to the three joined cases, whereas those submitted by the Swedish Government are restricted to Case C-17/14. Mr Miljoen, Ms X, Société Générale, the Netherlands, German and Swedish Governments and the Commission were represented at the hearing held on 18 March 2015.

IV – **Analysis**

A – *Preliminary observations*

40. At the outset, I would point out that the statement of reasons for the requests for a preliminary ruling lodged in the present cases is very brief, to such an extent that the potential implications of those requests, as well as the content of the national law and the subject-matter of the disputes in the main proceedings, can sometimes be grasped only in the light of the documents annexed to the orders

for reference. Those requests therefore verge on being inadmissible having regard to the requirements set out in Article 94 of the Rules of Procedure of the Court.[19] It follows from that observation that it will be necessary here to refer, in various respects, to the Opinion delivered by the Advocate General of the Hoge Raad in the three disputes in the main proceedings, though such an approach cannot ensure that the shortcomings of those orders for reference are entirely remedied.

41. Furthermore, it must be stated that, under the Netherlands legislation, some non-resident foreign taxpayers may be liable to income tax or corporation tax and, for that reason, have in the Netherlands opportunities which are similar to the rights granted to resident taxpayers either to offset withholding taxes or to obtain refunds. However, it is common ground that none of the three applicants in the main proceedings fell into that category in the tax years at issue.[20] Accordingly, the provisions of that legislation which are specific to such non-resident foreign taxpayers, who are in a very particular situation as compared with non-resident taxpayers in general, will not be considered in this Opinion.

42. It is settled case-law that, while direct taxation falls within their competence, Member States must none the less exercise that competence in accordance with EU law. This means, in particular, that Member States cannot adopt measures prohibited by Article 63(1) TFEU which constitute restrictions on the movement of capital in that they are such as to discourage non-residents from making investments in a Member State or to discourage that Member State's residents from doing so in other States, in particular in the context of the taxation of nationally-sourced dividends.[21]

43. The Court has repeatedly pointed out that, 'for national tax legislation [which gives rise to unequal treatment between residents and non-residents] to be capable of being regarded as compatible with the provisions of the Treaty on the free movement of capital, the difference in treatment must concern situations which are not objectively comparable or be justified by an overriding reason in the public interest'.[22]

44. The questions referred to the Court for a preliminary ruling in the present cases are prompted specifically by the issue of any objective comparability of the respective tax situations of resident and non-resident shareholders having regard to national legislation such as that applicable in the disputes in the main proceedings.

19 — In that regard, it should be borne in mind that it is essential that all pertinent information be contained in the order for reference itself, and not in the annexes thereto, since it is the only document in the file which is translated for the purposes of notification to all the interested parties permitted to submit observations pursuant to Article 23 of the Statute of the Court of Justice of the European Union (see the Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings, OJ 2012 C 338, p. 1, paragraph 20 et seq.).

20 — It is apparent from the information contained in the file, first, that Mr Miljoen declared a pension and a substantial shareholding in the Netherlands but that this did not give rise to taxation in that Member State in 2007, secondly, that Ms X did not opt for the residents' scheme in connection with the pensions which she received in the Netherlands in 2007 and, finally, that the contested dividends received between 2000 and 2008 by Société Générale are attributable not to the bank which it operates as a permanent establishment in the Netherlands but to the investment fund which it holds in France.

21 — See, inter alia, the order in *Tate & Lyle Investments* (C-384/11, EU:C:2012:463, paragraphs 18 and 21) and the judgment in *Emerging Markets Series of DFA Investment Trust Company* (C-190/12, EU:C:2014:249, paragraphs 38 and 39).

22 — See, inter alia, the judgments in *Bouanich* (C-265/04, EU:C:2006:51, paragraph 38) and *Commission* v *Belgium* (C-387/11, EU:C:2012:670, paragraph 45).

B – *The factors to be taken into account for the purposes of comparing the treatment for tax purposes of a non-resident shareholder and that of a resident shareholder (first questions referred in the three cases)*

1. The subject-matter of the first questions referred for a preliminary ruling

45. In the present three cases, the referring court wishes to ascertain, first of all, whether, for the purposes of determining whether the levying of the Netherlands tax on the dividends distributed by Netherlands companies gives rise to a restriction prohibited by Article 63 TFEU, the comparison between the tax situation of residents and that of non-residents must take into account only that dividend tax or whether account must also be taken of the income tax or corporation tax to which the dividends paid to residents are subject.

46. It is not disputed that residents and non-residents are subject to a body of rules which is, prima facie, identical as regards both the method of collection and the rate of the Netherlands dividend tax. All the income from shares distributed by companies established in the Netherlands is subject to that tax, which is levied by means of a 15% withholding tax, irrespective of the place of residence or establishment of the natural or legal person who is the holder of those shares.[23]

47. However, the parties to the disputes in the main proceedings are in disagreement as to whether there arises a prohibited difference in treatment as a result of the fact that the dividend tax is a withholding tax, that is to say a prepayment for residents, whereas it is generally a final tax for non-residents. Indeed, only residents are entitled in all circumstances to obtain reimbursement of the dividend tax collected from them, either by deducting it from the income tax or the corporation tax which they are also required to pay or by requesting it be refunded if their liability to income tax or corporation tax is not sufficient to allow such a deduction to be made.

48. The referring court therefore asks the Court whether account must be taken of that possibility of reimbursement for the purposes of assessing the extent to which the free movement of capital is restricted by such legislation. The Governments which submitted observations take the view that the comparison between the tax situation of residents and that of non-residents liable to the dividend tax should not be extended to include consideration of the income tax or corporation tax payable by residents, whereas the applicants in the main proceedings and the Commission take the opposing view.

49. I note that the Court is asked only about the factors of comparison which are relevant in the case of national legislation such as that at issue in the main proceedings, and not about the specific consequences to which carrying out that comparison will subsequently give rise in the light of the facts specific to the three disputes in the main proceedings, since that final analysis will be a matter for the referring court.

50. Thus, despite the similarities of the first questions referred to the Court in these three joined cases, I am of the view that it is necessary to examine those referred in Cases C-10/14 and C-14/14 separately from that referred in Case C-17/14, in view of the differences between the national rules applicable, on the one hand, to natural persons and, on the other hand, to companies receiving dividends in the Netherlands.

51. Before conducting any further analysis, it is necessary to examine, as a preliminary issue, the extent to which resident and non-resident shareholders are actually in comparable situations in the present cases.

23 — In that regard, the present cases differ, inter alia, from that in *Pensioenfonds Metaal en Techniek* (C-252/14), pending before the Court, in which the referring court asks, in essence, whether Article 63 TFEU precludes dividends received by resident pension funds and those received by non-resident pension funds from being taxed according to different arrangements in Sweden, where only the latter funds are subject to a withholding tax.

2. The objective comparability of the tax situation of resident shareholders and that of non-resident shareholders

52. As the referring court observes, the Court has consistently held that residents and non-residents are not necessarily in a comparable situation in matters of direct taxation and that, with regard in particular to income tax, the situation of non-residents is different in so far as the bulk of their income is most often concentrated not in the source State but in the State in which they are resident.[24] However, as soon as a Member State imposes a charge to tax not only on resident shareholders but also on non-resident shareholders in respect of dividends which they receive from a company established in that State, as is the case in the Netherlands, the respective situations of those two categories of taxpayers become comparable and they must therefore be subject to the same treatment for tax purposes in accordance with Article 63 TFEU.[25]

53. It is true that the Court held in *Truck Center* that the application to non-residents of a *different tax arrangement* from that applied to residents[26] was *not in itself contrary* to the free movement of capital, explaining that the situations of those two categories of taxpayers were not objectively comparable in that case, in view, inter alia, of the fact that the position of the Member State concerned differed depending on whether it collected the tax as the State of residence or as the source State and of the fact that the distinct charges in question rested on separate legal bases.[27] However, as the Commission pointed out at the hearing, that case related to objective comparability concerning the arrangements for the collection of the tax, a matter which is now settled, whereas the question of possible comparability raised in the present cases arises at a later stage, namely the stage at which there is a difference between the tax situations of residents and non-residents in relation to the actual tax which is collected on a particular component of the shareholding, namely the dividends; this is a completely different issue.

