JUDGMENT OF THE COURT (Grand Chamber)

13 November 2012 (*)

(Articles 49 TFEU and 63 TFEU – Payment of dividends – Corporation tax – Case C?446/04 – Test Claimants in the FII Group Litigation – Interpretation of the judgment – Prevention of economic double taxation – Equivalence of the exemption and imputation methods – Meaning of ‘tax rates’ and ‘different levels of taxation’ – Dividends from third countries)

In Case C?35/11,

REFERENCE for a preliminary ruling under Article 267 TFEU from the High Court of Justice of England and Wales, Chancery Division, made by decision of 20 December 2010, received at the Court on 21 January 2011, in the proceedings

Test Claimants in the FII Group Litigation

v

Commissioners of Inland Revenue,

The Commissioners for Her Majesty’s Revenue & Customs,

THE COURT (Grand Chamber),

composed of V. Skouris, President, K. Lenaerts (Rapporteur), Vice-President, A. Tizzano, L. Bay Larsen, T. von Danwitz, A. Rosas, Presidents of Chambers, U. Lõhmus, E. Levits, A. Ó Caoimh, J.?C. Bonichot and A. Arabadjiev, Judges,

Advocate General: N. Jääskinen,

Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 7 February 2012,

after considering the observations submitted on behalf of:

– Test Claimants in the FII Group Litigation, by G. Aaronson QC and P. Farmer, Barrister,

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

– the German Government, by T. Henze and K. Petersen, acting as Agents,

– Ireland, by D. O’Hagan, acting as Agent, A. Collins SC and N. McNicholas BL,

– the French Government, by G. de Bergues and N. Rouam, acting as Agents,

– the Netherlands Government, by C. Wissels and B. Koopman, acting as Agents,

– the European Commission, by R. Lyal and W. Mölls, acting as Agents, after hearing the Opinion of the Advocate General at the sitting on 19 July 2012,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Articles 49 TFEU and 63 TFEU.

2 The reference has been made in the context of application of the judgment of 12 December 2006 in Case C?446/04 *Test Claimants in the FII Group Litigation* [2006] ECR I?11753 and is designed to obtain clarification regarding various paragraphs of that judgment.

Legal framework in the United Kingdom

3 Under the tax legislation in force in the United Kingdom, the profits made during an accounting period by every company resident in that Member State, and by each company which is not resident there but which conducts trading activities through a branch or agency there, are subject to corporation tax in that State.

4 From 1973 onwards, the United Kingdom of Great Britain and Northern Ireland operated a system of taxation known as 'partial imputation', under which, in order to avoid economic double taxation, when a resident company distributed profits part of the corporation tax paid by that company was imputed to its shareholders. Until 6 April 1999, the basis of that system was, on the one hand, advance payment of corporation tax by the company making the distribution and, on the other hand, a tax credit granted to shareholders who had received a dividend. In addition, a United Kingdom-resident company was exempt from corporation tax on dividends received from another United Kingdom-resident company.

Advance corporation tax

5 Under section 14 of the Income and Corporation Taxes Act 1988 ('ICTA'), in the version in force at the time of the facts in the main proceedings, a company resident in the United Kingdom which paid dividends to its shareholders was liable to pay advance corporation tax ('ACT'), calculated by reference to the amount or value of the distribution made.

6 A company had the right to set the ACT paid in respect of a distribution made during a particular accounting period against the amount of mainstream corporation tax for which it was liable in respect of that accounting period, subject to certain restrictions. If the liability of a company for corporation tax was insufficient to allow the ACT to be set off in full, the surplus ACT could be carried back to a previous accounting period or carried forward to a later one, or surrendered to subsidiaries of that company, which could set it off against the amount for which they themselves were liable in respect of corporation tax. Surplus ACT could be surrendered only to United Kingdom-resident subsidiaries.

7 A group of companies that was established in the United Kingdom could also elect to be taxed as a group (group income election), in which case companies belonging to that group could postpone payment of ACT until the parent company in the group made a distribution by way of dividend.

The case of resident shareholders receiving dividends from resident companies

8 Under section 208 of ICTA, where a United Kingdom-resident company received dividends

from a company that was also resident in that Member State, it was not liable to corporation tax in respect of those dividends.

9 In addition, by virtue of section 231(1) of ICTA, every payment of dividends subject to ACT by a resident company to another resident company gave rise to a tax credit in favour of the latter company equal to the fraction of the ACT paid by the former company.

10 In the terms of section 238(1) of ICTA, the dividend received and the tax credit together constituted 'franked investment income' ('FII') in the hands of the company receiving the dividends.

11 A United Kingdom-resident company which received dividends from another resident company, the payment of which gave rise to entitlement to a tax credit, could recover the amount of ACT paid by the latter company and deduct it from the amount of ACT which it itself had to pay when making a distribution to its own shareholders, with the result that it was liable for ACT only on the excess.

The case of resident shareholders receiving dividends from non-resident companies

12 When a United Kingdom-resident company received dividends from a non-resident company, it was liable to corporation tax on those dividends.

13 In such a case, the company receiving those dividends was not entitled to a tax credit and the dividends paid did not qualify as franked investment income. However, in accordance with sections 788 and 790 of ICTA, it was entitled to relief for tax paid by the company making the distribution in the State in which the latter was resident. Such relief was granted either under the legislation in force in the United Kingdom or under a double taxation convention concluded by the United Kingdom with the other State.

14 Thus, the national legislation allowed withholding taxes paid on dividends from a non-resident company to be offset against the liability of a resident company receiving dividends to corporation tax. Where a resident company receiving dividends either directly or indirectly controlled, or was a subsidiary of a company which directly or indirectly controlled, 10% or more of the voting rights in the company making the distribution, the relief extended to the underlying foreign corporation tax on the profits out of which the dividends were paid. Relief on that tax paid abroad was available only on the amount due in the United Kingdom by way of corporation tax on the income concerned.

15 Similar provisions applied under the double taxation conventions concluded by the United Kingdom.

16 When a resident company itself paid dividends to its own shareholders, it was liable to account for ACT.

17 As regards the ability to offset ACT paid on such a distribution against the amount for which the resident company was liable in respect of corporation tax, the fact that such a resident company received dividends from a non-resident company was liable to result in surplus ACT, in particular because, as mentioned in paragraph 13 of the present judgment, the payment of dividends by a non-resident company did not give rise to a tax credit which could be deducted from the amount of ACT for which the resident company was liable when it paid dividends to its own shareholders.

