Reports of Cases

OPINION OF ADVOCATE GENERAL
WATHELET
delivered on 25 July 2018 [1]

Case C-416/17

European Commission
v

French Republic

(Failure of a Member State to fulfil obligations — Article 49 TFEU, Article 63 TFEU and the third paragraph of Article 267 TFEU — Imposition of tax in a chain of transactions — Difference in treatment according to the Member State of residence of the sub-subsidiary — Requirements relating to the evidence establishing a right to reimbursement of the advance payment of tax — Capping of the right to reimbursement — Judgment of 15 September 2011, *Accor* (C-310/09, EU:C:2011:581) — National court adjudicating at last instance — National case-law incompatible with the judgment of the Court — Obligation to make a reference for a preliminary ruling)

I. Introduction

1. By its action, the European Commission asks the Court to declare that the French Republic has maintained discriminatory and disproportionate treatment between French parent companies which receive dividends from French subsidiaries and those which receive dividends from foreign subsidiaries in breach of EU law, as interpreted by the Court in the judgment of 15 September 2011, *Accor* (C-310/09, EU:C:2011:581).

2. As it itself summarises in its application, the Commission claims that the French Republic has refused to give full effect to the judgment of 15 September 2011, *Accor* (C-310/09, EU:C:2011:581), through the case-law of its highest administrative court, that is the Conseil d'État (Council of State, France). According to the Commission, the judgments given by the Conseil d'État following the judgment of 15 September 2011, *Accor* (C-310/09, EU:C:2011:581) form the case-law in accordance with which *all* applications for reimbursement of the advance payment illegally made which have been submitted by parties in a situation similar to that of Accor SA will be analysed.

1 Original language: French.

3. The Commission's action therefore requires the Court to give a ruling on two separate issues: first, the compatibility with EU law, as interpreted by the judgment of 15 September 2011, *Accor* (C-310/09, EU:C:2011:581), of the procedures for reimbursement of the advance payment made on account of the receipt of dividends paid by non-resident subsidiaries and, second — and for the first time in the context of an action for failure to fulfil obligations —, the breach of the obligation to make a reference for a preliminary ruling by a court against whose decisions there is no remedy.[2]

II. Legal context

A. French law

4. Under Article 158*bis*(I) of the Code général des impôts (General Tax Code, 'the CGI'), in the version in force in the tax years at issue in the case which gave rise to the judgment of 15 September 2011, *Accor* (C-310/09, EU:C:2011:581):

'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.

…'

5. Article 146(2) of the CGI, in the version in force during the tax years at issue in the case which gave rise to the judgment of 15 September 2011, *Accor* (C-310/09, EU:C:2011:581), 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 tax years which ended within the last 5 years at most.'

2 Although the Commission had brought infringement proceedings against the Kingdom of Sweden because the Högsta domstolen (Swedish Supreme Court) was systematically failing to comply with its obligation to make a reference for a preliminary ruling (see reasoned opinion 2003/2161 of the Commission of 12 October 2004 [C(2004)3899]) — which, as the French Republic rightly points out in its defence, is not the case with the Conseil d'État —, it had not initiated the litigation stage of the proceedings. Furthermore, although in the action which gave rise to the judgment of 9 December 2003, *Commission* v *Italy* (C-129/00, EU:C:2003:656), the Commission sought a declaration that by maintaining an article of law 'as interpreted and applied by the Italian administrative authorities and courts' the Italian Republic had failed to fulfil its obligations under the Treaty, no complaint specifically based on Article 267 TFEU had been invoked. Finally, although in the case which gave rise to the judgment of 12 November 2009, *Commission* v *Spain* (C-154/08, not published, EU:C:2009:695), the question whether the Commission's action concerned a breach of Article 267 TFEU had been raised, the Commission had expressly indicated to the Court that that was not the case (paragraph 65 of that judgment).

6. The first subparagraph of Article 223*sexies*(1) of the CGI, as amended by Finance Law No 98-1266 of 30 December 1998 for 1999,[3] applicable to dividend distributions paid from 1 January 1999, provided:

'Subject to the provisions of Articles 209*quinquies* and 223(H), 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 provided for in the second subparagraph of Article 229(I), that company is required to make an advance payment equal to the tax credit calculated under the conditions provided for in Article 158*bis*(I).'

B. The judgment of 15 September 2011, Accor (C-310/09, EU:C:2011:581)

7. By a complaint of 21 December 2001, Accor had requested from the French tax authority the reimbursement of the advance payment made on receipt of dividends paid by its subsidiaries established in other Member States in the course of the years 1998 to 2000. Since this type of reimbursement is granted by the legislation in force only in respect of the receipt of dividends from a subsidiary located in French territory, the application was rejected.

8. Following that refusal, Accor brought proceedings before the Tribunal administratif de Versailles (Administrative Court, Versailles, France), which upheld Accor's application in its entirety. The appeal brought by the Ministre du Budget, des Comptes publics et de la Fonction publique (Minister for the Budget, Public Accounts and the Civil Service) against that judgment having been dismissed by a judgment of the Cour administrative d'appel de Versailles (Administrative Court of Appeal, Versailles, France), the Minister brought an appeal in cassation before the Conseil d'État. By a judgment of 3 July 2009, that court then made a reference to the Court for a preliminary ruling.

9. In its judgment of 15 September 2011, *Accor* (C-310/09, EU:C:2011:581), the Court found that, by contrast with dividends originating from resident subsidiaries, the French legislation did not permit account to be taken of taxation at the level of the non-resident distributing subsidiary, whilst dividends received both from resident subsidiaries and from non-resident subsidiaries were subject to the advance payment when redistributed.[4] In addition, according to the Court, in view of the unfavourable treatment applied to dividends received from a subsidiary established in another Member State as compared to that applied to dividends received from a resident subsidiary, a parent company might have been dissuaded from carrying on its activities through the intermediary of subsidiaries established in other Member States.[5]

10. The Court went on to recall its case-law in accordance with which, when the profits underlying foreign-sourced dividends are subject in the State of the company making the distribution to a *lower* level of tax than the tax levied in the Member State of the recipient company, that Member State must grant an overall tax credit corresponding to the tax paid by the company making the distribution in the State in which it is established, whereas where those profits are subject in the State of the company making the distribution to a *higher* level of tax than the tax levied by the Member State of the company receiving them, that Member State is obliged to grant a tax credit only up to the limit of the amount of corporation tax for which the company receiving the dividends is liable.[6]

3 JORF (Official Journal of the French Republic) of 31 December 1998, p. 20050.

4 See judgment of 15 September 2011, *Accor* (C-310/09, EU:C:2011:581, paragraph 49).

5 See judgment of 15 September 2011, *Accor* (C-310/09, EU:C:2011:581, paragraph 51).

6 See judgment of 15 September 2011, *Accor* (C-310/09, EU:C:2011:581, paragraphs 89 and 90 and the case-law cited).

11. The Court inferred from the foregoing that, as regards the French regime at issue, if a Member State were to grant recipients of dividends from a company established in another Member State a tax credit which was always equal to half of those dividends, that would amount to granting those dividends more favourable treatment than that received by dividends from the first Member State, where the rate of tax to which the company distributing those dividends is liable in the State in which it is established is lower than the rate of tax applied in the first Member State. [7]

12. It held that, consequently, a Member State had to be in a position to determine the amount of the corporation tax paid in the Member State in which the distributing company is established that must be the subject of the tax credit granted to the parent company; in those circumstances, it found that it was not sufficient to provide evidence that the distributing company had been taxed, in the Member State in which it is established, on the profits underlying the dividends distributed, without providing information relating to the nature and rate of the tax actually charged on those profits. [8]

