Case C-310/09

Ministre du Budget, des Comptes publics et de la Fonction publique

v

Accor SA

(Reference for a preliminary ruling from the Conseil d'État (France))

(Free movement of capital – Tax treatment of dividends – National rules conferring a tax credit in respect of dividends distributed by resident subsidiaries of parent companies – Refusal to grant a tax credit in respect of dividends distributed by non-resident subsidiaries – Redistribution of dividends by the parent company to its shareholders – Setting off the tax credit against the advance payment payable by the parent company at the time of redistribution – Refusal to reimburse the advance payment made by the parent company – Unjust enrichment – Evidence required regarding the taxation of non-resident subsidiaries)

Summary of the Judgment

1. *Freedom of movement for persons – Freedom of establishment – Free movement of capital – Tax legislation – Corporation tax*

(Art. 49 TFEU and 63 TFEU)

2. *Union law – Direct effect – National taxes incompatible with Union law – Repayment – Refusal – Condition – Charge directly passed on to the purchaser*

3. *Free movement of capital – Restrictions – Tax legislation – Taxation of dividends*

(Art. 63 TFEU)

1. It is contrary to Articles 49 TFEU and 63 TFEU for legislation of a Member State intended to eliminate economic double taxation of dividends to allow a parent company to set off against the advance payment, for which it is liable when it redistributes to its shareholders dividends paid by its subsidiaries, the tax credit applied to the distribution of those dividends if they originate from a subsidiary established in that Member State, but not to offer that option if those dividends originate from a subsidiary established in another Member State, since, in that case, that legislation does not give entitlement to a tax credit applied to the distribution of those dividends by that subsidiary.

(see para. 69, operative part 1)

2. When a national tax regime intended to eliminate double economic taxation of dividends does not of itself lead to the passing on to a third party of the tax unduly paid by the person liable for that tax, Union law precludes a Member State's refusing to reimburse sums paid by a parent company on the grounds either that such reimbursement would lead to the unjust enrichment of the parent company, or that the sum paid by the parent company does not constitute an accounting or tax charge for it but is set off against the total of the sums which may be redistributed to its shareholders.

The only exception to the right to repayment of taxes levied in breach of EU law is in a case in which a charge that was not due has been directly passed on by the taxable person to the purchaser.

(see paras 74, 76, operative part 2)

3. The principles of equivalence and effectiveness do not preclude the reimbursement to a parent company of sums which ensure the application of the same tax regime to dividends distributed by its subsidiaries established in one Member State and those distributed by the subsidiaries of that company established in other Member States, and subsequently redistributed by that parent company, being subject to the condition that the person liable for the tax furnish evidence which is in its sole possession and relating, with respect to each dividend concerned, in particular to the rate of taxation actually applied and the amount of tax actually paid on profits made by subsidiaries established in other Member States, whereas, with respect to subsidiaries established in that Member State, that evidence, known to the administration, is not required. Production of that evidence may however be required only if it does not prove impossible in practice or excessively difficult to furnish evidence of payment of the tax by the subsidiaries established in the other Member States, in the light in particular of the provisions of the legislation of those Member States concerning the avoidance of double taxation, the recording of the corporation tax which must be paid and the retention of administrative documents. It is for the national court to determine whether those conditions are met.

(see para. 102, operative part 3)

JUDGMENT OF THE COURT (First Chamber)

15 September 2011 (*)

(Free movement of capital – Tax treatment of dividends – National rules conferring a tax credit in respect of dividends distributed by resident subsidiaries of parent companies – Refusal to grant a tax credit in respect of dividends distributed by non-resident subsidiaries – Redistribution of dividends by the parent company to its shareholders – Setting off the tax credit against the advance payment payable by the parent company at the time of redistribution – Refusal to reimburse the advance payment made by the parent company – Unjust enrichment – Evidence required regarding the taxation of non-resident subsidiaries)

In Case C-310/09,

REFERENCE for a preliminary ruling under Article 234 EC from the Conseil d'État (France), made by decision of 3 July 2009, received at the Court on 4 August 2009, in the proceedings

Ministre du Budget, des Comptes publics et de la Fonction publique

v

Accor SA,

THE COURT (First Chamber),

composed of A. Tizzano, President of the Chamber, M. Ileši?, E. Levits (Rapporteur), M. Safjan and M. Berger, Judges,

Advocate General: P. Mengozzi,

Registrar: M.-A. Gaudissart, Head of Unit,

having regard to the written procedure and further to the hearing on 27 October 2010,

after considering the observations submitted on behalf of:

– Accor SA, by J.-P. Hordies, B. Boutemy and C. Smits, avocats,

– the French Government, by E. Belliard, G. de Bergues, J.-S. Pilczer and B. Beaupère-Manokha, acting as Agents,

– the United Kingdom Government, by S. Hathaway, acting as Agent, and K. Bacon, Barrister,

– the European Commission, by R. Lyal and J.-P. Keppenne, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 22 December 2010,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Articles 43 EC and 56 EC.

2 The reference has been made in proceedings between the Ministre du Budget, des Comptes Publics et de la Fonction Publique and Accor SA ('Accor') concerning the latter's application for reimbursement of the advance payment of tax ('précompte mobilier') paid in respect of the years 1999 to 2001.

Legal context

3 Article 145 of the Code général des impôts (General Tax Code, 'CGI'), as amended by Finance Act No 88-1149 of 23 December 1988 (JORF of 28 December 1988, p. 16320), in force until 31 December 2000, provided:

'1. The tax regime for parent companies, as set out in Articles 146 and 216, shall apply to companies and other bodies subject to corporation tax at the normal rate which have holdings meeting the following conditions:

...

b. Where the book value of the holding in the issuing company is below FRF 150 million, the shares must represent at least 10% of the capital of the issuing company; that book value and that percentage shall be assessed at the date of payment of income from shareholdings. …'

4 Finance Law No 2000-1352 of 30 December 2000 for 2001 (JORF of 31 December 2000, p. 21119) amended the threshold laid down in Article 145(l)(b) of the CGI, which, in the version in

force from 1 January 2001 to 31 December 2005, stated that shares must represent at least 5% of the capital of the issuing company.

