Reports of Cases

JUDGMENT OF THE COURT (Second Chamber)

12 May 2022 *

(Reference for a preliminary ruling – Approximation of laws – Directive 90/435/EEC – Common system of taxation applicable in the case of parent companies and subsidiaries of different Member States – Article 4 and Article 7(2) – Prevention of economic double taxation of dividends)

In Case C-556/20,

REQUEST for a preliminary ruling under Article 267 TFEU from the Conseil d'État (Council of State, France), made by decision of 23 October 2020, received at the Court on the same day, in the proceedings

Schneider Electric SE,

Axa SA,

BNP Paribas SA,

Engie SA,

Orange SA,

L'Air Liquide, société anonyme pour l'étude et l'exploitation des procédés Georges Claude,

v

Premier ministre,

Ministre de l'Économie, des Finances et de la Relance,

THE COURT (Second Chamber),

composed of: A. Arabadjiev, President of the First Chamber, acting for the President of the Second Chamber, I. Ziemele (Rapporteur), T. von Danwitz, P.G. Xuereb and A. Kumin, Judges,

Advocate General: J. Kokott,

Registrar: C. Di Bella, Administrator,

* Language of the case: French.

having regard to the written procedure and further to the hearing on 8 September 2021,

after considering the observations submitted on behalf of:

– Schneider Electric SE, Axa SA, Engie SA, Orange SA, by S. Dardour-Attali, B. Boutemy, S. Espasa-Mattei, C. Smits and C. Vannini, avocats,

– L'Air Liquide, société anonyme pour l'étude et l'exploitation des procédés Georges Claude, by A. Madec and G. Blanluet, avocats,

– the French Government, by É. Toutain, E. de Moustier and A.-L. Desjonquères, acting as Agents,

– for the European Commission, by A. Armenia and V. Uher, acting as Agents,

after hearing the Opinion of the Advocate General at the hearing on 14 October 2021,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 4 and Article 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 (OJ 1990 L 225, p. 6).

2 The request has been made in proceedings between Schneider Electric SE, Axa SA, BNP Paribas SA, Engie SA, Orange SA and L'Air Liquide, société anonyme pour l'étude et l'exploitation des procédés Georges Claude ('L'Air Liquide'), on the one hand, and the Premier ministre (Prime Minister, France) and the Ministre de l'Économie, des Finances et de la Relance (Minister for Economic Affairs, Finance and Recovery, France), on the other hand, relating to an action for the annulment of administrative commentaries on the advance payment of tax provided for in Article 223*sexies* of the Code général des impôts (General Tax Code), in the version applicable to the facts in the main proceedings ('the CGI').

Legal framework

European Union law

3 The third recital of Directive 90/435 stated:

'Whereas the existing tax provisions which govern the relations between parent companies and subsidiaries of different Member States vary appreciably from one Member State to another and are generally less advantageous than those applicable to parent companies and subsidiaries of the same Member State; whereas cooperation between companies of different Member States is thereby disadvantaged in comparison with cooperation between companies of the same Member State; whereas it is necessary to eliminate this disadvantage by the introduction of a common system in order to facilitate the grouping together of companies'.

4 Article 1(1) of that directive was worded as follows:

‘Each Member State shall apply this Directive:

– to distributions of profits received by companies of that State which come from their subsidiaries of other Member States,

– to distributions of profits by companies of that State to companies of other Member States of which they are subsidiaries.’

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

‘1. Where a parent company, by virtue of its association with its subsidiary, receives distributed profits, the State of the parent company shall, except when the latter is liquidated, either:

– refrain from taxing such profits, or

– tax such profits 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, up to the limit of the amount of the corresponding domestic tax.

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 same directive provided:

‘Profits which a subsidiary distributed to its parent company shall, at least where the latter holds a minimum of 25% of the capital of the subsidiary, be exempt from withholding tax.’

7 Article 6 of Directive 90/435 provided:

‘The Member State of a parent company may not charge withholding tax on the profits which such a company receives from a subsidiary.’

8 Under Article 7 of that directive:

‘1. 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.

2. 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.’

9 Directive 90/435 was repealed by Council Directive 2011/96/EU of 30 November 2011 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States (OJ 2011 L 345, p. 8), which came into force on 18 January 2012. Nevertheless, in view of the date of the facts in the main proceedings, Directive 90/435 is applicable to them *ratione temporis*.

10 Article 4(1) and (3) of Directive 2011/96 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 Member State of the parent company and the Member State of its permanent establishment shall, except when the subsidiary is liquidated, either:

(a) refrain from taxing such profits; or

(b) 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 fall within the definitions laid down in Article 2 and meet the requirements provided for in Article 3, up to the limit of the amount of the corresponding tax due.