13. With that in mind, the Court added that the evidence required should enable the tax authorities of the Member State of taxation to ascertain, clearly and precisely, whether the conditions for obtaining a tax advantage were met. It did, however, clarify that the evidence did not need to take any particular form and the assessment did not have to be conducted too formalistically. In addition, the request for production of that information had to be made within the statutory period for retention of administrative documents and accounts laid down by the law of the Member State in which the subsidiary is established, [9] since the taxpayer should not be required to provide documents 'covering a period significantly longer than the statutory period for retention of administrative documents and accounts'. [10]

14. It is for those reasons that the Court ruled that:

'1. Articles 49 TFEU and 63 TFEU preclude legislation of a Member State intended to eliminate economic double taxation of dividends, such as that at issue in the main proceedings, which allows a parent company to set off against the advance payment, for which it is liable when it redistributes to its shareholders dividends paid by its subsidiaries, the tax credit applied to the distribution of those dividends if they originate from a subsidiary established in that Member State, but does not offer that option if those dividends originate from a subsidiary established in another Member State, since, in that case, that legislation does not give entitlement to a tax credit applied to the distribution of those dividends by that subsidiary;

…

3. The principles of equivalence and effectiveness do not preclude the reimbursement to a parent company of sums which ensure the application of the same tax regime to dividends distributed by its subsidiaries established in France and those distributed by the subsidiaries of that company established in other Member States, and subsequently redistributed by that parent company, being subject to the condition that the person liable for the tax furnish evidence which is in its sole possession and relating, with respect to each dividend concerned, in particular to the rate of taxation actually applied and the amount of tax actually paid on profits made by subsidiaries established in other Member States, whereas, with respect to subsidiaries established in France, that evidence, known to the administration, is not required. Production of that evidence may however be required only if it does not prove virtually impossible or excessively difficult to furnish evidence of payment of the tax by the subsidiaries established in the other Member States, in the light in particular of the provisions of the legislation of those Member States concerning the avoidance of

7 See judgment of 15 September 2011, *Accor* (C-310/09, EU:C:2011:581, paragraph 91).

8 See judgment of 15 September 2011, *Accor* (C-310/09, EU:C:2011:581, paragraph 92).

9 See judgment of 15 September 2011, *Accor* (C-310/09, EU:C:2011:581, paragraphs 99 and 101).

10 See judgment of 15 September 2011, *Accor* (C-310/09, EU:C:2011:581, paragraph 101).

double taxation, the recording of the corporation tax which must be paid and the retention of administrative documents. It is for the national court to determine whether those conditions are met in the case before the national court.'

C. The judgments of the Conseil d'État of 10 December 2012

15. Following receipt of the judgment of 15 September 2011, *Accor* (C-310/09, EU:C:2011:581), the Conseil d'État delivered two judgments in which it laid down a series of conditions under which the advance payments made in breach of EU law could be reimbursed. The judgments in question are those of 10 December 2012, *Rhodia*[11] and *Accor*[12] ('the judgments of the Conseil d'État').

16. With regard, first, to the scope of the reimbursement of the advance payments, the judgments of the Conseil d'État state that:

– where the dividend redistributed to a French parent company by one of its subsidiaries established in another Member State has not been taxed at the level of that subsidiary, the tax paid by a sub-subsidiary does not have to be taken into account in determining the advance payment to be reimbursed to the parent company,[13] and

– where a distributing company has borne in its Member State effective tax at a rate higher than the normal rate of the French tax, that is 33.33%, the amount of the tax credit which it may claim must be limited to one third of the dividends that it has received and redistributed.[14]

17. With regard, second, to the evidence supporting the applications for reimbursement, the judgments acknowledge:

– the binding effect of the advance payment declarations for the purposes of determining the amount of the dividends received from subsidiaries established outside France;[15]

– the need for a person to possess all the information capable of demonstrating that its application is well-founded throughout the duration of the proceedings, without the expiry of the statutory period for retention exempting it from that obligation.[16]

III. The pre-litigation procedure and the procedure before the Court

18. Following the judgments of the Conseil d'État, the Commission received several complaints concerning the conditions for reimbursement of the advance payment. Those complaints were the subject of an exchange of information between the Commission's services and the competent authorities of the French Republic in the context of procedure EU Pilot 5511/13 TAXU.

11 FR:XX:2012:317074.20121210.

12 FR:CESSR:2012:317075.20121210.

13 See judgments of the Conseil d'État of 10 December 2012, *Rhodia* (FR:XX:2012:317074.20121210, paragraph 29), and *Accor* (FR:CESSR:2012:317075.20121210, paragraph 24).

14 See judgments of the Conseil d'État of 10 December 2012, *Rhodia* (FR:XX:2012:317074.20121210, paragraph 44), and *Accor* (FR:CESSR:2012:317075.20121210, paragraph 40).

15 See judgments of the Conseil d'État of 10 December 2012, *Rhodia* (FR:XX:2012:317074.20121210, paragraphs 24 and 25), and *Accor* (FR:CESSR:2012:317075.20121210, paragraphs 19 and 20).

16 See judgments of the Conseil d'État of 10 December 2012, *Rhodia* (FR:XX:2012:317074.20121210, paragraph 35), and *Accor* (FR:CESSR:2012:317075.20121210, paragraph 31).

19. Since the outcome of those exchanges was unsatisfactory in the Commission's view, it decided to initiate the infringement proceedings provided for in Article 258 TFEU. It is for that reason that on 27 November 2014 the Commission sent the French Republic a letter of formal notice in which it identified the requirements stemming from the judgments of the Conseil d'État which were liable to constitute breaches of EU law.

20. In a response of 26 January 2015, the French Republic disputed the complaints levelled against it. Taking the view the responses provided were unsatisfactory, the Commission sent a reasoned opinion to the French Republic on 29 April 2016; the Commission ordered the French Republic to take the steps necessary to comply with that opinion within 2 months of the date of its receipt.

21. As the French Republic maintained its position, the Commission decided to bring the present action for failure to fulfil obligations on the basis of Article 258 TFEU.

22. In the written procedure, the French Republic lodged a defence, to which the Commission responded by lodging a reply. The French Republic also lodged a rejoinder. In addition, they also had the opportunity of presenting their oral observations at a hearing held on 20 June 2018.

IV. The obligations allegedly not fulfilled by the French Republic

23. The Commission bases its action on four complaints. The first three relate to the restrictions stemming from the judgments of the Conseil d'État which are contrary to EU law as interpreted by the Court in the judgment of 15 September 2011, *Accor* (C-310/09, EU:C:2011:581). The fourth complaint concerns the obligation on the Conseil d'État, as a court adjudicating at last instance, to make a request for a preliminary ruling for the interpretation of EU law.

A. The first complaint, alleging a restriction of the right to reimbursement of the advance payment because of the failure to take into account the taxation borne by sub-subsidiaries established in a Member State other than France

1. Arguments of the parties

24. According to the Commission, it is apparent from the judgments of the Conseil d'État that the French authorities refuse to take into account, for the purposes of reimbursement of the advance payment, the taxation borne by non-resident sub-subsidiaries. However, where the chain of interests is purely within the French Republic, the dividends paid by a sub-subsidiary to the intermediate company conferred entitlement to a tax credit intended to offset the advance payment in its entirety when that same income is redistributed. If the intermediate company were to distribute those dividends to its parent company, that new distribution again gave rise to a tax credit applied to the dividends and intended to offset the advance payment payable in the same way on redistribution by the parent company. The economic double taxation was therefore completely neutralised.

25. This results in a difference in treatment according to the location of the distributing sub-subsidiary's registered office, since there is complete neutralisation of economic double taxation only where the sub-subsidiary is established in French territory. In addition, in the Commission's view, there is no objective reason which would justify the French Republic not neutralising the involvement of the intermediate company on the ground that the source of the dividends is outside France.