The foreign income dividend regime

18 From 1 July 1994, a resident company receiving dividends from a non-resident company

could elect that a dividend which it paid to its shareholders be treated as a foreign income dividend (‘FID’). ACT was payable on the FID but, to the extent to which the FID matched the foreign dividends received, the resident company could claim repayment of the surplus ACT.

19 While ACT was payable within 14 days of the end of the quarter in which the dividend was paid, surplus ACT was repayable when the resident company became liable for mainstream corporation tax, namely nine months after the end of the accounting period.

20 For dividends paid from 6 April 1999, the ACT system and the FID regime were abolished.

The facts and the questions referred for a preliminary ruling

21 The High Court of Justice of England and Wales, Chancery Division, seeks, first, to obtain clarification regarding paragraph 56 of the judgment in *Test Claimants in the FII Group Litigation* and point 1 of its operative part. It recalls that the Court of Justice held, in paragraphs 48 to 53, 57 and 60 of that judgment, that national legislation which applies the exemption method to nationally-sourced dividends and the imputation method to foreign-sourced dividends is not contrary to Articles 49 TFEU and 63 TFEU, provided 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 Member 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.

22 As is clear from paragraph 54 of the judgment in *Test Claimants in the FII Group Litigation*, the claimants in the main proceedings had pointed out before the Court that ‘when, under the relevant United Kingdom legislation, a nationally-sourced dividend is paid, it is exempt from corporation tax in the hands of the company receiving it, irrespective of the tax paid by the company making the distribution, that is to say, it is also exempt when, by reason of the reliefs available to it, the latter has no liability to tax or pays corporation tax at a rate lower than that which normally applies in the United Kingdom’. In that connection, the Court stated as follows in paragraphs 55 and 56 of the judgment:

‘55 That point is not contested by the United Kingdom Government, which argues, however, that the application to the company making the distribution and to the company receiving it of different levels of taxation occurs only in highly exceptional circumstances, which do not arise in the main proceedings.

56 In that respect, it is for the national court to determine whether the tax rates are indeed the same and whether different levels of taxation occur only in certain cases by reason of a change to the tax base as a result of certain exceptional reliefs.’

23 Following the judgment in *Test Claimants in the FII Group Litigation*, the claimants in the main proceedings adduced before the High Court of Justice of England and Wales, Chancery Division, expert evidence to show that the effective level of taxation of the profits of resident companies was lower than the nominal tax rate in the majority of cases and that this situation could therefore not be described as exceptional.

24 The defendants in the main proceedings did not contest the claimants’ evidence as to the effective level of taxation of resident companies. The defendants’ position was, rather, that the determination to be made by the national court pursuant to paragraph 56 of the judgment in *Test Claimants in the FII Group Litigation* was nothing to do with effective levels of taxation. In the light of the fact that, in its written observations before the Court, the United Kingdom had referred to the small companies relief in the United Kingdom legislation, the defendants pleaded that the referring court had the task of examining only whether different nominal rates of tax applying, on

the one hand, to resident companies paying dividends and, on the other, to resident companies receiving dividends occurred only in exceptional circumstances.

25 The referring court takes the view that it should determine the effective level of taxation of the profits distributed by resident companies, but nevertheless considers that it is necessary to refer this question to the Court.

26 Second, the referring court seeks clarification of points 2 and 4 of the operative part of the judgment in *Test Claimants in the FII Group Litigation*. It asks whether those points apply solely in the case where a United Kingdom-resident company is in direct receipt of dividends from a non-resident subsidiary that has paid corporation tax in its State of residence on the profits underlying the dividends paid, or whether they also apply in the case where the non-resident subsidiary itself paid no tax – or little tax – but the dividend was paid out of profits comprising dividends paid by a lower-tier subsidiary resident in a Member State out of profits on which corporation tax was paid in that State.

27 For that purpose, the referring court explains that very often the non-resident subsidiary did not pay any tax in its State of residence on the profits out of which the dividend was paid to its resident parent company. This is mainly because of the widespread use by international groups of intermediate holding companies that pay little or no tax on their profits. The States in which the holding companies are resident often give double tax relief for the tax borne on the distributed profits.

28 Third, the referring court seeks to ascertain whether point 2 of the operative part of the judgment in *Test Claimants in the FII Group Litigation* is limited to the situation in which the resident company receiving dividends from a non-resident company paid the ACT itself or whether point 2 of the operative part also applies in the situation in which that resident company made a group income election. Under those arrangements, the ACT is paid by a resident company higher up the corporate structure. The referring court also asks whether, in the latter situation, which is excluded by the Court in paragraph 10 of the judgment in *Test Claimants in the FII Group Litigation* , an infringement of European Union law should be found so that, by virtue of the principles laid down by the Court in Case 199/82 *San Giorgio* [1983] ECR 3595, a right to repayment exists in favour of the company higher up the corporate structure which actually paid the ACT.

29 According to the defendants in the main proceedings, however, the ACT paid in the present instance by that company was exacted lawfully, with the result that any loss suffered by it can only be the subject-matter of a claim for damages, where the conditions set out by the Court in Joined Cases C?46/93 and C?48/93 *Brasserie du Pêcheur and Factortame* [1996] ECR I?1029 are satisfied.

30 Fourth, the referring court points out that the first question in *Test Claimants in the FII Group Litigation* was confined to dividends received from companies resident in other Member States. However, when the case returned to the High Court of Justice of England and Wales, Chancery Division, the claimants in the main proceedings contended that, in the light of the developing case?law of the Court of Justice, the regime in force in the United Kingdom was also contrary to Article 63 TFEU in so far as the regime applied to dividends received from subsidiaries resident in third countries. According to the claimants, Article 63 TFEU was applicable as the United Kingdom legislation applied irrespective of the extent of the holding which the shareholder concerned had in the company making the distribution that was resident in a third country.

31 However, the defendants take the view that Article 63 TFEU is inapplicable to situations in which the company resident in a Member State has a definite influence on the decisions of a company resident in a third country and is able to determine its activities. According to the

referring court, the judgments in Case C?157/05 *Holböck* [2007] ECR I?4051, Case C?101/05 *A* [2007] ECR I?11531 and Case C?182/08 *Glaxo Wellcome* [2009] ECR I?8591 support the argument of the claimants in the main proceedings.