5 Article 146(2) of the CGI, in the version in force during the tax years at issue in the main proceedings, provided:

‘Where distributions made by a parent company give rise to the application of the advance payment provided for in Article 223*sexies*, that advance payment shall be reduced, where appropriate, by the amount of the tax credits which are applied to the income from shareholdings … received in the course of tax years which ended within the last five years at most.’

6 According to Article 158*bis*(I) of the CGI, in the version in force during the tax years at issue in the main proceedings:

‘Persons who receive dividends distributed by French companies shall be deemed in that respect to have received income in the form of:

(a) the sums they receive from the company;

(b) a tax credit represented by a credit opened with the Treasury.

That tax credit shall be equal to half of the actual payments made by the company.

It may be used only in so far as the income is included in the base of the income tax payable by the recipient.

It shall be received as payment for that tax.

It shall be refunded to natural persons where the amount of the tax credit exceeds the amount of the tax for which they are liable.’

7 Article 216(I) of the same code provides:

‘Net profits from shareholdings giving entitlement to application of the tax regime for parent companies … which are received by a parent company in the course of a financial year, may be deducted from the net total profits of that company …’

8 Article 223*sexies*(1) of the CGI, in the version applicable to dividend distributions paid after 1 January 1999, provided:

‘… where the profits distributed by a company are subject to a deduction on the ground that that company has not been subject to corporation tax at the normal rate … that company is required to make an advance payment equal to the tax credit calculated under the conditions provided for in Article 158*bis*(I). The advance payment shall be due with respect to distributions giving entitlement to a tax credit provided for in Article 158*bis*, whoever the recipients are.’

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

9 From the order for reference, it is apparent that Accor received dividends in the years 1998 to 2000 paid by its subsidiaries established in other Member States and that when it redistributed those dividends it made, in accordance with the combined provisions of Article 146(2) and Articles 158*bis* and 223*sexies* of the CGI, an advance payment of tax in respect of the years 1999 to 2001 of FRF 323 279 053, FRF 359 183 404 and FRF 341 261 380, respectively.

10 By a complaint of 21 December 2001, Accor sought reimbursement of that advance

payment, claiming that those provisions of the CGI were incompatible with Community law. After that complaint was dismissed, Accor brought an action before the Tribunal administratif de Versailles (Administrative Court, Versailles), which by judgment of 21 December 2006 upheld Accor's application in its entirety.

11 The appeal brought by the Ministre du Budget, des Comptes Publics et de la Fonction Publique against that judgment having been dismissed by a judgment of the Cour administrative d'appel de Versailles (Administrative Court of Appeal, Versailles) of 20 May 2008, the Minister brought an appeal in cassation against that judgment before the Conseil d'État.

12 The Conseil d'État finds that it is clear from the provisions of Article 216 of the CGI that, except for a fixed proportion of costs and expenses, a French parent company is not subject to corporation tax on dividends that it receives from its subsidiaries, wherever those subsidiaries are established. Also, under the provisions of Article 223*sexies* of that code, where it redistributes those dividends to its own shareholders, that company is required to make an advance payment in that respect, whatever the origin of the dividends which have been distributed to it and which it has redistributed in that way. Therefore, according to the Conseil d'État, the advance payment mechanism by itself does not affect either freedom of establishment or the free movement of capital.

13 The amount of the tax credit which the parent company receives under Article 158*bis* of the CGI in respect of dividends distributed by one of its subsidiaries, established in France, is set off, under Article 146(2) of the CGI, against the amount of the advance payment payable when those dividends are redistributed to shareholders. The provisions of Article 158*bis* of the CGI preclude a parent company being granted a tax credit in respect of dividends originating from subsidiaries established in another Member State and, therefore, preclude any set-off against the amount of the advance payment chargeable when that parent company redistributes those dividends. Consequently, in the absence of a tax credit being granted in respect of dividends originating from a subsidiary established in another Member State and able to reduce the chargeable amount of the advance payment, payment by the parent company of the advance payment, by setting it off against the total of the distributable sums, reduces the amount of the redistributed dividends by the same amount.

14 In those circumstances the Conseil d'État decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'1. (a) Must Articles 56 [EC] and 43 [EC] be interpreted as precluding a tax regime intended to eliminate economic double taxation of dividends which:

– allows a parent company to set off against the advance payment, for which it is liable when it redistributes to its shareholders dividends paid by its subsidiaries, the tax credit applied to the distribution of those dividends if they come from a subsidiary established in France,

– but does not offer that option if those dividends come from a subsidiary established in another Member State …, since, in that case, that regime does not give entitlement to a tax credit applied to the distribution of those dividends by that subsidiary on the ground that such a regime would in itself, with respect to the parent company, infringe the principles of the free movement of capital or freedom of establishment?

(b) If the answer to [Question 1(a)] is in the negative, must those articles be interpreted as meaning that they none the less preclude such a regime since the shareholders' position must also be taken into account on the ground that, given the making of the advance payment, the amount of the dividends received from its subsidiaries and redistributed by the parent company to its shareholders will differ according to the location of those subsidiaries, in France or in another Member State …, with the result that that regime deters shareholders from investing in the parent company and, therefore, affects the raising of capital by that company and is likely to deter that company from allocating capital to subsidiaries established in Member States other than France or from setting up such subsidiaries in those States?

2. If the answer to [Question 1(a) and (b)] is in the affirmative and if Articles 56 [EC] and 43 [EC] are to be interpreted as precluding the advance payment tax regime described above and, therefore, the administration is, in principle, required to reimburse the sums received under that regime in so far as they have been received contrary to Community law, does that law, under such a regime which does not of itself lead to the passing on of a tax to a third party by the person liable for the tax preclude:

(a) the administration from opposing the reimbursement of the sums paid by the parent company on the ground that that reimbursement would lead to the unjust enrichment of the parent company,

(b) and, if the answer is in the negative, the fact that the sum paid by the parent company does not constitute an accounting or tax charge for it but is set off only against the total of the sums which may be redistributed to its shareholders can be pleaded in support of an argument that that sum should not be reimbursed to the company?

