

OPINION OF ADVOCATE GENERAL

MAZÁK

delivered on 26 April 2007¹

1. The main purpose of these preliminary ruling proceedings is to determine whether national legislation such as the French legislation providing for a tax of 3% on the commercial value of immovable property ('the disputed tax') is compatible with Community law, in particular the provisions of the EC Treaty on freedom of establishment and the free movement of capital, and to settle certain other issues of interpretation which arise in that context.

2. For foreign legal persons, the national legislation makes the granting of an exemption from the tax of 3% conditional upon the existence of a conventional provision on administrative cooperation or on non-discrimination as regards tax matters with the Member State where the legal person has its effective centre of management.² The stated purpose of the national legislation is to ensure effective fiscal supervision and to combat tax avoidance and evasion as regards wealth tax levied in France ('impôt de solidarité sur la fortune').

¹ — Original language: English.

² — The relevant provisions use the terms 'seat' and 'effective centre of management'. It appears, in particular, from clarifications provided orally by the French Government that these terms can be used as synonyms for the purpose of the present proceedings.

I — The relevant legislation

A — Community legislation

3. Article 1 of Council Directive 77/799/EEC of 19 December 1977 concerning mutual assistance by the competent authorities of the Member States in the field of direct taxation³ ('Directive 77/799' or 'the Directive') provides as follows:

'General provisions

1. In accordance with the provisions of this Directive the competent authorities of the Member States shall exchange any informa-

³ — OJ 1977 L 336, p. 15.

tion that may enable them to effect a correct assessment of taxes on income and on capital.

4. Article 8 of Directive 77/799 states:

2. There shall be regarded as taxes on income and on capital, irrespective of the manner in which they are levied, all taxes imposed on total income, on total capital, or on elements of income or of capital, including taxes on gains from the disposal of movable or immovable property, taxes on the amounts of wages or salaries paid by enterprises, as well as taxes on capital appreciation.

3. The taxes referred to in paragraph 2 are at present, in particular: ... in France: Impôt sur le revenu, Impôt sur les sociétés, Taxe professionnelle, Taxe foncière sur les propriétés bâties, Taxe foncière sur les propriétés non bâties. ...

4. Paragraph 1 shall also apply to any identical or similar taxes imposed subsequently, whether in addition to or in place of the taxes listed in paragraph 3. The competent authorities of the Member States shall inform one another and the Commission of the date of entry into force of such taxes.

...'

'Limits to exchange of information

1. This Directive shall impose no obligation to have enquiries carried out or to provide information if the Member State, which should furnish the information, would be prevented by its laws or administrative practices from carrying out these enquiries or from collecting or using this information for its own purposes.

2. The provision of information may be refused where it would lead to the disclosure of a commercial, industrial or professional secret or of a commercial process, or of information whose disclosure would be contrary to public policy.

3. The competent authority of a Member State may refuse to provide information where the State concerned is unable, for practical or legal reasons, to provide similar information.'

5. Article 11 of Directive 77/799 states:

7. This tax is applicable to any form of legal persons, including companies, foundations, and associations, but companies the shares of which are traded on a regulated market are exempted.⁴

‘Applicability of wider-ranging provisions of assistance

The foregoing provisions shall not impede the fulfilment of any wider obligations to exchange information which might flow from other legal acts.’

8. The tax is levied on immovable property owned on 1 January of a given tax year.

B — *National legislation*

9. Exemptions from that tax are set out in Article 990E of the CGI, which provides:

1. The tax of 3% on immovable property held by legal persons

6. According to Article 990D(1) of the Code général des impôts (French General Tax Code) (‘the CGI’), legal persons which, directly or through an intermediary, own one or more properties situated in France or are the holders of rights *in rem* over such property are liable to pay an annual tax of 3% of the commercial value of these properties or rights.

‘... (2) The tax referred to in Article 990D is not applicable to legal persons which, having their seat in a country or territory which has concluded with France a convention on administrative assistance to combat tax evasion and avoidance, declare each year, by 15 May at the latest, at the place

⁴ — For the latter exemption, see Article 990E(4) of the CGI.

established by the Order referred to in Article 990F, the location, description and value of the properties in their possession as at 1 January, the identity and the address of their members at the same date and the number of shares held by each of them;

2. Wealth tax ('impôt de solidarité sur la fortune')⁶

(3) The tax referred to in Article 990D is not applicable to legal persons which have their effective centre of management in France or to other legal persons which, by virtue of a Treaty, must not be subject to a heavier tax burden, when they communicate each year, or take on and respect the obligation to communicate to the tax authority, at its request, the location and description of the properties owned as at 1 January, the identity and the address of their shareholders, partners or other members, the numbers of shares or other rights held by each of them and evidence of their residence for tax purposes ...'

11. According to the documents in the case and the observations of the French Government, the tax imposed by the national legislation at issue is aimed at ensuring effective fiscal supervision and preventing tax avoidance and evasion with respect to wealth tax.

12. The concept of wealth tax is known to the Court, which has described it as a direct tax based on the taxpayer's ability to pay, like income tax, and stated that wealth tax is often regarded as a complement to income tax, relating to capital in particular.⁷

10. According to Article 990E(1), an exemption is also granted to legal persons whose immovable assets located in France represent less than 50% of their total assets located in France (i.e. companies which are not so-called 'sociétés à prépondérance immobilière').⁵

13. The relevant provisions of the 'impôt de solidarité sur la fortune' (also referred to hereafter as 'wealth tax') are Article 885A et seq. of the CGI. It is an annual tax, levied on natural persons whose tax domicile is in France (on 1 January of a given year), provided their property is worth more than

5 — Any immovable property which is allocated by the legal person to its own business purposes, other than a purpose related to real estate, is not included for the purposes of the calculation of the threshold of 50%.

6 — See, for further detail, *Mémento pratique Francis Lefebvre*, 2006, p. 989 et seq., and *Lamy fiscal*, 2006, vol. 2, p. 1255 et seq.

7 — See Case C-251/98 *Baars* [2000] ECR I-2787, paragraph 4 et seq., and Case C-376/03 *D.* [2005] ECR I-5821, paragraph 32.

a certain threshold (EUR 750 000 in 2006). It is levied according to an increasing schedule applying to the part of the property which is above the threshold.

shares, debt claims, cars, gold and currency. Immovable property is to be valued at market value, i.e. the price at which the property could normally have been sold at the beginning of the year.

14. As regards the territorial scope of the tax, it is due on all the property of the individuals concerned, including property located abroad (in the absence of a tax treaty providing otherwise). Persons whose tax domicile is outside France (i.e. non-residents) are subject to wealth tax only on their property located in France, provided the value of such property located in France exceeds the threshold.⁸ Here again, a tax treaty can provide otherwise, in particular by splitting the right to tax between the two States concerned. Furthermore, investments are exempted for non-residents, but not when they relate to immovable property (for example shares in companies with a focus on immovable property ('sociétés à prépondérance immobilière')).

C — *International law*

16. Article 21(1) of the Convention concluded on 1 April 1958 between France and the Grand Duchy of Luxembourg for the avoidance of double taxation and establishing rules for mutual administrative assistance in the matter of taxes on income and on capital ('the Convention') provides that the nationals, companies or groups of one of the contracting States will not be subject in the other State to any other or higher taxes than those imposed on the nationals, companies or groups of the latter State.

15. Unless expressly exempted by law, all property belonging to individuals is taxable, including immovable property (land, houses, flats) unincorporated businesses, bonds and

17. According to Article 22(1) of the Convention, the higher administrative authorities of the two States can, for the purposes of the proper application of the Convention, exchange, upon request, such information which the tax laws of the two States allow to be obtained through normal administrative practices.

⁸ — See, for a similar system, the example of the Dutch wealth tax: 'non-residents' liability to wealth tax is limited, that is to say they are liable only in respect of that part of their wealth situated in the Netherlands', *D.*, cited in footnote 7, paragraph 21.

18. The two States have, by exchange of letters of 8 September 1970, excluded from the scope of the Convention holding companies, as defined for the purposes of Luxembourg law relating to such companies (for the purpose of the present proceedings, the Law of 31 July 1929 and Decree-law of 27 December 1937) as well as any income which a person resident for tax purposes in France derives from such companies or any interests of such a person in such holding companies.

