OPINION OF ADVOCATE GENERAL MENGOZZI
delivered on 22 December 2010 [1]

I — Introduction

1. By this reference for a preliminary ruling, the Conseil d'État (Council of State) (France) questions the Court of Justice as to the interpretation of Articles 43 EC and 56 EC in the context of a dispute between the Ministre du budget, des Comptes publics et de la Fonction publique and the Accor company concerning the latter's request for reimbursement of the advance payment of tax which it had to make when redistributing dividends to its shareholders for the years 1999 to 2001. [2]

2. It is apparent from the decision to refer the case that, in 1998, 1999 and 2000, Accor received dividends paid by its subsidiaries established in other Member States and that, when redistributing those dividends to its own shareholders, pursuant to the combined provisions of Articles 146(2), 158 bis and 223 sexies of the Code général des impôts (French Tax Code) ('CGI'), as they applied at the time of the facts in the main proceedings, the company made an advance payment of tax for the years 1999, 2000 and 2001 of FRF 323 279 053 (EUR 49 283 574), FRF 359 183 404 (EUR 54 757 157) and FRF 341 261 380 (EUR 52 024 962) respectively.

3. The payment of those sums by way of an advance payment of tax must be seen within the legislative context of the 'tax credit' applicable at the time of the facts in the main proceedings, which was abolished from 1 January 2005 by Article 93 of Law No 2003-1311. [3]

4. In order to prevent the economic double taxation of profits, which are taxed first when they are made, on the part of the distributing company, and subsequently when they are distributed, on the part of the beneficiaries, Article 158 bis of the CGI, as it applied at the time of the facts in the main proceedings, granted beneficiaries of dividends distributed by *French companies* a 'tax credit' in the form of a credit opened on the account of the Trésor public (Exchequer). That tax credit was equal to half of the sums actually paid to the parent company by the distributing company.

1 — Original language: French.

2 — As the reference for a preliminary ruling was made prior to the entry into force of the Treaty on the Functioning of the European Union, reference will be made to the provisions of the EC Treaty.

3 — JORF, 31 December 2003, p. 22530.

5. However, in order to avoid tax losses, the tax credit mechanism was coupled with that known as the 'advance payment of tax' where the profits underlying the distribution had not borne the burden of corporation tax at the normal rate.

6. In such circumstances, Article 223 sexies of the CGI, as it applied at the time of the facts in the main proceedings, provided that the company carrying out the distribution had to make an advance payment equal to the tax credit calculated under the conditions laid down in Article 158 bis of that code. That advance payment was due with respect to distributions conferring entitlement to the tax credit, whoever the beneficiaries.

7. In so far as, under Article 216 of the CGI, the dividends distributed by a subsidiary to its parent company with its head office in France were exempt from corporation tax on the part of that parent company, [4] whatever the source of those dividends, their redistribution by the parent company to its own shareholders therefore, in principle, meant that the advance payment was payable, in accordance with Article 223 sexies of the CGI.

8. However, while Article 146(2) of the CGI, in the wording in force during the years of the disputed taxation, provided that, in such a case, the advance payment was reduced, where appropriate, by the amount of the tax credits applied to the income from shareholdings referred to in Article 145 of the CGI, received in the course of the tax years which ended within, at most, the previous five years, as already mentioned in point 4 of this Opinion, the benefit of the tax credit was available only to parent companies receiving dividends distributed by French companies.

9. In other words, as summed up by the national court, Article 146(2) of the CGI allowed a parent company, established in France, where the redistributions of dividends received from subsidiaries made by it gave rise to the application of an advance payment, to reduce the amount of that advance payment by the amount of the tax credit that the distribution of the dividends received from those subsidiaries entitled it to. However, in the absence of a tax credit being available in respect of a dividend paid by a subsidiary established in another Member State and capable of reducing the amount of the advance payment due, payment by the parent company of the advance payment in respect of the redistribution of that dividend to its shareholders, setting it off against the total of the distributable sums, reduced the amount of the redistribution of that dividend by the same amount.

10. Considering that such different treatment was incompatible with Community law, Accor brought an action before the Tribunal

4 — Excluding the payment of a portion for fees and costs, determined in accordance with Article 216 of the CGI, which is not relevant in the main proceedings, and which, during the period at issue in the main proceedings, was fixed at 2.5% of the total income from shareholdings, including the tax credits, until 2000 and at 5% from 2001. The method of accounting for the payment of such a portion for fees and costs was examined by the Court in Case C-27/07 *Banque Fédérative du Crédit Mutuel* [2008] ECR I-2067.

administratif de Versailles (Administrative Court, Versailles), which, by a judgment of 21 December 2006, upheld its application. The appeal by the Ministre du Budget, des Comptes publics et de la Fonction publique against that judgment was dismissed by the Cour administrative d'appel de Versailles (Administrative Court of Appeal, Versailles) on 20 May 2008.

11. The Conseil d'État, having to rule on that judgment following an appeal in cassation by the Ministre du Budget, des Comptes publics et de la Fonction publique, accepted the Minister's plea based on the failure of the judgment from the Cour administrative d'appel de Versailles to state reasons and hence set that judgment aside.

12. Considering, in those circumstances, that it had to settle the substance of the case in the light of the circumstances of the present case, the Conseil d'État, having set aside Accor's argument concerning the incompatibility of the legislative provisions in question with Council Directive 90/435/EEC of 23 July 1990 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States, [5] took the view that there were some doubts as to the interpretation of other provisions and principles of EU law. The Conseil d'État therefore decided to stay the proceedings and refer the following questions for a preliminary ruling:

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

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

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

(b) If the answer to [1(a)] is in the negative, must those articles be

5 — OJ 1990 L 225, p. 6. This directive was amended by Council Directive 2003/123/EC of 22 December 2003 (OJ 2004 L 7, p. 41). However, the amendments made by that directive date from after the facts in the main proceedings and are not therefore relevant.

interpreted as meaning that they none the less preclude such a regime if the shareholders' position must also be taken into account on the ground that, given the making of the advance payment, the amount of the dividends received from its subsidiaries and redistributed by the parent company to its shareholders will differ according to the location of those subsidiaries, in France or in another Member State..., with the result that that regime deters shareholders from investing in the parent company and, therefore, affects the raising of capital by that company and is likely to deter that company from allocating capital to subsidiaries established in Member States other than France or from creating such subsidiaries in those States?

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

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

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

(3) Taking account of the answer to the questions set out in 1 and 2, do the Community principles of equivalence and effectiveness preclude the reimbursement of sums which ensure the application of the same tax regime to dividends redistributed by the parent company, whether those dividends originate from sums distributed by its subsidiaries established in France or in another Member State... being subject to the condition, (apart, where relevant, from the case of stipulations in a bilateral convention applicable between the French Republic and the Member State where the subsidiary is established relating to the exchange of information) that the person liable for the

tax furnishes evidence which is in its sole possession and relating with respect to each dividend concerned, in particular to the rate of taxation actually applied and the amount of tax actually paid on profits made by its subsidiaries established in the Member States... other than France, whereas, with respect to subsidiaries established in France that evidence, known to the administration, is not required?'

II — Analysis

13. While the first question raised by the national court relates to the compatibility with the freedom of establishment and the free movement of capital of a tax regime such as that described above, the second and third questions relate, in essence, to the possible application of principles, namely that prohibiting unjust enrichment (second question) and those of equivalence and effectiveness (third question), which would, in certain circumstances, be likely to preclude, in full or in part, the reimbursement of the advance payment made by Accor.

