CFE tax advisers europe

OPINION STATEMENT

Opinion Statement ECJ-TF 2/2021 on the CJEU decision of 25 February 2021 in Case C-403/19, *Société Générale*, on the calculation of the maximum amount of a foreign direct tax credit

Prepared by the CFE ECJ Task Force
Submitted to the EU Institutions in September 2021

The Court's judgment in *Société Générale* reinforces established case law that EU law neither prohibits juridical double taxation nor does it put an obligation on the residence Member State to prevent the disadvantages which could arise from the exercise of competence thus attributed by the two Member States. The parallel existence of taxing jurisdiction, however, must be distinguished from the exercise of such jurisdiction by each Member State. While Member States are free to determine the connecting factors for the allocation of taxing jurisdiction in tax treaties, "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".

It is generally accepted in the Court's case law that both the ordinary credit and exemption (including exemption with progression) are permissible methods to avoid double taxation. In *Société Générale* this position was confirmed, specifically as regards the "maximum deduction" under the ordinary credit method in tax treaties, even though this treatment can result in a disadvantage for cross-border income as compared with domestic income. As the disadvantage in Société Générale was due to the difference between gross-basis taxation of dividends in the source Member States (Italy, the Netherlands and the UK) and net-basis taxation of those foreign-sourced dividends in the residence State (France), it remains to be seen if future cases will bring clarity in light of the *Seabrokers* judgment of the EFTA Court which examined how expenses can be lawfully allocated to foreign income from the perspective of the residence Member State.

The CFE Tax Advisers Europe stresses that in an Internal Market neither (unintended) double non-taxation nor double taxation is acceptable. It, therefore, calls on all EU institutions to analyze and address the remaining issues of juridical double taxation – including in the context of the upcoming actions amending current corporate tax directives.

CFE Tax Advisers Europe is a Brussels-based umbrella association uniting 30 European national tax institutes and associations of tax advisers from 24 European countries. Founded in 1959, CFE represents more than 200,000 tax advisers. CFE Tax Advisers Europe is part of the European Union Transparency Register no. 3543183647-05. For further information regarding this opinion statement of the CFE ECJ Task Force please contact Prof. DDr. Georg Kofler, Chair of the CFE ECJ Task Force or Aleksandar Ivanovski, Tax Policy Manager at info@taxadviserseurope.org

CFE Tax Advisers Europe Office I 188A, Avenue de Tervueren, 1150 Brussels, Belgium
Tel. +32 2 761 00 92 I info@taxadviserseurope.org I www.taxadviserseurope.org

This is an Opinion Statement prepared by the CFE ECJ Task Force[1] on the *Société Générale* case, in which the Second Chamber of the Court of Justice of the EU (ECJ) delivered its decision on 25 February 2020,[2] without an Advocate General's Opinion. In *Société Générale* the Court confirmed previous case law and held that the French method of calculating the maximum amount of foreign direct tax credits for cross-border dividends to offset the double taxation of dividends received by a company subject to French corporate income tax is not contrary to the free movement of capital under Article 63 TFEU. The higher tax burden on foreign dividends resulting from the difference in tax bases – net taxation and corresponding credit limitation in France, gross withholding taxation in the source States – is therefore not prohibited under the fundamental freedoms.

I. Background and Issues

1. Juridical double taxation of cross-border dividends is typically addressed by the so-called ordinary credit method along the lines of Articles 23A(2) and 23B(1) OECD MC: A withholding tax lawfully levied in accordance with Article 10(2) OECD MC by the source State on dividends will be deducted (i.e., a "credit" granted) from the tax on that income in the residence State. That deduction, however, "is restricted to that part of its own tax which is appropriate to the income which may be taxed in the other State"[3] (so-called "maximum deduction" or "credit limitation"). From a policy perspective, this limitation of the credit prevents the full use of source State taxes to offset tax on domestic or third-country income. As the OECD MC Comm. notes, "[t]he maximum deduction is normally computed as the tax on net income", i.e. on the income from the source State, "less allowable deductions (specified or proportional) connected with such income".[4] The potentially disadvantageous effects of this ordinary credit method are obvious. The maximum deduction may be lower than the tax effectively paid in the source State, e.g., when the source State levies a tax on gross income (e.g., 15% on the gross amount of the dividends under Article 10(2)(b) OECD MC), while the residence State determines the foreign-sourced dividend income on a net basis after deduction of expenses. In other words, the lower the net income in the source State (from the residence State's perspective), the lower the maximum deduction. This may lead to situations where the amount of net income subject to tax in the residence State and as a corollary the maximum deduction "may be very small, or there may even be no net income at all".[5] Hence, where the foreign tax exceeds the maximum deduction, part of the foreign tax burden remains unrelieved; the higher foreign tax hence prevails. The OECD MC Comm. does not directly address this issue of "excess credits", but rather refers to bilateral negotiations or domestic laws.[6] While some States have indeed enacted rules on, e.g., the carry-forward of excess credits[7] or (at least) the deduction of excess foreign taxes from the tax base,[8] such measures have

[1] The CFE ECJ Task Force is formed by CFE Tax Advisers Europe and its members are Alfredo Garcia Prats (Professor at the University of Valencia), Werner Haslehner (Professor at the University of Luxembourg). Volker Heydt (Former official of the European Commission), Eric Kemmeren (Professor of International Taxation and International Tax Law at the Fiscal Institute Tilburg of Tilburg University), Georg Kofler (Chair of this Task Force and Professor at the Institute for Austrian and International Tax Law of WU Wien), Michael Lang (Professor at the Institute for Austrian and International Tax Law of WU Wien), João Nogueira (Deputy Academic Chairman at IBFD), Christiana HJI Panayi (Professor at Queen Mary University of London), Emmanuel Raingeard de la Blétière (Associate Professor at the University of Rennes, Partner PwC France), Stella Raventós-Calvo (President of AEDAF and Vice-President of CFE), Isabelle Richelle (Co-Chair of the Tax Institute - HEC - University of Liège, Brussels Bar Elegis), Alexander Rust (Professor at the Institute for Austrian and International Tax Law of WU Wien), and Rupert Shiers (Partner at Hogan Lovells). Although the Opinion Statement has been drafted by the ECJ Task Force, its content does not necessarily reflect the position of all members of the group. The CFE ECJ Task Force was founded in 1997 and its founding members were Philip Baker, Paul Farmer, Bruno Gangemi, Luc Hinnekens, Albert Raedler†, and Stella Raventós-Calvo.

[2] ECJ, 25 February 2021, Case C-403/19, *Société Générale*, EU:C:2021:136.

[3] For numerical examples see para. 23 *OECD Model: Commentary on Article 23* (2017).

[4] Paras 63 and 40 *OECD Model: Commentary on Article 23* (2017).

[5] Para. 63 *OECD Model: Commentary on Article 23* (2017) (concerning interest income).

[6] Para. 66 *OECD Model: Commentary on Article 23* (2017).

[7] See, e.g., for the United States § 904(c) IRC (carry-forward of 10 years and carry-back of one year), and for Canada § 126(2)(*a*) Income Tax Act (for business income carry-forward of 10 years and carry-back of three years).

[8] See, e.g., for Germany § 34c(2) and (6) 2nd sentence of the German Income Tax Act (EStG).

so far neither been viewed as being required by the OECD MC[9] nor by domestic constitutional law.[10] This is notwithstanding the fact that the refusal of carry-forward or other form of relief may lead to intertemporal double taxation.