II — Factual background, procedure and the questions referred

19. Société Européenne et Luxembourgeoise d'Investissements SA ('Elisa') is a holding company incorporated under Luxembourg law under the Law of 31 July 1929 on the tax regime applying to holding companies.

20. According to the order for reference, Elisa owns indirectly immovable property on French territory and is therefore subject to the provisions of Article 990D of the CGI imposing a tax on the commercial value of immovable property owned in France by legal persons.

21. The order for reference goes on to state that Elisa completed the tax returns required

by law but did not pay the corresponding tax. After tax penalties were notified on 18 December 1997, the tax authorities proceeded to the collection of those penalties on 10 June 1998. Its complaint having been rejected, Elisa summoned the Director-General of Taxes to appear before the Tribunal de grande instance (Regional Court) of Paris, with a view to obtaining a discharge from the disputed tax.

22. After two negative decisions, one by the Tribunal de grande instance and the other by the Cour d'Appel (Court of Appeal) of Paris, which both held that Elisa did not fulfil the conditions laid down in Article 990E(2) and (3) of the CGI providing for exemption from the disputed tax, Elisa appealed before the Cour de Cassation (Court of Cassation).

23. By order of 13 December 2005, received at the Court Registry on 19 December 2005, the Cour de Cassation decided to stay the proceedings and to make a reference to the Court of Justice of the European Communities for a preliminary ruling on the following questions:

'(1) Do Articles 52 et seq. and 73b et seq. of the EC Treaty preclude legislation such as that laid down by Article 990D et seq. of the General Tax Code which grants legal persons having their effective centre of management in France entitlement to exemption from the tax on

the commercial value of properties owned in France and which, as regards legal persons having their effective centre of management in the territory of another country, even if it is a Member State of the European Union, makes that entitlement conditional on the existence of a convention on administrative assistance to combat tax evasion and avoidance concluded between France and that State or on there being a requirement, under a treaty including a clause prohibiting discrimination on grounds of nationality, that those legal persons are not to be taxed more heavily than legal persons having their effective centre of management in France?

- (2) Does a tax such as the tax at issue constitute a tax on capital within the meaning of Article 1 of the Council Directive of 19 December 1977 concerning mutual assistance by the competent authorities of the Member States in the field of direct and indirect taxation?

bilateral convention on administrative assistance in the field of taxation, of obligations of the same kind excluding a category of taxpayers such as Luxembourg holding companies?

- (4) Do Articles 52 et seq. and 73b et seq. of the EC Treaty oblige a Member State which has concluded with another country, whether or not a member of the European Union, a convention including a clause prohibiting discrimination in the field of taxation to accord a legal person having its effective centre of management in the territory of another Member State the same benefits as those provided for by that clause, when that legal person owns one or several properties in the territory of the first Member State and the second Member State is not linked to the first by an equivalent clause?

III — Procedure before the Court

- (3) If so, do the obligations imposed on Member States concerning mutual assistance in the field of taxation by the Directive of 19 December 1977, cited above, preclude the implementation by the Member States, under a

24. Written observations were submitted in compliance with Article 20 of the Statute of the Court by Elisa, the Commission, and the Dutch, French, Greek and Italian Governments.

25. A hearing was held on 24 January 2007, at which the representatives of Elisa, as well as the agents of the French, Greek, Dutch and United Kingdom Governments, presented their oral observations.

IV — Preliminary remarks

Order of the answers to the questions referred

26. In order to understand the content and the order of the questions put by the Cour de Cassation, it may be useful to note that the French tax administration and the lower courts held that the conditions laid down under Articles 990D and 990E were not fulfilled. In that regard, it was held that Directive 77/799 was not relevant, in particular because of the existence of an agreement on administrative cooperation between France and Luxembourg, which explicitly excluded so-called 1929 holdings from its scope.

27. Against this background, the Cour de Cassation asks whether the provisions of the Treaty relating to the right of establishment (Article 43 et seq. EC) and the free movement of capital (Article 56 et seq. EC) preclude a Member State from maintaining

a tax on the commercial value of immovable property from which legal persons resident for tax purposes in France are exempted, whereas the exemption of legal persons resident in another Member State is subject to the existence of a bilateral convention containing either a clause providing for administrative assistance to combat tax evasion and avoidance or a clause prohibiting discrimination on grounds of nationality, by which non-resident legal persons may not be taxed more heavily than legal persons having their effective centre of management in France.

28. The second and third questions are aimed at determining whether a clause providing for administrative assistance to combat tax evasion and avoidance is capable of being applicable in the present case. Both Directive 77/799 and the Convention between France and Luxembourg make provision for administrative assistance.

29. Since, in order to justify the disputed tax, the French Government invokes the absence of appropriate administrative assistance between France and Luxembourg as far as 1929 holdings are concerned, it will be useful to clarify the question whether an instrument of administrative cooperation is applicable — whether in the form of Directive 77/799 or the Convention between Luxembourg and France — before answering the more general question of the compatibility of

the disputed tax mechanism with the fundamental freedoms. Therefore, the second and third questions will be addressed before the first question.

its aim is to prevent tax avoidance and evasion and not to tax capital in order to increase the tax revenue of the State.

V — The second question

B — *Legal assessment*

30. By its second question, the Cour the Cassation wants to know, in essence, whether the disputed tax falls within the scope of Directive 77/799, as defined in Article 1 of the Directive.

33. By way of background, it may be useful to point out that Directive 77/799 concerning mutual assistance in the field of direct taxation was adopted in order to combat tax evasion and tax avoidance.⁹ It establishes a mechanism of strengthened collaboration between the tax administrations of the Member States and facilitates the exchange of information which may be relevant for the correct assessment of taxes on income and on capital.¹⁰

A — *Main submissions of the parties*

31. According to *Elisa*, the *Greek Government* and the *Commission*, the disputed tax falls within the scope of the taxes covered by Directive 77/799.

32. The *French Government* is of the opposite view. It contends in particular that the tax is not mentioned in Article 1(3) of the Directive as being included in the national taxes falling within the material scope of the Directive. Furthermore, it is levied on legal persons and not natural persons on the immovable property which they own. Lastly,

34. According to Article 1(1) of the Directive, the exchange of information which is relevant for the purposes of the Directive is that relating to ‘taxes on income and on capital’. Article 1(2) of the Directive states that taxes on income and on capital are, ‘irrespective of the manner in which they are levied, all taxes imposed on total income, on

9 — Opinion of Advocate General Alber in Case C-420/98 *W.N.* [2000] ECR I-2847, point 7.

10 — According to Council Directive 2004/106/EC of 16 November 2004 (OJ 2004 L 359, p. 30), the Directive also applies to any information relating to the establishment of taxes on insurance premiums.

total capital, or on elements of income or of capital, including taxes on gains from the disposal of movable or immovable property, taxes on the amounts of wages or salaries paid by enterprises, as well as taxes on capital appreciation'. Given the use of the term 'including', it is clear that the list set out is not meant to be exhaustive.

are not resident for tax purposes in France to provide information on the identity of their shareholders and thereby remove the incentive for natural persons to hide behind such legal persons in order to avoid wealth tax. This means that the existence of wealth tax and the aim of ensuring that it is collected correctly and in full are the *raison d'être* of the disputed tax.

35. It follows from Article 1(4), which states that 'paragraph 1 shall also apply to any identical or similar taxes imposed subsequently, whether in addition to or in place of the taxes listed in paragraph 3', that the list set out in Article 1(3) of national taxes which fall within the scope of the directive is also not meant to be exhaustive. In this respect, it should be noted that the disputed tax is not mentioned among the French taxes which are listed, but, according to the French Government, the 'impôt de solidarité sur la fortune', which did not exist at the time of the adoption of the Directive, was added later.

37. Moreover, the tax can be seen, in fact, as a type of lump-sum compensation for the wealth tax revenue of the French State which is lost as a result of tax avoidance and evasion. Thus, although, according to the observations of the French Government, the tax is not primarily aimed at raising tax revenue for the State but at preventing tax avoidance and evasion, the French State, by levying the disputed tax, none the less compensates, to some extent, for lost wealth tax revenue and hopes thereby to remove any incentive for natural persons to pursue strategies of tax avoidance and evasion.