54. In the present cases, the applicable legislation makes both resident and non-resident taxpayers subject to the same arrangements for the collection of the dividend tax, namely by means of a withholding of tax at source, which was not the case in *Truck Center*, since the withholding tax at issue was collected only on the interest paid to non-resident recipient companies. In addition, it appears to me that the Court based its analysis on the finding that resident recipient companies were not treated in a systematically more favourable manner than non-resident recipient companies.[28] Accordingly, that judgment cannot support the Netherlands Government's argument that the situations are not objectively comparable where both residents and non-residents are subject to a tax withheld at source on the same type of income but the former can offset that tax against another tax whereas that tax is a final charge for the latter.

24 — See, inter alia, the judgments in *Amurta* (C-379/05, EU:C:2007:655, paragraph 37 and the case-law cited) and *Grünewald* (C-559/13, EU:C:2015:109, paragraph 25).

25 — See the judgment in *Amurta* (C-379/05, EU:C:2007:655, paragraphs 38 and 39) and the order in *Tate & Lyle Investments* (C-384/11, EU:C:2012:463, paragraphs 31 and 32 and the case-law cited).

26 — C 282/07, EU:C:2008:762. In that case, non-residents were subject to a withholding tax whereas residents were taxed following the filing of a return by the taxpayer.

27 — Ibid. (paragraphs 41 to 52). The Court pointed out that 'when both the company paying the interest and the company receiving that interest are resident in Belgium, the position of the Belgian State is different to that in which it finds itself when a company resident in Belgium pays interest to a non-resident company, because, in the first case, the Belgian State acts in its capacity as the State of residence of the companies concerned, while, in the second case, it acts in its capacity as the State in which the interest originates' and that 'the payment of interest by one resident company to another resident company and the payment of interest by a resident company to a non-resident company give rise to two distinct charges which rest on separate legal bases'.

28 — Ibid. (paragraph 49). There, the Court points out that the difference in treatment observed in relation to the arrangements for the collection of the tax did not necessarily procure an advantage for residents.

55. In the light of the case-law of the Court, the factor which appears to me to be crucial for the purpose of comparing the therefore comparable situations of resident and non-resident taxpayers in order to determine whether there is any prohibited restriction on the free movement of capital is *not so much the objective* of the legislation at issue,[29] as the Netherlands and Swedish Governments submit, *but rather* the fact that a Member State's legislation cannot establish a difference in treatment which has the *practical effect* of ultimately placing *a heavier tax burden* on non-residents and which is thus capable of discouraging them from exercising that freedom.[30] I shall return to those considerations later.[31]

56. I therefore consider that Mr Miljoen, Ms X and Société Générale are in a situation comparable to that of resident shareholders as regards the arrangements for the collection of the Netherlands dividend tax and that the potentially discriminatory effect produced by the relevant national provisions taken as a whole should be examined in the light of the requirements relating to the free movement of capital.

3. Comparison of tax situations in the case of natural persons subject to the Netherlands dividend tax (first questions referred in Cases C-10/14 and C-14/14)

57. Where the recipient of dividends generated by shares which he holds in Netherlands companies is a natural person who is resident in the Netherlands, he is subject not only to the dividend tax in respect of the income from those shares, but also to the income tax in respect of the holding of those same shares classed as 'heading 3' income. The latter tax, charged at a rate of 30%, is payable on the average value of those shares, which are deemed to generate each year a fixed, flat-rate return of 4% of their net value, obtained after deduction of the financing liabilities. In spite of the fact that the Hoge Raad assigns it the legal classification of an income tax, inter alia for the purposes of the application of tax conventions,[32] that 'heading 3' tax constitutes — from an economic perspective — rather a tax on wealth, which is levied on the flat-rate value of the yield basis at a rate of up to 1.2%, that is to say 30% of 4%. A resident can always obtain reimbursement of the dividend tax levied on him, either by offsetting the tax withheld against any income tax payable or by obtaining a refund of that first tax if his liability to income tax is lower than the tax withheld or equal to zero.

29 — In my view, this factor is more relevant in relation to the possible justification for a restriction on the free movement of capital for overriding reasons in the public interest.

30 — Thus, in *Commission* v *Finland* (C-342/10, EU:C:2012:688, paragraphs 32 and 33), the Court pointed out that 'dividends received by *resident* pension funds are, in practice, *exempt or partially exempt* from income tax *as a result of* the provisions of national law at issue' and that '*treating* dividends paid to non-resident pension funds *less favourably* … is liable to *deter* [them] from investing in … Finland, and thus constitutes a *restriction* on the free movement of capital *prohibited*, in principle, by Article 63 TFEU' (emphasis added). See also, inter alia, the judgments in *Gerritse* (C-234/01, EU:C:2003:340, paragraph 54) and *Bouanich* (C-265/04, EU:C:2006:51, paragraphs 33 to 35 and 55).

31 — See point 62 et seq. of this Opinion.

32 — In a judgment of 1 December 2006 (No 42211, LJN AV5017), the Hoge Raad found, first, that '[t]he collection of income tax on the taxable income from savings and investments within the meaning of Article 2.3(c) of the Law [on income tax], as explained in Article 5.1 et seq. of the Law, has … characteristics of a tax on wealth and may therefore be regarded in some respects as being a successor to the tax on wealth, as it was levied until 1 January 2001 … in the Netherlands. Collection of that tax … is, however, likewise a successor to income tax, as it was levied until 1 January 2001'. It found, secondly, that 'the tax on the taxable income from savings and investments forms part of the tax on other income components. This fact must take precedence. The tax in question must therefore be regarded as a tax on income for the purposes of the application of the Convention' (cited, inter alia, in point 7.16 of the Opinion of the Advocate General of the Hoge Raad relating to the dispute in the main proceedings in Case C-10/14).

58. By contrast, where such a recipient is a natural person who is not resident in the Netherlands, he is generally subject only to the dividend tax, which is levied at a rate of 15% on the gross amount of the dividends actually received, with no possibility of deducting costs of any kind. Since he is not liable to income tax in respect of the shares which he holds in Netherlands companies, a non-resident cannot benefit from the offsetting of the dividend tax withheld, so that that tax is final in nature, in so far as it is levied definitively, in the case of non-resident taxpayers.[33]

59. As the Advocate General of the Hoge Raad points out in his Opinion on the disputes in the main proceedings in Cases C-10/14 and C-14/14,[34] it follows from the Netherlands legislation, first, that the taxation applied in the two abovementioned situations differs both in terms of the tax base and in terms of the actual rate[35] and, secondly, that non-residents may be in a less favourable situation than residents, since only the latter (i) benefit from a tax-free allowance in respect of wealth, (ii) are taxed on a net taxable base and (iii) are entitled to tax relief.

60. In the light of those factors, the Netherlands legislation may appear to be directly discriminatory since only residents are de facto exempt from the dividend tax in all circumstances. The deduction at source of that tax is always neutralised subsequently, either by means of offsetting the tax withheld against income tax or via a reimbursement. In other words, for those taxpayers, the Netherlands dividend tax operates not in reality as a tax but rather as an advance payment of other taxes. In addition, the income tax base does not include the dividends actually received, which are therefore not taxed as such.[36] Accordingly, two resident shareholders in possession of the same net value of investments will pay the same amount of income tax, irrespective of whether or not they have received dividends from Netherlands companies.

61. There is, indeed, such a difference in treatment for tax purposes between resident and non-resident natural persons, not only with regard to the methods of taxation applied but also vis-à-vis the charges borne, that, in my view, this makes comparison almost impossible if only the dividends are taken into account to that end. Furthermore, the objective to which the Netherlands Government referred, namely that the purpose of the legislation at issue is to prevent the juridical double taxation of residents, is not wholly convincing. Since the bases of the dividend tax and of income tax are different, it is impossible to establish that there is *taxation affecting the same income twice in relation to the same taxpayer*, even though it is conceivable that that objective inspired the Netherlands legislature from a tax policy perspective.

