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French Withholding Tax on Dividends Paid to Collective Investment Funds: Where Do We Stand After the May 10, 2012 *Santander* Case?

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Certain laws are bound to result in litigation. Article 119 bis 2 of the French Tax Code (FTC), imposing a 30% withholding tax on dividend payments made by French resident companies to individuals or entities whose tax residence or registered office is not in France [1] ("Article 119"), is one such law.

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[1] The article states that: "(...) [income from shares and similar revenue, i.e., dividends] shall give rise to the levying of withholding tax at the rate (...) [of 30%] when benefiting persons whose fiscal residence or seat is outside France." Prior to Jan. 1, 2012, the rate was 25%. This rate may be reduced under the terms of tax treaties entered into by France.

The litigation that has followed Article 119 is particularly interesting because it focuses on the conflict between French national law and the international commitments undertaken by France under both European Union (EU) law and its bilateral tax treaties.

The most recent episode in the Article 119 saga is the judgment issued by the third chamber of the Court of Justice of the European Union [2] (CJEU) in joined cases C-338/11 to C-347/11 *Santander Asset Management SGIIC SA v. Directeur des résidents à l'étranger et des services généraux* [3] (the "*Santander* case"). The CJEU considered whether Article 119, as applied to "undertakings for collective investment in transferable securities" (UCITS, which are collective investment funds) is compatible with EU law, and found that it was not.

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[2] Since the entry into force of the Lisbon Treaty on December 1, 2008, this European court is called the Court of Justice of the European Union. It was called the Court of Justice of the European Communities before that date. For the sake of simplicity, we herein systematically use the acronym CJEU.

[3] CJEU Cases C-338/11 to C-347/11 reported in the *Revue de Jurisprudence Fiscale* [French journal of tax cases — RJF].

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The *Santander* case has garnered worldwide attention because the principles applied by the CJEU in its decision can be equally applied to other European jurisdictions levying a withholding tax on non-resident UCITS. Consequently, the scope of this judgment reaches well beyond the borders of France.

From the standpoint of management companies and collective investment vehicles, the *Santander* case not only creates an opportunity to claim reimbursement of withholding tax paid on French or other European source dividends but also, more importantly, obliges investment managers or companies to analyze the extent to which they are under the obligation to take appropriate steps to secure their right to obtain reimbursement of said withholding tax for the benefit of their investors, with failure to do so being potentially questionable in light their fiduciary duties as discretionary investment managers.

This article shows that it is possible, with no drawbacks, to quickly take the appropriate steps to secure such right to obtain reimbursement of withholding tax on French or other European-source dividends. It analyzes the *Santander* case from a French legal perspective, and in view of the French case law developments that led to the case coming before the CJEU. The analysis considers both EU law and tax treaty law, because the legality of withholding tax on cross-border dividends can be challenged on both grounds.

COMPATIBILITY OF ARTICLE 119 WITH EU LAW: A STORY IN THE MAKING

Notable CJEU Case Law

Parent Companies: The Denkavit Internationaal BV Case

In an important 2006 CJEU case known as the *Denkavit Internationaal BV* case, [4] the CJEU held that a Member State cannot tax dividends paid to a non-resident parent company if an exemption applies to dividends paid to a resident parent company in a comparable situation. The CJEU also specifically held that the availability of a tax credit mechanism pursuant to the applicable tax treaty does not negate the discriminatory nature of such a withholding tax where the non-resident parent company is unable to benefit from the credit in its home country, as was the case on the *Denkavit Internationaal* facts. The decision was predicated on protecting the fundamental freedom of establishment guaranteed under the treaty establishing the European Community ("EC Treaty").

[4] CJEU Dec. 14, 2006 Case C-170/05, *Denkavit Internationaal BV and Denkavit France SARL*: RJF 3/07 no. 374, opinion L. A. Geelhoed reported in the *Bulletin des Conclusions Fiscales* [French bulletin of reports made by independent judges reporting on the cases before tax courts — BDCF] 3/07 no. 39. This decision was answering questions referred to the CJEU by the *Conseil d'Etat* (CE) (French Supreme Administrative Court). Confirmed on the effect of double tax treaty by Case C-540-07 Nov. 19, 2009, *Commission v. Italy*.

The facts concerned French subsidiaries paying dividends to their Dutch holding company parent. The French tax system at the time applied differing tax rules to resident and non-resident parent companies. [5] The case gave the CJEU an opportunity to visit the critical notion of the fundamental freedom of establishment under the EC Treaty when a Member State exercises its exclusive competence in respect to direct taxation.

[5] This decision relates to a period prior to the EC Parent-Subsidiary Directive entering into effect (Directive

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90/435/EEC of July 23, 1990), but the entry into force of this Directive affects neither the question, nor the reasoning and the solution.

Indeed, according to settled CJEU case law, although direct taxation falls within the competence of Member States, they must nonetheless exercise that competence consistently with EU law, thus complying with the fundamental freedoms set out by the EC Treaty. [6]

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[6] Case C-170/05 paragraph 19.

This requires Member States to treat residents and non-residents equally when they are in a comparable situation with respect to their domestic tax system and when there is no overriding reason of public interest justifying such differences of treatment. Similarly, when different rules are applied to comparable situations, or the same rules are applied to different situations, the CJEU historically has found discrimination.

In *Denkavit Internationaal*, the CJEU found that the situation of residents and non-residents was comparable, as the parent company's residence created no objective difference in the application of the French tax rule. [7] The difference in treatment of the non-resident resulted solely from the French tax rule. The CJEU confirmed that non-residents cannot be treated differently from residents when there is no objective difference in their situation with respect to the taxation of the French-source dividends. The CJEU found the difference in treatment by the French tax rule at issue to amount to discrimination. The French tax authorities took full account of the consequences of these rulings in two new instructions issued in 2007, as did the French *Conseil d'Etat* (the French Supreme Administrative Court) in a 2007 decision. [8]

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[7] The concept of parent company under French law is understood to mean essentially a company subject to corporate income tax and that holds at least 5% of the capital in its subsidiary (also subject to corporate income tax) for a period of at least two years. *See* FTC Articles 145 and 216.

[8] *Bulletin Officiel des Impôts* [French official tax bulletin — BOI] 4 C 7-07 and 4 C 8-07 dated May 10 and July 12, 2007. The *Conseil d'Etat* relied on the Denkavit decision in its decision of Apr. 6, 2007. *Conseil d'Etat* (CE) Apr. 6, 2007 no. 235609, *Denkavit Internationaal BV and Denkavit France*: RJF 7/07 no. 807, opinion C. Landais BDCF 7/07 no. 87.

Pension Funds: The Centro di Musicologia Walter Stauffer Case

In 2006, the CJEU issued a decision in a case called *Centro di Musicologia Walter Stauffer*, which dealt with whether or not Member States are allowed to differentiate between domestic and foreign charities with respect to taxation. [9]

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[9] CJEC Sept. 14, 2006 Case C-386/04, *Centro di Musicologia Walter Stauffer*: RJF 12/06 no. 1645.