32 Fifth, the referring court seeks clarification of point 3 of the operative part of the judgment in *Test Claimants in the FII Group Litigation*, which concerns the legislation relating to ACT, mentioned in paragraph 6 of the present judgment, that allowed a United Kingdom-resident parent company to surrender surplus ACT to its resident subsidiaries so that the ACT could be set off against the subsidiaries' corporation tax liability. The claimants in the main proceedings had contended that that legislation was contrary to Article 49 TFEU in so far as this possibility was restricted to United Kingdom-resident subsidiaries. They contended that, in choosing to operate such rules, the United Kingdom was obliged to provide some form of equivalent relief, such as a refund of ACT which could be matched against the corporation tax paid by subsidiaries established in the European Union.

33 In paragraph 115 of its judgment in *Test Claimants in the FII Group Litigation*, the Court prefaced its discussion of this question by noting that '… the arguments presented to the Court were limited to the inability of a resident company to surrender surplus ACT to non-resident subsidiaries in order for them to set it off against the corporation tax for which they are liable in the United Kingdom in respect of activities carried on in that Member State'.

34 Consequently, the reply given in paragraph 139 and point 3 of the operative part of the judgment does not cover the case where the non-resident company was liable to corporation tax only in the Member State of its residence. The referring court accordingly seeks to ascertain whether the reply in point 3 of the operative part would be different where the non-resident subsidiaries to which surplus ACT could not be surrendered are not subject to tax in the Member State of the parent company.

35 In those circumstances, the High Court of Justice of England and Wales, Chancery Division, decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'1. Do the references to "tax rates" and "different levels of taxation" at paragraph 56 of the [judgment in *Test Claimants in the FII Group Litigation*]:

(a) refer solely to statutory or nominal rates of tax; or

(b) refer to the effective rates of tax paid as well as the statutory or nominal rates of tax; or

(c) do the phrases referred to have some different meaning and, if so, what?

2. Does it make any difference to the Court's answer to Questions 2 and 4 of the reference in [*Test Claimants in the FII Group Litigation*] if:

(a) foreign corporation tax is not (or not wholly) paid by the non-resident company paying the dividend to the resident company, but that dividend is paid from profits comprising dividends paid by its direct or indirect subsidiary resident in a Member State and which were paid out of profits on which tax has been paid in that State; and/or

(b) [ACT] is not paid by the resident company which receives the dividend from a non-resident company, but is paid by its direct or indirect resident parent company upon the further distribution of the profits of the recipient company that directly or indirectly comprise the dividend?

3. In the circumstances described in Question 2(b) …, does the company paying the ACT have

a claim for the repayment of the tax unduly levied (*San Giorgio* ...) or only a claim for damages (*Brasserie du Pêcheur and Factortame* …)?

4. Where the national legislation in question does not apply exclusively to situations in which the parent company exercises decisive influence over the dividend paying company, can a resident company rely upon Article 63 TFEU … in respect of dividends received from a subsidiary over which it exercises decisive influence and which is resident in a third country?

5. Does the Court’s answer to Question 3 of the reference in [*Test Claimants in the FII Group Litigation*] also apply where the non-resident subsidiaries to which no surrender could be made are not subject to tax in the Member State of the parent company?’

Consideration of the questions referred

Question 1

36 By its first question, the referring court asks, in essence, whether Articles 49 TFEU and 63 TFEU must be interpreted as precluding legislation of a Member State which applies the exemption method to nationally-sourced dividends and the imputation method to foreign-sourced dividends when, in that Member State, the effective level of taxation of company profits is generally lower than the nominal rate of tax.

37 It should be recalled that, in the context of tax rules, such as those at issue in the main proceedings, which seek to prevent the economic double taxation of distributed profits, the situation of a corporate shareholder receiving foreign-sourced dividends is comparable to that of a corporate shareholder 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 (*Test Claimants in the FII Group Litigation*, paragraph 62, and Joined Cases C?436/08 and C?437/08 *Haribo Lakritzen Hans Riegel and Österreichische Salinen* [2011] ECR I?305, paragraph 59).

38 That being so, Articles 49 TFEU and 63 TFEU require a Member State which has a system for preventing economic double taxation as regards dividends paid to residents by resident companies to accord equivalent treatment to dividends paid to residents by non-resident companies (see *Test Claimants in the FII Group Litigation*, paragraph 72, and *Haribo Lakritzen Hans Riegel and Österreichische Salinen*, paragraph 60).

39 It is to be recalled, next, that the Court has held that a Member State is, in principle, free to prevent the imposition of a series of charges to tax on dividends received by a resident company by opting for the exemption method when the dividends are paid by a resident company and for the imputation method when they are paid by a non-resident company. Those two methods are in fact equivalent 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; Case C?310/09 *Accor* [2011] ECR I?8115, paragraph 88; and the order in Case C?201/05 *Test Claimants in the CFC and Dividend Group Litigation* [2008] ECR I?2875, paragraph 39).

40 It should be noted in this regard that, since European Union law, as it currently stands, does not lay down any general criteria for the attribution of areas of competence between the Member States in relation to the elimination of double taxation within the European Union (Case C?513/04 *Kerckhaert and Morres* [2006] ECR I?10967, paragraph 22, and Case C?157/10 *Banco Bilbao Vizcaya Argentaria*

[2011] ECR I?13023, paragraph 31 and the case?law cited), each Member State remains free to organise its system for taxing distributed profits, provided, however, that the system in question does not entail discrimination prohibited by the FEU Treaty. An obligation on the Member State where the company receiving dividends resides to exempt foreign-sourced dividends from corporation tax would affect the competence of the Member State concerned to tax, in compliance with the principle of non-discrimination, the profits thereby distributed at the rate prescribed by its own legislation.

41 As is apparent from paragraph 54 of the judgment in *Test Claimants in the FII Group Litigation*, the claimants in the main proceedings disputed that the exemption and imputation methods are equivalent by submitting that when, under the relevant United Kingdom legislation, a nationally-sourced dividend is paid, it is exempt from corporation tax in the hands of the company receiving it, irrespective of the tax paid by the company making the distribution, that is to say, also when, by reason of the reliefs available to the company making the distribution, that company has no liability to tax or pays corporation tax at a rate lower than that which normally applies in the United Kingdom.