…

3. 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.'

French law

The provisions relating to tax credit and withholding tax

11 Article 158*bis* of the CGI provided that persons who received dividends distributed by French companies were deemed in that respect to have received income in the form of the sums they received from the company and a tax credit represented by a credit open with the Treasury. That tax credit was equal to half of the sums actually paid by the company.

12 Under the first subparagraph of paragraph 1 of Article 223*sexies* of that code:

'… 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 credit provided for in Article 158*bis* and applied to those distributions. The advance payment shall be due whoever the recipients of those distributions may be.'

13 Article 158*bis* and Article 223*sexies* of the CGI were repealed, for income distributed or received and for available tax credits, respectively, from 1 January 2005.

The provisions relating to the regime for parent companies

14 Article 145 of the CGI was worded as follows:

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

…

b. … the shares must represent at least 10% of the capital of the issuing company; …’

15 Article 146(2) of the CGI provided:

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

16 Under Article 216 of the CGI:

‘Net income from shareholdings, conferring entitlement to the application of the regime applicable to parent companies and referred to in Article 145, received by a parent company during the financial year, may be deducted from its total net profits …’

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

17 Schneider Electric, Axa, Engie and Orange (together, ‘Schneider Electric and Others’) and BNP Paribas and L’Air Liquide brought an action before the Conseil d’État (Council of State, France) for the annulment of the administrative commentaries relating to Article 223*sexies* of the CGI, published on 1 November 1995 in the basic documentation under Nos 4 J 1321 and 4 J 1322, and also the administrative commentaries contained in Instruction 4 J-1-01 of 21 March 2001, published in bulletin officiel des impôts (Official Tax Gazette) No 62 on 30 March 2001.

18 The applicants in the main proceedings consider that the contested commentaries restate the provisions imposing the advance payment of Article 223*sexies* of the CGI, which are themselves incompatible with Article 4 of Directive 90/435, since the advance payment of tax is in the nature of a tax measure introduced by the Member State of a parent company providing for the levy of a tax when the parent company distributes dividends and the basis of assessment of which tax is the amounts of the dividends distributed, including those originating from that company’s non-resident subsidiaries.

19 It is apparent from the request for a preliminary ruling that the provisions of Article 223*sexies* of the CGI, as interpreted by the contested commentaries, were applied to Schneider Electric and Others and to L’Air Liquide in respect, depending on the case, of the financial years 2000 to 2004, due to the distribution of sums levied on profits distributed to them by subsidiaries established in France, in other Member States or in third States, and that those companies disputed the full amount of those tax assessments.

20 The referring court therefore considered that Schneider Electric and Others and L'Air Liquide had a proven legal interest in bringing an action against the contested commentaries. On the other hand, BNP Paribas did not have a personal interest giving it the capacity to act in that regard, since it had not maintained either that the provisions of Article 223*sexies* of the CGI, as interpreted by those commentaries, had been applied to it or that it had been excluded from an advantage which the persons referred to by that interpretation can claim.

21 The referring court states that, as regards the tax treatment of profits falling within the scope of Directive 90/435, the French legislature opted, in Articles 145 and 216 of the CGI, for the exemption system, provided for in the first indent of Article 4(1) of that directive, subject to the imposition of a proportion of the costs and fees, fixed at the flat rate of 5%, representing the costs and fees borne by the parent company relating to its shareholding in the subsidiary which distributed those profits, in accordance with Article 4(2) of that directive. Those profits are therefore exempt up to 95%.

22 That court points out that only the redistributing party is subject to the advance payment of tax provided for in Article 223*sexies* of the CGI and that, consequently, in the light of the case-law of the Court of Justice, that advance payment of tax is not in the nature of a withholding tax within the meaning of Articles 5 and 6 and Article 7(1) of Directive 90/435, as is common ground between the parties. By contrast, that advance payment of tax is capable of falling within the scope of the first indent of Article 4(1) of Directive 90/435.

23 However, since the advance payment of tax provided for in Article 223*sexies* of the CGI was one of the constituent elements of a mechanism for eliminating economic double taxation of dividends, the referring court wonders whether that advance payment of tax does not fall within Article 7(2) of Directive 90/435. That advance payment of tax was payable in the event of a distribution of profits giving rise to the application of a tax credit, that is a tax deduction, where those profits were not subject to corporation tax at the ordinary rate, and it sought to prevent the situation whereby (i) the justification for the tax credit applied to that income is lost in the light of the tax borne by the distributing company on the profits out of which the distributions were made and, thus (ii) the application of that tax credit results in a 'windfall' for the recipient of the distributions.