36. In this connection, it should be pointed out that the disputed tax is closely linked to the French wealth tax. Indeed, the disputed tax was introduced with the aim of combating avoidance and evasion of the French wealth tax, which, as such, falls within the scope of Directive 77/799. The objective of the disputed tax, according to the French Government, is to induce those legal persons who hold ownership and other rights *in rem* over immovable property in France but who

38. It follows that the disputed tax can be regarded as an ancillary to French wealth tax and, as such, it would be illogical to exclude the former from the scope of the Directive when the latter remains subject to it.

39. It may also be added that the disputed tax is clearly levied on an element of capital, namely immovable property. It appears from the Court's judgment in *Halliburton* that, at least as far as taxes on immovable property are concerned, it adopts a relatively broad approach to the notion of a tax on capital when defining the material scope of Directive 77/799.¹¹

40. Moreover, the principle of uniform interpretation of Community law¹² implies that the name given to a particular tax under national law cannot be regarded as significant for the purpose of determining whether a particular tax should be considered a tax on capital within the meaning of Article 1(1) of the Directive.

41. Lastly, it follows from Article 1(2) that the manner in which taxes are levied is also not relevant for that purpose. Therefore, the fact that the disputed tax is levied on a legal person is in my view not a point of great significance.

42. In those circumstances, the answer to the second question should be that a tax such as the tax at issue constitutes a tax on capital within the meaning of Article 1 of Directive 77/799.

VI — The third question

43. By its third question, the Cour de Cassation asks, in essence, whether the obligations imposed on Member States concerning mutual assistance in the field of taxation under Directive 77/799 preclude the implementation by the Member States, under a bilateral convention on administrative assistance in the field of taxation, of obligations of the same kind excluding a category of taxpayers such as Luxembourg holding companies.

44. In the present case, as is shown by the answer to the second question, the disputed tax falls within the scope of Directive 77/799, which lays down harmonised procedures for administrative cooperation as regards the correct assessment of taxes on income and

¹¹ — See Case C-1/93 *Halliburton* [1994] ECR I-1137, paragraph 22. In that case, the Court held that Directive 77/799 was applicable to taxes on transfers of immovable property. Such a tax is levied on the acquirer at the occasion of an acquisition of immovable property. It is not levied on the holding of such property or the gains it may produce for the owner.

¹² — See to this effect, inter alia, Case 314/85 *Foto-Frost* [1987] ECR 4199; Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125; and, more recently, Case C-495/03 *Intermodal Transports* [2005] ECR I-8151.

on capital between all Member States. The provisions concerning administrative co-operation laid down under that directive are therefore applicable.

the competent authorities of another Member State all the information it deems necessary to determine the exact amount of income tax for which a taxpayer is liable. As this directive has been implemented in all Member States, a system for the exchange of information is operational between France and Luxembourg.

45. At the same time, a bilateral Convention between Luxembourg and France provides for administrative assistance but excludes certain categories of taxpayers, namely 1929 holdings, from its scope and thus from the benefit of the clause on administrative cooperation.

46. In the light of the foregoing, I shall answer the third question by determining the relationship between Directive 77/799, which is applicable in the present case, and the provisions of a bilateral Convention between Luxembourg and France, which provides in principle for administrative assistance but excludes certain categories of taxpayers, namely 1929 holdings.

48. The principle of primacy of Community law also requires that the provisions of Directive 77/799 be applied rather than the provisions of a bilateral convention concluded with another Member State. Indeed, in accordance with the case-law of the Court, a Member State may not disregard the requirements of a directive, or any other binding Community measure, on the ground that the provisions of an agreement or convention concluded with another State state otherwise.

A — *Main submissions by the parties*

47. The *Commission* is of the view that Directive 77/799 can, according to the established case-law of the Court, be invoked by a Member State in order to obtain from

49. *Elisa* considers that obligations imposed on Member States under Directive 77/799 preclude the implementation by the Member States, under a bilateral Convention on administrative assistance in the field of taxation, of obligations of the same kind excluding a category of taxpayers such as Luxembourg holding companies. The Directive permits the implementation of the Convention only as long as the application of the Convention does not reduce the effect of the Directive.

50. The *French Government* considers that the obligations contained in Directive 77/799 do not prevent a Member State from concluding a convention on the same subject-matter which excludes a certain category of taxpayers, such as 1929 holdings, from its scope. In support of this view, the French Government refers in particular to the fact that, in accordance with Article 8 of Directive 77/799 in combination with the applicable laws of Luxembourg, Luxembourg is entitled to refuse requests for information from other tax authorities in relation to information that would be needed for the taxation of 1929 holdings. Thus, neither Directive 77/799 nor the Convention between France and Luxembourg can oblige the Luxembourg authorities to provide information on 1929 holdings to other Member States. The French Government is therefore justified in not giving such companies the benefit of the exemption which is subject to the condition that there is a convention on administrative cooperation, since the laws of Luxembourg deprive Directive 77/799 of its effectiveness in this respect as far as 1929 holdings are concerned.

receive full effect and must be interpreted and applied in a uniform way throughout the Community.¹³

52. Article 11 of Directive 77/799 lays down express provisions governing the relationship of the Directive with other legal instruments which contain 'wider obligations to exchange information'. By such a provision, the objective of the Community legislature was to clarify the legal effects of any bilateral conventions that Member States had concluded or would conclude having the same subject-matter as the Directive. This was particularly important, since the Directive was added to a network of already existing bilateral (and multilateral) conventions providing for administrative cooperation in tax matters,¹⁴ and the rationale of the Directive was not to limit any existing mutual

B — *Legal assessment*

51. Directive 77/799 is a form of Community-wide instrument, which ensures that a minimum level of harmonisation of administrative assistance and cooperation exists between all Member States. As such, it must

13 — See to this effect, *inter alia*, *Foto-Frost*, cited in footnote 12; *Internationale Handelsgesellschaft*, cited in footnote 12; and, more recently, *Intermodal Transports*, cited in footnote 12.

14 — See in particular the third recital of Directive 77/799, which states that 'collaboration between administrations on the basis of bilateral agreements is also unable to counter new forms of tax evasion and avoidance, which are increasingly assuming a multinational character'. The need for such a directive stemmed from the fact that not all bilateral relations between all Member States were and are covered by bilateral treaties on administrative cooperation. Also, the scope and the strength of the obligations in the area of administrative cooperation are likely to differ from one bilateral agreement to another.

assistance obligations or possibilities, but rather to create such obligations and possibilities.¹⁵

tain categories of taxpayers, namely 1929 holdings, cannot be applicable in the present case.

53. In this context, a provision such as Article 11 of the Directive ensures that Member States can maintain or conclude, in particular bilateral agreements having the same subject-matter as that covered by the Directive and thus maintain or establish a form of cooperation which goes beyond that established by the Directive. In the light of the principles of effectiveness and uniform application of Community law, it follows from Article 11 of the Directive that a bilateral tax treaty can apply only insofar as it contains wider obligations to exchange information than those established by the Directive.

55. The finding that the Convention can only be implemented insofar as it does not limit in any way the applicability of Directive 77/799, including its application to 1929 holdings, is confirmed by the case-law of the Court, according to which Member States cannot rely on a bilateral tax convention in order to avoid the obligations imposed on them by the Treaty.¹⁶ Thus, it would for instance not be possible to exclude certain taxpayers from the scope of the directive by means of the application of a bilateral tax treaty.

54. In this respect, it cannot reasonably be argued that a provision from which a certain category of taxpayers is excluded, in the present case, 1929 holdings, could be regarded, at least as far as the excluded taxpayers are concerned, as a wider-ranging obligation than the provisions of the Directive, which has no similar exclusions in its scope. Therefore, the provisions of a bilateral convention between Luxembourg and France, which provides in principle for administrative assistance but excludes cer-

56. It follows from the above that the answer to the third question should be that the obligations imposed on Member States concerning mutual assistance in the field of taxation by Directive 77/799 preclude the implementation by the Member States, under a bilateral convention on administrative assistance in the field of taxation, of obligations of the same kind excluding a category of taxpayers such as Luxembourg 1929 holding companies only in so far as giving effect to the bilateral convention would prevent the applicability of the Directive to these taxpayers.