2. From the perspective of the EU fundamental freedoms, the 2011 judgment in *Haribo and Salinen*[11] has already addressed the situation of a disallowance of a credit, i.e., where the recipient of a foreign dividend was in an overall loss situation. In that case, the Court held that a credit carry-forward is not required by the free movement of capital under Article 63 TFEU. In light of more recent cases such as *Beker and Beker*[12] and *Miljoen and Others*,[13] however, *Société Générale* again brought the issue of double taxation and the "maximum deduction" before the Court. Indeed, in *Société Générale* the "maximum deduction" foreseen in the French tax treaties with Italy, the UK and the Netherlands exposed cross-border dividends to a higher overall tax burden than domestic dividends would bear. This was because the various source States (Italy, the Netherlands and the UK) imposed a withholding tax on the gross amount of the dividends, while the tax on those dividends and the corresponding "maximum deduction" in France was calculated on a net base (i.e., after the deduction of charges). The issue is obvious (and common under all OECD patterned treaties): Is the resulting higher tax burden on foreign source dividends as compared with domestic source dividends an infringement on the free movement of capital under Article 63 TFEU?

3. The facts of the *Société Générale* case are rather straightforward. SGAM Banque, a French company, received dividends in connection with securities lending and fund structuring transactions from companies established in Italy, the UK and the Netherlands. Each of the source States levied a dividend withholding tax on a gross basis, whilst France, as the State of residence, taxed the dividends under French corporate income tax on a net basis, i.e., after deduction of certain charges**.**[14] Under the applicable French tax treaties with Italy, the UK and the Netherlands and French domestic law, in order to offset double taxation, SGAM Banque was entitled to a foreign tax credit. However, following an audit by the French tax authorities, the credits for the tax years ending 2004 and 2005 were limited to the "maximum deduction", i.e., to the French corporate income tax corresponding to those dividends after deduction of relating charges (i.e., net basis taxation). Société Générale SA, a French company, in its capacity as parent company of the tax-integrated group that includes SGAM Banque, challenged these assessments. According to Société Générale SA, this method for calculating the foreign tax credit placed cross-border dividends at a disadvantage compared to domestic dividends, as it did not allow for a credit that fully eliminated the double taxation on the dividends. The disadvantage resulted from the fact that, under the French legislation, the net income for the calculation of the tax credit was a result of the deduction of charges against the gross amount of the dividends and, accordingly, SGAM Banque could not completely offset the foreign, gross-based withholding taxes levied in Italy, the UK and the Netherlands. Société Générale SA argued that the French legislation violated the freedom of capital movement under Article 63 TFEU.

---

[9] See, e.g., Austrian Verwaltungsgerichtshof (VwGH), 20 April 1999, 99/14/0012, ÖStZB 1999, 696; Indian Income Tax Appellate Tribunal (Mumbai), 10 March 2004, *Joint Commissioner Of Income Tax v Digital Equipments India Ltd*., 2005 94 ITD 340 Mum, 2005 277 ITR 15 Mum, (2005) 93 TTJ Mum 478; Austrian Verwaltungsgerichtshof (VwGH), 28 September 2004, 2000/14/0172, ÖStZB 2005/219; Belgian Constitutional Court, 29 January 2014, Case 5547 (IBFD); Austrian Verwaltungsgerichtshof (VwGH), 27 November 2014, 2012/15/0002. The historical documents are inconclusive but the issue of cross-period crediting was briefly touched upon during the work on the 1963 OECD Draft, but eventually left open: Working Party 15 raised the question "whether the deduction should be restricted to the fiscal year in which the income is included for tax purposes, or whether, for practical reasons, the deduction might be given for any fiscal year in which the claim for relief may be made ('subsequent credit')" (see FC/WP15(59) [2 March 1959] Part I, 14).

[10] See, e.g., Belgian Constitutional Court, 29 January 2014, no 14/2014, Case 5547 (IBFD).

[11] ECJ, 10 February 2011, C-436/08 and C-437/08, *Haribo and Salinen,* EU:C:2011:61, paras 166-172.

[12] ECJ, 28 February 2013, Case C-168/11, *Manfred Beker and Christa Beker*, EU:C:2013:117; see also the subsequent domestic decision in this case by the German Bundesfinanzhof (BFH), 18 December 2013, I R 71/10, IStR 2014, 302.

[13] ECJ, 17 September 2015, Cases C-10/14, C-14/14 and C-17/14, *Miljoen and Others*, EU:C:2015:608. See on that case also the discussion by the CFE ECJ Task Force, "Opinion Statement ECJ-TF 1/2016 on the decision of 17 September 2015 of the Court of Justice of the EU in the combined Cases C-10/14, *Miljoen*, C-14/14, *X*, and C-17/14, *Société Générale*, on the Dutch dividend withholding tax", ET 2016, 255-261.

[14] In this case, manufactured dividends, i.e. after deduction of charges which were fully offsetting the amount of dividends received under a securities lending and funds structuring transactions.

4. As becomes clear from the request for a preliminary ruling and the Court's description of the dispute,[15] the referring French Conseil d'État was well aware of the Court's case law that, first, juridical double taxation in the EU was not seen as contrary to the fundament freedoms and, second, that EU law does not require a Member State to grant a concession to offset the disadvantage resulting from a series of charges to tax that results from the parallel exercise of the various Member States' fiscal sovereignty (*Kerckhaert and Morres*[16] and *Haribo and Salinen*[17]). However, it also noted by the referring court that when applying a tax treaty, a Member State must comply with EU law (*De Groot*,[18] *Beker and Beker*[19] and *Jacob and Lennertz*[20]). More specifically, if a Member State has decided to grant a concession, that power must be exercised in accordance with EU law (*Orange European Smallcap Fund*[21] and *Sauvage and Lejeune*[22]). The Conseil d'État was, therefore, "unsure as to the margin of discretion left to Member States when adopting a mechanism for the elimination of double taxation"[23] and referred the following question to the ECJ 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?"[24]

II. The Judgment of the Court of Justice

5. In *Société Générale*, the Court had to answer the question whether a mere ordinary credit under a tax treaty, "limited to the amount which the first Member State would receive if those dividends alone were subject to corporation tax" and as such whether the refusal to "[offset] in full the levy paid in that other Member State")[25] violated the free movement of capital under Article 63 TFEU.

6. The Court first reiterated three established lines of case law:

   a. As a starting point, each Member State is "free 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".[26]

[15] See ECJ, 25 February 2021, Case C-403/19, *Société Générale*, EU:C:2021:136, paras 19-22.

[16] ECJ, 14 November 2006, Case C-513/04, *Mark Kerckhaert and Bernadette Morres*, EU:C:2006:713.

[17] ECJ, 10 February 2011, C-436/08 and C-437/08, *Haribo and Salinen,* EU:C:2011:61.

[18] ECJ, 12 December 2002, Case C-385/00, *F.W.L. de Groot*, EU:C:2002:750.

[19] ECJ, 28 February 2013, Case C-168/11, *Manfred Beker and Christa Beker*, EU:C:2013:117; see also the subsequent domestic decision in this case by the German Bundesfinanzhof (BFH), 18 December 2013, I R 71/10, IStR 2014, 302.

[20] ECJ, 14 March 2019, Case C-174/18, *Jean Jacob and Dominique Lennertz*, EU:C:2019:205.

[21] ECJ, 20 May 2008, Case C-194/06, *Orange European Smallcap Fund*, EU:C:2008:289.

[22] ECJ, 24 October 2018, Case C-602/17, *Sauvage and Lejeune*, EU:C:2018:856.