24 Since, in accordance with the judgment of 15 September 2011, *Accor* (C-310/09, EU:C:2011:581), the company in receipt of the dividends is entitled to a tax credit which ensures the application of the same tax regime to dividends originating from companies established in France and those originating from companies established in another Member State, applicable to the advance payment tax provided for in Article 223*sexies* of the CGI, the application of that advance payment does not appear, according to the referring court, to have the effect of obstructing the objective pursued by Directive 90/435.

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

'Does Article 4 of [Directive 90/435], in view, in particular of Article 7(2) thereof, preclude a provision such as Article 223*sexies* 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?'

The request for the reopening of the oral part of the procedure

26 Following the delivery of the Advocate General's Opinion, Schneider Electric and Others and L'Air Liquide, by documents lodged at the Registry of the Court of Justice on 22 October 2021, requested that the oral part of the procedure be reopened, pursuant to Article 83 of the Rules of Procedure of the Court of Justice.

27 In support of their request, Schneider Electric and Others and L'Air Liquide claim, first of all, that certain considerations relating to the tax credit and the advance payment arrangements, on which the Advocate General's Opinion is based, are incorrect.

28 Next, Schneider Electric and Others claim that some of their arguments have remained unanswered and they also dispute the figures in the example given in point 47 of the Advocate General's Opinion.

29 Lastly, L'Air Liquide maintains that some of the arguments contained in the Advocate General's Opinion are contradictory, or even go against the wording of Article 7(2) of Directive 90/435 and the *travaux préparatoires* of that provision.

30 In that regard, it must be noted that, pursuant to the second paragraph of Article 252 TFEU, the Advocate General, acting with complete impartiality and independence, is to make, in open court, reasoned submissions on cases which, in accordance with the Statute of the Court of Justice of the European Union, require the Advocate General's involvement. The Court is not bound either by the Advocate General's Opinion or by the reasoning on which it is based (judgment of 16 December 2020, *Council* v *K. Chrysostomides & Co. and Others*, C-597/18 P, C-598/18 P, C-603/18 P and C-604/18 P, EU:C:2020:1028, paragraph 58 and the case-law cited).

31 Moreover, the Statute of the Court of Justice of the European Union and the Rules of Procedure make no provision for the interested parties referred to in Article 23 of the Statute to submit observations in response to the Advocate General's Opinion (judgment of 16 November 2021, *Prokuratura Rejonowa w Mińsku Mazowieckim and Others*, C-748/19 to C-754/19, EU:C:2021:931, paragraph 30 and the case-law cited).

32 Consequently, the disagreement of an interested party, as referred to in Article 23 of the Statute of the Court of Justice of the European Union, with the Opinion of the Advocate General, irrespective of the questions that he or she examines in the Opinion, cannot in itself constitute grounds justifying the reopening of the oral procedure (see, to that effect, judgment of 16 November 2021, *Prokuratura Rejonowa w Mińsku Mazowieckim and Others*, C-748/19 to C-754/19, EU:C:2021:931, paragraph 31 and the case-law cited).

33 It is true that the Court may, at any time, after hearing the Advocate General, order that the oral part of the procedure be reopened, in accordance with Article 83 of its Rules of Procedure, in particular if it considers that it lacks sufficient information or where a party has, after the close of that part of the procedure, submitted a new fact which is of such a nature as to be a decisive factor for the decision of the Court, or where the case must be decided on the basis of an argument which has not been debated between the parties or the interested persons, as referred to in Article 23 of the Statute of the Court of Justice of the European Union.

34 However, in the present case, the Court notes that it has all the information necessary to give a ruling and that the present case does not have to be decided on the basis of an argument which has not been debated during the written and oral part of the procedure. Moreover, the request that the oral part of the procedure be reopened does not contain any new fact which is of such a nature as to be a decisive factor for the decision which the Court is called upon to give in this case.

35 In those circumstances, the Court considers, after hearing the Advocate General, that there is no need to order that the oral part of the procedure be reopened.

The question referred for a preliminary ruling

36 By its question, the referring court asks, in essence, whether Article 4(1) of Directive 90/435 is to be interpreted as precluding national legislation which provides that a parent company is liable for an advance payment of tax when it redistributes to its shareholders profits paid by its subsidiaries, giving rise to the application of a tax credit, where those profits have not been subject to corporation tax at the normal rate and, if appropriate, whether that legislation falls within the scope of Article 7(2) of that directive.