15 — See B. Terra and P. Wattel, *European Tax Law*, Kluwer, 2005, p. 681.

16 — Case C-170/05 *Denkavit* [2006] ECR I-11949, paragraph 53.

VII — The first question

57. By its first question, the *Cour de Cassation* asks, in essence, whether the provisions of the Treaty relating to the right of establishment (Article 43 et seq. EC) and the free movement of capital (Article 56 et seq. EC) preclude a Member State from maintaining a tax on the commercial value of immovable property from which legal persons resident in France are exempted, whereas the exemption of legal persons resident in another Member State is subject to the existence of a bilateral convention containing either a clause providing for administrative assistance to combat tax evasion and avoidance or a clause prohibiting discrimination on grounds of nationality for tax purposes, meaning that companies resident in a Member State other than France cannot be taxed more heavily than legal persons resident in France.

A — *Main submissions of the parties*

58. According to the *French, Greek, Italian and United Kingdom Governments*, Articles 43 EC and 56 EC must be construed in such a way that they do not preclude the existence of legislation such as the French legislation at issue.

59. The *Commission* and *Elisa* are of the opposite view. In particular, the *Commission* considers that only the provisions relating to the free movement of capital (Article 56 et seq. EC) are relevant to the present case. It submits that Article 56 EC precludes the existence of national legislation such as Articles 990D and 990E of the CGI. *Elisa* considers that both Articles 43 EC and 56 EC preclude the existence of national legislation such as Articles 990D and 990E of the CGI.

B — *Which fundamental freedom(s) are/is concerned?*

60. As a preliminary point, it should be noted that, although direct taxation falls within the competence of the Member States, the latter must nonetheless exercise that competence consistently with Community law,¹⁷ including the provisions which lay down the principles of freedom of establishment and the free movement of capital.

61. In the present case, the questions put by the national court refer both to freedom of

¹⁷ — See, inter alia, Case C-80/94 *Wielockx* [1995] ECR I-2493, paragraph 16; Case C-39/04 *Laboratoires Fournier* [2005] ECR I-2057, paragraph 14; Case C-513/03 *van Hilten-van der Heijden* [2006] ECR I-1957, paragraph 36; and Case C-386/04 *Centro di Musicologia Stauffer* [2006] ECR I-8203, paragraph 15.

establishment (Article 43 EC) and the free movement of capital (Article 56 et seq. EC). In its written observations, the *Commission* has questioned this approach and raised the question whether freedom of establishment truly has a bearing on the present dispute. It appears to be supported in this view by the Italian Government. Accordingly, it is necessary to examine whether, in the light of the facts of the case, Elisa may rely on the rules relating to the right of establishment and/or the rules governing the free movement of capital.

62. Freedom of establishment, which Article 43 EC confers on Community nationals and which includes the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, under the conditions laid down for its own nationals by the law of the Member State where such establishment is effected, entails, in accordance with Article 48 EC, for companies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the European Community, the right to exercise their activity in the Member State concerned through a subsidiary, a branch or an agency.¹⁸

63. According to the case-law of the Court, the concept of establishment within the meaning of the Treaty is a very broad one, allowing a Community national to participate, on a stable and continuous basis, in the economic life of a Member State other than his State of origin and to profit therefrom, so contributing to economic and social interpenetration within the Community in the sphere of activities as self-employed persons.¹⁹ However, in order for the provisions relating to freedom of establishment to apply, it is generally necessary to have secured a permanent presence in the host Member State and, where immovable property is purchased and held, that property should be actively managed.²⁰

64. It appears that Elisa, as a holding company, does not have any other commercial activity besides the holding of ownership rights over immovable property in France, but the account of the referring court and the information provided by the parties to the proceedings before the Court are not entirely conclusive in this respect.

65. In any event, it should be noted that the Court has consistently considered provisions relating to the acquisition and or exploitation

18 — See Case C-307/97 *Saint-Gobain* [1999] ECR I-6161, paragraph 34; Case C-446/03 *Marks & Spencer* [2005] ECR I-10837, paragraph 30; and *Centro di Musicologia Stauffer*, cited in footnote 17, paragraph 17.

19 — See *Centro di Musicologia Stauffer*, cited in footnote 17, paragraph 18 and the case-law cited therein.

20 — See *Centro di Musicologia Stauffer*, cited in footnote 17, paragraph 19.

of immovable property in the context of the free movement of capital, even if the referring court, as, for instance, in *Konle*,²¹ *Centro di Musicologia Stauffer*,²² and *Festersen*²³ also referred to freedom of establishment.²⁴

66. In that context, the Court has held that the exercise of the right to acquire immovable property in the territory of another Member State, to use it and to dispose of it represents a necessary corollary of freedom of establishment.²⁵

67. As is clear from the nomenclature of capital movements set out in Annex I to Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty (article repealed by the Treaty of Amsterdam),²⁶ capital movements include investments in real estate on the territory of a Member State by non-residents. That nomenclature still has the same indicative

value for the purposes of defining the notion of capital movements.²⁷

68. It follows that the free movement of capital covers both the ownership and administration of immovable property. It is not disputed that Elisa, whose seat is located in Luxembourg, owns such property in France. Therefore, the situation at issue falls under the provisions of the Treaty governing the free movement of capital and Elisa may rely in any event on those provisions for the purposes of the present proceedings.

69. Furthermore, the very aim of the provision in question, as will be explained below, is to prevent tax avoidance and evasion by natural persons who are resident for tax purposes in France, where they would normally have to pay wealth tax in relation to immovable property in France if they owned such property in their own name, as natural persons. Thus, the disputed tax is targeted in particular at cross-border investment in immovable property, which does not necessarily involve any establishment on French territory. It is therefore the cross-border character of the investment which may be affected by the national legislation at

21 — Case C-302/97 [1999] ECR I-3099, paragraph 39 et seq.

22 — Cited in footnote 17, paragraph 16 et seq.

23 — Case C-370/05 [2007] ECR I-1129, paragraph 20 et seq.

24 — An exception to that approach was made in the earlier *Fearon* case (Case 182/83 [1984] ECR 3677), which however had a clear connection to freedom of establishment on the basis of the facts of the case.

25 — See *Konle*, cited in footnote 21, paragraph 22, and Joined Cases C-515/99, C-519/99 to C-524/99 and C-526/99 to C-540/99 *Reisch and Others* [2002] ECR I-2157, paragraphs 29 and 30.

26 — OJ 1988 L 178, p. 5.

27 — See, most recently, *Centro di Musicologia Stauffer*, cited in footnote 17, paragraph 22 and the case-law cited therein, and *Festersen*, cited in footnote 23, paragraph 23.

issue. Any restrictive effects on freedom of establishment are merely an inevitable consequence of the restriction imposed on the free movement of capital.²⁸

complies with the principle of the free movement of capital, it may be useful to recall the characteristics of this fundamental freedom, which may be the least known of the fundamental freedoms laid down under the EC Treaty.

70. Thus, I am of the opinion that the free movement of capital should be the primary criterion for the assessment of the present case.

71. In any event, should the referring court, having regard to the factual circumstances of the case before it, reach the conclusion that the provisions on freedom of establishment are also applicable, it should be borne in mind that the considerations set out below, and in particular the review of the principle of proportionality, would also apply in relation to freedom of establishment.²⁹

C — The principle of the free movement of capital

72. Before determining whether national legislation such as the legislation at issue

73. To start with, it should be noted that the free movement of capital differs from the other fundamental freedoms in terms of its formulation, which may raise the question whether that formulation gives rise to any practical consequences.

74. While Article 56 EC contains a general prohibition of restrictions on the movement of capital, Article 58(1)(a) EC makes it clear that that prohibition is without prejudice to the right of the Member States to apply relevant provisions of their tax law which distinguish between taxpayers with regard to their place of residence or with regard to the place where capital is invested. This right is, however, limited in itself by Article 58(3) EC, which specifies that the distinctions that Member States make between taxpayers with regard to their place of residence or the place where their capital is invested may not constitute a means of arbitrary discrimination or a disguised restriction on the free movement of capital.³⁰

28 — See, by analogy, Case C-452/04 *Fidium Finanz* [2006] ECR I-9521, paragraph 49, and Case C-196/04 *Cadbury Schweppes and Cadbury Schweppes Overseas* [2006] ECR I-7995, paragraph 33.

