OPINION OF ADVOCATE GENERAL CRUZ VILLALÓN delivered on 9 December 2010[1]

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1 — Original language: Spanish.

1. The Tribunal de Grande Instance de Paris (Regional Court, Paris) has referred for a preliminary ruling two questions concerning the compatibility with the Treaties of French tax legislation which, for the purposes of granting an exemption from a tax on the immovable property of legal persons, draws a distinction based on whether the taxpayer has its effective centre of management in a third country or in a Member State. A special feature of the present case is that the place where the company concerned has its effective centre of management is the British Virgin Islands which, as is common knowledge, are not a third country but rather an overseas territory subject to the specific rules laid down in Article 198 et seq. of the Treaty on the Functioning of the European Union.

2. Consequently, in this case, the Court is required to interpret the provisions governing the free movement of capital in the light of the special features of the arrangements for 'overseas countries and territories' ('OCT'), particularly where Member States rely on the fight against tax evasion to justify the lawfulness of a restriction of the free movement of capital.

3. The reference for a preliminary ruling has arisen in a context which is already familiar to the Court: recently, in *ELISA* and *Établissements Rimbaud*, [2] it had occasion to consider the legislation at issue in this case, albeit in connection with restrictions relating to other

2 — Case C-451/05 [2007] ECR I-8251 and Case C-72/09 [2010] ECR I-10659.

Member States and States of the European Economic Area, respectively. Finally, this case will allow the Court to supplement its case-law by addressing the specific difficulties raised by OCTs.

I — Legislative framework

A — *European Union legal framework*

4. Articles 63 to 65 TFEU enshrine the free movement of capital in the following terms:

'*Article 63*

1. Within the framework of the provisions set out in this Chapter, all restrictions on the movement of capital between Member States and between Member States and third countries shall be prohibited.

2. Within the framework of the provisions set out in this Chapter, all restrictions on payments between Member States and between Member States and third countries shall be prohibited.

Article 64

1. The provisions of Article 63 shall be without prejudice to the application to third countries of any restrictions which exist on 31 December 1993 under national or Union law adopted in respect of the movement of capital to or from third countries involving direct investment — including in real estate — establishment, the provision of financial services or the admission of securities to capital markets. In respect of restrictions existing under national law in Bulgaria, Estonia and Hungary, the relevant date shall be 31 December 1999.

…

Article 65

1. The provisions of Article 63 shall be without prejudice to the right of Member States:

(a) to apply the relevant provisions of their tax law which distinguish between taxpayers who are not in the same situation with regard to their place of residence or with regard to the place where their capital is invested;

(b) to take all requisite measures to prevent infringements of national law and regulations, in particular in the field of

taxation and the prudential supervision of financial institutions, or to lay down procedures for the declaration of capital movements for purposes of administrative or statistical information, or to take measures which are justified on grounds of public policy or public security.

...

3. The measures and procedures referred to in paragraphs 1 and 2 shall not constitute a means of arbitrary discrimination or a disguised restriction on the free movement of capital and payments as defined in Article 63.

4. In the absence of measures pursuant to Article 64(3), the Commission or, in the absence of a Commission decision within three months from the request of the Member State concerned, the Council, may adopt a decision stating that restrictive tax measures adopted by a Member State concerning one or more third countries are to be considered compatible with the Treaties in so far as they are justified by one of the objectives of the Union and compatible with the proper functioning of the internal market. The Council shall act unanimously on application by a Member State.'

5. The arrangements for OCTs are set out in Part Four of the TFEU. In particular, for the purposes of the present proceedings, it is worth pointing out the following provisions:

'*Article 198*

The Member States agree to associate with the Union the non-European countries and territories which have special relations with Denmark, France, the Netherlands and the United Kingdom. These countries and territories (hereinafter "the countries and territories") are listed in Annex II.

The purpose of association shall be to promote the economic and social development of the countries and territories and to establish close economic relations between them and the Union as a whole.

In accordance with the principles set out in the preamble to this Treaty, association shall serve primarily to further the interests and prosperity of the inhabitants of these countries and territories in order to lead them to the economic, social and cultural development to which they aspire.

Article 199

Association shall have the following objectives:

(1) Member States shall apply to their trade with the countries and territories the same treatment as they accord each other pursuant to the Treaties.

(2) Each country or territory shall apply to its trade with Member States and with the other countries and territories the same treatment as that which it applies to the European State with which it has special relations.

(3) The Member States shall contribute to the investments required for the progressive development of these countries and territories.

(4) For investments financed by the Union, participation in tenders and supplies shall be open on equal terms to all natural and legal persons who are nationals of a Member State or of one of the countries and territories.

(5) In relations between Member States and the countries and territories the right of establishment of nationals and companies or firms shall be regulated in accordance with the provisions and procedures laid down in the Chapter relating to the right of establishment and on a non-discriminatory basis, subject to any special provisions laid down pursuant to Article 203.

...

Article 203

The Council, acting unanimously on a proposal from the Commission, shall, on the basis of the experience acquired under the association of the countries and territories with the Union and of the principles set out in the Treaties, lay down provisions as regards the detailed rules and the procedure for the association of the countries and territories with the Union. Where the provisions in question are adopted by the Council in accordance with a special legislative procedure, it shall act unanimously on a proposal from the Commission and after consulting the European Parliament.'

6. Annex II to the TFEU, concerning the OCTs to which the provisions of Part Four of the Treaty apply, includes, inter alia, the British Virgin Islands.

7. By Council Decision 91/482/EEC of 25 July 1991 on the association of the OCTs with the European Economic Community, [3] the then European Economic Community adopted specific provisions applicable to relations with OCTs. That decision was in force until 1 December 2001.

3 — OJ 1991 L 263, p. 1.

8. With regard to the movement of capital, Decision 91/482 provided as follows:

'*Article 180*

1. With regard to capital movements linked with investment and to current payments, the relevant authorities of the OCT and the Member States of the Communities shall refrain from action in the field of foreign exchange transactions which would be incompatible with their obligations under this Decision resulting from the provisions on trade in goods and services, establishment and industrial cooperation. These obligations shall not, however, prevent the adoption of the necessary protection measures should they be justified by reasons relating to serious economic difficulties or severe balance-of-payments problems.

2. In respect of foreign exchange transactions linked with investment and current payments, the OCT, on the one hand, and the Member States, on the other, shall avoid, as far as possible, taking discriminatory measures vis-à-vis each other or according more favourable treatment to third States, taking full account of the evolving nature of the international monetary system, the existence of specific monetary arrangements and balance-of-payments problems.

In the event of such measures or treatment becoming unavoidable, they shall be maintained or introduced in accordance with accepted international monetary rules and every effort shall be made to minimize any adverse effects on the parties affected.'

9. On 2 December 2001, Council Decision 2001/822/EC of 27 November 2001 on the association of the OCTs with the European Community [4] entered into force. This instrument, which replaces Decision 91/482, also lays down a specific provision on capital:

'*Article 47*

Current payments and capital movements

1. Without prejudice to paragraph 2:

(a) Member States and the OCT authorities shall impose no restrictions on any payments in freely convertible currency on the current account of balance of payments between residents of the Community and of the OCTs;

4 — OJ 2001 L 314, p. 1.

(b) with regard to transactions on the capital account of balance of payments, the Member States and the OCT authorities shall impose no restrictions on the free movement of capital for direct investments in companies formed in accordance with the laws of the host Member State, country or territory and to ensure that the assets formed by such investment and any profit stemming therefrom can be realised and repatriated.

2. The Community, Member States and OCTs shall be entitled to take the measures referred to mutatis mutandis in Articles 57, 58, 59, 60 and 301 of the Treaty in accordance with the conditions laid down therein... When taking such measures, the OCT authorities, the Member State or the Community shall inform each other without delay and submit to each other as soon as possible a timetable for the elimination of the measures concerned.'

B — *National legal framework*

10. In accordance with Article 990 D(1) of the Code general des impôts (French General Tax Code; '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. This tax is applicable to any form of legal persons, including companies, foundations, and associations.

11. An exemption from that tax is provided for in Article 990 E CGI, in the following terms:

'The tax laid down in Article 990 D shall not be applicable:

1 To legal persons of which the immovable assets, within the meaning of Article 990 D, situated in France, represent less than 50% of their total assets in France. For the application of this provision, immovable assets shall not include those assets which the legal persons referred to in Article 990 D or intermediaries allocate for their own professional activity if not related to immovable property.