The interpretation of Article 4(1) of Directive 90/435

37 As preliminary point, it should be noted that it is apparent from Article 4(1) of Directive 90/435 that where a parent company, by virtue of its association with its subsidiary, receives distributed profits, the Member State in which the parent company is established either refrains from taxing those profits or authorises that parent company to deduct from the amount of tax due that fraction of the 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, up to the limit of the amount of the corresponding domestic tax.

38 Directive 90/435 therefore expressly leaves it open to Member States to choose between the exemption system and the imputation system, set out in the first and second indents respectively of Article 4(1) of that directive (judgment of 19 December 2019, *Brussels Securities*, C-389/18, EU:C:2019:1132, paragraph 31).

39 According to the information contained in the request for a preliminary ruling, as mentioned in paragraph 21 of this judgment, the French legislature has opted, in Articles 145 and 216 of the CGI, for the exemption system, set out in the first indent of Article 4(1) of Directive 90/435. Therefore, the question referred must be answered by reference to that provision.

40 In that regard, it is necessary to take into account not only the wording of the first indent of Article 4(1) of Directive 90/435, but also the objectives and scheme of that directive (see, to that effect, judgment of 8 March 2017, *Wereldhave Belgium and Others*, C-448/15, EU:C:2017:180, paragraph 24 and the case-law cited).

41 In the first place, it should be pointed out that the wording of the first indent of Article 4(1) of Directive 90/435 is, in essence, identical to that of Article 4(1)(a) of Directive 2011/96, with regard to which the Court has held that, in providing that the Member State of the parent company and the Member State of its permanent establishment are to 'refrain from taxing such profits', that provision prohibits Member States from taxing the parent company or its permanent establishment in respect of the profits distributed by the subsidiary to its parent

company, without drawing a distinction based on whether the chargeable event of the taxation of the parent company is the receipt of those profits or their redistribution (judgment of 17 May 2017, *X*, C-68/15, EU:C:2017:379, paragraph 79).

42 In the second place, as regards the context of the first indent of Article 4(1) of Directive 90/435, it must be observed that, under Article 4(2) thereof, each Member State is to retain the option of providing that any charges relating to the holding in the subsidiary may not be deducted from the taxable profits of the parent company, and it is stated that, where the management costs relating to that 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.

43 In the third place, the Court has held that the finding set out in paragraph 41 of this judgment was confirmed by the objective of Directive 2011/96 that aims to eliminate the double taxation of profits distributed by a subsidiary to its parent company at the level of the parent company. Taxation of those profits by the Member State of the parent company in the hands of that company when they are redistributed, which has the effect of subjecting those profits to taxation exceeding in fact the 5% ceiling provided for in Article 4(3) of the directive, would result in double taxation at the level of that company, which is prohibited by that directive (judgment of 17 May 2017, *X*, C-68/15, EU:C:2017:379, paragraph 80).

44 Directive 90/435 also pursues that objective. As is apparent, in particular, from the third recital thereof, the directive aims, by introducing a common system of taxation, to eliminate any disadvantage to cooperation between companies of different Member States as compared with cooperation between companies of the same Member State and thereby to facilitate the grouping together of companies at EU level. That directive therefore seeks to ensure the neutrality, from the tax point of view, of the distribution of profits by a subsidiary established in one Member State to its parent company established in another Member State (judgment of 19 December 2019, *Brussels Securities*, C-389/18, EU:C:2019:1132, paragraph 35 and the case-law cited).

45 In order to ensure that neutrality, Directive 90/435 aims to avoid, in particular by the rule laid down in the first indent of Article 4(1) in economic terms, double taxation of profits, in other words to avoid taxation of distributed profits, first, in the hands of the subsidiary and, then, in the hands of the parent company (see, to that effect, judgment of 19 December 2019, *Brussels Securities*, C-389/18, EU:C:2019:1132, paragraph 36 and the case-law cited).

46 Consequently, since Article 4(1)(a) of Directive 2011/96 has essentially the same effect as the first indent of Article 4(1) of Directive 90/435, and those two directives pursue the same objectives, the Court's case-law on the first provision is equally applicable to the second (see, to that effect, judgment of 2 April 2020, *GVC Services (Bulgaria)*, C-458/18, EU:C:2020:266, paragraph 34).

47 Moreover, it is apparent from the Court's case-law, first of all, that the application of the first indent of Article 4(1) of Directive 90/435 is not subject to a tax in particular and that that provision seeks to avoid Member States adopting tax measures which lead to double taxation of the parent company in respect of profits distributed to it by the subsidiary (see, by analogy, judgment of 17 May 2017, *AFEP and Others*, C-365/16, EU:C:2017:378, paragraph 33).

