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Provisional text

JUDGMENT OF THE COURT (Second Chamber)

25 February 2021 (1)

(Reference for a preliminary ruling – Article 63 TFEU – Free movement of capital – Corporation tax – Bilateral conventions for the avoidance of double taxation – Taxation of dividends distributed by a non-resident already subject to a levy in another Member State – Maximum amount of tax credit accorded – Legal double taxation)

In Case C?403/19,

REQUEST for a preliminary ruling under Article 267 TFEU from the Conseil d'État (France), made by decision of 24 April 2019, received at the Court on 24 May 2019, in the proceedings

Société Générale SA

v

Ministre de l'Action and des Comptes publics,

THE COURT (Second Chamber),

composed of A. Arabadjiev, President of the Chamber, A. Kumin, T. von Danwitz (Rapporteur), P.G. Xuereb and I. Ziemele, Judges,

Advocate General: P. Pikamäe,

Registrar: Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– Société Générale SA, by C. Rameix-Séguin, E. Meier and R. Torlet, avocats,

– the French Government, by P. Dodeller and by E. de Moustier, A. Alidière and A.-L. Desjonquères, acting as Agents,

– the German Government, by R. Kanitz and J. Möller, acting as Agents,

– the Spanish Government, by S. Jiménez García, acting as Agent,

– the Italian Government, by G. Palmieri, acting as Agent and G.M. De Socio, avvocato dello Stato,

– the Netherlands Government, by C.S. Schillemans and M. Bulterman, acting as Agents,

– the Finnish Government, by S. Hartikainen, acting as Agent,

– the Swedish Government, by H. Eklinder, C. Meyer-Seitz, H. Shev, A. Falk and J. Lundberg,

acting as Agents,

– the United Kingdom Government, by Z. Lavery, acting as Agent and R. Baldry QC,

– the European Commission, by W. Roels and N. Gossement, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 63 TFEU.

2 The request has been made in proceedings between Société Générale SA and the Ministre de l'Action et des Comptes publics (French Minister for the Public Sector and Public Accounts) concerning a decision by the tax authorities to charge that company, in its capacity as parent company of the tax-integrated group including Société Générale Asset Management (SGAM) Banque ('SGAM Banque'), additional corporate income tax for the financial years ending in 2004 and 2005.

Legal context

The Franco-Italian Convention

3 Article 10 of the Convention for the avoidance of double taxation of income and capital and for the prevention of fiscal evasion and fraud between the Government of the French Republic and the Government of the Italian Republic signed in Venice on 5 October 1989 ('the Franco-Italian Convention') states:

'1. Dividends paid by a company resident in one State to a resident of the other State shall be taxable in that other State.

2. However, such dividends may also be taxed in the State of which the company paying the dividends is a resident and according to the laws of that State ….'

4 Article 24(1)(a) of that Convention provides that double taxation is to be avoided in the following manner as far as the French Republic is concerned:

'Profits and other positive income arising in Italy and taxable there under the provisions of this Convention shall also be taxable in France where they accrue to a person resident in France. The Italian tax is not to be deductible for calculation of the taxable income in France. However, the recipient shall be entitled to a tax credit to be set against the French tax charged on the taxable amount which includes that income. This tax credit shall be equal:

for income referred to in Articles 10,11,12, 16 and 17 … to the amount of tax paid in Italy in accordance with the provisions of those articles. That tax credit shall not however exceed the amount of French tax on that income.'

The Franco-British Agreement

5 Article 9 of the Convention between the Government of the French Republic and the Government of the United Kingdom of Great Britain and Northern Ireland for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income, signed in London on 22 May 1968 ('the Franco-British Convention') provides:

'1.(a) Dividends paid by a company resident in one State to a resident of the other State shall be taxable in that other State.

Where a resident of France is entitled to a tax credit in respect of such a dividend under paragraph 2 of this Article, the tax may also be levied in the United Kingdom … .