[23] ECJ, 25 February 2021, Case C-403/19, *Société Générale*, EU:C:2021:136, para. 23.

[24] ECJ, 25 February 2021, Case C-403/19, *Société Générale*, EU:C:2021:136, para. 24.

[25] ECJ, 25 February 2021, Case C-403/19, *Société Générale*, EU:C:2021:136, para. 25.

[26] ECJ, 25 February 2021, Case C-403/19, *Société Générale*, EU:C:2021:136, para. 26, referring to ECJ, 20 May 2008, Case C-194/06, *Orange European Smallcap Fund*, EU:C:2008:289, para. 30, and ECJ, 4 February 2016, Case C-194/15, *Baudinet and Others*, EU:C:2016:81, para. 30.

b. While this may lead to juridical double taxation of cross-border dividends, this is neither discriminatory *per se*[27] nor does EU law, as it currently stands, imposes an obligation on the residence Member State to prevent the disadvantages which could arise from the exercise of competence thus attributed by the two Member States.[28]

c. In addition, while Member States are free to determine the connecting factors for the allocation of fiscal jurisdiction in tax treaties, "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".[29]

7. Regarding the double taxation of the dividends distributed to SGAM Banque by companies established in Italy, the UK and the Netherlands, the Court highlighted that regarding "the exercise by France of its powers of taxation" *(1)* all resident companies are subject to corporation tax on dividends received, regardless of whether such dividends are from domestic or foreign sources; *(2)* 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; and *(3)* the same rules for allocating costs which derive from the French General Tax Code would apply to that income, regardless of its origin.[30]

As for the tax credit and the method of calculating it (the credit being limited to the tax paid in the source Member State and which could not exceed the French corporation tax corresponding to that income), the Court noted that "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 […] also appear to be deducted from the overall profits of the resident company in respect of domestic-source dividends […]".[31] Subject to verification by the national court, therefore, the Court concluded that "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".[32]

8. Having clarified that France did not discriminate in setting its tax base, the Court had to address the issue of juridical double taxation. Indeed, Société Générale SA had argued that the tax credit calculated under the "maximum deduction" was insufficient as it resulted in a higher tax burden on foreign-sourced dividends than on domestic dividends. This put transactions involving securities of non-resident companies at a disadvantage compared to those involving securities of resident companies.[33] The reason for that disadvantage was the "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 was clear that the tax paid in Italy, the UK and the Netherlands had been calculated on the gross amount of those dividends, without the possibility of deduction of charges, whereas French corporation tax was calculated on a net basis (with France allowing the deduction of charges in accordance

[27] ECJ, 25 February 2021, Case C-403/19, *Société Générale*, EU:C:2021:136, para. 27, referring ECJ, 10 February 2011, C-436/08 and C-437/08, *Haribo and Salinen,* EU:C:2011:61, para. 169, and ECJ, 4 February 2016, Case C-194/15, *Baudinet and Others*, EU:C:2016:81, para. 32.

[28] ECJ, 25 February 2021, Case C-403/19, *Société Générale*, EU:C:2021:136, para. 29, referring to ECJ, 10 February 2011, C-436/08 and C-437/08, *Haribo and Salinen,* EU:C:2011:61, para. 170, and ECJ, 4 February 2016, Case C-194/15, *Baudinet and Others*, EU:C:2016:81, para. 33.

[29] ECJ, 25 February 2021, Case C-403/19, *Société Générale*, EU:C:2021:136, para. 30, referring to ECJ, 24 October 2018, Case C-602/17, *Sauvage and Lejeune*, EU:C:2018:856, para. 24, and ECJ, 14 March 2019, Case C-174/18, *Jean Jacob and Dominique Lennertz*, EU:C:2019:205, para. 25.

[30] ECJ, 25 February 2021, Case C-403/19, *Société Générale*, EU:C:2021:136, para. 32.

[31] ECJ, 25 February 2021, Case C-403/19, *Société Générale*, EU:C:2021:136, para. 34.

[32] ECJ, 25 February 2021, Case C-403/19, *Société Générale*, EU:C:2021:136, para. 35.

[33] ECJ, 25 February 2021, Case C-403/19, *Société Générale*, EU:C:2021:136, para. 36.

with domestic law, so that the net income for the calculation of the tax credit was reduced by that deduction of charges).[34]

9. The Court rejected Société Générale's arguments on three grounds. First, the difference in tax bases used by the source Member States (gross amount of the dividends) and by France as the residence Member State (net amount of dividends after deductions) was not contrary to the free movement of capital, as "each Member State is free to define, in compliance with Union law, the tax base which applies to shareholders receiving the dividends".[35] Second, the purpose of a tax treaty "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".[36] Third, "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".[37]

10. Finally, the Court had to distinguish *Société Générale* from *Beker and Beker*[38] and *Miljoen and Others*.[39] It did so by noting that the latter case concerned the taxation of a non-resident taxpayer's income by the source Member State and not the taxation of foreign-sourced dividends by the residence State.[40] Indeed, *Miljoen and Others* "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". Conversely, *Beker and Beker* concerned a relief mechanism under which the resident individual 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, as the Court noted with a view at *Beker and Beker*, and "subject to verification by the referring court", in *Société Générale* "the deduction of costs is not limited in the case of dividends distributed by another Member State".[41]

11. Having neither found a discriminatory restriction by the French calculation of the tax base and the foreign tax credit nor a violation of the free movement of capital based on unrelieved juridical double taxation, the Court concluded:

> "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."[42]

[34] ECJ, 25 February 2021, Case C-403/19, *Société Générale*, EU:C:2021:136, para. 37.

[35] ECJ, 25 February 2021, Case C-403/19, *Société Générale*, EU:C:2021:136, para. 38.

[36] ECJ, 25 February 2021, Case C-403/19, *Société Générale*, EU:C:2021:136, para. 39, referring to ECJ, 12 May 1998, Case C-336/96, *Gilly*, EU:C:1998:221, para. 46.

[37] ECJ, 25 February 2021, Case C-403/19, *Société Générale*, EU:C:2021:136, para. 40.

[38] ECJ, 28 February 2013, Case C-168/11, *Manfred Beker and Christa Beker*, EU:C:2013:117.

[39] ECJ, 17 September 2015, Cases C-10/14, C-14/14 and C-17/14, *Miljoen and Others*, EU:C:2015:608.

[40] ECJ, 25 February 2021, Case C-403/19, *Société Générale*, EU:C:2021:136, para. 41.

[41] ECJ, 25 February 2021, Case C-403/19, *Société Générale*, EU:C:2021:136, para. 42.

[42] ECJ, 25 February 2021, Case C-403/19, *Société Générale*, EU:C:2021:136, para. 43.