3. Taking account of the answer to [Questions (1) and (2)], do the Community principles of equivalence and effectiveness preclude the reimbursement of sums which ensure the application of the same tax regime to dividends redistributed by the parent company, whether those dividends originate from sums distributed by its subsidiaries established in France or in another Member State … being subject to the condition (apart, where relevant, in the case of stipulations in a bilateral convention applicable between [the French Republic] and the Member State where the subsidiary is established relating to the exchange of information) that the person liable for the tax furnishes evidence which is in its sole possession and relating with respect to each dividend concerned, in particular to the rate of taxation actually applied and the amount of tax actually paid on profits made by its subsidiaries established in the Member States … other than France, whereas, with respect to subsidiaries established in France that evidence, known to the administration, is not required?'

The requests for the reopening of the oral procedure

15 By documents lodged on 7 January and 2 February 2011, Accor and the French Government, respectively, requested that the oral procedure be reopened.

16 Accor claimed that, in point 73 et seq. of his Opinion, the Advocate General used arguments arising from Case C?446/04 *Test Claimants in the FII Group Litigation* [2006] ECR I?11753 that were not debated between the parties.

17 The French Government for its part requested that there be further discussion, at a second hearing, of its argument that the combined system of a tax benefit and an advance payment, at issue in the main proceedings, could create a restriction on the free movement of capital only so far as shareholders were concerned, an argument contained in paragraph 82 of its written observations and analysed in the Advocate General's Opinion.

18 Moreover, that Government maintained that the Advocate General's Opinion contained a statement which did not take full account of French domestic law. In particular, first, although in the context of the answer to the second question referred the Advocate General considers that

reimbursement of the advance payment made to a company would indirectly benefit its shareholders, the French Government argues that the assets of a company are separate from those of its shareholders. Secondly, the French Government challenges the contention that, under French procedural law, shareholders cannot bring an action for restitution, pointing out that the existence of such a remedy, and also the remedy of an action for damages, stem from the obligation on Member States, according to the consistent case-law of the Court, to repay charges levied in breach of the rules of EU law.

19 In that regard, it is clear from the case-law that the Court may of its own motion, or on a proposal from the Advocate General, or at the request of the parties, order the reopening of the oral procedure in accordance with Article 61 of its Rules of Procedure if it considers that it lacks sufficient information, or that the case must be dealt with on the basis of an argument which has not been debated between the parties (see Cases C?284/06 *Burda* [2008] ECR I?4571, paragraph 37 and the case-law cited, and Case C?266/09 *Stichting Natuur en Milieu and Others* [2010] ECR I?0000, paragraph 27).

20 However, neither the Statute of the Court of Justice of the European Union nor its Rules of Procedure make provision for the parties to submit observations in response to the Advocate General’s Opinion (see *Stichting Natuur en Milieu and Others*, paragraph 28).

21 In the present case, the Court takes the view that it has all the material necessary to answer the questions referred and that the observations submitted before it have related to that material.

22 Consequently, the requests that the oral procedure be reopened must be rejected.

Consideration of the questions referred

The first question

23 By its first question, the national court asks, in essence, whether Articles 49 TFEU and 63 TFEU preclude legislation of a Member State intended to eliminate economic double taxation of dividends, such as that at issue in the main proceedings, which allows a parent company to set off against the advance payment, for which it is liable when it redistributes to its shareholders dividends paid by its subsidiaries, the tax credit applied to the distribution of those dividends if they originate from a subsidiary established in that Member State, but does not offer that option if those dividends originate from a subsidiary established in another Member State, since, in that case, that legislation does not give entitlement to a tax credit applied to the distribution of those dividends by that subsidiary.

24 By Question 1(a), the national court asks the Court whether such legislation may constitute a restriction on the freedoms of movement so far as the parent company is concerned.

25 By Question 1(b), the national court asks whether, if the answer to Question 1(a) is in the negative, Articles 49 TFEU and 63 TFEU none the less preclude such legislation since the shareholders’ position must also be taken into account.

26 Although Question 1(b) is referred only if the answer to Question 1(a) is in the negative, the point concerning whether the shareholders’ position should also be taken into account is raised in order to examine whether there exists a restriction so far as the parent company itself is concerned.

27 The national court asks whether Articles 49 TFEU and 63 TFEU preclude legislation of a Member State such as that at issue in the main proceedings on the ground that it would deter

shareholders from investing in the shares of the parent company, would therefore affect the raising of capital by that company and would thus be likely to deter that company from allocating capital to subsidiaries established in other Member States or from setting up such subsidiaries in those States.

28 Question 1(a) and (b) should therefore be answered together.

The relevant freedom

29 Since the referring court has asked its first question with respect both to Article 49 TFEU and to Article 63 TFEU, it must first be determined whether and to what extent national rules such as those at issue in the main proceedings may affect the freedoms guaranteed by those articles.

30 In this connection, it is to be noted that the tax treatment of dividends may fall within Article 49 TFEU on freedom of establishment and Article 63 TFEU on the free movement of capital (Joined Cases C?436/08 and C?437/08 *Haribo Lakritzen Hans Riegel and Österreichische Salinen* [2011] ECR I?0000, paragraph 33 and the case-law cited).

31 As regards the question whether national legislation falls within the scope of one or other of the freedoms of movement, it is clear from what is now well-established case-law that the purpose of the legislation concerned must be taken into consideration (*Haribo Lakritzen Hans Riegel and Österreichische Salinen*, paragraph 34 and case-law cited).

32 It has already been held in that regard that national legislation intended to apply only to those shareholdings which enable the holder to exert a definite influence on a company's decisions and to determine its activities falls within the provisions of the Treaty on freedom of establishment (see *Test Claimants in the FII Group Litigation*, paragraph 37, and Case C?81/09 *Idrima Tipou* [2010] ECR I?0000, paragraph 47). However, national provisions which apply to shareholdings acquired solely with the intention of making a financial investment without any intention to influence the management and control of the undertaking must be examined exclusively in light of the free movement of capital (*Haribo Lakritzen Hans Riegel and Österreichische Salinen*, paragraph 35 and case-law cited).

