Provisional text

JUDGMENT OF THE COURT (Fifth Chamber)

4 October 2018 (*)

(Failure of a Member State to fulfil obligations — Articles 49 and 63 TFEU and the third paragraph of Article 267 TFEU — Series of charges to tax — Difference in treatment according to the Member State of residence of the sub-subsidiary — Reimbursement of the advance payment of tax unduly paid — Requirements relating to the evidence establishing a right to such reimbursement — Capping of the right to reimbursement — Discrimination — National court adjudicating at last instance — Obligation to make a reference for a preliminary ruling)

In Case C?416/17,

ACTION under Article 258 TFEU for failure to fulfil obligations, brought on 10 July 2017,

European Commission, represented by J.-F. Brakeland and W. Roels, acting as Agents,

applicant,

v

French Republic, represented by E. de Moustier, A. Alidière and D. Colas, acting as Agents,

defendant,

THE COURT (Fifth Chamber),

composed of J.L. da Cruz Vilaça, President of the Chamber, K. Lenaerts, President of the Court, acting as Judge of the Fifth Chamber, E. Levits (Rapporteur), M. Berger and F. Biltgen, Judges,

Advocate General: M. Wathelet,

Registrar: M.-A. Gaudissart, Deputy Registrar,

having regard to the written procedure and further to the hearing on 20 June 2018,

after hearing the Opinion of the Advocate General at the sitting on 25 July 2018,

gives the following

Judgment

1 By its application, the European Commission asks the Court to declare that, by its discriminatory and disproportionate treatment of French parent companies which receive dividends from foreign subsidiaries with regard to the right to reimbursement of tax levied in breach of EU law, as interpreted by the Court in its judgment of 15 September 2011, *Accor* (C?310/09, EU:C:2011:581), the French Republic has failed to fulfil its obligations under Article 49, Article 63 and the third paragraph of Article 267 TFUE, along with the principles of equivalence and effectiveness.

National law

2 In the version in force during the tax years at issue in the case which gave rise to the judgment of 15 September 2011, *Accor* (C?310/09, EU:C:2011:581), Article 146(2) of the code général des impôts (General Tax Code; 'CGI') provides as follows:

'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 the tax years ending within the last five years at most.'

3 Article 158 *bis*(I) of the CGI, in the version in force during the tax years at issue in the case which gave rise to the judgment of 15 September 2011, *Accor* (C?310/09, EU:C:2011:581), provides as follows:

'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.'

4 The first paragraph of Article 223 *sexies*(1) of the CGI indicated, in the version applicable to distributions paid after January 1999:

'… 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.'

Background to the dispute

Judgment of 15 September 2011, *Accor* (C?310/09, EU:C:2011:581)

5 In 2001, Accor, a company governed by French law, sought reimbursement from the French tax authority of the advance payment made when dividends received from its subsidiaries established in other Member States were redistributed. That application for reimbursement was linked to the fact that, when redistributing dividends only from resident companies, a parent company was entitled to set off the tax credit applied to the distribution of those dividends against the advance payment of tax for which it is liable. Following that authority's refusal to grant that application, Accor brought an action before the French administrative courts.

6 Having been requested to deliver a preliminary ruling by the Conseil d'État (Council of State,

France), the Court stated, in its judgment of 15 September 2011, *Accor* (C?310/09, EU:C:2011:581), first, in paragraph 49, that, by contrast with dividends originating from resident subsidiaries, the French legislation did not permit avoidance of taxation at the level of the non-resident distributing subsidiary, while dividends received both from resident subsidiaries and from non-resident subsidiaries were subject to the advance payment when redistributed.

7 The Court held, in paragraph 69 of that judgment, that such a difference in treatment between dividends distributed by a resident subsidiary and those distributed by a non-resident subsidiary was contrary to Articles 49 and 63 TFEU.

8 Next, in paragraph 92 of that judgment, the Court held that a Member State had to be in a position to determine the amount of the corporation tax paid in the Member State in which the distributing company was established which must be the subject of the tax credit granted to the recipient parent company, and, accordingly, that it was not sufficient to provide evidence that the distributing company had been taxed, in the Member State in which it was 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.

9 The Court added, in paragraphs 99 and 101 of that judgment, 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 have been met and that the request for production of that information should be made within the statutory period for retention of administrative documents and accounts, as laid down by the law of the Member State in which the subsidiary is established, without it being required to provide documents covering a period significantly longer than that period.

10 The Court accordingly held that:

‘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;

...

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.’

The judgments of the Conseil d’État

11 Following the delivery of the judgment of 15 September 2011, *Accor* (C?310/09, EU:C:2011:581), the Conseil d’État (Council of State, France), in its judgments of 10 December 2012, *Rhodia* (FR:CESSR:2012:317074.20121210), and of 10 December 2012, *Accor* (FR:CESSR:2012:317075.20121210) (‘the judgments of the Conseil d’État (Council of State)’) established the conditions for the reimbursement of advance payments made in breach of EU law.

12 With regard, first, to the scope of the reimbursement of the advance payments, the judgments of the Conseil d’État (Council of State) state that:

– where a dividend redistributed to a French parent company by one of its subsidiaries established in another Member State has not been taxed at the level of that subsidiary, the tax paid by a sub-subsidiary does not have to be taken into account in determining the advance payment to be reimbursed to the parent company (judgments of the Conseil d’État (Council of State) of 10 December 2012, *Rhodia*, FR:CESSR:2012:317074.20121210, paragraph 29, and of 10 December 2012, *Accor*, FR:CESSR:2012:317075.20121210, paragraph 24);

– where a distributing company has paid effective tax in its Member State at a rate higher than the normal rate of the French tax, that is 33.33%, the amount of the tax credit which it may claim must be limited to one third of the dividends that it has received and redistributed (judgments of the Conseil d’État (Council of State) of 10 December 2012, *Rhodia*, FR:CESSR:2012:317074.20121210, paragraph 44, and of 10 December 2012, *Accor*, FR:CESSR:2012:317075.20121210, paragraph 40).