42 The Court thus called upon the referring court, in paragraph 56 of the judgment in *Test Claimants in the FII Group Litigation*, to determine whether the tax rates are indeed the same and whether different levels of taxation occur only in certain cases by reason of a change to the tax base as a result of certain exceptional reliefs.

43 It must in fact be held that the tax rate applied to foreign-sourced dividends will be higher than the rate applied to nationally-sourced dividends within the meaning of the case?law cited in paragraph 39 of the present judgment, and therefore that the equivalence of the exemption and imputation methods will be compromised, in the following circumstances.

44 First, if the resident company which pays dividends is subject to a nominal rate of tax below the nominal rate of tax to which the resident company that receives the dividends is subject, the exemption of the nationally-sourced dividends from tax in the hands of the latter company will give rise to lower taxation of the distributed profits than that which results from application of the imputation method to foreign-sourced dividends received by the same resident company, but this time from a non-resident company also subject to low taxation of its profits, inter alia because of a lower nominal rate of tax.

45 Application of the exemption method will give rise to taxation of the distributed nationally-sourced profits at the lower nominal rate of tax applicable to the company paying dividends, whilst application of the imputation method to foreign-sourced dividends will give rise to taxation of the distributed profits at the higher nominal rate of tax applicable to the company receiving dividends.

46 Second, exemption from tax of dividends paid by a resident company and application to dividends paid by a non-resident company of an imputation method which, like that laid down in the rules at issue in the main proceedings, takes account of the effective level of taxation of the profits in the State of origin also cease to be equivalent if the profits of the resident company which pays dividends are subject in the Member State of residence to an effective level of taxation lower than the nominal rate of tax which is applicable there.

47 The exemption of the nationally-sourced dividends from tax gives rise to no tax liability for the resident company which receives those dividends irrespective of the effective level of taxation to which the profits out of which the dividends have been paid were subject. By contrast, application of the imputation method to foreign-sourced dividends will lead to an additional tax liability so far as concerns the resident company receiving them if the effective level of taxation to which the profits of the company paying the dividends were subject falls short of the nominal rate

of tax to which the profits of the resident company receiving the dividends are subject.

48 Unlike the exemption method, the imputation method therefore does not enable the benefit of the corporation tax reductions granted at an earlier stage to the company paying dividends to be passed on to the corporate shareholder.

49 Accordingly, the determination which the referring court was called upon to make by the Court, in paragraph 56 of its judgment in *Test Claimants in the FII Group Litigation*, relates both to the applicable nominal rates of tax and to the effective levels of taxation. The ‘tax rates’ to which paragraph 56 refers relate to the nominal rate of tax and the ‘different levels of taxation … by reason of a change to the tax base’ relate to the effective levels of taxation. The effective level of taxation may be lower than the nominal rate of tax by reason, in particular, of reliefs reducing the tax base.

50 As regards any difference between the nominal rate of tax and the effective level of taxation to which the resident company paying dividends is subject, it is admittedly apparent from paragraph 56 of the judgment in *Test Claimants in the FII Group Litigation* that the exemption and imputation methods do not immediately cease to be equivalent as soon as exceptional cases exist in which nationally-sourced dividends are exempt although the profits out of which those dividends have been paid have not been subject in their entirety to an effective level of taxation corresponding to the nominal rate of tax. The Court made it clear, however, that it was for the referring court to determine whether or not the difference between the effective level of taxation and the nominal rate of tax was exceptional in nature.

51 It is apparent from the order of the referring court that the latter made the determination asked of it in paragraph 56 of the judgment in *Test Claimants in the FII Group Litigation*. It found that, in the main proceedings, the same nominal rate of tax applies both to the profits of the resident company paying dividends and to those of the resident company receiving them. On the other hand, it is apparent from the order for reference that the circumstance referred to in paragraph 46 of the present judgment is present, and not by way of exception: according to the referring court, in the United Kingdom the effective level of taxation of the profits of resident companies is lower than the nominal rate of tax in the majority of cases.

52 It follows that application of the imputation method to foreign-sourced dividends as prescribed by the legislation at issue in the main proceedings does not ensure a tax treatment equivalent to that resulting from application of the exemption method to nationally-sourced dividends.

53 Since, in the context of a tax rule, such as that at issue in the main proceedings, which seeks to prevent the economic double taxation of distributed profits, the situation of a corporate shareholder receiving foreign-sourced dividends is comparable to that of a corporate shareholder 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, and *Haribo Lakritzen Hans Riegel and Österreichische Salinen*, paragraph 59), the difference in the tax treatment of the two categories of dividends is not justified by a relevant difference in situation.

54 Therefore, legislation such as that at issue in the main proceedings constitutes a restriction on freedom of establishment and on capital movements that is in principle prohibited by Articles 49 TFEU and 63 TFEU.

55 In accordance with settled case?law, such a restriction is permissible only if it is justified by an overriding reason in the public interest. It is further necessary, in such a case, that the

restriction be appropriate for ensuring the attainment of the objective in question and not go beyond what is necessary to attain that objective (see Case C?371/10 *National Grid Indus* [2011] ECR I?12273, paragraph 42, and Case C?250/08 *Commission* v *Belgium* [2011] ECR I?12341, paragraph 51).

56 The United Kingdom Government contended in *Test Claimants in the FII Group Litigation* that the rules at issue in the main proceedings were objectively justified by the need to ensure the cohesion of the national tax system.

57 It should be recalled that the Court has already accepted that the need to preserve the cohesion of a tax system may justify a restriction on the exercise of the freedoms of movement guaranteed by the Treaty (Case C?204/90 *Bachmann* [1992] ECR I?249, paragraph 21; Case C?319/02 *Manninen* [2004] ECR I?7477, paragraph 42; Case C?157/07 *Krankenheim Ruhesitz am Wannsee-Seniorenheimstatt* [2008] ECR I?8061, paragraph 43; and *Commission* v *Belgium*, paragraph 70).

58 However, in accordance with settled case?law, the existence of a direct link must be established between the tax advantage concerned and the offsetting of that advantage by a particular tax levy (*Commission* v *Belgium*, paragraph 71 and the case?law cited), the direct nature of that link falling to be examined in the light of the objective pursued by the rules in question (Case C?418/07 *Papillon* [2008] ECR I?8947, paragraph 44, and Case C?303/07 *Aberdeen Property Fininvest Alpha* [2009] ECR I?5145, paragraph 72).

