Reports of Cases

OPINION OF ADVOCATE GENERAL
KOKOTT
delivered on 19 January 2017[1]

Case C-6/16

Eqiom SAS, previously Holcim France SAS
Enka SA
v
Ministre des finances et des comptes publics
(Request for a preliminary ruling

from the Conseil d'État (Council of State, France))

(Tax legislation — Freedom of establishment (Article 43 EC) — Free movement of capital (Article 56 EC) — Council Directive 90/435/EEC — Parent-Subsidiary Directive — Withholding tax on dividends paid abroad — Prevention of tax evasion — Misuse of rights)

I – Introduction

1. The present case essentially concerns the question of the circumstances in which a Member State may refuse — on grounds of preventing tax evasion — an exemption from withholding tax that would normally be granted for the dividend payments of a resident subsidiary to its non-resident parent company

2. The question arises in the context of a French rule that is intended to counteract an abusive reliance on this exemption from withholding tax which Article 5 of Council Directive 90/435/EEC[2] ('the Parent-Subsidiary Directive') (which applied at the time) basically requires. In applying this provision, the tax authorities refused to exempt from withholding tax the dividends of a company resident in France paid to its Luxembourg parent company. The Luxembourg-resident company was in turn indirectly controlled by a company that had its seat in Switzerland and the proof required in these circumstances — namely that the principal purpose behind the structure of the chain of interests was not tax-related — had not been adduced.

1 Original language: German.

2 Council Directive of 23 July 1990 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States (OJ 1990 L 225, p. 6), since replaced by Council Directive 2011/96/EU of 30 November 2011 (OJ 2011 L 345, p. 8).

3. The issue is whether the French regulation, which in theory addresses a form of 'directive shopping',[3] is compatible with the Parent-Subsidiary Directive and with the fundamental freedoms. In this context the recent, significantly increased efforts to address abusive tax practices at European[4] and international[5] level highlight the special relevance of this topic. While it is necessary to forcefully counteract evasion simply for reasons of tax fairness, proportionality must nevertheless always be preserved when doing so.

II – Legal framework

A – EU law

4. The primary law framework in this case is provided by the provisions on freedom of establishment and the free movement of capital. Given that, in the main proceedings, it is necessary to assess the legality of the taxation of profit distributions made in 2005 and 2006, reference needs to be made, in response to the request for a preliminary ruling, to the provisions of the treaties as amended by the Treaty of Amsterdam.[6]

5. The Parent-Subsidiary Directive is relevant at the level of secondary legislation. Under its Article 1(1) it should be applied by each Member State

'…

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

…'

6. In relation to such profit distributions, Article 5 of the Parent-Subsidiary Directive provides:

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

7. Article 1(2) of the Parent-Subsidiary Directive provides:

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

B – National legislation

8. Article 119a(2) of the version of the French Code général des impôts (General Tax Code of France, the 'CGI'), which is applicable here, makes profits distributed by French legal persons to persons whose residence for tax purposes or seat is outside France subject to withholding tax.

3 In the context that is of interest here, a third country legal person that does not benefit under the Parent-Subsidiary Directive is structuring its arrangements through the creation of an intermediate company within the European Union in order to be able to profit from the withholding tax exemption provided for in the directive.

4 See Council Directive (EU) 2016/1164 of 12 July 2016 laying down rules against tax avoidance practices that directly affect the functioning of the internal market (OJ 2016 L 193, p. 1), Council Directive (EU) 2015/121 of 27 January 2015 (OJ 2015 L 21, p. 1), which incorporated a 'common minimum anti-abuse rule' into the current version of the Parent-Subsidiary Directive, as well as the Commission recommendation of 6 December 2012 on aggressive tax planning (C(2012) 8806 final).

5 See in particular the OECD's Final Reports published on 5 October 2015 on the OECD/G20's Base Erosion and Profit Shifting Project ('BEPS'), available at http://www.oecd.org/ctp/beps-2015-final-reports.htm

6 OJ 1997 C 340, p. 1.

9. Article 119b(1) in conjunction with Article 119b(2) CGI provides, on certain conditions, for a distribution of profits to a legal person to be exempt from such withholding tax. These conditions include, among other things, that the legal person provides proof to the debtor or person responsible for the payment of dividends that it is indeed the person entitled to the dividends. In addition, its effective centre of management must be in a Member State of the European Union, it must be in one of the forms listed in the Annex to the Parent-Subsidiary Directive and must also have an interest of at least 20% in the capital of the legal person making the distribution.

