Reports of Cases

OPINION OF ADVOCATE GENERAL
KOKOTT
delivered on 14 October 2021 [1]

Case C-556/20

Schneider Electric SA,
Axa SA,
BNP Paribas,
Engie,
Orange SA,
L'Air liquide, société anonyme pour l'étude et l'exploitation des procédés Georges Claude
v
Premier ministre,
Ministre de l'Economie, des Finances et de la Relance

(Request for a preliminary ruling from the Conseil d'État (Council of State, France))

(Request for a preliminary ruling – System of advance payments and tax credits at the time of redistribution of dividends – Relationship between the Parent-Subsidiary Directive (Directive 90/435/EEC) and the fundamental freedoms – Withholding tax – Taxation of dividends paid to a parent company under Article 4 of Directive 90/435 – Provisions relating to the payment of tax credits to the recipients of dividends (Article 7(2) of Directive 90/435))

I. Introduction

1. Up to and including 2004, French companies had to make an advance payment of tax ('précompte mobilier') when redistributing dividends to their shareholders if the company profits to be distributed (in this case, the dividends received) were not subject to corporation tax. This system also included a tax credit received by the recipient of the dividends at the time of redistribution, which, however, was refused in cases involving distributions from foreign subsidiaries.

2. The Court of Justice has therefore already addressed the French legal situation with regard to the taxation of dividends in a chain of companies in *Accor* [2] and *Commission* v *France* [3] and found infringements of the freedom of establishment and the free movement of capital in each case. The issue in the present case is the compatibility of the relevant French provisions with Directive

[1] Original language: German.

[2] Judgment of 15 September 2011, *Accor* (C-310/09, EU:C:2011:581).

[3] Judgment of 4 October 2018, *Commission* v *France (Advance payment)* (C-416/17, EU:C:2018:811).

90/435[4] ('the Parent-Subsidiary Directive'). By its present request for a preliminary ruling, the Conseil d'État (Council of State, France) is now seeking interpretation of that directive, in particular as to whether Article 7(2) thereof allows the imposition by the French authorities of such an advance payment.

3. In addition to the compatibility of the French system with the Parent-Subsidiary Directive, the question also arises as to whether a taxation system that violates the fundamental freedoms can nevertheless be permitted in the Member State by means of Article 7(2) of the Parent-Subsidiary Directive.

II. Legal context

A. EU law

4. According to the recitals of the Parent-Subsidiary Directive, the objective of that directive is to exempt dividends and other profit distributions paid by subsidiary companies to their parent companies from withholding taxes and to eliminate double taxation of such income at the level of the recipient parent company.

5. Article 4(1) and (2) of that directive provides:

'1. Where a parent company or its permanent establishment, by virtue of the association of the parent company with its subsidiary, receives distributed profits, the State of the parent company and the State of its permanent establishment shall, except when the subsidiary is liquidated, either:

– refrain from taxing such profits, or

– tax such profits while authorising the parent company and the permanent establishment to deduct from the amount of tax due that fraction of the corporation tax related to those profits and paid by the subsidiary and any lower-tier subsidiary, subject to the condition that at each tier a company and its lower-tier subsidiary meet the requirements provided for in Articles 2 and 3, up to the limit of the amount of the corresponding tax due.

…

2. However, each Member State shall retain the option of providing that any charges relating to the holding and any losses resulting from the distribution of the profits of the subsidiary may not be deducted from the taxable profits of the parent company. Where the management costs relating to the holding in such a case are fixed as a flat rate, the fixed amount may not exceed 5% of the profits distributed by the subsidiary.'

6. Article 5(1) of the directive reads:

'Profits which a subsidiary distributes to its parent company shall be exempt from withholding tax.'

[4] 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 (OJ 1990 L 225, p. 6) – in this case in the version in force in 2004 as last amended by Council Directive 2003/123/EC of 22 December 2003 (OJ 2004 L 7, p. 41).

7. However, under Article 7(2) of the directive:

'This Directive shall not affect the application of domestic or agreement-based provisions designed to eliminate or lessen economic double taxation of dividends, in particular provisions relating to the payment of tax credits to the recipients of dividends.'

B. French law

8. In the version in force during the tax years at issue in the main proceedings, Article 146(2) of the Code général des impôts (General Tax Code; 'the CGI') provides as follows:

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

9. According to Article 158a(1) of the CGI, in the version in force during the tax years at issue in the main proceedings:

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

(a) the sums they receive from the company;

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

That tax credit shall be equal to half of the actual payments made by the company. It may be used only in so far as the income is included in the base of the income tax payable by the recipient. It shall be received as payment for that tax. It shall be refunded to natural persons where the amount of the tax credit exceeds the amount of the tax for which they are liable.'