62. In any event, in the light of the principle of the free movement of capital, it is, in my view, neither appropriate nor sufficient to take into consideration only the Netherlands dividend tax as such. All taxation relating to the income obtained from the holding of shares in companies established in the Netherlands should rather be incorporated into the analysis. In this connection, I would point out that a resident shareholder is taxed, as far as income tax is concerned, on the basis of a flat-rate tax

33 — This information, which summarises the content of the Netherlands legislation, is made clear, inter alia, by the Opinion of the Advocate General of the Hoge Raad concerning the disputes in the main proceedings in Case C-10/14 (paragraphs 6.1 to 6.8) and Case C-14/14 (paragraphs 5.1 to 5.8) respectively, which contain citations of parliamentary documents confirming that the scheme introduced for residents tends to 'enable the offsetting in full of the dividend tax withheld against the tax ultimately payable by way of the tax on the return from wealth' (Kamerstukken II 1998/99, 26 727, No 3 [Memorie van Toelichting], p. 43).

34 — Ibid.

35 — The basis of taxation is different in that the tax base of the income tax payable by residents is made up of the average asset value of their income of which the shares form part, whereas the tax base of the dividend tax levied in respect of non-residents is made up of the income from shares actually received. The rate of taxation is also different since it theoretically amounts to 30% in the case of the flat-rate income tax payable by residents, whereas it is 15% in the case of the dividend tax levied in respect of non-residents.

36 — Dividends come under the income tax base solely by virtue of a form of substitution, as sums of money held in bank accounts which are included in the taxable base. In practice, a shareholder who makes use of the proceeds of the dividends before the end of the year or who invests them by acquiring assets which are not taxable will not be taxed at all on the basis of those proceeds.

base which operates as a kind of 'substitute' for all forms of income from capital, such as dividends, interest and capital gains. By contrast, a non-resident shareholder is subject to the dividend tax withheld at source, which constitutes for him a final tax, but is not taxed on capital gains or on other items of income from the share capital to which the shares that he holds may contribute.

63. It follows from this, in my opinion, that Mr Miljoen's proposal to divide the income tax charged on the holding of shares into two parts, one part corresponding to the dividends and the other to capital gains,[37] is not justified, despite its theoretical elegance. Since a resident shareholder can prevent only capital gains or non-realised gains from being included in the income tax which is based on the holding of Netherlands shares, it would, in my view, be insufficient to include in the comparison only the proportion of that tax which could in theory be attributed to dividends.

64. I take the view that the relevant factor when comparing the situation of residents and that of non-residents is the tax burden which is ultimately borne respectively by those two categories of shareholders and which is therefore liable to make investments in the Netherlands in the form of portfolios of shares, which constitute cross-border movements of capital, more or less attractive than comparable investments in other Member States. That position is supported by the case-law of the Court previously cited,[38] according to which the decisive criterion in that regard is that of the effective tax burden to which the legislation at issue gives rise in reality.[39] Accordingly, the comparison concerning the effects to which the holding of Netherlands shares gives rise from a tax perspective in the Netherlands may, in my view, reasonably be performed, despite the fact that the dividends paid to resident shareholders are not taxed as such.

65. In the light of those factors, I propose that the answer be given that, for the purposes of the application of Article 63 TFEU, in a situation in which a dividend tax is withheld by the source State on the distribution of dividends, the comparison between the treatment for tax purposes of a non-resident natural person and that of a resident natural person must take into account the income tax charged on the shares held by residents and in relation to which the dividend tax constitutes a prepayment.

4. Comparison of tax situations in the case of companies subject to the Netherlands dividend tax (first question referred in Case C-17/14)

66. In Case C-17/14, the referring court states that the difference in treatment invoked by Société Générale follows from the fact that, in a domestic situation, shareholders can offset the Netherlands dividend tax, as a tax prepayment, against the corporation tax to which they are subject in the Netherlands, whereas the dividend tax cannot be offset as a tax prepayment in external situations such as that of the person concerned.[40]

67. Concerning the possible relevance of the judgment in *Truck Center* in that regard, I am of the view that the fact that the dividend tax is levied both on recipient companies established in the Netherlands and on recipient companies not established there is a factor which, as I have already pointed out,[41] represents an essential difference between the present case and the case which gave rise to that judgment.[42]

37 — According to Mr Miljoen, 'the flat-rate base to be taken into account for a resident must be divided into a return from dividends and a return from capital growth', so as to take into account, in the comparison, only the part of the return corresponding to the dividends actually received (paragraph 3.3.3(i) of the order for reference relating to Case C-10/14).

38 — See point 55 of this Opinion.

39 — See, in that regard, the comparison required by the Court in the judgments in *Gerritse* (C-234/01, EU:C:2003:340, paragraph 54) and *Bouanich* (C-265/04, EU:C:2006:51, paragraph 55).

40 — Paragraph 3.4.2 of the order for reference relating to that case.

41 — See points 53 and 54 of this Opinion.

42 — C-282/07, EU:C:2008:762.

68. Furthermore, I would point out that the provisions of the Law on corporation tax which are relevant in Case C-17/14 differ considerably from the provisions of the Law on income tax which are relevant in Cases C-10/14 and C-14/14, since the dividends received by resident companies contribute as such to the tax base of corporation tax, which is not the case with regard to personal income tax.

69. However, the considerations set out above in relation to Cases C-10/14 and C-14/14 and the above-cited case-law are, in my opinion, also — and even a fortiori — applicable in relation to Case C-17/14.

70. I therefore propose that the answer be given that, for the purposes of the application of Article 63 TFEU, in a situation in which a dividend tax is withheld by the source State on the distribution of dividends, the comparison between the treatment for tax purposes of a non-resident company and that of a resident company must be extended to the corporation tax charged on the shares held by residents and in relation to which the dividend tax constitutes a prepayment. [43]

C – *The criteria for the assessment of the effective tax burden borne by a non-resident shareholder as compared with that borne by a resident shareholder (second questions referred in the three cases)*

1. The subject-matter of the second questions referred for a preliminary ruling

71. The second questions referred in these joint cases are submitted in the alternative, in the event that the Court should find, as I recommend, that, when comparing the tax situation of taxpayers who are not resident in the Netherlands and of those who are resident there, account must be taken of the final tax borne by the latter taxpayers, namely, depending on the circumstances, income tax (Cases C–10/14 and C–14/14) or corporation tax (Case C–17/14).

72. In these three cases, the referring court asks the Court about the types of criteria for determining whether the effective tax burden relating to dividends which is borne by a non-resident is greater than that which must be borne by a resident, and refers to various factors which could be relevant in that regard.

73. In spite of the points they have in common, the questions referred in the first two cases must, in my view, be dealt with separately from that referred in the third case, on the one hand, on account of the specific features of the national tax provisions governing, respectively, natural persons and companies receiving dividends in the Netherlands and, on the other hand, because of the differences between the types of criteria for comparison mentioned by the referring court.

2. The assessment of the effective tax burden in the case of natural persons subject to the Netherlands dividend tax (second questions referred in Cases C-10/14 and C-14/14)

74. In both Case C–10/14 and Case C–14/14, the referring court suggests that the effective tax burdens of residents and of non-residents be assessed by comparing the Netherlands dividend tax borne by a non-resident with the Netherlands income tax payable by a resident, in light of the fact that a particular feature of that latter tax is that it is ‘calculated in respect of the flat-rate income

43 — As a prepayment, the dividend tax affects, in the case of residents, only the cash flows between the Netherlands tax authorities and the taxpayer concerned. In that regard, the effective tax burden, which should be taken into account in order to perform that comparison, is dependent solely on the burden resulting from the income tax or corporation tax payable by the taxpayer. It is for this reason that, with a view to giving answers to the first questions referred in these three cases, I have opted for the expression ‘in relation to which the dividend tax constitutes a prepayment’, rather than the words ‘against which, in the case of residents, the dividend tax is set off’, the wording chosen by the referring court.

which, in the year in which the dividends were received, is attributable to the total holding of investment shares in Netherlands companies'. In Case C–14/14, it adds another possible standard of comparison, namely the tax-free capital allowance which applies to residents, referring expressly to the judgment in *Welte*.[44]

75. In essence, the Court is asked to define the extent to which it is necessary, in order to strike a balance between those effective tax burdens, to take account either of the arrangements subject to which a resident is taxed in relation to income derived from shares which he holds in Netherlands companies or of other criteria. In the absence of provisions of EU law harmonising the arrangements for the taxation of dividends, I am of the view that the criteria to be applied in the context of this comparative approach must be as close as possible to the elements of the scheme established for the benefit of resident shareholders by the tax legislation in question, since the advantage potentially obtained by a resident as a result of a reduced tax burden is determined by the rules applied to this category of shareholders.