33 In the present case, the tax regime for the parent companies at issue in the main proceedings, under Article 145 of the CGI, was applicable, in the years 1999 and 2000, to companies holding at least 10% of the capital of their subsidiaries. For the year 2001 that threshold was lowered to 5% of the subsidiary's capital.

34 It follows that the national legislation at issue in the main proceedings could apply not only to companies receiving dividends on the basis of a holding conferring a definite influence on the distributing subsidiary's decisions and allowing the companies concerned to determine that subsidiary's activities, but also to companies receiving dividends on the basis of a minority holding not conferring such influence.

35 As regards the facts at issue in the main proceedings, it should be noted, first, that the order for reference contains no information regarding the nature of Accor's holdings in the capital of its subsidiaries distributing dividends.

36 Secondly, Accor maintains, in its observations submitted to the Court, that the dispute in the main proceedings concerns dividends received from subsidiaries established in Member States other than the French Republic which are under its control, whilst the French Government also mentions shareholdings which did not confer on Accor a definite influence on the distributing subsidiary's decisions and did not allow it to determine its activities.

37 In that regard, it must be borne in mind that, under the cooperation procedure established by Article 267 TFEU, it is not for the Court of Justice but for the national court to ascertain the facts which have given rise to the dispute and to establish the consequences which they have for the judgment which it is required to deliver (see, inter alia, Case C?435/97 *WWF and Others* [1999] ECR I-5613, paragraph 32; Case C?510/99 *Tridon* [2001] ECR I-7777, paragraph 28; and Case C?291/05 *Eind* [2007] ECR I?10719, paragraph 18).

38 In those circumstances, in view of the purpose of the legislation at issue in the main proceedings, the first question referred must be answered in the light of both Article 49 TFEU and Article 63 TFEU.

Freedom of establishment

39 The freedom of establishment conferred by Article 49 TFEU on EU nationals, which entails for them access to, and pursuit of, activities as self-employed persons and the forming and management of undertakings, under the same conditions as those laid down for its own nationals by the laws of the Member State of establishment, includes, pursuant to Article 54 TFEU, the right of companies or firms formed in accordance with the laws of a Member State and having their registered office, central administration or principal place of business within the European Union, to pursue their activities in the Member State concerned through a subsidiary, a branch or an agency (see, inter alia, Case C?307/97 *Saint Gobain ZN* [1999] ECR I-6161, paragraph 35; Case C?471/04 *Keller Holding* [2006] ECR I-2107, paragraph 29; and Case C?196/04 *Cadbury Schweppes and Cadbury Schweppes Overseas* [2006] ECR I?7995, paragraph 41).

40 Even though, according to their wording, the Treaty provisions concerning freedom of establishment are directed to ensuring that foreign nationals and companies are treated in the host Member State in the same way as nationals of that State, they also prohibit the Member State of origin from hindering the establishment in another Member State of one of its nationals or of a company incorporated under its legislation (see, inter alia, Case C?264/96 *ICI* [1998] ECR I?4695, paragraph 21, and *Cadbury Schweppes and Cadbury Schweppes Overseas*, paragraph 42).

41 In the case in the main proceedings, it is common ground that the rules at issue introduce a difference in treatment between dividends distributed by a resident subsidiary and those distributed by a non-resident subsidiary.

42 Thus, a parent company which receives dividends from a resident subsidiary enjoys, in respect of those dividends, a tax credit which is equal to half of the sums paid in the form of dividends by that resident subsidiary, whilst such a tax credit is not granted in respect of dividends distributed by a non-resident subsidiary.

43 In that regard, it follows from the case-law that in structuring their tax system and, in particular, when they establish a mechanism for preventing or mitigating the imposition of a series of charges to tax or economic double taxation, Member States must comply with the requirements of EU law and especially those imposed by the Treaty provisions concerning the freedoms of movement (see *Test Claimants in the FII Group Litigation*, paragraph 45).

44 It is thus clear from the case-law that, whatever the mechanism adopted for preventing or mitigating the imposition of a series of charges to tax or economic double taxation, the freedoms of movement guaranteed by the Treaty preclude a Member State from treating foreign-sourced dividends less favourably than nationally-sourced dividends, unless such a difference in treatment concerns situations which are not objectively comparable or is justified by overriding reasons in the public interest (see, to that effect, Case C?315/02 *Lenz* [2004] ECR I?7063, paragraphs 20 to 49; Case C?319/02 *Manninen* [2004] ECR I?7477, paragraphs 20 to 55; and *Test Claimants in the FII Group Litigation*, paragraph 46).

45 In the context of a tax rule which seeks to prevent or to mitigate the taxation of distributed profits, the situation of a parent company receiving foreign-sourced dividends is comparable to that of a parent company receiving nationally-sourced dividends in so far as, in each case, the profits made are, in principle, liable to be subject to a series of charges to tax (see *Test Claimants in the FII Group Litigation*, paragraph 62).

46 As pointed out by the French Government, a parent company was exempt from corporation tax both on dividends received from its resident subsidiaries and on those received from its non-resident subsidiaries, and, moreover, that company could not set off tax credits applied to dividends distributed by its resident subsidiaries against the amount of corporation tax for which it was liable.

47 None the less, as the French Government also accepts, tax credits could be used when dividends received were redistributed. Thus, a parent company, when redistributing dividends, could set off such tax credits against the advance payment for which it was liable.

48 Therefore, whilst exempting dividends received from non-resident subsidiaries from tax so far as the parent company was concerned, the French Republic made them subject to treatment which was less favourable than that applied to dividends from resident subsidiaries.

49 By contrast with dividends originating from resident subsidiaries, the legislation at issue in the main proceedings did not permit avoidance of taxation at the level of the distributing subsidiary, whilst dividends received both from resident subsidiaries and from non-resident subsidiaries were subject to the advance payment when redistributed. Consequently, so far as dividends received from resident subsidiaries were concerned, when they were distributed the tax credit was set off against the amount of the advance payment due, without that advance payment reducing the total amount of the dividends available for redistribution. As regards dividends received from non-resident subsidiaries, however, since the parent company did not receive a tax credit on those dividends, the effect of applying the advance payment was to reduce the total amount of dividends available for distribution.