13 As regards, in the second place, the evidence to be provided in support of the applications for reimbursement, the Conseil d’État (Council of State) acknowledged:

– the binding effect of the advance payment declarations for the purposes of determining the amount of the dividends received from subsidiaries established in another Member State (judgments of the Conseil d’État (Council of State) of 10 December 2012, *Rhodia*, FR:CESSR:2012:317074.20121210, paragraphs 24 and 25, and of 10 December 2012, *Accor*, FR:CESSR:2012:317075.20121210, paragraphs 19 and 20);

– the need for a person to possess all the evidence capable of demonstrating that its application is well founded throughout the duration of the proceedings, without the expiry of the statutory period for retention exempting it from that obligation (judgments of the Conseil d’État (Council of State) of 10 December 2012, *Rhodia*, FR:CESSR:2012:317074.20121210, paragraph 35, and of 10 December 2012, *Accor*, FR:CESSR:2012:317075.20121210, paragraph 31).

Pre-litigation procedure

14 Following the judgments of the Conseil d’État (Council of State), the Commission received several complaints concerning the conditions for reimbursement of advance payments made by French companies which had received dividends of foreign origin.

15 Since the Commission was not satisfied with the information exchanged between it and the French Republic, on 27 November 2014, it sent a letter of formal notice to the French authorities in which it noted that certain conditions for the reimbursement of advance payments of tax established by the judgments of the Conseil d'État (Council of State) were likely to constitute infringements of EU law.

16 In its reply of 26 January 2015, the French Republic disputed the complaints made against it. On 29 April 2016, the Commission sent a reasoned opinion calling upon the French Republic to take steps to comply within a period of two months of receipt of that opinion.

17 Since the French Republic maintained its position in its reply of 28 June 2016, the Commission brought the present action for failure to fulfil obligations on the basis of Article 258 TFEU.

The application

18 In support of its application, the Commission relies on four complaints, the first three alleging infringement of Articles 49 and 63 TFEU, as interpreted by the Court in the judgment of 15 September 2011, *Accor* (C?310/09, EU:C:2011:581), and of the principles of equivalence and effectiveness, and the fourth alleging infringement of the third paragraph of Article 267 TFEU.

The first complaint, alleging infringement of Articles 49 and 63 TFEU due to a restriction of the right to reimbursement of the advance payment resulting from the failure to take into account the taxation of sub-subsidiaries established in a Member State other than the French Republic

Arguments of the parties

19 The Commission considers that the judgments of the Conseil d'État (Council of State) did not remedy the incompatibility, found by the Court in its judgment of 15 September 2011, *Accor* (C?310/09, EU:C:2011:581), of the French legislation with Articles 49 and 63 TFEU. By virtue of the judgments of the Conseil d'État (Council of State), the taxation levied on the non-resident subsidiaries from which the dividends underlying the dividends distributed by the non-resident subsidiary to the resident parent company originate, is not taken into account for the purposes of reimbursement of the advance payment made by the parent company on redistribution of the dividends. Conversely, in a purely domestic chain of interests, economic double taxation is neutralised, since the distribution of dividends between a sub-subsidiary and the subsidiary gives rise to a tax credit of an amount equivalent to the advance payment due on account of that distribution.

20 Moreover, that difference in treatment on the basis of the head office of the distributing sub-subsidiary cannot be objectively justified.

21 First, the Commission maintains that the lack, in French law, of the concept of a 'sub-subsidiary' cannot constitute the basis for failing to take into account the taxation of the profits underlying the dividends distributed by the non-resident sub-subsidiary to the parent company via its subsidiary, as the risk would arise that the tax credit mechanism would be applied too formalistically. In addition, the treatment of dividends is at issue on the basis of their origin and not on the basis of entities in a chain of interests. In that regard, the fact that a subsidiary benefited from a tax exemption is irrelevant, since, initially the dividends distributed by the sub-subsidiary were taxed.

22 Next, since there is an obligation under French law to make an advance payment when distributing dividends, it cannot be claimed that the additional tax burden applicable to dividends distributed by a resident company, which originate in a prior distribution of dividends between its non-resident subsidiary and sub-subsidiary, derives from the legislation of the Member States in which they are established.

23 Finally, the Commission maintains that the French Republic cannot avoid its obligation to prevent economic double taxation in the event of the distribution of dividends originating in the profits of a non-resident sub-subsidiary on the ground that it is not required to adapt its tax system to different tax regimes of other Member States. According to the Commission, the French Republic is required not to adapt its own tax system, but only to apply it equally, irrespective of the origin of the dividends distributed.

24 The French Republic does not dispute the fact that the arrangements for reimbursement of the advance payment as defined in the judgments of the Conseil d'État (Council of State) do not permit the tax levied on dividends distributed by a non-resident sub-subsidiary to be offset. However, it claims that the French system only ensures avoidance of double taxation at the level of each distributing company. A Member State is free to organise its taxation system, provided that it does not entail discrimination, with the result that it is not required to adapt its own tax system to those of other Member States.

25 In the present case, French tax legislation does not allow the taxation payable by a parent company to be offset against the taxes paid by its resident sub-subsidiaries. The tax credit is granted to the parent company solely on account of the tax levied on the profits of the distributing subsidiary. Accordingly, the French Republic is under no obligation to ensure that account is taken, when calculating the reimbursement of the advance payment made, of the taxation levied on non-resident sub-subsidiaries which distribute dividends.

26 The fact that the distribution of dividends by a sub-subsidiary to a subsidiary has been taxed is then the result of the application of tax legislation from outside the French Republic, which it is not for it to correct.