III. Comments

A. Introduction

12. The limitation of a foreign tax credit based on the typical "maximum deduction" rule in tax treaties (and Articles 23A(2) and 23B(1) OECD MC) is aimed at preventing source State taxes to offset tax on domestic or third-country income. Indeed, if the source State had a higher tax rate than the residence State (on the same tax base), a so-called "full" credit in the residence State would not only eliminate double taxation, but would also reduce the tax burden and corresponding revenue on other (domestic or third-country) income of the taxpayer. The same is true if additional differences arise regarding the tax base in both countries, such as in *Société Générale* and, more generally, in all situations where the source State taxes on a gross basis while the residence State does so on a net basis (e.g., under Articles 10 and 11 OECD MC). Conversely, if the residence State's tax rate was higher, it would effectively collect an additional tax on lower-taxed source State income. Both results are intended: From a tax treaty perspective it is enough "if the lower of the two taxes were given up", as it is not the "function of a convention to provide relief in one State from the effects of a higher level of taxation in the other".[43] As such, one could view the credit method under Article 23 OECD MC as merely putting an overall cap on the tax borne by cross-border activities at the higher of either the source or residence State tax. This also becomes clear in a comparison with the exemption method: Only in profit situations and where the source State's tax is at least as high as the residence State's tax will the ordinary credit and exemption (with progression, in case of a domestic progressive system of rates) produce the same results.[44] From an EU law perspective, however, both the ordinary credit and exemption (also with progression) are permissible methods to avoid double taxation.[45] As regards the "maximum deduction" under the French rules, this has now been explicitly confirmed by the Court in *Société Générale*. If one considers the policy considerations underlying the OECD MC and the avoidance of juridical double taxation through the "ordinary" credit method, the "maximum deduction" rule at issue in *Société Générale* was therefore fully in line with tax treaty law (and also the Court's case on the fundamental freedoms).

B. Irrelevance of Parallel Taxing Jurisdiction and Disadvantages Created by Double Taxation …

13. The Court in *Société Générale* clearly acknowledged "a disadvantage resulting from the double taxation of foreign-source dividends", but denied a violation of the fundamental freedoms as this disadvantage "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".[46] As such, *Société Générale* is a good reminder of the fact that the fundamental freedoms, as interpreted by the Court in cases such as *Kerckhaert and Morres*,[47] do not prohibit juridical double taxation – effectively, the mere parallel exercise of taxing jurisdiction. The impact of this non-prohibition should, however, not be overestimated. Many issues in the daily life of international taxation are thoroughly resolved by existing tools. For example, out of the 351 possible bilateral income tax treaty relationships between the 27 Member States, only 5 are currently not covered by a tax treaty.[48] (The number of bilateral treaties on inheritance and gift taxes, which are not

---

[43] See FC/WP15(59) (2 March 1959) Part I, 12.

[44] See also para. 27 *OECD Model: Commentary on Article 23* (2017).

[45] See, e.g., ECJ, 12 May 1998, C-336/96, *Gilly*, EU:C:1998:221; ECJ, 12 December 2002, Case C-385/00, *F.W.L. de Groot*, EU:C:2002:750. Equally, the ECJ has found that a participation exemption and an indirect credit (imputation) are, in principle, equally permissible methods to avoid economic double taxation (see ECJ, 10 February 2011, C-436/08 and C-437/08, *Haribo and Salinen,* EU:C:2011:61, paras 86 et seq.; ECJ, 13 November 2012, Case C-35/11, *FII Group Litigation*, EU:C:2012:707).

[46] ECJ, 25 February 2021, Case C-403/19, *Société Générale*, EU:C:2021:136, para. 40.

[47] ECJ, 14 November 2006, Case C-513/04, *Mark Kerckhaert and Bernadette Morres*, EU:C:2006:713.

[48] As of August 2021, out of 351 possible bilateral tax treaty relationships between the 27 Member States only 5 are not covered. The missing relationships are between Cyprus and Croatia (the 1985 treaty was terminated), Cyprus and the Netherlands (a treaty was

levied by all Member States, is much smaller.[49]) Of course, disputes can and do still arise with regard to the interpretation of these tax treaties. To resolve such issues, the EU has chosen a procedural path: Binding arbitration is foreseen both in the multilateral 1990 Arbitration Convention for transfer pricing disputes[50] and the 2017 Tax Dispute Resolution Directive (TDRD).[51] The TDRD provides a binding procedural mechanism for resolving disputes between Member States regarding EU resident taxpayers when those disputes arise from the interpretation and application of agreements and conventions (i.e., tax treaties between Member States and the EU Arbitration Convention) that provide for the elimination of double taxation of income and, where applicable, capital, which is especially important for "disputes leading to double taxation".[52] By virtue of the primacy of EU law, the TDRD is not impacted by any restriction on dispute resolution contained in a bilateral tax treaty. Moreover, and even if some technicalities of the TDRD need to be worked out in practice, the mere existence of a legally enforceable, tightly timed arbitration mechanism will certainly have a positive impact on the Member States' willingness to speedily resolve disputes in mutual agreement proceedings before cases are taken out of their hands and into independent arbitration.

14. It is nevertheless important to briefly review (and criticize) the Court's position on juridical double taxation in the framework of the fundamental freedoms. While double taxation "is the most serious obstacle there can be to people and their capital crossing internal borders",[53] outside the limited scope of the company tax Directives,[54] EU currently law neither provides for explicit substantive mechanisms to avoid juridical double taxation of income or capital between Member States,[55] nor has the Court so far found that the fundamental freedoms offer relief. Indeed, juridical double taxation cannot easily be categorized within the traditional framework of the fundamental freedoms. Since juridical double taxation would prevail even if all Member States (hypothetically) had the same tax system (each with source-based and residence-based taxation demonstrating that the disadvantage is created solely by the interaction of the two taxing States and not by discriminatory taxation of either State),[56] it can neither be (clearly) qualified as a discriminatory restriction nor as a mere disparity. While, however, the European Commission[57] had historically taken the

---

initialled in 2019 but is not yet in force), Denmark and France (the 1957 treaty was terminated effective January 1, 2009, and a new treaty is currently under negotiation), Denmark and Spain (the 1972 treaty was terminated effective January 1, 2009), and Finland and Portugal (the 1970 treaty was terminated effective January 1, 2019, and the 2016 treaty is not yet in force). However, Sweden has terminated its treaties with Greece and Portugal with effect from 2022 (as for Greece see Swedish Law No. 2021-573, as for Portugal see Law No. 2021-574).

[49] See also the Commission's Recommendation of 15 December 2011 regarding relief for double taxation of inheritances, [2011] OJ L 336/81.

[50] Convention 90/436/EEC on the elimination of double taxation in connection with the adjustment of transfers of profits between associated undertakings, [1990] OJ L 225, p. 10, as amended. See also the Revised Code of Conduct for the effective implementation of the Convention on the elimination of double taxation in connection with the adjustment of profits of associated enterprises, [*2009]* OJ C 322/1.

[51] Council Directive (EU) 2017/1852 of 10 October 2017 on tax dispute resolution mechanisms in the European Union, [2017] OJ L 265/1.

[52] See Pt. 1 of the Preamble of Council Directive (EU) 2017/1852 of 10 October 2017 on tax dispute resolution mechanisms in the European Union, [2017] OJ L 265/1.

[53] Opinion of Advocate General Colomer, 26 October 2004, C-376/03, *D*, EU:C:2004:663, para. 85.

[54] Such as the avoidance of juridical double taxation of inter-company dividends under the Parent-Subsidiary Directive (Council Directive 2011/96/EU) and of inter-company interest and royalty payments under the Interest-Royalties-Directive (Council Directive 2003/49/EC). Also, the step-up provided in Article 5(5) of the ATAD (Council Directive (EU) 2016/1164) is a measure to avoid – time delayed – double taxation of the same capital gain, as are the provisions of Art 8(5) and (6) ATAD with regard to CFC rules.

[55] The only provision directly dealing with double taxation was former Art. 293(2) of the EC Treaty (ex-Article 220 EEC Treaty), which urged the Member States, "so far as is necessary, [to] enter into negotiations with each other with a view to securing for the benefit of their nationals ... the abolition of double taxation within the Community". That provision was not directly applicable to the benefit of taxpayers (ECJ, 12 May 1998, C-336/96, *Gilly*, EU:C:1998:221, para. 15) and was also subject to intense debate with regard to its interpretation. Article 293 of the EC Treaty was, however, repealed by the Treaty of Lisbon (Point 280, [2007] OJ C 306/1) and speculation as to the reasons for its repeal and its effect are ongoing.