50 In those circumstances, a parent company receiving dividends from a subsidiary established in another Member State was obliged either to distribute dividends minus the amount of the advance payment, the total amount of those dividends being lower than in the case of the redistribution of dividends received from subsidiaries established in France, or, as the Advocate General stated in point 48 of his Opinion, to withdraw from its cash reserves a sum equivalent to the amount payable by way of the advance payment and thereby increase the total amount of dividends distributed.

51 In view of the unfavourable treatment applied to dividends received from a subsidiary established in another Member State as compared to that applied to dividends received from a resident subsidiary, a parent company might have been dissuaded from carrying on its activities through the intermediary of subsidiaries established in other Member States (see, to that effect,

Case C-168/01 *Bosal* [2003] ECR I?9409, paragraph 27 and *Keller Holding*, paragraph 35).

52 The French Government, whilst accepting the existence of a difference in treatment between dividends paid by a subsidiary established in France and dividends paid by a subsidiary established in another Member State, as regards the possibility for the recipient parent company to set off the tax credit against the advance payment for which that company was liable when it redistributed those dividends to its own shareholders, considers however that this did not constitute a restriction so far as the parent company was concerned.

53 The French Government points out, first, that the tax credit was implemented as a consequence of an autonomous decision by the competent organs of a parent company and not as a consequence of the legislation at issue in the main proceedings, since it is the decision of that parent company to redistribute the dividends paid by a French subsidiary which results in the tax credit applied to the dividends in question being set off against the advance payment. Referring to Case C?190/98 *Graf* [2000] ECR I?493, paragraphs 24 and 25, the French Government also contends that the possible negative effect of the provisions at issue in the main proceedings depends upon a decision by the competent organs of the parent company which is so hypothetical that those provisions cannot be considered to constitute an obstacle to the freedoms of movement.

54 Secondly, according to the French Government, irrespective of the origin of the dividends, the parent company's disbursement is the same since the advance payment is set off against the results distributable to the shareholders.

55 Non-resident shareholders could, under conventions for the avoidance of double taxation concluded by the French Republic with all Member States of the European Union, obtain reimbursement of the advance payment deducted by the parent company distributing dividends, so that the rules at issue in the main proceedings do not affect their situation.

56 So far as resident shareholders of the distributing parent company are concerned, the French Government considers that if the absence of a tax credit that can be set off against the advance payment for which that parent company is liable when redistributing dividends paid by its non-resident subsidiaries were to be regarded as an obstacle to raising capital from French shareholders, that restriction would in any event concern a purely domestic capital movement between a French parent company and its French shareholders, having no foreign element and not falling within the scope of EU law.

57 Those arguments cannot be accepted.

58 In the first place, although the tax credit relating to dividends distributed by resident subsidiaries could be used only where the parent company decided to redistribute those dividends, it is common ground that both the difference in treatment depending on the place of establishment of the subsidiary distributing the dividends and the possibility of setting off any tax credit against the advance payment due when those dividends were redistributed stem directly from the French legislation at issue in the main proceedings.

59 Therefore, the possibility of receiving a tax credit, which could be set off against the advance payment when the dividends were redistributed, depended not on a future hypothetical event for a parent company but on a circumstance linked, by definition, to the exercise of freedom of establishment, namely, the place of establishment of its subsidiary.

60 Secondly, although, as the French Government states, the rules at issue in the main proceedings have no effect on the situation of non-resident shareholders, the fact that the legislation at issue in the main proceedings might have constituted an obstacle to a parent

company raising capital from resident shareholders is sufficient to confirm the restrictive nature of those rules.

61 The fact that resident shareholders might have been deterred from acquiring shares in a parent company, due to the fact that dividends originating from that company's subsidiaries established in a Member State other than the French Republic were lower than dividends from resident subsidiaries, might in turn have deterred that parent company from carrying on its activities through the intermediary of non-resident subsidiaries.

62 It must be stated that, since it is related to intra-Community trade, such a situation may fall within the scope of the provisions of the Treaty relating to the fundamental freedoms (*Keller Holding*, paragraph 24) and that inasmuch as, from a taxation perspective, they put Community situations at a disadvantage compared with purely domestic situations, the provisions of the CGI at issue in the main proceedings thus constituted a restriction which is, in principle, prohibited by the Treaty provisions relating to freedom of establishment (see Case C?418/07 *Papillon* [2008] ECR I?8947, paragraph 32).

63 According to the Court's case-law, a restriction on freedom of establishment is permissible only if it is justified by overriding reasons in the public interest (see, inter alia, Case C?303/07 *Aberdeen Property Fininvest Alpha* [2009] ECR I?5145, paragraph 57). Neither the national court nor the parties which submitted observations have provided evidence to justify that restriction. It must therefore be held that Article 49 TFEU precludes legislation such as that at issue in the main proceedings.

Free movement of capital

64 The reasoning set out in the above paragraphs applies in the same way where a parent company has received dividends on the basis of a holding which does not confer on it a definite influence on the decisions of its distributing subsidiary and does not allow it to determine the latter's activities.

65 The difference in treatment in question in paragraph 41 above might have had the effect of deterring parent companies established in France from allocating capital to companies established in another Member State and also have had a restrictive effect as regards companies established in other Member States in that it constituted an obstacle to the raising of capital in France.

66 In so far as income arising from foreign-sourced capital was treated less favourably from a tax point of view than dividends paid by companies established in France, shares in companies established in other Member States were less attractive to parent companies established in France than those of companies having their seat in that Member State (see Case C?35/98 *Verkooijen* [2000] ECR I?4071, paragraph 35; *Manninen*, paragraphs 22 and 23; and *Test Claimants in the FII Group Litigation*, paragraph 64).

67 It follows that the difference in treatment arising from the legislation at issue in the main proceedings constituted a restriction on the free movement of capital which is, in principle, prohibited by Article 63 TFEU.

68 Neither the national court nor the parties which submitted observations have referred to the grounds set out in Article 65 TFEU or to overriding reasons of public interest that were likely to justify such a restriction.