10. Article 216(1) of the same code provides:

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

11. The first subparagraph of Article 223e(1) of the CGI indicated, in the version applicable from 1 January 2000:

'… 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 158a(1). The advance payment shall be due with respect to distributions giving entitlement to a tax credit provided for in Article 158a, whoever the recipients are.'

III. Main proceedings

A. Background to Case C-556/20

12. This request for a preliminary ruling concerns the French system of taxation of dividends in a chain of companies, which system existed up to and including 2004.

13. That system was made up of several components. If profits were distributed by a – French or foreign – subsidiary to its French parent company, they were exempt from corporation tax under Article 216(1) of the CGI, with the exception of a proportion of the costs and expenses fixed at the flat rate of 5%.

14. Furthermore, since 1965, France had already established a system of taxation consisting of tax credits and advance payments ('précompte mobilier'), provided that the dividends were passed on in a chain of companies. Those provisions were repealed on 1 January 2005, but were still applicable to the years 2000 to 2004 at issue.

15. Under Article 158a of the CGI, the recipients of dividends from a French company automatically received a tax credit equal to 50% of the dividend distributed. That tax credit was intended to neutralise the taxation levied earlier by means of corporation tax at company level and to ensure correct taxation of investors (natural persons) by reference to their financial capacity in the context of their income tax. This is because the distributed profit was already subject to corporation tax at 33.33% at the level of the distributing company that had generated the profit and was taxed a second time at the level of the shareholders. In short, it was precisely the distributing company's corporation tax burden that was neutralised by the recipient's tax credit. As a result, the recipient received 100% of the profit (66.66 in the form of a distribution and 50% of 66.66 = 33.33 in the form of a tax credit) and paid tax on this 100 according to his or her individual rate of income tax.

16. In the light of the above, however, the tax credit was only necessary to the extent that the distributed profits were actually subject to corporation tax at the distributing company concerned. However, for practical reasons, the tax credit was granted in a general manner to all shareholders who received distributions from French companies. It was irrelevant whether that income had, in fact, previously been subject to corporation tax at the level of the distributing company.

17. As a corrective mechanism, however, an advance payment at the level of the relevant distributing company was introduced by Article 223e of the CGI. That advance payment was levied, inter alia, in cases where the profits underlying the distribution had not been taxed or had been taxed only partially at the level of the distributing company concerned. Thus, the advance payment at the level of the distributing company was intended to justify the tax credit granted in a general manner at shareholder level. A tax-free profit of, for example, 100 is reduced by the advance payment to 66.66, which is then distributed and increased again to 100 by the tax credit (50% of 66.66 = 33.33) granted to the recipient of the dividend.

18. For example, if a French parent company received a dividend from its French subsidiary, the parent company would automatically receive a tax credit amounting to 50% of the dividend. Since the dividend was tax-exempt at the level of the parent company under the parent-subsidiary regime provided for in Article 216 of the CGI, but the shareholder also received a tax credit, an advance payment was levied when the parent company redistributed the dividend to its

shareholders. However, the parent company could offset its tax credit against the advance payment under Article 146(2) of the CGI. Thus, ultimately, there was no extra tax burden at the level of the parent company. The tax credit and advance payment always cancelled each other out, as long as the profits distributed to it did not cross a border.

19. By contrast, under Article 158a of the CGI, a French parent company was not entitled to a tax credit if it received dividends from a subsidiary established in another Member State. Under the Parent-Subsidiary Directive, it was at any rate not required to pay tax on this dividend income. At the time of redistribution, however, its own shareholders received a tax credit under Article 158a of the CGI, since the distribution originated from a French company (in this case the parent company). However, as the dividend income was not taxed at the level of the parent company, that tax credit at the level of the shareholder was corrected by the advance payment at the level of the parent company. Thus, if the parent company redistributed these dividends from its subsidiary to its own shareholders, it was required to make the advance payment. Now, however, this could not be offset by a tax credit of its own. This reduced the amount that the parent company could distribute to its own shareholders.

20. In that regard, the fact that the parent company was not granted a tax credit when receiving dividends from subsidiaries established abroad, on account of Article 158a of the CGI, prevented the neutral redistribution of dividends to the shareholders concerned and led to a difference in treatment of dividends in cross-border situations.

B. Dispute in the main proceedings

21. Therefore, the companies Schneider Electric SE, AXA SA, BNP Paribas, Engie SA, Orange SA and L'Air Liquide SA ('the applicant companies') sought reimbursement of the advance payment of tax made in 2000 to 2004, which was not offset by corresponding tax credits.