2. Subject to the provisions of paragraphs 3, 4 and 5 of this Article, a resident of France who receives, from a company resident in the United Kingdom, dividends of which he is the beneficial owner shall be entitled, where he is liable to tax in France in respect of those dividends, to the tax credit attached thereto to which an individual resident in the United Kingdom would have been entitled if he had received those dividends and to payment of the excess of that tax credit over the United Kingdom tax payable by him …'.

6 Under Article 24(b)(ii) of the Franco-British Convention, double taxation of income is avoided in the following manner in the case of the French Republic:

'France shall grant to a resident of France who receives income referred to in Articles 9 and 17 having its source in the United Kingdom and who has borne tax in the United Kingdom in accordance with the provisions of those Articles, a tax credit corresponding to the amount of tax paid in the United Kingdom. Such tax credit, not exceeding the amount of French tax levied on such income, shall be allowed against taxes mentioned in sub- paragraph 1(b) of Article 1 of this Convention [i.e. French taxes], in the bases of which such income is included.'

The Franco-Netherlands Convention

7 The Convention 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 capital, signed in Paris on 16 March 1973 ('the Franco-Netherlands Convention), provides in Article 10:

'1. Dividends paid by a company resident in one State to a resident of the other State shall be taxable in that other State.

2. However, such dividends may be taxed in the State of which the company paying the dividends is a resident and according to the laws of that State …'.

8 According to Article 24B(b) of that Convention, double taxation shall be avoided in the following way in the case of the French Republic:

'With regard to the income referred to in Articles 8, 10, 11, 16 and 17 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. That tax credit, which may not exceed the amount of tax levied in France on the income in question, shall be offset against the taxes referred to in Article 2(3)(b), within the bases in which that income is included.'

French law

9 Article 39, paragraph 1, of the Code général des impôts (General Tax Code), in the version applicable to the main proceedings, provides as follows:

‘The net profit is established after deduction of all charges’.

10 Under the first paragraph of Article 209 of that code:

‘Subject to the provisions of this Section, profits liable to corporation tax shall be determined in accordance with the rules laid down in Articles 34 to 45 … and taking into account only profits made in undertakings carried on in France and profits the taxation of which is attributed to France by an international double taxation convention. …’

11 Article 220(1) of that code provides:

‘Upon justification, the withholding tax to which the income from investment capital, referred to in Articles 108 to 119, 238 septies B and 1678 bis, received by the company or legal person has given rise shall be set off against the amount of the tax payable by the company or legal person by virtue of this chapter.

However, the deduction to be made on that ground may not exceed the fraction of the latter tax corresponding to the amount of that income.

With regard to income from foreign sources referred to in Articles 120 to 123, the tax credit is limited to the amount of the credit corresponding to the tax withheld at source abroad or the discount in lieu thereof, as provided for by international conventions. …’

The dispute in the main proceedings and the questions referred for a preliminary ruling

12 SGAM Banque, established in France, is part of the tax-integrated group of which Société Générale, also established in France, is the parent company.

13 During 2004 and 2005, SGAM Banque carried out securities lending transactions involving the remittance by the borrower of securities intended to guarantee those lent by SGAM Banque, which thus temporarily became the owner of the remitted securities. The standard contract signed between SGAM Banque and its contracting partners provided that SGAM Banque was required, in principle, to return to the borrower securities equivalent to those given as collateral, so that the borrower could benefit from the payment of the dividends attached to those securities and, in the absence of restitution, pay it a sum of money or remit property to it, of a value equal to the amount of those dividends.

14 SGAM Banque also carried out fund structuring transactions consisting, in particular, in managing baskets of shares corresponding to management profiles set by its contracting partners. In that context, SGAM Banque received the dividends attached to securities included in the equity baskets, which it had acquired, but was required, in respect of the performance sold to its contractual partners, to repay a sum corresponding to the amount of dividends received and any increase in the value of the securities. In return, the customers paid SGAM Banque a fixed remuneration fee for managing the equity basket.