10. However, Article 119b(3) provides that such exemption does not apply where the distributed dividends are for the benefit of a legal person controlled directly or indirectly by one or more residents of States that are not members of the Union, unless that legal person provides proof that the principal purpose or one of the principal purposes of the chain of interests is not to take advantage of the exemption.

III – Main proceedings and proceedings before the Court

11. The present case concerns a legal dispute between Eqiom SAS and Enka SA ('the appellants in the main proceedings') on the one hand and the French tax authorities on the other.

12. In 2005 and 2006 a legal predecessor of the France-resident company Eqiom made dividend distributions to its parent company and sole shareholder Enka, which has its seat in Luxembourg. At the time in question, almost all of the latter's shares were owned by a company resident in Cyprus which was in turn controlled by a company with its seat in Switzerland.

13. In regard to the dividend distributions, the relevant authorities permitted no exemption from withholding tax under Article 119b(1) in conjunction with Article 119b(2) CGI. Instead, they took the view that the distributions fell within the scope of the exception provided for by Article 119b(3) CGI as the beneficiary was unable to provide proof that the principal purpose or one of the principal purposes of the chain of interests was not to take advantage of the exemption. The companies concerned have appealed against this decision.

14. The Conseil d'État (Council of State), before which the dispute has since been brought, considers that EU law will determine the dispute and on 30 December 2015 therefore referred the following questions to the Court pursuant to Article 267 TFEU:

'(1) If the national legislation of a Member State uses in domestic law the option offered by Article 1(2) of Directive 90/435/EEC of 23 July 1990, is there scope for review of the measures or agreements adopted in order to give effect to that option under EU primary law?

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

(3) (a) If the compatibility with EU law of the "anti-abuse" mechanism mentioned above should have to be assessed having regard to the provisions of the Treaty too, must it be examined, having regard to the purpose of the legislation at issue, in the light of the provisions of Article 43 of the Treaty establishing the European Community, now Article 49 of the Treaty on the Functioning of the European Union, even though the company receiving the dividend

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

(b) If the above question is answered in the negative, must that compatibility be examined in the light of the provisions of Article 56 of the Treaty establishing the European Community, now Article 63 of the Treaty on the Functioning of the European Union?

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

15. In the proceedings before the Court the appellants in the main proceedings, the Republic of France, the Kingdom of Denmark, the Republic of Italy, the Kingdom of Spain and the European Commission have submitted written pleadings. The parties listed above — with the exception of the Republic of Italy and the Kingdom of Spain — and the Federal Republic of Germany took part in the hearing on 30 November 2016.

IV – Analysis

16. Through its questions the referring court essentially asks whether the Parent-Subsidiary Directive and the fundamental freedoms preclude a Member State rule such as that under Article 119b(3) CGI under which no exemption from withholding tax is granted for dividends that a company in that Member State pays to a company established in a different Member State if those dividends are received by a legal person controlled directly or indirectly by shareholders in States that are not members of the European Union, unless the company receiving them proves that the principal purpose or one of the principal purposes of that chain of interests is not to benefit from the exemption.

17. I begin my analysis by examining the second question referred, which relates to the Parent-Subsidiary Directive (see A). I then address the first, third and fourth questions referred, which cover the compatibility of the measure with primary law, specifically the fundamental freedoms (see B).

A – The second question

18. The referring court's second question is intended to clarify whether the disputed rule is compatible with the Parent-Subsidiary Directive.

19. The parties to the proceedings do not dispute that, in principle, the relevant dividend payments fall within the Parent-Subsidiary Directive. It follows that France, as the country in which the company making the distributions was resident, was obliged under Article 5 of the directive to exempt the dividends from withholding tax. However, France regards the additional requirements that it applies to the granting of a tax exemption as covered by Article 1(2) of the Parent-Subsidiary Directive. According to this provision the directive shall not preclude the application of domestic provisions required for the prevention of fraud or abuse.

20. It therefore needs to be considered whether Article 1(2) of the Parent-Subsidiary Directive is able to support a Member-State provision such as that under Article 119b(3) CGI.

21. In the view of the Commission, Article 1(2) of the Parent-Subsidiary Directive is not relevant. Given that no measure implementing the directive is evident in the enactment of the disputed provision, primary law alone forms the standard by which to assess the provision's compatibility with EU law.