48 Lastly, the prohibition under the first indent of Article 4(1) of Directive 90/435 also applies to national legislation which, although it does not tax the dividends received by the parent company in themselves, may have the effect that the parent company is subject indirectly to taxation on those dividends (see, to that effect, judgment of 19 December 2019, *Brussels Securities*, C-389/18, EU:C:2019:1132, paragraph 37 and the case-law cited).

49 It follows that taxation of profits distributed by a subsidiary to its parent company by the Member State of the parent company at the level of the parent company when those profits are redistributed, which would have the effect of making those profits subject to taxation exceeding the ceiling of 5% laid down in Article 4(2) of Directive 90/435, would lead to a double taxation at the level of the parent company contrary to that directive (see, by analogy, judgment of 17 May 2017, *AFEP and Others*, C-365/16, EU:C:2017:378, paragraph 32).

50 As has been pointed out in paragraph 23 of the present judgment, it is apparent from the request for a preliminary ruling that the advance payment of tax, as derived from Article 223*sexies* of the CGI, was payable in the event of distribution of profits giving rise to the application of a tax credit, where those profits had not been subject to corporation tax at the normal rate, at the level of the parent company.

51 The Court has already held that, as regards dividends received from subsidiaries established in a Member State other than the one concerned, the effect of applying the advance payment was to reduce the total amount of dividends available for distribution and that the parent company receiving such dividends was obliged either to distribute the dividends minus the amount of the advance payment, the total amount of those dividends being lower than in the case of the redistribution of dividends received from subsidiaries established in France, or to withdraw from its cash reserves a sum equivalent to the amount payable by way of the advance payment and thereby increase the total amount of dividends distributed (see, to that effect, judgment of 15 September 2011, *Accor*, C-310/09, EU:C:2011:581, paragraphs 49 and 50).

52 As is apparent from the Court's file, in accordance with Article 223*sexies* of the CGI, that advance payment corresponded to the tax credit applied to dividends distributed by the parent company to its shareholders, which was equal, in accordance with Article 158*bis* of the CGI, to half of the sums actually paid by that company.

53 Application of that advance payment was therefore likely to have the effect of subjecting the profits received by a parent company from its subsidiaries established in a Member State other than the one concerned to taxation, at the time of their redistribution, exceeding the 5% ceiling provided for in Article 4(2) of Directive 90/435, contrary to that directive.

54 That finding cannot be called in question by the fact that, as the referring court states, companies which have received dividends from a subsidiary established in a Member State other than the one concerned, derive from Articles 49 and 63 TFEU, as interpreted by the Court in the judgment of 15 September 2011, *Accor* (C-310/09, EU:C:2011:581), a right to a tax credit in order to receive the same tax treatment as a company receiving dividends from a subsidiary established in France.

55 It is admittedly true that the interpretation which, in the exercise of the jurisdiction conferred on it by Article 267 TFEU, the Court gives to a rule of EU law clarifies and defines the meaning and scope of that rule as it must be or ought to have been understood and applied from the time of its entry into force. It follows that the rule as thus interpreted may, and must, be applied by the courts even to legal relationships which arose and were established before the judgment ruling on the

request for interpretation, provided that in other respects the conditions for bringing a dispute relating to the application of that rule before the competent courts are satisfied (judgment of 14 May 2020, *B and Others (Vertical and horizontal tax integration)*, C-749/18, EU:C:2020:370, paragraph 60 and the case-law cited).

56 In its judgment of 15 September 2011, *Accor* (C-310/09, EU:C:2011:581), the Court held that Articles 49 and 63 TFEU must be interpreted as precluding legislation of a Member State intended to eliminate economic double taxation of dividends, which allows a parent company to set off against the advance payment, for which it is liable when it redistributes to its shareholders dividends paid by its subsidiaries, the tax credit applied to the distribution of those dividends if they originate from a subsidiary established in that Member State, but does not offer that option if those dividends originate from a subsidiary established in another Member State, since, in that case, that legislation does not give entitlement to a tax credit applied to the distribution of those dividends by that subsidiary.

57 Although the referring court states that, following the judgment of 15 September 2011, *Accor* (C-310/09, EU:C:2011:581), a company in receipt of dividends from a subsidiary established in a Member State other than the State concerned is entitled to a tax credit in order to receive the same tax treatment as a company in receipt of dividends from a subsidiary established in France, it is common ground that no legislative or regulatory measures have been adopted in order to specify the conditions for the grant of that tax credit. Furthermore, the referring court does not document the methods used by the national courts to calculate that tax credit.