15 In the context of those two types of transactions, SGAM Banque received, in the case of securities held by companies resident in Italy, the United Kingdom and the Netherlands, dividends less withholding tax paid on the dividends in those three countries respectively. Consequently, SGAM Banque offset – against the amount of corporate income tax due in France for the years ended 2004 and 2005 – tax credits corresponding to those withholding taxes on the basis of the

Franco-Italian, Franco-British and Franco-Dutch agreements.

16 Following an audit of the accounts, the competent tax authorities challenged the allocation of a fraction of those tax credits and revised upwards the amount of the corporation tax. By judgment of 3 February 2011, the Tribunal administratif de Montreuil (Administrative Court, Montreuil, (France)) discharged the surcharges to that tax to which Société Générale, in its capacity as parent company, was subject as a result of that increase. By judgment of 17 March 2016, the Cour administrative d'appel de Versailles (France) (Administrative Court of Appeal, Versailles) set aside that judgment and ordered the company to bear the additional contributions.

17 Société Générale, considering that that court had erroneously held that the application of the rules for calculating the tax credit was consistent with the free movement of capital enshrined in Article 63 TFEU, appealed against that judgment before the referring court, the Conseil d'État (France). Société Générale argues, with reference to the judgments of 28 February 2013, *Beker and Beker* (C?168/11, EU:C:2013:117) and of 17 September 2015, *Miljoen and Others*, that transactions made by companies subject to corporation tax in France involving the securities of foreign companies, are at a disadvantage compared to those involving securities of French companies, because of the method of calculating the ceiling of the tax credit under the Franco-Italian, Franco-British and Franco-Dutch conventions, which would only allow for an insufficient amount of the tax levied by the Member State in which the dividends are paid to be offset against the corporation tax due in France.

18 It is apparent from Article 220(1)(b) of the General Tax Code, set out in paragraph 1 above, that the deduction from the amount of tax due in France of the withholding tax levied abroad in respect of foreign-source income, to which that provision refers, is limited to the amount of tax credit corresponding to that withholding tax as provided for in international tax agreements.

19 In that regard, the referring court states that it follows from the Franco-Italian, Franco-British and Franco-Dutch conventions concluded for the avoidance of double taxation that, where a company subject to corporation tax in France receives dividends from a company established in another State party to one of those conventions which are subject to withholding tax in that State, the French Republic has the power to tax the former company on those dividends. However, that company is entitled to a tax credit which can be off-set against corporation tax, provided that that tax credit does not exceed the amount of French tax corresponding to such income. In that regard, the referring court explains that, under French law, and in the absence of any stipulation to the contrary in the double taxation convention concerned, the maximum amount of that tax credit must be determined by applying all the provisions of the General Tax Code on corporation tax, including those of Article 39(1), applicable by virtue of the first paragraph of Article 209(I) thereof. It follows, according to the referring court, that the maximum amount of the tax credit must be determined by deducting from the amount of the dividends distributed, before any withholding tax, and unless excluded by specific provisions, the justified charges relating to those dividends. Those expenses are incurred solely as a result of the acquisition, holding or disposal of the securities which produce the dividends, which are directly related to the receipt of the dividends and which do not result in an increase in assets.

20 The Conseil d'Etat observes that the rules set out in the preceding paragraph are intended to compensate for the disadvantage that may arise from the parallel exercise of the taxation powers enjoyed by the various Member States and that, in order to implement the offsetting procedure, the maximum amount of foreign withholding tax which can be offset against the amount of tax due is calculated by applying to foreign-source dividends subject to withholding tax under the provisions of ordinary law of the General Tax Code on the deduction of charges.

21 That court adds that charges deducted from the amount of such dividends before

withholding tax are also deducted for the determination of the basis of assessment for corporation tax due in France. Those rules reflect France’s commitment to forgo, if appropriate in its entirety, the tax revenue that it derives from the taxation of foreign-source dividends of companies. The Conseil d’Etat observes that granting tax credits higher than those resulting from the application of the rules could lead not only to loss tax revenue, but also to France having to bear all or part of the tax to which those dividends are subject the State in which the dividends are paid.