22. That argument cannot be accepted. Article 1(2) of the Parent-Subsidiary Directive creates a framework that imposes limits to the scope for action of Member States where they refuse to grant benefits provided under the directive and do so on grounds of preventing fraud and abuse. Indeed, it follows *a contrario* from the wording of the provision that the directive precludes such provisions which do *not* serve to prevent fraud and abuse and go beyond what is needed to that end.[7]

23. A different interpretation could furthermore have a negative impact on the effectiveness of the Parent-Subsidiary Directive in practice. This is because, contrary to the Commission's implicit assumption, an assessment of the disputed French provision against the standard of the directive on the one hand and the fundamental freedoms on the other may not necessarily be regarded as being of equal value. If, in applying Article 119b(3) CGI, France overstepped the limits imposed on Member States by Article 1(2) of the Parent-Subsidiary Directive, the withholding tax exemption would have to be granted unconditionally. A successful reliance on the fundamental freedoms, on the other hand, in theory guarantees only the same treatment as in a comparable domestic case.

24. Article 1(2) of the Parent-Subsidiary Directive reflects the general principle of EU law that any abuse of rights is prohibited.[8] EU law cannot be relied on for abusive or fraudulent ends.[9] Admittedly, the wording of the provision adds nothing to the understanding of abuse that is its basis,[10] but at any rate no simple reference to the legislation of the Member States is evident in the provision. Otherwise, there would be a risk of the scope of the directive being reduced at will in line with the particular practice in the various Member States.

25. Being an exception, Article 1(2) of the Parent-Subsidiary Directive needs to be interpreted strictly, however.[11] In regard to the provisions prohibiting abuse, the principle of legal certainty in particular also requires this. If, in terms of form, an individual meets all the conditions for claiming a right, this right may be denied on grounds of abuse only in particular cases.

26. As the Court has already decided in relation to the Parent-Subsidiary Directive, ownership structures that serve only to profit from tax advantages provided in the directive represent a form of abuse.[12] Hence, also in the case of this directive, there must be commercial reasons for the structure. By contrast, the mere attempt to obtain a purely tax-related advantage unrelated to economic reality

7 With the exception of its German and Dutch version, Article 1(2) of the Parent-Subsidiary Directive refers specifically to the provisions *required* for the prevention of fraud or abuse that are not precluded by the directive.

8 See judgment of 5 July 2007, *Kofoed* (C-321/05, EU:C:2007:408, paragraph 38 and the case-law cited there).

9 See judgments of 12 May 1998, *Kefalas and Others* (C-367/96, EU:C:1998:222, paragraph 20); of 23 March 2000, *Diamantis* (C-373/97, EU:C:2000:150, paragraph 33); of 21 February 2006, *Halifax and Others* (C-255/02, EU:C:2006:121, paragraph 68); of 13 March 2014, *SICES and Others* (C-155/13, EU:C:2014:145, paragraph 29); and of 28 July 2016, *Kratzer* (C-423/15, EU:C:2016:604, paragraph 37).

10 On the other hand, see for example Article 15 of Council Directive 2009/133/EC of 19 October 2009 (Merger Directive, OJ 2009 L 310, p. 34).

11 See judgments of 17 October 1996, *Denkavit and Others* (C-283/94, C-291/94 and C-292/94, EU:C:1996:387, paragraph 27); of 17 July 1997, *Leur-Bloem* (C-28/95, EU:C:1997:369, paragraphs 38 and 39); of 5 July 2007, *Kofoed* (C-321/05, EU:C:2007:408, paragraph 37); of 11 December 2008, *A.T.* (C-285/07, EU:C:2008:705, paragraph 31); of 20 May 2010, *Zwijnenburg* (C-352/08, EU:C:2010:282, paragraph 46); and of 10 November 2011, *FOGGIA-Sociedade Gestora de Participações Sociais* (C-126/10, EU:C:2011:718, paragraph 44).

12 See judgment of 17 October 1996, *Denkavit and Others* (C-283/94, C-291/94 and C-292/94, EU:C:1996:387, paragraph 31).

is not protected.[13] Hence, where no exemption from withholding tax is granted on the basis of Article 119b(3) CGI if the beneficiary company is part of a chain of ownership that is essentially created only for tax purposes, this is not precluded by Article 1(2) of the Parent-Subsidiary Directive.[14]

27. Under Article 119b(3), however, the very fact that the company receiving the dividends is directly or indirectly controlled by persons not resident in the EU gives rise to the presumption of an abuse of the exemption from withholding tax. It is then for the beneficiary to provide proof that the chain of interests is not essentially for tax purposes.