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The facts concerned an Italian charity operating in Germany and meeting all requirements of a German charity except that it was not established in Germany. Germany exempted German charities from tax, but subjected the Italian charity to tax. The CJEU analyzed whether the fundamental freedoms granted under the EC Treaty of the right of establishment, the freedom to provide services and/or the right to free movement of capital might preclude a Member State from refusing to grant the same exemption from tax to a charitable foundation established in another Member State. Ultimately, the CJEU determined that the fundamental freedom permitting free movement of capital, as defined under Article 56 of the EC Treaty, was implicated. The CJEU held that a tax exemption for income applying only to domestic charities places charities based in another Member State at a disadvantage, thus creating an obstacle to the free movement of capital and payments.

In 2009, the French *Conseil d'Etat* applied the CJEU's reasoning set forth in its *Centro di Musicologia Walter Stauffer* case. The *Conseil d'Etat* held that the withholding tax levied pursuant to Article 119 on dividends paid by French companies to Dutch pension funds constituted a restriction on the free movement of capital, [10] as those same dividends were tax exempt when paid to French pension funds.

[10] CE Feb. 13, 2009 no. 298108, *Stichting Unilever Pensioensfonds Progress*: RJF 5/09 no. 525, opinion E. Geffray BDCF 5/09 no. 66.

French Conseil d'Etat: The 2012 *GBL Energy* Case

More recently, in May 2012, the *Conseil d'Etat*, [11] in a plenary session and ruling as last instance jurisdiction on issues of EU law, rendered a decision that is also significant to the developments surrounding Article 119. [12] The decision was premised on whether a French withholding tax levied on a non-resident could be found to unlawfully restrict the right to free movement of capital granted under the EC Treaty.

[11] 12 CE May 9, 2012 no. 342221 and 342222 plenary *GBL Energy* RJF 07/12 no. 774.

[12] The fact that the *Conseil d'Etat* did not refer this question to the CJEU can be taken to indicate either the established nature of the case law on these issues (glass half-full attitude) or a desire on the part of the *Conseil d'Etat* to avoid exposing itself to a contrary ruling from the CJEU (glass half-empty).

The *GBL Energy* case concerned a Luxembourg holding company with an equity participation of less than 5% [13] in a French company. Dividends paid by the French company to the Luxembourg company were subject to French withholding tax at a rate of 15%. [14]

[13] The parties were not eligible to benefit from either the EU Parent-Subsidiary Directive or the *Denkavit Internationaal* case law, as the French parent exemption was not applicable.

[14] This rate resulted from the combined application of the provisions of Articles 119 bis 2 and 187(1) of the FTC on the one hand, and the provisions of Articles 8(2) and 19(3) of the tax treaty of Apr. 1, 1958, between France and Luxembourg on the other hand.

The case raised an issue not previously examined by the courts, about the differing treatment of companies in a loss position when the non-resident company is subjected to a withholding tax on dividends, while the resident company is subject to corporate income tax on dividends. The case focused on the fact that the differing tax treatment meant that the non-resident company, when in a loss position, would be disadvantaged relative to a resident company in a loss position. The *Conseil d'Etat* held that, even if the tax and accounting rules governing the determination of losses for resident and non-resident companies were similar, the levying of a withholding tax on non-resident companies would not constitute a difference in tax treatment resulting in an unlawful restriction on the free movement of capital, since a Member State is permitted to apply different tax collection methods for residents and non-residents, even if this results in a cash flow imbalance. [15] Thus, this decision essentially equated levying a French withholding tax on non-resident companies, with levying French corporate income tax on resident companies.

[15] This ruling follows on from the *Truck Center SA* judgment of Dec. 22, 2008 (CJEC Dec. 22, 2008 Case C-282/07, *Truck Center SA*: RJF 3/09 no. 302, opinion of J. Kokott: BDCF 3/09 no. 40) in which the CJEU considered that Articles 43 and 56 of the EC Treaty did not preclude legislation of a Member State that provides for withholding tax on interest paid by a company resident in that Member State to a non-resident company, whilst exempting from that withholding tax interest paid to a resident company, the income of which is taxed by way of corporate income tax. Specifically, the CJEU permitted Belgium to withhold tax on interest paid to a 48% parent company resident in Luxembourg, even though no withholding tax would be applied to a similar payment to a Belgian resident. In this case, the CJEU considered that the difference in treatment under the Belgian tax legislation between companies receiving income from loans, in that it consisted solely in the application of different taxation methods according to whether such companies were resident in Belgium or in another Member State, concerned situations that were not objectively comparable in terms of the aim of the measure at issue and reflected a difference between the situations of these companies as regards tax collection — even though a reliable system for administrative assistance between the Member States in question was in place. The court also noted that the difference in treatment under this legislation did not necessarily result in an advantage for resident companies in receipt of such income. The *Conseil d'Etat* observed that dividends received by a shareholder company incorporated in France are, ultimately, effectively taxed as part of that company's income, even if only in relation to a later tax year, as there is no provision under French fiscal legislation for exemption of dividends received by a resident company when it is making losses and such dividends are included in the company's overall profit and reduce the negative profit or losses carried forward. Therefore, such dividends are effectively subject to corporate income tax for a later year, at the standard tax rate, once the company returns to profitability.

The *GBL Energy* decision illustrates that the simultaneous exercise of the right to tax by the source State and the residence State, when applied to the same income and resulting in double taxation, does not necessarily constitute a prohibited restriction of the freedoms provided for under the EC Treaty. This would otherwise lead to compromising the very rights of Member States to impose direct taxation. [16] National rules that result in a difference in treatment between resident and non-resident taxpayers do not necessarily always result from an incompatibility with EU law, but sometimes simply from the exercise in parallel by two Member States of their fiscal sovereignty. [17]

[16] In its *Kerckhaert and Morres* judgment of Nov. 14, 2006, the CJEU held that the principles of free movement of capital and freedom of establishment did not prevent a Member State from making dividends from shares in companies established in that State and dividends from shares in companies established in another Member State subject to the same uniform rate of taxation, without providing for the possibility of setting off tax levied by deduction at source in that other Member State. Because the legislation treated

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all dividends in the same manner, regardless of source, the differing tax consequences could not be deemed to result in a discrimination against dividends from shares in non-resident companies. The disadvantage suffered by the taxpayers concerned did not, in such circumstances, result from any incompatibility with EU law, but rather from the exercise in parallel by two Member States of their fiscal sovereignty (CJEC Nov. 14, 2006 Case C-513/04, *Kerckhaert and Morres*: RJF 2/07 no. 244, opinion L. A. Geelhoed BDCF 2/07 no. 25).

[17] For example, in its previous judgments of Feb. 14, 1995 (Case C-279/93: RJF 3/95 no. 425 with opinion P. Leger p. 166), *Schumacker*, and June 12, 2003 (Case C-234/01: RJF 10/03 no. 1189), *Gerritse*, the CJEU considered that the situations of resident and non-resident taxpayers were not comparable as regards the tax law at issue in these cases. On the other hand, it refused, in circumstances such as those in *Denkavit Internationaal BV*, *Commission v. Italy* and *Commission v. Germany*, to rule that the situations of resident and non-resident companies in receipt of dividends were non-comparable as regards disputed national tax legislation on the elimination of the risk of economic double taxation of dividends.

However, the conflict resulting from the juxtaposition of two national tax systems must be distinguished from discrimination resulting from the national law of a Member State that contravenes the fundamental freedoms provided under the EC Treaty. These freedoms, including in particular the right of establishment, the freedom to provide services, and the right to free movement of capital, preclude national legislation of a Member State that, in and of itself, leads to a risk of application of a tax chain or economic double taxation for non-resident companies, whilst providing for a difference in treatment between resident and non-resident companies with regard to such risks. [18] EU law restrictions against discrimination are meant to address the latter. The *Santander* case relates to this latter situation.