22. From the submissions of the applicant companies, it is apparent that they received dividends in the years 2000 to 2004 paid by their subsidiaries established in other Member States and that, when they redistributed those dividends, they made an advance payment of tax in accordance with Article 146(2) of the CGI, read in conjunction with Articles 158a and 233e of the CGI.

23. In that regard, they submit that those provisions do not comply with the Parent-Subsidiary Directive. At first instance, the actions were upheld in part before the Cour administrative d'appel de Versailles (Administrative Court of Appeal of Versailles, France), but the French State appealed to the Conseil d'État (Council of State).

24. At the same time and with a view to accelerating the decision, the applicant companies brought direct actions before the Conseil d'État (Council of State) on 27 and 28 July 2020. In their applications, they sought the annulment of the administrative provisions published on 1 November 1995 under Nos 4 J 1321 and 4 J 1322 and contained in Instruction 4 J-1-01 of 21 March 2001.

25. In that regard, the applicant companies submit that the contested administrative instructions repeat the provisions of Article 223e of the CGI in force at the time. However, according to the case-law of the Court of Justice, that provision itself is incompatible with Article 4 of Directive 90/435, with the result that the corresponding administrative provisions are also invalid.

26. In addition to its compatibility with Article 4 of Directive 90/435, the referring court asks whether the French tax system, consisting of tax credits and advance payments, may be permissible as a uniform system for the avoidance of double taxation under Article 7(2) of Directive 90/435.

IV. The request for a preliminary ruling and the procedure before the Court

27. In those circumstances, the Conseil d'État (Council of State) decided to stay the proceedings against the administrative provisions and to refer the following question to the Court of Justice for a preliminary ruling:

'Does Article 4 of the Parent-Subsidiary Directive, in view, in particular, of Article 7(2) thereof, preclude a provision such as Article 223e of the CGI, which provides, in order to ensure the correct implementation of a scheme designed to eliminate economic double taxation of dividends, for a levy when a parent company redistributes profits which have been distributed to it by subsidiaries established in another Member State?'

28. In the proceedings before the Court, Schneider Electric, AXA, Engie, Orange, L'Air liquide, France and the European Commission submitted written observations and attended the hearing on 8 September 2021.

V. Legal assessment

A. The question referred for a preliminary ruling

29. By its question referred for a preliminary ruling, the referring court expressly asks only whether the advance payment of tax provided for in Article 223e of the CGI is compatible with Article 4 of the Parent-Subsidiary Directive, in view of Article 7(2) thereof. The case in which the referring court seeks an answer relates to the distribution by a subsidiary established in another Member State to its parent company in France of dividends which the latter redistributes to its shareholders.

30. As is apparent from the request for a preliminary ruling, the applicant companies dispute the obligation to make an advance payment of tax under the administrative provisions published on 1 November 1995 under Nos 4 J 1321 and 4 J 1322 and contained in Instruction 4 J-1-01 of 21 March 2001. However, a tax burden exists only if and because, in their situation (unlike in the purely domestic situation), that advance payment is not offset by a corresponding tax credit.

31. It is precisely that disadvantageous treatment of the cross-border situation compared with the purely domestic situation which the Court had already held to be contrary to EU law in *Accor*.[5] It found that the French legislation relevant in the present case is contrary to freedom of establishment (Article 49 TFEU) and free movement of capital (Article 63 TFEU). The incompatibility of that tax with EU law was confirmed in *Commission* v *France*.[6] The referring

[5] Judgment of 15 September 2011, *Accor* (C-310/09, EU:C:2011:581).

[6] Judgment of 4 October 2018, *Commission* v *France (Advance payment)* (C-416/17, EU:C:2018:811).

court rightly concludes from this that a company which receives dividends from a subsidiary established abroad and which, in the event of redistribution, is subject to advance payment of tax is entitled to a tax credit.

32. However, it remains to be ascertained [7] whether and how that entitlement to a tax credit can now (that is to say, following the implementation of the requirements of EU law stemming from the two decisions of the Court) be offset against the advance payment. It is therefore possible that the applicant companies will still not benefit from a tax credit as in the domestic situation. However, it could also be the case that they are seeking both the tax credit (as recipients of the dividends) and the abolition of the advance payment (as the companies redistributing the dividends).

33. If the applicant companies still do not receive a comparable tax credit, the question then arises as to the consequences of the possible compatibility of the advance payment provided for in Article 223e of the CGI with the Parent-Subsidiary Directive on the fundamental freedoms (see B). If, on the other hand, the applicant companies received a tax credit comparable to that in the domestic situation, then it must be clarified whether that French system of dividend taxation consisting of advance payments and tax credits falls within the scope of the Parent-Subsidiary Directive (see C) and, if so, whether Article 7(2) of that directive may authorise such a system (see D).