28. Such an approach goes beyond what is required to prevent tax evasion and is no longer within the limits of what is permissible under Article 1(2) of the Parent-Subsidiary Directive.

29. In applying the disputed provision, proof of non-fiscal grounds is automatically imposed on the tax payer without the administration being obliged to provide sufficient indications of tax evasion.[15] The mere reference to the direct or indirect control by shareholders in third States cannot be regarded as such an indication for the simple reason that it cannot be said in general that the tax treatment of profit distributions to companies outside the EU is more favourable in the Member State of the parent company or grandparent company than it is in France.

30. The refusal to grant an exemption from withholding tax is therefore based on a general presumption that this will involve tax evasion. Such a presumption is not permissible, however.[16] There always needs to be a test of the objective and verifiable facts of the specific case.[17] If, in light of this, there is a reasonable initial suspicion that it cannot be ruled out that the principal purpose or one of the principal purposes of the chain of interests is fiscal, the abuse objection is nevertheless rebutted if the taxpayer provides other reasons for the structure and these are not purely fiscal.[18] This is because the prohibition on abuse does not apply if the structure in question could have a different explanation other than that of achieving a tax benefit.[19]

31. The answer to the question from the referring court is therefore that Article 1(2) of the Parent-Subsidiary Directive precludes a Member State rule such as Article 119b(3) CGI in so far as it requires a non-resident company directly or indirectly controlled by persons resident in third States, to prove non-fiscal reasons for the structure of the chain of interests, in order to benefit from the grant of an exemption from withholding tax under Article 5 of the directive, without the administration being obliged to provide sufficient indications of tax evasion.

13 See, in relation to the Merger Directive, the judgments of 17 July 1997, *Leur-Bloem* (C-28/95, EU:C:1997:369, paragraph 47) and of 10 November 2011, *FOGGIA-Sociedade Gestora de Participações Sociais* (C-126/10, EU:C:2011:718, paragraph 34).

14 Regarding the ownership structures in this case, I take the liberty of noting that in the proceedings before the Court it remained unclear where the fiscal advantage lay. As far as can be seen, France would not in fact have charged any withholding tax even in the case of a dividend payment to a shareholder resident in Switzerland. See Article 11(2)(b) of the Double Taxation Treaty between France and Switzerland and Article 15(1) of the Savings Agreement between Switzerland and the EU of 26 October 2004 (OJ 2004 L 385, p. 30).

15 See the judgment of 5 July 2012, *SIAT* (C-318/10, EU:C:2012:415, paragraph 55).

16 See judgments of 4 March 2004, *Commission* v *France* (C-334/02, EU:C:2004:129, paragraph 27); of 9 November 2006, *Commission* v *Belgium* (C-433/04, EU:C:2006:702, paragraph 35); of 28 October 2010, *Établissements Rimbaud* (C-72/09, EU:C:2010:645, paragraph 34); and further of 5 July 2012, *SIAT* (C-318/10, EU:C:2012:415, paragraph 38 and the case-law cited there).

17 See judgments of 17 July 1997, *Leur-Bloem* (C-28/95, EU:C:1997:369, paragraphs 41 and 44); of 9 March 1999, *Centros* (C-212/97, EU:C:1999:126, paragraph 25); of 21 November 2002, *X and Y* (C-436/00, EU:C:2002:704, paragraph 42); of 20 May 2010, *Zwijnenburg* (C-352/08, EU:C:2010:282, paragraph 44); and of 10 November 2011, *FOGGIA-Sociedade Gestora de Participações Sociais* (C-126/10, EU:C:2011:718, paragraph 37).

18 See judgments of 13 March 2007, *Test Claimants in the Thin Cap Group Litigation* (C-524/04, EU:C:2007:161, paragraph 82); of 5 July 2012, *SIAT* (C-318/10, EU:C:2012:415, paragraph 50); and of 3 October 2013, *Itelcar* (C-282/12, EU:C:2013:629, paragraph 37).