58 It is settled case-law that the right to a refund of charges levied in a Member State in breach of rules of EU law is the consequence and complement of the rights conferred on individuals by provisions of EU law as interpreted by the Court (judgment of 15 September 2011, *Accor*, C-310/09, EU:C:2011:581, paragraph 71 and the case-law cited).

59 It must be stated, however, that the tax credit intended to remedy the incompatibility of the national legislation with Articles 49 and 63 TFEU, as provided, as Schneider Electric and Others pointed out during the hearing before the Court, by the national court several years after the repeal of the system relating to the tax credit and to the advance payment, is not such as to remedy the effects of that legislation which are incompatible with Directive 90/435.

60 First of all, the possibility of receiving such a tax credit is subject, inter alia, to the condition that the taxpayers have brought administrative and legal proceedings in that regard and that they are able to provide the necessary proof that the tax authorities are entitled to require in order to assess whether the conditions of a tax advantage provided for in the legislation at issue have been met and, consequently, whether to allow that advantage (judgment of 4 October 2018, *Commission* v *France (Advance payment)*, C-416/17, EU:C:2018:811, paragraph 58).

61 It must be observed that Member States may not make the benefit of the advantage derived from the first indent of Article 4(1) of Directive 90/435 subject to conditions other than those laid down in that directive (see, to that effect, judgment of 19 December 2019, *Brussels Securities*, C-389/18, EU:C:2019:1132, paragraph 34 and the case-law cited).

62 Further, as the European Commission points out, taking the tax credit into account in that way leads, in essence, to applying an imputation method to dividends received from subsidiaries resident in a Member State other than the one concerned.

63 In that regard, it is clear from the case-law of the Court that the choice between the exemption system and the imputation system does not necessarily lead to the same result for the company receiving the dividends, and that a Member State which has opted, when transposing a directive, for one of the alternate systems provided for by that directive cannot rely on the effects or restrictions which might have arisen from the implementation of the other system (judgment of 12 February 2009, *Cobelfret*, C-138/07, EU:C:2009:82, paragraphs 48 and 50).

64 Lastly, as the French Government acknowledged at the hearing, even taking into account the tax credit, a remnant of the advance payment may persist, particularly where the tax rate levied in a Member State other than France was lower than the French tax.

65 Consequently, the first indent of Article 4(1) of Directive 90/435 must be interpreted as precluding national legislation which provides that a parent company is liable for an advance payment of tax if it redistributes to its shareholders profits paid by its subsidiaries, giving rise to the application of a tax credit, where those profits have not been subject to corporation tax at the normal rate, whenever the amounts payable in respect of that advance payment tax exceed the 5% ceiling provided for in Article 4(2) thereof.

The interpretation of Article 7(2) of Directive 90/435

66 The referring court wonders, however, where national legislation which provides that a parent company is liable for an advance payment of tax if it redistributes to its shareholders profits paid by its subsidiaries, giving rise to the application of a tax credit, where those profits have not been subject to corporation tax at the normal rate, falls within the scope of Article 7(2) of Directive 90/435.

67 In order to reply to that question, it must be observed, first of all, that it is apparent from the wording of Article 7(2) of Directive 90/435 that the scope of that provision is not limited to withholding tax, as referred to in Article 5(1) and Article 6 thereof. Unlike Article 7(1) of the directive, which expressly applies to withholding tax, Article 7(2) thereof provides only that the directive does not affect the application of domestic or agreement-based provisions designed to eliminate or lessen double taxation of dividends, in particular provisions relating to the payment of tax credits to the recipients of dividends.

68 In that regard, the French Government submits that it is clear from the *travaux préparatoires* of Directive 90/435 that the provisions of Article 7 thereof, which were not included in the initial proposal for a directive presented by the Commission, were added in that draft text, at the time it was being negotiated between the Member States, on the initiative of the United Kingdom of Great Britain and Northern Ireland, in order to cover advance corporation tax and associated contractual mechanisms. That proposal for Article 7 was supported by the French delegation and the wording of that article was clarified in order to apply expressly to the advance payment of tax. It follows from the outcome of the *travaux préparatoires* that, by adopting Article 7 of Directive 90/435, the EU legislature had clearly intended to exclude from the scope of that directive, in particular, the French mechanisms of advance payment of tax and tax credit.