59 Having regard to the objective pursued by the rules at issue in the main proceedings, a direct link exists between, on the one hand, the tax advantage granted, namely the tax credit in the case of foreign-sourced dividends and the tax exemption for nationally-sourced dividends, and, on the other, the tax to which the distributed profits have already been subject.

60 As to the proportionality of the restriction, whilst application of the imputation method to foreign-sourced dividends and of the exemption method to nationally-sourced dividends may be justified in order to avoid economic double taxation of distributed profits, it is not, however, necessary, in order to maintain the cohesion of the tax system in question, that account be taken, on the one hand, of the effective level of taxation to which the distributed profits have been subject to calculate the tax advantage when applying the imputation method and, on the other, of only the nominal rate of tax chargeable on the distributed profits when applying the exemption method.

61 The tax exemption to which a resident company receiving nationally-sourced dividends is entitled is granted irrespective of the effective level of taxation to which the profits out of which the dividends have been paid were subject. That exemption, in so far as it is intended to avoid economic double taxation of distributed profits, is thus based on the assumption that those profits were taxed at the nominal rate of tax in the hands of the company paying dividends. It thus resembles grant of a tax credit calculated by reference to that nominal rate of tax.

62 For the purpose of ensuring the cohesion of the tax system in question, national rules which took account in particular, also under the imputation method, of the nominal rate of tax to which the profits underlying the dividends paid have been subject would be appropriate for preventing the economic double taxation of the distributed profits and for ensuring the internal cohesion of the tax system while being less prejudicial to freedom of establishment and the free movement of capital.

63 It is to be observed in this connection that in *Haribo Lakritzen Hans Riegel and Österreichische Salinen*, paragraph 99, the Court, after pointing out that the Member States are, in principle, allowed to prevent the imposition of a series of charges to tax on dividends received by a

resident company by applying the exemption method to nationally-sourced dividends and the imputation method to foreign-sourced dividends, noted that the national rules in question took account, for the purpose of calculating the amount of the tax credit under the imputation method, of the nominal rate of tax applicable in the State where the company paying dividends was established.

64 It is true that calculation, when applying the imputation method, of a tax credit on the basis of the nominal rate of tax to which the profits underlying the dividends paid have been subject may still lead to a less favourable tax treatment of foreign-sourced dividends, as a result in particular of the existence in the Member States of different rules relating to determination of the basis of assessment for corporation tax. However, it must be held that, when unfavourable treatment of that kind arises, it results from the exercise in parallel by different Member States of their fiscal sovereignty, which is compatible with the Treaty (see, to this effect, *Kerckhaert and Morres*, paragraph 20, and Case C?96/08 *CIBA* [2010] ECR I?2911, paragraph 25).

65 In light of the foregoing, the answer to the first question is that Articles 49 TFEU and 63 TFEU must be interpreted as precluding legislation of a Member State which applies the exemption method to nationally-sourced dividends and the imputation method to foreign-sourced dividends if it is established, first, that the tax credit to which the company receiving the dividends is entitled under the imputation method is equivalent to the amount of tax actually paid on the profits underlying the distributed dividends and, second, that the effective level of taxation of company profits in the Member State concerned is generally lower than the prescribed nominal rate of tax.

Question 2

66 By its second question, the referring court asks, in essence, whether the answers given by the Court to the second and fourth questions in the judgment in *Test Claimants in the FII Group Litigation* also apply, first, where the foreign corporation tax to which the profits underlying the distributed dividends have been subject was not or was not wholly paid by the non-resident company paying those dividends to the resident company, but was paid by a company resident in a Member State that is a direct or indirect subsidiary of the first company, and second, where ACT has not been paid by the resident company which receives the dividends from a non-resident company, but was paid by its resident parent company under a group income election.

67 In *Test Claimants in the FII Group Litigation*, the Court ruled in reply to the second and fourth questions that Articles 49 TFEU and 63 TFEU preclude:

– legislation of a Member State which allows a resident company receiving dividends from another resident company to deduct from the amount which the former company is liable to pay by way of advance corporation tax the amount of that tax paid by the latter company, whereas no such deduction is permitted in the case of a resident company receiving dividends from a non-resident company as regards the corresponding tax on distributed profits paid by the latter company in the State in which it is resident;

– legislation of a Member State which, while exempting from advance corporation tax resident companies paying dividends to their shareholders which have their origin in nationally-sourced dividends received by them, allows resident companies distributing dividends to their shareholders which have their origin in foreign-sourced dividends received by them to elect to be taxed under a regime which permits them to recover the advance corporation tax paid but, first, obliges those companies to pay that advance corporation tax and subsequently to claim repayment and, secondly, does not provide a tax credit for their shareholders, whereas those shareholders would have received such a tax credit in the case of a distribution made by a resident company which had its origin in nationally-sourced dividends.

68 First, it is to be recalled that, under the rules at issue in the main proceedings, when dividends were paid outside a group income election, the resident company making that distribution was required to pay ACT, which constituted a form of advance payment of corporation tax. Subsequently the distributed dividends ascended the group structure as franked investment income, in the sense that a tax credit, in the amount of the ACT paid, was attached to the dividends. The tax credit was set off against the liability of companies higher up the group structure to pay ACT when dividends were subsequently paid to their immediate parent company or to external shareholders. Thus, when a dividend was paid outside a group income election, the ACT was borne by the lowest level of the United Kingdom-resident companies.

69 The United Kingdom Government considers that it is not contrary to Articles 49 TFEU and 63 TFEU that the corporation tax to which the profits underlying foreign-sourced dividends were subject cannot be deducted from the ACT payable by the parent company resident in the United Kingdom when the subsidiary resident in another Member State which has paid the dividends to the parent company resident in the United Kingdom did not itself pay – or did not wholly pay – the corporation tax on the distributed profits, but that tax was paid by a direct or indirect subsidiary of the first subsidiary, also resident in a Member State. In its submission, if the non-resident company paying dividends to its parent company resident in the United Kingdom has not itself paid the corporation tax in respect of the distributed profits, there is no series of charges to tax on the cross-border dividends that requires relief from tax.