2 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 established by the decree referred to in Article 990 F, the location, description and value of the properties in their possession as at 1 January, the identity and

the address of their shareholders at the same date and the number of shares held by each of them.

3 To legal persons which have their effective centre of management in France or to 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 comply with 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. The obligation shall be entered into on the date on which the legal person acquires the immovable property or the right in immovable property or the shareholding referred to in Article 990 D or, in respect of immovable properties, rights in immovable properties or shareholdings already in its possession on 1 January 1993, by 15 May 1993 at the latest …'

II — Facts

12. S.a.r.l. Prunus ('Prunus') is a commercial company with its registered office in Paris, France. All of its shares are owned by S.A. Polonium ('Polonium'), a holding company with its registered office in Luxembourg. In turn, Polonium is wholly owned in equal shares by Lovett Overseas SA ('Lovett') and Grebell Investments S.A. ('Grebell'), both of which have their registered office in the British Virgin Islands.

13. From 1998 to 2002, Prunus owned three immovable properties in Paris, in respect of which it made the relevant declaration to the French tax authorities. Under Article 990 E CGI, Prunus was exempt from the tax of 3 % on immovable property belonging to legal persons. However, as indirect shareholders of Prunus, Lovett and Grebell were liable to that tax in the amount of 50 % each because they did not satisfy any of the conditions of exemption laid down in Article 990 E CGI. In that connection, on 7 May 2003, the tax authorities gave both companies formal notice to settle the tax in respect of the years 2001 and 2002.

14. The French authorities gave formal notice to Prunus, in its capacity as joint and several debtor, to pay the tax debt of Lovett and Grebell. Prunus lodged an objection against that decision, which was rejected on 12 December 2006, and Prunus brought an appeal against that rejection before the Tribunal de grande instance de Paris, the court which has made the present reference for a preliminary ruling to the Court of Justice under Article 267 TFEU.

III — The procedure before the Court of Justice and the questions referred for a preliminary ruling

15. On 29 September 2009, the reference for a preliminary ruling from the Tribunal de grande instance de Paris was received at the registry of the Court; the two questions referred are worded as follows:

'(1) Does Article 56 et seq. of the EC Treaty preclude legislation such as that laid down by Article 990 D et seq. of the Code général des impôts which grants legal persons having their effective centre of management in France or, since 1 January 2008, in a Member State of the European Union, entitlement to exemption from the tax at issue and which, as regards legal persons having their effective centre of management in the territory of a non-Member State, makes that entitlement conditional either 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 containing 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 Article 56 et seq. of the EC Treaty preclude legislation such as that laid down by Article 990 F of the Code général des impôts which enables tax services to hold jointly and severally liable for payment of the tax provided for in Article 990 D et seq. of the Code général des impôts any legal person interposed between the party or parties liable to the tax and the immovable properties or rights in such properties?'

16. Written observations were lodged by the representative of Prunus and Polonium, the French Republic, the Kingdom of Belgium, the Kingdom of Denmark, the Republic of Estonia, the Kingdom of Spain, the Italian Republic, the Kingdom of the Netherlands, the Kingdom of Sweden, the United Kingdom of Great Britain and Northern Ireland, and the Commission.

17. At the hearing, which was held on 23 September 2009, oral argument was presented by the representative of Prunus and Polonium, and by the agents of the French Republic, the Kingdom of Sweden, the United Kingdom and the Commission.

IV — The first question referred for a preliminary ruling

18. In formulating its first question, the referring court mentions the fact that the company liable to the tax at issue has its

effective centre of management *in a non-Member State*. However, the real uncertainty raised by this case does not concern the fact that the company's seat is in a third country but rather that it is in an OCT. That particular feature, together with the special status enjoyed by such countries and territories, calls for a different approach from the one which would be required in a situation involving a third country proper. Accordingly, the question referred actually requires a determination of whether a tax in relation to which different treatment is laid down for legal persons having their effective centre of management in an OCT complies with European Union law.

A — *Preliminary observations*

19. Having clarified that point, the reply to the first question referred by the Tribunal de grande instance de Paris calls for a number of preliminary observations concerning, first, the particular features of the free movement of capital and, second, the character of OCTs and the manner of their association with the European Union.

1. The free movement of capital and its external scope

20. Unlike the other freedoms, the free movement of capital has both a scope which is *internal* to the European Union, designed to safeguard the movement of financial assets between Member States, and an *external* scope, concerned with maintaining the free flow of capital between Member States and third countries.

21. There are a number of reasons for the removal of barriers to the movement of capital from outside the European Union: the prevention of the unilateral entry of capital via Member States with more liberal rules on access; the need to strengthen the single currency; and the development of world financial centres in the territory of the Union. [5] However, the pursuit of those objectives also brings with it the need to establish safeguards to combat negative situations resulting from liberalisation. Thus, while the Treaties envisage the free movement of capital to third countries, they also surround it with specific exceptions and derogations which differ substantially from the exceptions laid down in relation to the other freedoms. [6]

22. The fact that the scope of the free movement of capital, and the objectives pursued through it, differ so significantly from the other freedoms of movement explains why the Court has a certain amount of difficulty ensuring that its case-law accords with its

5 — See Hinojosa Martínez, L.M., *La regulación de los movimientos de capital desde una perspectiva europea,* McGraw Hill, Madrid, 1997, p. 11 et seq. The Court pointed out the reasons behind this liberalisation in Case C-101/05 *A* [2007] ECR I-11531), paragraph 31.

6 — See Articles 64 to 66 TFEU and Article 75(1) and (2) TFEU.

traditional statement of the law each time it deals with Article 63 et seq. TFEU. [7] It is that common approach, albeit adapted in certain respects vis-à-vis the free movement of capital, which must be taken when considering the present case.

2. OCTs and their legal status in European Union law

23. The second preliminary point to make concerns the legal status of OCTs, given that the 'non-Member State' referred to in the first question, where the registered office of the company liable to the tax at issue is situated, is an OCT, specifically the British Virgin Islands. Before interpreting Article 63 TFEU, it is appropriate to focus briefly on the position and status of such territories for the purposes of European Union law.

24. In 1956, on the initiative of the French Republic, the Venice Conference, held on 29 and 30 May of that year, proposed, with a view to the subsequent drafting of the Treaty establishing the European Economic Community, the creation of a specific status for those territories of the signatory States with which special historic, social and political ties existed. The proposal was finally accepted and included in the EEC Treaty. [8] The result was set out in a specific chapter on OCTs, whilst the territories falling within that category were listed [9] and, in addition, the implementing convention, which would serve as an instrument for the specific regulation of relations between those territories and the then European Economic Community, was signed and ratified. [10]

25. Since then, the fundamental elements of the legal status of OCTs laid down in the Treaties have remained essentially unaltered over time, although occasional amendments have been made to the number of territories concerned and also to the specific implementation framework, since the implementing conventions have been replaced with successive Council decisions adopted pursuant to Article 203 TFEU. [11] The nature of the ties which bind those territories to a Member State, and by extension to the European

7 — For a critical view, see Terra, B. and Wattel, P., *European Tax Law,* 4th ed., Kluwer, The Hague, p. 52.

8 — Articles 131 to 136 of the EEC Treaty, in its original version, although it is interesting to note that no equivalent arrangements were laid down for either the ECSC or EURATOM.

9 — See Annex IV to the EEC Treaty, in its original version.

10 — Implementing Convention of 25 March 1957, signed by the six founding Member States of the Communities.

11 — To date, the Council has adopted a number of such decisions, the most recent being Council Decision 2001/822, which is currently in force and due to expire on 31 December 2011.

Union as a whole, is a feature which, in general terms, has remained unchanged to this day. [12]

26. To put it very succinctly, the OCTs are not sovereign States with international legal personality but rather 'territories' linked to a Member State on the basis of special historical, social and political ties. Even though they are political communities which are *formally* integrated into the State with which they share a special bond, they are afforded a particular status in the Treaties, specifically based on the territorial scope of European Union law. Thus, Article 355 TFEU reiterates the provisions of Article 52 TEU (which lists the signatory Member States for the purpose of defining the territorial scope of the Treaty) and then goes on to state that, *in addition to* that provision, a number of provisions are to apply, including paragraph 2, which provides that OCTs are covered by '[t]he special arrangements for association set out in Part Four'.

27. In those terms, the combination of Articles 52 TEU and 355 TFEU creates more questions than answers because it is clear that the Treaty has left open a number of matters of principle concerning both the applicable law and the relationship between OCTs and the Union.