27 Furthermore, in so far as the French system for the elimination of double taxation is silent as regards sub-subsidiaries, the tax payable when dividends are distributed may be set off only in respect of the company which receives those dividends. In other words, it concerns a binary relationship between two entities, a distributor and a recipient, and in the event of redistribution by an intermediate company, the sub-subsidiary is then considered to be the subsidiary of the intermediate company.

28 In those circumstances, the French system must thus be distinguished from the UK system of advance corporation tax at issue in the cases giving rise to the judgments of 12 December 2006, *Test Claimants in the FII Group Litigation* (C?446/04, EU:C:2006:774), and of 13 November 2012, *Test Claimants in the FII Group Litigation* (C?35/11, EU:C:2012:707). The French system does not take into account the tax payable by sub-subsidiaries, irrespective of whether or not they are resident, since its approach is based on offsetting taxation and not group taxation.

Findings of the Court

29 By its first complaint, the Commission considers that the impossibility resulting from the judgments of the Conseil d'État (Council of State) of claiming, for reimbursement of the advance payment payable by a parent company resident in France when distributing dividends, the tax levied on the profits underlying those dividends made by a sub-subsidiary of that company

established in another Member State, when they were redistributed to that parent company via a non-resident subsidiary, cannot remedy the incompatibility of the French mechanism for the avoidance of double taxation with Articles 49 and 63 TFEU, as found by the Court in its judgment of 15 September 2011, *Accor* (C?310/09, EU:C:2011:581).

30 In paragraph 69 of that judgment, the Court held that Articles 49 and 63 TFEU preclude legislation of a Member State 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 originate from a subsidiary established in that Member State, but does not offer that right if those dividends were distributed by a subsidiary established in another Member State, since, in that case, such distribution does not entail a tax credit applied to the distribution of those dividends by that subsidiary.

31 As the Commission maintains, the implementation by the Conseil d'État (Council of State) of the judgment of 15 September 2011, *Accor* (C?310/09, EU:C:2011:581), has the consequence that a resident parent company, which is a recipient of dividends distributed by one of its subsidiaries established in another Member State, is granted the advance payment reimbursement on account of the redistribution of those dividends to its shareholders, taking into account the tax levied on those dividends at subsidiary level only. By contrast, the tax levied on those dividends at an earlier stage, at a lower level of the chain of interests with respect to a sub-subsidiary, is not taken into account for the purpose of determining the amount to be reimbursed.

32 In that regard, the French Republic does not dispute that, in the context of a purely domestic chain of interests, the French system for the avoidance of economic double taxation automatically entails taking into account the taxation of dividends distributed at every level of a chain of interests. Every distribution of dividends by a subsidiary gives rise to an entitlement to a tax credit that the parent company can set off against the advance payment for which it is liable, as a subsidiary, when it redistributes those dividends to its own parent company, an advance payment which is equal to the tax credit. The system in question thus prevents economic double taxation of the profits distributed by granting a tax credit to the parent company which offsets the advance payment payable on the profits it has redistributed.

33 By contrast, in the case of cross-border distribution of dividends, the limitation, for calculation of the advance payment payable in the event of redistribution by a recipient resident parent company, to the taxation levied on those dividends in respect of the non-resident distributing subsidiary itself, entails, where the profits underlying those dividends were made by a sub-subsidiary, less favourable treatment of those dividends than in the case of a purely domestic chain of interests.

34 In the event that the dividends distributed by a non-resident subsidiary to its resident parent company have enjoyed a tax exemption in the Member State in which the subsidiary is established, the amount of the reimbursement of the advance payment due in the event of redistribution is zero, since the dividends were not taxed at subsidiary level. Failure to take into account the effective tax levied on the profits underlying the dividends which were distributed at an earlier stage, at a lower level of the chain of interests, that is to say by a sub-subsidiary of the subsidiary therefore entails economic double taxation of the benefits distributed.

35 As the French Republic claims, EU law currently in force 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 in the European Union. Thus, each Member State remains free to organise its system for taxing distributed profits, provided that the system in question does not entail discrimination prohibited by the FEU Treaty (see, to that effect, judgment of 13 November

2012, *Test Claimants in the FII Group Litigation*, C?35/11, EU:C:2012:707, paragraph 40).

36 It should be recalled that, in the context of tax rules, such as those whose implementing rules are challenged by the Commission, 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 (judgments of 12 December 2006, *Test Claimants in the FII Group Litigation*, C?446/04, EU:C:2006:774, paragraph 62; of 15 September 2011, *Accor*, C?310/09, EU:C:2011:581, paragraph 45; and of 13 November 2012, *Test Claimants in the FII Group Litigation*, C?35/11, EU:C:2012:707, paragraph 37).

37 Articles 49 and 63 TFEU require a Member State which has a system for the avoidance 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 (judgments of 12 December 2006, *Test Claimants in the FII Group Litigation*, C?446/04, EU:C:2006:774, paragraph 72; of 10 February 2011, *Haribo Lakritzen Hans Riegel and Österreichische Salinen*, C?436/08 and C?437/08, EU:C:2011:61, paragraph 60; and of 13 November 2012, *Test Claimants in the FII Group Litigation*, C?35/11, EU:C:2012:707, paragraph 38) unless a difference in treatment is justified by overriding reasons in the public interest (judgments of 15 September 2011, *Accor*, C?310/09, EU:C:2011:581, paragraph 44, and of 11 September 2014, *Kronos International*, C?47/12, EU:C:2014:2200, paragraph 69).

38 Furthermore, the argument relied on by the French Republic alleging that the lack of the concept of a ‘sub-subsidiary’ in the French system for the avoidance of double taxation is irrelevant, with regard to the objective of the rules in question and the mechanism adopted for its implementation.