B. The relationship between the Parent-Subsidiary Directive and the fundamental freedoms (freedom of establishment and free movement of capital)

34. If the advance payment schemes laid down in Article 223e of the CGI were in conformity with the Parent-Subsidiary Directive, this would not mean that the French system as a whole complied with EU law, notwithstanding the absence of a tax credit.

35. The Court has already held that the French legislation or its interpretation by the referring court is contrary to fundamental freedoms and constitutes a failure on the part of France to fulfil its obligations. [8] That infringement of primary law results from the inadequacy of the tax credit in the case of a distribution made by a company not established in France. If Article 7(2) of the Parent-Subsidiary Directive does not affect the French tax system at issue, and therefore does not preclude it, this would not remedy or justify that infringement, as the applicant companies also argued at the hearing.

36. The hierarchy of norms is clear. The Parent-Subsidiary Directive is to be measured against the fundamental freedoms, and not vice versa. Nothing to the contrary can be inferred from the fact that the case-law of the Court suggests that any national measure in an area which has been the subject of exhaustive harmonisation at the level of the European Union must be assessed in the light of the provisions of that harmonising measure, and not in the light of the provisions of primary law. [9]

7 See also the Commission's observations in paragraph 41 of its written submission.

8 Judgments of 4 October 2018, *Commission* v *France (Advance payment)* (C-416/17, EU:C:2018:811), and of 15 September 2011, *Accor* (C-310/09, EU:C:2011:581).

9 See judgments of 20 December 2017, *Deister Holding* and *Juhler Holding* (C-504/16 and C-613/16, EU:C:2017:1009, paragraphs 45 and 46); of 7 September 2017, *Eqiom and Enka* (C-6/16, EU:C:2017:641, paragraph 15); of 30 April 2014, *UPC DTH* (C-475/12, EU:C:2014:285, paragraph 63); of 11 December 2003, *Deutscher Apothekerverband* (C-322/01, EU:C:2003:664, paragraph 64); of 23 May 1996, *Hedley Lomas* (C-5/94, EU:C:1996:205, paragraph 18); and of 12 October 1993, *Vanacker and Lesage* (C-37/92, EU:C:1993:836, paragraph 9).

37. First, the Court reviews the compatibility of secondary law with primary law.[10] Second, the foregoing statement is correct in cases where there is no doubt as to the compatibility of secondary law with primary law. This would mean that the secondary law, as a *lex specialis*, must be given precedence. If it already follows from this that the contested act is contrary to EU law, there is no need also to examine whether it is incompatible with primary law.

38. If Article 7(2) of the Parent-Subsidiary Directive were to permit such a system without tax credits, there would be doubts, first, as to its compatibility with the fundamental freedoms. Second, Article 7(2) of the Parent-Subsidiary Directive does not affect the 'application of domestic or agreement-based provisions' in that regard. Thus, there is also no exhaustive harmonisation by means of the Parent-Subsidiary Directive.

39. Therefore, as long as the tax credit, which is offset against the advance payment, continues to depend on whether the distributing subsidiary is established in France or in another Member State, the French system of advance payments and tax credits will remain, in accordance with the case-law of the Court,[11] contrary to EU law. Nor could Article 7(2) of the Parent-Subsidiary Directive alter this fact.

C. The applicability of the Parent-Subsidiary Directive in the case of a tax credit granted upon receipt of a 'foreign dividend'

40. By contrast, if an equivalent tax credit is granted to the applicant companies even in the case of dividends paid by subsidiaries established abroad, the relevance of the Parent-Subsidiary Directive is debatable.

1. The scope of the Parent-Subsidiary Directive

41. According to recital 3 of the Parent-Subsidiary Directive, the directive aims to eliminate double taxation of profits distributed by a subsidiary to its parent company at the level of the parent company.[12] However, this is already ensured by Article 216 of the CGI. The parent company is not required to pay tax again on dividends received from the subsidiary's taxed profits. However, this must be distinguished from the French system of advance payments and tax credits.

42. The *tax credit* is intended to neutralise, at the level of the recipient of the distribution, the advance charge imposed by tax legislation to be paid by the distributing company, ultimately so that it is possible to progressively tax only the shareholder, where appropriate, in accordance with his or her ability to pay. It prevents economic double taxation. The *advance payment of tax*, by contrast, is intended to eliminate or justify a tax credit which is in fact unjustified, by imposing a corresponding advance charge on the distributing company. The advance payment therefore avoids double or permanent non-taxation of the distribution.