28. When referring to the application of Article 52 TEU and, *in addition*, to the special arrangements for association, Article 355 TFEU does not specify whether the Treaties are creating a general body of rules which give priority to the special arrangements laid down for OCTs or whether those special arrangements are the only ones applicable to OCTs. To put it another way, it is necessary to point out that the Treaty does not clarify whether OCTs are covered by arrangements which constitute an *autonomous* body of rules within European Union law or whether the arrangements applicable to OCTs are simply a *lex specialis* which replaces the general provisions of the Treaty.

29. At the same time, Article 355 TFEU does not assign a specific category to OCTs as regards their status as bodies. While OCTs are not States with their own legal personality, the special arrangements applicable to them resemble those of an association, of the kind already established with other third countries with which the Union maintains special ties. [13] Those arrangements, with their

12 — On the history, development and current status of OCTs, see Tesoka, L. and Ziller, J. (dirs.), *Union Européenne et outre-mers. Unis dans leur diversité,* Presses Universitaires d'Aix-Marseille, Marseilles, 2008.

13 — Here, the term 'association' must be construed differently from the definition afforded to international agreements with the same name concluded between the Union and third countries. In the case of OCTs, it is, rather, a unilateral association which has been *granted*, and which, with the passage of time, has tended to be framed more as a *partnership*, as noted by Dormoy, D., 'Association des Pays et Territoires d'outre-mer (PTOM) à la Communauté Européenne', *JurisClasseur Europe Traité*, 2007, p. 25.

own rules which are aimed at the creation of an integrated market comprising the Union and the territories concerned, justify, for some purposes, OCTs having, at least substantively if not formally, the status of third countries. That is the case, for example, with Article 64(1) TFEU, where it refers to 'third countries', a category which, in the opinion of the Commission, must be applied to OCTs.

30. A response to those concerns may be reached only by means of a systematic interpretation of the Treaties. In particular, it is the articles of Part Four of the TFEU which, interpreted in the light of other provisions of that Treaty, are likely to provide a reply.

31. First of all, Article 198 represents OCTs as hybrid bodies, halfway between a third country and a territory forming an integral part of the Union. The article states that OCTs are associated '*with* the Union' while at the same time describing them as 'non-European' territories. The latter term certainly has a more geographical than politico-legal connotation but it rightly emphasises the *sui generis* character of the relationship of association between OCTs and the Union.

32. Further, the objectives of association are 'to establish close economic relations between [OCTs] and the Union as a whole; those objectives are to be achieved '[i]n accordance with the principles set out in the preamble to [the TFEU]'. On that premiss, Article 199 TFEU states that 'Member States shall apply to their trade with the countries and territories the same treatment as they accord each other pursuant to the Treaties'. Next, Article 200 TFEU provides for specific measures concerning the free movement of goods and, finally, Article 203 TFEU authorises the Council to adopt implementing measures.

33. For all those reasons, it is difficult to accept that the legal arrangements applicable to OCTs constitute an autonomous body of rules which is, so to speak, impervious to any influence from the Treaties. In particular, the view of radical autonomy advanced by the French Republic in these proceedings would mean that OCTs were subject to their own body of provisions of European Union law of which the only relevant ones were Articles 198 to 204 TFEU and the decisions adopted to implement that corpus. Viewed thus, the European Union law applicable to OCTs would exist as a legal system 'encapsulated' within that of the Union, and, as a result of its autonomy, it would appear to be 'shielded' from the application of provisions of the Treaty other than Articles 198 to 204 TFEU.

34. However, that interpretation fails in the light of a literal reading of Article 355 TFEU. The article begins by stating that,

'[i]n addition to the provisions of Article 52 [TEU]', '[t]he special arrangements for association set out in Part Four' are to apply to OCTs. The term 'in addition' indicates that European Union law applies to the Member States and that, where OCTs are concerned, *additional* special arrangements apply. Naturally, those arrangements must be taken into account and they operate as a *lex specialis,* thereby replacing the general provisions of the Treaty; that, however, does not convert them into an autonomous body of rules, immune to any influence from primary law.

35. It is not only the textual argument which militates against the full autonomy of the provisions of European Union law applicable to OCTs but also the practical consequences of an interpretation like the one set out above. If autonomous legislation existed which was applicable to OCTs and was separate from the rest of European Union law, that would mean that, in the event of legislative silence, OCTs would be left on their own in a kind of legal limbo, and might even run the risk of third countries being entitled to benefit from more advantageous treatment than OCTs despite the close ties which the latter have with the Union. That last factor calls for particular vigilance when the general provisions of the Treaty refer to third countries. It is in such cases that OCTs, because they do not formally come within the ambit of either Member States or third countries, run the risk of being the victims of interpretations which are, at the very least, risky.

36. To avoid that outcome, the Court has been very pragmatic in its case-law when dealing with the nature of OCTs and their classification as third countries or territories which are *associated with* (but not *members of*) the European Union.

37. In *Kaefer and Procacci,* the Court confirmed the competence of the courts of French Polynesia to refer questions for a preliminary ruling under Article 267 TFEU. At no point does Part Four of the Treaty state that its rules on jurisdiction apply to the courts of OCTs but, nevertheless, the Court merely observed that the referring court was a 'French court' and, therefore, it deemed the reference to be admissible. [14] In *Eman and Sevinger*, the Court held that a national of a Member State whose place of residence is in an OCT is entitled to rely on the rights of citizenship of the Union laid down in Article 18 et seq. TFEU, thereby extending the right to vote in elections to the European Parliament to individuals residing in an OCT in the same way as if the latter were a Member State. [15] More recently, in *N*, the Court held

14 — Joined Cases C-100/89 and C-101/89 *Kaefer and Procacci* [1990] ECR I-4647, paragraphs 8 to 10, subsequently confirmed in Case C-260/90 *Leplat* [1992] ECR I-643, in response to a reference for a preliminary ruling from the District Court, Papeete.

15 — Case C-300/04 *Eman and Sevinger* [2006] ECR I-8055.

that a company with its registered office in the Netherlands Antilles which exercised effective control over another company in the United Kingdom fell within the scope of the freedom of establishment, on the grounds that the Netherlands Antilles must be regarded as an integral part of a Member State. [16]

38. In other situations, however, the Court held that OCTs warranted treatment equivalent to that afforded to a third country. In *Van der Kooy*, the entry into the Netherlands of goods which were in free circulation in the Netherlands Antilles was classified as entry into the Community from a third country. [17] In *DADI and Douane-Agenten*, the Court was again required to consider the entry of goods originating in the Netherlands Antilles, on this occasion from the perspective of Directive 92/46/EEC, [18] and again reached the conclusion that goods originating in an OCT were equivalent to goods from a third country. [19] That is also apparent from the opinions of the Court of Justice concerning international agreements, in which the Court stated on two occasions that OCTs fall outside the scope of European Union law and, therefore, 'are, as regards the Community, in the same situation as non-member countries'. [20]

39. Although those two strands of case-law appear to be conflicting, they are in fact less so than they might at first appear. In cases in the first strand, the Court is concerned with situations in which the Treaty does not clearly state the extent of its application, such as with regard to references for a preliminary ruling, the rights of European citizenship, and the freedom of establishment. On the other hand, the second strand has tended to develop in the area of the free movement of goods, in relation to which both Part Four of the Treaty and the decisions adopted by the Council to date lay down a complete set of rules which allow the Court to address the question in other terms. All of the foregoing confirms that there is no categorical answer to the question whether an OCT should be categorised as a Member State or a third country, and instead the answer varies on a case-by-case basis according to the relevant legal framework and taking into careful

16 — Case C-470/04 *N* [2006] ECR I-7409, paragraphs 11 and 28. As the judgment states, N transferred his residence from the Netherlands to the United Kingdom. At the time he left the Netherlands, he was the sole shareholder of three limited liability Netherlands companies (besloten vennootschappen), the management of which had since that same date been in Curaçao (Netherlands Antilles). It is likely that the conclusion reached by the Court is connected to the fact that the law applicable to the three companies was that of a Member State, but, in any event, it is indisputable that the treatment afforded to N was the same as any shareholder whose company was established in a Member State would have received.

17 — Case C-181/97 *Van der Kooy* [1999] ECR I-483, paragraphs 34 to 39.