26. The French Government does not dispute that, in accordance with the judgments of the Conseil d'État, the system for reimbursement of the advance payment does not allow the taxation of dividends distributed by a sub-subsidiary to a non-resident subsidiary to be neutralised. However, it claims that the national system to eliminate double taxation guarantees the prevention of such taxation only at the level of each distributing company. In addition, each Member State is free to organise its system of taxation as long as that system does not entail discrimination. That being the case, Member States are not obliged to adapt their own tax system to those of the other Member States.

27. In the present case, the French tax legislation does not allow the taxation payable by a parent company to be set off against the taxes paid by its resident sub-subsidiaries. The tax credit is granted to the parent company solely on account of the tax charged on the profits of the distributing subsidiary. Accordingly, France is under no obligation to ensure that account is taken, when calculating the reimbursement of the advance payment unduly made, of the taxation borne by the non-resident sub-subsidiaries distributing dividends. The fact that the distribution of the dividends from a sub-subsidiary to a subsidiary has been taxed is the result of the application of tax legislation from outside the French Republic, which it is not for it to correct.

28. Furthermore, since the French system for the elimination of double taxation is silent on the issue of sub-subsidiaries, the tax collected when dividends are distributed may be set off only in respect of the company which receives those dividends. The French system must thus be distinguished from the UK system of advance corporation tax at issue in the cases giving rise to the judgments of 12 December 2006, *Test Claimants in the FII Group Litigation* (C-446/04, EU:C:2006:774) and of 13 November 2012, *Test Claimants in the FII Group Litigation* (C-35/11, EU:C:2012:707). Unlike the UK system at issue in the cases which gave rise to those judgments, the French scheme at issue does not take account of the tax charged on sub-subsidiaries, whether or not they are resident companies; the scheme is based on an approach consisting in offsetting the tax charged at each level and not on a group taxation approach.

2. Assessment

29. In response to the first question referred for a preliminary ruling which had been submitted to it by the Conseil d'État in the case which gave rise to the judgment of 15 September 2011, *Accor* (C-310/09, EU:C:2011:581), the Court held that 'Articles 49 TFEU and 63 TFEU preclude legislation of a Member State intended to eliminate economic double taxation of dividends … which allows a parent company to set off against the advance payment, for which it is liable when it redistributes to its shareholders dividends paid by its subsidiaries, the tax credit applied to the distribution of those dividends if they originate from a subsidiary established in that Member State, but does not offer that 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'.

30. Relying on the fact that EU law, as it currently stands, does not lay down any general criteria for the attribution of areas of competence between the Member States in relation to the elimination of double taxation within the European Union,[17] the French Republic proposes a formalistic, restrictive and, in my view, incorrect application of the answer given to the first question in the case which gave rise to the judgment of 15 September 2011, *Accor* (C-310/09, EU:C:2011:581).

17 See, inter alia, judgment of 11 September 2014, *Kronos International* (C-47/12, EU:C:2014:2200, paragraph 68).

31. It is true that a Member State is not obliged to adapt its own tax system to the different systems of tax of the other Member States in order, inter alia, to eliminate double taxation, so long as its rules are not discriminatory. [18] However, in the present case, in a purely national situation, the absence of double taxation on the part of the parent company is attributable simply to the successive grant, at all 'links' in the chain of interests of companies established in France, of a tax credit intended to offset in its entirety the advance payment payable on redistribution of the same income.

32. Accordingly, although it is true that the taxes paid by sub-subsidiaries established in France also may not be set off directly against the corporation tax paid by a parent company, such offsetting however proves unnecessary having regard to the applicable tax system as a whole.

33. The lack of discrimination relied on by the French Republic is therefore quite clearly the result of an artificial, or at the very least formalistic, reading — since it is focussed exclusively on the last link in the chain of taxation — of the tax system criticised by the Court in the judgment of 15 September 2011, *Accor* (C-310/09, EU:C:2011:581).

34. In addition, it is clear from the case-law of the Court that a Member State is not obliged to offset the tax burden resulting from the exercise of the tax powers of another Member State or of a third State, provided that it does not exercise a power of taxation over the incoming dividends — either by taxing them or by taking them into account in a different way — as regards the company receiving them. However, when that same Member State elects to tax those dividends, it must take into account, within the limits of its own taxation, the tax burden resulting from the exercise of the tax powers of the other Member State. [19]

35. I cannot agree with the French Republic in this regard where it states that the Court confined itself, in the judgment of 13 November 2012, *Test Claimants in the FII Group Litigation* (C-35/11, EU:C:2012:707), to finding the UK legislation to be discriminatory without laying down the requirement to take account of the taxation borne by sub-subsidiaries in any mechanism for the elimination of double taxation.

36. As the French Republic itself states, that judgment follows on from an initial judgment of the Court in which it had observed, in general and abstract terms, without referring to the UK legislation at issue, that, 'whatever the mechanism adopted for preventing or mitigating the imposition of a series of charges to tax or economic double taxation, the freedoms of movement guaranteed by the Treaty preclude a Member State from treating foreign-sourced dividends less favourably than nationally sourced dividends, unless such a difference in treatment concerns situations which are not objectively comparable or is justified by overriding reasons in the general interest'. [20]

37. The fact that the UK tax system at issue in those cases provided for a system of exemption for dividends paid by resident companies and a system of offsetting for dividends paid by non-resident companies, whereas the French scheme provides for a system of offsetting regardless of the origin of the dividends distributed and the taxation in full of the dividends distributed, coupled with a tax credit, on every distribution and redistribution of dividends, is irrelevant.

18 See, to that effect, judgments of 8 December 2011, *Banco Bilbao Vizcaya Argentaria* (C-157/10, EU:C:2011:813, paragraph 39), and of 26 May 2016, *NN (L) International* (C-48/15, EU:C:2016:356, paragraph 47).

19 See, to that effect, inter alia, judgment of 11 September 2014, *Kronos International* (C-47/12, EU:C:2014:2200, paragraphs 85 and 86).

20 Judgment of 12 December 2006, *Test Claimants in the FII Group Litigation* (C-446/04, EU:C:2006:774, paragraph 46).

38. The principle recalled in the judgment of 12 December 2006, *Test Claimants in the FII Group Litigation* (C-446/04, EU:C:2006:774), which has been re-confirmed since then, is indeed that dividends paid to residents by non-resident companies must be accorded equivalent treatment where the Member State has a system for preventing or mitigating the imposition of a series of charges to tax or economic double taxation as regards dividends paid to residents by resident companies. [21]

39. In those circumstances, the Court held that 'Articles [49 TFEU and 63 TFEU] preclude legislation of a Member State which allows a resident company receiving dividends from another resident company to deduct from the amount which the former company is liable to pay by way of advance corporation tax the amount of that tax paid by the latter company, whereas no such deduction is permitted in the case of a resident company receiving dividends from a non-resident company as regards the corresponding tax on distributed profits paid by the latter company in the State in which it is resident'. [22]

40. The Court was particularly clear in the grounds of the judgment and the answer given to the second and fourth questions referred in the case which gave rise to the judgment of 13 November 2012, *Test Claimants in the FII Group Litigation* (C-35/11, EU:C:2012:707): Articles 49 TFEU and 63 TFEU preclude legislation of a Member State which, as regards foreign-sourced dividends alone, does not take account of the tax paid on the distributed profits. [23] In that regard, the important point is indeed the taxation of those profits and not the fact that the non-resident company which pays dividends to its resident parent company is itself liable for corporation tax. [24]

3. Conclusion on the first complaint

41. It follows from the foregoing that, by refusing to take account of the taxation borne by sub-subsidiaries established in a Member State other than France even though the mechanism applicable to sub-subsidiaries established in France allowed them to pay to the recipient intermediate company dividends exempted from the cost of the tax charged on them, the French Republic perpetuates the discrimination found to exist by the Court in the judgment of 15 September 2011, *Accor* (C-310/09, EU:C:2011:581).