70 Such a line of argument cannot be upheld.

71 It should be recalled for this purpose that a resident company receiving foreign-sourced dividends is, in relation to the objective of preventing economic double taxation pursued by the rules at issue in the main proceedings, in a situation comparable to that of a resident company receiving nationally-sourced dividends. In the light of that objective, it is apparent from the answers given to the second and fourth questions in the judgment in *Test Claimants in the FII Group Litigation* that Articles 49 TFEU and 63 TFEU preclude legislation of a Member State which, as regards foreign-sourced dividends alone, does not take account of the corporation tax already paid on the distributed profits.

72 As is clear from paragraph 62 of the present judgment, the obligation imposed on a resident company by national rules, such as those at issue in the main proceedings, to pay ACT when profits from foreign-sourced dividends are distributed is, in fact, justified only in so far as that advance tax corresponds to the amount designed to make up for the lower nominal rate of tax to which the profits underlying the foreign-sourced dividends have been subject compared with the nominal rate of tax applicable to the profits of the resident company.

73 In this connection, it is of little account whether the non-resident company which pays dividends to its resident parent company is itself liable for corporation tax, provided, however, that the distributed profits have been subject to corporation tax.

74 The answers to the second and fourth questions asked in the case which gave rise to the judgment in *Test Claimants in the FII Group Litigation* are therefore not affected by a finding that the foreign corporation tax to which the profits underlying the distributed dividends have been subject was not or was not wholly paid by the non-resident company paying those dividends to the resident company, but was paid by a company resident in a Member State that is a direct or indirect subsidiary of the first company.

75 Second, as regards a group taxation scheme, such as the group income election at issue in

the dispute in the main proceedings, it is to be pointed out that, when dividends were paid by a resident company under a group income election, they were not subject to liability for ACT and were not regarded as franked investment income in the hands of the resident company receiving them.

76 This meant that, whereas the dividends were passed up the group structure without any liability to pay ACT, when the final resident parent company came to pay the dividends to the shareholders outside the group, it did not have any tax credit to offset against its liability for ACT and was, consequently, obliged to pay ACT on the dividends. The provisions of the ACT system permitted the final parent company, however, to surrender any surplus ACT that it had to its resident subsidiaries and to offset it against the group's overall tax liability (see Joined Cases C?397/98 and C?410/98 *Metallgesellschaft and Others* [2001] ECR I?1727, paragraphs 21 to 25).

77 According to the United Kingdom Government, the national rules relating to group income election are compatible with Articles 49 TFEU and 63 TFEU since the resident company which receives dividends from a non-resident company enjoys an exemption from ACT. In the absence of any ACT payable by that resident company, the system does not result in any economic double taxation.

78 It must be found that a group income election has the effect of passing payment of ACT up the group structure. Under such a scheme, it is in particular the obligation on the resident parent company of the group to pay ACT when dividends are paid to the shareholders outside the group that could, for that part of the distributed profits corresponding to foreign-sourced dividends, lead to economic double taxation.

79 As the claimants in the main proceedings and the European Commission point out, payment of ACT on the profits corresponding to foreign-sourced dividends by the final resident parent company of the group results in the distributed profits being liable for corporation tax for a second time. That taxation cannot be set off against the tax liability of the non-resident subsidiary distributing those profits. On the other hand, in a purely internal context, surplus ACT paid by the resident parent company can be surrendered and offset against the corporation tax owed by the resident subsidiaries of the group.

80 In the light of the objective of preventing economic double taxation pursued by the rules at issue in the main proceedings, it must be held that Articles 49 TFEU and 63 TFEU also preclude rules such as those at issue in the main proceedings in so far as those rules, in the context of a group income election, do not take account, as regards foreign-sourced dividends, of the corporation tax already paid on the distributed profits.

81 The answers to the second and fourth questions asked in the case which gave rise to the judgment in *Test Claimants in the FII Group Litigation* are, consequently, the same where ACT is not paid by the resident company which receives the dividends from a non-resident company, but is paid by its resident parent company under a group income election.

82 Accordingly, the answer to the second question is that the answers given by the Court to the second and fourth questions asked in the case which gave rise to the judgment in *Test Claimants in the FII Group Litigation* also apply where:

– the foreign corporation tax to which the profits underlying the distributed dividends have been subject was not or was not wholly paid by the non-resident company paying those dividends to the resident company, but was paid by a company resident in a Member State that is a direct or indirect subsidiary of the first company;

– ACT has not been paid by the resident company which receives the dividends from a non-resident company, but was paid by its resident parent company under a group income election.

Question 3

83 By its third question, the referring court asks, in essence, whether European Union law must be interpreted as meaning that a parent company which in the context of a group income election has, in breach of the rules of European Union law, been compelled to pay ACT on the part of its profit from foreign-sourced dividends may bring an action for repayment of the tax unduly levied or may rely only on an action for damages.

84 It is to be remembered that the right to a refund of charges levied by a Member State in breach of European Union law is the consequence and complement of the rights conferred on individuals by provisions of European Union law prohibiting such charges. The Member State is therefore required in principle to repay charges levied in breach of European Union law (Case C?398/09 *Lady & Kid and Others* [2011] ECR I?7375, paragraph 17 and the case?law cited).

85 It is apparent from the answer to the second question that national rules, such as those at issue in the main proceedings, which seek to prevent the economic double taxation of distributed profits are incompatible with European Union law in so far as those rules, in the context of a group taxation scheme, do not take account, as regards dividends from other States, of the corporation tax already paid on the profits out of which those dividends have been paid.

86 As is clear from paragraphs 62 and 72 of the present judgment, the obligation imposed on a resident company to pay ACT when profits from foreign-sourced dividends are distributed is justified only in so far as that advance tax corresponds to the amount designed to make up for the lower nominal rate of tax to which the profits underlying the foreign-sourced dividends have been subject compared with the nominal rate of tax applicable to the profits of the resident company.

87 The answer to the third question therefore is that European Union law must be interpreted as meaning that a parent company resident in a Member State, which in the context of a group taxation scheme, such as the group income election at issue in the main proceedings, has, in breach of the rules of European Union law, been compelled to pay ACT on the part of the profits from foreign-sourced dividends, may bring an action for repayment of that unduly levied tax in so far as it exceeds the additional corporation tax which the Member State in question was entitled to levy in order to make up for the lower nominal rate of tax to which the profits underlying the foreign-sourced dividends were subject compared with the nominal rate of tax applicable to the profits of the resident parent company.