39 Even though the granting of the tax credit is provided for only in the context of a binary relationship between the parent company and its subsidiary, the fact remains that the tax regime in question also avoids economic double taxation of profits distributed by resident sub-subsidiaries on account of the successive granting, at all levels of the chain of interests of companies established in France, of the tax advantage in question.

40 The French Republic submits that the disadvantages which could arise from the parallel exercise of powers of taxation by different Member States do not constitute restrictions on the freedoms of movement to the extent that such an exercise is not discriminatory.

41 Indeed, the status of Member State of residence of the company receiving dividends cannot entail the obligation for that Member State to offset a fiscal disadvantage arising where a series of charges to tax is imposed entirely by the Member State in which the company distributing those dividends is established, in so far as the dividends received are neither taxed nor taken into account in a different way by the first Member State as regards companies established in that State (see, to that effect, judgment of 11 September 2014, *Kronos International*, C?47/12, EU:C:2014:2200, paragraph 84).

42 However, as is apparent from paragraph 39 of the present judgment, the tax disadvantage in question arises from French tax legislation. That legislation subjects, by means of the advance payment, the redistribution of profits already taxed to tax but allows that economic double taxation to be eliminated where the redistributed profits were initially taxed in respect of a resident sub-subsidiary. By contrast, the same legislation subjects the redistribution of profits originating initially from a non-resident sub-subsidiary to tax even if those profits were previously taxed in the Member State in which that sub-subsidiary is established, without allowing the latter taxation to be

taken into account for the purposes of eliminating the economic double taxation arising from the French legislation.

43 The French Republic was therefore required, in order to bring an end to the discriminatory treatment thus found in the application of that tax mechanism seeking to avoid the economic double taxation of distributed dividends, to take into account the taxation levied earlier on the distributed profits resulting from the exercise of the tax powers of the Member State in which the dividends originated, within the limits of its own powers of taxation (see, to that effect, judgment of 11 September 2014, *Kronos International*, C?47/12, EU:C:2014:2200, paragraph 86), irrespective of the level of the chain of interests on which that tax was levied, that is to say a subsidiary or a sub-subsidiary.

44 It follows from paragraph 82 of the judgment of 13 November 2012, *Test Claimants in the FII Group Litigation* (C?35/11, EU:C:2012:707), read in conjunction with the operative part of the judgment of 12 December 2006, *Test Claimants in the FII Group Litigation* (C?446/04, EU:C:2006:774), that it is for the Member State, which allows a resident company that receives dividends from a non-resident company to deduct the amount of the tax paid by the second company from the amount payable by the first company in respect of corporation tax, to recognise that right for a resident company receiving dividends from a non-resident company, concerning tax corresponding to the profits distributed, irrespective of whether it was paid by a direct or indirect subsidiary of the first company.

45 In that regard, the difference between the French mechanism, based on the grant of a tax credit in question in the present case and the UK mechanism at issue in the cases giving rise to the judgments of 12 December 2006, *Test Claimants in the FII Group Litigation* (C?446/04, EU:C:2006:774), and of 13 November 2012, *Test Claimants in the FII Group Litigation* (C?35/11, EU:C:2012:707), does not affect the principle recalled in the preceding paragraph. That difference concerns only the taxation method used to achieve the same objective, that is to say eliminating economic double taxation of distributed profits. Thus, each Member State remains free to organise its system for the avoidance of economic double taxation of distributed profits, in so far as the system in question does not entail discrimination prohibited by the FEU Treaty (see, to that effect, judgment of 13 November 2012, *Test Claimants in the FII Group Litigation*, C?35/11, EU:C:2012:707, paragraph 40).

46 It follows from the foregoing that, by refusing to take into account, in order to calculate the reimbursement of the advance payment made by a resident parent company in respect of the distribution of dividends paid by a non-resident sub-subsidiary via a non-resident subsidiary, the tax on the profits underlying those dividends incurred by that non-resident sub-subsidiary, in the Member State in which it is established, even though the national mechanism for the avoidance of economic double taxation allows, in the case of a purely domestic chain of interests, the tax levied on the dividends distributed by a company at every level of that chain of interests to be offset, the French Republic has failed to fulfil its obligations under Articles 49 and 63 TFEU.

The second complaint, alleging that the evidentiary requirements laid down in order to establish the right to reimbursement of the advance payment unlawfully made are disproportionate

Arguments of the parties

47 The Commission’s second complaint consists of two parts.

48 By the first part of that complaint, the Commission claims that the requirement that the accounting documents relating to the dividends distributed are consistent with the minutes of

general meetings of the subsidiaries recording the profits made in the form of distributable dividends makes it very difficult or impossible to prove that the dividends distributed are connected to a particular accounting result, since the minutes of general meetings often refer to an accounting aggregate, encompassing carry-overs from previous financial years.

49 In the second part, the Commission maintains that, by making the right to reimbursement of the advance payment conditional upon lodging a prior advance payment declaration identifying the advance payment amounts paid in respect of redistributions of dividends, the judgments of the Conseil d'État (Council of State) nullify that right in practice. This is particularly the case for companies which had not claimed the benefit of the tax credit for distributed dividends from non-resident subsidiaries before the delivery of the judgment of 15 September 2011, *Accor* (C?310/09, EU:C:2011:581).

50 Since, by virtue of French legislation, resident companies could not be granted a tax credit in respect of the advance payment payable owing to the distribution of dividends from a non-resident subsidiary, those companies could not be required to record those dividends in their advance payment declarations.

51 Finally, the third part of that complaint alleges that, having indicated that the expiry of the statutory period for retention of the documents did not exempt the company seeking reimbursement of the advance payment unlawfully made from its obligation to produce all the evidence capable of demonstrating that its application was well founded, the judgments of the Conseil d'État (Council of State) make it extremely difficult or impossible to prove that tax was paid by the non-resident subsidiary on the dividends distributed.