19 See judgments of 21 February 2006, *Halifax and Others* (C-255/02, EU:C:2006:121, paragraph 75); of 22 December 2010, *Weald Leasing* (C-103/09, EU:C:2010:804, paragraph 30); of 12 September 2013, *Slancheva sila* (C-434/12, EU:C:2013:546, paragraph 42); of 13 March 2014, *SICES and Others* (C-155/13, EU:C:2014:145, paragraph 33); of 9 July 2015, *Cimmino and Others* (C-607/13, EU:C:2015:448, paragraph 65); of 14 April 2016, *Cervati and Malvi* (C-131/14, EU:C:2016:255, paragraph 34); and of 28 July 2016, *Kratzer* (C-423/15, EU:C:2016:604, paragraph 40).

B – The first, third and fourth questions referred for a preliminary ruling

32. The first, third and fourth questions essentially concern the compatibility of the disputed rule under Article 119b(3) CGI with the fundamental freedoms. Despite my remarks above, it is still necessary to examine these questions as further requirements could be implied by the fundamental freedoms. In this regard it is worth starting with an examination of the referring court's doubts as to whether there is room for scrutiny against the standard of primary law (see 1 below). I shall then move onto a determination of the applicable fundamental freedom (see 2 below) and a discussion of whether any restriction on this fundamental freedom exists here (see 3 below).

1. Scrutiny in light of primary EU law

33. The first question is whether the French rule should be measured against the standard of primary law at all.

34. The answer to this could be negative, at most, if the rule belongs to an area that has been exhaustively harmonised at EU level. This is because, according to settled case-law, it would have to be assessed in such a case not in the light of primary law provisions but in the light of the harmonising provision.[20]

35. However, in terms of its subject matter Article 119b(3) CGI does not fall within an area that has been exhaustively harmonised. In particular, Article 1(2) of the Parent-Subsidiary Directive cannot be regarded as a harmonising provision as it neither obliges Member States to apply measures to prevent fraud or abuse nor does it define exhaustive objectives.

36. Under Article 1(2) of the Parent-Subsidiary Directive it is, rather, a matter of judgment by the Member States whether and, within the framework referred to above, how they deal with abuse in connection with the claim of benefits under the directive. As the Court has already established, the Member States may make use of the options the directive provides them with only if at the same time they comply with the fundamental provisions of the Treaty. They are in particular bound by the fundamental freedoms.[21]

37. Hence the disputed rule under Article 119b(3) CGI is also subject to scrutiny against the standard of primary EU law.

2. The fundamental freedom applicable

38. The next thing is to determine which fundamental freedom is relevant to the review of the French provision. In this connection, the referring court asks about the applicability of the freedom of establishment (Article 43 EC, now Article 49 TFEU) or the free movement of capital (Article 56 EC, now Article 63 TFEU).

39. The main proceedings concern the tax treatment of dividends. According to the case-law of the Court, this may fall both within Article 43 EC and within Article 56 EC. This depends on the object of the relevant national rule. If it is intended only to apply to those shareholdings which enable the holder to exercise a definite influence on a company's decisions and to determine its activities, it falls

20 See judgments of 12 October 1993, *Vanacker and Lesage* (C-37/92, EU:C:1993:836, paragraph 9); of 23 May 1996, *Hedley Lomas* (C-5/94, EU:C:1996:205, paragraph 18); of 11 December 2003, *Deutscher Apothekerverband* (C-322/01, EU:C:2003:664, paragraph 64); and of 30 April 2014, *UPC DTH* (C-475/12, EU:C:2014:285, paragraph 63).

21 See judgments of 18 September 2003, *Bosal* (C-168/01, EU:C:2003:479, paragraph 26); of 23 February 2006, *Keller Holding* (C-471/04, EU:C:2006:143, paragraph 45); of 12 December 2006, *Test Claimants in the FII Group Litigation* (C-446/04, EU:C:2006:774, paragraph 46); of 1 October 2009, *Gaz de France — Berliner Investissement* (C-247/08, EU:C:2009:600, paragraph 53); and of 2 September 2015, *Groupe Steria* (C-386/14, EU:C:2015:524, paragraph 39).

within the provisions on freedom of establishment. On the other hand, national provisions which apply to shareholdings acquired solely with the intention of making a financial investment without any intention to influence the management and control of the undertaking must be examined exclusively in light of the free movement of capital.[22]

40. In the view of the Commission this case affects freedom of establishment given that Article 119b(3) CGI restricts dividend payments to persons that are in turn directly or indirectly *controlled* by one or more persons not resident in the EU.