B. The second complaint, alleging that the rules of evidence laid down in order to establish the right to reimbursement of the advance payment illegally made are disproportionate

1. Arguments of the parties

42. The Commission divides its second complaint into three parts.

43. In the first part, the Commission takes the view that the judgments of the Conseil d'État require that the accounting documents relating to the dividends distributed are consistent with the minutes of general meetings of the subsidiaries recording the profits made in the form of distributable dividends. In the case of the majority of the subsidiaries not established in France, the general meeting minutes

21 See, to that effect, judgments of 12 December 2006, *Test Claimants in the FII Group Litigation* (C-446/04, EU:C:2006:774, paragraph 72); of 30 June 2011, *Meilicke and Others* (C-262/09, EU:C:2011:438, paragraph 29); and of 11 September 2014, *Kronos International* (C-47/12, EU:C:2014:2200, paragraph 65).

22 Judgment of 12 December 2006, *Test Claimants in the FII Group Litigation* (C-446/04, EU:C:2006:774, point 2 of the operative part).

23 See, to that effect, judgment of 13 November 2012, *Test Claimants in the FII Group Litigation* (C-35/11, EU:C:2012:707, paragraph 71).

24 See, to that effect, judgment of 13 November 2012, *Test Claimants in the FII Group Litigation* (C-35/11, EU:C:2012:707, paragraph 73). The Court concluded from this that 'the answers to the second and fourth questions asked in the case which gave rise to the judgment [of 12 December 2006, *Test Claimants in the FII Group Litigation* (C-446/04, EU:C:2006:774)] are therefore not affected by a finding that the foreign corporation tax to which the profits underlying the distributed dividends have been subject was not or was not wholly paid by the non-resident company paying those dividends to the resident company, but was paid by a company resident in a Member State that is a direct or indirect subsidiary of the first company' (paragraph 74).

record the distribution of a 'distributable profit' resulting from an accounting aggregate which includes all previous sums carried forward which were not distributed and the result of the previous financial year. In those circumstances, it is very difficult, if not impossible, to determine whether the dividend distributed originates from a particular accounting result.

44. In the second part, the Commission criticises the judgments of the Conseil d'État for making the right to reimbursement of the advance payment subject to the submission of a previous advance payment declaration in which the amounts of the advance payment paid in respect of redistributions of dividends are identified. However, since resident companies could not be granted a tax credit in respect of the advance payment payable on account of the distribution of dividends from a non-resident subsidiary, those companies could not be required to have recorded those dividends in their advance payment declaration. By taking as a basis the choices made by a parent company when making the advance payment, the judgments of the Conseil d'État do not comply with the obligations stemming from the principles of equivalence and effectiveness which govern the national procedures for the reimbursement of national taxes collected in breach of EU law.

45. In the third part, the Commission disputes the restriction based on the requirement to produce supporting documents beyond the statutory period for retention. By having stated that the expiry of the statutory period for retention of the documents did not exempt the company seeking reimbursement of the advance payment illegally made from its obligation to produce all evidence capable of demonstrating that its application is well founded, the judgments of the Conseil d'État are at odds with the principle of effectiveness.

46. As a preliminary point, the French Government observes that the judgment of 15 September 2011, *Accor* (C-310/09, EU:C:2011:581), expressly stated that reimbursements of the advance payment were conditional upon the applicant companies providing evidence, by any means, of the taxes paid by their subsidiaries in the Member State in which they are established. In that context, the judgments of the Conseil d'État are marked by a particularly flexible approach, since they accepted any form of documents which allows the companies to show the tax rate to which their non-resident subsidiaries were subject.

47. With regard to the first part of the second complaint, the French Government states that the judgments of the Conseil d'État did not require proof that the taxation in respect of which offsetting was sought had been charged on dividends corresponding to a particular financial year. The taxation was thus deemed to have been paid on account of the dividends taken as a whole, regardless of the financial years from which they originated.

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

49. With regard to the second part of the second complaint, the French Government points out that all the distributions of dividends, whether they involved dividends from French subsidiaries or from non-resident subsidiaries, had to be recorded in the advance payment declarations. In addition, since the advance payment is payable only in the event of redistribution, the dividends in respect of which proof of the amount of taxation is required are necessarily those which were so redistributed.

50. As for the third part of the second complaint, the judgments of the Conseil d'État did not require that supporting evidence be produced beyond the statutory period for their retention. The Conseil d'État based its assessment on the documents submitted by the companies concerned, which included such supporting evidence.

51. In any event, it is for a taxpayer who has submitted a tax claim to retain the documents required to prove that his application is well founded until the outcome of the administrative and litigation procedures, regardless of the statutory period for retention of such documents.

2. Assessment

(a) The use of the minutes of the general meetings of the distributing subsidiaries

52. According to the Commission, the judgments of the Conseil d'État require that the accounting documents relating to the dividends distributed are consistent with the minutes of general meetings of the subsidiaries recording the profits made in the form of distributable dividends.

53. I do not agree with that interpretation of the judgments in question. Although it is true that the Conseil d'État does refer to the fact that it is impossible to rely on taxation which cannot be linked to the sums stated in the minutes of general meetings of the distributing subsidiaries, it does so to set out the view taken by the Minister.[25] Nor does it follow from the judgments of the Conseil d'État that the submission of such documents is the result of a binding request made by that court.

54. In any event, although the minutes of general meetings were used by the Conseil d'État, it appears that they were part of a body of evidence.[26] The decisions of the administrative courts cited by way of examples by the French Republic in its rejoinder support this interpretation of the judgments of the Conseil d'État. The first part of the second complaint therefore appears to me to be unfounded.

(b) The requirement of a previous advance payment declaration

55. The Commission takes the view that, by relying on the choices made by a parent company when making the advance payment at the time of submission of the declaration relating to that payment, the judgments of the Conseil d'État do not comply with the obligations stemming from the principles of equivalence and effectiveness.

56. It is not disputed that parent companies established in France were not eligible for the grant of a tax credit on account of the dividends received from their non-resident subsidiaries. However, it is apparent not only from the French Republic's response to the letter of formal notice of 26 November 2014, but also from the opinion of the rapporteur public on the judgments of the Conseil d'État that parent companies established in France did indeed have to state in their advance payment declaration the dividends from their non-resident subsidiaries. According to the opinion of the rapporteur public, if there were any legal uncertainty that uncertainty related not to the obligation to submit the declaration, but solely to the legal rules governing the distributed dividends.

57. In addition, reimbursement is possible only if an advance payment was made at the time of a distribution of dividends. In those circumstances, since any dividend distributed necessarily had to be declared, the Conseil d'État did not act contrary to the principles of equivalence and effectiveness where it found that parent companies were not justified in arguing that the advance payment declarations which they had filed could not be relied on against them.

25 See, inter alia, judgments of 10 December 2012, *Rhodia* (FR:XX:2012:317074.20121210, paragraph 47), and of 10 December 2012, *Accor* (FR:CESSR:2012:317075.20121210, paragraph 41).

26 See, inter alia, judgments of 10 December 2012, *Rhodia* (FR:XX:2012:317074.20121210, paragraph 49), and *Accor* (FR:CESSR:2012:317075.20121210, paragraphs 43 and 50). Furthermore, reference is not made to any specific minutes in the judgment in *Accor*. In addition, although the Conseil d'État relied on some minutes of general meetings in the case which gave rise to the judgment in *Accor*, it does so both to reject part of the link which the applicant claims exists and to refute a claim made by the Minister (see judgment of 10 December 2012, *Accor*, FR:CESSR:2012:317075.20121210, paragraphs 43, 50 and 56).

58. Accordingly, the second part of the second complaint appears to me to be unfounded. The judgment of 8 March 2011, *Metallgesellschaft and Others* (C-397/98 and C-410/98, EU:C:2001:134) relied on by the Commission cannot alter that finding, since the applications which gave rise to that judgment were claims for damages against which the inaction of the taxpayers and their lack of due diligence were raised in opposition.