52 First of all, the French Government maintains that the judgment of 15 September 2011, *Accor* (C?310/09, EU:C:2011:581) expressly stated that reimbursements of the advance payment were conditional upon the applicant companies providing evidence, by any means, of the taxes paid by their subsidiaries in the Member State in which they are established.

53 In that context, the judgments of the Conseil d'État (Council of State) are marked by a particularly flexible approach, since that court has accepted any form of documents which allows the companies to show the tax rate to which their non-resident subsidiaries were subject.

54 First, the French Republic states that, according to the judgments of the Conseil d'État (Council of State), proof that the taxation in respect of which offsetting was sought had been charged on dividends corresponding to a particular financial year was not required. The tax paid on the basis of dividends is thus considered as a whole, regardless of the financial years from which they originated.

55 In addition, the fact that, in the cases which led to the adoption of the judgments of the Conseil d'État (Council of State), that court relied on the minutes of general meetings of non-resident subsidiaries stems from the fact that such documents were submitted by the companies concerned to prove the tax rate amount charged on the dividends distributed.

56 Second, the French Republic maintains that the advance payment forms make it technically possible to identify the amounts of the advance payments made in respect of dividend redistributions from non-resident subsidiaries. In addition, since the advance payment is payable only in the event of redistribution, the dividends in respect of which proof of the amount of taxation is required are necessarily those which have been redistributed.

57 Third, the judgments of the Conseil d'État (Council of State) did not require supporting evidence not covered by the statutory retention period to be produced. The Conseil d'État (Council

of State) based its assessment on the documents submitted by the companies concerned. In any event, it is for a taxpayer who has submitted a tax claim to retain the documents required to prove that his application is well founded until the outcome of the administrative or litigation procedures, regardless of the statutory period for retention of those documents.

Findings of the Court

– *Preliminary observations*

58 It should be noted, first, 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, judgments of 3 October 2002, *Danner*, C?136/00, EU:C:2002:558, paragraph 50; of 26 June 2003, *Skandia and Ramstedt*, C?422/01, EU:C:2003:380, paragraph 43; of 27 January 2009, *Persche*, C?318/07, EU:C:2009:33, paragraph 54; of 10 February 2011, *Haribo Lakritzen Hans Riegel and Österreichische Salinen*, C?436/08 and C?437/08, EU:C:2011:61, paragraph 95; of 30 June 2011, *Meilickeand Others*, C?262/09, EU:C:2011:438, paragraph 45; and of 15 September 2011, *Accor*, C?310/09, EU:C:2011:581, paragraph 82).

59 Second, in order to provide a practical remedy to the incompatibility of the French legislation with Articles 49 and 63 TFEU, as interpreted by the Court in its judgment of 15 September 2011, *Accor* (C?310/09, EU:C:2011:581), the Court held that 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, which must be the subject of the tax credit granted to the recipient parent company, and stated that 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 (judgment of 15 September 2011, *Accor*, C?310/09, EU:C:2011:581, paragraph 92).

– *The first part*

60 It must be noted that, in its application, in order to establish that the French Republic imposes disproportionate evidential requirements by requiring that the accounting documents relating to the dividends distributed are consistent with the minutes of general meetings of the subsidiaries recording the profits made in the form of distributable dividends, the Commission refers to paragraphs 43 and 56 of the judgment of the Conseil d'État (Council of State) of 10 December 2012, *Accor* (FR:CESSR:2012:317075.20121210) concerning the examination of reimbursable sums in respect of 1999 to 2001.

61 It follows that the Commission does not dispute the need for a parent company which seeks reimbursement of the advance payment unlawfully made to adduce evidence relating, for each dividend, to the tax rate actually applied and to the amount of tax actually paid in relation to profits made by non-resident subsidiaries.

62 It does not follow from the judgment of the Conseil d'État (Council of State) of 10 December 2012, *Accor* (FR:CESSR:2012:317075.20121210), that that court intended to limit the evidence that the amounts for which reimbursement is sought actually concern distributed dividends to the submission of minutes of general meetings of subsidiaries recording such a distribution.

63 Although reference is made, in that judgment, to such documents, there are no grounds to conclude that recognition of the right to reimburse an advance payment unlawfully made

necessarily requires that they be produced.

64 In that regard, it must be recalled that, in the context of proceedings brought under Article 258 TFEU for failure to fulfil obligations, it is for the Commission to prove the allegation that an obligation has not been fulfilled, by placing before the Court all the information required to enable the Court to establish that the obligation has not been fulfilled (judgment of 28 January 2016, *Commission* v *Portugal*, C?398/14, EU:C:2016:61, paragraph 47).

65 In the light of the foregoing considerations, the Commission has failed to satisfy its requirement to adduce evidence, with the result that the first part of the second complaint cannot succeed.

– *The second part*

66 The Commission considers that French law, as applied in the judgments of the Conseil d'État (Council of State) and, more particularly, the limitation arising from the requirement to produce advance payment declarations and the ability to rely on the choices made by a parent company when making the advance payment at the time of those declarations constitutes an infringement of the principles of equivalence and effectiveness.

67 In that regard, it is common ground that, in order to remedy the incompatibility of the French legislation with Articles 49 and 63 TFEU, as interpreted by the Court in its judgment of 15 September 2011, *Accor* (C?310/09, EU:C:2011:581), it was for the French Republic to reimburse the advance payments made by resident companies when redistributing dividends from their non-resident subsidiaries, taking into account the tax levied on the profits underlying those dividends in the State in which those subsidiaries are established, within the limits of the tax rate applicable in France.