76. This approach to determining the effective tax burden is, in my view, supported by the judgment in *Bouanich*, the context of which is similar to that of Cases C-10/14 and C-14/14.[45] In that judgment, the Court held that it was a matter for the national court to '*determine* in the proceedings before it *whether* the fact that non-resident shareholders are permitted to deduct the nominal value and are liable to a maximum tax of 15% *amounts to treatment* that is *no less favourable* than that afforded to resident shareholders, who have the right to deduct the costs of acquisition and are taxed at a rate of 30%'.[46] It is therefore indeed the actual end result to which the global application of the legislation of a Member State ultimately 'amounts' which was regarded as being the decisive factor in the assessment of whether resident taxpayers are treated more favourably than non-resident taxpayers.

77. It is apparent from the statement of reasons in the orders for reference relating to Cases C–10/14 and C–14/14 that the first point of comparison concerning which the Hoge Raad raises a question is that relating to the *flat-rate basis* used to calculate the Netherlands tax on the income of residents.[47] The referring court asks the Court whether it is possible to compare that latter tax, which is calculated on a notional basis from the average obtained from the net value of the investments,[48] with the Netherlands dividend tax levied in respect of a non-resident, which, for its part, is calculated on the basis of the amount of dividends actually received.

78. For the reasons detailed above,[49] I take the view that the comparison must be made between, on the one hand, the dividend tax payable by a non-resident shareholder and, on the other hand, the income tax payable by a resident shareholder on the basis of the holding of a portfolio of similar shares.

44 — C-181/12, EU:C:2013:662.

45 — C 265/04, EU:C:2006:51. The case which gave rise to that judgment concerned a situation in which the national legislation provided that a payment in respect of a share repurchase to a non-resident shareholder in connection with a reduction in share capital was taxed as a dividend at a rate of 15%, without there being a right to deduct the cost of acquisition of those shares but with a right to deduct the nominal value of the shares. By contrast, such a payment to a resident shareholder was taxed as a capital gain at a rate of 30% and the cost of acquisition of those shares could be deducted.

46 — Ibid. (paragraphs 22 and 52 to 55, emphasis added).

47 — I would point out that, pursuant to Article 5.2 of the Law on income tax, the taxable base of the income derived from investments by persons residing in the Netherlands is calculated on a flat-rate basis at 4% of the average between the basis of the return determined on 1 January and that determined on 31 December of the year in relation to which that tax is payable.

48 — Article 5.3 of the Law on income tax states that 'the basis of the return' is 'the value of the assets less the value of the debts'.

49 — See points 62 to 65 of this Opinion.

79. The second point of comparison highlighted by the referring court is that relating to the relevant *reference period*. It asks whether the dividend tax withheld in the case of a non-resident should be compared with the income tax payable by a resident exclusively for the year in which the dividends were obtained or for several years and, where appropriate, for how many years.[50]

80. Since the provisions of the Law on income tax which apply to Netherlands taxpayers take as a point of reference the income obtained in the course of 'the calendar year',[51] I am of the view that that period is the only appropriate criterion, as is also proposed, in the alternative, by Mr Miljoen and Ms X as well as the Netherlands Government and the Commission.

81. With regard to the third point of comparison, it seems that the referring court hesitates between taking into account the Netherlands dividends obtained by a non-resident over the course of the reference period *as a whole*, encompassing all the shares which the person concerned holds in Netherlands companies, or *separately*, isolating the dividends according to each Netherlands company which distributed dividends to that person during that period.

82. Like the Netherlands Government and the Commission, I am of the view that the first approach is the more appropriate one for the purpose of comparing the effective tax burdens, since residents are taxed on the basis of the flat-rate return attributable to all the shares held in Netherlands companies.

83. Finally, the fourth point of comparison, to which reference is made only in Case C–14/14, relates to the benefit of the *tax-free capital allowance*, a benefit reserved for resident taxpayers.[52] Since such an exemption of a proportion of assets alters the taxable base of the income received by residents, and therefore the tax burden ultimately borne by them, it is necessary in my view to take this into account for the purposes of the comparison in question, as is also argued by Ms X and the Commission, the latter rightly relying on the stated objective of that rule.[53]

84. Indeed, as the Commission points out, the tax-free allowance affords the flat-rate taxation a progressive character, from which resident shareholders benefit.[54] It is my view that the judgment in *Welte*, to which the question referred for a preliminary ruling expressly refers, actually supports, by analogy, the validity of the inclusion of such an exemption, since the Court acknowledged in that judgment that account had to be taken of an allowance which affected the taxable base differently depending on whether the persons concerned were resident or non-resident.[55]

50 — This question is based on the finding by the referring court that 'the ratio between the actual dividend income and the flat-rate tax base may fluctuate greatly over the course of one year'.

51 — See Articles 5.2 and 7.1 of the Law.

52 — Under Articles 5.2 and 5.5 of the Law on income tax, the flat-rate average which determines the taxable base is used only provided that it is 'greater than the tax-exempt portion of the assets' and 'the tax-free capital allowance amounts to EUR 20 014'.

53 — The Commission makes the point that the explanatory memorandum to the Law on income tax states that the objective of the grant of a tax-free capital allowance is to make the collection of taxes under heading 3 more effective, that is a flat-rate collection of the tax on income from savings and investments in respect of residents, since this enables taxpayers holding few securities not to pay that tax. It rightly argues that that objective should also apply to non-residents.

54 — The Commission's written observations contain an illustration of how a tax-free allowance is capable of affecting the effective tax burden.

55 — In the judgment in *Welte* (C–181/12, EU:C:2013:662), delivered in the context of the inheritance of immovable property, a transaction covered by the principle of the free movement of capital, the Court held that Member State legislation which grants a tax-free allowance altering the taxable base which was greater where the deceased or the heir resided in that State entailed a restriction of that freedom (paragraph 21 et seq.). In addition, in relation to the possible justification for that restriction, the Court analysed the comparability of the situations at issue by examining the criteria for the grant of that allowance (paragraph 45 et seq.).

85. However, with regard to the contribution made in this regard by the judgment in *Schumacker*,[56] which is discussed in the present cases,[57] it is not clear to me to what extent that judgment provides useful guidance in the present case, since it concerned discrimination against a non-resident worker whose personal and family situation were not taken into account from a tax perspective in the State of residence or the State of employment.[58] However, in the present case, the Law on income tax provides that the exemption of a proportion of the taxable capital is based not on the individual circumstances of the taxpayer or on his ability to pay taxes, but solely on the extent of the capital which he holds.[59]

86. I am of the view that, in practice, a comparison with the effective tax burden borne by a non-resident in respect of the dividend tax withheld on the basis of a portfolio of shares in the Netherlands means that it is necessary, first of all, to subtract all deductions of liabilities,[60] allowances or exemptions of all kinds from which residents may benefit in respect of the taxation of their income, then to calculate the flat-rate return fixed at 4% of the average net value of the assets and, finally, to apply the 30% rate of taxation to the income from capital in order to determine the effective tax burden ultimately borne by a resident on the basis of the holding of a similar share portfolio.