69 In the light of all the foregoing, the answer to the first question is that Articles 49 TFEU and 63 TFEU preclude legislation of a Member State intended to eliminate economic double taxation of

dividends, such as that at issue in the main proceedings, which allows a parent company to set off against the advance payment, for which it is liable when it redistributes to its shareholders dividends paid by its subsidiaries, the tax credit applied to the distribution of those dividends if they originate from a subsidiary established in that Member State, but does not offer that option if those dividends originate from a subsidiary established in another Member State, since, in that case, that legislation does not give entitlement to a tax credit applied to the distribution of those dividends by that subsidiary.

The second question

70 By its second question, the national court asks, in essence, whether, where the tax regime at issue in the main proceedings does not of itself lead to the passing on to a third party of the tax payable by the person liable for that tax, EU law precludes the administration refusing to reimburse the sums paid by the parent company on the ground either that such reimbursement would lead to the unjust enrichment of that company, or that the sum paid by the parent company does not constitute an accounting or tax charge for it but is set off against the total of the sums which may be redistributed to its shareholders.

71 It should be noted in that regard that the right to a refund of charges levied in a Member State in breach of rules of EU law is the consequence and complement of the rights conferred on individuals by provisions of EU law as interpreted by the Court (see, inter alia, Case 199/82 *San Giorgio* [1983] ECR 3595, paragraph 12, and Joined Cases C?397/98 and C?410/98 *Metallgesellschaft and Others* [2001] ECR I?1727, paragraph 84). The Member State is therefore required in principle to repay charges levied in breach of EU law (Joined Cases C-192/95 to C-218/95 *Comateb and Others* [1997] ECR I-165, paragraph 20; *Metallgesellschaft and Others*, paragraph 84; Case C?147/01 *Weber's Wine World and Others* [2003] ECR I?11365, paragraph 93; and *Test Claimants in the FII Group Litigation*, paragraph 202).

72 However, according to established case-law, EU law does not prevent a national legal system from disallowing repayment of charges which have been levied but were not due where to do so would lead to unjust enrichment of the recipients (Case 104/86 *Commission* v *Italy* [1988] ECR 1799, paragraph 6; Case C-343/96 *Dilexport* [1999] ECR I?579, paragraph 47; Joined Cases C-441/98 and C-442/98 *Michaïlidis* [2000] ECR I-7145, paragraph 31; and Case C?309/06 *Marks & Spencer* [2008] ECR I?2283, paragraph 41). The protection of the rights so guaranteed by the EU legal order does not therefore require repayment of taxes, charges and duties levied in breach of EU law where it is established that the person required to pay such charges has actually passed them on to other persons (see *Comateb and Others*, paragraph 21, and Case C?398/09 *Lady & Kid and Others* [2011] ECR I?0000, paragraph 18).

73 However, it is settled law that, since the disallowing of repayment in such circumstances entails placing a limitation on a subjective right derived from the EU legal order, that restriction must be narrowly construed (*Weber's Wine World and Others*, paragraph 95, and *Lady & Kid and Others*, paragraph 20).

74 Thus, it is apparent from paragraphs 20 and 25 of *Lady & Kid and Others* that the only exception to the right to repayment of taxes levied in breach of EU law is in a case in which a charge that was not due has been directly passed on by the taxable person to the purchaser.

75 In the present case, the national court itself observes that the regime at issue in the main proceedings, which concerns an advance payment made by a parent company when distributing dividends and not a charge levied on the sale of goods, does not lead to the passing on of that advance payment to third parties such as the purchaser referred to in the case-law cited above.

76 In those circumstances, the answer to the second question is that where a national tax regime such as that at issue in the main proceedings does not of itself lead to the passing on to a third party of the tax unduly paid by the person liable for that tax, EU law precludes a Member State refusing to reimburse sums paid by the parent company on the grounds either that such reimbursement would lead to the unjust enrichment of the parent company, or that the sum paid by the parent company does not constitute an accounting or tax charge for it but is set off against the total of the sums which may be redistributed to its shareholders.

The third question

77 By its third question, the national court asks whether the principles of equivalence and effectiveness preclude the reimbursement to a parent company of sums which ensure the application of the same tax regime to dividends distributed by subsidiaries of that company established in France and dividends distributed by subsidiaries of that company established in other Member States, which are subsequently redistributed by the parent company, being subject to the condition that the person liable for the tax furnishes evidence which is in his sole possession and relating, with respect to each dividend concerned, in particular to the rate of taxation actually applied and the amount of tax actually paid on profits made by subsidiaries established in other Member States, whereas, with respect to subsidiaries established in France that evidence, known to the administration, is not required.

78 In that regard, according to settled case-law, under the principle of sincere cooperation laid down in Article 4 TEU, it is for the Member States to ensure judicial protection of an individual's rights under EU law (see, to that effect, Case 33/76 *Rewe-Zentralfinanz and Rewe-Zentral* [1976] ECR 1989, paragraph 5; Case 45/76 *Comet* [1976] ECR 2043, paragraph 12; Case C-213/89 *Factortame and Others* [1990] ECR I-2433, paragraph 19; and Case C?432/05 *Unibet* [2007] ECR I?2271, paragraph 38).

79 Therefore, in the absence of EU rules on this matter it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from EU law, provided, first, that such rules are not less favourable than those governing similar domestic actions (principle of equivalence) and, secondly, that they do not render virtually impossible or excessively difficult the exercise of rights conferred by EU law (principle of effectiveness) (*Test Claimants in the FII Group Litigation*, paragraph 203 and the case-law cited).

80 It also falls to the national court to establish how a breach of the prohibition on restrictions on freedom of establishment and the free movement of capital should be remedied in practice.

81 The third question referred implies that, according to the national court, where restrictions on freedom of establishment and the free movement of capital are established, in order to ensure equal treatment between recipients of dividends received from subsidiaries established in France and recipients of dividends received from a subsidiary established in another Member State, it is necessary to grant the latter the tax credit received by the former.