29 — See Opinion of Advocate General Stix-Hackl in *Festersen*, cited in footnote 23, point 30.

30 — In relation to direct taxation, these principles have been repeated in, inter alia, Case C-319/02 *Manninen* [2004] ECR I-7477, paragraph 28, and *Centro di Musicologia Stauffer*, cited in footnote 17, paragraph 31.

75. It was in *Manninen* that the Court first³¹ had the opportunity to consider the Member States' power to legislate in the area of direct taxation in the light of the principle of the free movement of capital under Articles 56 EC and 58 EC. One of the core principles which the Court set out in that judgment was that for national tax legislation which distinguishes between taxpayers according to the place where their capital is invested to be regarded as compatible with the Treaty provisions on the free movement of capital, the difference in treatment must concern situations which are not objectively comparable or be justified by overriding reasons in the general interest, such as the need to safeguard the coherence of the tax system or effective fiscal supervision.³²

76. Moreover, in order to be justified, the difference in treatment between legal persons with their seat in France and legal persons with their seat in other Member States must not go beyond what is necessary in order to attain the objective of the legislation in question.³³

77. It appears from the above that the concept of 'restriction' within the scope of the free movement of capital corresponds to the concept of 'restriction' that the Court has developed in connection with the other fundamental freedoms. Thus, any measure that makes the cross-border transfer of capital more difficult or less attractive and is capable of deterring investors from making such a transfer constitutes a restriction on capital movements.³⁴

78. Furthermore, although it is true that a prohibition on discrimination cannot be found in the wording of Article 56(1) EC and that, at best, it can be deduced indirectly from Article 58(3) EC,³⁵ the free movement of capital also encompasses a prohibition on discrimination, as do all fundamental freedoms. This implies a prohibition on differences of treatment between operators on financial markets on the basis of their nationality, place of residence or the place where such capital is invested, where such differences are not objectively justified.

D — *The legal characterisation of the disputed tax*

79. In order to answer the first question, it follows from the above that it must be

31 — In Case C-35/98 *Verkooijen* [2000] ECR I-4071, paragraphs 43 to 45, the Court had already provided some guidance as to the meaning of these provisions, but that guidance concerned their immediate predecessor (Article 67 EC).

32 — See, to that effect, *Verkooijen*, cited in footnote 31, paragraph 43; *Manninen*, cited in footnote 30, paragraph 29; and *Centro di Musicologia Stauffer*, cited in footnote 17, paragraph 32.

33 — See, to that effect, *Verkooijen*, cited in footnote 31, paragraph 43; *Manninen*, cited in footnote 30, paragraph 29; and *Centro di Musicologia Stauffer*, cited in footnote 17, paragraph 32.

34 — See, to that effect, Opinion of Advocate General Kokott in Case C-265/04 *Bouanich* [2006] ECR I-923, point 30.

35 — See, to that effect, Opinion of Advocate General Kokott in *Bouanich*, cited in footnote 34, point 31.

ascertained at the outset whether the disputed French tax mechanism constitutes a restriction on capital movements.

authority, at its request, the location and description of the properties owned on 1 January of a given year, the identity and the address of their shareholders, partners or other members, the numbers of shares or other rights held by each of them and evidence of their residence for tax purposes.

80. Under the disputed legislation, the situation which gives rise to the obligation to pay the tax is the holding of ownership rights or certain other rights *in rem* over immovable property in France on 1 January of a given year.

82. Furthermore, non-resident legal persons can be exempted where they satisfy the condition that the country or territory in which they have their seat has concluded with France a convention on administrative assistance to combat tax evasion and avoidance. Such legal persons must declare each year, by 15 May at the latest, the location, description and value of the properties in their possession as at 1 January, the identity and the address of their members at the same date and the number of shares held by each of them.

81. Legal persons with their effective centre of management in France (hereafter also referred to as 'resident') are exempted from the disputed tax. Legal persons which do not have their effective centre of management in France (hereafter also referred to as 'non-resident') are assimilated to resident legal persons if, by virtue of a treaty, they may not be subject to a higher tax burden. It appears from the order for reference that this condition refers to a situation where France has concluded with the country where the non-resident legal person has its effective centre of management a convention containing a clause of non-discrimination as regards tax matters. Resident legal persons and assimilated non-resident legal persons are exempted provided they fulfil certain obligations to make declarations to the tax authority. In particular, they must communicate each year, or take on and respect the obligation to communicate to the tax

83. It follows from the above that, while a resident legal person is in principle exempted from the tax, a non-resident legal person must have its centre of effective management in a country which has concluded with France either a convention containing a clause of non-discrimination as regards tax matters or a convention containing a clause on administrative assistance to combat tax evasion and avoidance. This constitutes a difference in treatment between legal persons subject to the disputed tax according to the location of their centre of effective management.

84. At the same time, the disputed tax mechanism may have the effect of rendering it less attractive for non-resident legal persons to invest in immovable property in France. When a non-resident legal person has its effective centre of management in a Member State which has not concluded with France a convention containing a clause of non-discrimination as regards tax matters or a convention on administrative assistance to combat tax evasion and avoidance, the immovable property held directly or indirectly by a non-resident legal person in France may be subject to the disputed tax. This also applies to legal persons who have been excluded from the benefit of such clauses, as is the case with 1929 holdings which were excluded from the scope of the Convention concluded between France and Luxembourg.

85. The disputed tax therefore constitutes a restriction on the free movement of capital which is, in principle, prohibited by Article 56 EC.

E — Is the situation of residents and non-residents objectively comparable?

86. As mentioned above, the Court's case-law provides that national tax legislation such as the legislation at issue in the main

proceedings may be regarded as compatible with the Treaty provisions on the free movement of capital, if the difference in treatment concerns situations which are not objectively comparable.

87. The Commission submits that the situations of residents and non-residents could be regarded as different when, in the case of certain countries, there are no means of obtaining appropriate information as to the holders of interests in certain legal persons owning immovable property. In the Commission's view, such a difference does not exist as regards EU Member States, because measures aimed at improving cooperation, such as Directive 77/799, ensure a minimum level of exchange of information.

88. The Court appears, however, to assess the objective situation of taxpayers in the face of a tax rule,³⁶ rather than on the basis of the aims such a rule may seek to pursue by means of its exemptions.

89. In the present case, it appears that as regards the situation which gives rise to the obligation to pay tax, namely the direct or

³⁶ — See, to this effect, *Manninen*, cited in footnote 30, paragraph 36.

indirect ownership or the holding of rights *in rem* over immovable property in France by legal persons on 1 January of a given year, legal persons having their effective centre of management in France and legal persons having their centre of effective management outside France are on the same footing in relation to the taxation of immovable property.

92. It follows that such a fiscal measure cannot, in principle, constitute unequal treatment permitted under Article 58(1)(a) EC, unless it can be justified by overriding reasons in the general interest.³⁸

F — Justification by overriding reasons in the general interest

90. Those rules cannot, without giving rise to discrimination, treat such persons differently as regards the grant of an advantage in respect of the same tax, such as an exemption. By treating the two types of legal persons in the same way for the purposes of taxing their immovable property, the French legislature has in fact acknowledged that there is no objective difference between their positions as regards the detailed rules and conditions relating to that taxation which could justify different treatment.³⁷

93. The French Government relies on justifications relating to the effectiveness of fiscal supervision and the prevention of tax avoidance and evasion in order to justify the disputed tax.

94. The Court has consistently held that the prevention of tax avoidance and evasion³⁹ and the effectiveness of fiscal supervision⁴⁰ are among the overriding reasons in the

91. Accordingly, in circumstances such as those in the main proceedings, the effect of the national legislation at issue is to treat legal persons in objectively comparable situations differently.

37 — See, to this effect, Case 270/83 *Commission v France* [1986] ECR 273, paragraph 20. See also Opinion of Advocate General Lenz in Case C-250/95 *Futura Participations and Singer* [1997] ECR I-2471, points 38 and 39.

38 — See, to that effect, *Verkooijen*, cited in footnote 31, paragraph 46; *Manninen*, cited in footnote 30, paragraph 29; *Bouanich*, cited in footnote 34, paragraph 38; and *Centro di Musicologia Stauffer*, cited in footnote 17, paragraph 32.