Question 4

88 By its fourth question, the referring court asks, in essence, whether European Union law must be interpreted as meaning that a company that is resident in a Member State and has a shareholding in a company resident in a third country giving it definite influence over the decisions of the latter company and enabling it to determine its activities may rely upon Article 63 TFEU in order to call into question the consistency with European Union law of legislation of that Member State which relates to the tax treatment of foreign-sourced dividends and does not apply exclusively to situations in which the parent company exercises decisive influence over the company paying the dividends.

89 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 (*Haribo Lakritzen Hans Riegel and Österreichische Salinen*

, paragraph 33, and *Accor*, paragraph 30).

90 As regards the question whether national legislation falls within the scope of one or other of the freedoms of movement, it is clear from well established case?law that the purpose of the legislation concerned must be taken into consideration (Case C?196/04 *Cadbury Schweppes and Cadbury Schweppes Overseas* [2006] ECR I?7995, paragraphs 31 to 33; Case C?374/04 *Test Claimants in Class IV of the ACT Group Litigation* [2006] ECR I?11673, paragraphs 37 and 38; Case C?524/04 *Test Claimants in the Thin Cap Group Litigation* [2007] ECR I?2107, paragraphs 26 to 34; *Haribo Lakritzen Hans Riegel and Österreichische Salinen*, paragraph 34; and *Accor*, paragraph 31).

91 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 scope of Article 49 TFEU on freedom of establishment (see *Test Claimants in the FII Group Litigation*, paragraph 37; Case C?81/09 *Idrima Tipou* [2010] ECR I?10161, paragraph 47; *Accor*, paragraph 32; and Case C?31/11 *Scheunemann* [2012] ECR, paragraph 23).

92 On the other hand, national provisions which apply to shareholdings acquired solely with the intention of making a financial investment without any intention to influence the management and control of the undertaking must be examined exclusively in light of the free movement of capital (*Haribo Lakritzen Hans Riegel and Österreichische Salinen*, paragraph 35; *Accor*, paragraph 32; and *Scheunemann*, paragraph 23).

93 The national rules at issue in the main proceedings apply not only to dividends received by a resident company on the basis of a shareholding that confers definite influence over the decisions of the company paying the dividends and enables its activities to be determined, but also to dividends received on the basis of a shareholding not conferring such influence. In so far as the national legislation relates to dividends which originate in a Member State, it cannot therefore be determined from its purpose whether it falls predominantly within the scope of Article 49 TFEU or Article 63 TFEU.

94 In such circumstances, the Court takes account of the facts of the case in point in order to determine whether the situation to which the dispute in the main proceedings relates falls within the scope of one or other of those provisions (see, to this effect, *Test Claimants in the FII Group Litigation*, paragraphs 37 and 38; Case C?284/06 *Burda* [2008] ECR I?4571, paragraphs 71 and 72; and Case C?311/08 *SGI* [2010] ECR I?487, paragraphs 33 to 37).

95 It was thus that, in paragraph 37 of its judgment in *Test Claimants in the FII Group Litigation*, the Court established that the cases chosen as test cases in the proceedings before the referring court concerned United Kingdom-resident companies which received dividends from companies established in other Member States that were wholly owned by them. As the nature of the interest in question would confer on the holder definite influence over the decisions of the company paying the dividends and allow it to determine the company's activities, the Court held that the Treaty provisions on freedom of establishment would apply in those test cases.

96 However, in a context such as that at issue in the main proceedings which relates to the tax treatment of dividends originating in a third country, it is sufficient to examine the purpose of national legislation in order to determine whether the tax treatment of such dividends falls within the scope of the Treaty provisions on the free movement of capital.

97 Since the chapter of the Treaty on freedom of establishment does not contain any provision which extends the application of its provisions to situations concerning the establishment of a company of a Member State in a third country or the establishment of a company of a third country

in a Member State (see *Holböck*, paragraph 28; Case C?452/04 *Fidium Finanz* [2006] ECR I?9521, paragraph 25; *Scheunemann*, paragraph 33; the order in Case C?102/05 *A and B* [2007] ECR I?3871, paragraph 29; and the order in *Test Claimants in the CFC and Dividend Group Litigation*, paragraph 88), legislation relating to the tax treatment of dividends originating in third countries is not capable of falling within the scope of Article 49 TFEU.

98 Where it is apparent from the purpose of such national legislation that it can only apply to those shareholdings which enable the holder to exert a definite influence on the decisions of the company concerned and to determine its activities, neither Article 49 TFEU nor Article 63 TFEU may be relied upon (*Test Claimants in the Thin Cap Group Litigation*, paragraphs 33, 34, 101 and 102, and the order in Case C?492/04 *Lasertec* [2007] ECR I?3775, paragraphs 22 and 27; see also the order in *A and B*, paragraphs 4 and 25 to 28).

99 On the other hand, national rules relating to the tax treatment of dividends from a third country which do not apply exclusively to situations in which the parent company exercises decisive influence over the company paying the dividends must be assessed in the light of Article 63 TFEU. A company resident in a Member State may therefore rely on that provision in order to call into question the legality of such rules, irrespective of the size of its shareholding in the company paying dividends established in a third country (see, to this effect, *A*, paragraphs 11 and 27).

100 Since the Treaty does not extend freedom of establishment to third countries, it is important to ensure that the interpretation of Article 63(1) TFEU as regards relations with third countries does not enable economic operators who do not fall within the limits of the territorial scope of freedom of establishment to profit from that freedom. Such a risk does not exist in a situation such as that at issue in the main proceedings. The legislation of the Member State in question does not relate to the conditions for access of a company from that Member State to the market in a third country or of a company from a third country to the market in that Member State. It concerns only the tax treatment of dividends which derive from investments which their recipient has made in a company established in a third country.

101 It should be added that the line of argument of the United Kingdom, German, French and Netherlands Governments that the freedom applicable to the tax treatment of dividends originating in third countries depends not only on the purpose of the national legislation at issue in the main proceedings but also on the particular circumstances of the case in those proceedings would produce effects incompatible with Article 64(1) TFEU.

102 It is apparent from that provision that Article 63 TFEU on the free movement of capital covers, in principle, capital movements involving establishment or direct investment. The latter terms relate to a form of participation in an undertaking through the holding of shares which confers the possibility of effectively participating in its management and control (see *Glaxo Welcome*, paragraph 40, and *Idrima Tipou*, paragraph 48).