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[18] For example, a Member State may not impose a withholding tax on outbound dividends whilst exempting dividends paid by its resident companies to other resident companies from all taxation. Similarly, a Member State may not decide to implement national legislation providing for more burdensome taxation on outbound dividends than that imposed on dividends distributed to companies whose registered offices are within its territory. Such forms of discriminatory treatment are proscribed by the CJEU in its judgments in *Denkavit Internationaal BV* of Dec. 14, 2006, as mentioned above, *Amurta SGPS* of Nov. 8, 2007 (CJEU Nov. 8, 2007 Case C-379/05, *Amurta SGPS*: RJF 2/08 no. 247), *Commission v. Kingdom of Spain* of June 3, 2010 (CJEU June 3, 2010 Case C-487/08, *Commission v. Kingdom of Spain*: RJF 10/10 no. 973), and *Commission v. Germany* of Oct. 20, 2011 (CJEU Oct. 20, 2011 Case C-284/09, *Commission v. Germany*: RJF 1/12 no. 85).

UCITS AND THE *SANTANDER* CASE

In early 2012, the French *Tribunal administratif* (Administrative Court) of Montreuil referred several cases to the CJEU dealing with the application of Article 119 to French source dividends paid to UCITS not resident in France. [19] The consolidated case, now known as the *Santander* case, specifically concerned UCITS located in Belgium, [20] Germany, [21] Spain, [22] and the United States. [23]

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[19] *Tribunal administratif* [TA] Montreuil, 10th ch., Dec. 1, 2010, no. 0709887, *Santander Asset Management SGIIC SA*, opinion N. Peton-Philippot and with the same *rapporteur* no. 1009683, *Generali Investments Deutschland Kapitalanlagegesellschaft Mbh*; no. 1006838, *SICAV KBC Select Immo*; no. 1008779, *International Values Series of the DFA Investment Trust Company*; no. 1002473, *Internationale Kapitalanlagegesellschaft Mbh (Spezialfonds)*; no. 1007188, *SGSS Deutschland Kapitalanlagegesellschaft Mbh (FCP)*; no. 1005888, *Allianz Global Investors Kapitalanlagegesellschaft Mbh (FCP)*; no. 0709782, *Santander Asset Management SGIIC SA*; no. 1008780, *Fonds Continental Small Company Series of The*

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DFA Investment Trust Company (Registered Investment Companies).

[20] Cases C-342/11 and C-346/11.

[21] Cases C-340/11, C-341/11, C-343/11 and C-347/11.

[22] Cases C-338/11 and C-339/11.

[23] Cases C-344/11 and C-345/11.

The crux of the *Santander* case is that distributions made by a French company to a UCITS established in France are entirely exempt from French tax, whereas the same distributions to non-resident UCITS are subject to the Article 119 withholding tax.

The CJEU was asked to rule on the compliance of the Article 119 withholding tax with EU law. Notably, there was already a pending case with the CJEU against France for its failure to fulfill obligations initiated by the European Commission regarding this same issue. [24]

[24] *Commission v. France* C-76/12, Feb. 13, 2012 (failure of a Member State to fulfill its obligations).

The CJEU held that the free movement of capital, as provided for under Articles 63 and 65 of the Treaty on the functioning of the European Union (TFEU), precludes legislation of a Member State that provides for the taxation, by means of withholding tax, of nationally-sourced dividends when they are received by a UCITS resident in another State, when such dividends are exempt from tax when received by a UCITS resident in the Member State in question.

The *Tribunal administratif* of Montreuil had turned to the CJEU to rule on the issue upon the recommendation of the *Conseil d'Etat*, to which it had addressed a request for an opinion on the issue.

The opinion issued by the *Conseil d'Etat* in response to this referral, [25] which is itself of great interest, recommended in particular that the CJEU be consulted regarding whether the relevant comparison for determining a difference in tax treatment between French resident and non-resident UCITS contrary to the free movement of capital should be undertaken at the level of the UCITS itself, or at the level of the UCITS and the UCITS holders. [26]

[25] CE opinion May 23, 2011 no. 344678 to 344687, *Suntanned Asset Management STOIC AS*: RJF 8-9/11 no. 1009, opinion P. Collin BDCF 8-9/11 no. 104.

[26] It is interesting to point out that the *Tribunal administratif* of Paris had already ruled in favor of foreign investment companies in a different case: *TA Paris* Apr. 22, 2010 no. 06-10333/2 2d division, 3d ch. *Axa Rosenberg Alpha Trust* (RJF 2011 no. 122).

Issues Considered by the CJEU

The specific questions referred to the CJEU for preliminary ruling were as follows:
• Must the situation of the UCITS holders be taken into account in addition to that of the UCITS when determining whether there is a difference in treatment for situations that are objectively comparable?

• If so, what are the conditions under which the Article 119 withholding tax may be regarded as consistent with the principle of free movement of capital?

In order to fully understand the CJEU's approach to answering the questions posed in the *Santander* case, one must consider (i) the CJEU's general process for evaluating whether a Member State's national tax law restricts a fundamental freedom guaranteed by the EC Treaty, and (ii) the relevant French law underlying the *Santander* case. These points are discussed in turn below.

The CJEU Determination Process

Member States are obliged to respect the fundamental freedoms granted by the EC Treaty, even for matters that are not directly governed by EU law. [27] Consequently, it is a fundamental mission of the CJEU to determine when such freedoms are contravened by a Member State's national law.

[27] CJEC Feb. 14, 1995 Case C-279/93, *Schumacker*: RJF 3/95 no. 425 with opinion P. Léger p. 166.

The process generally followed by the CJEU can be broken down into four stages:
(i) First, the fundamental freedom at issue must be identified. In the *Santander* case, the fundamental freedom at stake was the free movement of capital;

(ii) Second, the court must consider whether or not there is a restriction on this freedom resulting from a differing tax treatment pursuant to a Member State's national law as applied to situations that are objectively comparable;

(iii) Third, it must consider whether or not such restriction is justified by an overriding reason in the public interest; and

(iv) Lastly, if there is a public interest justification, it must ascertain whether or not the restriction is proportionate.

The French Tax Regime for UCITS

UCITS in France include *sociétés d'investissement à capital variable* (SICAV, which are open-ended investment companies) and *fonds communs de placement* (FCP, which are special investment companies). The former are formed as *sociétés anonymes*, which are the French equivalent of a U.S. corporation or a U.K. public limited company, whereas the latter are vehicles without distinct legal personality for French law purposes, used for investors to collectively hold a pool of transferable securities (somewhat in the nature of a U.S. partnership or trust).

Despite their differences, these two categories of French UCITS are governed by the same rules and are subject to the same tax regime, which does not vary according to whether they distribute or capitalize dividends received. In all cases the UCITS is itself exempt from French tax on dividends received.

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Notwithstanding their corporate form, the SICAV UCITS are expressly exempt from corporate income tax on profits made in compliance with their statutory investment objectives. [28] The FCP's lack of legal personality as a matter of French law places them automatically outside the scope of corporate income tax. By contrast, foreign UCITS are subject to the Article 119 withholding tax (which, at the time of the case, was levied at a rate of 25%). [29]

[28] FTC, Article 208, 1° bis (a).