[10] See, for example, judgments of 8 December 2020, *Hungary* v *Parliament and Council* (C-620/18, EU:C:2020:1001, paragraph 104); of 8 December 2020, *Poland* v *Parliament and Council* (C-626/18, EU:C:2020:1000, paragraph 87); of 26 October 2010, *Schmelz* (C-97/09, EU:C:2010:632, paragraph 50); and of 11 December 2003, *Deutscher Apothekerverband* (C-322/01, EU:C:2003:664, paragraph 64, at the end).

[11] Judgments of 4 October 2018, *Commission* v *France (Advance payment)* (C-416/17, EU:C:2018:811), and of 15 September 2011, *Accor* (C-310/09, EU:C:2011:581).

[12] In that regard, see also, for example, judgments of 17 May 2017, *X* (C-68/15, EU:C:2017:379, paragraph 70), and of 25 September 2003, *Océ van der Grinten* (C-58/01, EU:C:2003:495, paragraph 45).

43. Dividends are not subject to economic double taxation if the applicant companies are entitled to the tax credit, the credit is equivalent to the advance corporation tax paid on dividends received at subsidiary level, and the credit is offset against the advance payment in accordance with Article 146(2) of the CGI in respect of the redistributed dividends. The examples given by the Commission in its written observations demonstrate this. Indeed, there is only an adverse effect on the tax burden in cases where the advance payment at parent company level cannot be offset by a tax credit corresponding to the corporation tax burden at subsidiary level.

44. By contrast, granting a tax credit while also eliminating the advance payment at parent company level would lead to unjust enrichment of the parent company's shareholder. This is because the latter would receive a tax credit even though the dividend redistributed to him or her by the parent company had never been taxed.

45. Contrary to the view taken by the Commission and the applicant companies, the neutral treatment of dividends from a foreign subsidiary in the event of redistribution by the parent company to a shareholder, however, does not depend on an equivalent tax credit granted at the time when the dividends are received and on the advance payment at parent company level at the time of redistribution (that is, on its payment burden). Rather, the decisive factor is that the advance payment made by the parent company at the time of redistribution is equivalent to the tax credit received by the shareholder.

46. That is apparent from the following example, in which a parent company receives, free of tax, a dividend of 66.66 from a subsidiary. The latter is said to have paid exactly 33.33 corporation tax on its profit of 100 abroad (that is, the same corporation tax rate applied abroad as in France). The parent company now receives, albeit belatedly, a tax credit of 33.33, retroactively as a result of the case-law of the Court of Justice, and could now distribute in full (namely 100) the subsidiary's profit to the shareholder. The advance corporation tax charge is completely neutralised. However, if it distributes that 100, the shareholder would – without an advance payment at parent company level – receive 100 *and* a tax credit of 50%, that is, exactly 150. The subsidiary's profit – which should not be subject to double taxation in the event of redistribution – was, however, only 100 and, without the advance payment, has now increased to 150. It is only the advance payment of tax that is able to prevent that strange result (a redistribution increasing the dividend).

47. If that parent company had made the advance payment of tax (33.33) on the 100, it would only have been able to redistribute 66.66 and the shareholder would have received exactly 100 (66.66 in the form of a dividend and 33.33 in the form of its own tax credit). Since, in this case, the parent company's tax credit and advance payment exactly coincide, no payment burden arises.

48. If it had only redistributed 50, the shareholder would have received 75 (50 in the form of a dividend and 25 in the form of its own tax credit) and the advance payment would only have been 50% of 50 = 25. However, the parent company would also have received a tax credit of 33.33, leaving a balance of 8.33. If, on the other hand, the parent company increases the distribution of tax-exempt income from 66.66 to 100, then the shareholder receives 150 (100 in the form of a dividend and 50 in the form of its own tax credit). It is subject to an advance payment of 50 (50% of 100), which is offset by its own tax credit of 33.33. This leaves a payment burden of 16.66.

49. The result would be the same if the foreign corporation tax burden were lower (for example 15%) and France also neutralised only that burden by means of a tax credit. The subsidiary distributes 85 to the French parent company. France neutralises the advance charge by a tax credit of 15. Thus, the parent company receives (as in the domestic situation) a tax-free distribution of 100. It distributes 66.66 to the shareholder and makes an advance payment of 33.33. France credits that advance payment to the shareholder, meaning that he or she receives 100. This avoids double taxation of the dividend. Here, too, there is a payment burden (in this case 33.33 – 15 = 18.33) at parent company level.

