Case C-451/05

Européenne et Luxembourgeoise d’investissements SA (ELISA)

v

Directeur général des impôts,

Ministère public

(Reference for a preliminary ruling from the Cour de Cassation (France))

(Direct taxation – Tax on the commercial value of immovable property in France owned by legal persons – Holding companies under Luxembourg law – Refusal of exemption – Directive 77/799/EEC – Non-exhaustive list of specified taxes and duties – Tax similar in nature – Limits to exchange of information – Bilateral convention – Article 73b of the EC Treaty (now Article 56 EC) – Free movement of capital – Combating tax evasion)

Opinion of Advocate General Mazák delivered on 26 April 2007

Judgment of the Court (Fourth Chamber), 11 October 2007

Summary of the Judgment

1. *Approximation of laws – Mutual assistance by the authorities of the Member States in the field of direct and indirect taxation – Directive 77/799*

(Council Directive 77/799, Art. 1(2) and (3))

2. *Approximation of laws – Mutual assistance by the authorities of the Member States in the field of direct and indirect taxation – Directive 77/799*

(Council Directive 77/799, Art. 8(1))

3. *Free movement of capital – Restrictions – Tax on the commercial value of immovable property owned by legal persons*

(EC Treaty, Art. 73b (now Art. 56 EC))

1. A tax by a Member State on the commercial value of immovable property owned in that Member State by legal persons is a tax which is similar in nature to those taxes referred to in Article 1(3) of Directive 77/799 concerning mutual assistance by the competent authorities of the Member States in the field of direct and indirect taxation, which is levied on elements of capital within the meaning of Article 1(2) of that directive.

(see para. 37, operative part 1)

2. Directive 77/799 concerning mutual assistance by the competent authorities of the Member States in the field of direct and indirect taxation, and in particular Article 8(1) thereof, does not preclude two Member States from binding themselves by means of an international convention, with the intention of avoiding double taxation and establishing rules for reciprocal administrative assistance in the area of taxes on income and capital, which excludes from its scope, in respect of

one Member State, one category of taxpayers subject to a tax covered by that directive, if the competent authority of the Member State which should furnish information is prevented by its laws or administrative practices from collecting or using such information for that State’s own purposes, that being a matter which it is for the national court to verify.

(see para. 55, operative part 2)

3. Article 73b of the EC Treaty (now Article 56 EC) must be interpreted as precluding national legislation which exempts companies established in that Member State from the tax on the commercial value of immovable property owned there by legal persons, when, in respect of companies established in another Member State, it makes that exemption subject either to the existence of a convention on administrative assistance between the Member State concerned and that other State for the purposes of combating tax avoidance and tax evasion or to the existence of a requirement in a treaty containing a clause prohibiting discrimination on grounds of nationality to the effect that those companies cannot be more heavily taxed than companies established in the first Member State, and which does not allow the company established in another Member State to supply evidence to establish the identity of the natural persons who are its shareholders.

(see para. 102, operative part 3)

JUDGMENT OF THE COURT (Fourth Chamber)

11 October 2007(*)

(Direct taxation – Tax on the commercial value of immovable property in France owned by legal persons – Holding companies under Luxembourg law – Refusal of exemption – Directive 77/799/EEC – Non-exhaustive list of specified taxes and duties – Tax similar in nature – Limits to exchange of information – Bilateral convention – Article 73b of the EC Treaty (now Article 56 EC) – Free movement of capital – Combating tax evasion)

In Case C?451/05,

REFERENCE for a preliminary ruling under Article 234 EC by the Cour de cassation (Court of Cassation) (France), made by decision of 13 December 2005, received at the Court on 19 December 2005, in the proceedings

Européenne et Luxembourgeoise d’investissements SA (ELISA)

v

Directeur général des impôts,

Ministère public,

THE COURT (Fourth Chamber),

composed of K. Lenaerts, President of the Chamber, E. Juhász, G. Arestis (Rapporteur), J.