14. Before examining these questions, it may be helpful to make two observations.

15. First of all, in general terms one should not lose sight of the scale of the financial sums at stake in the main proceedings and in analogous cases pending before the French administrative courts, estimated at approximately EUR 3 billion. Those stakes are not unrelated to the decision of the Conseil d'État to make the present reference to the Court for a preliminary ruling and also partially motivated that court's application to have the present case heard under the accelerated procedure provided for in the first paragraph of Article 104a of the Court's Rules of Procedure, which was dismissed by order of the President of the Court of Justice of 19 October 2009.

16. As regards that financial aspect, it will also be noted that neither the national court nor the French Government has applied for the temporal limitation of the effects of the Court's forthcoming judgment, perhaps both because, according to the case-law, the financial consequences, where there is no risk of serious economic difficulties which might result for a Member State from a judgment given by way of a preliminary ruling, do not, in themselves, justify placing such a temporal limitation on the effects of that judgment [6] and because of the fact that the very subject-matter of all the disputes pending before the French administrative courts concerns the resolution of past situations, since

6 — See Case C-313/05 *Brzeziński* [2007] ECR I-513, paragraphs 58 to 60 and the case-law cited.

the contested regime, as I have already underlined, was abolished from 1 January 2005. [7]

17. Next, it should be pointed out that the questions from the Conseil d'État do not concern the interpretation of Directive 90/435, and in particular Article 4 thereof, under which, where the parent company holds a minimum of 25 % of the capital of a subsidiary established in another Member State, the Member State in which the parent company is established must offset the economic double taxation of the profits distributed by that subsidiary to that parent company. In order to do so, the Member State in which the parent company is established must either refrain from taxing such profits or tax them while authorising the parent company to deduct from the amount of tax due that fraction of the corporation tax paid by the subsidiary which relates to those profits and, if appropriate, the amount of the withholding tax levied by the Member State in which the subsidiary is resident, pursuant to the derogations provided for in Article 5 of the said directive, up to the limit of the amount of the corresponding domestic tax. As the Court pointed out, in essence, in *Cobelfret*, [8] the obligation on the Member State in which the parent company is established therefore relates to the distribution of profits to the parent company by its subsidiary.

18. Before the Conseil d'État, but also again in its written observations before the Court, Accor defended the proposition that the advance payment of tax conflicted with Article 4 of Directive 90/435. That proposition was based essentially on the following line of argument: the French Republic, under Articles 145 and 216 of the CGI, has opted for the exemption from corporation tax of dividends paid to a parent company by a subsidiary, whatever their source. [9] Where dividends from profits paid by a subsidiary established in a Member State other than France were being redistributed to its shareholders, the French parent company had to make the advance payment, the object of which was to take the place of the corporation tax in so far as it related solely to the distributed profits which had not already been liable to corporation tax at the full rate. Consequently, according to Accor, the advance payment was a tax on the dividends received from subsidiaries not resident in France, contrary to Article 4 of Directive 90/435.

7 — Another reason may lie in the fact that the Court has previously, in several of its judgments (see, in particular, Case C-319/02 *Manninen* [2004] ECR I-7477; Case C-446/04 *Test Claimants in the FII Group Litigation* [2006] ECR I-11753; and Case C-292/04 *Meilicke and Others* [2007] ECR I-1835), explained the requirements arising both from the freedom of establishment and from the free movement of capital as regards the position of natural or legal persons, resident in a Member State, receiving dividends from non-resident companies and that the Court has not limited the temporal effect of those judgments: see, on this point, *Meilicke and Others*, paragraphs 36 to 40 and the case-law cited. However, the French Government argues that the pattern in the above-mentioned case-law is not necessarily relevant in replying to the first question.

8 — Case C-138/07 *Cobelfret* [2009] ECR I-731, paragraphs 29 to 31.

9 — Excluding the portion for fees and costs referred to in footnote 4 above.

19. The Conseil d'État rejected that argument on the ground that the chargeable event for the contested advance payment was not the payment of dividends to the French parent company by subsidiaries established in other Member States but the redistribution by the parent company to its own shareholders of dividends received in that way. In other words, the advance payment of tax had neither the object nor the effect of taxing the distributed profits and did not therefore take the place of the corporation tax but was chargeable only on the redistribution of the dividends to the parent company's shareholders.

20. Despite the attempt by Accor in its written observations lodged before the Court to expand the scope of the questions raised by the Conseil d'État to include the interpretation of Directive 90/435, I support that court's rejection of the argument submitted by the company in the main proceedings.

21. Indeed, as already indicated, Directive 90/435 relates only to the distribution of profits between a subsidiary and its parent company established in two different Member States. It does not therefore prejudice the tax regime for the redistribution of the yield from the parent company's holdings to its own shareholders. The reasoning of the national court is, in the end, in the same spirit as the argument developed by the Court in *Test Claimants in the FII Group Litigation*, in relation to advance corporation tax (ACT), which a parent company established in the United Kingdom had to pay on the redistribution to its shareholders of dividends received from subsidiaries established in other Member States [10] and which was considered to fall outside the scope of Directive 90/435.

A — *The first question*

22. By its first question, which is divided into two parts, the national court wishes to know, first, whether Articles 43 EC and 56 EC preclude the regime whereby only a parent company which redistributes to its own shareholders dividends received from subsidiaries established in France, but not those from subsidiaries established in other Member States, may set off the tax credit applied to the distribution of those dividends against the advance payment of tax and, secondly, if the answer is in the negative, whether those articles none the less preclude such a regime because of its possible deterrent effect on shareholders in the parent company who receive dividends paid by subsidiaries established in Member States other than France.

23. Before examining the restrictive nature of such a regime, a few words should be said concerning the applicable freedom of movement.

10 — Paragraph 110.

1. Applicable freedom of movement

24. According to the case-law, where a national of a Member State has a holding in the capital of a company established in another Member State which gives him definite influence over the company's decisions and allows him to determine its activities, it is the Treaty provisions concerning freedom of establishment which apply and not those concerning the free movement of capital. [11]

25. In the present case, the referring court did not inform the Court of the scale of Accor's holdings in the capital of subsidiaries established in Member States other than France, which cannot therefore exclude holdings which do not permit it to exert definite influence over those companies' decisions.

26. It is important, first of all, to note that the contested regime was applicable, in accordance with Article 145 of the CGI, to companies whose holdings exceeded the minimum threshold of 10 % of the capital of the distributing company, for the period until 31 December 2000, a threshold which was reduced to 5 % of the capital of the distributing company for the period from 1 January 2001. [12] This regime therefore already applied to the holdings of parent companies in the capital of other companies on a scale which, a priori, precluded the possibility of exerting definite influence on those companies' decisions.

27. As regards the facts underlying the main proceedings, this inference appears to be confirmed by the information provided in the written observations of the French Government, according to which some dividends received by Accor were paid by companies in which Accor had only minority holdings which did not apparently permit it to exert definite influence over those companies' decisions.

28. By contrast, both Accor and the French Government also describe situations in which that company had a majority holding in the capital of subsidiaries established in different Member States, leading to the assumption that Accor exerted some influence on those subsidiaries' decisions.

29. Although it is a matter for the national court to verify the truth of all the above information for the purposes of settling the

11 — See, in particular, Case C-251/98 *Baars* [2000] ECR I-2787, paragraph 22; Case C-436/00 *X and Y* [2002] ECR I-10829, paragraph 37; Case C-196/04 *Cadbury Schweppes and Cadbury Schweppes Overseas* [2006] ECR I-7995, paragraph 31; and Case C-298/05 *Columbus Container Services* [2007] ECR I-10451, paragraph 30.

12 — Under the amendment to Article 145 of the CGI introduced by Order No 2000-912 of 18 September 2000, JORF, 21 September 2000, p. 14783.

dispute in the main proceedings, [13] it appears that both the legal provisions concerned and the factual situations underlying the main proceedings could relate equally to the freedom of establishment and the free movement of capital. [14]

30. I consider, however, that, in view of the information available to the Court, the examination of the present case may be more appropriately conducted in the light of the Treaty provisions governing the free movement of capital, it being understood that the analysis of the question referred by the standard of Article 43 EC should not in any event result in a different solution.