[29] This rate has been 30% since 2011. While this rate is often reduced under bilateral tax treaties, UCITS are not necessarily covered by tax treaties because they generally are not considered a "resident" according to the treaty definition.

This differing treatment was challenged in the *Santander* case and its precursors, and the particular focus of the CJEU was determining how to evaluate whether the difference in treatment was applied to objectively comparable situations.

The Arguments

The French tax authorities argued that the specific nature of UCITS and the French tax regime applicable to them meant that levying a withholding tax for UCITS established outside of France did not constitute any difference in treatment inconsistent with EU law. Their position was based on the premise that the tax regime applicable to UCITS was intended to make the taxation of revenue received by investment vehicles as similar as possible to the taxation of the same revenue when received directly by shareholders. When the shareholders are French, individuals are subject to individual income tax upon receipt of the income from securities or when their shares are redeemed, and corporations are subject to corporate income tax (or possibly the "mark to market" rule if appropriate). [30]

[30] FTC, Art. 209-0 A.

The French tax authorities also relied on treaty law and OECD commentary, the most recent of which indicates that "[i]n comparing the taxation of [collective investment vehicles (CIV) in the two States, taxation in the source State and at the investor level should be considered, not just the taxation of the CIV itself." [31] The OECD's strategy aims to make the taxation applicable to the UCITS and shareholder match as closely as possible to that which would be applicable to the shareholder had it received the same dividends directly. [32]

[31] OECD Commentary, July 2010 Article 1, C 6.18.

[32] This is the same strategy as that implemented by France when negotiating international tax treaties (see, in particular, the treaties between France and the U.S., Spain, Germany and Japan).

In this context, the withholding tax levied on dividends paid by the distributing entity to a foreign UCITS

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would not constitute a specific taxation on non-resident investment vehicles but merely a different procedure for charging tax applicable to the shareholders of these vehicles as compared to that applied to residents.

By contrast, the affected UCITS argued that, on the basis of CJEU case law, the difference in treatment must be assessed solely at the investment vehicle level, rather than at the level of the shareholders. [33]

[33] *Aberdeen Property Fininvest Alpha*, C-303/07, Rec. p. I-5145, paragraph 44 and *Commission v. Italy*, Case C-540/07, Rec. p. I-10983, paragraph 43.

The CJEU clearly dismissed the French tax authority's arguments, essentially on the basis that "only the relevant distinguishing criteria established by the legislation in question must be taken into account in determining whether the difference in treatment resulting from that legislation reflects situations which are objectively different." [34]

[34] See paragraph 28 of the *Santander* case judgment.

The CJEU stated that "[i]t is true that it is for each Member State to organise, in compliance with EU law, its system for taxing distributed profits. However, where national tax legislation establishes a distinguishing criterion for the taxation of distributed profits, account must be taken of that criterion in determining whether the situations are comparable." [35]

[35] See paragraph 27 of the *Santander* case judgment. See also, to that effect, judgments of Dec. 14, 2006, *Denkavit Internationaal* and *Denkavit France*, Case C-170/05, Rec. p. I-11949, paragraphs 34 and 35; June 18, 2009, *Aberdeen Property Fininvest Alpha*, Case C-303/07, Rec. p. I-5145, paragraphs 51 to 54; Nov. 19, 2009, *Commission v. Italy*, Case C-540/07, Rec. p. I-10983, paragraph 43, and Oct. 20, 2011, *Commission v. Germany*, Case C-284/09, not yet published in the Recueil, paragraph 60.

Article 119, in this case, established a distinction that, according to the CJEU, did not in any way take into account the situation of the shareholders. In particular, the exemption enjoyed by resident UCITS had no systematic legal or factual consideration in the form of taxation of the income distributed in the hands of the shareholders, as the latter could be non-residents, subject to a different tax regime than France applies to its shareholders. [36]

[36] See paragraphs 30 to 35 of the *Santander* case judgment.

The CJEU stated that there was no link in the French tax system between the exemption enjoyed by resident UCITS and the taxation of their shareholders. In particular, UCITS are exempt whether they capitalize or distribute dividends received even when their shareholders are also exempt. Similarly, it

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stated that the withholding tax was levied on non-resident UCITS whose shareholders were French, but not on French UCITS even when their shareholders were exempt as non-residents.

The CJEU thus held that Article 119 established a distinguishing criterion based solely on the UCITS' place of residence when levying withholding tax on dividends received solely by non-resident UCITS. The CJEU held that, in light of this distinguishing criterion, the examination of the comparability of the situations necessary to determining whether the French legislation was discriminatory, should be made solely at the level of the UCITS, without taking into account the situation of the shareholders.

In substance, the CJEU criticized the lack of consistency between the objective analysis of the French legislation at stake and its effects, on the one hand, and the arguments put forward by the French tax authorities justifying such legislation, on the other hand. This criticism left open the option of reforming the tax regime applicable to profits distributed to UCITS. [37]

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[37] This is not, however, the solution proposed at present by the French authorities, which have since taken full account of the consequences of the CJEU's ruling in the second amending finance bill for 2012 exempting foreign UCITS from withholding tax under Article 119. Indeed, the bill goes even further than required, by exempting dividends paid to foreign investment companies that are comparable to *Organismes de Placement Collectif Immobilier* (real estate collective investment schemes), even though the exemption from which the latter benefit under French law is conditional on them respecting a distribution requirement that should thus preclude it from being deemed inconsistent with EU law (*Orange European Smallcap Fund* May 20, 2008, Case C-194/06 Rec. P.i-3747).

The CJEU also overruled the arguments relating to the public interest, noting that:

• the need to ensure a balanced allocation between the Member States of the power to tax cannot be relied upon, in that France has chosen not to tax resident UCITS in receipt of nationally-sourced dividends; [38]

• the need to guarantee the effectiveness of fiscal supervision cannot justify taxation that affects solely and specifically non-residents; [39]

• the preservation of the coherence of the French tax system cannot justify rules that restrict fundamental freedoms unless a direct link is established between the tax advantage concerned and the compensation of that advantage by a particular tax. [40] In this case, the exemption from the withholding tax on dividends was not conditioned on the redistribution by the UCITS of the dividends received by it, and the taxation of the shareholders in that UCITS with respect to the dividend income as a means of compensating for the exemption from withholding tax. Consequently, there was no direct link within the meaning of the case law of the CJEU between the exemption from withholding tax on nationally-sourced dividends received by a resident UCITS and the taxation of those dividends as income received by the shareholders in that UCITS.

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[38] Paragraph 48 of the *Santander* case judgment.

[39] Paragraph 49 of the *Santander* case judgment.

[40] Judgments of Nov. 27, 2008, *Papillon*, Case C-418/07, Rec. p. I-8947, paragraph 44, and *Aberdeen Property Fininvest Alpha*, mentioned above, paragraph 72.

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Consequences of the *Santander* Case to Non-Member States

The CJEU's ruling does not discuss the possibility for collective investment funds established outside of the EU (e.g., in the United States) to claim incompatibility of the withholding tax provided for under Article 119 with the free movement of capital. The question was, however, put to the *Conseil d'Etat* by the *Tribunal administratif* of Montreuil.

In an unambiguous opinion dated May 23, 2011, [41] the *Conseil d'Etat* determined that investment companies that are comparable to French UCITS pursuant to Article 119 [42] should be able to file claims on the basis of a difference in treatment as a result of the withholding tax borne by them on French-sourced dividends.