22 The national court also refers to the case-law of the Court of Justice and, in particular, to paragraph 47 of the judgment of 20 May 2008, *Orange European Smallcap Fund* (C?194/06, EU:C:2008:289) and paragraph 28 of the judgment of 24 October 2018, *Sauvage and Lejeune* (C?602/17, EU:C:2018:856), from which it follows that Union law does not require a Member State to grant a concession in response to offset the disadvantage resulting from a series of charges to tax that is exclusively due to the parallel exercise of the various Member States’ fiscal sovereignty. However, where that Member State has decided to grant such a concession, that power must be exercised in accordance with Union law. Furthermore, a disadvantageous tax treatment resulting from the allocation of those powers between two Member States and the disparity between their tax systems cannot be regarded as constituting a difference in treatment which is prohibited.

23 In the absence of any case-law of the Court of Justice on that issue, the referring court is unsure as to the margin of discretion left to Member States when adopting a mechanism for the elimination of double taxation applicable, in the case of a distribution of dividends from foreign sources, to a resident company based on the grant of a tax credit which may be set off up to the limit of the amount of the tax of the State of residence corresponding to those dividends.

24 In those circumstances, the Conseil d’État (Council of State) decided to stay proceedings and to refer the following question to the Court for a preliminary ruling:

‘In the light of Article [63 TFEU], does the fact that the application of the rules set out in paragraph 5 of that decision, in order to compensate for the double taxation of dividends paid to a company liable for corporation tax in the Member State of residence by a company resident in another Member State and subject, by virtue of the exercise by that Member State of the power of taxation, to withholding tax is liable to create a disadvantage to the detriment of transactions involving the securities of foreign companies carried out by companies liable for corporation tax in the first Member State mean that that State, where it has been decided to grant a concession in response to the double taxation, goes beyond waiving its right to receive the tax revenue that it would derive from the imposition of corporation tax on the dividends in question?’

Consideration of the question referred

25 By its question, the national court is asking, in substance, whether Article 63 TFEU must be interpreted as precluding legislation of a Member State by which, under a scheme designed to offset the double taxation of dividends received by a company subject to corporation tax in that Member State in which it is established, which has been subject to a levy in another Member State, grants such a company a tax credit limited to the amount which the first Member State would receive if those dividends alone were subject to corporation tax, without offsetting in full the levy paid in that other Member State.

26 It must be observed, in that regard, that it is for each Member State to organise, in compliance with EU law, its system for taxing distributed profits and to define, in that context, the tax base and the tax rate which apply to the shareholder receiving them (see, inter alia, judgments of 20 May 2008, *Orange European Smallcap Fund*, C?194/06, EU:C:2008:289, paragraph 30, and order of 4 February 2016, *Baudinet and Others*, C?194/15, not published, EU:C:2016:81, paragraph 30 and the case-law cited).

27 It follows that dividends distributed by a company established in one Member State to a shareholder resident in another Member State are liable to be subject to juridical double taxation where the two Member States choose to exercise their fiscal competence and to subject those dividends to taxation in the hands of the shareholder (judgment of 10 February 2011 in *Haribo Lakritzen Hans Riegel and Österreichische Salinen*, C?436/08 and C?437/08, EU:C:2011:61, paragraph 168 and the case-law cited, and order of 4 February 2016, *Baudinet and Others*, C?194/15, not published, EU:C:2016:81, paragraph 31).

28 On the other hand, the disadvantages that may result from the parallel exercise of the tax powers of the various Member States, in so far as such an exercise is not discriminatory, do not constitute restrictions prohibited by the FEU Treaty (judgment of 10 February 2011 in *Haribo Lakritzen Hans Riegel and Österreichische Salinen*, C?436/08 and C?437/08, EU:C:2011:61, paragraph 169 and the case-law cited, and order of 4 February 2016, *Baudinet and others*, C?194/15, unpublished, EU:C:2016:81, paragraph 32).