68 Since, first, an application for reimbursement must be conditional upon the making of the earlier advance payment and, second, the chargeable event for making an advance payment is the distribution of dividends, such an application cannot be admissible if no advance payment has been made.

69 That is why the advance payment declarations concern the distribution of the dividends as a whole, irrespective of their origin, thereby allowing the amounts of the advance payment made in respect of the distribution of dividends from non-resident companies to be identified.

70 In that regard, the French Republic adduced evidence that the advance payment declaration forms require distributions of dividends from foreign subsidiaries to be mentioned, which the Commission ceased to dispute at the stage of its reply.

71 Accordingly, it cannot be held that objecting to the choices made by a parent company when making the advance payment in the relevant declaration constitutes an infringement of the principles of equivalence and effectiveness.

72 In those circumstances, having regard to the fact that the burden of proof lies with the Commission, as was noted in paragraph 64 of the present judgment, the second part of the second complaint must be rejected as unfounded.

– *The third part*

73 According to the Commission, the judgments of the Conseil d'État (Council of State) make it very difficult, or impossible, to prove that tax has been paid by a non-resident subsidiary on dividends distributed, in that they do not exempt the parent company claiming reimbursement of

the advance payment from the obligation to produce supporting documents relating to the payment for which the statutory retention period, arising from the national law of another Member State, has expired.

74 It should be noted, as regards compliance with the principle of effectiveness 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 (see, to that effect, judgment of 15 September 2011, *Accor*, C?310/09, EU:C:2011:581, paragraph 99).

75 In addition, the production of information relating, for each dividend to the tax rate actually applied and to the amount of tax actually paid on profits made by subsidiaries established in other Member States can only be required on condition that it is not 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 (see, to that effect, judgment of 15 September 2011, *Accor*, C?310/09, EU:C:2011:581, paragraph 100).

76 In that regard, the request for production of that information should 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. Thus, such a request cannot concern documents covering a period significantly longer than the statutory period for retention of administrative documents and accounts (see, to that effect, judgment of 15 September 2011, *Accor* , C?310/09, EU:C:2011:581, paragraph 101).

77 Accordingly, it follows from the judgment of 15 September 2011, *Accor* (C?310/09, EU:C:2011:581), that the tax authorities of a Member State cannot require the production of administrative documents in support of an application for reimbursement after a period significantly longer than the statutory period for retention of those documents in the Member State of origin of those documents.

78 In that regard, it follows from paragraph 35 of the judgment of the Conseil d’État (Council of State) of 10 December 2012, *Rhodia* (FR:CESSR:2012:317074.20121210), and from paragraph 31 of the judgment of the Conseil d’État (Council of State) of 10 December 2012, *Accor* (FR:CESSR:2012:317075.20121210), that a company which has submitted a claim must possess all the evidence capable of demonstrating that its application is well founded throughout the duration of the proceedings, without the expiry of the statutory period for retention of the documents exempting it from that obligation.

79 In those circumstances, as the Advocate General pointed out in point 64 of his Opinion, the relevant date for assessing the existence of any infringement of the principle of effectiveness, on account of the fact that the tax authorities of a Member State requested that an administrative document be produced in order to prove certain facts is the date on which that pre-litigation procedure was initiated.

80 Accordingly, the obligation to submit evidence capable of demonstrating that an application for reimbursement is well founded, in the context of a claim procedure, cannot constitute an infringement of the principle of effectiveness, to the extent that that obligation does not cover a period significantly longer than the statutory period for retention of administrative documents and accounts.

81 The judgments of the Conseil d’État (Council of State) do not point to any infringement of that principle in stating that the expiry of the statutory period for retaining the documents does not

affect a company's obligation to possess all the evidence capable of demonstrating that its application is well founded 'throughout the entire procedure', and in particular during the court proceedings. A company cannot claim that the expiry of that period automatically entails a right to reimbursement of the advance payment made.

82 As regards the alleged infringement of the principle of equivalence, the Commission does not put forward any argument to substantiate that complaint.

83 Consequently, since the third part of the second complaint is not well founded, the second complaint must be rejected in its entirety.

The third complaint, alleging the capping of the amount reimbursable in respect of the advance payment unlawfully made at one third of the amount of the dividends distributed

Arguments of the parties

84 The Commission recalls that the judgments of the Conseil d'État (Council of State) impose a limit on the amount to be reimbursed to parent companies in respect of the advance payment made for the distribution of dividends received from a non-resident subsidiary, which amounts to one third of the amount of the dividends distributed.

85 According to the Commission, since the amount of the tax credit for dividends distributed by a resident subsidiary is always equal to half of those dividends, the judgments of the Conseil d'État (Council of State) did not put an end to the discrimination, found by the Court in the judgment of 15 September 2011, *Accor* (C?310/09, EU:C:2011:581), between dividends distributed by a resident company and those distributed by a non-resident company.

86 The French Republic submits that the cap on the reimbursement of the advance payment at one third of the dividends received corresponds to the amount of the advance payment actually made. The equal treatment of dividends distributed by resident subsidiaries and dividends distributed by non-resident subsidiaries is thus fully guaranteed.

87 In addition, such a cap on the reimbursement of the advance payment allows account to be taken of the tax charged on dividends distributed from the Member State in which the subsidiary is established, in the same way as that charged on dividends distributed by a resident subsidiary.

88 On that basis, that limitation could indeed, in practice, lead to a reimbursement of the advance payment which is lower than the tax actually paid by the distributing subsidiary in its Member State of establishment. However, that reimbursement corresponds exactly to the amount of the advance payment actually made by the resident company, with the result that the treatment of dividends of foreign origin is not more favourable than that of dividends distributed by a resident company.