Malenovský and T. von Danwitz, Judges,

Advocate General: J. Mazák,

Registrar: J. Swedenborg, Administrator,

having regard to the written procedure and further to the hearing on 24 January 2007,

after considering the observations submitted on behalf of:

– Européenne et Luxembourgeoise d'investissements SA, by J.?J. Gatineau, avocat,

– the French Government, by G. de Bergues and J.?C. Gracia, acting as Agents,

– the Greek Government, by S. Spyropoulos, Z. Chatzipavlou and K. Boskovits, acting as Agents,

– the Italian Government, by I.M. Braguglia, acting as Agent, and by G. De Bellis, avvocato dello Stato,

– the Netherlands Government, by H.G. Sevenster and M. de Grave, acting as Agents,

– the United Kingdom Government, by V. Jackson, acting as Agent, and by T. Ward, Barrister,

– the Commission of the European Communities, by R. Lyal and J.?P. Keppenne, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 26 April 2007,

gives the following

Judgment

1 The reference for a preliminary ruling concerns the interpretation of Article 52 of the EC Treaty (now, after amendment, Article 43 EC), Article 73b of the EC Treaty (now Article 56 EC), and 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 and indirect taxation (OJ 1977 L 336, p. 15), as amended by Council Directive 92/12/EEC of 25 February 1992 (OJ 1992 L 76, p. 1), ('Directive 77/799').

2 This reference has been made within proceedings in which the opposing parties are Européenne et Luxembourgeoise d'investissements SA ('ELISA') and the directeur général des impôts (Director-General of Taxes) relating to the imposition on that company of the tax on the commercial value of immovable property owned in France by legal persons ('the disputed tax').

Legal context

Community law

3 Article 1 of Directive 77/799, headed 'General provisions', provides:

'1. In accordance with the provisions of this Directive the competent authorities of the Member States shall exchange any information that may enable them to effect a correct assessment of taxes on income and on capital …

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, the following:

…

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. …

…'

4 Articles 2, 3 and 4 of Directive 77/799 respectively set out provisions relating to exchange on request, automatic exchange and spontaneous exchange of the information referred to in Article 1(1) of that directive.

5 Article 8 of Directive 77/779, headed 'Limits to exchange of information' provides:

'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.'

6 Article 11 of Directive 77/799, headed 'Applicability of wider-ranging provisions of assistance', provides that '(t)he foregoing provisions shall not impede the fulfilment of any wider obligations to exchange information which might flow from other legal acts'.

National law

7 Articles 990 D and 990 E of the Code général des impôts (French General Tax Code) ('the CGI'), as amended by Law No 92-1376 of 30 December 1992, being the Finance Law for the year

1993 (*Official Journal of the French Republic* No 304 of 31 December 1992), provide:

‘Article 990 D

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% on the commercial value of those properties or rights.

There shall be deemed to own through an intermediary properties or rights in France, any legal person which possesses an interest, in whatever form or quantity, in a legal person which is the owner of those properties or rights or which possesses an interest in a third legal person, which is itself the owner of properties or rights or an intermediary in a chain of interests. This provision applies irrespective of the number of intermediary legal persons.

Article 990 E

The tax laid down in Article 990 D is not 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 do 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 property acquisition;

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 members 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 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 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 …’

International law

8 Article 21(1) of the Convention concluded at Paris on 1 April 1958 between the French Republic 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, as amended by the Addendum signed at Paris on 8 September 1970 (‘the Convention of 1 April 1958’), provides:

‘The nationals, companies or other groups of one of the two Contracting States shall not be subject in the other State to any other or higher taxes than those imposed on the nationals, companies or other groups of the latter State.’

9 Article 22(1) of the Convention of 1 April 1958 provides:

‘The competent authorities of the two States may, either on their own initiative, or upon request, exchange, on condition of reciprocity, such information which the tax laws of the two States allow to be obtained through normal administrative practices, as is necessary for the proper application of this Convention …'

10 By exchange of letters of 8 September 1970 concerning the Convention of 1 April 1958, the French and Luxembourg Governments declared that, 'from the date on which the Convention came into force, it should not be applied to "sociétés holding" (holding companies) within the meaning of the relevant Luxembourg legislation (currently the Law of 31 July 1929 and Decree-Law of 27 December 1937) nor to any income which a person resident for tax purposes in France derives from such companies or to any interests which such a person has in such companies'.

11 The Convention on establishment between the French Republic and the Grand-Duchy of Luxembourg, signed at Paris on 31 March 1930, contains a most-favoured-nation clause.