(c) The effect of the expiry of the statutory period for retention of the supporting documents

59. Finally, the Commission criticises the French Republic for restricting reimbursements of the advance payment by requiring the production of supporting documents beyond the statutory period for their retention.

60. In the judgments of the Conseil d'État, the view was taken that 'it is for a company which has submitted a claim for the reimbursement of the advance payment to possess all the evidence capable of demonstrating that its application is well founded throughout the duration of the proceedings, [and] that the expiry of the statutory period for retention of such documents cannot exempt it from that obligation'. [27]

61. In my view, that approach is not at odds with the limits laid down by the Court in the judgment of 15 September 2011, *Accor* (C-310/09, EU:C:2011:581).

62. In that judgment, the Court accepted that the taxpayer had to provide information relating to the nature and rate of the tax actually charged on the profits underlying the dividends distributed. [28] In that regard, it made clear that 'the request for production [of the evidence required had to be] made within the statutory period for retention of administrative documents or accounts, as laid down by the law of the Member State in which the subsidiary is established'. [29] In the same paragraph, the Court further added that, 'in order for it to receive the tax credit', the taxpayer should not be required 'to provide documents covering a period significantly longer than the statutory period for retention of administrative documents and accounts'.

63. However, as the French Republic rightly points out in its defence, those clarifications come in the context of the Court's examination of the principle of effectiveness which concerns, primarily, the administrative authorities of the Member State of taxation. According to the Court, 'the evidence required should enable *the tax authorities of the Member State of taxation* to ascertain, clearly and precisely, whether the conditions for obtaining a tax advantage are met'. [30]

64. In the case of an administrative procedure brought to challenge a decision, I am therefore of the view that the expiry of the statutory period for retention of the relevant documents must be determined at the date on which that pre-litigation procedure is initiated and not at the date of any request relating to those documents by the court before which the matter is subsequently brought. This is, moreover, the only interpretation of the second clarification made by the Court vis-à-vis the expiry of the statutory period for retention of administrative documents and accounts, namely that a taxpayer should not be required 'to provide documents covering a period significantly longer than the statutory period for retention of administrative documents and accounts'. [31] If the statutory retention period were a strict time limit to which the courts were likewise subject, how could regard conceivably be had to documents covering a period longer — even if not significantly longer — than the statutory period for retention?

27 Judgments of 10 December 2012, *Rhodia* (FR:XX:2012:317074.20121210, paragraph 35), and *Accor* (FR:CESSR:2012:317075.20121210, paragraph 31).

28 See judgment of 15 September 2011, *Accor* (C-310/09, EU:C:2011:581, paragraph 92).

29 Judgment of 15 September 2011, *Accor* (C-310/09, EU:C:2011:581, paragraph 101).

30 Judgment of 15 September 2011, *Accor* (C-310/09, EU:C:2011:581, paragraph 99); emphasis added.

31 Judgment of 15 September 2011, *Accor* (C-310/09, EU:C:2011:581, paragraph 101).

65. In addition, I also note that the judgments of the Conseil d'État expressly state that, 'where the person concerned produces evidence or relies on the fact that it is materially impossible to produce evidence, it is for the authorities to adduce evidence to the contrary [and, in such circumstances,] it thus falls to the tax court to make a determination in the light of the preparatory inquiries and to assess, taking into account the arguments of the parties, whether, in the case of the dividend at issue, that person shows that his application for reimbursement is well-founded'. [32]

66. Like the first two parts, the third part of the second complaint appears to me to be unfounded.

3. Conclusion on the second complaint

67. In those circumstances, I take the view that the Commission fails to show that the French Republic made the reimbursement to a parent company of sums intended to guarantee the application of one and the same tax scheme to the dividends distributed by the subsidiaries of that parent company established in France and to those distributed by the subsidiaries of that company established in other Member States subject to rules of evidence contrary to the principles of equivalence and effectiveness.

C. The third complaint, alleging the capping of the amount reimbursable in respect of the advance payment illegally made at one third of the amount of the dividends

1. Arguments of the parties

68. According to the Commission, it is explicitly clear from the judgments of the Conseil d'État that the amount of the tax credit to be reimbursed to French parent companies which have received dividends from their non-resident subsidiaries is strictly limited to one third of the amount of the dividends received and distributed. By contrast, the amount of the tax credit for dividends distributed by a resident subsidiary is fixed at a flat rate of half the amount of the dividends.

69. By limiting to one third of the dividends paid by a non-resident subsidiary the reimbursement of the advance payment made on those dividends, the judgments of the Conseil d'État therefore place companies receiving such dividends in a less favourable situation than that of companies receiving them from a resident subsidiary, which means that the discrimination found to exist by the Court in the judgment of 15 September 2011, *Accor* (C-310/09, EU:C:2011:581) continues.

70. The French Government submits that the restriction of the reimbursement of the advance payment to one third of the dividends received corresponds to the amount of the advance payment actually made. The equal treatment of the dividends received by resident and non-resident subsidiaries is thus entirely guaranteed.

71. In addition, such a cap on the reimbursement of the advance payment allows equal account to be taken of the tax charged on the dividends distributed, the origin of which is the Member State in which the subsidiary is established, and that charged on the dividends distributed by a resident subsidiary. On that basis, that restriction may, in practice, result in a reimbursement of the advance payment which is lower than the tax actually paid by the distributing subsidiary in its Member State of establishment, but that reimbursement does correspond exactly to the amount of the advance payment actually made by the resident company. This ensures that foreign-sourced dividends do not receive more favourable treatment than dividends from the Member State of the parent company.

32 Judgments of 10 December 2012, *Rhodia* (FR:XX:2012:317074.20121210, paragraph 37), and *Accor* (FR:CESSR:2012:317075.20121210, paragraph 33).

2. Assessment

72. In essence, according to the applicable provisions of the CGI, parent companies established in France which received dividends distributed by resident companies obtained a tax credit equal to half the sums actually paid. Those parent companies were required to make an advance payment equal to that tax credit.

73. In accordance with the judgments of the Conseil d'État, 'where a distributing company has borne, in the Member State, effective tax at a rate higher than the normal rate of the French tax, that is 33.33%, the amount of the tax credit which it may claim must be limited to one third of the dividends which it has received and redistributed'.[33] That limitation allows for the implementation of the reservation laid down by the Court, namely that, where the profits of a company are subject in the State of the company making the distribution to a higher level of tax than the tax levied by the Member State of the company receiving them, the latter Member State is not obliged to grant a tax credit higher than the amount of the corporation tax for which the company receiving the dividends is liable.[34]

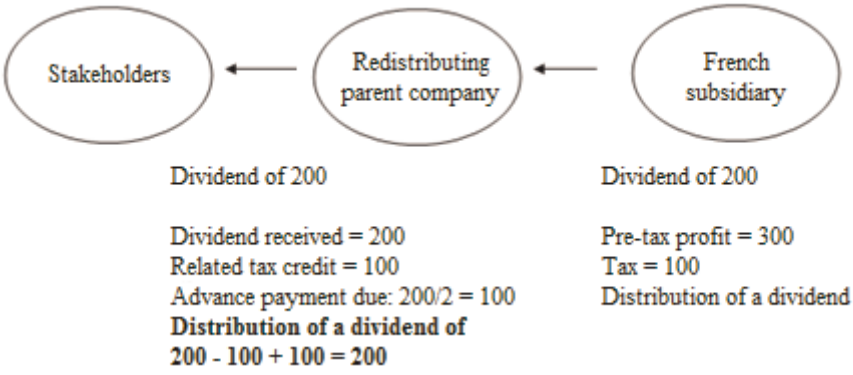
74. The example presented by the French Republic appears to me, in this regard, to be convincing. Where a subsidiary resident in France makes a profit of 300, the dividend available for the parent company is 200 after payment by the subsidiary of corporation tax at the normal rate of 33.33%. The parent company established in France therefore receives a dividend of 200 exempt from corporation tax and, at that time, a tax credit equivalent to half that amount, that is 100. Since that amount is identical to the advance payment that it is required to pay when it distributes the dividend, the balance available for the shareholder is still 200. However, where a dividend of an equivalent amount has been paid to the parent company by a non-resident subsidiary, the advance payment due corresponds to one third of the income distributable, without the possibility of a tax credit being used by way as an offset. In this situation, the balance available is therefore 133. By limiting the amount to be reimbursed to one third of the dividend received from the non-resident subsidiary — itself equivalent to the tax credit received by the shareholder in respect of that distribution — the distributing company is reimbursed the amount of the advance payment that it had made. Equilibrium is thus re-established since an available balance of 200 is restored.[35] The French Republic illustrates its presentation using the following diagram:

33 Judgments of 10 December 2012, *Rhodia* (FR:XX:2012:317074.20121210, paragraph 44), and *Accor* (FR:CESSR:2012:317075.20121210, paragraph 40).