[56] Opinion of A.G. Geelhoed, 23 February 2006, Case C-374/04, *ACT Group Litigation*, EU:C:2006:139, para. 48.

[57] See the Answer given by Mr Bolkestein on behalf of the Commission to Written Question E-2287/99 by Karin Riis-Jørgensen (ELDR) concerning "Right to freedom of movement and Danish tax rules", [2000] OJ C 225 E/87, and the Position taken by the Commission concerning Petition 626/2000 by Mr Klaus Schuler (German), concerning the dual taxation of an inheritance (25 January 2007), p. 4.

view that double taxation should be prohibited by the fundamental freedoms, the Court's Grand Chamber in its 2006 decision in *Kerckhaert and Morres*[58] did not share this view.

15. *Kerckhaert and Morres* raised the simple question of whether the residence State of a dividend recipient (Belgium) may tax both, domestic and cross-border dividends, at the same rate, while allowing in the case of a cross-border dividend only a deduction of the foreign (French) withholding tax rather than granting a credit.[59] Largely following the Advocate General's opinion,[60] the Court rejected the notion that the similar treatment of all dividends by Belgium was discriminatory, as the situation of the shareholders whose dividends had already been taxed was dissimilar to those whose dividends had not been taxed.[61] The Court moreover acknowledged that the disadvantage at issue in *Kerckhaert and Morres* resulted from the parallel exercise of fiscal sovereignty by two Member States. The Court noted the importance of tax treaties to eliminate or mitigate the negative effects on the functioning of the Internal Market resulting from the co-existence of national tax systems, but then moved on to state that "Community law, in its current state and in a situation such as that in the main proceedings, 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 Community."[62] Hence, "it is for the Member States to take the measures necessary to prevent situations such as that at issue in the main proceedings by applying, in particular, the apportionment criteria followed in international tax practice.[63]

16. The Court subsequently confirmed this approach in, e.g., *Block*,[64] *Damseaux,*[65] *Orange European Smallcap Fund*,[66] *CIBA*,[67] *Haribo and Salinen*,[68] *Levy & Sebbag*,[69] *Baudinet and Others*[70] and now in *Société Générale*.[71] Also, the EFTA Court in *Seabrokers*[72] followed this position in interpreting the EEA Agreement's freedom of establishment. While in those cases the Court appreciated that there is a "fiscal disadvantage" resulting from juridical double taxation, it also consistently noted that this disadvantage "is the result of the exercise in parallel by the two Member States concerned of their fiscal sovereignty".[73] However, "disadvantages which could arise from the parallel exercise of tax competences by different Member States, to the extent that such an exercise is not discriminatory, do not constitute restrictions prohibited by the EC Treaty.[74] Also, the Court made it quite clear that it would not even be able to decide which Member State would have to refrain from taxation as EU law does not lay down any general criteria for the attribution of areas of

[58] ECJ, 14 November 2006, Case C-513/04, *Mark Kerckhaert and Bernadette Morres*, EU:C:2006:713.

[59] Clearly, if there is no credit available, the after-tax result for the taxpayer will be better in the case of a purely domestic distribution, while in the cross-border setting double taxation would occur, reducing the net dividend in comparison to a purely internal situation.

[60] Opinion of A.G. Geelhoed, 6 April 2006, Case C-513/04, *Mark Kerckhaert and Bernadette Morres*, EU:C:2006:242.

[61] The Court accepted that, in principle, the application of the same rule to different circumstances could amount to a prohibited discrimination, but then stated that "in respect of the tax legislation of his State of residence, the position of a shareholder receiving dividends is not necessarily altered, in terms of that case-law, merely by the fact that he receives those dividends from a company established in another Member State, which, in exercising its fiscal sovereignty, makes those dividends subject to a deduction at source by way of income tax." See ECJ, 14 November 2006, Case C-513/04, *Mark Kerckhaert and Bernadette Morres*, EU:C:2006:713, para. 19.

[62] ECJ, 14 November 2006, Case C-513/04, *Mark Kerckhaert and Bernadette Morres*, EU:C:2006:713, para. 22.

[63] ECJ, 14 November 2006, Case C-513/04, *Mark Kerckhaert and Bernadette Morres*, EU:C:2006:713, para. 23.

[64] ECJ, 12 February 2009, Case C-67/08, *Margarete Block*, EU:C:2009:92, paras 28 et seq.

[65] ECJ, 16 July 2009, Case C-128/08, *Jacques Damseaux*, EU:C:2009:471, paras 27 et seq.

[66] ECJ, 20 May 2008, Case C-194/06, *Orange European Smallcap Fund NV*, EU:C:2008:289, para. 42.

[67] ECJ, 15 April 2010, Case C-96/08, *CIBA*, EU:C:2010:185.

[68] ECJ, 10 February 2011, C-436/08 and C-437/08, *Haribo and Salinen,* EU:C:2011:61, para. 170.

[69]. ECJ, 19 September 2012, Case C-540/11, *Daniel Levy and Carine Sebbag*, EU:C:2012:581, paras 18 et seq.

[70] ECJ, 4 February 2016, Case C-194/15, *Baudinet and Others*, EU:C:2016:81, paras 30 et seq.

[71] ECJ, 25 February 2021, Case C-403/19, *Société Générale*, EU:C:2021:136, para. 29.

[72] EFTA-Court, 7 May 2008, Case E-7/07, *Seabrokers AS*, [2008] EFTA Court Report 172, paras 49 et seq.

[73] ECJ, 12 February 2009, Case C-67/08, *Margarete Block*, EU:C:2009:92, para. 28; see also, e.g., ECJ, 14 November 2006, Case C-513/04, *Mark Kerckhaert and Bernadette Morres*, EU:C:2006:713, para. 20.

[74] ECJ, 16 July 2009, Case C-128/08, *Jacques Damseaux*, EU:C:2009:471, para. 27; see also, e.g., ECJ, 14 November 2006, Case C-513/04, *Mark Kerckhaert and Bernadette Morres*, EU:C:2006:713, paras 19, 20 and 24, and ECJ, 20 May 2008, Case C-194/06, *Orange European Smallcap Fund NV*, EU:C:2008:289, paras 41, 42 and 47.

competence between the Member States in relation to the elimination of double taxation within the Union,[75] emphasizing that there is no natural priority for one of the Member States to tax.[76] Even though the Court reminds the Member States of the (political) necessity "to take the measures necessary to prevent situations of double taxation by applying, in particular, the criteria followed in international tax practice",[77] it is clear that juridical double taxation as such cannot be challenged under the fundamental freedoms.[78]

17. The Court consistently finds that Union law does not question the parallel existence of tax competence of the Member States concerned (but rather only impacts the exercise of that competence by one of them). This line of case law can, of course, be criticized in light of the ideal of the internal market in which neither double taxation or double non-taxation would be acceptable.[79] First, the Court's reasoning in *Kerckhaert and Morres* seems to be at odds with extensive internal market case law on, e.g., the prohibition of double contributory burdens in the field of social security[80] and of double taxation in the context of VAT.[81] Second, a prohibition of double taxation under the freedoms would not excessively limit Member States' tax sovereignty, as Member States would in any event be free to allocate taxing powers among them and to determine – by means, *inter alia*, of international agreements – the criteria for direct taxation "with a view to eliminating double taxation".[82] Third, the Court's hesitation to allocate responsibility for the avoidance of double taxation is not necessarily reflected in other areas of direct taxation where the Court has created or implicitly accepted "priority rules".[83] Fourth and finally, the Court's hesitation leads to an obvious asymmetry in the internal market: The Court protects Member States from taxpayers' double use of losses,[84] but does not equally protect taxpayers from Member States' double taxation of their profits – even though in a true internal market neither would be acceptable. The same is true for EU Tax Policy: ATAD II,[85] for example, addresses double non-taxation in hybrid situations but does not likewise address instances of double taxation. An effective prohibition of juridical double taxation would, however, require the Court to establish criteria for the identification of the State 'responsible' for the existence of double taxation, a task the Court is clearly refraining to take up.