103 According to the case?law, the restrictions on capital movements involving establishment or direct investment within the meaning of Article 64(1) TFEU extend not only to national measures which, in their application to capital movements to or from third countries, restrict establishment or investment, but also to those which restrict payments of dividends deriving from them (*Test Claimants in the FII Group Litigation*, paragraph 183, and *Holböck*, paragraph 36).

104 Having regard to the foregoing, the answer to the fourth question is that European Union law must be interpreted as meaning that a company that is resident in a Member State and has a shareholding in a company resident in a third country giving it definite influence over the decisions of the latter company and enabling it to determine its activities may rely upon Article 63 TFEU in

order to call into question the consistency with that provision of legislation of that Member State which relates to the tax treatment of dividends originating in the third country and does not apply exclusively to situations in which the parent company exercises decisive influence over the company paying the dividends.

Question 5

105 By its fifth question, the referring court seeks, in essence, to ascertain whether the reply given by the Court to the third question asked in the case which gave rise to the judgment in *Test Claimants in the FII Group Litigation* also applies where the subsidiaries established in other Member States to which ACT could not be surrendered are not subject to tax in the Member State of the parent company.

106 In *Test Claimants in the FII Group Litigation*, the Court held in reply to the referring court's third question that Article 49 TFEU precludes legislation of a Member State which allows a resident company to surrender to resident subsidiaries the amount of ACT paid which cannot be offset against the liability of that company to corporation tax for the current accounting period or previous or subsequent accounting periods, so that those subsidiaries may offset it against their liability to corporation tax, but does not allow a resident company to surrender such an amount to non-resident subsidiaries where the latter are taxable in that Member State on the profits which they made there.

107 The claimants in the main proceedings contend that this reply by the Court also applies where the profits of non-resident subsidiaries in respect of which such a surrender of surplus ACT is not possible are not subject to tax in the Member State of the parent company, but are subject to tax in other Member States. In their submission, it would be contrary to the objectives pursued by the national legislation at issue to limit the mechanism for surrendering surplus ACT to subsidiaries subject to tax in the United Kingdom. The national regime at issue in the main proceedings should have provided for the possibility of matching the ACT paid by the parent company with the foreign corporation tax borne by the subsidiary paying the dividends and should have allowed the surplus ACT to be refunded in order to prevent a series of charges to tax from being imposed upon the companies in the group.

108 In that regard, as the Commission points out, a distinction is to be drawn between ACT which has been charged unlawfully by the Member State concerned, contrary to the Treaty freedoms, and ACT which, as is apparent from paragraphs 62 and 72 of the present judgment, a resident company having received foreign-sourced dividends could legitimately be charged because it corresponded to the additional corporation tax payable in order to make up for the lower nominal rate of tax to which the profits underlying the foreign-sourced dividends had been subject compared with the nominal rate of tax applicable to the profits of the resident company.

109 It is clear from the answer given to the third question in the present case that unlawfully levied ACT must be repaid.

110 As regards, on the other hand, ACT which corresponds to the additional corporation tax which the Member State concerned was entitled to impose, it is to be recalled that ACT is an advance payment of corporation tax in the United Kingdom. The right to surrender surplus ACT to subsidiaries ensures that a group of companies that are subject to tax in the United Kingdom does not – by reason only of the existence of the ACT – pay tax of an amount exceeding the aggregate tax liability that has arisen in the United Kingdom. The extension of that right to non-resident companies that are not taxable in the United Kingdom, which would result in the surplus ACT being repaid, would in effect deny the United Kingdom the right to levy additional tax on foreign-sourced dividends paid out of profits which were subject to a nominal rate of tax lower than that

applicable in the United Kingdom and would thus jeopardise a balanced allocation of the power to impose taxes between Member States (see, to this effect, Case C?262/09 *Meilicke and Others* [2011] ECR I?5669, paragraph 33 and the case?law cited).

111 The answer to the fifth question therefore is that the reply given by the Court to the third question asked in the case which gave rise to the judgment in *Test Claimants in the FII Group Litigation* does not apply where the subsidiaries established in other Member States to which ACT could not be surrendered are not subject to tax in the Member State of the parent company.

Costs

112 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring 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 (Grand Chamber) hereby rules:

1. **Articles 49 TFEU and 63 TFEU must be interpreted as precluding legislation of a Member State which applies the exemption method to nationally-sourced dividends and the imputation method to foreign-sourced dividends if it is established, first, that the tax credit to which the company receiving the dividends is entitled under the imputation method is equivalent to the amount of tax actually paid on the profits underlying the distributed dividends and, second, that the effective level of taxation of company profits in the Member State concerned is generally lower than the prescribed nominal rate of tax.**

2. **The answers given by the Court to the second and fourth questions asked in the case which gave rise to the judgment of 12 December 2006 in Case C?446/04 *Test Claimants in the FII Group Litigation* also apply where:**

– **the foreign corporation tax to which the profits underlying the distributed dividends have been subject was not or was not wholly paid by the non-resident company paying those dividends to the resident company, but was paid by a company resident in a Member State that is a direct or indirect subsidiary of the first company;**

– **advance corporation tax has not been paid by the resident company which receives the dividends from a non-resident company, but was paid by its resident parent company under a group income election.**

3. **European Union law must be interpreted as meaning that a parent company resident in a Member State, which in the context of a group taxation scheme, such as the group income election at issue in the main proceedings, has, in breach of the rules of European Union law, been compelled to pay advance corporation tax on the part of the profits from foreign-sourced dividends, may bring an action for repayment of that unduly levied tax in so far as it exceeds the additional corporation tax which the Member State in question was entitled to levy in order to make up for the lower nominal rate of tax to which the profits underlying the foreign-sourced dividends were subject compared with the nominal rate of tax applicable to the profits of the resident parent company.**

4. **European Union law must be interpreted as meaning that a company that is resident in a Member State and has a shareholding in a company resident in a third country giving it definite influence over the decisions of the latter company and enabling it to determine its activities may rely upon Article 63 TFEU in order to call into question the consistency with that provision of legislation of that Member State which relates to the tax treatment of dividends originating in the third country and does not apply exclusively to situations in which the parent company exercises decisive influence over the company paying the**

dividends.

5. **The reply given by the Court to the third question asked in the case which gave rise to the judgment in *Test Claimants in the FII Group Litigation* does not apply where the subsidiaries established in other Member States to which advance corporation tax could not be surrendered are not subject to tax in the Member State of the parent company.**

[Signatures]

* Language of the case: English.