3. The assessment of the effective tax burden in the case of companies subject to the Netherlands dividend tax (parts (a) and (b) of the second question referred in Case C-17/14)

87. By the second two-part question that it raises in Case C–17/14, the referring court asks the Court to define the relevant criteria for determining whether, in the hypothetical[61] domestic situation which ought to enable the comparison to be made, the effective corporation tax burden charged on dividends would be lower than the tax at source charged on the dividends in the present case. It asks, in particular, whether account should be taken in this regard of ‘all the costs which, in an economic sense, are connected with the shares from which the dividend arises’ (part (a) of the second question), and if not whether account should be taken either of ‘a possible deduction of a dividend included in the share purchase price’ or of ‘a possible financing costs resulting from ownership of the shares concerned’ (part (b) of the second question).

88. It is apparent from the order for reference that this question is raised in those terms because Société Générale claimed that, having regard to its own commercial activities, it was necessary to include, in the points of comparison with the tax burden borne by a comparable resident company, not only the costs directly attributable to the dividends, as the Rechtbank te Haarlem acknowledged, but also the negative results of prices and transactions on shares or items other than those from which the dividends arise but which are nevertheless linked to them. Before the Court, Société Générale claims that the dividends are inextricably linked to other income and expenditure deriving from a transaction, such as ‘the interest costs, the purchase price and the proceeds of the sale of shares’.[62]

56 — C-279/93, EU:C:1995:31, paragraph 38.

57 — The order for reference relating to Case C–14/14 mentions (paragraph 3.6.1) that, on appeal, ‘the Hof failed to take account of the tax-free capital allowance or the tax reductions, because it was not stated and it is not evident that the criterion referred to in *Schumacker* (C–279/93 …) is met’.

58 — In that case, the issue brought before the Court involved determining which Member State, the State of the place of residence of the person concerned or that in which he worked and received almost all his income, was obliged to take into account the personal situation of the person concerned by the taxation.

59 — See Articles 5.1 and 5.2 of that law.

60 — Provided that the non-resident taxpayer is able, where appropriate, to prove that he has financed his portfolio of shares using borrowed capital.

61 — It is apparent from the Opinion of the Advocate General of the Hoge Raad concerning the dispute in the main proceedings in Case C–17/14 (paragraph 2.7) that Société Générale described, both at first instance and on appeal, various ‘domestic situations’ which, according to it, are comparable to its situation and in which, in its opinion, the Kingdom of the Netherlands levies less tax than is levied against it.

62 — Société Générale submits that its argument that such financial instruments which are connected by a close functional link should be treated as a whole is supported by Article 28 of the Proposal for a Council Directive on a Common Consolidated Corporate Tax Base (CCCTB), [COM(2011) 121 final] and by the case-law of the Hoge Raad relating to national tax law.

89. The referring court contends, in opposition to that extensive approach, that numerous practical complications would arise if, in order to assess the extent to which the tax burden borne by a non-resident company is higher than it would have been in a purely domestic situation, account had to be taken of all the particular features of the situation in question. It mentions, by way of examples, 'the financing costs relating to shareholdings, as well as the transaction costs and any dividend included in the share purchase price', and develops its analysis in the light of the national case-law concerning the latter element. [63]

90. Like the Netherlands, German and Swedish Governments and the Commission, and contrary to the doubts which the referring court appears to entertain, [64] I take the view that the case-law of Court provides answers which may be applied to this issue.

91. It is settled case-law that, in relation to expenses which are directly linked to an activity which has generated taxable income in a Member State, such as business expenses, [65] residents and non-residents of that State are in comparable situations and must therefore be treated in the same way as regards the granting, in taxation matters, of a possibility of deducting those expenses.

92. It follows that the national legislation at issue could be contrary to Article 63 TFEU if, first, costs such as those claimed by Société Générale were to be regarded as constituting expenses directly linked to an activity of that kind and, secondly, only resident companies were eligible to deduct such expenses. [66]

93. The Court has explained that the existence of a direct link within the meaning of that case-law results from the fact that the expenditure is inextricably linked to the activity which gives rise to the taxable income concerned, as is the case with expenses necessary in order to carry out the activity which gives rise to those expenses. [67] It has already found, in particular, that it is possible for such a direct link to exist in the case of income received in the form of dividends, [68] specifying inter alia that although the expenses in question may, where appropriate, be directly linked to an amount paid in connection with a securities transaction, they must also be directly linked to the receipt of dividends. [69]

94. I note that Société Générale trades in financial instruments and in particular in derivatives. The relevant transactions in securities are conducted in France, where the profits made from those commercial transactions are taxed. The link to the territory of the Kingdom of the Netherlands follows from the fact that, on account of the holding of shares in Netherlands companies, acquired for the purposes of covering risks linked to those instruments and transactions, Société Générale may receive dividends on which a Netherlands tax is withheld at source, at a rate of 15%.

63 — See paragraph 3.4.3.2 of the order for reference in Case C–17/14.

64 — While referring, with regard to that latter element, to the judgment in *Commission* v *Finland* (C-342/10, EU:C:2012:688), that court begins by contrasting the situation at issue here with that in 'the judgment in *Schröder* (C–450/09, EU:C:2011:198, paragraph 40)', on the grounds that, in its view, '*portfolio dividends must be distinguished from earned income*, so that it may be argued that, *unlike expenses such as business expenses, even the costs which are directly attributable to the dividends must not be taken into account* for the purposes of determining whether discrimination exists' (emphasis added).

65 — The words 'such as' contained in that case-law demonstrate, in my view, that the Court did not intend to limit the scope of its analysis to the particular case of business expenses, contrary to the position which the referring court appears to adopt in the present case (see the preceding footnote of this Opinion).

66 — See, inter alia, the judgments in *Schröder* (C–450/09, EU:C:2011:198, paragraph 40 et seq.) and *Grünewald* (C–559/13, EU:C:2015:109, paragraphs 29 and 30).

67 — Ibid. See also the Opinion of Advocate General Bot in *Schröder* (C–450/09, EU:C:2010:761, point 60), in which it is stated that expenditure 'must be regarded as a cost linked directly to that income where the chargeable event with regard to that expenditure is the activity that made it possible to obtain that income and not the personal situation of the taxpayer'.

68 — See the judgment in *Commission* v *Finland* (C–342/10, EU:C:2012:688, paragraph 37 et seq.), from which it is clear that adopting and maintaining in force national tax legislation reserving solely for resident pension funds the right to treat as deductible expenses the dividends received and reserved by such a fund with a view to meeting its obligations in respect of pensions constitutes a failure to fulfil the obligations under Article 63 TFEU.

69 — Judgment in *Commission* v *Germany* (C–600/10, EU:C:2012:737, paragraphs 20, 22 and 24).

95. In the case of a shareholder company established in the Netherlands, the two abovementioned forms of income contribute simultaneously to the taxable profits in that Member State and there is therefore no need to draw a strict distinction between the costs directly linked to receipt of the dividends and those linked to the transactions taken as a whole. By contrast, in a cross-border situation such as that of Société Générale, it is necessary to identify the hypothetical domestic situation which is objectively comparable.

96. In this regard, I would point out, as did the Advocate General of the Hoge Raad who delivered his Opinion in relation to the dispute in the main proceedings, that the fiscal powers of the Kingdom of the Netherlands are justified solely in relation to the amount of the dividends received, and not in respect of any other profits or proceeds of Société Générale's business. [70] I take the view that the situation of the person concerned may be compared to that of a resident solely in relation to those dividends, and not in relation to other activities economically linked to the holding of shares, which fall outside those powers.

97. It is necessary, in my view, to determine the net amount of the dividends, which is the only relevant factor for the purposes of conducting that comparison properly, taking into account the financing costs of the temporary holding of shares and the transaction and holding costs relating to those shares, provided that and in so far as a resident shareholder could deduct them from the gross amount of the dividends, and disregarding the profits arising from transactions involving the purchase or resale of the shares concerned.

98. It is in the light of those elements that it is for the court seised of the dispute in the main proceedings to establish whether, under the national tax legislation, [71] expenses such as those on which Société Générale relies may be regarded as being directly linked, and not solely economically linked, to the holding of the shares which generated the dividends at issue, and whether such costs are actually taken into account, in the context of the application of the Law on corporation tax, in respect of the taxation of dividends paid to a resident company.