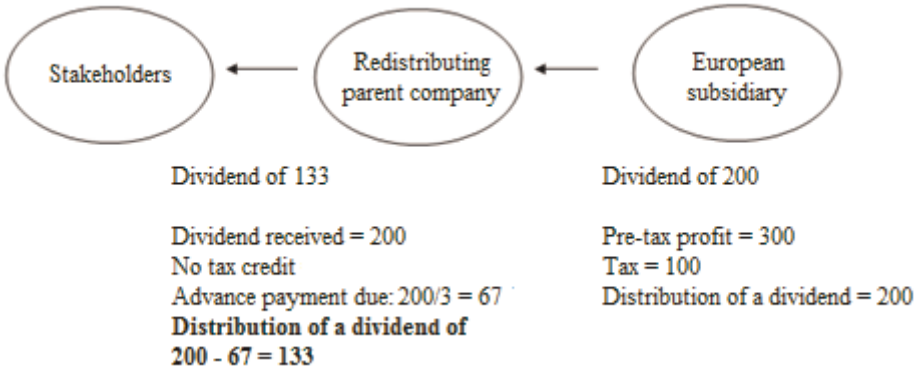
34 See judgment of 15 September 2011, *Accor* (C-310/09, EU:C:2011:581, paragraph 90).

35 It could be that the parent company drew on its reserves in order to 'offset' the advance payment made and pay to its shareholder a dividend upon which tax is not levied. However, any resultant cash-flow problem does not form the subject matter of the actions which gave rise to the judgments of the Conseil d'État or of these infringement proceedings, which are concerned solely with the procedures for reimbursement of the advance payment.

Situation in which the French parent company redistributes to its shareholders the dividends received from a French subsidiary



Situation in which the French parent company redistributes to its shareholders the dividends received from a subsidiary established in another Member State



Reimbursing to the distributing company the amount of the advance payment which it has paid, that is 67, does indeed allow the discrimination suffered to be removed, since that company thus distributes 133 + 67 = 200

75. However, if the French Republic had to reimburse an advance payment equivalent to all the tax paid by the distributing subsidiary in its State of residence — that is to say, in the scenario used in the previous point, an amount of 100, that is to say an amount higher than the tax paid by the parent company on account of its receipt of the dividend —, the amount received by the shareholders would be higher than that received by a shareholder in a purely domestic situation.[36]

76. The cap on the advance payment reimbursed fixed at one third of the amount of the dividends forming the subject of the (pre-tax) re-distribution is not therefore equivalent to the tax actually paid by the subsidiary in its State of residence. However, the amount reimbursed — which is not subject to the advance payment and therefore redistributable in full — does correspond to the advance payment actually made by the distributing parent company and of which it seeks reimbursement; the discrimination complained of is therefore remedied.

36 The amount ultimately received of 133 (dividend received from the subsidiary company less the advance payment made by the parent company) + 100 (sum reimbursed) = 233.

77. In its reply, the Commission concedes that it had not taken into account the fact that the reimbursements made following the judgment of 15 September 2011, *Accor* (C-310/09, EU:C:2011:581), did not give rise to taxation or to the grant of a tax credit. Nevertheless, the Commission takes the view that there is still a 'risk' that the cap on the reimbursement does not wholly eliminate the discrimination caused by the tax scheme found to be incompatible with EU law. This is even the case where the amount of the tax on company profits ultimately payable is higher than the amount of the advance payment previously levied, or where the tax to which the shareholder is subject is greater than the amount of the advance payment initially levied. The intention of this new approach is therefore that the final shareholders are treated differently. However, that situation is not the situation dealt with in the cases which gave rise to the judgment of 15 September 2011, *Accor* (C-310/09, EU:C:2011:581),[37] nor that at issue before a tax court to which an application for reimbursement of the advance payment is made by a parent company distributing dividends.

78. In addition, this new approach by the Commission is merely the expression of a theoretical analysis. It is not accompanied by any specific example capable of demonstrating its operation in reality. Moreover, 'in proceedings under Article 258 TFEU for failure to fulfil obligations, it is incumbent upon the Commission to prove the alleged failure. It must provide the Court with the information necessary for it to determine whether the infringement is made out, and the Commission may not rely on any presumption for that purpose'.[38]

3. Conclusion on the third complaint

79. In the light of the foregoing considerations, I take the view that the Commission fails to show that the French Republic continues the discrimination found to exist by the Court in the judgment of 15 September 2011, *Accor* (C-310/09, EU:C:2011:581) by limiting to one third of the dividends paid by a non-resident subsidiary the reimbursement of the advance payment made on those dividends.

D. The fourth complaint, alleging a failure to ask the Court to determine the compatibility with EU law of the restrictions on the right to reimbursement of the advance payment illegally made

1. Arguments of the parties

80. According to the Commission, the Conseil d'État should have made a reference for a preliminary ruling before establishing the procedures for reimbursement of the advance payment, the collection of which was found to be incompatible with EU law in accordance with the judgment of 15 September 2011, *Accor* (C-310/09, EU:C:2011:581). As the court adjudicating at last instance for the purposes of the third paragraph of Article 267 TFEU, the Conseil d'État was required to put questions to the Court in view of the difficulties in drawing conclusions from that judgment.

81. On the one hand, doubts as to the compatibility with EU law of any restrictions on the right to reimbursement of the advance payment were brought to the fore by the opinion of the rapporteur public and by the parties' desire that the Conseil d'État make a new request for a preliminary ruling.

82. On the other hand, the risk of a divergence in case-law within the European Union could not be ruled out in the light of the judgment of 13 November 2012, *Test Claimants in the FII Group Litigation* (C-35/11, EU:C:2012:707).

37 In answer to the second question put to it, the Court moreover expressly drew a distinction between the situation of a parent company and that of its shareholders. According to the Court, 'the regime at issue in the main proceedings, which concerns an advance payment made by a parent company when distributing dividends and not a charge levied on the sale of goods, does not lead to the passing on of that advance payment to third parties' (judgment of 15 September 2011, *Accor* (C-310/09, EU:C:2011:581, paragraph 75)).

38 Judgment of 26 April 2018, *Commission* v *Bulgaria* (C-97/17, EU:C:2018:285, paragraph 69). See also judgment of 16 July 2015, *Commission* v *Slovenia* (C-140/14, not published, EU:C:2015:501, paragraph 38).

83. The French Government recalls, first of all, the case-law of the Court according to which national courts are not required to make a request for a preliminary ruling on interpretation simply because a party to the proceedings so wishes.

84. It goes on to argue that the Commission has still failed to specify the difficulties with which the Conseil d'État was faced in the cases which gave rise to the judgments concerned and which justified a reference for a preliminary ruling under the third paragraph of Article 267. In addition, that court had to face difficulties of a factual nature and not difficulties involving the interpretation of EU law.