---

[75] ECJ, 12 February 2009, Case C-67/08, *Margarete Block*, EU:C:2009:92, para. 30; see also, e.g., ECJ, 14 November 2006, Case C-513/04, *Mark Kerckhaert and Bernadette Morres*, EU:C:2006:713, para. 22, and ECJ, 16 July 2009, Case C-128/08, *Jacques Damseaux*, EU:C:2009:471, para. 33.

[76] ECJ, 16 July 2009, Case C-128/08, *Jacques Damseaux*, EU:C:2009:471, paras 32-34.

[77] ECJ, 16 July 2009, Case C-128/08, *Jacques Damseaux*, EU:C:2009:471, para. 30.

[78] ECJ, 16 July 2009, Case C-128/08, *Jacques Damseaux*, EU:C:2009:471, 22. *See*, however, the still doubtful Opinion of AG Kokott, 15 February 2007, Case C-464/05, *Maria Geurts and Dennis Vogten*, EU:C:2007:108, para. 60 with note 37, stating for the case of dual unlimited inheritance tax liability that it "remains to be seen" "[w]hether the Court of Justice, in accordance with the findings in *Kerckhaert and Morres*, would actually accept this consequence, even in the case of a very high burden of inheritance tax".

[79] See also Opinion of the Economic and Social Committee on "Taxation in the European Union – Report on the development of tax systems", [1997] OJ C 296/37, Appendix II: "Double taxation or the absence of taxation is incompatible with the internal market".

[80] See, e.g., ECJ, 15 February 1996, Case C-53/95, *Hans Kemmler*, EU:C:1996:58; ECJ, 28 March 1996, Case C-272/94, *Michel Guiot*, EU:C:1996:147; ECJ, 23 November 1999, Cases C-369/96 and C-376/96, *Jean-Claude Arblade*, EU:C:1999:575; ECJ, 15 June 2000, Case C-302/98, *Manfred Sehrer*, EU:C:2000:322; ECJ, 18 July 2006, Case C-50/05, *Maija T. I. Nikula*, EU:C:2006:493. The distinguishing line between taxation and social security implied in *CIBA* (ECJ, 15 April 2010, Case C-96/08, *CIBA*, EU:C:2010:185) seems to be based on whether there is a "direct benefit" for citizens. This is, however, quite unsatisfactory as it leaves Member States a nearly unlimited leeway to escape scrutiny.

[81] See, e.g., ECJ, 5 May 1982, Case 15/81, *Gaston Schul ("Schul I")*, EU:C:1982:135; ECJ, 25 February 1988, Case 299/86, *Rainer Drexl*, EU:C:1988:103, paras 9 et seq.; ECJ, 21 May 1985, Case 47/84, *Gaston Schul ("Schul II")*, EU:C:1985:216, paras 12 et seq.

[82] ECJ, 12 May 1998, C-336/96, *Gilly*, EU:C:1998:221, para. 24; ECJ, 28 February 2008, Case C-293/06, *Deutsche Shell GmbH*, EU:C:2008:129, para. 41.

[83] E.g., ECJ, 14 February 1995, Case C-279/93, *Roland Schumacker*, EU:C:1995:31 (concerning personal and family benefits); ECJ, 13 December 2005, Case C-446/03, *Marks & Spencer*, EU:C:2005:763 (concerning foreign losses).

[84] E.g., ECJ, 13 December 2005, Case C-446/03, *Marks & Spencer*, EU:C:2005:763, para. 47; ECJ, 29 March 2007, Case C-347/04, *Rewe Zentralfinanz*, EU:C:2007:194, para. 47; ECJ, 15 May 2008, Case C-414/06, *Lidl Belgium*, EU:C:2008:278, para. 35.

[85] See Council Directive (EU) 2017/952 of 29 May 2017 amending Directive (EU) 2016/1164 as regards hybrid mismatches with third countries, [2017] OJ L 144/1.

18. It is nevertheless common ground that the abolition of double taxation is, still (even after the repeal of Arricle 293(2) EC),[86] an objective of the TFEU, as the overlap of taxing jurisdictions may result in distortions of the internal market.[87] While no comprehensive substantive EU legislation is in sight, the Commission has nevertheless addressed the issue, inter alia, in its communications on "Double Taxation in the Single Market" (2011)[88] and on "Removing cross-border tax obstacles for EU citizens" (2011)[89] as well as in a recommendation regarding relief for double taxation of inheritances (2011).[90]

C. … But Scrutiny of a Member State's Exercise of Taxing Jurisdiction

19. *Société Générale* is an important decision, as it clearly confirms the Court's view that, while Member States are free to determine the connecting factors for the allocation of fiscal jurisdiction in tax treaties, "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".[91] It can indeed be gleaned from the ECJ and EFTA Court case law that once a Member State has concluded a tax treaty both, the exemption and the credit method, must be applied consistently with EU law.

20. First, and even though the existing case law of the Court does not prohibit juridical double taxation, once a Member State has decided to provide relief for juridical double taxation it must do so in a way that family and personal benefits of *individual taxpayers* are fully taken into account and not (implicitly) allocated to foreign income so to limit the exemption or credit (see, for example, *De Groot*,[92] *Beker and Beker*,[93] *Imfeld and Garcet*,[94] *Jacob and Lennertz*[95] and *BJ*[96]). More generally, and beyond the subjective sphere of individual income taxation, in *Société Générale* the Court implied that the discriminatory disallowance of deductions relating to foreign-sourced income would clearly be problematic, but also noted that "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".[97] Given this background, however, that remark by the Court needs more context. Société Générale SA did not complain about the expense deduction as such, but rather that too much of the deductible expenses had been allocated to the foreign income (thereby reducing the "maximum deduction"), not too little. This question of expense allocation needs to be addressed next, as there are indeed EU/EEA law limitations with regard to the allocation of expenses to foreign-source income (*Seabrokers*[98]).

---

[86] See ECJ, 12 September 2017, C-648/15, *Austria v. Germany*, EU:C:2017:664, para. 26, noting the "the beneficial effect of the mitigation of double taxation on the functioning of the internal market that the European Union seeks to establish in accordance with Article 3(3) TEU and Article 26 TFEU". In the past, the ECJ specifically referred to – now repealed – Article 293(2) of the EC Treaty to establish that "the abolition of double taxation is one of the objectives of the Community to be attained by the Member States" (see, e.g., ECJ, 12 May 1998, C-336/96, *Gilly*, EU:C:1998:221, para. 16, and ECJ, 19 January 2006, C-265/04, *Bouanich*, EU:C:2006:51, para. 49).

[87] Discussion paper for the Informal Meeting of Economic and Financial Affairs Council (ECOFIN) Ministers, Taxation in the European Union, SEC(96)487 final, 7 (20 Mar. 1996).