12 In accordance with Article 9 of the latter convention, 'the two High Contracting Parties bind themselves to conclude, as soon as possible, a special convention on the subject of duties, taxes, levies and charges to which nationals and companies are subject and to regulate issues of double taxation'.

The main proceedings and the questions referred for a preliminary ruling

13 ELISA is a holding company incorporated under Luxembourg law, established in accordance with the provisions of the Law of 31 July 1929 on the tax regime governing financial participation companies (Holding Companies) (Mém. (Official Journal) 1929, p. 685), as amended by the Grand Ducal Regulation of 24 March 1989 (Mém. A 1989, p. 181).

14 Under the second paragraph of Article 1 of that law, a holding company is exempted from income tax, additional and supplementary taxes and withholding tax and is also exempted from local taxes. In accordance with the sixth paragraph of Article 1 of that law, powers of monitoring and investigation fall to the registration authority and are restricted to examination of facts and data relating to the tax status of the company and material gathered for the purposes of confirming and checking that taxes and duties payable by the company are fairly and accurately levied.

15 According to the order for reference, ELISA owns several immovable assets on French territory and, in that capacity, is subject to the provisions of Article 990 D et seq. of the CGI imposing the disputed tax.

16 The order for reference also states that ELISA completed the returns required by law but did not pay the corresponding taxes. After the company was notified on 18 December 1997 of the relevant tax penalties, the tax authorities proceeded to the collection of those penalties. After its complaint was dismissed, ELISA summoned the Director-General of Taxes to appear before the Tribunal de grande instance de Paris (Paris Regional Court) with a view to obtaining relief from those taxes.

17 After two negative decisions, delivered respectively by the Tribunal de grande instance de Paris on 28 October 1999 and by the Cour d'appel de Paris (Paris Court of Appeal) on 5 July 2001, ELISA appealed to the Cour de cassation.

18 The Cour de cassation decided to stay the proceedings and to make a reference to the Court 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 990 D et seq. of the [CGI] which grants legal persons having their effective centre of management in France entitlement to exemption from the [disputed] tax 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 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 a tax such as the disputed tax constitute a tax on capital within the meaning of Article 1 of Directive [77/799]?

(3) If so, do the obligations imposed on Member States concerning mutual assistance in the field of taxation by the 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?,

(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 containing 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?'

The questions referred for a preliminary ruling

19 By way of preliminary, it must be observed that the dispute in the main proceedings turns on facts concerning Member States, to the exclusion of any non-member country. Consequently, the answers to the questions referred for a preliminary ruling are relevant only to relations between Member States.

The second question

20 In its second question, which it is appropriate to consider first, the referring court asks whether the disputed tax is a tax on capital within the meaning of Article 1 of Directive 77/799.

21 In that regard, first, it is clear from Article 1(2) of Directive 77/799 that, irrespective of the manner in which they are levied, 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 are to be regarded as taxes on income and on capital.

22 It follows clearly from that provision that, in addition to taxes on total income and total capital, Directive 77/799 also relates to taxes imposed on elements of income or capital. Consequently, such taxes, irrespective of what they are called, are also among those taxes for the purposes of which the competent authorities of the Member States are to exchange, in accordance with Directive 77/799, any information which may enable them correctly to assess those taxes.

23 Secondly, Article 1(3) of Directive 77/799 provides that, with regard to France, the taxes and duties referred to in Article 1(2) include income tax ('l'impôt sur le revenu), corporation tax (l'impôt sur les sociétés), local business tax (la taxe professionnelle), property tax on buildings (la taxe foncière sur les propriétés bâties) and land tax (la taxe foncière sur les propriétés non-bâties).

24 It follows unambiguously from Article 1(3) of Directive 77/799 that the list of taxes and duties specified in that article is not exhaustive.

25 Accordingly, it is appropriate to dismiss at the outset the argument that, because the disputed tax does not feature among the taxes and duties referred to in Article 1(3) of Directive 77/799, that provision cannot be applicable to the dispute in the main proceedings.

26 The fact that the list of taxes and duties in Article 1(3) of Directive 77/799 is not exhaustive is confirmed by Article 1(4), which provides that the competent authorities of the Member States are to also exchange any information which may enable them to effect the correct assessment of any identical or similar taxes imposed subsequently, whether in addition to or in place of the taxes listed in paragraph 3.