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[41] "By virtue of Article 57(1) of the Treaty Establishing the European Community, now Article 64 of the Treaty on the Functioning of the European Union, Article 56 does not preclude the application to non-Member States of restrictions already existing as at Dec. 31, 1993, under national or EU law regarding movement of capital to or from non-Member States via direct investments. According to the case law of the Court of Justice of the European Union, direct investments covered by the aforementioned provisions are those that serve to establish or maintain lasting and direct links between the persons providing the capital and the undertaking, i.e., those that allow the shareholder to exercise a decisive influence over the management or control of the company.

"Therefore, it is only in exceptional circumstances that investments by UCITS could be considered to constitute direct investments in this sense and that the fact that the provisions of Article 119 bis 2 of the FTC date from prior to Dec. 31, 1993, would mean that any obstacle to the free movement of capital that such provisions might represent is justified."

"In all other cases, it cannot be excluded that the authorities could demonstrate, when movements of capital to or from a non-Member State are subject to a different legal scheme from that for movements of capital within the European Union, that the withholding tax at issue is justified by the need to provide for effective fiscal supervision. However, such reasoning may not, in principle, be used against taxpayers from a non-Member State that, like the United States in the cases submitted by the *Tribunal administratif* of Montreuil, is connected to France by a tax treaty that includes a clause for mutual administrative assistance aiming to prevent tax evasion and avoidance."

[42] See below.

Notwithstanding the *Conseil d'Etat*'s clear reasoning, certain clarifications should nonetheless be made.

It is clear that Article 56 of the EC Treaty (now Article 63 of the TFEU) prohibits any restriction on the movement of capital not only between Member States but also between Member States and non-Member States. Article 57 of the EC Treaty (now Article 64 of the TFEU), deriving from the Treaty of Maastricht, softens the effects of the restriction somewhat insofar as it applies to restrictions on movement of capital between Member States and non-Member States, by authorizing the maintenance of any restrictions already in existence as of December 31, 1993, and pertaining to direct investments.

The concept of direct investment is defined in CJEU case law, [43] which states that investments in a company that do not serve to establish or maintain lasting and direct economic links between the shareholder and the company, and that do not put the shareholder in a position to exercise a decisive influence over the management or control of the company, do not constitute direct investments. [44]

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[43] In particular CJEC Dec. 18, 2007, Case C-101/05, *Skatteverket*: RJF 3/08 no. 378 and the aforementioned *Orange European Smallcap Fund NV* ruling.

[44] *Haribo Lakritzen Hans Riegel BetriebsgmbH* and *Österreichische Salinen AG*judgment of Feb. 10, 2011; CJEU Feb. 10, 2011 Cases C-436/08 and C-437/08: RJF 5/11 no. 666. In the present case, the court refused to allow holdings of less than 10% to qualify as direct investments.

In light of this definition of direct investment, the *Conseil d'Etat* draws the logical conclusion that the nature of UCITS would, in the majority of cases, prevent any lasting and direct link from arising between the investor and the company. UCITS do not in principle aim to exercise a decisive influence over the management or control of the companies in which they invest, but merely to optimize the financial investments for the UCITS's holders.

The ruling from the *Conseil d'Etat* also implies, although the issue is not directly addressed in its opinion, that shareholders would not be considered investors in the sense of the standstill clause either, in that the UCITS acts as a screen between them and the company, such that it should not be possible to rely upon the standstill clause.

Nonetheless, the fact that the standstill clause is not applicable does not entirely eliminate the possibility for movements of capital to or from non-Member States to be treated differently. The CJEU case law on this point is clear and states that the principle of free movement of capital applies equally to relations between Member States and non-Member States, and to intra-Community relations. However, the CJEU does distinguish between intra-Community relations, and relations between Member States and non-Member States in respect of the overriding reason of public interest that can justify the difference of treatment. It is only in situations where there is no obligation for mutual assistance under a tax treaty that a Member State may restrict movement of capital to or from a non-Member State on the basis that it is impossible to carry out any verification regarding the situation of the non-Member State resident. [45]

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[45] CJEC Dec. 18, 2007 Case C-101/05: RJF 3/08 no. 378, CJEU Oct. 28, 2010 Case C-72/09, 3d ch., *Etablissements Rimbaud SA*: RJF 1/11 no. 128.

In a 2007 judgment from the Grand Chamber, the CJEU upheld a tax exemption for inbound dividends which only applies if the distributing company is established in a Member State of the European Economic Area or in a State with which the taxing Member State has entered into a treaty that includes an exchange of information clause as such exemption is granted subject to criteria that cannot be verified by the authorities of the taxing Member State other than by obtaining information from the State in which the distributing company is established.

The treaty entered into between France and the United States includes such clauses, as well as the treaties between France and Canada, the British Virgin Islands (as of November 18, 2010), and the Cayman Islands (as of October 13, 2010). [46] Consequently, provided they are comparable to French UCITS, [47] funds established in these non-Member States may claim reimbursement of the withholding tax paid on French-sourced dividends.

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[46] A list of the States and territories outside of the European Union that had signed with France an agreement containing such a clause for exchange of information as of Jan. 1, 2011 is included below as

Appendix 1.

[47] See below.

Refund Claims Under the *Santander* Case

Which Years Could Be the Object of Such Refund Claims?

In accordance with the procedural rules applicable in France, [48] that were clarified by the *Conseil d'Etat*'s *Santander* opinion dated May 23, 2011, foreign investment vehicles affected by the *Santander* case may file a claim for recovery of withholding tax paid after January 1st of the three years preceding the date of the CJEU's ruling, i.e., for sums paid in 2009, 2010, 2011 and 2012. In order to be admissible, claims must be filed with the authorities no later than December 31st of the second year after the event triggering the claim, i.e., no later than December 31, 2014.

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[48] French Code of Fiscal Procedure (CFP) Articles L 190 and R 196-1.

However, certain clarifications should be made with respect to the retroactive effect of the *Santander* case on refund claims.

The first concerns the fact that the *Santander* case, which, unsurprisingly in light of the CJEU's own settled case law in the matter, rejected the French tax authorities' claim for a temporal limitation of the effects of the judgment. This claim was based on the projected costs, assessed at €5 billion, [49] of a declaration of incompatibility of Article 119 with EU law. However, the French tax authorities did not establish this cost would have "serious economic repercussions" as required, despite the fact that such a demonstration should have been facilitated by the current economic and financial climate.

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[49] Report no. 689 to the French Senate from the finance commission for 2012, dated July 23, 2012. The Government intends to spread the liability over three years: €1.5 billion in 2012, and then €1.75 billion in 2013 and in 2014.

The second clarification concerns the starting point for the time period during which claims may be filed by non-Member State investment companies. In accordance with Article R 196-1 of the CFP, the *Conseil d'Etat* considered that only CJEU rulings that uphold an interpretation of EU law that directly reveals an incompatibility between such law and a rule applicable in France are susceptible to constitute a starting point for the time period during which claims based on that event may be admitted. In the present case, the *Conseil d'Etat* considered that no rulings from the CJEU prior to May 10, 2012, had revealed, as required under applicable French law, the incompatibility between Article 119 and the principle of free movement of capital. Given that the CJEU's judgment does not specifically consider the issue of non-Member States, whether or not it constitutes a fair starting point for the period during which claims made by non-Member State funds may be admitted might be discussed. Arguably, the *Santander* case, read together with the *Conseil d'Etat*'s *Santander* opinion dated May 23, 2011, which does specifically discuss UCITS resident in non-Member States, should serve as the starting point for the time period for claims. [50]

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[50] It might well appear that a different response to this question would be provided for claims filed by non-Member State pension funds on the grounds of the *Conseil d'Etat*'s judgment of Feb. 13, 2009 no. 298108, *Stichting Unilever Pensioensfonds Progress* (RJF 5/09 no. 525), in that this judgment does not specifically consider the issue of non-Member States.