69 It must be observed, first, that expressions of intent on the part of Member States in the Council of the European Union have no legal status if they are not actually expressed in the legislation. Legislation is addressed to those affected by it. They must, in accordance with the principle of legal certainty, be able to rely on what it contains, (judgment of 1 October 2009, *Gaz de France – Berliner Investissement*, C-247/08, EU:C:2009:600, paragraph 39).

70 Second, it is clear that the expression 'advance payment' is not used in Article 7(2) of Directive 90/435 while Article 7(1) thereof states that the term 'withholding tax' used in that directive does not cover an advance payment or prepayment of corporation tax to the Member State of the subsidiary, which is made in connection with a distribution of profits to the parent company. However, the advance payment, as referred to in the case in the main proceedings, does not involve taxation in favour of the Member State in which the subsidiary is established, but is a payment in favour of the Member State in which the parent company is established, payable by the latter company. Therefore, it is not apparent from the wording of Article 7 of Directive 90/435 that an advance payment, as referred to in the case in the main proceedings, is excluded from the scope of that directive.

71 As regards, next, the context of Article 7(2) of Directive 90/435, it cannot be ruled out that the situations referred to in Article 7(1) thereof must be taken into account in order to determine the scope of the first provision. However, a limitation on the scope of Article 7(2) of that directive only to tax levied in the State in which the distributor subsidiary is situated also does not expressly follow from the positioning of that paragraph 2 within Article 7, in relation to paragraph 1 of that article.

72 In that regard, it is true that the Court has held that, since it is a derogation from the general principle prohibiting withholding taxes on distributed profits laid down in Article 5(1) of Directive 90/435, Article 7(2) of that directive is to be interpreted strictly (judgment of 24 June 2010, *P. Ferrero e C. and General Beverage Europe*, C-338/08 et C-339/08, EU:C:2010:364, paragraph 45).

73 However, since the cases giving rise to the judgment of 24 June 2010, *P. Ferrero e C. and General Beverage Europe* (C-338/08 and C-339/08, EU:C:2010:364), and also to the judgment of 25 September 2003, *Océ van der Grinten* (C-58/01, EU:C:2003:495), to which the first judgment refers, concerned the application of Article 5(1) of Directive 90/435, it cannot be inferred from those judgments that the Court took a position therein on the impossibility of relying on Article 7(2) thereof with regard to other taxes which do not have the characteristics of a withholding tax and, particularly, as a derogation from the provisions laid down in Article 4 of the directive.

74 Consequently, in order to determine whether national legislation which provides that a parent company is liable for an advance payment if it redistributes to its shareholders profits paid by its subsidiaries, giving rise to the application of a tax credit, where those profits have not been subject to corporation tax at the normal rate, falls within the scope 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', it is necessary to refer to the objective of Article 7(2) of Directive 90/435, and to the objective of that directive as a whole.

75 In that regard, it is clear from the case-law of the Court that Article 7(2) of Directive 90/435 merely enables specific sets of domestic or agreement-based rules to continue to apply, where they are consistent with the aim of that directive (see, to that effect, judgment of 25 September 2003, *Océ van der Grinten*, C-58/01, EU:C:2003:495, paragraph 102) and are designed to eliminate or lessen economic double taxation of dividends alone (see, to that effect, judgment of 3 April 2008, *Banque Fédérative du Crédit Mutuel*, C-27/07, EU:C:2008:195, paragraph 49).

76 In the light of that objective, a withholding tax could be regarded as within the scope of Article 7(2) of Directive 90/435 only if the application of that levy did not cancel out the effects of national or agreement-based provisions intended to eliminate or mitigate the economic double taxation of dividends (see, to that effect, judgment 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).

77 In particular, the tax levy at issue must be assessed not in isolation, but together with other elements of the mechanism, which is the subject of the domestic or agreement-based provisions intended to eliminate or mitigate the economic double taxation of dividends, with which that levy is directly linked (see, to that effect, judgment of 25 September 2003, *Océ van der Grinten*, C-58/01, EU:C:2003:495, paragraphs 87 and 88).

78 In the present case, the referring court notes that the advance payment of tax, provided for in Article 223*sexies* of the CGI, was one of the constituent elements of a mechanism for eliminating economic double taxation of distributed income, which, if a distribution of profits gave rise to the application of a tax credit, where those profits were not subject to corporation tax at the ordinary rate, sought to prevent the situation whereby the tax credit applied to that income was no longer justified in view of the tax borne by the distributing company on the profits out of which the distributions were made, and, thus to avoid that the application of that tax credit results in a 'windfall' for the recipient of the distributions.