27 While acknowledging that the list of taxes and duties referred to in Article 1(3) of Directive 77/799 is not exhaustive, the French Government submits none the less that the nature of the disputed tax is such that it cannot be treated as equivalent to a tax on capital, within the meaning of Article 1(1) to (3) of Directive 77/799, and that, consequently, that directive cannot be applicable to the dispute in the main proceedings.

28 On that point, the French Government claims, first, that the disputed tax affects not natural persons but legal persons, and, secondly, that the objective of that tax is to combat tax avoidance.

29 As regards the first argument relied on, it must be stated at the outset that it is clear from Article 1(3) of Directive 77/799 that the taxes and charges in respect of which the competent authorities of the Member States are to exchange any information which may enable them to effect a correct assessment of those taxes, include those which affect legal persons, such as the local business tax ('taxe professionnelle'), which is expressly referred to in Article 1(3) of Directive 77/799.

30 Consequently, the argument that the taxes and charges referred to in Directive 77/799 do not relate to legal persons must be rejected.

31 As regards the second argument advanced by the French Government, it must be pointed out that, on the supposition that the objective of the disputed tax is to combat tax avoidance, that fact could not by itself, on any view, provide a basis for a challenge to the applicability of Directive 77/799 to the dispute in the main proceedings.

32 Moreover, it must be pointed out that it is precisely to combat practices of tax evasion and tax avoidance, as well as to enable taxes on income and capital to be correctly assessed, that Directive 77/799 set out mechanisms designed to strengthen cooperation among the tax authorities within the Community (see, to that effect, inter alia, Case C?420/98 *W. N*. [2000] ECR I?2847, paragraph 22, and Case C?533/03 *Commission* v *Council*[2006] ECR I?1025, paragraphs 70 and 71).

33 It appears none the less that the objective of that argument of the French Government is to demonstrate that the disputed tax cannot be regarded as a tax on capital within the meaning of Directive 77/799. That assertion is said to be supported by the fact that the disputed tax affects legal persons.

34 That argument must, however, be rejected.

35 In addition to the fact that, as stated in paragraph 29 of this judgment, Directive 77/799 does not in any way exclude from its scope taxes and charges which affect legal persons, it must be

pointed out that the disputed tax is payable by legal persons who are owners of immovable property situated in France and that it is calculated as a proportion of the value of that property.

36 Clearly, that tax affects part of the assets of the legal person concerned. It is therefore one of the taxes and duties which, irrespective of what they are called, are imposed on elements of income or of capital within the meaning of Article 1(2) of Directive 77/799.

37 It follows from all of the foregoing that the answer to be given to the second question must be that the disputed tax is a tax which is similar in nature to those taxes referred to in Article 1(3) of Directive 77/799, which is levied on elements of capital within the meaning of Article 1(2) of that directive.

The third question

38 In order to answer this question, it is useful to outline, first, the obligations imposed on Member States as a result of the relevant provisions of Directive 77/799 and, secondly, the obligations which the Convention of 1 April 1958 imposes on the two Member States concerned in the present proceedings.

39 As regards the obligations imposed by Directive 77/799, it must first be stated that, under the combined the provisions of Article 1(1), (3), and (4) thereof, the competent authorities of the Member States are to exchange any information which may enable them to effect a correct assessment of taxes on income and capital and taxes and charges of a similar nature, such as the disputed tax.

40 Next, Article 2 of Directive 77/799 provides that this exchange of information is to occur at the request of the competent authority of the Member State concerned. As is clear from Article 3 of that directive, the competent authorities of the Member States are also to exchange information without prior request, automatically, in respect of certain categories of cases referred to in the directive or even, in accordance with Article 4 thereof, spontaneously.

41 In that regard, Article 8(1) of Directive 77/799 states that the directive imposes no obligation to have enquiries carried out or to provide information if the competent authority of the Member State, which should furnish the information, would be prevented by its laws or administrative practices from carrying out those enquiries or from collecting or using that information for that State’s own purposes.

42 Lastly, Article 11 of Directive 77/799 states that the provisions of the directive are not to impede the fulfilment of any wider obligations to exchange information which might flow from other legal acts.