2. The existence of a restriction on the free movement of capital

31. According to the case-law, movements of capital for the purposes of Article 56(1) EC include in particular direct investments in an undertaking in the form of a shareholding which confers the possibility of effectively participating in its management and control (known as 'direct' investments) and the acquisition of shares on the capital market solely with the intention of making a financial investment without any intention of influencing the management and control of the undertaking (known as 'portfolio' investments). [15]

32. The Court has also ruled that the restrictions on the free movement of capital between Member States prohibited by Article 56(1) EC include national measures, including fiscal measures, likely to deter persons resident in one Member State from investing their capital in companies established in other Member States. [16]

33. In the main proceedings, it is common ground that, as the French Government itself accepts, while the tax credit applied to dividends paid by French subsidiaries to their parent company established in France might be set off against the amount of the advance payment due on the redistribution by that company of the dividends in question to its own shareholders, the dividends paid by subsidiaries not resident in France did not confer an entitlement, by virtue of their French parent company, to a similar tax credit. The latter company therefore had to make the advance payment without, however, obtaining the benefit of the tax credit, unlike the situation

13 — I reiterate that, as I underlined in point 11 of this Opinion, the Conseil d'État has to rule on the substance of the main proceedings.

14 — Following the example of, for instance, the Court's finding in *Test Claimants in the FII Group Litigation*, paragraph 80.

15 — See, to that effect, Case C-222/97 *Trummer and Mayer* [1999] ECR I-1661, paragraph 21; Case C-483/99 *Commission* v *France* [2002] ECR I-4781, paragraphs 36 and 37; Case C-98/01 *Commission* v *United Kingdom* [2003] ECR I-4641, paragraphs 39 and 40; Joined Cases C-282/04 and C-283/04 *Commission* v *Netherlands* [2006] ECR I-9141, paragraph 19; and Case C-182/08 *Glaxo Wellcome* [2009] ECR I-8591, paragraph 40.

16 — See, in particular, *Manninen*, paragraph 22, and *Meilicke and Others*, paragraph 23.

of a parent company receiving dividends from French subsidiaries and redistributing those dividends to its own shareholders.

34. This regime therefore, as the French Government itself admits, entailed different treatment for the dividends paid to French parent companies depending on whether they originated from subsidiaries established in France or those established in other Member States.

35. Although not initiating discussion of the comparability of the situation of a French parent company receiving dividends from French subsidiaries and that of the same parent company receiving dividends from subsidiaries established in other Member States, [17] the French Government none the less argues, rather contentiously, first, that such different treatment does not have a restrictive effect on the movement of capital within the meaning of Article 56 EC, [18] while conceding, secondly, that a direct deterrent exists only where the French parent company pursues a policy of redistributing the dividends received from subsidiaries established in the other Member States. [19]

36. Irrespective of the internal contradiction in the French Government's argument described above, it may be noted that that government bases its principal proposition, namely that the contested tax rules do not have a restrictive effect, on the following two arguments.

37. First, it submits that the activation of the tax credit or the making of the advance payment follows from an autonomous decision by the competent organs of the parent company receiving dividends paid by its French subsidiaries and not from the law. Referring in particular to the judgment in *Graf*, [20] the French Government adds that the possible negative effect of the contested provisions of the national legislation thus depends upon a decision by the competent organs of the parent company which is so hypothetical that those provisions cannot be considered to constitute an obstacle to the free movement of capital.

38. Secondly, that government claims that, in so far as the advance payment was set off against the distributable results of the parent company, it did not constitute a charge on profits, but a tax charge on the distributable results the cost of which was born in full by

17 — Which follows from case-law that is now well established: see, in particular, *Test Claimants in the FII Group Litigation*, paragraph 62.

18 — See, in particular, paragraph 74 of the French Government's written observations.

19 — See paragraph 82 of the same observations.

20 — Case C-190/98 *Graf* [2000] ECR I-493, paragraphs 24 and 25.

the shareholders who received a reduced dividend. The parent company was not therefore affected by the regime. Moreover, the French Government states that, in so far as the non-resident shareholders were able to obtain reimbursement of the advance payment if they did not benefit from the tax credit, in accordance with the tax conventions concluded by the French Republic and/or French administrative doctrine, only the French shareholders of the French parent company were affected by the different treatment, a situation which, because of its purely internal character, did not fall within the scope of Article 56 EC.

39. In my view there is no need to spend too much time on the first objection by the French Government, which is after all somewhat confused. As far as I understand it, that objection consists in stating that parent companies (or their organs) enjoy the freedom to decide to redistribute dividends to their shareholders so that they do or do not activate the regime for the application of the advance payment and the tax credit. Thus the French Government appears to consider that, if the competent organs of a French parent company which receives dividends from subsidiaries established in other Member States decide to make a redistribution to the shareholders of that company corresponding in full to the sum of the dividends paid by the subsidiary to its parent company, thus without benefiting from the tax credit, those organs have only themselves to blame. This argument is apparently based on the opinion of the rapporteur public before the Conseil d'État, which is annexed to the written observations of the French Government and Accor. [21]

40. However, apart from the fact that the different treatment highlighted above lies firmly within the provisions of French legislation themselves, the question is not whether, as the French Government suggests, a parent company or its competent organs were able to avoid making the advance payment by not carrying out the redistribution of the dividends paid to the parent company by its subsidiaries established in Member States other than France or to reduce the amount of the dividends which were the subject of the redistribution to that parent company's shareholders with the aim, in the end, of circumventing or adapting to the obstacle which is the contested tax regime.

41. On the contrary, the question is whether a parent company in Accor's situation can

21 — According to the rapporteur public (p. 14 of opinion) '… the company … has only itself to blame if it has not reduced the amount of the sums distributed. In other words, it is not the law which creates the charge the reimbursement of which is sought by the parent company, but its policy of distributing dividends.' That assessment has, however, been developed not in the context of the existence of a restriction on capital movements but in relation to reimbursement of the amount of the advance payment made by Accor.

benefit from the free movement of capital by claiming treatment equivalent to that reserved by the national legislation for a French parent company which, having received dividends from French subsidiaries, goes on to redistribute the full amount of those dividends to its shareholders.

42. Moreover, I have some difficulty seeing how, within a corporation, a decision to (re)distribute dividends to that company's shareholders can, as the French Government claims, be of a hypothetical or uncertain nature within the meaning of *Graf*. As Accor indicated at the hearing, it is difficult to imagine that shareholders would invest in a company which plans to redistribute dividends only very episodically, and where, what is more, that company is listed in the financial markets and is developing a distribution policy pertaining to its financial communication.

43. As regards the second argument set out by the French Government, I must point out that it appears to underlie the subdivision of the first question referred by the national court, depending on whether the parent company (first part of that question) or the shareholders in that company (second, alternative part of the question) are involved.

44. That subdivision appears essentially to be motivated by procedural considerations of domestic law, in so far as the dispute in the main proceedings brings the French authorities into conflict with Accor and not with that company's shareholders.

45. It does not, however, appear relevant for the purposes of interpreting Article 56 EC, the scope of which extends to national measures which deter cross-border investment, without it being necessary to ask whether that deterrent has a greater effect on the company as such, the competent organs of that company or, more generally, its shareholders. Endorsing the distinction put forward by the national court and the French Government would, in my opinion, amount to making the application of Article 56 EC subordinate to the national law of the Member States and to the methods of organisation of companies established in their respective territories.