D – *Neutralisation of the effects of the difference in treatment for tax purposes as a result of a convention for the avoidance of double taxation concluded with another Member State (third questions referred in Cases C-14/14 and C-17/14)*

1. The subject-matter of the third questions referred for a preliminary ruling

99. The third questions referred in Cases C–14/14 and C–17/14 are raised conditionally, since the referring court refers them to the Court solely in the event that the first questions referred respectively in those cases are answered in the affirmative, [72] as in my view they should.

100. In essence, the referring court asks the Court what the effect may be of a convention concluded between the Member State in which those dividends were received ('the source State') and the Member State in which the shareholder harmed is resident ('the State of residence') with the aim of avoiding international juridical double taxation, on the basis of a division between them of their

70 — See point 7.2 et seq. of that Opinion, annexed to the order for reference in Case C-17/14.

71 — Thus, in the judgment in *Commission* v *Finland* (C–342/10, EU:C:2012:688, paragraph 42), the Court found that a direct link between expenses and taxable income results from the technique of assimilation chosen by the Finnish legislature.

72 — More specifically, the situation envisaged by the referring court is that in which the comparison between the tax situation of a non-resident and that of a resident, who have both received dividends taxed in the Netherlands, should be extended to take account of the final tax — income tax or corporation tax — against which the dividend tax may be systematically set off by residents, for the purposes of determining whether a non-resident is in fact harmed by the national legislation.

respective fiscal powers. More specifically, it asks in which circumstances the view could be taken that such a convention makes it possible to remedy sufficiently the difference in treatment for tax purposes which may exist between residents and non-residents and whether that difference results in any incompatibility with EU law.

101. Notwithstanding the fact that the issue thus formulated is common to the third questions referred in Cases C–14/14 and C–17/14, the elements relevant to answering them differ in part, on account of the differences between the provisions of the conventions applicable in the two disputes in the main proceedings signed between, on the one hand, the Kingdom of the Netherlands and, on the other hand, the Kingdom of Belgium and the French Republic respectively. In addition, it may be observed that the question referred in Case C–17/14 has, in reality, a dual purpose, as is clear from the two questions contained therein.

2. Established case-law

102. As the referring court points out at the outset, it follows from the case-law of the Court that any incompatibility between the tax legislation of a Member State and EU law cannot be remedied merely by the application of provisions adopted unilaterally by another Member State.[73] In particular, infringement of the principle of the free movement of capital caused by the fact that the source State treats a taxpayer who is resident in its territory more favourably than a taxpayer who is not resident there cannot be properly compensated for by the mere fact that the other Member State in which the latter resides has introduced national measures which grant him an advantage.[74]

103. It is true that the Court has repeatedly acknowledged that it cannot be ruled out that a Member State may succeed in ensuring compliance with its obligations under the Treaty as a result of a convention for the avoidance of double taxation concluded with another Member State,[75] provided, however, that implementation of the provisions of that convention, in so far as they form part of the legal background to the main proceedings,[76] enables the negative effects of the difference in treatment resulting from the legislation of the first State to be compensated for in full.

104. In accordance with the case-law, the difference in treatment between dividends distributed to resident taxpayers and dividends distributed to taxpayers established in other Member States *does not cease to exist completely unless the tax withheld at source can be* sufficiently *set off* against the tax due in the other Member State, that is *in the full amount of the difference in treatment*. In order to achieve that objective of neutralisation, it appears necessary that the application of the deduction or set-off method provided for in such a convention enables the dividend tax levied by the source State to be deducted in full from, or set off in full against, the tax payable in the State of residence of the recipient shareholder.[77]

73 — In the wording used in *Amurta* (C–379/05, EU:C:2007:655, paragraph 78), a Member State 'cannot rely on the existence of a *tax advantage granted unilaterally by another Member State* in order to escape its obligations under the Treaty' (emphasis added).

74 — See, by analogy, the judgment in *Arens-Sikken* (C–43/07, EU:C:2008:490, paragraphs 66 and 67).

75 — Judgment in *Commission* v *Germany* (C–284/09, EU:C:2011:670, paragraph 62 and the case-law cited).

76 — Judgment in *Bouanich* (C–265/04, EU:C:2006:51, paragraph 51).

77 — See, inter alia, the judgments in *Commission* v *Spain* (C–487/08, EU:C:2010:310, paragraphs 59 and 60); *Commission* v *Germany* (C–284/09, EU:C:2011:670, paragraphs 63 and 67); *Commission* v *Belgium* (C–387/11, EU:C:2012:670, paragraph 55) and the order in *Tate & Lyle Investments* (C–384/11, EU:C:2012:463, paragraph 37).

105. I would point out that international conventions for the avoidance of double taxation usually provide that the State of residence is to grant an ordinary set-off, and not a full set-off, of the tax paid in the source State.[78] In so far as such conventions provide that the amount of that latter tax which may be deducted from or offset against the tax payable in the State of residence cannot exceed the tax which should be paid in that same State, they do not enable the systematic neutralisation of all differences in treatment existing in the source State which are capable of creating prohibited obstacles to the free movement of capital. This is, in my view, one of the lessons provided by the case-law established in the context of various actions for failure to fulfil obligations relating to this issue.[79]

106. It follows from the case-law of the Court that a failure to fulfil obligations under Article 63 TFEU committed by the source Member State is established if it emerges that there are cases in which a non-resident taxpayer is treated less favourably than a resident taxpayer. However, in my view that case-law does not mean that the source Member State is obliged to reimburse the excess tax resulting from its discriminatory legislation where the application of such a tax convention has already specifically enabled the negative effects of that legislation to be neutralised by means of a tax credit or a set-off against the taxation levied in the Member State of residence.[80] It appears to me that, in that situation, EU law in no way imposes on the Member States concerned an obligation to disapply the division of fiscal powers on which they agreed between themselves, on account of the existence of a discriminatory factor within the source Member State. I consider that the requirement of full neutralisation in the Member State of residence, a requirement which follows from the case-law of the Court, would otherwise be rendered meaningless.

3. The neutralising effect of a bilateral treaty such as the Belgium-Netherlands Convention (third question referred in Case C-14/14)

107. Article 23(1)(b) of the Belgium-Netherlands Convention, which is applicable in Case C–14/14, provides that where a person resident in Belgium receives dividends which are not exempt from Belgian taxes, as was the case of Ms X, the Netherlands tax levied at source on that income[81] must be offset against the Belgian tax relating to that income, 'subject to the provisions of Belgian legislation on the offsetting against Belgian tax of taxes paid in other countries'.

78 — As the Advocate General of the Hoge Raad explains, in particular, in his Opinion relating to the dispute in the main proceedings in Case C–17/14 (paragraph 6.10), the ordinary set-off (or 'the ordinary credit') means that the amount set off in the State of residence cannot be greater than the dividend tax collected by that State in respect of its own final tax, whereas a full set-off (or 'the full credit') would have the result that, if the tax payable in the State of residence is lower than the tax collected in the source State, the State of residence should nevertheless reimburse (by drawing, therefore, on other tax revenues) the balance of the tax charged in the source State, which cannot be accepted. In relation to those two aspects of offsetting, which constitutes together with exemption one of the methods of eliminating juridical double taxation, see the abovementioned commentary on Articles 23 A and 23 B of the OECD Model Tax Convention on Income and on Capital (paragraphs 1, 13 and 16).

79 — See the judgments in *Commission* v *Italy* (C–540/07, EU:C:2009:717, paragraph 39); *Commission* v *Spain* (C–487/08, EU:C:2010:310, paragraph 64); *Commission* v *Germany* (C–284/09, EU:C:2011:670, paragraph 70); *Commission* v *Belgium* (C–387/11, EU:C:2012:670, paragraph 57) and *Commission* v *Finland* (C–342/10, EU:C:2012:688, paragraph 34).