18 — Council Directive 92/46/EEC of 16 June 1992 laying down the health rules for the production and placing on the market of raw milk, heat-treated milk and milk-based products (OJ 1996 L 268, p. 1).

19 — Case C-106/97 *DADI and Douane-Agenten* [1999] I-5983, paragraphs 35 to 37.

20 — Opinion 1/78 [1979] ECR 2871, paragraphs 61 and 62, and Opinion 1/94 [1994] ECR I-5267, paragraph 17.

consideration the objectives pursued by the special arrangements for association laid down in Part Four of the TFEU.

3. Recapitulation

40. In the light of the arguments set out above, it is my view that the special arrangements for OCTs replace the general provisions of European Union law and comprise their own provisions of primary (Articles 198 to 204 TFEU) and secondary law. In the event of a lacuna, the Treaties may apply in so far as the objectives of association are not compromised, in which connection the direct effect of the provision relied on must be analysed in the light of Articles 198 to 204. Further, as stated above, it is necessary to pay special attention to the provisions of the Treaty which apply to third countries to ensure that the objectives of Part Four of the Treaty are not circumvented. This is precisely the situation to which the free movement of capital gives rise and which I will go on to analyse below from the perspective of its applicability to OCTs.

B — *The applicability of Article 63 TFEU to OCTs*

41. At this point, it is appropriate to analyse the position of the Commission and the French Republic, which maintain, albeit supported by different lines of reasoning, that Article 63 TFEU does not apply to the present case. The United Kingdom, for its part, submits that these proceedings are concerned with freedom of establishment rather than the free movement of capital.

42. I shall begin by considering the position of the United Kingdom which, for the reasons I will explain below, I believe to be unfounded. Next, in the light of the arguments set out in points 31 to 39 of this Opinion, I will also decide to reject the positions of the Commission and the French Republic.

1. Application of the free movement of capital or the freedom of establishment

43. The United Kingdom submits that the freedom of establishment, laid down in Article 49 TFEU, rather than the free movement of capital laid down in Article 63 TFEU, is applicable to this case.

44. Naturally, it should be pointed out that the dividing line between the two freedoms is vague and there is even some overlapping. However, in the instant case, it is perfectly clear that freedom of establishment is not applicable, at least in the light of the facts presented in the proceedings. As the Court has previously acknowledged, in order for the provisions relating to the right of establishment to apply, it is in principle necessary to have a permanent presence in the host Member State and, where immovable property is purchased and held, that property should be actively managed. [21] It cannot be denied that Prunus is controlled by Polonium and, in turn by Lovett and Grebell, and it is a legal person which, according to the order for reference, has a permanent presence on French territory. However, all the information available to the Court in this case indicates that ownership of the immovable properties, which forms the taxable event giving rise to the tax at issue, constitutes a direct investment in immovable property. The immovable properties concerned are, therefore, being commercially exploited without, according to the order, any material activity being carried out in connection with the operations of the holding companies. Therefore, this is a case of a direct investment in which control over Prunus is an instrumental means of achieving the free movement of capital; in other words, an investment.

45. That is, moreover, the conclusion which the Court reached in *Elisa* when presented with the same argument in relation to Article 990 E CGI, ruling out, in the light of the facts before it, the application of the freedom of establishment. [22]

46. That freedom of establishment has no bearing on the instant case is further confirmed by the fact that the registered office of the holding company is in an OCT. It would, therefore, be necessary to determine whether Article 49 TFEU, or the decisions of 1991 and 2001, extend the freedom of establishment to companies which are resident in the British Virgin Islands and have subsidiaries in a Member State. [23] Having already noted that freedom of establishment would not apply even in a case arising between Member States, there is no need to examine this other aspect of the dispute.

21 — See, in general, Case 2/74 *Reyners* [1974] ECR 631, paragraph 21; Case C-55/94 *Gebhard* [1995] ECR I-4165, paragraph 25; and, more specifically, Case C-386/04 *Centro di Musicologia Walter Stauffer* [2006] ECR I-8203, paragraph 18, in which the Court carried out an analysis based on this premiss: '… 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. It is clear from the account provided by the national court that the foundation does not have any premises in Germany for the purposes of pursuing its activities and that the services ancillary to the letting of the property are provided by a German property management agent... It must therefore be concluded that the provisions governing freedom of establishment are not applicable in circumstances such as those in the dispute in the main proceedings' (paragraphs 19 and 20).

22 — *Elisa*, paragraphs 63 to 65.

23 — In that connection, albeit in the context of a dispute concerning third countries rather than an OCT, see *A*, paragraph 29, and also *N*, cited in footnote 16 above, with the nuances evident therein.

47. Accordingly, based on the facts adduced in the present proceedings, I do not agree with the view put forward by the United Kingdom and, therefore, I propose that the Court reply to the questions referred exclusively in the light of the free movement of capital.

2. Whether Article 63(1) TFEU is not applicable as a result of Decisions 91/482 and 2001/822.

48. The French Republic maintains that the silence of Part Four of the TFEU and of the decisions on the association of OCTs in relation to the free movement of capital means that, as concerns its dealings with those territories, the Union has not laid down measures on liberalisation in that sphere. The French Republic submits that this outcome also precludes OCTs from being treated as third countries by reason of the autonomous nature of the arrangements for those territories.

49. First, it is necessary to acknowledge that the French Republic is right to point out the relevance to these proceedings of both Article 180 of Decision 91/482 and Article 47 of Decision 2001/822. Those are the provisions which, in principle, are likely to govern a situation like the one which has arisen in the instant case, because they define the specific terms on which capital may be moved between OCTs and the Union. As a result of the entry into force and repeal of each decision, the legislation in force with regard to payment of the tax for 2001 was Decision 91/482, while Decision 2001/822 is the relevant provision as concerns the payment for the following year. [24]

50. As the French Republic correctly points out, as far as capital is concerned, the decisions on the association of OCTs focus mainly on movements from Member States to OCTs. To put it another way, it is a unilateral rather than a bilateral freedom and the reason for its existence is rooted in a policy of promoting European investments in OCTs. That approach was made clear in Article 168(e) of Decision 91/482, which called for the facilitation of 'a greater and more stable flow of resources from the Community private sector *to* the OCT'. [25] Decision 2001/822 changed the wording of that provision by removing the unilateral nature of the rule, but, in Article 47(1)(b), it again laid down special measures to protect capital investment from the Union in OCTs. Thus, the article prohibits

24 — Article 63 of Decision 2001/822, according to which the decision entered into force on 2 December 2001, while Decision 91/482 ceased to be effective on the previous day.

25 — Emphasis added.

any restrictions on the free movement of capital 'for direct investments in companies formed in accordance with the laws of the host Member State, country or territory'. [26]

51. However, the fact that the decisions focus on the movement of capital to OCTs does not necessarily mean that Part Four of the TFEU and the decisions have, solely and exclusively, a unilateral, central-peripheral, scope. On the contrary, while the provisions in question attest to a greater concern on the part of the arrangements for OCTs with movements of capital to those territories, that does not mean that the provisions preclude a bi-directional interpretation of the freedom. To put it another way, the special arrangements for OCTs lay down specific measures to ensure with greater safeguards the flow of European Union capital to OCTs, but under no circumstances does that mean that the flow of capital in the opposite direction is not part of the those arrangements.

52. Let us look step by step at the extent to which that bi-directional character is reflected.

53. The first aspect to be borne in mind is the wording of the decisions of 1991 and 2001. As concerns Decision 91/482, the fact that movements of capital are confined strictly to foreign exchange transactions permits the assertion that a situation of the kind at issue does not fall within the scope of that decision. The reply is rather more complex in relation to Decision 2001/822, Article 47 of which does not restrict its subject-matter to a specific activity and instead refers expressly to 'direct investments' in the context of 'transactions on the capital account of balance of payments'. As I already stated at point 50 of this Opinion, Article 47 refers to direct investments made in companies established in OCTs, thereby restricting its scope to capital flows from Member States to OCTs. Therefore, it is appropriate to conclude that the two decisions do not cover a situation like the one in the instant case, because their provisions

26 — This provision gives rise to a number of uncertainties resulting from the different translations of it. In the French version, the article provides that 'les États membres et les autorités des PTOM n'imposent aucune restriction aux libres mouvements des capitaux concernant les investissements directs réalisés *dans des sociétés constituées conformément au droit de l'État membre du pays ou territoire d'accueil*' (emphasis added). However, the Spanish version, together with other language versions (the English and the German, for example), in referring to 'sociedades constituidas de conformidad con la legislación del Estado miembro, país o territorio de acogida', implies that the companies referred to are ones governed *either* by the law of a Member State *or* by the law of an OCT. Completely the opposite is inferred from the wording of the French version, since there the provision clearly refers to companies *which are governed by the law of a Member State and which have their registered office in an OCT*, meaning that the State concerned has special ties with the Union; that confirms the French Government's interpretation of the provision, to the effect that it is a one-directional freedom flowing towards OCTs. That difference is also apparent in other language versions, and the Court is therefore required to adopt a position in favour of one interpretation or the other, although, in line with the evolution of the decisions on OCTs, all the indications are that the French version is the correct one.

refer to activities or capital flows other than the ones at issue.