39 — See, inter alia, Case C-264/96 *ICI* [1998] ECR I-4695, paragraph 26; Joined Cases C-397/98 and C-410/98 *Metallgesellschaft and Others* [2001] ECR I-1727, paragraph 57; Case C-436/00 *X and Y* [2002] ECR I-10829, paragraph 61; Case C-324/00 *Lankhorst-Hohorst* [2002] ECR I-11779, paragraph 37; and *Marks & Spencer*, cited in footnote 18, paragraph 57.

40 — See, in particular, *Futura Participations and Singer*, cited in footnote 37, paragraph 31.

public interest which can justify a restriction on the exercise of the fundamental freedoms.⁴¹

95. In the light of the objective pursued by the national provision at issue in this case, those justifications overlap to a certain extent, because the provision in question seeks to ensure the collection of the information necessary for the levying of wealth tax and thereby to prevent tax avoidance and evasion with respect to this tax.

96. It must be noted at the outset that, while the Court has repeatedly held that effectiveness of fiscal supervision constitutes an overriding requirement of general interest capable of justifying a restriction on the exercise of fundamental freedoms guaranteed by the Treaty,⁴² it has been relatively reluctant to accept such a justification in practice, since it has been successfully invoked by a Member State in only one case concerning direct taxation, namely *Futura Participations and Singer*.⁴³ It appears from the case-law of the Court that a Member State may apply only such measures which enable the Member State in question to ascertain clearly and precisely the taxpayers

subject to a given tax and the amount to be paid by them.⁴⁴

97. The same restraint may be observed in relation to justifications based on the counteraction of tax avoidance and evasion. While recognising that the counteraction of tax avoidance represents an overriding reason in the public interest which can justify a restriction on the exercise of the fundamental freedoms,⁴⁵ the Court has, in practice, confined the possibility of establishing a justification based on tax combating avoidance and evasion within relatively strict limits.⁴⁶

98. Indeed, according to a phrase commonly used in the case-law, an obstacle to a freedom guaranteed by the Treaty can be justified only on the basis of the counteraction of tax avoidance if the legislation in question is specifically designed to exclude from a tax advantage wholly artificial arrangements aimed at circumventing national law.⁴⁷

41 — See, for example, Case C-334/02 *Commission v France* [2004] ECR I-2229, paragraph 27. See also Opinion of Advocate General Léger in *Cadbury Schweppes and Cadbury Schweppes Overseas*, cited in footnote 28, point 85.

42 — See, inter alia, Case C-334/02 *Commission v France*, cited in footnote 41, paragraph 27.

43 — Cited in footnote 37, paragraph 31.

44 — See, to that effect, Case C-254/97 *Baxter* [1999] ECR I-4809, paragraph 18, and *Laboratoires Fournier*, cited in footnote 17, paragraph 24.

45 — See, inter alia, *ICI*, cited in footnote 39, paragraph 26; *Metallgesellschaft and Others*, cited in footnote 39, paragraph 57; *X and Y*, cited in footnote 39, paragraph 61; *Lankhorst-Hohorst*, cited in footnote 39, paragraph 37; and *Marks & Spencer*, cited in footnote 18, paragraph 57.

46 — See Opinion of Advocate General Léger in *Cadbury Schweppes and Cadbury Schweppes Overseas*, cited in footnote 28, point 87.

47 — See, inter alia, *ICI*, cited in footnote 39, paragraph 26; *X and Y*, cited in footnote 39, paragraph 61; *Lankhorst-Hohorst*, cited in footnote 39, paragraph 37; Case C-9/02 *de Lasteyrie du Saillant* [2004] ECR I-2409, paragraph 50; and *Cadbury Schweppes and Cadbury Schweppes Overseas*, cited in footnote 28, paragraph 51.

99. It follows that, in order to be proportionate, the effective scope of a measure aimed at counteracting tax avoidance and evasion should be limited, as far as possible, only to those cases which present a real risk of tax avoidance by recourse to wholly artificial arrangements⁴⁸ and must be designed, in view of all of its conditions for application and exemption, to apply only in very specific circumstances which correspond to cases in which the probability of the risk of tax avoidance is highest.⁴⁹

100. According to the case-law of the Court, 'wholly artificial arrangements' are those which do not reflect economic reality.⁵⁰ In the case of freedom of establishment, the Court has held that economic reality presupposes actual establishment of the company concerned in the host State and the pursuit of genuine economic activity there.⁵¹

101. If we apply this reasoning to the free movement of capital, this appears to suggest that a restrictive measure should not go

beyond taxing effectively the immovable property of those legal persons which are formally established in another Member State, where the establishment in that other Member State has no economic reality.

102. As far as the burden of proof is concerned, the Court's case-law provides that it is in principle for the tax authorities of the Member State concerned to prove a risk of tax avoidance or evasion in each case.⁵² It cannot be inferred from the fact that a taxpayer uses his fundamental freedoms to establish his residence in another Member State that such a taxpayer pursues a fraudulent objective.⁵³ A general presumption of tax evasion or tax avoidance cannot justify a fiscal measure which compromises the objectives of Treaty.⁵⁴ The Court has gone as far to consider that the laying down of a general rule automatically excluding certain categories of operations from a tax advantage, whether or not there is actually tax evasion or tax avoidance, cannot be considered as proportionate.⁵⁵

103. More recently, the Court seems to have refined its approach to general presumptions of tax avoidance and evasion in the area of

48 — See to that effect, *ICI*, cited in footnote 39, paragraph 26; *Lankhorst-Hohorst*, cited in footnote 39, paragraph 37; *de Lasteyrie du Saillant*, cited in footnote 47, paragraph 50; *Marks & Spencer*, cited in footnote 18, paragraph 57; and *Cadbury Schweppes and Cadbury Schweppes Overseas*, cited in footnote 28, paragraph 51.

49 — See to that effect, Opinion of Advocate General Léger in *Cadbury Schweppes and Cadbury Schweppes Overseas*, cited in footnote 28, point 137.

50 — See to that effect, *Cadbury Schweppes and Cadbury Schweppes Overseas*, cited in footnote 28, paragraph 55.

51 — See *Cadbury Schweppes and Cadbury Schweppes Overseas*, cited in footnote 28, paragraph 54.

52 — See Opinion of Advocate General Mischo in *de Lasteyrie du Saillant*, cited in footnote 47, point 59.

53 — See to that effect, *ICI*, cited in footnote 39, paragraph 26; *Metallgesellschaft*, cited in footnote 39, paragraph 57; *X and Y*, cited in footnote 39, paragraphs 61 and 62; *Lankhorst-Hohorst*, cited in footnote 39, paragraph 37; *de Lasteyrie du Saillant*, cited in footnote 47, paragraphs 50 and 51.

54 — See, to that effect, Case C-478/98 *Commission v Belgium* [2000] ECR I-7587, paragraph 45, and Case C-334/02 *Commission v France*, cited in footnote 41, paragraph 27.

55 — See, to that effect, Case C-28/95 *Leur-Bloem* [1997] ECR I-4161, paragraph 44.

direct taxation. In *Cadbury Schweppes*, it held that such a presumption could be acceptable, provided that it is designed, by the precise conditions it establishes, to apply only in very specific circumstances which correspond to cases in which the probability of the risk of tax avoidance is highest. In that case, the burden of proof will lie with the non-resident taxpayer, which is best placed for that purpose, to prove the reality of its activities which allows it to claim the benefit of the fundamental freedoms.⁵⁶

104. In the light of these considerations, I shall consider whether the national measure at issue is suitable for the purpose of ensuring fiscal supervision and counteracting tax avoidance and evasion and does not go beyond what is necessary to achieve these objectives.

105. The intention of the legislature in imposing the disputed tax was to dissuade taxpayers subject to the French wealth tax from avoiding their liability to it by creating, in States which have not concluded a tax convention with France including an administrative assistance clause to combat tax evasion and tax avoidance, companies which

become the owners of immovable property situated in France.⁵⁷

106. Thus the disputed tax mechanism appears to target, in particular, those practices which aim to avoid the wealth tax that would normally be due on immovable property. More precisely, according to the written and oral observations of the French Government, the practice to be counteracted consists in the creation by natural persons who are resident in France for tax purposes and whose immovable property would normally be subject to wealth tax, of legal persons which are resident for tax purposes outside France for no other purpose than to avoid the payment of such wealth tax. It appears that natural persons, resident in France, then transfer ownership or other rights *in rem* over immovable property in France to legal persons which are, as such, not subject to French wealth tax.