43 As regards the obligations deriving from the Convention of 1 April 1958, Article 22(1) of that convention states that the administrative authorities of the two States concerned – the French Republic and the Grand Duchy of Luxembourg – may, either on their own initiative, or upon request, exchange, on condition of reciprocity, such information which the national tax laws allow to be obtained through normal administrative practices for the purposes of the proper application of the convention. That exchange on information does not, however, relate to holding companies incorporated under Luxembourg law.

44 It is clear from the provisions of that convention that the latter establishes obligations of the same kind as those deriving from Directive 77/799.

45 Those are the circumstances in which the referring court asks whether the obligations

imposed on Member States by Directive 77/799, in the area of mutual assistance in tax matters, preclude the application, by the Member States, of the obligations which derive from the Convention of 1 April 1958.

46 In that regard, it is claimed, first, that the obligations deriving from that convention have no bearing on how Directive 77/799 is to be applied. The Greek Government submits that, on any view, those obligations are covered by Article 11 of the directive, which states that its provisions are not to impede the fulfilment of any wider obligations to exchange information which might flow from other legal acts.

47 That argument must be dismissed at the outset. It is patent that, so far as holding companies incorporated under Luxembourg law are concerned, the obligations which flow from the Convention of 1 April 1958 do not have a wider scope as regards the exchange of information. On the contrary, their objective is to restrict, if not preclude, such exchange when information concerning such holding companies is involved.

48 It follows that Article 11 of Directive 77/799 cannot validly be relied on in the dispute in the main proceedings.

49 Secondly, the French Government submits that it is clear from the provisions of Article 8(1) of Directive 77/799 that the directive does not preclude the application to the facts of this case of the Convention of 1 April 1958, which excludes, from the arrangements for exchange of information among the national administrations concerned, the holding companies incorporated under Luxembourg law.

50 On that point, it is evident from Article 8(1) of Directive 77/799 that the latter does not impose on Member States any obligation to have enquiries carried out or to provide information if the competent authority of the Member State which should furnish the information would be prevented by its laws or administrative practices from carrying out those enquiries or from collecting or using that information for that State’s own purposes.

51 According to the French Government, the relevant Luxembourg legislation is limited to requiring that the holding companies incorporated under Luxembourg law supply information on their legal status while providing that no information can be requested from them for purposes of taxation.

52 Consequently, if the relevant Luxembourg legislation does so provide, which it is for the national court to verify, the situation of holding companies incorporated under Luxembourg law, in relation to the subject of mutual assistance by Member States in the area of direct and indirect taxation, falls within the scope of Article 8(1) of Directive 77/799.

53 The same is true of the Convention of 1 April 1958 from which it follows that the Contracting Parties thereto excepted those holding companies from the information arrangements set up by the convention.

54 The Convention of 1 April 1958 does no more than reflect the terms of the Luxembourg legislation on the subject, with the result that that convention also falls, in respect of its restrictive scope, under Article 8(1) of Directive 77/799.

55 Accordingly, the answer to the third question must be that Directive 77/799, and in particular Article 8(1) thereof, does not preclude two Member States from binding themselves by means of an international convention, with the intention of avoiding double taxation and setting up rules for reciprocal administrative assistance in the area of taxes on income and capital, which excludes

from its scope, in respect of one Member State, one category of taxpayers subject to a tax covered by that directive, if the competent authority of the Member State which should furnish information is prevented by its laws or administrative practices from collecting or using such information for that State's own purposes, this being a matter which it is for the national court to verify.

The first question

56 By the first question, the national court asks, in essence, whether the Treaty provisions relating to freedom of establishment and free movement of capital are incompatible with national legislation, such as that at issue in the main proceedings, which exempts companies established in France from the disputed tax, while, in respect of companies established in another Member State, making that exemption subject either to the existence between France and that other State of a convention on administrative assistance for the purposes of combating tax evasion and tax avoidance or to the existence of a requirement imposed by a treaty containing a clause prohibiting discrimination on grounds of nationality, to the effect that such companies may not be taxed more heavily than companies established in France.

57 Inasmuch as the national court asks the Court to provide an interpretation both of Article 52 of the Treaty on freedom of establishment and of Article 73b of the Treaty on the free movement of capital, it is necessary to determine whether national legislation such as that at issue in the main proceedings may fall with the scope of those freedoms.