46. In any case, the case-law of the Court illustrates that the same national measure can discourage residents (including corporations) in one Member State from investing their capital in another Member State and also have a restrictive effect as regards residents of those other Member States in that it constitutes an obstacle to their raising of capital in the first Member State. [22] Therefore, for

22 — See, in particular, *Manninen*, paragraph 22, and *Test Claimants in the FII Group Litigation*, paragraphs 64 and 166.

the purposes of describing a national measure under Article 56(1) EC, I do not see any obstacle to that measure also having a deterrent effect in regard to a company and/or its shareholders. After all, the existence of such *dissuasion* from cross-border movements of capital is not, by definition, including in the field of tax, subordinate to an arithmetical demonstration of the financial consequences borne by the parties concerned.

47. In any case, I believe that the Court will be able to dispense with replying to the second part of the question referred, in the light of the dissuasive nature of the contested regime in regard to the parent company Accor, which, as I have already indicated, the French Government has moreover admitted in paragraph 82 of its written observations.

48. Being unable to benefit from the neutralisation of the advance payment by the granting of the tax credit, unlike in the situation of a parent company which has redistributed to its own shareholders all the dividends paid by its French subsidiaries, a parent company in Accor's situation should, in order to make a full redistribution of the dividends to its shareholders, withdraw from its cash reserves a sum equivalent to the amount payable by way of the advance payment. French parent companies which have invested their capital in French subsidiaries therefore benefit from a cash flow advantage compared with parent companies which have invested their capital in subsidiaries with their head office in other Member States. [23]

49. Furthermore – and on this point I fully agree with the opinion of the rapporteur public before the Conseil d'État – the advance payment, which related to the redistribution of dividends to the parent company's shareholders and for which that company was liable, had the effect of reducing the total distributable dividends; that total differed depending on whether the parent company's subsidiary was established in France or in another Member State. In all probability, that situation was likely to affect the value of the parent company's shares once the dividends distributed had fallen. The company's distribution policy might then be less attractive to actual or potential shareholders, so that that company's access to the capital market was likely to be affected.

50. The contested tax regime was therefore perfectly capable of deterring companies established in France from making portfolio investments in companies which had their head office in other Member States.

51. In those circumstances, I consider that the contested tax regime is a restriction within the meaning of Article 56(1) EC.

23 — See, by analogy, *Test Claimants in the FII Group Litigation*, paragraph 84 and the case-law cited.

52. As neither the national court nor the French Government has referred to the grounds set out in Article 58 EC or to the overriding reasons of general interest which are likely to justify such a restriction, I therefore propose that the Court should reply to the first question as follows: Article 56 EC must be interpreted as precluding a tax regime under which a parent company established in a Member State which receives dividends paid by a subsidiary established in another Member State may not set off against the advance payment for which it is liable when it redistributes those dividends to its own shareholders the tax credit applied to the distribution of those dividends, unlike the comparable situation of a parent company established in the first Member State receiving dividends paid by a subsidiary also established in that Member State.

B — *The second question*

53. By its second question, the national court wishes to know, in essence, whether, if the tax administration is in principle required to reimburse the sums paid by the parent company in breach of EU law, that administration could none the less oppose that reimbursement either on the ground that such reimbursement would lead to the unjust enrichment of that company, even though the contested regime does not lead to the passing-on of a tax to a third party by the person liable for the tax, or, if the answer is in the negative, on the ground that the sums paid do not constitute an accounting or tax charge for the parent company, but are set off against the total dividends which may be distributed to its shareholders.

54. In the light of the proposed reply to the first question, it should be observed that, according to established case-law, individuals have, in principle, the right to a refund of charges levied in a Member State in breach of rules of EU law. That right is the consequence and complement of the rights conferred on individuals by those provisions, as interpreted by the Court. It follows that the Member State in question is required in principle to repay charges levied in breach of EU law. [24]

55. According to that case-law, there is only one exception to that obligation to make repayment: where it is established by the national authorities that the charge has been borne, in its entirety or in part, by someone other than the taxable person and that reimbursement of the charge, in full or in part, would constitute unjust enrichment of the

24 — See, in particular, Case C-147/01 *Weber's Wine World and Others* [2003] ECR I-11365, paragraph 93 and the case-law cited, and *Test Claimants in the FII Group Litigation*, paragraph 202.

latter. [25] Such a situation may in particular arise in the context of indirect taxation where a taxable person has passed on, in full or in part, the value added tax unduly paid to the final consumer.

56. The Court has also held that, even where it is established that the burden of the charge levied by the national authorities though not due has been passed on in whole or in part to third parties, repayment to the trader of the amount thus passed on does not necessarily entail his unjust enrichment. [26] Even in such circumstances, the taxable person may have suffered damage as a result of the payment of the tax in breach of EU law, for example because of the reduction in the value of his sales or the failure to pass on the total amount of the tax in full in his cost price. [27]

57. As regards the demonstration of any unjust enrichment of the taxable person caused by passing on the tax paid to a third party, the Court has held that the evidence must be a matter for the national court, which is free to assess the evidence adduced before it, [28] taking account of all the relevant circumstances, [29] it being understood that, in the absence of EU rules, it is for the domestic legal system of each Member State to lay down the detailed procedural rules applicable while complying with the principles of equivalence and effectiveness. [30]

58. The Court has also held that the latter principle precludes any rules of evidence which have the effect of making it virtually impossible or excessively difficult to secure repayment of charges levied in breach of that law. That is so particularly in the case of presumptions or rules of evidence intended to place upon the taxpayer the burden of establishing that the charges unduly paid have not been passed on to other persons or of special limitations concerning the form of the evidence to be adduced. [31] Thus, even in a situation where it is a question of recovering indirect taxes which must legally be passed on to a third party, the Court has rejected the argument that there is a presumption that they have been passed on and that it is for the taxpayer to prove the contrary. [32]

25 — See, to that effect, *Weber's Wine World and Others*, paragraph 94. The use of the term unjust enrichment seems in this context to be closer to that of recovery of undue payment, which may, in some Member States, be considered to be a specific type of unjust enrichment.

26 — *Weber's Wine World and Others*, paragraph 98 and the case-law cited.

27 — See, to that effect, Joined Cases C-192/95 to C-218/95 *Comateb and Others* [1997] ECR I-165, paragraphs 29, 31 and 32, and *Weber's Wine World and Others*, paragraph 99.

28 — See *Weber's Wine World and Others*, paragraph 96.

29 — See Case C-309/06 *Marks & Spencer* [2008] ECR I-2283, paragraph 41, and Case C-566/07 *Stadeco* [2009] ECR I-5295, paragraph 49.

30 — *Weber's Wine World and Others*, paragraph 103.

31 — See Case 199/82 *San Giorgio* [1983] ECR 3595, paragraph 14, and Joined Cases C-441/98 and C-442/98 *Michailidis* [2000] ECR I-7145, paragraph 36.

32 — *Comateb and Others*, paragraph 25.

59. In those circumstances, as the parties which have lodged written observations in this case agree, it is for the tax authorities which claim to oppose the reimbursement of charges unduly levied by the taxpayer in breach of EU law to furnish evidence that such reimbursement would result in the unjust enrichment of that taxpayer [33] and it is for the national court to assess whether those claims are well founded, namely to assess the existence and the degree of unjust enrichment, by carrying out an economic analysis in which all the relevant circumstances submitted are taken into account. [34]

60. This reference to the case-law itself, in my view, permits an answer to the second part of the question under examination here. For, by choosing to formulate this part in an alternative and subsidiary manner in relation to the first part, which concerns the plea of unjust enrichment, the national court appears to wish to push back the boundaries of the right to reimbursement of taxes paid in breach of EU law. As has been stated above, EU law permits only one exception to the reimbursement of taxes paid in breach of that law, namely that of unjust enrichment.