54. The fact that the decisions are silent with regard to a case such as the one under scrutiny does not necessarily mean that European Union law has exhausted its function. As stated in points 31 to 39 of this Opinion, the law applicable to OCTs is not an autonomous body of rules which is immune to the influence of the general provisions of the Treaties. On the contrary, once it has been confirmed that the specific provisions are not applicable to a particular case, it is necessary to ascertain, having regard to the objectives of Part Four of the TFEU, whether it is appropriate to rely on a provision of the Treaty which concerns third countries. In the case before the Court, it is a matter of ascertaining whether Article 63 TFEU is a provision which, in the light of Article 198 TFEU et seq., is applicable to a national measure which restricts the free movement of capital from an OCT to the Union.

55. As I have previously pointed out, Article 63 TFEU enshrines the free movement of capital, stipulating that the provision takes effect not only as between Member States but also in relation to third countries. Accordingly, the free movement of capital also precludes, somewhat exceptionally in comparison with the other freedoms, national measures which impede the exit and entry of capital to and from third countries. On the basis of that special feature, it is my view that, interpreted in the light of Article 198 TFEU et seq., Article 63 TFEU is applicable to OCTs.

56. An interpretation of the free movement of capital as a regime which extends outside the European Union inevitably entails an interpretation of that freedom which is susceptible to universalisation. The opening-up of capital markets does not occur in a fragmented fashion but rather with a general purpose aimed at fulfilling well-known objectives which have already been described. [27] The view that this freedom is not applicable to OCTs contradicts the very spirit underlying the current wording of 63 TFEU, as it introduces a notable exception which, in any event, must be expressly provided for. [28]

57. In addition, the aims which underpin the special arrangements for OCTs, specifically their economic and social development,

27 — See point 21 of this Opinion.

28 — For example, that was the interpretation of the Supreme Court of the Netherlands in its judgment of 13 July 2001 (No 35 333, BNB 2001/323), which was subsequently confirmed by judgment of 12 August 2005 (No 39 935, BNB x). In that regard, see Smits, D.S., 'The position of the EU Member States' associated and dependent territories under the freedom of establishment, the free movement of capital and secondary EU law in the field of company taxation', *Intertax,* No 12, 2010.

would be called into question if the European Union were to allow the entry of capital originating in Member States into OCTs while severely curtailing the entry of capital originating in OCTs. The promotion of economic and social development, together with the establishment of 'close economic relations' between OCTs and the European Union cannot be reconciled with a free movement of capital which excludes OCTs while embracing all third countries. The ties which bind OCTs to the European Union are such that they justify arrangements for association which consolidate economic relations between the two territories. Those arrangements may, in some circumstances, entail the adoption of restrictive measures, which will, on occasions, be counteracted by other provisions. [29] However, that is a balancing exercise which must be performed by Decision 2001/822 in particular, in addition to all the acts which preceded it. In the event of silence, a general freedom laid down in the Treaty, which, in very specific terms, is applicable to all third countries without exception, must be construed as applying equally to OCTs.

58. In short, it is my view that the argument relied on by the French Republic cannot be accepted. Accordingly, for the reasons set out, I consider that, in the absence of a specific set of rules in the decisions on association, Article 63 TFEU is applicable to OCTs.

29 — See, for example, in relation to the free movement of goods, Article 200(3) TFEU, which authorises OCTs to 'levy customs duties which meet the needs of their development and industrialisation or produce revenue for their budgets.'

3. Whether Article 63 TFEU is not applicable as a result of the standstill clause laid down in Article 64(1) TFEU

59. According to the Commission, the French provision at issue is caught by Article 64(1) TFEU, because it is a provision, first, which was in force on 31 December 1993; second, which concerns the movement of capital from third countries; and, third, which involves direct investment in immovable property. Since those conditions are satisfied, Article 64(1) TFEU creates a kind of standstill effect, in accordance with which the free movement of capital does not take effect in respect of national measures which satisfy those conditions.

60. The Commission is correct to state that the tax referred to in the CGI, as it applies to the instant case, is a measure which 'existed' on 31 December 1993. The Court has previously had occasion to give a ruling on that point, [30] and I agree with the Commission's assertion that the tax concerned satisfies the

30 — In *A*, the Court held that 'the words "restrictions which exist on 31 December 1993" presuppose that the legal provision relating to the restriction in question have formed part of the legal order of the Member State concerned continuously since that date. If that were not the case, a Member State could, at any time, reintroduce restrictions on the movement of capital to or from third countries which existed as part of the national legal order on 31 December 1993 but had not been maintained' (paragraph 48). See also Case C-446/04 *Test Claimants in the FII Group Litigation* [2006] ECR I-11753, paragraph 192 and Case C-157/05 *Holböck* [2007] ECR I-4051, paragraph 41.

conditions laid down for it to be regarded as a measure 'in existence' on that date. The same applies with regard to the 'direct investment' requirement laid down in Article 64(1) TFEU, because the provision in question governs a tax on investment in immovable property using capital from third countries. [31] The fact that the capital has moved in stages via a chain of companies does not deprive the provision at issue of its function of restricting direct investment in immovable property.

61. Lastly, the Commission submits that the British Virgin Islands, as an OCT, are a 'third country' for the purposes of Article 64(1) TFEU. In support of its stance, the Commission refers to opinions 1/78 and 1/94, in which the Court stated that, since they remain outside the sphere of application of the Treaty, OCTs must be regarded as third countries for the purposes of European Union law. [32] In addition, as I observed at point 38 of this Opinion, other decisions of the Court also demonstrate a tendency to treat OCTs as third countries, while, in other cases, a different solution is reached.

62. The position of the Commission with regard to the third condition is difficult to accept because it simplifies excessively the status of OCTs which, as observed above, has special features which do not lend themselves to categorical replies. When the Treaty refers to third countries in provisions other than the ones contained in Part Four, it is necessary, as I indicated above, to assess on a case-by-case basis whether or not the provision applies to OCTs. That approach appears to have been followed for some time in case-law, since, together with the decisions to which the Commission has drawn attention, pointing to the treatment of OCTs as third countries, there are also decisions which do not place them on the same footing. [33]

63. In my view, in the case of Article 64(1) TFEU, the reference to 'third countries'

31 — Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty (OJ 1988 L 178, p.5) defines direct investments in real estate as '[p]urchases of buildings and land and the construction of buildings by private persons for gain or personal use. This category also includes rights of usufruct, easements and building rights'. That definition has interpretative value for the purposes of defining the term 'direct investment in real estate' in the context of the free movement of capital, as the Court has confirmed on a number of occasions (see Case C-222/97 *Trummer and Mayer* [1999] ECR I-1661, paragraph 21; Case C-464/98 *Stefan* [2001] ECR I-173, paragraph 5; Case C-386/04 *Centro di Musicologia Walter Stauffer* [2006] ECR I-8203, paragraph 22; and *Elisa*, paragraphs 33 and 34).

32 — Opinion 1/78, point 62, and Opinion 1/94, point 17.

33 — See point 37 of this Opinion and the case-law cited therein.

must be interpreted in the light of the specific objectives pursued by the provision. Article 64(1) TFEU is aimed at conferring on Member States and the Union the power to decide unilaterally on the termination of measures contrary to Article 63 TFEU, provided that those measures were adopted prior to 31 December 1993. To put it another way, it is an optional standstill clause in favour of the Member States and the European Union, the fundamental reason for which relates to the time when the European monetary policy was created and the free movement of capital was enshrined in the Treaties as a further freedom. [34] At that time, it was possible to foresee the positive effects which the liberalisation of capital would bring with it, but also clear was the risk of a negative effect, capable of justifying the retention of existing measures in order to safeguard against possible imbalances in capital movements.