50. However, that payment burden (and also the credit balance) in no way constitutes double taxation of the dividend. Rather, it ensures that the shareholder receives the original dividend from the subsidiary, without that dividend being reduced or increased. The question of whether the offsetting of the advance payment and the tax credit results in a payment burden or a credit balance at the parent company depends on the parent company's distribution policy and on the advance corporation tax charge imposed on the dividend, as well as the amount of the shareholder's tax credit. Seeking both a tax credit and the abolition of the advance payment would be tantamount to 'cherry-picking', which is permitted neither by the fundamental freedoms nor by the Parent-Subsidiary Directive. Instead of ensuring neutrality in the event of redistribution, the volume of distribution would be increased, to the detriment of the French State.

51. Ultimately, the interaction between tax credits and advance payments does not therefore affect, in the present case, the scope of the Parent-Subsidiary Directive. Nor is it possible, therefore, to establish any infringement of Article 4 (see 3.) or Article 5 (see 2.) of that directive.

2. No withholding tax within the meaning of Article 5 of the Parent-Subsidiary Directive

52. Since the advance payment must be made not by the holder of the shares (that is, the recipient of the distribution) but the distributing company, there is no withholding tax within the meaning of Article 5 of the Parent-Subsidiary Directive.[13] Similarly, the present case does not concern the withholding tax burden of a foreign recipient of dividends, but 'only' the tax burden of a French parent company which redistributes the dividends.

3. No infringement of Article 4 of the Parent-Subsidiary Directive

53. Infringement of Article 4(1) of the Parent-Subsidiary Directive is also excluded. That article provides that the State of the parent company is either to refrain from taxing the profits it receives (in this case in the form of dividends) or to deduct the foreign advance charge imposed by tax legislation.

54. France opted for the tax exemption method. Under Article 216 of the CGI, this dividend income may be deducted from the profit of the parent company. In that regard, Article 4(2) of the Parent-Subsidiary Directive allows, ultimately, taxation of up to 5% of the dividend income. As long as the French system ensures that the dividends received by the parent company are not

[13] See, expressly, with regard to the Belgian fairness tax, judgments of 17 May 2017, *X* (C-68/15, EU:C:2017:379, paragraph 65); of 24 June 2010, *P. Ferrero e C.* and *General Beverage Europe* (C-338/08 and C-339/08, EU:C:2010:364, paragraph 26); of 26 June 2008, *Burda* (C-284/06, EU:C:2008:365, paragraph 52 and the case-law cited); of 12 December 2006, *Test Claimants in the FII Group Litigation* (C-446/04, EU:C:2006:774, paragraph 109); and of 25 September 2003, *Océ van der Grinten* (C-58/01, EU:C:2003:495, paragraph 47). See also, on the concept of withholding tax, my Opinion in *X* (C-68/15, EU:C:2016:886, point 37 et seq.).

taxed at a rate higher than 5%, there is no conflict with Article 4 of the Parent-Subsidiary Directive. Article 216 of the CGI seems to guarantee this. Ultimately, however, that is a matter for the national court to assess.

55. On the other hand, as stated above (point 42 et seq.), the intention of the system of advance payments and tax credits is not to tax profits or dividends, but to ensure that profits already subject to corporation tax are exempt from corporation tax at shareholder level and can then be taxed in their entirety (generally progressively) at the shareholder's individual rate.

56. It is only if the advance payment is considered in purely isolated terms that it is possible to reach the conclusion, along with the applicant companies and the Commission, that there is a conflict with Article 4 of the Parent-Subsidiary Directive. That would be possible if the advance payment were to be regarded as (additional) taxation of dividends received at the time of redistribution.

57. Thus, the Court has already held that additional taxation when the received dividends are redistributed is also covered by Article 4(1) of the Parent-Subsidiary Directive.[14] However, that case concerned additional corporate taxation at the time of redistribution of dividends received in a situation regarded as unfair by the Belgian State. Although, in the year of the distribution, the company had reduced its taxable income, in whole or in part, by applying the various deductions provided for in national tax law, the shareholders received distributions (fairness tax). That fairness tax was nothing more than subsequent taxation of the dividends received (that were in fact exempt) at the time of redistribution. Such a taxation is incompatible with Article 4(1) of the Parent-Subsidiary Directive.

58. However, the nature of the advance payment of tax under French law is clearly different from this, as France reiterated at the hearing. That advance payment – unlike, for example, the fairness tax – does not generate tax revenue, but 'merely' corrects a subsequent tax credit received by the shareholder. Considering only the advance payment purely in isolation would overlook the binding link between the advance payment made by the distributing company and the tax credit received by the recipient of the distribution in the French system.

59. If a company did not pay corporation tax on profits (for example, for income exempt from tax) and distributed that income in the amount of 100, it would not be possible to justify granting a tax credit (in that case of 50) to the recipient of the dividend. In that regard, the French authorities rightly refer, in their written observations, to unjust enrichment or a doubling of the tax exemption. To avoid that, France could also have cancelled the tax credit received by the shareholder, which would not have been open to criticism under EU law.