61. The second part of the question could none the less properly be interpreted in the context of the problems associated with unjust enrichment. By pointing out that the sums paid did not constitute an accounting or tax charge on the parent company but were set off against the total dividends which could be distributed to its shareholders, the national court ultimately underlines the fact that it was not the parent company which bore the real burden of making the advance payment and that, therefore, the reimbursement in its favour of the sums corresponding to the payment of that charge could result in its unjust enrichment.

62. It is therefore possible, in my view, to examine the two parts of the question together.

63. In the main proceedings, it is important to bear in mind that the national court also starts from the premiss that the contested regime does not result in the passing-on of a tax to a third party by the taxable person and does not therefore fall into the 'classic' pattern of unjust enrichment such as that which follows from the case-law of the Court referred to above. That premiss may appear to be surprising and could at first sight justify rejecting the very existence of unjust enrichment in the light of that case-law.

33 — The French Government states moreover that this passing-on of the burden of proof to the tax authorities also follows from the case-law of the Conseil d'État and the French Cour de cassation (Court of Cassation) in situations governed solely by domestic law. Such a rule should therefore apply equally, in accordance with the principles of equal treatment and equivalence, in disputes in which the French tax administration opposes the reimbursement of charges levied in breach of European Union law.

34 — See *Weber's Wine World and Others*, paragraph 100, and *Marks & Spencer*, paragraph 43.

64. However, that rather simplistic reading of the question put to us should be avoided. The premiss on which the question is based appears to be explained by the legal character of the advance payment in French administrative law. The Conseil d'État has held that the advance payment does not constitute a charge which may be deducted from the company's net profit since that levy was introduced to prevent companies which, under conditions conferring entitlement to the tax credit, distribute profits which have not been liable to corporation tax at the normal rate from benefiting, for that reason, from an undue tax advantage. [35] Thus, by setting off solely against the total distributable income, the advance payment does not affect the parent company making the distribution but is levied on the shareholders' assets. Seen from this point of view, which is after all defended by the French Government, the question whether the advance payment was passed on to a third party, in accordance with the criterion used in the Court's case-law, is not therefore relevant since the making of the advance payment directly affects the assets of the parent company's shareholders.

65. Thus placed in its context, the question raised by the national court calls for the following observations.

66. In general terms, I see no obstacle to a Member State, in principle, opposing the reimbursement of sums paid in breach of EU law which, if they were repaid, would result in the unjust enrichment of an economic operator or of a taxable person, even if not in the types of case which have been brought before the Court (essentially, reimbursement of import duties or indirect taxes). That would, in my opinion, be the case if the person concerned had not himself borne the full economic burden of the sums which he had to pay. According to the case-law, it is for the national courts to assess whether such an argument applies in the light of the circumstances of each individual case.

67. Thus, with regard to the main proceedings, I do not believe that it is possible to reject from the outset, as the European Commission and Accor attempt to do, the very existence of the possible unjust enrichment of the parent company which would result in the reimbursement of the sums paid in breach of Article 56 EC on the sole ground that, in legal terms, it is that company which is liable to make the advance payment. As I have stressed, the case-law of the Court favours an economic rather than a strictly legal approach to possible unjust enrichment resulting from the reimbursement of sums unduly paid by an economic operator.

35 — Judgment of the Conseil d'État of 30 June 2004, *Sté Freudenberg*.

68. However, the French Government's general argument that the reimbursement to the parent company of a sum equivalent to the amount of the advance payment would enrich that company to the detriment of its shareholders is not convincing.

69. The reimbursement of that sum held within the company would in reality constitute a deferred profit for the shareholders which would be likely to increase the financial value of their holding in the capital of that company and by no means an impoverishment of those shareholders.

70. It is moreover perfectly plausible, as the rapporteur public argued before the Conseil d'État and as Accor submitted to the Court, that the making of the advance payment by the parent company did not, in the end, affect the distribution of dividends in favour of the shareholders, as that company had borne the full burden of that levy by drawing on its reserves in order to avoid disrupting its distribution policy and altering the price of its shares on the stock market.

71. As the French Government confirmed at the hearing before the Court, in a purely domestic situation, a parent company which had, for various reasons, incorrectly paid an excessive amount by way of an advance payment itself benefited from the reimbursement of the surplus levied by the French tax authorities, while that did not affect the redistribution of dividends to its shareholders. In my view, the application of the principle of equivalence would require that a parent company which had unduly made an advance payment, without that sum affecting the total dividends which could be distributed to its own shareholders because in particular of the desire of those shareholders to maintain an attractive distribution policy at that company, should be granted reimbursement of that amount.

72. However, in the situation which has just been described, the reimbursement of the advance payment in the context of an action for reimbursement such as that brought by Accor before the French administrative courts appears to be rendered inadmissible by the case-law of the Court.

73. It should be observed that, in *Test Claimants in the FII Group Litigation*, the Court, without explicitly taking as a basis the theory of unjust enrichment, excluded the possibility that the financial losses borne by companies which had been required to increase the amount of their dividends in order to compensate for the loss of a tax credit on the part of their shareholders might, on the basis of EU law, be compensated for by way of an action for reimbursement.

74. Thus the Court dismissed the claim of the applicant companies in the main proceedings

against the United Kingdom tax authorities that they were entitled, by means of an action for reimbursement, to complain of the damage which those resident companies had suffered because they were obliged to increase the amount of their dividends in order to compensate for the loss of the tax credit on the part of their shareholders.

75. According to the Court, that damage could not be compensated for, on the basis of EU law, by means of an action for the reimbursement of the tax unlawfully levied or of sums paid to the Member State concerned or withheld by it directly against that tax. For '[s]uch... increases in the amount of dividends are the result of decisions taken by those companies and do not constitute, on their part, *an inevitable consequence* of the refusal by the United Kingdom to grant those shareholders the same treatment as that afforded to shareholders receiving a distribution which has its origin in nationally-sourced dividends.' [36]

76. From the point of view of guaranteeing the exercise of rights conferred by the legal system of the European Union, and in the light of the questions put to the Court, the Court none the less asked the national court to determine whether the increases in the amount of dividends constitute, on the part of the companies concerned, financial losses suffered by reason of a breach of EU law for which the Member State in question is responsible, [37] that is to say damage which might be established and compensated for in the context of an action for liability brought against that state.

77. If that solution were to be transposed to the present case, and given Accor's redistribution policy referred to in point 70 of this Opinion, that company could not then claim, in the context of its action for reimbursement of the advance payment before the national court, any losses which it might have borne because of the decision of its shareholders' meeting to redistribute all the dividends from Accor's subsidiaries not resident in France and therefore not to set off the advance payment against the dividends distributed to shareholders. For those losses would not be the inevitable consequence of the refusal by the French Republic to pay the tax credit under conditions analogous to the situation of a French parent company receiving dividends from French subsidiaries. In those circumstances, it would be possible only to acknowledge its right to bring an action for liability against the state for the infringement of EU law, while complying with the conditions

36 — *Test Claimants in the FII Group Litigation*, paragraph 207 (my italics).

37 — Idem, paragraph 208.

giving rise to such liability and the principles of equivalence and effectiveness.

78. By contrast, the application of the contested tax regime, in my opinion, had the direct consequence of requiring a French parent company such as Accor to set off the advance payment against the dividends redistributed to its own shareholders, which inevitably led to a reduction in the amount of those dividends.

79. In that case, it was primarily the shareholders who bore a financial loss, consisting in the payment of a reduced dividend. The parent company may also, however, have suffered financial damage in the form of a reduction in the value of its share price owing to a distribution policy likely to be considered less attractive by the market.

80. In such circumstances, should the calculation of the reimbursement to the parent company of the advance payment be limited to its own losses or also include the losses which affected the shareholders owing to the redistribution of a reduced dividend?