[88] Commission's Communication on "Double Taxation in the Single Market", COM(2011)712 final (11 November 2011).

[89] Commission's Communication on "Tackling cross-border inheritance tax obstacles within the EU", COM(2011)864 final (15 December 2011).

[90] Commission's Recommendation of 15 December 2011 regarding relief for double taxation of inheritances, [2011] OJ L 336/81.

[91] ECJ, 25 February 2021, Case C-403/19, *Société Générale*, EU:C:2021:136, para. 30, referring to ECJ, 24 October 2018, Case C-602/17, *Sauvage and Lejeune*, EU:C:2018:856, para. 24, and ECJ, 14 March 2019, Case C-174/18, *Jean Jacob and Dominique Lennertz*, EU:C:2019:205, para. 25.

[92] ECJ, 12 December 2002, Case C-385/00, *F.W.L. de Groot*, EU:C:2002:750.

[93] ECJ, 28 February 2013, Case C-168/11, *Manfred Beker and Christa Beker*, EU:C:2013:117; see also the subsequent domestic decision in this case by the German Bundesfinanzhof (BFH), 18 December 2013, I R 71/10, IStR 2014, 302.

[94] ECJ, 12 December 2013, Case C-303/12, *Guido Imfeld and Nathalie Garcet*, EU:C:2013:822.

[95] ECJ, 14 March 2019, Case C-174/18, *Jean Jacob and Dominique Lennertz*, EU:C:2019:205.

[96] ECJ, 15 July 2021, Case C-241/20, *BJ*, EU:C:2021:605.

[97] ECJ, 25 February 2021, Case C-403/19, *Société Générale*, EU:C:2021:136, para. 42.

[98] EFTA-Court, 7 May 2008, Case E-7/07, *Seabrokers AS*, [2008] EFTA Court Report 172.

21. Second, the issue of allocation of expenses to foreign-sourced income, as addressed by the EFTA Court in *Seabrokers*,[99] requires some exploration. It is a particularly interesting question also from an EU law perspective, as tax treaties generally do not address the question of how costs or deductions should be allocated (apportioned) to foreign income[100] and largely leave this issue to be decided under domestic law. In a credit system, this allocation of (deductible) expenses between domestic and foreign activities is important not so much for determining taxable (overall) income but rather for the purpose of determining net income in the source State and hence the maximum deduction. The lower the net income in the source State from the residence State's perspective (i.e., net foreign-sourced income determined under the residence State's rules), the lower the maximum deduction. While the OECD is largely silent on this question,[101] the fundamental freedoms of EU/EEA law limit a Member State's options on how to allocate deductions when determining the maximum credit. In interpreting the freedom of establishment under the EEA Agreement, the EFTA Court in *Seabrokers*[102] scrutinized rules that allocated, among others, interest expenses in proportion of domestic and foreign income, irrespective of the purpose for which an expense was incurred. The Court distinguished three situations:

   a. First, if expenses were "linked" to the foreign income, then they could be used to reduce the foreign income for the purposes of the limitation on credit, irrespective of whether the source State had granted a deduction under its domestic law.[103]

   b. Second, if the "expenses cannot be linked to any particular business activities", then the attribution of the expenses in proportion to the parts of the global net income earned in the home State and in the host State is adequate.[104]

   c. However, thirdly, it constitutes a restriction of the freedom of establishment if "debt interest expenses related solely to a taxpayer's business in the home State" are attributed "to the income of a branch situated in another EEA State when calculating the maximum credit allowance".[105] Such allocation places taxpayers with a branch in another EEA State in a less favourable position for the sole reason that they made use of their right of establishment under the EEA Agreement. This discriminatory restriction results from the fact that taxpayers having all their debt interest expenses linked to the home State are in a comparable position with regard to those expenses whether or not they also conduct their business through a branch in another EEA State, and therefore "should get the same tax treatment in the home State with respect to these expenses".[106]

22. The Court in *Société Générale* did not address *Seabrokers* directly. It, however, referred to the issue of expense deduction when it noted that "the same rules for allocating costs which derive from the French General Tax Code would apply to that income, regardless of its origin".[107] While that reference indicates that the allocation of costs under domestic law is not *prima facie* discriminatory, *Seabrokers* would require even more. A Member State would, e.g., not be allowed to apportion parts of the costs that are directly

---

[99] EFTA-Court, 7 May 2008, Case E-7/07, *Seabrokers AS*, [2008] EFTA Court Report 172.

[100] Paras 39-41, 44 and 62 *OECD Model: Commentary on Article 23* (2017).

[101] As regards deductions relating to the income itself (e.g., depreciation and amortization, business expenses etc), the wording of Articles 23A and 22B OECD MC seems to leave quite some leeway and also the Commentary refers to an allocation that is "specified or proportional" (para. 63 *OECD Model: Commentary on Article 23* (2017)). While a direct allocation of income-related expenses seems to be a common (and reasonable) approach (see, e.g., German Bundesfinanzhof (BFH), 16 March 1994, I R 42/93, BStBl 1994 II 799; see also German Bundesfinanzhof (BFH), 6 April 2016, I R 61/14, BStBl 2017 II 48, focusing on the question of which activity primarily caused the respective expenses), Article 23B would perhaps even allow a proportionate allocation of deductions that are clearly related only to domestic income (see in this direction UK High Court of Justice (Chancery Division), 14 July 2006, *Legal & General Assurance Society Ltd v Commissioners for Her Majesty's Revenue and Customs*, [2006] EWHC 1770 (Ch), paras 31-32).

[102] EFTA-Court, 7 May 2008, Case E-7/07, *Seabrokers AS*, [2008] EFTA Court Report 172.

[103] EFTA-Court, 7 May 2008, Case E-7/07, *Seabrokers AS*, [2008] EFTA Court Report 172, para. 54.

[104] EFTA-Court, 7 May 2008, Case E-7/07, *Seabrokers AS*, [2008] EFTA Court Report 172, para. 55.

[105] EFTA-Court, 7 May 2008, Case E-7/07, *Seabrokers AS*, [2008] EFTA Court Report 172, para. 57; see also German Bundesfinanzhof (BFH), 6 April 2016, I R 61/14, BStBl 2017 II 48.

[106] EFTA-Court, 7 May 2008, Case E-7/07, *Seabrokers AS*, [2008] EFTA Court Report 172, para. 56.

[107] ECJ, 25 February 2021, Case C-403/19, *Société Générale*, EU:C:2021:136, para. 32.

connected only with a domestic activity also to foreign-sourced income (and thereby reduce the maximum credit). It is unclear if such allocation issues have arisen in *Société Générale* and if, under the French rules, charges unrelated to the foreign-sourced dividends were allocated to them. We know that for purposes of the "maximum deduction" the foreign dividends were reduced by "the justified charges relating to those dividends", i.e., the expenses that "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".[108] Obviously considering that all expenses at issue were directly ("specifically"[109]) linked to the foreign source dividends, *Société Générale* did not create a direct conflict with the EFTA Court's decision in *Seabrokers*. Of course, it cannot be excluded that disadvantages may arise because of different perspectives as to which costs relate directly to the foreign-sourced dividends. Such outcome, however, was implicitly accepted by the EFTA Court in *Seabrokers*, where it noted that "to the extent the host State does not grant a deduction for expenses relating solely to the income of the branch when calculating the tax on the income of the branch, the resulting burden for the taxpayer is simply a consequence of the two States exercising their different tax regimes in parallel and does not constitute a restriction within the meaning of Article 31 EEA".[110]