85. In any event, the Conseil d'État was right to take the view that the answers to the questions with which it was faced were sufficiently obvious for there to be no resultant obligation to submit a new question to the Court for a preliminary ruling.

2. Assessment

(a) The principle of infringement of the third paragraph of Article 267 TFEU

86. The fourth complaint can be contemplated only in the event that one (or more) of the other complaints is well founded. As the Commission itself makes clear, this last complaint is limited to the fact that the Conseil d'État failed to fulfil its obligation '*in the circumstances of the present case*',[39] that is to say the consequences of the judgment of 15 September 2011, *Accor* (C-310/09, EU:C:2011:581). It is therefore not concerned with a structural failure to fulfil the obligation to make a reference for a preliminary ruling, which is incumbent on the Conseil d'État under the third paragraph of Article 267 TFEU.

87. In any event, as I have set out in the introduction to this Opinion, this is the first time that the Court has been called upon to rule on a complaint of this kind in the context of an action for failure to fulfil obligations. However, the theoretical possibility of a State failing to fulfil its obligations on the basis of an infringement of the third paragraph of Article 267 TFEU appears to me to be certain.

88. First, it is established that 'the liability of a Member State under Article [258 TFEU] arises whatever the agency of the State whose action or inaction is the cause of the failure to fulfil its obligations, even in the case of a constitutionally independent institution'.[40] Second, the Court has rejected the argument that it would be difficult to remedy an infringement because that infringement has its origin in a judgment of a supreme court.[41]

89. The aforementioned possibility is consistent not only with the objective pursued by the obligation to make a reference provided for in the third paragraph of Article 267 TFEU but also with the conditions governing the rules on the liability of Member States where EU law is infringed.

39 See paragraph 118 of the Commission's application.

40 Judgment of 5 May 1970, *Commission* v *Belgium* (77/69, EU:C:1970:34, paragraph 15). For confirmation of the principle in relation to national case-law, see judgments of 9 December 2003, *Commission* v *Italy* (C-129/00, EU:C:2003:656, paragraph 29), and of 12 November 2009, *Commission* v *Spain* (C-154/08, not published, EU:C:2009:695, paragraph 125).

41 See, to that effect, judgment of 12 November 2009, *Commission* v *Spain* (C-154/08, not published, EU:C:2009:695, paragraphs 124 to 127). In that judgment, the Court was further keen to point out that, 'although isolated or numerically insignificant judicial decisions in the context of case-law taking a different direction, or still more a construction disowned by the national supreme court, cannot be taken into account, that is not true of a widely held judicial construction which has not been disowned by the supreme court, but rather confirmed by it' (paragraph 126, with the Court referring to paragraph 32 of the judgment of 9 December 2003, *Commission* v *Italy*, C-129/00, EU:C:2003:656).

90. The obligation to make a reference laid down in the third paragraph of Article 267 TFEU is intended in particular to prevent a body of national case-law that is not in accordance with the rules of EU law from being established in a Member State.[42] As Advocate General Bot has observed, non-compliance on the part of national courts and tribunals against whose decisions there is no judicial remedy under national law with their obligation to make a reference has the effect of depriving the Court of the fundamental task assigned to it by the first subparagraph of Article 19(1) TEU, namely to ensure 'that in the interpretation and application of the Treaties the law is observed'.[43]

91. In addition, the Court has consistently held that non-compliance with the obligation to make a reference for a preliminary ruling laid down in the third paragraph of Article 267 TFEU is one of the factors which must be taken into account when examining the liability of a Member State on account of a decision of a national court adjudicating at last instance.[44]

92. The possibility of finding that a Member State has failed to fulfil its obligations on account of a breach of the obligation to make a reference for a preliminary ruling is particularly justified where that failure to fulfil obligations follows an initial judgment of the Court. According to the Court, the obligation incumbent on a Member State under Article 260(1) TFEU means that 'all the institutions of the Member States concerned must … ensure within the fields covered by their respective powers that judgments of the Court are complied with. … [It is for this reason that] the courts of the Member State concerned have an obligation to ensure, when performing their duties, that the Court's judgment is complied with'.[45] Having been confirmed with regard to compliance with a judgment declaring a failure to fulfil obligations, the same conclusion must be reached vis-à-vis courts which have referred questions to the Court for a preliminary ruling since judgments on interpretation given by the Court have a 'generalised' effect within the EU legal system:[46] once a provision of EU law has been interpreted by the Court of Justice, that interpretation is binding on all courts.[47] That interpretation clarifies the meaning and scope of the rule of EU law at issue as it must be or ought to have been understood and applied from the time of its entry into force.[48]

93. Accordingly, if the court which referred the question for a preliminary ruling still has doubts about the meaning of the rule and it is a court of last instance, it is thus obliged to put further questions to the Court. In those circumstances, the Court's response appears necessary to decide the case such that, in accordance with the judgment of 6 October 1982, *Cilfit and Others* (283/81, EU:C:1982:335),[49] the obligation to make a reference is 'made out'.[50]

94. With regard to the scope of that obligation, the Court has confirmed that it now followed 'from settled case-law, beginning with the judgment in *Cilfit and Others* (283/81, EU:C:1982:335), that a court or tribunal against whose decisions there is no judicial remedy under national law is obliged, where a question of EU law is raised before it, to comply with its obligation to bring the matter

42 See, to that effect, judgment of 15 March 2017, *Aquino* (C-3/16, EU:C:2017:209, paragraph 33).

43 See Opinion of Advocate General Bot in *Ferreira da Silva e Brito and Others* (C-160/14, EU:C:2015:390, point 102).

44 See, to that effect, judgments of 30 September 2003, *Köbler* (C-224/01, EU:C:2003:513, paragraph 55); of 13 June 2006, *Traghetti del Mediterraneo* (C-173/03, EU:C:2006:391, paragraph 32); and of 28 July 2016, *Tomášová* (C-168/15, EU:C:2016:602, paragraph 25).

45 Judgment of 14 December 1982, *Waterkeyn and Others* (314/81 to 316/81 and 83/82, EU:C:1982:430, paragraph 14).

46 See, to that effect, Wildemeersch, J., 'Une loi inconstitutionnelle et contraire au droit de l'Union: et alors? Une déférence erronée vis-à-vis du législateur', *Journal des tribunaux*, 2018, pp. 256 and 257, in particular p. 257. The author himself refers to Lenaerts, K., 'Form and Substance of the Preliminary Ruling Procedure', in Curtin, D. and Heukels, T., (eds.), *Institutional Dynamics of European Integration, Essays in Honor of Henry G. Schermers*, Vol. II, Kluwer Academic Publishers, 1994, pp. 355-380, in particular p. 376.

47 See Soulard, S., Rigaux, A., and Munoz, R., *Contentieux de l'Union européenne/3 — Renvoi préjudiciel — Recours en manquement*, coll. Axe Droit, Paris, Lamy, 2011, No 59.

48 See, to that effect, judgment of 27 March 1980, *Meridionale Industria Salumi and Others* (66/79, 127/79 and 128/79, EU:C:1980:101, paragraph 9).

49 Paragraph 11 of that judgment.

50 The expression is taken from Lekkou, E., comment No 24, in Karpenschif, M. and Nourissat, C. (eds.), *Les grands arrêts de la jurisprudence de l'Union européenne*, 3rd edition, PUF, 2016, pp. 131 to 136, in particular No 24-4. See, to that effect, judgment of 28 July 2016, *Association France Nature Environnement* (C-379/15, EU:C:2016:603, paragraph 47).

before the Court of Justice, unless it has established that the question raised is irrelevant [— that is to say, "if the answer to that question, regardless of what it may be, can in *no way affect* the outcome of the case" [51] —] or that the provision of EU law concerned has already been interpreted by the Court or that the correct application of EU law is so obvious as to leave no scope for any reasonable doubt'. [52]

(b) The application of the principle to the present case

95. At the end of my analysis of the second and third complaints, I came to the conclusion that the Conseil d'État had not mistaken the meaning or the scope of the judgment of 15 September 2011, *Accor* (C-310/09, EU:C:2011:581), as regards the rules of evidence permitted and the assessment of the amount of the advance payment to be reimbursed. It cannot be said to have failed to fulfil its obligation to make a reference for a preliminary ruling in that regard. It may be accepted that the points of law in question had been dealt with, within the meaning of the judgment of 6 October 1982, *Cilfit and Others* (283/81, EU:C:1982:335, paragraph 14), by the judgment of 15 September 2011, *Accor* (C-310/09, EU:C:2011:581).