The third clarification concerns the evidence required in support of a claim for recovery of withholding tax paid. In this respect, the *Conseil d'Etat* specified that there is no provision in the CFP that sets out the nature of the documents indicating the amount of withholding tax paid that should be submitted with such a claim in order for it to be admissible.

Foreign investment companies may therefore submit any documents evidencing payment of the withholding at issue, provided that such documents indicate the date of payment and the identity of the paying entity. Any failure to provide sufficient evidence that leads to dismissal of the claim may be rectified before the *Tribunal administratif* up until the closing of the court instruction.

Which Foreign Investment Companies Could File Such Refund Claims: How to Compare a Foreign Investment Company to a French UCITS for the Purposes of Applying the *Santander* Case

When determining whether a foreign investment company (whether EU resident or not) should file a claim for obtaining reimbursement of withholding tax paid on French-sourced dividends for previous years, it must be confirmed that such foreign investment company is comparable to French UCITS i.e., that it would be tax-exempt if it were French-resident.

This question could well be critical in future litigation, as it is in respect of pension funds.

When making this comparison, it must be considered whether the exemption for French UCITS is conditional on such UCITS fulfilling specific criteria that must be taken into account when comparing foreign investment companies to French UCITS.

The case law of the CJEU and the *Conseil d'Etat* provides a generic definition of investment companies based on the concept of French UCITS, but does not examine the precise legal characteristics inherent to SICAV or FCP in order to compare them to foreign investment companies for the purpose of applying the *Santander* case.

This is especially important because the concept of UCITS is not actually defined under French law. Article L 214-1-1 of the French Monetary and Financial Code (MFC) simply uses the notion of UCITS to distinguish, other than in terms of legal structure, between coordinated UCITS, which are able to benefit from the European passport system introduced under the UCITS IV Directive, [51] and other UCITS.

[51] Directive 2009/65/EC.

This approach is particularly apparent in the CJEU *Aberdeen* case, [52] which addressed the treatment of dividends paid by a Finnish company to a Luxembourg SICAV. In *Aberdeen*, the CJEU ruled that: “the circumstance that in Finnish law there is no type of company with a legal form identical to that of a SICAV governed by Luxembourg law cannot in itself justify a difference in treatment, since, as the company law of the Member States has not been fully harmonized at EU level, that would deprive the freedom of establishment of all effectiveness." The fact that Finnish law prohibits such Finnish funds from making real property investments of the kind that were made by the Luxembourg SICAV was not even taken into account in this analysis.

[52] Case C-303/07, paragraphs 48 and 50.

Similarly, in its opinion of May 23, 2011, the *Conseil d'Etat* did not deem it necessary to differentiate Spanish mutual funds, which are subject to 1% corporate income tax in Spain, from French SICAV, which are exempt from corporate income tax. On this point, the *Conseil d'Etat* appears to have followed the reasoning of the CJEU; in a case, for example, where the sole difference between a foreign entity and a French UCITS is that the foreign entity is subject to marginal tax rates, that difference cannot in itself justify a difference in treatment under the national tax legislation. [53]

[53] Opinion of the *Rapporteur Public* Pierre Collin in the *Conseil d'Etat* opinion of May 23, 2011, BDCF 8/9 2011, no. 104.

This standard approach — which corresponds to the French tax regime applicable to French UCITS — is facilitated by the fact that UCITS are taken into account, as such, by EU law. Consequently, UCITS constitute a legal entity under EU law, the specific nature of which should logically be taken into account when examining the compatibility of the tax rules to which they are subject with EU law.

The most recent version of Directive 2009/65/EC (the "Directive") harmonized the operating rules of UCITS within the EU, making the conditions regarding competition between such undertakings more consistent at the EU level and offering investors more effective and homogeneous protection. The Directive implemented an approval system whereby, once approved in one Member State, a UCITS is authorized to operate throughout the EU ("coordinated UCITS"). The Directive established a fixed set of basic rules applicable to all such UCITS.

Article 1 of the Directive defines UCITS as "undertaking[s]:
(a) with the sole object of collective investment in transferable securities or in other liquid financial assets [...] of capital raised from the public and which operate on the principle of risk-spreading; and

(b) with units which are, at the request of holders, repurchased or redeemed, directly or indirectly, out of those undertakings' assets."

It would therefore seem logical to consider that all UCITS governed by this Directive — coordinated UCITS — must be deemed comparable to French UCITS when applying the *Santander* case.

However, this solution only answers part of the question, since:

- not all EU UCITS are coordinated UCITS, and therefore covered by the Directive; and

- investment vehicles from non-Member States can never be coordinated UCITS.

Here again, EU law nonetheless offers a partial response to the question with respect to non-coordinated UCITS. The various organizational bodies of those UCITS, in particular the management companies, are now governed by Directive 2011/61/EU of June 8, 2011, on alternative investment fund (AIF) managers, regardless of the state in which the fund is established. This Directive applies a very broad definition of AIF, which includes "collective investment undertakings, including investment compartments thereof, which:
(i) raise capital from a number of investors, with a view to investing it in accordance with a defined investment policy for the benefit of those investors; and

(ii) do not require authorisation pursuant to [...] Directive 2009/65/EC" (i.e. which are not coordinated UCITS).

Although this very broad definition can certainly be of use when comparing foreign investment vehicles to French UCITS, it is not in itself sufficient to eliminate the need to analyze the main legal characteristics of French UCITS when comparing them with non-coordinated foreign investment companies.

The complexity of the question stems from the fact that the notion of French UCITS — all of which are tax exempt — covers a wide variety of situations. The notion, not strictly defined, corresponds broadly to undertakings as described in Articles L 217-2 *et seq.* of the MFC. [54]

[54] See Appendix 2.

In substance, as can be seen from the summary tables provided below in Appendix 3, it seems that in order for foreign investment vehicles to be considered comparable to French UCITS (for purposes of the *Santander* case) they need to satisfy the following requirements:
• There must be a management company. In this respect, it should be pointed out that under French law, a SICAV may be "self-managed," but this possibility is not implemented; as a result, the existence of a management company might well appear to be a determining factor;

• There must be a custodian, i.e., a regulated entity appointed according to the fund's documentation to be responsible for holding the assets and to supervise the portfolio management company. In the case of non-Member States, this may be a single account-keeper;

• There must be a set of regulations or bylaws and a prospectus that details the undertaking's investment strategy; and

• There must be a system for subscription/redemption at net asset value on an ongoing basis according to the subscription applications received. In that respect also, it is interesting to note that it is possible — especially for contractual UCITS — to have a long lock-up period, with limited gating so that the open character of such UCITS can be questionable in substance.