D. What About the Source Member State?

23. Finally, it should be noted that the credit limitation in *Société Générale* was due to the fact that the source States (Italy, the Netherlands and the UK) had all levied a tax on gross income (i.e., the gross amount of the dividends), while the residence State (France) had determined that income on a net basis after deduction of directly linked expenses and taxed it at the regular corporate tax rate. The "excess" tax was therefore also caused by the gross-basis of taxation in the source States, as the lower treaty rate (15% in the 1989 France-Italy treaty, the 1973 France-Netherlands as well as in the 1968 France-UK treaty) did not make up for the higher (gross) base. However, EU law certainly has an impact on that question as well. A number of cases – ranging from *Gerritse*[111] and *Scorpio*[112] to *Miljoen*,[113] *Brisal*,[114] and *Pensioenfonds Metaal en Techniek*[115] – have shown that non-residents are entitled to non-discriminatory treatment with regard to the deduction of business expenses directly related to the income-generating activity in the source State. While this basic foundation is solid, there are still some open questions, e.g., whether the comparison should include a combined perspective on tax base and tax rate,[116] whether such deduction must already

---

[108] ECJ, 25 February 2021, Case C-403/19, *Société Générale*, EU:C:2021:136, para. 19.

[109] See for that terminology ECJ, 25 February 2021, Case C-403/19, *Société Générale*, EU:C:2021:136, para. 34.

[110] EFTA-Court, 7 May 2008, Case E-7/07, *Seabrokers AS*, [2008] EFTA Court Report 172, para. 54.

[111] ECJ, 12 June 2003, Case C-234/01, *Arnoud Gerritse*, EU:C:2003:340, paras 25-29 (concerning business expenses of an artists that are directly linked to the activity that generated the taxable income in the source State).

[112] ECJ, 3 October 2006, Case C-290/04, *FKP Scorpio Konzertproduktionen GmbH*, EU:C:2006:630, paras 41-49 (concerning business expenses of a service provider which are economically connected with his activities in the Member State in which the services are provided).

[113] ECJ, 17 September 2015, Cases C-10/14, C-14/14 and C-17/14, *Miljoen and Others*, EU:C:2015:608, paras 55-61 (concerning expenses directly related to dividends); see also CFE ECJ Task Force, "Opinion Statement ECJ-TF 1/2016 on the Decision of the European Court of Justice in Joined Cases *Miljoen* (Case C-10/14), *X* (Case C-14/14) and *Société Générale* (Case C-17/14) on the Netherlands Dividend Withholding Tax", ET 2018, 255 (259).

[114] ECJ, 13 July 2016, Case C-18/15, *Brisal*, EU:C:2016:549, paras 23-54 (concerning expenses directly related to interest); see also CFE ECJ Task Force, "Opinion Statement ECJ-TF 2/2016 on the Decision of the Court of Justice of the European Union of 13 July 2016 in *Brisal and KBC Finance Ireland* (Case C-18/15), on the Admissibility of Gross Withholding Tax of Interest", ET 2017, 30 (32-34).

[115] ECJ, 2 June 2016, Case C-252/14, *Pensioenfonds Metaal en Techniek*, EU:C:2016:402, paras 64-65 (concerning expenses directly related to dividends).

[116] Compare, e.g., on the one hand SE: ECJ, 19 November 2015, Case C-632/13, *Hilkka Hirvonen*, EU:C:2015:765, para. 44, and ECJ, 17 September 2015, Cases C-10/14, C-14/14 and C-17/14, *Miljoen and Others*, EU:C:2015:608, para. 61 (both accepting that, in a specific case, a difference in rate can compensate for a difference in base) with, e.g., on the other hand ECJ, 12 June 2003, Case C-234/01, *Arnoud Gerritse*, EU:C:2003:340 (clearly distinguishing between base discrimination and rate advantage), and ECJ, 13 July 2016, Case C-18/15, *Brisal*, EU:C:2016:549, paras 31-33 (holding categorically that a base discrimination "cannot be justified by the fact that non-resident financial institutions are subject to a tax rate which is lower than the rate for resident financial institutions").

be possible at the moment of withholding[117] or if a refund procedure is sufficient,[118] or which concrete expenses are "directly related" to a certain activity.[119] More specifically, *Société Générale* has already brought that issue before the Court, albeit not entirely successfully: In its judgment in *Miljoen, X and Société Générale*, the Court held that neither the part of the purchase price of shares that represents an upcoming dividend (which can be deducted when calculating the taxable base, and as such effectively eliminate tax on the dividend), nor financing costs, both of which concern ownership of shares as such, are "directly linked" in that way to the actual dividends from those shares.[120]

IV. The Statement

24. The Court's judgment in *Société Générale* reinforces established case law that EU law neither prohibits juridical double taxation nor does it put an obligation on the residence Member State to prevent the disadvantages which could arise from the exercise of competence thus attributed by the two Member States. The parallel existence of taxing jurisdiction, however, must be distinguished from the exercise of such jurisdiction by each Member State. While Member States are free to determine the connecting factors for the allocation of taxing jurisdiction in tax treaties, "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".

25. It is generally accepted in the Court's case law that both the ordinary credit and exemption (including exemption with progression) are permissible methods to avoid double taxation. In Société Générale this position was confirmed, specifically as regards the "maximum deduction" under the ordinary credit method in tax treaties, even though this treatment can result in a disadvantage for cross-border income as compared with domestic income. As the disadvantage in *Société Générale* was due to the difference between gross-basis taxation of dividends in the source Member States (Italy, the Netherlands and the UK) and net-basis taxation of those foreign-sourced dividends in the residence State (France), it remains to be seen if future cases will bring clarity in light of the *Seabrokers* judgment of the EFTA Court which examined how expenses can be lawfully allocated to foreign income from the perspective of the residence Member State.

26. The CFE Tax Advisers Europe stresses that in an Internal Market neither (unintended) double non-taxation nor double taxation is acceptable. It, therefore, calls on all EU institutions to analyze and address the remaining issues of juridical double taxation – including in the context of the upcoming actions amending current corporate tax directives.

---

[117] See ECJ, 3 October 2006, Case C-290/04, *FKP Scorpio Konzertproduktionen GmbH*, EU:C:2006:630, paras 41-49.

[118] See ECJ, 13 July 2016, Case C-18/15, *Brisal*, EU:C:2016:549, para. 42.

[119] See, e.g., the different approaches to financing costs with regard to dividend-generating shares on the one hand and interest-generating loans on the other hand ECJ, 17 September 2015, Cases C-10/14, C-14/14 and C-17/14, *Miljoen and Others*, EU:C:2015:608, para. 60, and ECJ, 13 July 2016, Case C-18/15, *Brisal*, EU:C:2016:549, para. 48, and the discussion in CFE ECJ Task Force, "Opinion Statement ECJ-TF 2/2016 on the Decision of the Court of Justice of the European Union of 13 July 2016 in *Brisal and KBC Finance Ireland* (Case C-18/15), on the Admissibility of Gross Withholding Tax of Interest", ET 2017, 30 (33).

[120] ECJ, 17 September 2015, Cases C-10/14, C-14/14 and C-17/14, *Miljoen and Others*, EU:C:2015:608, para. 60. For analysis see, e.g., CFE ECJ Task Force, "Opinion Statement ECJ-TF 1/2016 on the Decision of the European Court of Justice in Joined Cases *Miljoen* (Case C-10/14), *X* (Case C-14/14) and *Société Générale* (Case C-17/14) on the Netherlands Dividend Withholding Tax", ET 2018, 255 (259).