29 Moreover, the Court has ruled that since European Union law, as it currently stands, does not lay down any general criteria for the attribution of areas of competence between the Member States in relation to the elimination of double taxation within the European Union, the fact that both the Member State in which the dividends are paid and the Member State in which the shareholder is resident are liable to tax those dividends does not mean that the Member State of residence is obliged, under European Union law, to prevent the disadvantages which could arise from the exercise of competence thus attributed by the two Member States (judgment of 10 February 2011 in *Haribo Lakritzen Hans Riegel and Österreichische Salinen*, C?436/08 and C?437/08, EU:C:2011:61, paragraph 170 and the case-law cited, and order of 4 February 2016, *Baudinet and Others*, C?194/15, not published, EU:C:2016:81, paragraph 33).

30 In accordance with settled case-law, although the Member States are free to determine the connecting factors for the allocation of fiscal jurisdiction in bilateral conventions for the avoidance of double taxation, that allocation of fiscal jurisdiction does not allow them to apply measures contrary to the freedoms of movement guaranteed by the FEU Treaty. As far as concerns the exercise of the power of taxation, so allocated by bilateral conventions for the avoidance of double taxation, the Member States must comply with EU rules and, more particularly, observe the principle of equal treatment (see, to that effect, judgments of 24 October 2018, *Sauvage and Lejeune*, C?602/17, EU:C:2018:856, paragraph 24, and 14 March 2019, *Jacob and Lennertz*, C?174/18, EU:C:2019:205, paragraph 25).

31 In the present case, it is apparent from the reference for a preliminary ruling that dividends, which have been distributed to SGAM Banque by companies established in Italy, the United Kingdom and the Netherlands, in connection with securities lending and fund structuring transactions are subject to legal double taxation by the States of the source of such income and by the French Republic, as the State of residence of SGAM Banque, in respect of the corporation tax whose base includes such income.

32 As regards the exercise by France of its powers of taxation, it appears, first, from the information from the referring court and the clarifications provided by the French Government and

Société Générale in their written observations that all resident companies are subject to corporation tax on dividends received, regardless of whether such dividends are from domestic or foreign sources. Such income is part of the total income of the company concerned, from which operating costs are deducted, without any reference to differential tax rates. In addition, the same rules for allocating costs which derive from the French General Tax Code would apply to that income, regardless of its origin.

33 Next, it is common ground that, although it subjects dividends received from companies established in Italy, the United Kingdom and the Netherlands to corporation tax, France grants the company receiving those dividends a tax credit that can be offset against corporation tax. That tax credit is equal to the tax paid in the Member State in which the income arises, and may not exceed the French corporation tax corresponding to that income.

34 Finally, as regards the method of calculation of the tax credit deductible from the tax already paid on foreign-source dividends, the basis of assessment and the rate of corporation tax corresponding to that income alone appear to be the same as that of the corporation tax which would be due if the dividends were domestic-source dividends. In particular, the charges relating specifically to dividends deducted in making that calculation, in accordance with the case-law of the referring court, also appear to be deducted from the overall profits of the resident company in respect of domestic-source dividends, which it is for the referring court to ascertain.

35 It follows from the foregoing that, subject to verification by the national court, it does not appear that dividends distributed by companies established in Italy, the United Kingdom and the Netherlands are subject to a higher rate of corporation tax in France than that applied to domestic-source dividends.

36 However, Société Générale maintains, in its written observations, that the methods for calculating the tax credit to which such a company is entitled allow only for an insufficient amount of the tax levied by the withholding State to be deducted from the corporation tax paid in France, with the effect that, for a company established in France, placing transactions involving securities of non-resident companies at a disadvantage compared to those involving securities of resident companies. That would result in a higher tax burden on foreign source dividends than on domestic source dividends.

37 In that regard, it must be observed, as Société Générale acknowledges, that such a disadvantage results from a difference between the tax base applied by the Member State in which the dividends are paid and that of French corporation tax, which determines the maximum amount of the tax credit that can be deducted. It is apparent from the documents before the Court that the tax paid in Italy, the United Kingdom and the Netherlands has been calculated on the gross amount of those dividends, without the possibility of deduction of charges, whereas French corporation tax is calculated on a net basis, the French Republic allowing the deduction of charges in accordance with Article 39(1) of the General Tax Code, so that the net income for the calculation of the tax credit is reduced by that deduction of charges.