These characteristics also seem to correspond to the criteria employed by the French authorities to compare tax regimes applicable under French law to shareholders of domestic and foreign UCITS. [55]

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[55] *Bulletin official* [French official bulletin — BO] 4 A-13-93 no. 9 and 5 C-2-10 sections 10 and 13.

This approach is further validated by the preparatory work on the French Second Amending Finance Bill for 2012, which was adopted by the Parliament on July 31, 2012 (the "Bill"). This Bill responds to the *Santander* case by providing an exemption for collective investment vehicles incorporated under foreign law and situated within a Member State or another State or territory having a tax treaty with France which includes an administrative assistance clause, provided such vehicles meet the following two conditions:

• They must raise capital from a number of investors, with a view of investing the capital in accordance with a defined investment policy for the benefit of those investors, in line with the definition provided for AIF under Directive 2011/61/EU of June 8, 2011, on alternative investment fund managers;

• They must present characteristics similar to those of French undertakings for collective investment covered by Article L 214-1(I) (1), (5) or (6) of the MFC, i.e., UCITS, real estate collective investment schemes (OPCI) and closed-ended investment companies (SICAF) respectively. [56]

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[56] On this point, it is surprising to note that the Government goes a step further than the CJEU in its analysis in the *Santander* case, by exempting from withholding tax not only distributions made to UCITS but also to other undertakings comparable to OPCI and SICAV, despite the fact that the exemption enjoyed by these latter undertakings in France is conditional on a distribution obligation, such that the consistency of the French tax regime in this respect should preclude the risk of criticism for non-compliance with the free movement of capital as raised by the CJEU in the *Santander* case. This is somewhat compensated for, however, by the fact that the Bill provides that dividends distributed by French OPCI to foreign UCITS are still subject to withholding tax in France.

Foreign investment vehicles should thus be compared against these profiles when assessing the difference in situation between them and French UCITS and considering filing a reimbursement claim for withholding tax paid in the past on French-sourced dividends.

Consequences of the *Santander* Case on Other Member States

The principles deriving from the *Santander* case can be applied to other Member States whose tax regulations result in the same type of non-compliance with EU law as regards tax burdens on dividends received by investment companies.

While this article does not purport to provide any definitive answers to this question, it does point out which States could potentially be exposed to the same litigation as France. In particular, based on legislation in place similar to Article 119, Belgium, Germany, Italy and Spain are vulnerable to similar claims with respect to discriminating against foreign investment companies in the taxation of outbound dividends. Consequently, there is substantial litigation potential on this issue all across Europe.

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IMPACT OF FRENCH BILATERAL TAX TREATIES

When considering compatibility of Article 119 with France's external obligations, attention must be paid to France's bilateral tax treaty obligations, including the OECD Model Treaty's Article 24 on non-discrimination, and not just EU law.

Article 24 states that nationals of a Contracting State shall not be subjected in the other Contracting State to any taxation that is different or more burdensome than the taxation to which nationals of that other State in the same circumstances are or may be subjected, especially with respect to residence. This is a different view from that of the CJEU, in that it prohibits differences in treatment on the basis of nationality, unless justified by a difference in residence. By contrast, the CJEU decisions prohibit differences in treatment between residents and non-residents that are not justified by an objective difference in situation. However, in the case at hand, the two approaches lead to the same conclusion because:
• French law defines nationality by where a legal entity's registered office (viewed as the seat of effective management) is located, which is the basis for residence for legal entities pursuant to tax treaties and;

• the criterion to apply the withholding tax set out by Article 119 is the residence or seat outside France of the payee. [57]

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[57] The *Cour de cassation* (French Supreme Civil Court) considers that the criterion of the registered office is discriminatory as it necessarily refers to the company's nationality (Cass. Com Feb. 28, 1989 no. 87-12.015 (no. 328 P), *Anglo Swiss Land and Building* RJF 4/89 no. 524).

In this respect it would appear that the arguments set out by the *Conseil d'Etat* in its *Pinacothèque d'Athènes* decision of July 5, 2010 [58] are applicable to French-sourced dividends paid to a foreign investment company located in a State that has signed a tax treaty with France containing a non-discrimination clause.

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[58] CE July 5, 2010 no. 309693, 3d and 8th sub-divisions, *Pinacothèque d'Athènes* RJF 11/10 no. 1092.

In the *Pinacothèque* decision, the *Conseil d'Etat* held that the levying of a $33^1/_3$ % withholding tax on real estate capital gain derived by foreign legal entities from the sale of French real estate assets was contrary to Article 22 of the tax treaty between France and Greece, because:

• the criterion for application of the $33^1/_3$ % withholding tax was the registered office of the foreign legal entity, and;

• Pinacothèque — the foreign legal entity in that case — would not have been subject to the levy had it been French resident.

Since the criterion for application of Article 119 is the seat of the foreign legal entity, it can be argued that the same conclusion should be drawn in relation to withholding taxes levied on investment companies that are resident in States that have a tax treaty with France, which may therefore benefit from a non-discrimination clause applicable to legal entities and which would be tax exempt in France if they were French residents.

This is the position that was taken by the *Tribunal administratif* of Paris in two cases heard in 2009 regarding German pension funds that would have been tax exempt had they been similar entities created under French law. [59]

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[59] TA Paris June 24, 2008 no. 04-16078 and 05-10298, 2d div., 1st ch., *Arzteversorgung Niedersachsen*; TA Paris Oct. 21, 2008 no. 05-1925, 2d div., 1st ch., *Landesarztekammer Hessen Versorgungswerk* RJF 4/79 no. 379.

Accordingly, if a foreign investment company (i) has legal personality in its home jurisdiction, (ii) is comparable to French investment companies that are tax exempt pursuant to French law, and (iii) is resident in a State with a tax treaty with France that includes an applicable non-discrimination clause, then such foreign investment company should be able to claim that the Article 119 withholding tax is non-compliant with the treaty.

Notably, this argument will not help U.S. investment companies because Article 25 of the tax treaty between France and the U.S. on non-discrimination is limited to individuals.

CONCLUSION

From a practical point of view, collective investment vehicles and management companies must evaluate their situations in light of the *Santander* case to determine whether or not they should take appropriate steps to secure, for the benefit of the fund holders, reimbursement of withholding tax on French or other European-source dividends. From a French perspective, this can be done quickly and relatively simply by filing a claim with the French tax authorities, that can subsequently be further supplemented by due evidence of payment of the withholding tax throughout the course of the proceedings and up until the closure of the court investigation.

More generally, the *Santander* case is not exceptional in light of the CJEU's well-established case law, but it does raise fundamental questions regarding tax policy, in that it can prevent Member States from levying taxes on dividends paid to non-resident exempt entities.

This results in a completely different perspective from the OECD approach, which recommends looking through the collective investment vehicles when considering access to the tax treaty provisions, in order to draw consequences from the tax situation and residency of the investment vehicle's shareholders.

The reaction of the French government to the *Santander* case illustrates this difficulty.

The French government could have reconsidered the tax treatment of distributions to French UCITS, so as to strengthen the correlation between the tax exemption for UCITS and the treatment of their shareholders. This would have strengthened the EU compatibility of Article 119, by way of the opportunity proffered by the CJEU's reasoning.

Instead, the 2012 Second Amending Finance Bill abolishes the withholding tax on French-sourced

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dividends paid to non-French collective investment vehicles incorporated under foreign law and situated within a Member State or another State or territory having a tax treaty with France which includes an administrative assistance clause, provided such vehicles meet the following two conditions: (i) they raise capital from a number of investors, with a view to investing it in accordance with a defined investment policy for the benefit of those investors and (ii) they are similar to French collective investment vehicles.