80 — See, in this regard, a contrario, the judgment in *Commission* v *Germany* (C–284/09, EU:C:2011:670, paragraph 68 and the case-law cited), in which the Court observed that, in that case, *neutralisation was not properly achieved* by virtue of the application of a convention for the avoidance of double taxation *since* 'if … dividends are not taxed, or are not taxed sufficiently [in the State of residence of the taxpayer], *the amount of tax deducted [in the source State of those dividends] or a part thereof cannot be set off*' (emphasis added).

81 — In line with the exception provided for in Article 10(2) of that convention.

108. As is stated in the order for reference, it is apparent from the official commentary to that convention [82] that the wording above refers to the offsetting method laid down in Article 285 et seq. of the 1992 Belgian Income Tax Code. Those articles enable a ‘flat-rate proportion of foreign tax’ to be set off against the tax payable in Belgium but, in the case of dividends, only if certain restrictive conditions are satisfied. [83]

109. With a view to claiming that neutralisation is not achieved in the present case, Ms X submits that offsetting the Netherlands tax levied on dividends against Belgian personal income tax is impossible in circumstances such as those at issue in the main proceedings, a matter which is not in dispute. [84] She alleges that the Belgian legislation permits the deduction of that tax from the taxable base of such income only as an expense, before applying a rate of taxation of 25% to the net amount of the dividends thus obtained, [85] and that such a deduction does not compensate for the discriminatory part of the Netherlands tax.

110. The Netherlands Government takes the opposing view, arguing that the disadvantage suffered prima facie by a taxpayer who is not resident in the Netherlands is duly neutralised, since, on the one hand, a double taxation convention provides for a conditional possibility of offsetting, such as the permitted deduction of costs in the State in which that taxpayer resides, and, on the other hand, in this particular case that possibility compensates fully, even more than fully, for that disadvantage. [86]

111. I am of the view that, in order to neutralise fully the effects of a restriction in the source State on the free movement of capital, it is not sufficient that such a convention may result, where appropriate by means of a reference to the national law of the State of residence, in a tax reduction in that latter State which is actually obtained only in certain circumstances. As the referring court observes, ‘the [Belgium-Netherlands] Convention does not provide for an unconditional full credit, with the result that full set-off is not guaranteed in all cases’, [87] meaning that the disadvantage suffered by taxpayers who are not resident in the Netherlands is not compensated for in all circumstances.

112. Like the Commission, I am of the view that such an arrangement does not satisfy the requirements under the FEU Treaty as they have been previously defined by the Court. It follows from the case-law that, in order for a correction to operate properly pursuant to a double taxation convention, the offsetting of the tax paid in the Member State whose tax legislation is prejudicial to the free movement of capital against the tax payable in the other Contracting Member State must enable the difference in treatment resulting from the provisions of that legislation to be neutralised *in all cases.* [88]

113. In order for it to be guaranteed from a legal perspective that the discriminatory part of the tax levied at source is fully offset as a result of such a convention, the difference in treatment must be neutralised unconditionally, by means of a method of offsetting or deduction applicable in all situations. In my view, the need to combat the deterrent effect which national tax legislation may

82 — See the article-by-article commentary to that convention, which is common to the two Contracting States and annexed to the ‘explanatory memorandum’ to both the proposal for the Netherlands Law approving the Belgium-Netherlands Convention (the referring court cites in that regard the ‘Netherlands parliamentary documents, second chamber, 2001 to 2002, 28 259, No 3, p. 54’) and the Belgian Law approving that convention (see documents from the Belgian Senate, 2001 to 2002 session, 2–1293/2, p. 56).

83 — The referring court points out that ‘paragraph 4.13 of the judgment of the Hof [under appeal] contains the finding, unchallenged in cassation, that, in the situation of the person concerned, neither Article 285 nor any of the following provisions of the 1992 Income Tax Code affords the right to set off the tax levied on dividends in the Netherlands against Belgian tax’.

84 — See the previous footnote in this Opinion.

85 — In the light of the order for reference, it is established that it is the *net amount* of the dividends which was taken into account in Belgium for the purposes of calculating the personal income tax payable by Ms X, following a deduction of the Netherlands tax levied on the dividends (see also point 32 of this Opinion).

86 — In the wording of the order for reference, in the case of Ms X, ‘the deduction of the Netherlands dividend tax at the Belgian rate results in a tax saving [obtained in Belgium] which is greater than the disadvantage suffered … in the amount of EUR 526.86’.

87 — Paragraph 4.1.3 of the order for reference.

88 — See the judgment in *Commission* v *Belgium* (C–387/11, EU:C:2012:670, paragraph 57 and the case-law cited).

have on the free movement of capital necessarily entails the introduction of corrective mechanisms at an earlier stage. The obstacle to which the legislation of a Member State may give rise is not properly remedied if compensation is indeed granted by means of a convention but without the certainty that such compensation will systematically, and therefore effectively in all cases, confer a corrective benefit. The difference in treatment found to exist to the detriment of persons established in other Member States is thus capable of deterring them from making investments in that State.

114. Although it is for the national court to assess whether any discriminatory effect of a tax levied in the source State is fully neutralised by compensation granted in the State of residence under a bilateral convention, I consider, for my part, that this is not the case in the situation of a taxpayer residing in Belgium who has paid a dividend tax in the Netherlands. The Kingdom of Belgium does not genuinely provide for the setting off of that Netherlands tax against the tax payable in Belgium but applies taxation relating to the net amount of the dividends received, that is to say the gross amount of those dividends minus the dividend tax withheld in the Netherlands, at a rate of 25%. The excess tax levied in the Netherlands is thus neutralised only up to a maximum of 25%, since the Netherlands dividend tax is deducted from the taxable base in Belgium and not from the tax payable in that State. Such a method does not result in full neutralisation because, as the Advocate General of the Hoge Raad observed in his Opinion relating to the dispute in the main proceedings, '25% can never be sufficient to compensate for 100%'.[89]

115. I therefore propose that the third question referred in Case C-14/14 be answered to the effect that, in order for a Member State which levies a dividend tax at source in a discriminatory manner to succeed in ensuring compliance with its obligations under the FEU Treaty as a result of the application of a convention for the avoidance of double taxation concluded with the Member State in which the taxpayer concerned resides, it is not sufficient that that convention provides for a reduction of the tax payable in the State of residence by means of a set-off of the tax levied at source which is not unconditional. However, where it emerges that, in the specific case brought before the national court, the discriminatory effects of the legislation applied in the source Member State were fully remedied by the option to set off the tax made available, pursuant to such a bilateral convention, in the Member State in which the taxpayer concerned resides, it is not necessary for a reimbursement of the discriminatory part of the tax levied at source to be granted in the first of those States.

4. The neutralising effect of a bilateral treaty such as the Franco-Netherlands Convention (third question referred in Case C-17/14)

116. The third question referred in Case C–17/14 is divided into two parts. *The first part* concerns, in a similar manner to Case C–14/14, the question whether, in the event that the comparison between the tax situation of residents and that of non-residents should take into account corporation tax and that it appears that a non-resident company bears a heavier tax burden, the Franco-Netherlands Convention for the avoidance of double taxation enables such a difference in treatment to be neutralised.

117. It follows from Article 24(B)(b) of that convention that the dividends paid to a person residing in France which have been subject to a Netherlands tax[90] give rise, in that State, to a tax credit. The amount of that credit is equal to that tax but cannot exceed the amount of the tax payable in France on the income in question. That credit is set off, in particular, against the corporation tax within the base of which such dividends are included.

89 — See points 1.5 and 7.10 of that Opinion, which is annexed to the order for reference in Case C–14/14.
90 — In accordance with the provisions of Article 10(2) of that convention.