81. I would be inclined to take the second option.

82. For, first, as I have already mentioned, the principle of the reimbursement of such a sum to the parent company does not appear to me in any way to impoverish the shareholders in that company since the cumulative value in the parent company benefits those shareholders.

83. Secondly, to limit the scope of the reimbursement to the parent company's own losses would, from the procedural point of view, imply that the injured shareholders were in a position to bring an action for reimbursement of the advance payment before the competent French courts. However, as the rapporteur public stressed before the Conseil d'État, without that finding having been disproved by the French Government, under French domestic law, a shareholder in that situation has no personal fiscal action available to him which enables him to gain reimbursement of that advance payment in his favour but could at most bring an action for liability against the state.

84. It is true that, in essence, the French Government mentioned in its observations before the Court that that principle would be tempered by the possibility offered by the preventive double taxation conventions concluded by the French Republic to a non-resident shareholder of a French parent company to benefit from the reimbursement of the advance payment where no tax credit had been

granted at the time when the dividends were distributed to that company. [38]

85. Although, as the Commission also admits, the exercise of such an option by any non-resident shareholders in a parent company such as Accor should to be taken into account in the assessment by the national court of the effective amount of the advance payment to be reimbursed to the parent company, it cannot, however, justify the categorical refusal to reimburse what was improperly levied by the state, which is, in practice, likely to be reimbursed only to the parent company which made the payment levied in breach of EU law.

86. Any other assessment would lead to two consequences which, in my view, would not be tolerated by EU law. First, it would make it impossible in practice to bring an action for the reimbursement of a levy imposed in breach of EU law. Secondly, the argument defended, in essence, by the French Government would amount to admitting the unjust enrichment of the state, as it received the sum equivalent to the undue settlement of the advance payment, without having to reimburse it to the taxpayer.

87. To sum up, I consider that the answer to the second question should be as follows: a Member State may preclude the reimbursement of a payment levied in breach of EU law with respect to the full financial charge which the taxpayer has not borne himself, which, to that extent, would result in the unjust enrichment of that taxpayer. Such enrichment would be likely to arise if the Member State had to reimburse the charges borne by the taxpayer which were not the inevitable consequence of the refusal of a Member State to ensure compliance with the provisions of the EC Treaty. In the main proceedings, it is for the national court, in the light of all the relevant factors available to it, to investigate, on the basis of the dividend distribution policy established by a parent company, such as the defendant in the main proceedings, in favour of its shareholders whether the making of the contested advance payment has been set off, in full or in part, against the dividends redistributed to those shareholders such that the parent company may, if applicable, have had to suffer losses which are the inevitable consequence of the Member State's refusal to grant it the equal treatment requested. In that case, the calculation of the reimbursement of the contested payment to the parent company should be established on the basis of the financial burden which it has borne based on all the relevant factors available to the national court.

38 — This question lay behind Case C-513/04 *Kerckhaert and Morres* [2006] ECR I-10967. The abolition of the tax credit from 1 January 2005 and subsequently of its reimbursement to non-resident shareholders was the basis for Case C-128/08 *Damseaux* [2009] ECR I-6823. However, the question raised related solely to the obligations on the Member State in which the shareholders resided (in that case the Kingdom of Belgium).

C — *The third question*

88. I now come to the third question raised by the national court, which gave rise to the strongest debate between the interested parties and the answer to which will be helpful only if, in the light of the explanations given to it by the Court, the national court excludes, if only in part, the unjust enrichment of the parent company.

89. By this question, the Conseil d'État wishes to know whether, in the light of the replies given to the first two questions, the principles of equivalence and effectiveness preclude the reimbursement of sums unduly paid by the parent company being subject to the condition, apart, where relevant, from the case of stipulations in a bilateral convention relating to the exchange of information, that that company furnishes evidence relating, for each dividend paid by its subsidiaries not established in France, to the rate of taxation actually applied and the amount of tax actually paid on profits made by those subsidiaries, whereas, with respect to subsidiaries established in France, that evidence, known to the administration, is not required.

90. As the Commission rightly argued in its written observations, that question appears to arise only if the national court, to re-establish equal treatment, opts not for the reimbursement of the advance payment – which would, to some degree, amount to releasing the parent company from that advance payment without it first having benefited from the tax credit – but for the recognition of the benefit of the tax credit (after the parent company has paid the advance payment), such as it would have been granted in a purely domestic situation. For, as the Commission indicates in its written observations, referring to *Test Claimants in the FII Group Litigation*, paragraphs 50 to 52, in that second case, the parent company should receive a tax credit reflecting the rate of the corporation tax for which the subsidiary is liable in the Member State in which it is established. [39]

39 — In *Test Claimants in the FII Group* the question arose as to whether EU law precluded a Member State exempting the dividends paid by a resident company to another resident parent company, while, by means of a set-off system, avoiding a series of charges to tax on those dividends where they were paid by a non-resident company to a resident parent company. The Court confirmed the compatibility of the application of a set-off system in those circumstances where (a) the foreign-sourced dividends are not liable, in the Member State in question, to a tax rate higher than the rate applied to dividends of national origin and (b) the series of charges to tax on foreign-sourced dividends is set off against the amount of tax paid by the non-resident company making the distribution against the amount of tax for which the resident recipient company is liable up to the limit of the latter amount. Accordingly, as the Court indicates in paragraphs 51 and 52 of that judgment, when the profits underlying foreign-sourced dividends are subject in the Member State of the company making the distribution to a lower level of tax than the tax levied in the Member State of the recipient company, the latter Member State must grant an overall tax credit corresponding to the tax paid by the company making the distribution in the Member State in which it is resident. Where, conversely, those profits are subject in the Member State of the company making the distribution to a higher level of tax than the tax levied by the Member State of the company receiving them, the latter Member State is obliged to grant a tax credit only up to the limit of the amount of corporation tax for which the company receiving the dividends is liable. It is not therefore required to repay the portion which is greater than the difference between those two amounts.

91. While it is for the national court to choose the procedures permitting the re-establishment of equal treatment between the purely domestic situation and that in which a parent company such as Accor has been placed, that choice must be exercised and implemented in compliance with the principles of equivalence and effectiveness.

92. In that regard, Accor considers, first, that the French tax authorities cannot make the reimbursement of the advance payment subject to the parent company furnishing evidence of the rate and amount of the tax actually paid by foreign subsidiaries on the profits underlying the payment of each dividend distributed when that condition was not imposed in purely domestic situations. Secondly, Accor submits that it would be contrary to the principle of effectiveness to require it to furnish such evidence relating not only to its subsidiaries but also all its sub-subsidiaries established in other Member States, particularly since that demand is being made over 10 years after the fact and, therefore, beyond the legal requirement for the retention of administrative documents in France. Moreover, Accor points out the importance of Council Directive 77/799/EEC of 19 December 1977 concerning mutual assistance by the competent authorities of the Member States in the field of direct taxation. [40]

93. The governments of France and the United Kingdom take the opposite view. They point out that the purpose of the contested tax regime is to mitigate economic double taxation and that, therefore, the French tax authorities have the right to require evidence to verify whether foreign subsidiaries have actually paid, in the Member State in which they are established, the corporation tax underlying the distribution of dividends to the parent company. In that regard, the French Government insists on the fact that national law observes the principles of equivalence and effectiveness. That government points out in particular that the tax rate in a purely domestic situation was also the rate actually paid by the subsidiaries on the profits underlying the distribution of dividends to their parent company and that the national law takes account only of distributions made by direct subsidiaries of French parent companies. As the information requested is known only to the taxpayer itself, it would not in any way be excessive, according to the French and United Kingdom governments, to require the parent company to furnish the first specific items concerning taxation and the nature of the distributions and the subsidiaries concerned, and the tax administration could subsequently, if appropriate, request administrative assistance from the authorities of the Member State in which the subsidiaries are established within the framework of the provisions of Directive 77/799 or those of bilateral tax conventions. In any event, the French Government considers that, if the Court were to rule that placing the burden of proof on the parent company entailed an infringement

40 — OJ 1997 L 336, p. 15.

of the principles of equivalence and/or effectiveness, that infringement would be justified by the need to combat tax avoidance.