107. The cases which appear to give rise to difficulty are those where the French tax authorities cannot verify the identity and the holdings of natural persons who may be the shareholders of such legal persons. According to the French Government, this is the case when such legal persons have their effective centre of management in a country with which France has not concluded a convention containing a clause on adminis-

⁵⁶ — See, to that effect, *Cadbury Schweppes and Cadbury Schweppes Overseas*, cited in footnote 28, paragraph 70.

⁵⁷ — According to the observations of the French Government, this was stated by the Conseil constitutionnel (French Constitutional Council) in a decision of 29 December 1989.

trative cooperation. In such a case, it is submitted that the French tax authorities face difficulties in the cross-checking of declarations filled by legal persons concerning, in particular, the identity and the holdings of their shareholders and the wealth tax returns of natural persons resident in France, who are under a duty to declare any holdings they have in companies in France and abroad, such as 1929 holdings. In these circumstances, natural persons can successfully hide behind legal persons to avoid the payment of wealth tax on immovable property which they would otherwise have to pay if they owned it in their own name.

108. In order to prevent such practices, the tax provided for under Articles 990D and 990E of the CGI targets in particular those legal persons which have their main centre of management in countries from which France cannot obtain appropriate information on the natural persons who hold shares in legal persons. Thus, the French legislation at issue makes exemption from the tax for non-resident legal persons dependent on the existence of a treaty provision on administrative cooperation or on non-discrimination for tax purposes. With respect to the latter clause, the French Government has pointed out that any tax treaty containing a non-discrimination clause will *a fortiori* imply the existence of administrative cooperation.

109. It appears, therefore, that the essential criterion for exemption is in fact the ensuring, by means of a bilateral tax treaty, that the French tax administration can request directly from foreign tax authorities all the information necessary to cross-check declarations made by legal persons holding ownership and other rights *in rem* over immovable property in France in accordance with Article 990E of the CGI, as well as declarations made by natural persons resident for tax purposes in France regarding their property subject to wealth tax.

110. By taxing all legal persons which do not fulfil this requirement, the French legislation at issue has the effect of taxing the immovable property held by legal persons used as a 'screen' by natural persons who would otherwise be subject to wealth tax. Thus, the disputed tax makes it possible to combat, or at least to render less attractive, such practices, which pursue no other purpose than to avoid the payment of wealth tax that would otherwise be due by natural persons in France. It is therefore suitable for the purpose of ensuring effective fiscal supervision and counteracting tax avoidance and evasion.

111. It remains, however, to be determined whether the disputed tax goes beyond what is necessary to achieve this purpose.

112. The national legislation at issue appears to proceed from the assumption that all of those countries with which France has not concluded a bilateral tax treaty containing either a clause providing for administrative assistance or for non-discrimination on tax matters are likely to host legal persons used as a vehicle to avoid the payment of wealth tax by natural persons. The same assumption applies to those corporate entities, such as 1929 holdings, which have been excluded from the scope of the bilateral tax treaties.

113. The French Government appears to justify this assumption in particular by invoking generally the harmfulness of 1929 holdings.

114. In this respect, it should be observed that the harmfulness of this legal regime has been indeed recognised by the OECD⁵⁸ as well as by the Economic Affairs and Finance Council (Ecofin Council) in the course of the

adoption of a code of conduct for business taxation.⁵⁹ Luxembourg's legal regime applicable to 1929 holdings was cited in the report of the 'Code of Conduct' group, responsible for evaluating national measures which may come within the scope of the code, as being a harmful measure. That tax regime therefore is required to be progressively abolished.⁶⁰

115. However, those factors cannot influence the scope of the rights conferred on economic operators by the fundamental freedoms. According to its preamble, the Code of Conduct is a political commitment and does not affect the Member States' rights and obligations or the respective spheres of competence of the Member States and the Community resulting from the Treaty.⁶¹ The reference to 1929 holdings among those tax measures which are harmful to the single market cannot limit the right conferred on an investor by the Treaty under Article 56 EC to make investments in a particular Member State while having its effective centre of management in another Member

58 — The legal regime of 1929 holdings has consistently been cited by the OECD as a harmful tax practice. See the 2006 update report of the OECD's project on harmful tax practices, available at: <http://www.oecd.org/dataoecd/1/17/37446434.pdf>.

59 — Resolution of the Council and the Representatives of the Governments of the Member States, meeting within the Council of 1 December 1997, on a code of conduct for business taxation (OJ 1998 C 2, p. 2). The latter concerns 'those measures which affect, or may affect, in a significant way the location of business activity in the Community' and contains a commitment by the Member States as to the standstill and rollback of such measures.

60 — That report is available on the internet at http://ec.europa.eu/taxation_customs/resources/documents/primarolo_en.pdf.

61 — See Opinion of Advocate General Léger in *Cadbury Schweppes and Cadbury Schweppes Overseas*, cited in footnote 28, point 57.

State, even if that investor has a corporate structure subject to a tax system that is viewed as harmful to the single market.

116. The fact that 1929 holdings have been classified as a State aid scheme incompatible with the common market⁶² does not alter that analysis. Indeed, the Treaty contains specific provisions, in Articles 87 EC and 88 EC, designed to assess the compatibility of such a measure with the common market and to eliminate its harmful effects on that market. The fact that such a corporate structure and its tax system do not comply with the rules of the Treaty cannot therefore entitle a Member State to take unilateral measures intended to counter its effects by limiting freedom of movement.⁶³

117. As a result, an argument that relies on the harmfulness of a specific national tax regime or corporate structure can certainly not be accepted, as such, to justify the general denial of a tax advantage in the form of an exemption to an entire category of legal persons resident in another Member State.

118. In order to justify the national legislation at issue, the French Government also invokes difficulties in obtaining information from countries with which no effective administrative cooperation exists.

119. In particular, the French Government, supported in its view by the Dutch, Italian, United Kingdom and Greek Governments, contends that a restrictive approach to exemption from the disputed tax is made necessary by the difficulty which the French tax authorities have in proving tax avoidance or evasion in the absence of reliable information to cross-check the information provided by taxpayers in their tax returns. The difficulty consists in the fact that the onus is normally on the tax authorities to prove tax avoidance. In the absence of the ability to cross-check information with information that the French authorities are able to obtain by their own means, which may involve the provision of administrative cooperation by foreign tax authorities, the existing presumption of tax avoidance is justified.

120. This argument raises the question of the effectiveness of the administrative cooperation which is available between Member States under Directive 77/799.

121. It follows from my response to the second and third questions that the disputed tax falls within the scope of Directive 77/799,

62 — Commission Decision of 19 July 2006 on aid scheme C 3/2006 implemented by Luxembourg for '1929' holding companies and 'billionaire' holding companies (OJ 2006 L 366 p. 47).

63 — See Opinion of Advocate General Léger in *Cadbury Schweppes and Cadbury Schweppes Overseas*, cited in footnote 28, point 58.

which is applicable to the factual situation underlying the dispute brought before the referring court.

information concerning their legislative status and which provide that no information can be requested from 1929 holdings for taxation purposes.

122. According to the Commission and Elisa, the Directive enables the French tax authorities to obtain all the necessary information for the collection of wealth tax.

124. In response to this argument, it must be pointed out that the Court has consistently held that Directive 77/799 may be relied on by a Member State in order to obtain from the competent authorities of another Member State all the information necessary to enable it to ascertain the correct amount of the taxes covered by the Directive.⁶⁵

123. However, in the view of the French Government and all other Member States which took part in the proceedings, in the particular case of 1929 holdings, the efficiency of Directive 77/799 is questionable because of the terms of Article 8(1). According to Article 8 of the Directive, a Member State which is requested to provide information is not obliged to do so if the Member State which should furnish the information would be prevented by its laws or administrative practices from collecting or using this information for its own purposes. In this connection, the French Government refers to the applicable laws of Luxembourg,⁶⁴ which require such holdings to provide only

125. In the present case, it cannot be ruled out that, having regard to Article 8 of Directive 77/799, the national legislation of Luxembourg may make it difficult for the French authorities to obtain directly from the Luxembourg authorities certain kinds of information necessary in order to prevent tax avoidance or evasion, particularly in relation to the legal structure and the identity of the shareholders of 1929 holdings.