82 It should be noted that the tax authorities of a Member State are entitled to require the taxpayer to provide such proof as they may consider necessary in order to determine whether the conditions of a tax advantage provided for in the legislation at issue have been met and, consequently, whether to allow that advantage (see, to that effect, Case C?136/00 *Danner* [2002] ECR I?8147, paragraph 50; Case C?422/01 *Skandia and Ramstedt* [2003] ECR I?6817, paragraph 43; Case C?318/07 *Persche* [2009] ECR I?359, paragraph 54; *Haribo Lakritzen Hans Riegel and Österreichische Salinen*, paragraph 95; and Case C-262/09 *Meilicke and Others* [2011]

ECR I?0000, paragraph 45).

83 In that regard, Accor has argued that the tax credit system is based merely on the liability of the distributing subsidiary to corporation tax, since the tax credit is always equal to 50% of the dividends distributed. Consequently, Accor considers that it is sufficient to provide evidence that the distributing subsidiary was liable to corporation tax in the Member State in which it was established.

84 The Commission, whilst considering that it is legitimate to take into account the tax paid by the subsidiary in the Member State in which it is established, considers that, in the context of the regime at issue in the main proceedings, there is no strict correspondence between the amount of tax paid and the amount of the tax credit and that it is sufficient to refer to the statutory tax rate in the State in which the subsidiary is established.

85 The French Government and the United Kingdom Government consider that, in order to remedy the alleged discriminatory impact of the regime at issue in the main proceedings, it is necessary to apply a tax credit of an amount that would offset the tax paid in the Member State in which the subsidiary is established and which should be calculated on the basis of the amount of the tax to which the profits underlying the dividends paid by the subsidiary were liable in that State. The French Government states that the system of tax credits and advance payments consisted in mitigating the double economic taxation of dividends distributed whilst respecting the requirement of fiscal neutrality and that the mitigation of double economic taxation took into account the level of corporation tax to which French subsidiaries had actually been subject at the preceding stage. Thus, according to that government, the amount of the tax credit could not be greater than the amount of the corporation tax levied at the normal rate on the profits underlying the dividends distributed and, in a situation where the underlying profits had been taxed at a rate that was so low that the amount of the tax credit was greater than the amount of the corporation tax paid at the preceding stage, an advance payment would become payable at a level equivalent to the surplus of the tax credit over the corporation tax.

86 It is for the national court, which has sole jurisdiction to interpret national law, to settle the question to what extent the tax regime at issue in the main proceedings was based on a strict correspondence between the amount of the tax paid on the profits underlying the distribution of the dividends and the amount of the tax credit.

87 However, whilst it follows from the case-law that EU law requires a Member State which has a system for the avoidance of double economic taxation as regards dividends paid to residents by resident companies to treat dividends paid to residents by resident companies in the same way as dividends paid to residents by non-resident companies (see *Test Claimants in the FII Group Litigation*, paragraph 72), that law does not require Member States to give taxpayers that have invested in foreign companies an advantage compared with those having invested in domestic companies (see, to that effect, Case C?298/05 *Columbus Container Services* [2007] ECR I?10451, paragraphs 39 and 40, and *Haribo Lakritzen Hans Riegel and Österreichische Salinen*, paragraph 89).

88 Thus, it has been held that EU law does not prohibit a Member State from preventing the imposition of a series of charges to tax on dividends received by a resident company by applying rules which exempt those dividends from tax when they are paid by a resident company, while preventing those dividends from being liable to a series of charges to tax through an imputation method when they are paid by a non-resident company, provided, however, that the tax rate applied to foreign-sourced dividends is not higher than the rate applied to nationally-sourced dividends and that the tax credit is at least equal to the amount paid in the State of the company making the distribution, up to the limit of the tax charged in the Member State of the company

receiving the dividends (see *Test Claimants in the FII Group Litigation*, paragraphs 48 and 57; *Haribo Lakritzen Hans Riegel and Österreichische Salinen*, paragraph 86; and order of 23 April 2008 in Case C?201/05 *Test Claimants in the CFC and Dividend Group Litigation* [2008] ECR I?2875, paragraph 39).

89 The Court has held that when the profits underlying foreign-sourced dividends are subject in the State of the company making the distribution to a lower level of tax than the tax levied in the Member State of the recipient company, that Member State must grant an overall tax credit corresponding to the tax paid by the company making the distribution in the State in which it is established (*Test Claimants in the FII Group Litigation*, paragraph 51, and *Haribo Lakritzen Hans Riegel and Österreichische Salinen*, paragraph 87).

90 Where, conversely, those profits are subject in the State of the company making the distribution to a higher level of tax than the tax levied by the Member State of the company receiving them, that Member State is obliged to grant a tax credit only up to the limit of the amount of corporation tax for which the company receiving the dividends is liable. It is not required to repay the difference, that is to say, the amount paid in the State of the company making the distribution which is greater than the amount of tax payable in the Member State of the company receiving it (see *Test Claimants in the FII Group Litigation*, paragraph 52, and *Haribo Lakritzen Hans Riegel and Österreichische Salinen*, paragraph 88).

91 As regards the regime at issue in the main proceedings, if a Member State were to grant recipients of dividends from a company established in another Member State a tax credit which was always equal to half of those dividends, as sought by Accor, that would amount to granting those dividends more favourable treatment than that received by dividends from the first Member State, where the rate of tax to which the company distributing those dividends was liable in the State in which it was established was lower than the rate of tax applied in the first Member State.

92 Consequently, a Member State must be in a position to determine the amount of the corporation tax paid in the State in which the distributing company is established that must be the subject of the tax credit granted to the recipient parent company. Therefore, contrary to what Accor maintains, it is not sufficient to provide evidence that the distributing company has been taxed, in the Member State in which it is established, on the profits underlying the dividends distributed, without providing information relating to the nature and rate of the tax actually charged on those profits.

93 In those circumstances, the administrative burdens, in particular the fact that the national tax authority demands information relating to the tax that has actually been charged on the profits of the company distributing dividends in the State in which the latter is established, cannot be regarded as excessive or infringing the principles of equivalence and effectiveness.

94 As regards the principle of equivalence, first, the national court states itself, in the wording of the third question, that with regard to dividends distributed by subsidiaries established in France, information concerning the rate of taxation actually applied and the amount of tax actually paid is known to the administration.