64. Like any provision derogating from a fundamental freedom, Article 64(1) TFEU must be interpreted strictly. [35] The restrictive nature of the article is apparent from the fact that it does not cover all movements of capital and instead is confined to those which involve direct investment, establishment, the provision of financial services or the admission of securities to capital markets. Further, the derogation operates solely and exclusively in respect of the entry of capital from third countries, as a response to the special feature, inherent in and exclusive to the free movement of capital, which is its external dimension.

65. In addition, bearing in mind the objectives pursued by the Treaty in creating the special arrangements for OCTs, it is clear that the priority of those arrangements is the strengthening of political, social and economic ties between OCTs and the Union. Even though they do not formally constitute a territory '*of*' the Union, I pointed out above that OCTs are linked '*to*' the Union on terms which occasionally render them closer in status to a Member State than a third country. Further, in so far as they are not third countries, because they are not sovereign States with international legal personality, their relationship with the Union must always be construed in terms of integration. It might be a different, more phased kind of integration from the one envisaged for Member States, but ultimately it is integration.

66. In addition, as I pointed out in point 56 of this Opinion, the free movement of capital laid down in Article 63 TFEU must apply to OCTs, since otherwise there would be a paradox in that a freedom granted to third

34 — On this provision, see Hindelang, S., *The Free Movement of Capital and Foreign Direct Investment,* Oxford University Press, Oxford, 2009, p. 275 et seq.

35 — In that connection, see Hindelang, S., op. cit., pp. 280 to 291.

countries would be denied to territories with which the Union has special relations. On that premiss, the application of a derogation from the free movement of capital which is reserved exclusively to third countries must be interpreted with extreme caution when it is applied to territories such as OCTs. In my opinion, the fact that they are not States in the strict sense and that they have a status which is specifically protected by the Treaty supports the view that the derogation in Article 64(1) TFEU is not applicable to those territories.

67. Lastly, that conclusion is the one that is most consistent with the system of the Treaty, since it places OCTs in the legal situation which Part Four of the TFEU accords to them: territories governed by arrangements which permit derogation from the general provisions of the Treaty but which, in the event of silence, are capable of being caught by those provisions, in particular where they concern third countries. For all those reasons, it is appropriate to assert that Article 64(1) TFEU does not allow OCTs to be treated as third countries and that, rather, it is a provision concerning a specific one-off problem; the extension of Article 64(1) TFEU to OCTs is contrary to the objectives pursued by the Treaty in conferring on those territories a special political, economic and social relationship with the Union.

68. Accordingly, in response to the arguments advanced by the Commission, I consider that Article 64(1) TFEU is not applicable to a measure such as the one laid down in Article 990 E CGI, when applied to a legal person which has its effective centre of management in the British Virgin Islands.

C — *The infringement of Article 63 TFEU*

69. Now that the foregoing uncertainties have been cleared up, it remains to be examined whether the French measure at issue is compatible with the free movement of capital laid down in Article 63 TFEU. In the event of a negative reply, it will then be necessary to establish whether it is appropriate to accept any of the justifications set out in Article 65 TFEU.

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

70. In *Elisa* [36] the Court ruled on whether Article 990 E CGI was contrary to Article 63(1)

36 — Cited above.

TFEU, albeit in a dispute where the legal person liable to the tax had its effective centre of management in Luxembourg. Therefore, the judgment in *Elisa* concerned the lawfulness of the French tax in a situation involving the movement of capital between Member States. As in the instant case, the French Republic argued that the requirement of the existence of a convention on administrative assistance to combat tax evasion and avoidance or of a treaty guaranteeing the principle of equality as between taxpayers was a proportionate condition which did not obstruct the free movement of capital.

71. The Court did not accept the argument of the French Republic and held that, since a condition of the kind referred to above requires a bilateral decision of the Member States concerned, it equates to a *de facto* permanent regime of non-exemption from the disputed tax for legal persons which have their effective centre of management in a Member State other than France. Accordingly, in the opinion of the Court, the legislation concerned 'constitut[ed], in relation to the legal persons in question, a restriction on the principle of free movement of capital which is, in principle, prohibited by [the Treaty]'. [37]

72. Despite the clarity with which the judgment in *Elisa* resolved the issue of the restriction, it still remains to be determined whether that solution may be applied to a case in which the effective seat of management of the legal person concerned is not in a Member State but rather in a third country or in a territory other than that of the Union. The reply to that question is provided, at least in part, by the judgment in *A*. [38]

73. In that case, the Court was asked whether the concept of restrictions on the movement of capital referred to in Article 63(1) TFEU must have the same scope with regard to relations between Member States and third countries as it does with regard to relations between Member States. Contrary to the submissions of a number of the governments which participated in the proceedings, the Court concluded that the concept of restriction is, in principle, the same, while pointing out that account must be taken of the fact that the Treaty has laid down specific derogations for the movement of capital from or to third countries, [39] and that the applicable legal context is necessarily different from that which exists between the Member States as a result of their participation in the process of European economic integration. [40] Confirming an approach which had begun in the *Test Claimants* judgment, [41] the Court thus approved an

37 — *Elisa*, paragraph 78.

38 — Cited above.

39 — See Articles 64(1), 66 and 75(1) and (2) TFEU.

40 — *A*, paragraphs 35 to 38.

41 — *Test Claimants in the FII Group Litigation*, paragraph 171.

interpretation which allowed the application, albeit with a number of nuances, of its case-law on the movement of capital in situations arising between Member States. [42]

74. Although *A* and *Test Claimants* concerned tax measures relating to dividends received from companies established in another Member State, that approach was confirmed more recently, specifically in relation to Article 990 E CGI, the provision at issue in the present case. In *Établissements Rimbaud*, [43] The Court had the opportunity to rule on whether that article constitutes a restriction when the effective centre of management of a legal person is situated in a third country, specifically a State of the European Economic Area. In those circumstances, there was a formal change in the reference legal framework because the applicable provision was Article 40 of the EEA Agreement rather than Article 63 TFEU. Nevertheless, Article 40 of the EEA Agreement reproduces the wording of Article 63(1) TFEU and therefore the case-law already laid down on the interpretation of the latter provision applies in principle to the former in the interests of ensuring as uniform an interpretation as possible of the EEA Agreement. [44] That being so, the Court concluded that a provision such as the French one, considered in the context of the EEA, contributes to making investment in immovable property in France less attractive for non-resident companies, such as those established in Liechtenstein. [45]

75. As I observed above, the association between OCTs and third countries is formulated with regard to the special status of the former as territories with close ties to the Union. This means that, although it is not appropriate to apply automatically the *A* or *Test Claimants* case-law to a situation such as the one at issue, nor is it possible to state categorically that the present situation is like the one in *Elisa* or *Établissements Rimbaud*. On the contrary, the fact that the effective centre of management of the legal person liable to the French tax is situated in the British Virgin Islands means that account must be taken of the specific nature of that territory for the purposes of interpreting Article 63(1)

42 — In his Opinion in *A*, Advocate General Bot expressed it clearly in these terms: 'The Treaty does not state the reasons why the scope of that freedom was extended to third countries. It is commonly accepted that this extension should be seen in the context of the development of the Community's monetary policy. However, if the Member States had wanted that difference in objective to be reflected in the scope of that liberalisation as regards their relations with third countries, they should, logically, have set out the principle of free movement of capital within the Community and at non-Community level in different terms, as had been the case previously. The fact that, despite that difference in objective, they chose to provide for such freedom of movement in the same terms and in the same article of the Treaty can, in my view, be explained only by the intention to give it the same scope in both cases' (point 77).

43 — Cited above.

44 — See Case C-452/01 *Ospelt and Schlössle Weissenberg* [2003] ECR I-9743, paragraph 29; Case C-286/02 *Bellio F.lli* [2004] ECR I-3465, paragraph 34; Case C-471/04 *Keller Holding* [2006] ECR I-2107, paragraph 48; Case C-521/07 *Commission* v *Netherlands* [2009] ECR I-4873, paragraph 15; Case C-157/07 *Krankenheim Ruhesitz am Wannsee-Seniorenheimstatt* [2008] ECR I-8061, paragraph 24; and Case C-540/07 *Commission* v *Italy* [2009] ECR I-10983, paragraph 65.

45 — *Établissements Rimbaud*, paragraphs 25 to 29.

TFEU. The considerations which I am setting out should assist with the reply to that question.