96. However, the solution adopted in the judgments of the Conseil d'État with regard to the tax paid by the sub-subsidiaries is more problematic, since it is indisputable that recourse to EU law appeared necessary in order to resolve the disputes brought before it.

97. It is true that the national court or tribunal alone has sole responsibility for determining whether the correct application of EU law is so obvious as to leave no scope for any reasonable doubt and for deciding, as a result, to refrain from referring to the Court a question concerning the interpretation of EU law which has been raised before it. [53] In other words, 'it is for the national courts alone against whose decisions there is no judicial remedy under national law to take upon themselves independently the responsibility for determining whether the case before them involves an "acte clair"'. [54]

98. However, it has been established since the judgment of 6 October 1982, *Cilfit and Others* (283/81, EU:C:1982:335) that, in order to find that such a situation exists, 'the national court ruling at last instance must be convinced that the matter is equally obvious to the courts of the other Member States *and to the Court of Justice*' . [55] As the Court took care to clarify, 'only if those conditions are satisfied may the national court refrain from submitting that question to the Court of Justice and take upon itself the responsibility for resolving it'. [56]

99. In the present case, it is not disputed that the question of taking into account the tax paid by the sub-subsidiaries of the parent company had not been addressed by the Court in the judgment of 15 September 2011, *Accor* (C-310/09, EU:C:2011:581), whereas it did form the subject matter of the judgment of 13 November 2012, *Test Claimants in the FII Group Litigation* (C-35/11, EU:C:2012:707). Accordingly, by choosing to depart from that judgment solely on the ground that the UK scheme was

51 Judgment of 6 October 1982, *Cilfit and Others* (283/81, EU:C:1982:335, paragraph 10); emphasis added. See also judgments of 18 July 2013, *Consiglio nazionale dei geologi* (C-136/12, EU:C:2013:489, paragraph 26), and of 15 March 2017, *Aquino* (C-3/16, EU:C:2017:209, paragraph 42).

52 Judgment of 9 September 2015, *Ferreira da Silva e Brito and Others* (C-160/14, EU:C:2015:565, paragraph 38). See also, to that effect, judgments of 15 September 2005, *Intermodal Transports* (C-495/03, EU:C:2005:552, paragraph 33); of 9 September 2015, *X and van Dijk* (C-72/14 and C-197/14, EU:C:2015:564, paragraph 55); and of 1 October 2015, *Doc Generici* (C-452/14, EU:C:2015:644, paragraph 43).

53 See, to that effect, judgment of 9 September 2015, *Ferreira da Silva e Brito and Others* (C-160/14, EU:C:2015:565, paragraph 40).

54 Judgment of 9 September 2015, *X and van Dijk* (C-72/14 and C-197/14, EU:C:2015:564, paragraph 59).

55 Judgment of 28 July 2016, *Association France Nature Environnement* (C-379/15, EU:C:2016:603, paragraph 48); emphasis added. See also, to that effect, judgments of 6 October 1982, *Cilfit and Others* (283/81, EU:C:1982:335, paragraph 16), and of 15 September 2005, *Intermodal Transports* (C-495/03, EU:C:2005:552, paragraph 39).

56 Judgment of 28 July 2016, *Association France Nature Environnement* (C-379/15, EU:C:2016:603, paragraph 48). See also judgment of 6 October 1982, *Cilfit and Others* (283/81, EU:C:1982:335, paragraph 16).

different from the French tax credit and advance payment scheme, the Conseil d'État could not be certain that its reasoning would be equally obvious to the Court. Furthermore, the different solutions proposed by the applicant companies and the rapporteur public demonstrated the lack of certainty about the solution to be adopted.

100. In any event, by failing to put questions to the Court, the Conseil d'État created a *risk* of a divergence in case-law within the European Union which is incompatible with the obligation to make a reference for a preliminary ruling, an obligation incumbent on it as a court against whose decisions there is no remedy within the meaning of the third paragraph of Article 267 TFEU.

101. Nor can I agree with the French Republic's argument that the need to take account of the sub-subsidiaries did not necessitate any legal interpretation but merely factual assessments. After all, in order to calculate the amount to be reimbursed — which is a factual assessment — the question whether account must be taken of the tax paid by the sub-subsidiaries is a question which necessarily had to be dealt with beforehand and the answer to which is dependent on the applicable legal rule.[57]

3. Conclusion on the fourth complaint

102. In the light of the foregoing considerations, I take the view that the French Republic has failed to fulfil the obligation incumbent on the Conseil d'État under the third paragraph of Article 267 TFEU.

103. Even though it was clear, in the light of the judgment of 13 November 2012, *Test Claimants in the FII Group Litigation* (C-35/11, EU:C:2012:707), that the question of any account taken of the tax paid by non-resident sub-subsidiaries was a question of EU law capable of having an impact on the resolution of the disputes brought before the Conseil d'État, and although the correct application of EU law was not so obvious as to leave no scope for any reasonable doubt, the Conseil d'État chose not to refer this question to the Court for a preliminary ruling.

V. Costs

104. Under Article 138(1) of the Rules of Procedure of the Court, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

105. In the present case, the Commission and the French Republic applied, respectively, for the other party to the proceedings to be ordered to pay the costs.

106. Article 138(3) of the Rules of Procedure of the Court provides that, if it appears justified in the circumstances of the case, the Court may order that one party, in addition to bearing its own costs, to pay a proportion of the costs of the other party. In this case, since I propose that the Commission's action be upheld solely as regards the first and fourth complaints, I am of the view that, pursuant to that provision, the French Republic should be ordered, in addition to bearing its own costs, to pay half of the Commission's costs.

57 I note in this regard that Olivier Fouquet, Section President of the Conseil d'État, ends his commentary on the judgments of the Conseil d'État by stating that 'the case raised other interesting questions, such as that of taking into account the dividends paid by sub-subsidiaries. *However, those are purely questions of law* and not of judicial technique' (Fouquet, O., 'Conseil d'État, précompte et fléchage: "*non possumus*"', *Revue de droit fiscal*, No 1, January 2013, pp. 1 and 2, in particular p. 2; emphasis added).

VI. Conclusion

107. Having regard to the foregoing considerations, I propose that the Court should rule as follows:

1) By refusing to take account of the taxation borne by sub-subsidiaries established in a Member State other than France even though the mechanism applicable to sub-subsidiaries established in France allowed them to pay to the recipient intermediate company dividends exempted from the cost of the tax charged on them, the case-law of the Conseil d'État has perpetuated the discrimination found to exist by the Court in the judgment of 15 September 2011, *Accor* (C-310/09, EU:C:2011:581) and, in so doing, the French Republic has failed to fulfil its obligations under Articles 49 TFEU and 63 TFEU.

2) By having failed to put questions to the Court even though the question of taking into account the tax paid by non-resident sub-subsidiaries was a question of EU law capable of having an impact on the resolution of the disputes brought before it, and although the correct application of EU law was not so obvious as to leave no scope for any reasonable doubt, the French Republic failed to fulfil its obligation under the third paragraph of Article 267 TFEU.

3) The remainder of the action is dismissed.

4) The French Republic is ordered, in addition to bearing its own costs, to pay half the costs of the European Commission, which is to bear half of its own costs.