79 As is clear from Article 158*bis* of the CGI, a parent company which received dividends from a resident subsidiary enjoyed, in respect of those dividends, a tax credit which was equal to half of the sums paid in the form of dividends by that resident subsidiary. On the other hand, such a tax credit was not granted in respect of dividends distributed by a non-resident subsidiary (judgment of 15 September 2011, *Accor*, C-310/09, EU:C:2011:581, paragraph 42).

80 The Court has thus found that, so far as dividends received from resident subsidiaries were concerned, when they were distributed, the tax credit was set off against the amount of the advance payment due, without that advance payment reducing the total amount of the dividends available for redistribution. As regards dividends received from non-resident subsidiaries, however, since the parent company did not receive a tax credit on those dividends, the effect of applying the advance payment was to reduce the total amount of dividends available for distribution (judgment of 15 September 2011, *Accor*, C-310/09, EU:C:2011:581, paragraph 49).

81 Therefore, it cannot be denied that the advance payment provided for in Article 223*sexies* of the CGI was introduced directly in conjunction with the tax credit paid to the recipients of dividends distributed by the resident companies, and that it is thus part of the national provisions intended to eliminate or mitigate the economic double taxation of dividends, when these were paid by resident companies to resident beneficiaries.

82 However, although those provisions were intended to prevent the economic double taxation of dividends at national level, the application of that advance payment was likely to have the effect, as has been pointed out in paragraph 53 of the present judgment, of subjecting the profits received by a parent company from its subsidiaries established in another Member State to an economic double taxation when they are redistributed.

83 First, as has been pointed out in paragraph 76 of the present judgment, if a levy which cancels out the effects of national provisions intended to eliminate or mitigate the economic double taxation of dividends cannot fall within Article 7(2) of Directive 90/435, there is all the more reason why a levy, the application of which would trigger such double taxation, cannot fall within its scope.

84 Second, as has been pointed out in paragraphs 44 and 45 of the present judgment, Directive 90/435 aims to eliminate any disadvantage to cooperation between companies of different Member States as compared with cooperation between companies of the same Member State and to avoid double taxation of profits distributed by a subsidiary to its parent company at the level of the parent company, in economic terms, in other words to avoid taxation of distributed profits, first, in the hands of the subsidiary and, then, in the hands of the parent company.

85 Consequently, a mechanism which has the effect of subjecting the profits received by a parent company from its subsidiaries established in a Member State other than the one concerned to economic double taxation when they are redistributed is also inconsistent with the aim of Directive 90/435. As has been pointed out in paragraph 75 of the present judgment, Article 7(2) thereof seeks to enable sets of domestic or agreement-based rules to continue to apply, where they are consistent with the aim of that directive.

86 Lastly, third, as has been pointed out in paragraphs 54 and 57 of the present judgment, parent companies admittedly have a right to obtain reimbursement of the sums in order to ensure the application of the same tax regime to dividends distributed by their subsidiaries established in France and those distributed by their subsidiaries established in other Member States, giving rise to redistribution by those parent companies, as required by Articles 49 and 63 TFEU. According to the information from the referring court set out in paragraph 57 of the present judgment, that reimbursement takes the form of a tax credit granted by the courts.

87 However, the application of legislation which has the effect of subjecting the profits received by a parent company from its subsidiaries established in another Member State to economic double taxation when they are redistributed cannot be regarded as compatible with the objective of Directive 90/435, even where the effects of that double taxation may be mitigated by a subsequent claim for reimbursement of the amounts unduly paid, based on the incompatibility of the payment of those amounts with Articles 49 and 63 TFEU.

88 Having regard to all the foregoing considerations, the answer to the question referred is that Article 4(1) of Directive 90/435 must be interpreted as precluding national legislation which provides that a parent company is liable for an advance payment of tax if it redistributes to its shareholders profits paid by its subsidiaries, giving rise to the application of a tax credit, where those profits have not been subject to corporation tax at the normal rate, whenever the amounts payable in respect of that advance payment tax exceed the 5% ceiling provided for in Article 4(2) thereof. Such legislation does not fall within the scope of Article 7(2) of that directive.

Costs

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

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

Article 4(1) 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 must be interpreted as precluding national legislation which provides that a parent company is liable for an advance payment of tax if it redistributes to its shareholders profits paid by its subsidiaries, giving rise to the application of a tax credit, where those profits have not been subject to corporation tax at the normal rate, whenever the amounts payable in respect of that advance payment tax exceed the 5% ceiling provided for in Article 4(2) thereof. Such legislation does not fall within the scope of Article 7(2) of that directive.

[Signatures]