41. The relationship between the recipient of dividends and companies that are above it in the chain of ownership cannot, however, be the decisive factor. After all, the main proceedings concern the taxation of dividend payments by a French company to its shareholder resident in Luxembourg.

42. The application of Article 119b(3) CGI to such dividend payments assumes that an interest of at least 20% exists between the recipient and the company making the distribution. However, such an interest does not necessarily permit the conclusion that its holder exercises a definite influence over the decisions of the company.[23] In order to determine which fundamental freedom is relevant we therefore need to rely on the actual facts of the specific case.[24]

43. According to the indications of the referring court the shares in the French company distributing the dividends were, at the time in question, wholly owned by the Luxembourg company that received the dividends. Since such a shareholding unquestionably gives its holder a definite influence over the decisions of the company, the provisions on freedom of establishment apply.

3. Restriction on freedom of establishment

44. This means we need to examine whether a restriction exists on freedom of establishment. Such a restriction could exist given that the application of Article 119b(3) CGI results in an exemption from withholding tax being refused in the case of the Luxembourg company receiving the dividends.

45. Under Article 43 EC in conjunction with Article 48 EC, freedom of establishment gives a company incorporated under the law of a Member State and having its registered office, central administration or principal place of business within the European Union, the right, among other things, to conduct business in other Member States through a subsidiary.[25] In so doing it particularly guarantees the same treatment in the host Member State as that accorded to nationals of that Member State by prohibiting any discrimination on the grounds of where the company has its seat.[26]

22 See judgments of 12 December 2006, *Test Claimants in the FII Group Litigation* (C-446/04, EU:C:2006:774, paragraphs 36 and 37); of 10 February 2011, *Haribo Lakritzen Hans Riegel and Österreichische Salinen* (C-436/08 und C-437/08, EU:C:2011:61, paragraphs 33 to 35); of 15 September 2011, *Accor* (C-310/09, EU:C:2011:581, paragraphs 30 to 32); and of 11 September 2014, *Kronos International* (C-47/12, EU:C:2014:2200, paragraphs 29 to 32).

23 In relation to the holding of a third of a company's shares see judgment of 13 April 2000, *Baars* (C-251/98, EU:C:2000:205, paragraph 20). In relation to interests of 10% see also judgments of 3 October 2013, *Itelcar* (C-282/12, EU:C:2013:629, paragraph 22), and of 11 September 2014, *Kronos International* (C-47/12, EU:C:2014:2200, paragraph 31).

24 See the judgments of 13 April 2000, *Baars* (C-251/98, EU:C:2000:205, paragraph 21), of 12 December 2006, *Test Claimants in the FII Group Litigation* (C-446/04 EU:C:2006:774, paragraphs 37 and 38), of 13 November 2012, *Test Claimants in the FII Group Litigation* (C-35/11, EU:C:2012:707, paragraphs 93 to 94) and of 11 September 2014, *Kronos International* (C-47/12, EU:C:2014:2200, paragraph 37).

25 See judgments of 21 September 1999, *Saint-Gobain ZN* (C-307/97, EU:C:1999:438, paragraph 35); of 13 December 2005, *Marks & Spencer* (C-446/03, EU:C:2005:763, paragraph 30); of 17 July 2014, *Nordea Bank*, (C-48/13, EU:C:2014:2087, paragraph 17); and of 17 December 2015, *Timac Agro Deutschland* (C-388/14, EU:C:2015:829, paragraph 40).

26 See judgments of 28 January 1986, *Commission* v *France* (C-270/83, EU:C:1986:37, paragraph 14); of 21 September 1999, *Saint-Gobain ZN* (C-307/97, EU:C:1999:438, paragraph 35); of 14 December 2006, *Denkavit Internationaal and Denkavit France*, (C-170/05, EU:C:2006:783, paragraph 22); and of 12 June 2014, *SCA Group Holding and Others* (C-39/13 to C-41/13, EU:C:2014:1758, paragraph 45).