58 As regards Article 73b of the Treaty, it must be pointed out that the right to acquire, use or dispose of immovable property on the territory of another Member State, which is the corollary of freedom of establishment, as is apparent from Article 54(3)(e) of the EC Treaty (now Article 44(2)(e) EC), generates capital movements when it is exercised (Case C?370/05 *Festersen* [2007] ECR I?0000, paragraph 22, and case-law cited there).

59 According to settled case-law, capital movements include investments in immovable property on the territory of a Member State by non-residents, 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] (OJ 1988 L 178, p. 5), that nomenclature retaining the same indicative value for the purposes of defining the notion of capital movements (see *Festersen*, paragraph 23 and case-law cited there).

60 It is common ground that the applicant in the main proceedings, as a holding companies incorporated under Luxembourg law, has purchased immovable property in France. There is no doubt that such a cross-border investment is a capital movement within the meaning of that nomenclature (see Case C?376/03 *D*. [2005] ECR I?5821, paragraph 24).

61 Accordingly, national legislation such as that at issue in the main proceedings falls within the scope of free movement of capital.

62 As regards Article 52 of the Treaty, it is clear from the case-law of the Court that freedom of establishment, which is conferred by that article on Community nationals and which entails for them access to, and pursuit of, activities as self-employed persons as well as the establishment and management of undertakings on the same conditions as those laid down for its own nationals by the laws of the Member State of establishment, includes the right of companies formed in accordance with the laws of a Member State and having their registered office, central administration or principal place of business within the Community to pursue their activities in the Member State concerned through a subsidiary, a branch or an agency (Case C?471/04 *Keller Holding* [2006] ECR I?2107, paragraph 29, and Case C?386/04 *Centro di Musicologia Walter Stauffer* [2006] ECR I?8203, paragraph 17 and case-law there cited).

63 In addition, the concept of establishment within the meaning of the Treaty is a very broad one, implying that a Community national may 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 a self-employed person (see, inter alia, *Centro di Musicologia Walter Stauffer*, paragraph 18 and case-law there cited).

64 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 that property should be actively managed (*Centro di Musicologia Walter Stauffer*, paragraph 19).

65 In the present case, although the appellant in the main proceedings owns immovable property in France, it does not appear to be the case, either from the narration of facts provided by the referring court or from the observations submitted to the Court that it owns that property as part of the pursuit of its activities or even that it itself manages its immovable assets.

66 Consequently, it must be concluded that the provisions governing freedom of establishment cannot as a general rule be applied in circumstances such as those set out in the order of reference.

67 It follows from the foregoing that it is appropriate to examine whether national legislation such as that at issue in the main proceedings constitutes a restriction on movements of capital.

68 In that regard, it is relevant to point out, by way of preliminary, that, according to settled case-law, while direct taxation falls within their competence, the Member States must none the less exercise that competence consistently with Community law (see, inter alia, Case C?319/02 *Manninen* [2004] ECR I?7477, paragraph 19; Case C?292/04 *Meilicke and Others* [2007] ECR I?0000, paragraph 19; and Case C?157/05 *Holböck* [2007] ECR I?0000, paragraph 21).

69 It also follows from the case-law of the Court that the measures prohibited by Article 73b(1) of the Treaty, as restrictions on the movement of capital, include those which are likely to discourage non-residents from making investments in a Member State or to discourage that Member State’s residents from doing so in other States (*Festersen*, paragraph 24 and case-law there cited).

70 As regards legal persons which have their effective centre of management in France, these are exempted, under Article 990E(3) of the CGI, from the disputed tax, 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 immovable property owned as at 1 January, the identity and address of their shareholders, partners or other members, the number of shares or other

rights held by each of them and evidence of their residence for tax purposes.

71 As regards legal persons which have their centre of management in a State other than France, Article 990 E(2) of the CGI provides that these are exempted from the disputed tax – precisely in the same way as are legal persons which have their effective centre of management in France – when they declare each year the location, description and value of the immovable property in their possession as at 1 January, the identity and address of their members at that date and the number of shares or other rights held by each of them.

72 However, the same provision of the CGI lays down the additional requirement that there should have been concluded either a convention on administrative assistance to combat tax evasion and tax avoidance or, pursuant to Article 990 E(3) of the CGI, a treaty under which the legal persons concerned must not be more heavily taxed than those legal persons which have their effective centre of management in France.