Findings of the Court

89 In paragraph 87 of the judgment of 15 September 2011, *Accor* (C?310/09, EU:C:2011:581), the Court held that while 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, that law does not require Member States to give taxpayers which have invested in foreign companies an advantage compared with those who have invested in domestic companies.

90 In the present case, it is common ground that, by virtue of the judgments of the Conseil

d’État (Council of State), the amount to be reimbursed to the parent companies in respect of the advance payment, made with the distribution of the dividends received from a non-resident subsidiary, is capped at one third of the amount of the dividends received.

91 The Commission considers that, since the tax credit granted to a company distributing dividends received from a resident subsidiary is always equal to half of those dividends, the cap, in the event of distribution of dividends from a non-resident subsidiary, on the reimbursement of the advance payment made at one third of the amount of those dividends constitutes discrimination.

92 Such an argument cannot, however, be accepted.

93 As the Advocate General pointed out in point 74 of his Opinion, the application of the provisions of the CGI in force during the tax years at issue in the judgments of the Conseil d’État (Council of State) can lead, ultimately, to equivalent treatment of dividends redistributed by a parent company to its shareholders, irrespective of whether the subsidiary which initially made those profits was resident or non-resident.

94 In that regard, it follows from the wording of the first paragraph of Article 223 *sexies*(1) of the CGI that the advance payment that a parent company is required to make when redistributing dividends to its own shareholders is equal to the tax credit calculated under the conditions provided for in Article 158 *bis* of the CGI, that tax credit being equal to half of the dividends paid earlier by that parent company. That tax credit is used to offset, in respect of the parent company, the obligation to make the advance payment and eliminate the economic double taxation of the profits distributed.

95 As the French Republic set out in its defence, without being contradicted in that regard by the Commission, when the dividends distributed by a subsidiary are not matched by any tax credit, which is the case concerning a non-resident subsidiary, since the advance payment to be made by the parent company is equivalent to a third of the dividends distributed. It follows that the cap on the reimbursement of the advance payment to the parent company at a third of the dividends distributed may also, ultimately, avoid economic double taxation of the profits distributed.

96 In those circumstances, that cap can remedy the difference in treatment between those dividends and dividends from a resident subsidiary, as noted by the Court in its judgment of 15 September 2011, *Accor* (C?310/09, EU:C:2011:581). By virtue of the principles identified by the Court in that judgment, in particular in paragraph 88 thereof, a Member State cannot be required to grant a tax credit in respect of tax paid, in another Member State, on distributed profits which exceeds the amount of tax resulting from the application of its own tax legislation.

97 The Commission also argues, in its reply, that, when a parent company, after recovering the advance payment which was unlawfully made, distributes those amounts to its own shareholders, those shareholders are likely to experience a shortfall compared with a purely domestic distribution.

98 It suffices to note, in that regard, that the circumstances leading to the judgments of the Conseil d’État (Council of State) did not concern the situation of the ultimate shareholders of the distributing companies, since the actions of the parent companies in question in those cases concern the recovery of the advance payment made by the latter.

99 Therefore, the third complaint must be dismissed.

Fourth complaint, alleging infringement of Article 267(3) TFEU

Arguments of the parties

100 According to the Commission, the Conseil d'État (Council of State) should have made a reference for a preliminary ruling to the Court before establishing the procedures for reimbursement of the advance payment, the levying of which was found to be incompatible with Articles 49 and 63 TFEU in accordance with the judgment of 15 September 2011, *Accor* (C?310/09, EU:C:2011:581).

101 First, the Commission submits that the Conseil d'État (Council of State) is a court against whose decisions there is no judicial remedy under national law, within the meaning of the third paragraph of Article 267 TFEU, which is required to make a reference for a preliminary ruling when it is seised of a dispute that raises a question concerning the interpretation of EU law.

102 Second, the compatibility with EU law of the restrictions arising from the judgments of the Conseil d'État (Council of State) appears doubtful, at the very least, in the light, in particular, of the case-law established in the judgment of 13 November 2012, *Test Claimants in the FII Group Litigation* (C?35/11, EU:C:2012:707). In any event, the mere fact that the Commission has a different understanding of the principles established in the judgment of 15 September 2011, *Accor* (C?310/09, EU:C:2011:581), from that expressed by the Conseil d'État (Council of State) shows that the solutions arising from those judgments cannot enjoy a presumption of compatibility with EU law.

103 The French Republic maintains that the Commission has failed to specify the difficulties with which the Conseil d'État (Council of State) was faced in the cases which gave rise to the judgments referred to by that institution and which justified a reference for a preliminary ruling under the third paragraph of Article 267 TFEU. The only difficulties faced by the Conseil d'État (Council of State) were, in reality, factual difficulties and not difficulties concerning the interpretation of EU law.

104 In any event, according to the French Republic, the Conseil d'État (Council of State) was justified in considering that the answers to the questions put to it could be clearly inferred from the case-law.

Findings of the Court

105 It is important to note that the Commission's fourth complaint is based on the premiss that the Conseil d'État (Council of State), as a court adjudicating at last instance, was not entitled to interpret EU law, as it arises from the judgments of 10 December 2012, *Rhodia* (FR:CESSR:2012:317074.20121210), and of 10 December 2012, *Accor* (FR:CESSR:2012:317075.20121210), without, first, making a reference for a preliminary ruling to the Court.

106 In that regard, it should be noted, first, that the obligation of the Member States to comply with the provisions of the FEU Treaty is binding on all their authorities, including, for matters within their jurisdiction, the courts.

107 Thus, a Member State’s failure to fulfil obligations may, in principle, be established under Article 258 TFEU whatever the agency of that State whose action or inaction is the cause of the failure to fulfil its obligations, even in the case of a constitutionally independent institution (judgments of 9 December 2003, *Commission* v *Italy*, C?129/00, EU:C:2003:656, paragraph 29, and of 12 November 2009, *Commission* v *Spain*, C?154/08, not published, EU:C:2009:695, paragraph 125).