46. As the French Government confirmed at the hearing, only distributions of profit to non-resident companies are subject to the special proof requirement under Article 119b(3). Dividend payments to resident companies are not affected. This makes it less attractive for companies established in other Member States to exercise freedom of establishment. They might therefore regard themselves as forced to refrain from acquiring, creating or maintaining a subsidiary in France.[27]

47. In this regard it is irrelevant that the company relying on freedom of establishment is controlled by persons with their seat in a non-member State. As the Court has made clear, it does not follow from any provision of EU law that the origin of the shareholders of companies affects the right of those companies to rely on freedom of establishment.[28]

48. Such a difference in the tax treatment of dividends between parent companies, based on the location of their seat, constitutes a restriction on freedom of establishment, which is, in principle, prohibited by Article 43 EC and Article 48 EC.[29]

49. According to the case-law, such a restriction is permissible only if it relates to situations which are not objectively comparable (see (a) below) or if it is otherwise justified by an overriding reason in the public interest (see (b) below).[30]

a) Objective comparability

50. The Court assesses the objective comparability of situations as a rule against the aim of the relevant regulation.[31] In light of this it may appear questionable whether the situation of dividend payments to resident companies and that of dividend payments to non-resident companies are comparable. This is because the purpose of the disputed provision is to prevent persons resident in non-member countries from avoiding withholding tax by setting up intermediary companies inside the EU and taking advantage of differences in the legal systems of the Member States. Dividends paid out to resident companies, however, continue to be bound by the same legal order.

51. The deciding factor for the Court in relation to dividend payments, however, is the exercise of tax sovereignty.[32] Assessed against this, it must certainly be accepted that there is objective comparability given that France applies its tax sovereignty both to dividend payments to recipients who are resident and to dividend payments to those who are not resident.

b) Justification

52. Consequently, what remains to be assessed is whether the restriction on freedom of establishment under Article 119b(3) CGI is justified by an overriding reason in the public interest.

53. France claims that such grounds lie in the prevention of tax fraud and evasion.

27 See judgments of 12 December 2002, *Lankhorst-Hohorst* (C-324/00, EU:C:2002:749, paragraph 32); of 23 February 2006, *Keller Holding* (C-471/04, EU:C:2006:143, paragraph 35); and of 14 December 2006, *Denkavit Internationaal und Denkavit France* (C-170/05, EU:C:2006:783, paragraph 30).

28 See judgment of 1 April 2014, *Felixstowe Dock and Railway Company and Others* (C-80/12, EU:C:2014:200, paragraph 40).

29 See judgment of 14 December 2006, *Denkavit Internationaal und Denkavit France* (C-170/05, EU:C:2006:783, paragraph 29).

30 See judgments of 25 February 2010, *X Holding* (C-337/08, EU:C:2010:89, paragraph 20); of 6 September 2012, *Philips Electronics* (C-18/11, EU:C:2012:532, paragraph 17); of 17 July 2014, *Nordea Bank* (C-48/13, EU:C:2014:2087, paragraph 23); and of 17 December 2015, *Timac Agro Deutschland* (C-388/14, EU:C:2015:829, paragraph 26).

31 See judgments of 25 February 2010, *X Holding* (C-337/08, EU:C:2010:89, paragraph 22); of 21 February 2013, *A* (C-123/11, EU:C:2013:84, paragraph 33); and of 12 June 2014, *SCA Group Holding and Others* (C-39/13 to C-41/13, EU:C:2014:1758, paragraph 28).

32 See judgments of 14 December 2006, *Denkavit Internationaal und Denkavit France* (C-170/05, EU:C:2006:783, paragraphs 34 to 36), and of 12 December 2006, *Test Claimants in Class IV of the ACT Group Litigation* (C-374/04, EU:C:2006:773, paragraph 68).

54. Settled case-law states that a restrictive measure can be justified for the abovementioned reason where it specifically targets wholly artificial arrangements which do not reflect economic reality and whose purpose is to obtain a tax advantage. [33]

55. However, in the present case it is not apparent that the French measure is specifically aimed at such arrangements. Given that Article 119b(3) requires proof that the principal purpose or one of the principal purposes of that chain of interests is not to benefit from the withholding tax exemption, the provision essentially adopts the criterion of an attempt to obtain a tax benefit. However, of itself this subjective criterion is not sufficient to indicate an artificial arrangement as defined in the case-law of the Court. [34] Rather, there must be objective circumstances showing that, despite formal observance of the conditions for the granting of a tax exemption, the objective pursued by freedom of establishment has not been achieved. [35]

56. This objective is then deemed to have failed if, in the light of an overall assessment of the circumstances, it is apparent that the exemption from withholding tax benefits not the company receiving the dividends in another Member State but, in reality, directly benefits a person resident in a non-member country. After all, freedom of establishment a priori protects only entities belonging to Member States. [36]

57. The nature of the intermediate company may provide an indication to support this. Thus, an artificial arrangement can be assumed if the company is only a fictitious establishment in the form of a 'letterbox' company. [37] But even where there is a physical presence, one might conclude, in light of the financial and staffing set-up, that the arrangement is artificial. In this regard, what appears to be relevant is, for instance, the actual authority of the company organs to take decisions, to what extent the company is endowed with own financial means and whether any commercial risk exists.