95 Secondly, as the Advocate General states in point 102 of his Opinion, it follows from the case-law referred to in paragraph 82 of the present judgment that the European Union does not preclude the burden of providing the relevant evidence falling primarily on the parent company concerned.

96 Whilst the parent company receiving dividends does not itself have all the information relating to the corporation tax that has been charged on the dividends distributed by its subsidiary

established in another Member State, such information is known, in principle, to the latter company. Accordingly, any difficulty that the parent company may have in providing the information required in respect of the tax paid by its subsidiary distributing dividends is due not to the inherent complexity of the information but to a possible lack of cooperation on the part of the subsidiary that has the information. Therefore, the inadequate flow of information to the parent company is not a problem for which the Member State concerned should have to answer (see, to that effect, *Haribo Lakritzen Hans Riegel and Österreichische Salinen*, paragraph 98).

97 Moreover, contrary to what Accor maintains, the fact that the tax authorities can have recourse to the mechanism of mutual assistance under Council Directive 77/799/EEC of 19 December 1977 concerning mutual assistance by the competent authorities of the Member States in the field of direct and indirect taxation (OJ L 336, p. 15), as amended by Council Directive 92/12/EEC of 25 February 1992 (OJ L 76, p. 1), ('Directive 77/799'), does not mean that they are required to absolve the parent company receiving dividends from proving to those authorities the tax paid by the distributing company in another Member State (see *Haribo Lakritzen Hans Riegel and Österreichische Salinen*, paragraph 100, and *Meilicke and Others*, paragraph 50).

98 Since Directive 77/799 provides the option for national tax authorities to request information which they cannot obtain themselves, the Court has stated that the use, in Article 2(1) of Directive 77/799, of the word 'may' indicates that, whilst those authorities have the possibility of requesting information from the competent authority of another Member State, such a request does not in any way constitute an obligation. It is for each Member State to assess the specific cases in which information concerning transactions by taxable persons established in its territory is lacking and to decide whether those cases justify submitting a request for information to another Member State (Case C?184/05 *Twoh International* [2007] ECR I?7897, paragraph 32; *Persche*, paragraph 65; *Haribo Lakritzen Hans Riegel and Österreichische Salinen*, paragraph 101; and *Meilicke and Others*, paragraph 51).

99 As regards compliance with the principle of effectiveness, it should be noted, first, that the evidence required should enable the tax authorities of the Member State of taxation to ascertain, clearly and precisely, whether the conditions for obtaining a tax advantage are met, but it does not need to take any particular form and the assessment must not be conducted too formalistically (see, to that effect, *Meilicke and Others*, paragraph 46).

100 Secondly, it is for the national court to determine whether the evidence concerning the rate of taxation actually applied and the amount of tax actually paid on the profits underlying the distribution of the dividends will not prove virtually impossible or excessively difficult to obtain, in particular in the light of the legislation of the Member State in which the distributing company is established concerning the avoidance of double taxation, the registration of corporation tax to be paid, and the retention of administrative documents or accounts.

101 The request for production of that information should moreover be made within the statutory period for retention of administrative documents or accounts, as laid down by the law of the Member State in which the subsidiary is established. As Accor observes, in order for it to receive the tax credit it should not be required to provide documents covering a period significantly longer than the statutory period for retention of administrative documents and accounts.

102 In the light of the foregoing, the answer to the third question is that the principles of equivalence and effectiveness do not preclude the reimbursement to a parent company of sums which ensure the application of the same tax regime to dividends distributed by its subsidiaries established in France and those distributed by the subsidiaries of that company established in other Member States, and subsequently redistributed by that parent company, being subject to the condition that the person liable for the tax furnish evidence which is in its sole possession and

relating, with respect to each dividend concerned, in particular to the rate of taxation actually applied and the amount of tax actually paid on profits made by subsidiaries established in other Member States, whereas, with respect to subsidiaries established in France, that evidence, known to the administration, is not required. Production of that evidence may however be required only if it does not prove virtually impossible or excessively difficult to furnish proof of payment of the tax by the subsidiaries established in the other Member States, in the light in particular of the provisions of the legislation of those Member States concerning the avoidance of double taxation, the recording of the corporation tax which must be paid and the retention of administrative documents. It is for the national court to determine whether those conditions are met in the case before the national court.

Costs

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

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

1. **Articles 49 TFEU and 63 TFEU preclude legislation of a Member State intended to eliminate economic double taxation of dividends, such as that at issue in the main proceedings, which allows a parent company to set off against the advance payment, for which it is liable when it redistributes to its shareholders dividends paid by its subsidiaries, the tax credit applied to the distribution of those dividends if they originate from a subsidiary established in that Member State, but does not offer that option if those dividends originate from a subsidiary established in another Member State, since, in that case, that legislation does not give entitlement to a tax credit applied to the distribution of those dividends by that subsidiary;**

2. **Where a national tax regime such as that at issue in the main proceedings does not of itself lead to the passing on to a third party of the tax unduly paid by the person liable for that tax, EU law precludes a Member State refusing to reimburse sums paid by the parent company on the grounds either that such reimbursement would lead to the unjust enrichment of the parent company, or that the sum paid by the parent company does not constitute an accounting or tax charge for it but is set off against the total of the sums which may be redistributed to its shareholders;**

3. **The principles of equivalence and effectiveness do not preclude the reimbursement to a parent company of sums which ensure the application of the same tax regime to dividends distributed by its subsidiaries established in France and those distributed by the subsidiaries of that company established in other Member States, and subsequently redistributed by that parent company, being subject to the condition that the person liable for the tax furnish evidence which is in its sole possession and relating, with respect to each dividend concerned, in particular to the rate of taxation actually applied and the amount of tax actually paid on profits made by subsidiaries established in other Member States, whereas, with respect to subsidiaries established in France, that evidence, known to the administration, is not required. Production of that evidence may however be required only if it does not prove virtually impossible or excessively difficult to furnish evidence of payment of the tax by the subsidiaries established in the other Member States, in the light in particular of the provisions of the legislation of those Member States concerning the avoidance of double taxation, the recording of the corporation tax which must be paid and the retention of administrative documents. It is for the national court to determine whether those conditions are met in the case before the national court.**

[Signatures]

* Language of the case: French.