This ultimately results in more favorable treatment for foreign investment vehicles investing in France when compared to the situation of French UCITS.

Indeed, foreign investors in a French UCITS will suffer withholding tax — as a foreign investor directly holding a stake in a French company — while a foreign investment vehicle investing in the same French company would not, even if the shareholder of such foreign investment vehicle is itself not subject to any tax in the form of withholding tax or otherwise.

Avoiding one form of discrimination may therefore sometimes lead to another, but EU law does not preclude a Member State from discriminating against its own nationals.

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APPENDIX 1

List of non-European Union States or territories having entered into a tax treaty with France containing an administrative assistance clause

Albania	Egypt	Liechtenstein	Saint Kitts and Nevis
Algeria	Ethiopia	Libya	Saint Martin
Andorra	French Polynesia	Macedonia	Saint Pierre and Miquelon
Antigua and Barbuda	Gabon	Malaysia	San Marino
Argentina	Georgia	Malawi [3]	Senegal [3]
Armenia	Ghana	Mali [3]	Singapore
Australia	Gibraltar	Mauritania [3]	South Africa
Azerbaijan	Guernsey	Mauritius	Sri Lanka
Bahamas	Guinea (Republic of)	Mayotte [2, 3]	Switzerland
Bangladesh	Iceland	Mexico	Syria
Benin [3]	India [3]	Monaco [3]	Taiwan
Bermuda	Indonesia [3]	Mongolia	Thailand [3]
Botswana	Iran [3]	Morocco [3]	Togo [3]
Brazil [3]	Isle of Man	Namibia [3]	Trinidad and Tobago
British Virgin Islands	Israel	New Caledonia [3]	Tunisia [3]
Burkina Faso [3]	Ivory Coast [3]	New Zealand	Turkey [3]
Cameroon [3]	Jamaica	Niger	Ukraine
Canada	Japan	Nigeria	United Arab Emirates
Cayman Islands	Jersey	Norway	United States
Central African Rep. [3]	Jordan	Pakistan	Uruguay
Chile	Kazakhstan	Philippines [3]	Uzbekistan
China [1]	Kenya	Qatar	Venezuela
Congo	Korea (Republic of)	Quebec	Vietnam
Croatia	Kuwait	Russia	Zambia [3]
Ecuador	Lebanon [3]	Saint Barthélemy	Zimbabwe

[1] The tax treaty between France and China dated May 30, 2004 does not cover Hong Kong and Macau.

[2] Former tax treaty with the Comoros.

[3] The administrative assistance clause of this treaty does not apply to entities without legal personality; the latter cannot therefore benefit from exemption on the basis of the existence of an administrative assistance clause.

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APPENDIX 2

Effective in 2011 and 2012

Anguilla	Grenada
Antigua and Barbuda	Saint Kitts and Nevis
Cook Islands	Saint Lucia
Costa Rica	Saint Vincent and the Grenadines
Dominica	Uruguay

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APPENDIX 3

Principal characteristics of French UCITS

	Coordinated UCITS	**Non-coordinated UCITS**
	1. Shared characteristics / qualifying criteria 2.	
a. Legal status — Establishment — Management	*(Essentially in compliance with BO 4 A 13 93 no. 9 — Art. 209 0A FTC & 5 C-2 10, sections 10 & 13)*	
(i) Legal form	Open-ended investment company (SICAV) (either a *société anonyme* — public limited company — or a *société par actions simplifiéè* — simplified joint-stock company) Special investment companies (FCP) (collective holders of funds) (*legal form not relevant or analyzed by analogy*)	
(ii) Parties involved	**Portfolio management company**: regulated entity responsible for managing the assets (**SICAV can be set up as “self-managed”**) **Custodian**: a regulated entity appointed according to the fund's documentation to act as custodian of the assets and to supervise the portfolio management company (*single account-keeper for non-Member States*)	
(iii) Documentation	Regulations (FCP) or bylaws (SICAV) governing the operation of the UCITS **Prospectus detailing the UCITS's investment strategy**	
b. Assets	Investment of capital raised in accordance with an **investment policy detailed in the prospectus**	
c. Liabilities	**Subscription / redemption system** **Shares (SICAV) or units (FCP) issued at net asset value** on an ongoing basis according to subscription applications received **Redemption of the shares/units at net asset value** by the FCP or SICAV at the request of the holder, paid out of the UCITS's assets (*but the rules may be very flexible so as to restrict the possibilities for redemption*)	
d. Marketing	Marketing regime different from the regulations governing public issues subject to the supervision of the French Financial Markets Authority (AMF) (*criterion more related to the regime applicable to UCITS rather than their characterization as such — should not be relevant in characterizing non-Member State funds*)	

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	Coordinated UCITS	Non-Coordinated UCITS
	2. Distinguishing characteristics	
a. Legal status — Establishment — Management	UCITS subject to **approval** from the AMF	Distinction between UCITS: subject to AMF approval (e.g., general-purpose UCITS, venture capital funds (FCPR), innovation-focused investment funds (FCPI), local investment funds (FIP), SICAV available exclusively to employee shareholders (SICAVAS), FCP) subject only to a **declaration** (contractual UCITS, FCPR with reduced operating rules, contractual FCPR)
		Very **broad diversity in the rules applicable**:
	Very strict investment rules as a result of transposition of the UCITS Directive, governing:	UCITS subject to rules equivalent to those for coordinated UCITS (general-purpose UCITS)
b. Assets	Eligible assets (financial securities, derivatives, CIV units or shares, deposits and liquidities)	UCITS dedicated to certain asset classes: employee savings, private equity (FCPR, FCPI, FIP), alternative management (UCITS with reduced investment rules), all types of assets (contractual UCITS)
	Risk diversification (investment ratio and counterparty ratio)	UCITS subject to **contractually defined rules on eligibility and diversification (contractual UCITS**, contractual FCPR, FCPR with reduced operating rules)
	Gearing limited to the value of the assets	**Gearing** in excess of three times the value of the assets (UCITS with reduced investment rules) or **unlimited (contractual UCITS)**
		Very **broad diversity in the rules applicable**:

		UCITS subject to rules equivalent to those for coordinated UCITS (general-purpose UCITS)
c. Liabilities	Obligation to publish a net asset value twice a month	**Net asset value date** at least once per month (UCITS with reduced investment rules); quarterly (contractual UCITS) or **at least once per semester (contractual FCPR**, FCPR with reduced operating rules)
	Suspension of subscriptions / redemptions only allowed in certain strictly limited situations	Option of suspending subscriptions (UCITS restricted to 20 investors or dedicated to a certain category of investors) **Option of suspending ('lock up') or limiting ('gating') redemption applications (contractual UCITS**, contractual FCPR, FCPR with reduced operating rules) Significant diversity in the rules applicable: UCITS open to all investors (general-purpose UCITS, FIP, FCPR, FCPI)
d. Marketing	UCITS open to all investors	**UCITS reserved to certain investors only (contractual UCITS**, UCITS with reduced investment rules, FCPR with reduced operating rules, contractual FCPR) UCITS restricted to 20 investors or dedicated to a certain category of investors and cannot be actively marketed UCITS dedicated to employee savings schemes (company or multi-company employees fund (FCPE))