94. The Commission, for its part, takes a middle line. In essence, it considers that EU law does not, in principle, preclude, in the context of the reimbursement of an advance payment such as that in the main proceedings, a Member State requiring that account be taken of the charge to tax borne by the subsidiary in the Member State in which it is established. However, in the present case, it takes the view that, as the tax credit was guaranteed to parent companies on the basis of the (normal) statutory tax rate, without taking account of the rate actually applied to the profits underlying the distribution made by the French subsidiaries or of the evidence of the amount of tax actually paid by those companies, the principle of equivalence would require the same treatment to be applied in a cross-border situation.

95. Those opposing positions may, in part, be explained by different interpretations of national law.

96. The interested parties are debating, first, the requirements of national law concerning the rate of corporation tax applicable to the underlying profits of French subsidiaries whose parent companies receiving dividends from those subsidiaries were asked to demonstrate that payment had been made; Accor and the Commission consider that only evidence of liability at the normal rate was requested, while the French Government has explained at length that it was the rate actually applied.

97. Secondly, in order to reply to Accor's criticisms concerning excessive evidential requirements as regards the taxation of subsidiaries of companies in the Accor group which were laid down by the French tax authorities, the French Government stressed at the hearing that, when calculating the tax credit, national law took account only of the dividends distributed at the level of the direct subsidiary of the parent company and not at the level of its subsidiaries' subsidiaries. Applying the principle of equivalence, that government considers that it could not be otherwise in a cross-border situation, or else discrimination in the other direction would be introduced.

98. It is not for the Court either to settle the question whether, in a purely domestic situation, national law required evidence of the normal rate or of the actual rate paid by the subsidiaries on the profits underlying the distribution of dividends to their parent company or to determine whether that law, to that end, took account only of relationships between that company and its direct subsidiary and not all the sub-subsidiaries in the group. These aspects are investigations which the national court will have to perform.

99. It is therefore necessary to argue on the basis of assumptions.

100. The first assumption to be considered is that defended by the French Government, that is to say that in which national law makes the payment of the tax credit, in a purely domestic situation, subject to payment of the actual rate of corporation tax on the underlying profits made by the direct subsidiary of the parent company.

101. In that case, the extension to cross-border situations of the treatment applied to domestic situations does not in any way infringe the principle of equivalence.

102. Nor does EU law preclude the burden of providing the relevant evidence falling primarily on the parent company concerned. The tax authorities have the right to ask the taxpayer for such proof as they may consider necessary in order to determine whether the conditions for obtaining a tax credit provided for in the national legislation have been met. [41]

103. Contrary to Accor's apparent argument, although the mutual assistance mechanism provided for by Directive 77/799 does permit the tax authorities to call upon the authorities of another Member State in order to obtain all the information that may be necessary to effect a correct assessment of a taxpayer's liability to tax, [42] it cannot, however, constitute either a procedure prior to the obligation on the taxpayer to provide the evidence necessary for the grant of a tax advantage or, moreover, an obligation on the part of those authorities. [43]

104. Furthermore, the French Government reiterated at the hearing before the Court that the evidence required need not by any means take a particular form. The fact that that evidence is not required in a purely domestic situation appears to me to be inherent in the fact that the tax administration clearly knows the domestic law applicable and already has sufficient information provided when the tax returns are made concerning the settlement of the advance payment on the distributions to which the tax credit was attached and the settlement of the advance payment payable by the parent company of a group, a copy of which is annexed to the French Government's written observations. In those circumstances, it does not appear to me that requiring that type of evidence to be submitted in regard to a French parent company receiving dividends from subsidiaries established in other Member States can constitute an additional administrative burden in comparison with the information required in a purely domestic situation since, subject to verification by the national court, in a situation of the latter type, parent companies were also subject to

41 — See, to that effect, Case C-318/07 *Persche* [2009] ECR I-359, paragraphs 54 and 60 and the case-law cited.

42 — Idem, paragraph 61.

43 — Ibid, paragraphs 62, 64 and 65.

administrative formalities, in particular in order to allow the tax authorities to verify whether the conditions for the application of the contested tax regime were met.

105. However, two points should be considered from the perspective of compliance with the principle of effectiveness.

106. First of all, it cannot be excluded that, under the legislation of the Member States in which the subsidiaries concerned are established, in particular if those Member States did not themselves prevent the double economic taxation of dividends on their territory at the time of the facts in the main proceedings, it is in practice impossible or unachievable to demonstrate the corporation tax actually paid by subsidiaries on the profits underlying the distribution of dividends to the French parent company. For it is not impossible that certain Member States exempt companies established on their territory from the need to produce a breakdown of their own capital, according to the rate applicable to the different revenue sources, and to record the corporation tax paid on the profits underlying the distribution of dividends. In those circumstances, it would run counter to the principle of effectiveness to require evidence of the amount of the corporation tax reflecting the actual rate paid by those companies, which are subsidiaries of a French parent company. It is of course for the national court, in the light of all the elements of the case, to verify whether the parent company Accor is faced with such a situation.

107. Some attention must also be paid to Accor's objection that it cannot be asked to submit documents whose legal period of retention in France has expired. In so far as the contested years are 1999, 2000 and 2001 and, in accordance with the CGI, the advance payment was payable in the five years in which dividends were paid, it cannot be excluded, as Accor, after all, claimed at the hearing, that the production of the evidence requested may relate to years (up to 1994 at the outside) in respect of which the persons concerned were no longer required to retain them.

108. A distinction must, in my view, be made between two different situations. First of all, that in which the French tax authorities request the production of that evidence during its legal retention period in France: it would then be for the parent company to gather those documents for whatever purpose in order, in particular, to be prepared for confirmation of the legality of such a request in the context of a legal action. Then in the opposite situation, where the tax authorities do not request those documents during their legal retention period, they would not, consequently, be available to the parent company. In this second situation, it appears to me, however, that, contrary to Accor's submissions, it is not so much the legal retention period in France that is relevant but that applicable in the Member States in which the various

subsidiaries concerned are established. If, at the time when the court has to rule on the main proceedings, that period has expired, it will accordingly be impossible for Accor to produce the required evidence. In those circumstances, Accor could not be refused the benefit of the tax credit for the dividends concerned without infringing the principle of effectiveness.

109. The second assumption, which is diametrically opposed and defended, in essence, by Accor, is that according to which the *normal rate* applied to the profits underlying the distribution of dividends of the subsidiaries and sub-subsidiaries of the parent company was taken into account in a purely domestic situation.

110. In such a context, it is a question of whether the fact that a Member State requires the parent company established in its territory to demonstrate the rate and the amount of the corporation tax *actually* paid on the profits underlying the distribution of dividends by the foreign subsidiaries and sub-subsidiaries of that company infringes the principles of equivalence and effectiveness.

111. An affirmative reply to that question would not appear to me to be particularly complex if the case-law of the Court did not require, at least at first sight, that, in calculating the setting-off of a tax credit applied to the payment of dividends known as 'incoming', account should be taken of the corporation tax *actually paid* by the distributing company in the Member State in which it is established.

112. Thus, in paragraph 54 of *Manninen*, and reiterated in paragraph 15 of *Meilicke and Others*, the Court concluded that the calculation of a tax credit granted to a shareholder fully taxable in Finland, who has received dividends from a company established in Sweden, must take account of the tax actually paid by the company established in that other Member State, as such tax arises from the general rules on calculating the basis of assessment and from the rate of corporation tax in that latter Member State.