118. Société Générale claims reimbursement of the dividend tax levied by the Netherlands tax authorities, which oppose reimbursement on the ground that that company benefited in France from a tax credit under Article 24 of the abovementioned convention. It submits that the Netherlands national legislation is an obstacle to the free movement of capital and that the Franco-Netherlands Convention does not enable that obstacle to be removed because the Convention does not offer in advance the guarantee that the Netherlands dividend tax will *always* give rise to a set-off in France, with the result that the tax burden of a company established in that State would in no circumstances exceed that of a comparable company established in the Netherlands.[91]

119. In that regard, it should be noted that it is not disputed that Société Générale was granted a set-off, against French corporation tax, of all the Netherlands dividend tax withheld in respect of the years 2000 to 2007, but that the Netherlands dividend tax levied in respect of the year 2008 could not, however, be set off against French corporation tax on account of the deficit which that company incurred in France that year.

120. The referring court asks what significance should be attached to the fact that, first, the Franco-Netherlands Convention does not guarantee a full set-off for non-residents in all cases, but that, secondly, the taxpayer concerned has nonetheless benefited from that possibility, at least over the course of several years, in the present case. As I have stated above,[92] EU law does not, in my opinion, require that any discriminatory taxation borne in the source Member State be remedied there by that State in favour of the person concerned in such circumstances.

121. Both the Netherlands Government and Swedish Government — in the alternative in the case of the latter[93] — take the view that it is sufficient, in order for any disadvantage suffered by a non-resident shareholder to be properly neutralised, that a double taxation convention provides for an option to set off the tax in the form of a tax credit, even if that option is conditional, and that such a provision specifically enables that disadvantage to be compensated for in full in that shareholder's State of residence.

122. In the light of the case-law cited above,[94] it appears to me to be necessary, in order to comply with Article 63 TFEU, for an unconditional provision allowing for compensation in full to be laid down to that end in the convention concerned, so that the tax burden borne in a Member State is never greater for a non-resident company than for a resident company in a comparable situation. Accordingly, such a convention should provide for a proper set-off, irrespective of the circumstances specific to the case in question.

123. As the Commission points out, although Article 24 of the Franco-Netherlands Convention does indeed provide for an unconditional tax credit, in that that credit is not dependent on a reference to any conditions laid down in French national law,[95] that provision does not, however, guarantee that the dividend tax levied in the Netherlands can *in all cases* be set off against the tax payable in France *in the full amount of the difference in treatment arising under the Netherlands legislation*, as required by the case-law of the Court.[96] Where a shareholder who is not resident in the Netherlands is liable to dividend tax in the Netherlands but is subject to an insufficient level of taxation in France, he

91 — At the hearing, Société Générale submitted that the neutralisation is genuine only where a non-resident investor is certain, when he decides to purchase a shareholding in a Member State, that he will not be in a less favourable situation than a resident investor in respect of any dividends.

92 — See point 106 of this Opinion.

93 — The Swedish Government submits, primarily, that 'the arrangements, laid down in a tax convention, whereby the State of residence takes account of the tax levied by the source State have no bearing on the assessment of whether the taxation applied by the source State is compatible with EU law'.

94 — See, in particular, points 103, 105 and 112 of this Opinion.

95 — Contrary to Article 23 of the Belgium-Netherlands Convention.

96 — See, inter alia, the judgment in *Commission* v *Spain* (C–487/08, EU:C:2010:310, paragraphs 59 and 64).

cannot benefit in that latter State from a tax credit which would allow for the remedying of that difference, which is therefore not systematically neutralised. The application of that provision of the Convention therefore does not enable the Kingdom of the Netherlands to satisfy fully its obligations under Article 63 TFEU.

124. In *the second part* of its third question, the referring court asks the Court whether it is relevant, for the purposes of assessing whether the effects of any restriction on the free movement of capital are sufficiently neutralised by a bilateral convention, that there is, where the compensation for the disadvantage to a non-resident is insufficient in respect of the year in which the dividends were received, a possibility of carrying forward a deficit incurred in the State of residence and of effectively offsetting the tax levied by the source State in the course of subsequent years. The Netherlands Government submits that such a possibility is in fact a crucial element in that regard.

125. In my opinion, it is sufficient to observe that the option of deferring the offsetting against the tax payable in France to a financial year other than that in respect of which a non-resident paid the Netherlands dividend tax, an option which is mentioned by the referring court, is by no means a certainty in the present case, in view of the order for reference and the observations submitted to the Court.[97] In particular, I would point out that the convention applicable in this case does not require the French Republic to establish such an option. In any event, like the Commission, I am of the view that, in order to evaluate the neutralising effect of a double taxation convention, the sole relevant factor is the result which application of that convention may have for a non-resident, in terms of whether or not the compensation is sufficient, as compared with the advantages enjoyed by a resident of the source Member State placed in an equivalent situation.[98]

126. I therefore propose that the third questions submitted by the referring court be answered in the negative, in the terms set out below.

V – **Conclusion**

127. In the light of the foregoing considerations, I propose that the Court should answer as follows the questions referred for a preliminary ruling by the Hoge Raad der Nederlanden:

(1) In answer to the first questions referred in Cases C-10/14, C-14/14 and C-17/14:

For the purposes of the application of Article 63 TFEU, where a dividend tax is withheld at source by a Member State in respect of dividends distributed by companies established in that State, the comparison between the treatment for tax purposes of a non-resident and that of a resident must be extended to the income tax or the corporation tax charged on the shares held by residents and in relation to which the dividend tax constitutes a prepayment.

(2) In answer to the second questions referred in Cases C-10/14 and C-14/14:

For the purposes of determining whether the effective tax burden borne by a non-resident natural person is greater than that borne by a resident natural person, it is necessary to compare the Netherlands dividend tax withheld in respect of a non-resident with the Netherlands income tax payable by a resident calculated on the basis of the flat-rate income

97 — In particular, the order for reference states that '[t]he lower courts did not examine whether Société Générale's right to offset tax in respect of the year 2008 had been carried forward in France and could be relied on effectively' (paragraph 3.4.5.2). Furthermore, the Netherlands Government states that 'it is not established that the right to offset tax in respect of the year 2008 was carried forward [by Société Générale] to another year in which it was used'.

98 — In that connection, the Commission rightly points out that, unlike a non-resident shareholder, a shareholder who is resident in the Netherlands may benefit from a full tax credit and, in the case of a loss, from the reimbursement of the dividend tax deducted at source, without having to wait for the — by definition uncertain — time when it will again receive dividends.

which, in the year in which the dividends were received, is attributable to the total holding of investment shares in Netherlands companies, and also to take into account in that comparison the tax-free capital allowance from which residents benefit.

(3) In answer to the second question referred in Case C–17/14:

For the purposes of determining whether the effective tax burden borne by a non-resident company is greater than that borne by a resident company, account should be taken of the costs directly linked to the holding of the shares which generated the dividends taxed at source, provided that such costs would be taken into account in the taxation of such dividends paid to a resident company when applying the 1969 Law on corporation tax in the version applicable to the facts in the main proceedings in Case C-17/14, which it is a matter for the national court to determine.

(4) In answer to the third question referred in Case C–14/14:

In order to assess whether the potentially discriminatory nature of a deduction of tax in the Member State in which the income originates is properly neutralised by the application of a convention for the avoidance of double taxation concluded with the Member State in which the taxpayer concerned resides, it is not sufficient for that convention to provide for a reduction of the tax payable in the State of residence by means of a set-off of the tax levied at source which is not, however, guaranteed in all cases in the full amount of the difference in treatment. Nevertheless, where it emerges that, in the specific case in question, the discriminatory effects of the legislation applied in the source Member State were fully remedied by a set-off or by a tax credit in the Member State of residence, pursuant to such a bilateral convention, it is not necessary for a reimbursement of the discriminatory part of the tax levied at source to be granted in the first of those States.

(5) In answer to the third question referred in Case C–17/14:

In order to assess whether the potentially discriminatory nature of a deduction of tax in the Member State in which the income originates is properly neutralised by the application of a convention for the avoidance of double taxation concluded with the Member State in which the taxpayer concerned resides, it is not sufficient for that convention to provide for a set-off of a tax credit in an amount equal to the tax deducted at source which is not, however, guaranteed in all cases in the full amount of the difference in treatment, where it is provided that the tax credit granted in the Member State of residence cannot exceed the amount of the tax payable in that Member State.