76. As I stated in points 31 to 39 of this Opinion, Article 63(1) TFEU is applicable to OCTs. On that premiss, it is necessary to point out, as the Court did in *A* and *Test Claimants*, that movements of capital to or from the British Virgin Islands take place in a different legal context from that which occurs within the European Union. [46] However, while that difference in legislative framework is liable to have a decisive effect when it comes to considering the justifications in defence of a measure such as the one at issue, that in no way precludes the Court from finding, directly and without hesitation, that there is a restriction within the meaning of Article 63(1) TFEU.

77. In that connection, the judgments in *Elisa* and *Établissments Rimbaud* provide useful criteria, since they both concern the same provision as the one now at issue. In those cases, the Court had no hesitation in declaring that a regime of the kind provided for in Article 990 E CGI, in so far as it entails, for legal persons whose effective centre of management is situated outside French territory, a *de facto* permanent regime of non-exemption from the disputed tax, constitutes a restriction of the principle of the free movement of capital. [47] I see no reason why the reply should be any different in circumstances such as the present ones, once it has been confirmed that Article 63(1) TFEU is applicable and owing to the fact that the effective place of management is an OCT.

78. Accordingly, it follows from the foregoing that a provision of the kind laid down in Article 990 E CGI constitutes a restriction prohibited as a matter of principle by Article 63(1) TFEU, since it makes the entitlement to an exemption of legal persons which do not have their centre of management in France, by contrast to other persons liable to the tax, subject to an additional condition, namely that there is a convention concluded between the French Republic and, in the instant case, an OCT.

2. The justification for the restriction

79. At this juncture, it should be pointed out, first of all, that Article 65(1) and (2) TFEU constitute a variant of the justifications which

46 — *A*, paragraphs 36 and 37, and *Test Claimants*, paragraphs 170 and 171.

47 — *Elisa*, paragraphs 75 to 78, and *Établissements Rimbaud*, paragraphs 25 to 29.

primary law lays down in respect of the freedoms of movement. The article provides for three general exceptions, followed by a restriction thereof, but the final outcome is to broaden the discretion of the Member States. Thus, paragraph 1(a) provides for a justification in respect of tax measures which differentiate between situations which are not objectively comparable; paragraph 1(b) lays down a general justification based, inter alia, on grounds of public policy; and paragraph 2 refers to the specific case of restrictions on the freedom of establishment.

80. I shall begin by analysing the first justification, which is laid down in Article 65(1)(a) TFEU. It is common knowledge that this justification, relating exclusively to national measures of 'tax law' which provide for differences in treatment, had already been dealt with in the case-law of the Court before the entry into force of Article 65 TFEU. Thus, as the Court observed in *Verkooijen*, [48] before the entry into force of Article 65 TFEU (then Article 73 D EC) it had been acknowledged in case-law, notably starting with *Schumacker*, [49] that national tax provisions which establish certain distinctions based, in particular, on the residence of taxpayers, could be compatible with European Union law provided that they applied to situations which were not objectively comparable. Accordingly, although in the instant case the Court will apply the wording of Article 65(1)(a) TFEU, it must do so in the light of its earlier case-law and by using a double test.

81. In the first stage, the Court examines whether the national provision or decision concerns objectively comparable situations. If the Court concludes that they do not, it must hold that the measure is lawful. [50] However, if the Court reaches the opposite conclusion, it will be necessary to perform a second analysis: having established that the situations are comparable, the Court considers whether there is an overriding reason in the public interest which may, in the light of the principle of proportionality, support the lawfulness of the measure. [51] In this second stage, it will be possible to rely on grounds such as, for example, the coherence of the tax system [52] or effectiveness in combating tax evasion. [53]

82. It is apparent from the case-file that the French tax at issue entails a uniform system of

48 — Case C-35/98 *Verkooijen* [2000] ECR I-4071, paragraph 43.

49 — Case C-279/93 *Schumacker* [1995] ECR I-225.

50 — See Case C-512/03 *Blanckaert* [2005] ECR I-7685, paragraph 39, and Case C-194/06 *Orange European Smallcap Fund* [2008] ECR I-3747, paragraph 65.

51 — *Verkooijen*, paragraphs 56 to 61, and Case C-319/02 *Manninen* [2004] ECR I-7477, paragraph 52.

52 — Case C-242/03 *Weidert and Paulus* [2004] ECR I-7379, paragraph 17.

53 — *Centro di Musicologia Walter Stauffer*, paragraph 47.

taxation in which the chargeable event is the immovable property of legal persons. Thus, bearing in mind the general condition which gave rise to the obligation to pay the tax, legal persons having their effective centre of management in France and legal persons having their effective centre of management outside France are on the same footing in relation to the taxation of immovable property. [54] In so far as the difference in treatment lies in an advantage relating to tax, the situation before the Court is a comparable situation entailing discrimination and is, therefore, not caught by the wording of Article 65(1)(a) TFEU.

83. It now remains to be established whether the difference in treatment is based on an overriding reason in the public interest; more specifically, as the Member States which have participated in these proceedings have submitted, effectiveness in combating tax evasion.

84. In *Elisa*, after recalling that, according to case-law, that justification is accepted only if the legislation is aimed at wholly artificial arrangements the objective of which is to circumvent the tax laws, [55] the Court observed that two elements are necessary for a finding that Article 990 E CGI, applied to a movement of capital between Member States, is not caught by that justification. First of all, the Court pointed out that Directive 77/799/EEC [56] concerning mutual assistance by the competent authorities of the Member States in the field of direct and indirect taxation lays down a general framework for cooperation and the exchange of information which makes it easier for each authority to combat fraud in cross-border contexts. [57] Next, after noting that Article 8(1) of Directive 77/799 provides for an exemption from cooperation which was applicable to the facts of the case in *Elisa*, the Court repeated an already settled statement of the law, pursuant to which, even once it has been established that the article is applicable, there is no reason why the tax authorities concerned should not request from the taxpayer the evidence that they consider they need to effect a correct assessment of the taxes and duties concerned and, where appropriate, refuse the exemption applied for if that evidence is not supplied. [58]

85. On those grounds, the Court held in *Elisa* that Article 990 E CGI was incompatible with European Union law and ruled that the requirement of an overriding reason in the public interest, concerning the fight against tax

54 — See, in that connection, the Opinion of Advocate General Mazák in *Elisa*, points 87 to 91, which refers specifically to the *Manninen* judgment, paragraph 36.

55 — *Elisa*, paragraph 91, referring also to Case C-478/98 *Commission* v *Belgium* [2000] ECR I-7587, paragraph 45; Case C-334/02 *Commission* v *France* [2004] ECR I-2229, paragraph 27; and Case C-196/04 *Cadbury Schweppes and Cadbury Schweppes Overseas* [2006] ECR I-7995, paragraph 50.

56 — 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 (OJ 1977 L 336, p. 15)

57 — *Elisa*, paragraphs 92 to 94.

58 — *Elisa*, paragraphs 95 and 96, referring to Case C-150/04 *Commission* v *Denmark* [2007] ECR I-1163, paragraph 54. However, the Court began developing that approach in Case C-204/90 *Bachmann* [1992] ECR I-249, paragraph 20.

evasion, had not been satisfied.[59] Although the Court acknowledged that the French tax authorities would find it difficult to obtain all the relevant information for the purposes of an assessment or possible inspection, the problem with the French system lay in its automatic nature, which did not allow the companies concerned to provide any documentary evidence to establish the identity of their shareholders or any other information which the French tax authorities might consider to be necessary. Accordingly, an exemption of that nature, which under no circumstances allows the taxpayer to cooperate with the authorities, thereby creating a kind of presumption of fraud which it is impossible to counteract, was, in the opinion of the Court, disproportionate and, therefore, infringed the Treaties.[60]

86. In the present case, there is an important nuance in the legal framework, since the effective centre of management of the legal person liable to the tax is situated in an OCT, namely the British Virgin Islands, where secondary European Union law does not apply save where expressly provided for. As I pointed out above, where the provisions concerned are part of primary law, the determination of whether European Union law is applicable must be made on a case-by-case basis. However, secondary law must expressly state that it is applicable to one or more OCTs in order to take effect in them.