58. To the extent the application of Article 119b(3) CGI ignores these factors, the provision does not represent an appropriate way of counteracting wholly artificial arrangements which do not reflect economic reality, and whose purpose is to obtain a tax advantage.

59. In any case, however, the rule at issue goes beyond what is required to prevent tax evasion in that ultimately the burden of proving that there is no abuse is imposed on companies making use of the withholding tax exemption solely on the basis of their being controlled directly or indirectly by a person who is not resident in the European Union. [38] In effect, case-law states that such a general presumption of tax evasion cannot justify a restrictive tax measure. [39] However, under Article 119b(3) CGI the burden of proof is reversed without the tax authorities being obliged to provide sufficient indications of tax evasion. [40]

33 See judgments of 12 September 2006, *Cadbury Schweppes and Cadbury Schweppes Overseas* (C-196/04, EU:C:2006:544, paragraph 55); of 13 March 2007, *Test Claimants in the Thin Cap Group Litigation* (C-524/04, EU:C:2007:161, paragraph 74); of 4 December 2008, *Jobra* (C-330/07, EU:C:2008:685, paragraph 35); and in of 5 July 2012, *SIAT* (C-318/10, EU:C:2012:415, paragraph 40).

34 See judgment of 12 September 2006, *Cadbury Schweppes and Cadbury Schweppes Overseas* (C-196/04, EU:C:2006:544, paragraph 63).

35 See judgment of 12 September 2006, *Cadbury Schweppes and Cadbury Schweppes Overseas* (C-196/04, EU:C:2006:544, paragraph 64).

36 See judgment of 12 September 2006, *Cadbury Schweppes and Cadbury Schweppes Overseas* (C-196/04, EU:C:2006:544, paragraph 53); of 11 March 2010, *Attanasio Group* (C-384/08, EU:C:2010:133, paragraph 36); and of 23 February 2016, *Commission* v *Hungary* (C-179/14, EU:C:2016:108, paragraph 148).

37 See judgment of 12 September 2006, *Cadbury Schweppes and Cadbury Schweppes Overseas* (C-196/04, EU:C:2006:544, paragraphs 67 and 68).

38 See paragraphs 27 to 30 above.

39 See judgments of 4 March 2004, *Commission* v *France* (C-334/02, EU:C:2004:129, paragraph 27); of 9 November 2006, *Commission* v *Belgium* (C-433/04, EU:C:2006:702, paragraph 35); of 28 October 2010, *Établissements Rimbaud* (C-72/09, EU:C:2010:645, paragraph 34); and further of 5 July 2012, *SIAT* (C-318/10, EU:C:2012:415, paragraph 38 and the case-law cited there).

40 See judgment of 5 July 2012, *SIAT* (C-318/10, EU:C:2012:415, paragraph 55).

4. Interim conclusion

60. The answer to the first, third and fourth questions referred is therefore that Article 43 EC in conjunction with Article 48 EC precludes a Member State rule such as Article 119b(3) CGI to the extent it imposes on a non-resident company directly or indirectly controlled by persons resident in a non-member State the burden of proving, for the granting of an exemption from withholding tax under Article 5 of the Parent-Subsidiary Directive, that the reasons for the structuring of the chain of interests are not tax-based, without the authorities being obliged to provide sufficient indications of wholly artificial arrangements which do not reflect economic reality and whose purpose is to obtain a tax advantage.

V – Conclusion

61. In the light of the foregoing considerations, I propose that the Court reply to the questions referred by the Conseil d'État as follows:

Article 1(2) of Council Directive 90/435/EEC and Article 43 EC in conjunction with Article 48 EC preclude a Member State rule that imposes on a non-resident company directly or indirectly controlled by persons resident in a non-member State the burden of proving, for the granting of an exemption from withholding tax under Article 5 of the Parent-Subsidiary Directive, that the reasons for the structuring of the chain of interests are not tax-based, without the authorities being obliged to provide sufficient indications of wholly artificial arrangements which do not reflect economic reality and whose purpose is to obtain a tax advantage.