108 Second, it must also be noted that, where there is no judicial remedy against the decision of a national court, that court is in principle obliged to make a reference to the Court within the meaning of the third paragraph of Article 267 TFEU where a question of the interpretation of the FEU Treaty is raised before it (judgment of 15 March 2017, *Aquino*, C?3/16, EU:C:2017:209, paragraph 42).

109 Moreover, the obligation to make a reference laid down in that provision is intended in particular to prevent a body of national case-law that is not in accordance with the rules of EU law from being established in any of the Member States (judgment of 15 March 2017, *Aquino*, C?3/16, EU:C:2017:209, paragraph 33 and the case-law cited).

110 Indeed, that court is not under such an obligation when it finds that the question raised is irrelevant or that the provision of EU law in question has already been interpreted by the Court or that the correct application of EU law is so obvious as to leave no scope for any reasonable doubt, and the existence of such a possibility must be assessed in the light of the specific characteristics of EU law, the particular difficulties to which its interpretation gives rise and the risk of divergences in judicial decisions within the European Union (see, to that effect, judgments of 6 October 1982, *Cilfit and Others*, 283/81, EU:C:1982:335, paragraph 21; of 9 September 2015, *Ferreira da Silva e Brito and Others*, C?160/14, EU:C:2015:565, paragraphs 38 and 39; and of 28 July 2016, *Association France Nature Environnement*, C?379/15, EU:C:2016:603, paragraph 50).

111 In that regard, as regards the matter examined in the context of the first complaint of the present action for failure to fulfil obligations, as the Advocate General observed in point 99 of his Opinion, the judgment of 15 September 2011, *Accor* (C?310/09, EU:C:2011:581), being silent in that respect, the Conseil d’État (Council of State) chose to depart from the judgment of 13 November 2012, *Test Claimants in the FII GroupLitigation* (C?35/11, EU:C:2012:707), on the ground that the British scheme at issue was different from the French tax credit and advance payment scheme, while it could not be certain that its reasoning would be equally obvious to the Court.

112 Furthermore, it follows from what was held in paragraphs 29 to 46 of the present judgment, in the context of examining the first complaint raised by the Commission, that the absence of a reference for a preliminary ruling on the part of the Conseil d’État (Council of State) in the cases giving rise to the judgments of 10 December 2012, Rhodia (FR:CESSR:2012:317074.20121210), and of 10 December 2012, *Accor* (FR:CESSR:2012:317075.20121210), led that court to adopt, in those judgments, a solution based on an interpretation of the provisions of Articles 49 and 63 TFEU which is at variance with that of the present judgment, which implies that the existence of reasonable doubt concerning that interpretation could not be ruled out when the Conseil d’État (Council of State) delivered its ruling.

113 Consequently, there is no need to examine the other arguments put forward by the Commission in the context of the present complaint and it must be held that it was for the Conseil d’État (Council of State), as a court or tribunal against whose decisions there is no judicial remedy under national law, to request a preliminary ruling from the Court of Justice on the basis of the third paragraph of Article 267 TFEU in order to avert the risk of an incorrect interpretation of EU

law (see, to that effect, judgment of 9 September 2015, *Ferreira da Silva e Brito and Others*, C?160/14, EU:C:2015:565, paragraph 44).

114 Consequently, since the Conseil d'État (Council of State) failed to make a reference to the Court, in accordance with the procedure provided for in the third paragraph of Article 267 TFEU, in order to determine whether it was necessary to refuse to take into account, for the purpose of calculating the reimbursement of the advance payment made by a resident company in respect of the distribution of dividends paid by a non-resident company via a non-resident subsidiary, the tax incurred by that second company on the profits underlying those dividends, even though its interpretation of the provisions of EU law in the judgments of 10 December 2012, *Rhodia* (FR:CESSR:2012:317074.20121210), and of 10 December 2012, *Accor* (FR:CESSR:2012:317075.20121210), was not so obvious as to leave no scope for doubt, the fourth complaint must be upheld.

Costs

115 Under Article 138(1) of the Rules of Procedure of the Court, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs and the French Republic has been unsuccessful in part, each party must be ordered to bear its own costs.

On those grounds, the Court (Fifth Chamber) hereby:

1. **Declares that, by refusing to take into account, in order to calculate the reimbursement of the advance payment made by a resident company in respect of the distribution of dividends paid by a non-resident company via a non-resident subsidiary, the tax incurred by that second company on the profits underlying those dividends, even though the national mechanism for the avoidance of economic double taxation allows, in the case of a purely domestic chain of interests, the tax levied on the dividends distributed by a company at every level of that chain of interests to be offset, the French Republic has failed to fulfil its obligations under Articles 49 and 63 TFEU;**

2. **Declares that, since the Conseil d'État (Council of State, France) failed to make a reference to the Court of Justice of the European Union, in accordance with the procedure provided for in the third paragraph of Article 267 TFEU, in order to determine whether it was necessary to refuse to take into account, for the purpose of calculating the reimbursement of the advance payment made by a resident company in respect of the distribution of dividends paid by a non-resident company via a non-resident subsidiary, the tax incurred by that second company on the profits underlying those dividends, even though its interpretation of the provisions of EU law in the judgments of 10 December 2012,** *Rhodia* **(FR:CESSR:2012:317074.20121210), and of 10 December 2012,** *Accor* **(FR:CESSR:2012:317075.20121210), was not so obvious as to leave no scope for doubt, the French Republic failed to fulfil its obligations under the third paragraph of Article 267 TFEU;**

3. **Dismisses the action as to the remainder;**

4. **Orders the European Commission and the French Republic to bear their own costs.**

[Signatures]

* Language of the case: French.