38 In that context, as regards the argument that it would be contrary to the free movement of capital to adopt a different tax base from that adopted by the Member States in which the dividends are paid for the calculation of the French tax credit, when the French Republic and those Member States intended to eliminate double taxation, it must be observed that, in accordance with the case-law of the Court, referred to in paragraph 26 of the present judgment, each Member State is free to define, in compliance with Union law, the tax base which applies to shareholders receiving the dividends.

39 Furthermore, as the Court has already stated, the purpose of a convention for the avoidance

of double taxation, such as those at issue in the main proceedings, is not to ensure that the taxation to which the taxpayer is subject in one Member State is not higher than that to which he would be subject in the other Member State (see, to that effect, judgment of 12 May 1998, *Gilly*, C?336/96, EU:C:1998:221, paragraph 46.

40 Therefore, as the Commission and the Governments which have submitted written observations to the Court and the European Commission have also pointed out, it must be held that, in the absence of discriminatory exercise by a Member State of its tax jurisdiction, a disadvantage resulting from the double taxation of foreign-source dividends, such as that at issue in the main proceedings, arises from the parallel exercise of tax jurisdiction by the States of the source of those dividends and by the Member State of residence of the shareholder company. In those circumstances, the national legislation at issue in the main proceedings cannot be regarded as reflecting a restriction on the free movement of capital prohibited under Article 63 TFEU.

41 That finding cannot be called into question by the judgments of 28 February 2013, *Beker and Beker* (C?168/11, EU:C:2013:117) and of 17 September 2015, *Miljoen and Others*, relied on by Société Générale, as those judgments cannot be transposed to a situation, such as that at issue in the main proceedings, where disadvantageous taxation of foreign-source dividends received by a company subject to corporation tax in its Member State of residence results from the parallel exercise of tax competences by the Member States in which that income arises and the Member State of residence of the shareholder company.

42 In that regard, the judgment of 17 September 2015, *Miljoen and Others*. (C?10/14, C?14/14 and C?17/14, EU:C:2015:608) dealt with the obligations of the Member State in which the dividends were paid, in view of the mechanism for deduction or refund of withholding tax applicable to dividends distributed by resident companies to residents of that Member State, while in the case giving rise to the judgment of 28 February 2013, *Beker and Beker* (C?168/11, EU:C:2013:117), the deduction at issue concerned the possibility to make deductions, not by companies, but by individuals, of withholding tax on income tax in their State of residence, which was able to grant the full tax benefits corresponding to the taxpayer's personal and family situation. According to that imputation mechanism, the resident taxpayer benefited in full from personal and family deductions when all his income was received in his Member State of residence, whereas that was not the case when part of his income was received abroad. However, subject to verification by the referring court, in the main proceedings, the deduction of costs is not limited in the case of dividends distributed by another Member State.

43 In the light of the foregoing, the answer to the question referred is that Article 63 TFEU must be interpreted as not precluding legislation of a Member State which, in the context of a scheme designed to offset the double taxation of dividends received by a company subject to corporation tax in the Member State in which it is established, which has been subject to a levy by another Member State, grants such a company a tax credit limited to the amount which the first Member State would receive if those dividends alone were subject to corporation tax, without offsetting in full the levy paid in that other Member State.

Costs

44 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Second Chamber) hereby rules:

Article 63 TFEU must be interpreted as not precluding legislation of a Member State which, under a scheme designed to offset the double taxation of dividends received by a company subject to corporation tax in that Member State in which it is established, which has been

subject to a levy by another Member State, shall grant such a company a tax credit limited to the amount which that first Member State would receive if those dividends alone were subject to corporation tax, without offsetting in full the levy paid in that other Member State.

[Signatures]

1 Language of the case: French.