126. It should, however, be noted that in similar cases in which Member States have claimed that the Directive was ineffective *vis-*

64 — In particular: Règlement grand-ducal du 24 mars 1989 précisant le secret bancaire en matière fiscale et délimitant le droit d'investigation des administrations fiscales (Grand-Ducal Regulation of 24 March 1989 providing for banking secrecy in tax matters and defining the scope of the investigative rights of the tax authorities) (Mém. A-15 du 28 mars 1989). Article 4 provides that no information can be requested for the purpose of the taxation of the taxpayer from holding companies within the scope of the law of 31 July 1929.

Article 5 states that with respect to such holding companies the right of supervision and investigation lies with the registration authority and is limited to inquiry into and examination of the facts and information regarding the fiscal status of the company and the information necessary to ensure and verify the proper and correct levying of taxes and duties for which the company is liable.

65 — See, inter alia, Case C-204/90 *Bachmann* [1992] ECR I-249, paragraph 18; *Halliburton*, cited in footnote 11, paragraph 22; Case C-136/00 *Danner* [2002] ECR I-8147, paragraph 49; Case C-422/01 *Ramstedt* [2003] ECR I-6817, paragraph 42; Case C-334/02 *Commission v France*, cited in footnote 41, paragraph 31; *Cadbury Schweppes and Cadbury Schweppes Overseas*, cited in footnote 28, paragraph 71; and Case C-150/04 *Commission v Denmark* [2007] ECR I-1163, paragraph 52.

à-vis Member States which practice banking secrecy, the Court has in the past rejected such an argument. It held that, while Article 8(1) of the directive imposes no obligation on the tax authorities of Member States to collaborate where their laws or administrative practices prevent the competent authorities from carrying out enquiries or from collecting or using information for those States' own purposes, the inability to request such collaboration cannot justify the refusal of a tax advantage. Nothing prevents the tax authorities concerned from demanding from the person involved such proof as they consider necessary and, where appropriate, from refusing a tax advantage, including an exemption, where such proof is not forthcoming.⁶⁶ Indeed, the possibility cannot be excluded *a priori* that the taxpayer will be able to provide relevant documentary evidence enabling the tax authorities of the Member State of taxation to ascertain, clearly and precisely, that he is not attempting to avoid or circumvent the payment of taxes.⁶⁷

127. In the context of the present case, this appears to suggest that, while a 'legal obstacle' of this kind, which has the result that it is impossible to request cooperation from the Luxembourg tax authorities directly, may make the verification of information more difficult, it does not justify the outright refusal to make available a tax

advantage in respect of investments made by investors from that Member State. Indeed, where 1929 holdings seek exemption from the disputed tax, the French tax authorities could request from those holdings themselves the proof the authorities deem necessary to ensure full transparency of their ownership and shareholder structure.⁶⁸ The French authorities could, for example, request appropriate official evidence in order to pierce the veil of anonymity behind which some natural persons attempt to hide their property rights.

128. It may be added in this respect that it must be ensured that the requirements as to the documentary evidence which is demanded do not exceed what is necessary in order to attain the objective of securing the information sought.⁶⁹

129. In the present case, it appears that these requirements are not fulfilled because the French legislation at issue does not allow legal persons which do not fall under the scope of a tax treaty providing for administrative assistance, but which invest in immovable property in France, to provide documentary evidence to prove the identity

66 — See *Bachmann*, cited in footnote 65, paragraph 20; Case C-300/90 *Commission v Belgium* [1992] ECR I-305, paragraph 13; Case C-334/02 *Commission v France*, cited in footnote 41, paragraph 32; and *Commission v Denmark*, cited in footnote 65, paragraph 54.

67 — See to this effect, *Laboratoires Fournier*, cited in footnote 17, paragraph 25, and *Baxter*, cited in footnote 44, paragraphs 19 and 20.

68 — See to this effect, *Centro di Musicologia Stauffer*, cited in footnote 17, paragraph 48.

69 — See, to this effect, Opinion of Advocate General Poiares Maduro in *Marks & Spencer*, cited in footnote 18, point 81.

of the shareholders of those legal persons and any other information the French tax authorities deem necessary. As a result they appear to be prevented, in all circumstances, from proving that they are not pursuing a fraudulent objective.⁷⁰

130. The legislation at issue may thus lead to substantial 'collateral' damage because, while it may well penalise those 1929 holdings which have been established by natural persons who are resident for tax purposes in France in order to enable them to avoid the payment of French wealth tax on immovable property in France, it will also penalise other 1929 holdings which own immovable property in France.

131. As a result, the group of legal persons which will have to pay the disputed tax is likely to exceed the group of those natural persons who attempt to avoid the payment of wealth tax by remaining the anonymous shareholders of legal persons which have their seat in a country with which France has not concluded a treaty containing a clause on administrative cooperation, or which have been excluded conventionally from the benefit of such a clause, such as 1929 holdings.

132. It follows that the French Government could have adopted less restrictive measures in order to achieve the objective of ensuring effective fiscal supervision and counteracting tax avoidance and evasion. The difference in treatment which exists under the national legislation at issue between resident and non-resident legal persons is therefore not proportionate to the aim it pursues.

133. Thus, the answer to the first question should be that the provisions of the Treaty concerning the free movement of capital (Article 56 et seq. EC) preclude a Member State from maintaining a tax on the commercial value of immovable property from which legal persons resident for tax purposes in France are exempted, whereas the exemption of non-resident legal persons is subject to the existence of a bilateral convention containing either a clause providing for administrative assistance to combat tax evasion and avoidance or a clause prohibiting discrimination on grounds of nationality, according to which non-resident legal persons may not be taxed more heavily than resident legal persons.

VIII — Fourth question

134. By the fourth question, the national court essentially asks whether France, having concluded with a State a convention contain-

⁷⁰ — It appears to follow from the 'Instruction administrative' of 13 October 2000 (Bulletin officiel des impôts 7 Q-1-00) that a person will have to pay the disputed tax even when the identity of its shareholders is known to the French tax authorities.

ing a non-discrimination clause allowing legal persons established in that State successfully to claim the benefit of the exemption provided for in Article 990E(3) of the CGI, must, pursuant to Articles 56 EC and 43 EC, extend that tax benefit so as to include legal persons established in another Member State, such as Luxembourg, which is not linked to France by a convention containing such a non-discrimination clause, when those legal persons own immovable property in France. Put differently, the question seeks to determine whether Articles 56 EC and 43 EC have the effect of extending

to legal persons which are resident for tax purposes in any other Member States and own immovable property in France the benefits of a non-discrimination clause concluded between France and another Member State or a third country.

135. In the light of my answers to the previous questions, I consider that an answer to the fourth question is not required.

IX — Conclusion

136. In the light of the foregoing, I propose that the Court should answer the questions referred as follows:

- (1) The provisions of the Treaty concerning the free movement of capital (Article 56 et seq. EC) preclude a Member State from maintaining a tax on the commercial value of immovable property from which companies resident for tax purposes in France are exempted, whereas the exemption of companies having their tax residence in another Member State is subject to the existence of

a bilateral convention containing either a clause providing for administrative assistance to combat tax evasion and avoidance or a clause prohibiting discrimination on grounds of nationality, when companies having their tax residence in a Member State other than France are taxed more heavily than legal persons having their effective centre of management in France.

- (2) A tax such as the tax at issue constitutes a tax on capital within the meaning of Article 1 of Council Directive 77/799/EEC of 19 December 1977, concerning mutual assistance by the competent authorities of the Member States in the field of direct taxation.
- (3) The obligations imposed on Member States concerning mutual assistance in the field of taxation by Directive 77/799 preclude the implementation by the Member States, under a bilateral convention on administrative assistance in the field of taxation, of obligations of the same kind excluding a category of taxpayers such as Luxembourg holding companies only in so far as giving effect to the bilateral convention would prevent the applicability of the directive to these taxpayers.