113. Similarly, in the operative part of *Test Claimants in the FII Group Litigation*, the Court ruled that 'Articles 43 EC and 56 EC do not preclude legislation of a Member State which exempts from corporation tax dividends which a resident company receives from another resident company, when that State imposes corporation tax on dividends which a resident company receives from a non-resident company in which the resident company holds at least 10% of the voting rights, while, in the latter case, granting a tax credit for the tax *actually paid* by the company

making the distribution in the Member State in which it is resident, provided that the rate of tax applied to foreign-sourced dividends is no higher than the rate of tax 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 amount of the tax charged in the Member State of the company receiving the distribution.' [44]

114. However, it appears to me that this case-law is only an apparent obstacle.

115. As regards *Manninen*, it follows very clearly from paragraphs 40 and 53 of that judgment that the tax credit granted to Finnish residents in purely domestic situations corresponded to the corporation tax actually paid by the distributing company. [45] The fact that, in paragraph 54 of that judgment, the Court extended the benefit of that regime to Finnish residents who had received dividends paid by companies established in other Member States is quite simply the consequence of the application of the principle of non-discrimination.

116. As regards the judgment in *Test Claimants in the FII Group Litigation*, although it is true that the Court accepted that a Member State could, in the context of preventing double economic taxation, apply an exemption system for dividends paid in purely domestic situations and an imputation system in the context of distributing 'incoming' dividends from non-resident companies, the Court dealt only incidentally with the link between the exemption applicable to nationally-sourced dividends and the taxation of the parent company. The applicants in the main proceedings had submitted that the exemption of nationally-sourced dividends applied independently of the tax (actually) paid by the distributing company. The Court left it to the national court to determine whether the tax rate was indeed the same and whether different levels of taxation occurred only in certain cases by reason of a change to the tax base as a result of certain exceptional reliefs. [46]

117. It cannot therefore be inferred from those judgments that the Court would be prepared to accept that, as a general rule, a Member State preventing economic double taxation of dividends in its territory grants a tax credit to a parent company in that Member State applied to the distribution of the dividends of a subsidiary established in the same Member State on the basis of the normal rate of corporation tax which the latter is in principle liable to pay, while the benefit of

44 — Second subparagraph of paragraph 1 of the operative part of the judgment (my italics).

45 — In paragraph 53 of the judgment the Court states '... in Finnish law the tax credit always corresponds to the amount of the tax actually paid by way of corporation tax by the company which distributes the dividends'.

46 — *Test Claimants in the FII Group Litigation*, paragraphs 53 to 56.

that same tax credit to a parent company of that Member State applied to the distribution of the dividends of subsidiaries established in other Member States is subject to demonstration of the actual rate and amount of corporation tax which those companies have paid in those other Member States.

118. On the contrary, such different treatment would, in my view, infringe the principles of non-discrimination and equivalence.

119. Contrary to the argument of the French Government, such an infringement could not be justified by the desire, expressed in general terms, to prevent tax avoidance. First, it should be pointed out that the Member States cannot take as a basis a general presumption of tax avoidance to justify a tax measure which adversely affects the objectives of the Treaty. [47] Secondly, such different treatment does not in any way appear to me to offer itself as the measure which is least prejudicial to the above-mentioned principles in aiming to achieve the objective of combating tax avoidance. In a situation such as that examined under the present assumption, a Member State could perfectly well require the taxpayer to furnish evidence of the normal rate of corporation tax applicable to distributing subsidiaries to which those companies are liable in the Member State in which they are established and the payment of the amount of tax corresponding to that rate in order to avoid – which appears to be the primary concern of the French Government – a tax credit being applied to the distribution of dividends from such subsidiaries to a French parent company where those subsidiaries, owing to the various general reliefs applicable in the Member State in which they are established, are totally exempted from payment of corporation tax on the profits underlying distribution of dividends.

120. As regards the obligation to furnish such evidence for the entire chain of subsidiaries and sub-subsidiaries of the French parent company, such an obligation is not rendered inadmissible by the principles of non-discrimination and equivalence, provided that it is also a requirement in purely domestic situations in regard to the declarations required of the parent companies and their French subsidiaries. It remains the case that responding to such a requirement may prove impossible in practice in cross-border situations, all the more so where the distributions concerned relate to profits which were made at a time in regard to which the legal obligation to retain documents has expired. It will be for the national court, if such an assumption should prove to be relevant, to carry out the necessary investigations.

47 — See, in particular, Case C-72/09 *Établissements Rimbaud* [2010] ECR I-10659, paragraph 34 and the case-law cited.

121. For these reasons, I propose that the reply to the third question should be as follows: the principles of equivalence and effectiveness do not preclude the reimbursement of sums which ensure the application of the same tax regime to dividends redistributed by the parent company established in a Member State, whether those dividends originate from sums distributed by its subsidiaries established in the same Member State or from another Member State, being in principle subject to the condition that the person liable for the tax furnish evidence which is in his sole possession and relating, with respect to each dividend concerned, in particular to the rate of taxation actually applied and the amount of tax actually paid on profits made by its subsidiaries established in Member States other than the first Member State, whereas, with respect to subsidiaries established in that Member State, that evidence, known to the administration, is not required, provided that the rate and the amount of the tax actually paid also apply to the distribution of dividends to the parent company which are received from subsidiaries established in the same Member State, and it does not in practice prove 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 prevention 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 investigate whether those conditions are satisfied in the case in the main proceedings.

III — Conclusion

122. In light of the foregoing considerations, I suggest that the Court give the following answer to the questions referred by the Conseil d'État:

'(1) Article 56 EC must be interpreted as precluding a tax regime under which a parent company established in a Member State which receives dividends paid by a subsidiary established in another Member State may not set off against the advance payment for which it is liable when it redistributes those dividends to

its own shareholders the tax credit applied to the distribution of those dividends, unlike the comparable situation of a parent company established in the first Member State receiving dividends paid by a subsidiary also established in that Member State.

(2) A Member State may preclude the reimbursement of a payment levied in breach of EU law with respect to the full financial charge which the taxpayer has not borne himself, which, to that extent, would result in the unjust enrichment of that taxpayer. Such enrichment would be likely to arise if the Member State had to reimburse the charges borne by the taxpayer which were not the inevitable consequence of the refusal of a Member State to ensure compliance with the provisions of the EC Treaty. In the main proceedings, it is for the national court, in the light of all the relevant factors available to it, to investigate, on the basis of the dividend distribution policy established by a parent company, such as the defendant in the main proceedings, in favour of its shareholders, whether the making of the contested advance payment has been set off, in full or in part, against the dividends redistributed to those shareholders such that the parent company has, if applicable, had to suffer losses which are the inevitable consequence of the Member State's refusal to grant it the equal treatment requested. In that case, the calculation of the reimbursement of the contested payment to the parent company should be established on the basis of the financial burden which it has borne based on all the relevant factors available to the national court.

(3) The principles of equivalence and effectiveness do not preclude the reimbursement of sums which ensure the application of the same tax regime to dividends redistributed by the parent company established in a Member State, whether those dividends originate from sums distributed by its subsidiaries established in the same Member State or from another Member State, being in principle subject to the condition that the person liable for the tax furnish evidence which

is in his sole possession and relating, with respect to each dividend concerned, in particular to the rate of taxation actually applied and the amount of tax actually paid on profits made by its subsidiaries established in Member States other than the first Member State, whereas, with respect to subsidiaries established in that Member State, that evidence, known to the administration, is not required, provided that the rate and the amount of the tax actually paid also apply to the distribution of dividends to the parent company which are received from subsidiaries established in the same Member State, and it does not in practice prove 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 prevention 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 investigate whether those conditions are satisfied in the case in the main proceedings.'