60. However, France opted for a different mechanism. France does indeed grant the tax credit, but creates with the advance payment the potentially missing corporation tax burden at the level of the distributing company (in this case the parent company) (see point 45 et seq. above).

61. The advance payment is therefore not taxation in that system, but only a mechanism guaranteeing the full allocation of the profits to the shareholder, under which the distributed profits may be taxed appropriately. It is only formally linked to the payment of the dividends.

[14] Judgment of 17 May 2017, *X* (C-68/15, EU:C:2017:379, paragraph 77 et seq.), see also, in this respect, my Opinion in *X* (C-68/15, EU:C:2016:886, point 53 et seq.).

However, as to the substance, it is linked to the tax credit granted to the recipient of the dividends. That credit is thus ultimately cancelled if the income is not taxed at the level of the distributing company.

62. The advance payment is therefore *not an additional tax* due to the distribution of dividends (such as, for example, the fairness tax [15]). On the contrary, it is only a more or less complex means of correction in order to ensure correct taxation at the level of the recipient of the dividends. The advance payment 'merely' corrects an otherwise unjustified tax credit received by the recipient of the distribution, the correction being applied to the distributing company. As a result, part of the dividend (33.33%) is paid not directly to the shareholders, but indirectly to the shareholders via the tax authorities, without, however, being taxed (that is, reduced) by them.

4. Interim conclusion

63. The advance payment made by the distributing company, which is offset by a tax credit received by the recipient of the distribution, does not constitute, from a substantive point of view and when assessing the French system overall, additional taxation of the dividends to be distributed and, therefore, cannot be contrary to either Article 5 or Article 4 of the Parent-Subsidiary Directive.

D. In the alternative: Interpretation of Article 7(2) of the Parent-Subsidiary Directive

64. It is only if the Court were to take a different view and consider the advance payment, in isolation, as additional taxation of dividends received by the parent company at the time of redistribution to the shareholders, that the question would arise, in the alternative, as to the scope of Article 7(2) of the Parent-Subsidiary Directive.

65. According to that provision, the directive does not affect the application of domestic provisions designed to eliminate or lessen economic double taxation of dividends (first alternative), in particular provisions relating to the payment of tax credits to the recipients of dividends (second alternative). The first alternative is not relevant here, since the advance payment – if viewed in isolation, contrary to my suggestion – does not serve to lessen or eliminate double taxation. At most, it serves to avoid double non-taxation, as has also been confirmed by a representative of one of the applicant companies.

66. However, the advance payment could be considered to be a provision relating to the payment of tax credits to the recipients of dividends (second alternative). This is conditional, however, upon Article 7(2) of the Parent-Subsidiary Directive also referring to Article 4 of that directive. The applicant companies take the view that Article 7(2) of the Parent-Subsidiary Directive refers only to derogations from the prohibition of withholding tax laid down in Articles 5 and 6 of that directive. Since the advance payment is not a withholding tax, Article 7(2) of the

[15] Judgment of 17 May 2017, *X* (C-68/15, EU:C:2017:379).

Parent-Subsidiary Directive cannot apply either. That view is principally based on the need for derogations to be interpreted strictly [16] and the fact that Article 7(1) of that directive [17] clarifies what is not covered by the term 'withholding tax'.

67. However, I am not convinced by this restrictive interpretation of the scope of Article 7(2) of the Parent-Subsidiary Directive. First, it is not apparent from its wording and, second, it is contrary to the legislative history of the directive and, more specifically, to the earlier case-law of the Court.

68. The wording of Article 7(2) of the Parent-Subsidiary Directive does not contain any limitation to the prohibition of withholding tax laid down in Articles 5 and 6 of that directive. Instead, Article 7(2) allows derogations from the directive as a whole, thus also from Article 4. The second alternative also refers to tax credits which, as in the present case, do not necessarily have to be linked to withholding tax. There is no indication that specifically Article 4 of the Parent-Subsidiary Directive should not be covered by Article 7(2) of that directive.

69. In my opinion, Article 7(2) of the Parent-Subsidiary Directive merely states that national taxation systems which pursue the objectives of the directive by means of certain mechanisms which might be problematic when considered in isolation may nevertheless be permissible when considered as a whole. Such derogations must 'merely' not compromise the spirit and purpose of the Parent-Subsidiary Directive. [18]

70. By analogy, it is apparent from the case-law of the Court that Article 7(2) of the Parent-Subsidiary Directive must not be read solely in relation to the prohibition of withholding tax laid down in Articles 5 and 6 of that directive. In *Océ van der Grinten*, [19] it was disputed whether Article 7(2) of that directive also (!) extended to the prohibition of withholding tax. The Court concluded that Article 7(2) of the Directive is to be interpreted as allowing taxation even if such a charge, in so far as it applies to dividends paid by the subsidiary to its parent company, amounts to a withholding tax within the meaning of Article 5(1) of the Directive. [20] The Court therefore considers that 'even' the prohibition of withholding tax laid down in Article 5 of the Parent-Subsidiary Directive is covered by Article 7(2) of that directive. This would be contradicted by limiting Article 7(2) of the Directive 'only' to the prohibition of withholding tax.