87. Directive 77/799 does not do that in respect of the British Virgin Islands. As the Commission and a number of Member States which submitted observations in these proceedings have stated, that directive does not apply to a situation such as the one at issue, where a Member State — the French Republic — requests administrative assistance in relation to taxation from an OCT, in this case the British Virgin Islands. Further, I took the opportunity to ask the agent of the United Kingdom whether there is, or was at the material time, a cooperation agreement or treaty between the United Kingdom and the British Virgin Islands in relation to taxation. The reply was negative. Accordingly, the OCT concerned is governed by its own legislative framework and no instruments on administrative cooperation relating to taxation have been concluded, even with the Member State with which the territory has special ties.

88. In that regard, it might be possible to find some guidance on the particular status of the British Virgin Islands in the case-law on the external aspect of the free movement of capital. I believe that it is appropriate to refer again to the judgment in *A*, a case concerning a third country, in which the Court drew attention to the importance of Community harmonisation in the sphere of company

59 — *Elisa*, paragraphs 100 and 101.
60 — *Elisa*, paragraphs 97 to 99.

accounts.[61] Thus, the fact that companies established in Member States are subject to common accounting rules allows the taxpayer, in the words of the Court, 'to produce reliable and verifiable evidence on the structure or activities of a company established in another Member State'.[62] However, those guarantees are not afforded to the taxpayer 'in the case of a company established in a third country which is not required to apply those Community measures'.[63] Since that absence of harmonisation in the field of accounting may also arise in a case concerning the British Virgin Islands, I believe that the solution in *Elisa*, where the French authorities were criticised for failing to allow the taxpayer the opportunity to provide tax information, needs some modification in a case such as the instant one.

89. In the light of the considerations set out, it is clear that a Member State, like the French Republic, would be unable to benefit from Directive 77/799; further, in a case such as the present one, were that Member State to allow the taxpayer to furnish evidence, it would not necessarily receive harmonised accounting information where the legal person liable for the tax had its effective centre of management in the British Virgin Islands. Since that is the legal context in which the dispute between Prunus and the French tax authorities takes place, it follows from the case-law of the Court that the French Republic is lawfully entitled to rely on an overriding reason in the public interest concerning the fight against tax evasion.

90. In addition, that is the conclusion which the Court reached recently when resolving the uncertainties raised by Article 990 E CGI in a dispute in which the overseas connection was in Liechtenstein. In *Établissements Rimbaud*, the Court took care to distinguish that case from the one in *Elisa*, referring on a number of occasions to the difference between the legal frameworks in the two cases.[64] Moreover, in *Établissements Rimbaud*, the Court found that the directives on corporate accounting were applicable to Liechtenstein pursuant to Annexe XXII to the EEA Agreement,[65] and also in that case the Court held that it was possible to rely on an overriding reason in the public interest concerning the fight against tax evasion. It may be inferred from that judgment that the crucial factor in the substantive analysis was the fact

61 — *A*, paragraph 62. Advocate General Bot took the same approach in points 141 to 143 of his Opinion in that case.

62 — Ibid.

63 — Ibid.

64 — *Établissements Rimbaud*, paragraph 46.

65 — *Établissements Rimbaud*, paragraph 42.

that Directive 77/799 did not apply within the EEA, not accounting harmonisation. [66]

91. In the instant case, both factors are present: Directive 77/799 is not applicable and nor is there harmonisation of corporate accounting. Not only are the French authorities unable to use the cooperation mechanisms provided for in the directive but also, if they were to accept documentary evidence from the taxpayer, they would find it difficult to verify its truthfulness or lawfulness. In the absence of cooperation instruments of the kind concluded between the Member States, it is reasonable to accept that the French Republic makes the exemption from the tax conditional on the existence of a convention on administrative assistance to combat tax evasion or a treaty which guarantees the principle of non-discrimination between taxpayers.

92. Accordingly, in reply to the question referred by the Tribunal de grande instance de Paris, I consider that Article 63 TFEU must be construed as meaning that it does not preclude legislation such as that laid down by Article 990 D et seq. CGI, which grants legal persons having their effective centre of management in France or, since 1 January 2008, in a Member State of the European Union, entitlement to exemption from the tax at issue and which, as regards legal persons having their effective centre of management in the territory of a third country, 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 requirement, under a treaty containing 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.

93. Since it has been established that the conditions for the justification laid down in Article 65(1)(a) TFEU are satisfied, and in so far as the arguments set out above are sufficient to provide a useful reply to the first question referred, I do not consider it necessary to continue with an analysis of the other exceptions referred to in that article.

V — The second question referred for a preliminary ruling

94. By its second question, the Tribunal de grande instance de Paris asks the Court whether legislation such as that laid down by Article 990 F of the Code général des impôts,

66 — See also, in connection with the free movement of capital between the Italian Republic and Norway, Iceland and Liechtenstein, Case C-540/07 *Commission* v *Italy* [2009] ECR I-10983, paragraphs 66 to 73.

which enables tax services to hold jointly and severally liable for payment of the tax provided for in Article 990 D et seq. of the Code général des impôts any legal person interposed between the party or parties liable to the tax and the immovable properties or rights in such properties, is compatible with Article 63 et seq. TFEU.

95. The reply to this question is apparent from the answer proposed to the first question referred. Thus, if a Member State is able to introduce restrictions on the free movement of capital of the kind examined in these proceedings, and those restrictions are adopted in accordance with the Treaties, there is nothing to preclude the legal system of that State from laying down rules on joint and several liability for the purposes of reclaiming payment of a tax. A system of that kind, provided that it is formulated in proportionate and non-discriminatory terms and is aimed at the attainment of a lawful objective in the general interest, does not, in principle, infringe the requirements of Article 63(1) TFEU.

96. The European Union legislature has in fact adopted a system of joint and several liability in relation to indirect taxation, the aim of which is to ensure fiscal credit and, therefore, to combat fraud. It is common knowledge that Article 22(7) of Directive 77/388/EEC [67] calls on Member States to adopt 'the necessary measures to ensure that those persons who... are considered to be liable to pay the tax instead of a taxable person established in another country or who are jointly, and severally liable for the payment, shall comply with the above obligations relating to declaration and payment.' Therefore, the mechanism of joint and several liability, in so far as it is an instrument which allows Member States to collect tax debts, does not necessarily give rise to a restriction of the free movement of capital.

97. That conclusion is bolstered where the rules on liability are applied in a non-discriminatory manner to situations in which there is no link to European Union law. Therefore, if the French tax legislation provides in relation to purely internal cases for a rule of joint and several tax liability, there are insufficient grounds for finding that there is a restriction in a case such as the instant one. That is a matter which it falls to the referring court to determine.

98. It is possible to advance the same argument in the light of the principle of proportionality. In so far as a measure which lays down a rule of joint and several liability in relation to taxation is an instrument for combating tax evasion, it is appropriate and necessary to achieve those aims. If the French rule guarantees the personal identity of the companies involved in the imputation, in such a way that liability may attach to the group as a unit, it is not appropriate to find that there is an abuse which is sufficiently serious for the measure to be regarded as disproportionate. In those circumstances, it also falls to the

67 — Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment (OJ 1977 L 145, p. 1).

referring court to establish whether, in matters relating to taxation, French law guarantees that the imputation of a debt is directed, jointly and severally, strictly at legal persons which are part of a unit.

99. Accordingly, I propose that, in reply to the second question, the Court should declare that Article 63 TFEU must be construed as meaning that it does not preclude legislation such as that laid down by Article 990 F of the Code général des impôts, which enables tax services to hold jointly and severally liable for payment of the tax provided for in Article 990 D et seq. of the Code général des impôts any legal person interposed between the party or parties liable to the tax and the immovable properties or rights in such properties, provided that it is applied in a proportionate and non-discriminatory manner.

VI — Conclusion

100. In the light of the foregoing considerations, I propose that the Court should reply to the Tribunal de grande instance de Paris as follows:

'1. Article 63 TFEU must be construed as meaning that it does not preclude legislation such as that laid down by Article 990 D et seq. CGI, which grants legal persons having their effective centre of management in France or, since 1 January 2008, in a Member State of the European Union, entitlement to exemption from the tax at issue and which, as regards legal persons having their effective centre of management in the territory of a third country, 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 requirement, under a treaty containing 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. Article 63 TFEU must be construed as meaning that it does not preclude legislation such as that laid down by Article 990 F of the Code général des impôts, which enables tax services to hold jointly and severally liable for payment of the tax provided for in Article 990 D et seq. of the Code général des impôts any legal person interposed between the party or parties liable to the tax and the immovable properties or rights in such properties, provided that it is applied in a proportionate and non-discriminatory manner.'