71. This is confirmed by the legislative history of Article 7(2) of the Parent-Subsidiary Directive, which France emphasises in its observations. The derogation originates in an initiative of the United Kingdom on account of particular features in its corporation tax system. As is apparent from the final compromise proposal of 12 June 1989, the wording was intended to ensure that a 'précompte' [advance payment] and a 'crédit d'impot (avoir fiscal) [tax credit]' were not affected

16 See, with regard to Article 7(2) of the Parent-Subsidiary Directive, judgments of 24 June 2010, *P. Ferrero e C.* and *General Beverage Europe* (C-338/08 and C-339/08, EU:C:2010:364, paragraph 45), and of 25 September 2003, *Océ van der Grinten* (C-58/01, EU:C:2003:495, paragraph 86).

17 That provision reads as follows: 'The term "withholding tax" as used in this Directive shall not cover an advance payment or prepayment (précompte) of corporation tax to the Member State of the subsidiary which is made in connection with a distribution of profits to its parent company'.

18 See also, to that effect, in particular judgments of 24 June 2010, *P. Ferrero e C.* and *General Beverage Europe* (C-338/08 and C-339/08, EU:C:2010:364, paragraph 46), and of 25 September 2003, *Océ van der Grinten* (C-58/01, EU:C:2003:495, paragraph 102).

19 Judgment of 25 September 2003, *Océ van der Grinten* (C-58/01, EU:C:2003:495).

20 Judgment of 25 September 2003, *Océ van der Grinten* (C-58/01, EU:C:2003:495, paragraph 89).

by the directive.[21] Both of those elements were also present in the French system of taxation which existed at the time. The wording proposed in the compromise still appears in Article 7 of the Parent-Subsidiary Directive.

72. It is therefore possible to apply the second alternative of Article 7(2), even though the present case does not involve a withholding tax. It must, however, involve a provision relating to the payment of tax credits to the recipients of dividends.

73. Although, as the applicant companies rightly maintain, the advance payment is made at the level of the distribution company in the present case, its function (see, in that regard, point 58 et seq. above) is to correct a substantively unjustified tax credit received by the recipient of the dividend. As I stated above, the advance payment is necessarily linked to taxation at the level of the distributing company (corporation tax or advance payment) and to the tax credit system at the level of the recipient of the dividend. Under the French system, one is not conceivable without the other.

74. Thus, the advance payment also *relates to* the payment of tax credits to the recipients of dividends. The wording of that provision of French law therefore falls within the scope of Article 7(2) of the Parent-Subsidiary Directive. The latter provision states that the Parent-Subsidiary Directive does not affect such a corrective mechanism.

75. It is a condition, however, that that derogation does not undermine the spirit and purpose of the Parent-Subsidiary Directive. That is not, in any event, the case where the parent company receives, on receipt of dividends from its foreign subsidiary, a corresponding tax credit which neutralises the advance corporation tax paid on those dividends. In so far as that tax credit may be offset against the advance payment in the case of a redistribution which, in turn, merely corrects a substantively unjustified tax credit received by the shareholder, there are no concerns: in that case also, the French system allows a distribution of dividends, neutral as regards taxation, between companies falling within the scope of the Parent-Subsidiary Directive.

VI. Conclusion

76. In the light of the foregoing considerations, I propose that the Court answer the question referred for a preliminary ruling by the Conseil d'État (Council of State, France) as follows:

The combined provisions of Articles 4 and 7(2) of 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 do not preclude a provision which provides, in order to ensure the implementation of a scheme for the correct taxation of shareholders, for a levy when profits are redistributed, in order to neutralise a corresponding tax credit received by the next recipient of the distribution (the parent company's shareholder). This also applies if those profits have previously been distributed to the parent company by a subsidiary established in another Member State. By contrast, according to the case-law of the Court, a refusal to grant the tax credit to the parent company in this situation is already contrary to the fundamental freedoms.

[21] Compromise submitted to the Ecofin Council of 17 April 1989 concerning three key issues relating to the proposed Merger and Parent-Subsidiary Directives – No 7322/89, page 7/11 – French version.