73 As regards the exemption provided for in Article 990 E(2) of the CGI, the convention to which that article refers was concluded, but the holding companies incorporated under Luxembourg law, such as the appellant in the main proceedings, are excluded from its scope and, consequently, cannot take advantage of the exemption from the disputed tax.

74 As regards legal persons which do not have their centre of management in France and which may take advantage of the exemption provided for in Article 990 E(3) of the CGI, no special convention designed to regulate questions of double taxation has to date been concluded between the French Republic and the Grand-Duchy of Luxembourg. That being the case, as has been stated clearly in the order for reference, in the main proceedings the tax authority applied the provisions of Article 990 E(3) of the CGI, and rejected the application for exemption from the disputed tax made by the appellant in the main proceedings.

75 It follows that, before legal persons which do not have their centre of management in France can benefit from the exemption from the disputed tax pursuant to Articles 990 D and 990 E(2) and (3) of the CGI, they, by contrast to other persons liable to the tax, must satisfy an additional condition, namely that there is a convention concluded between the French Republic and the State concerned.

76 In that regard, it must be observed that, in the absence of such a convention, a legal person which does not have its centre of management in France is deprived of the possibility of making a successful application for exemption from the disputed tax pursuant to Articles 990 D and 990 E(2) and (3) of the CGI. Given that only the States concerned can decide whether to bind themselves by means of conventions, the condition linked to the existence of a convention on administrative assistance or of a treaty may entail, for that category of legal persons, a de facto permanent regime of non-exemption from the disputed tax.

77 It follows that the requirements laid down by the national legislation at issue in the main proceedings in order to benefit from the exemption from the disputed tax make investment in immovable property in France less attractive for non-resident companies, such as the holding companies incorporated under Luxembourg law.

78 Accordingly, that legislation constitutes, in relation to the legal persons in question, a restriction on the principle of free movement of capital which is, in principle, prohibited by Article 56 EC.

79 That being the case, what must be examined, thirdly and lastly, is whether the restriction resulting from the disputed tax is justified by an overriding requirement of general interest.

80 On that point, the French Government submits that the disputed tax is one of the measures designed to combat tax evasion, and that its objective is to induce legal persons which possess, directly or indirectly immovable property in France to disclose the identity of the natural or legal persons who or which are its partners.

81 It is admittedly clear from the case-law of the Court that the prevention of tax evasion is an overriding requirement of general interest capable of justifying a restriction on freedom of movement (see *Centro di Musicologia Walter Stauffer*, paragraph 32, and Case C?150/04 *Commission* v *Denmark* [2007] ECR I?0000, paragraph 51 and the case-law there cited).

82 However, the restriction in question must be appropriate to the objective pursued, and must not go beyond what is necessary to attain that objective (see, to that effect, *Manninen*, paragraph 29; *Centro di Musicologia Walter Stauffer*, paragraph 32; *Commission* v *Denmark*, paragraph 46; and Case C?522/04 *Commission* v *Belgium* [2007] ECR I?0000, paragraph 47).

83 It is thus necessary to examine therefore whether the disputed tax is appropriate to combat tax evasion and whether or not it goes beyond what is necessary to attain that objective.

84 The French Government maintains that the purpose of the disputed tax is to deter taxpayers liable to pay the French tax on capital from avoiding such a tax by setting up companies, which are to become owners of immovable property situated in France, in States which have not concluded with the French Republic a convention on administrative assistance or a treaty containing a clause prohibiting discrimination on grounds of nationality by which those companies must not be taxed more heavily than companies established in France.

85 The purpose of the disputed tax, it argues, is, in particular, to combat the practice whereby natural persons who are resident for tax purposes in France, and whose immovable property is normally subject to the tax on capital, set up companies which are resident for tax purposes in another State from which the French Republic cannot obtain the appropriate information on the natural persons who have shareholdings in those companies.

86 It appears therefore that the essential criterion for exemption is, in fact, whether the French tax authorities can reliably request from foreign tax authorities all the information they need to corroborate the returns made by companies which own rights of property in or other rights *in rem* over immovable property situated in France in accordance with Article 990 E of the CGI, as well as the returns made by natural persons who are resident for tax purposes in France in relation to their immovable property which is subject to the tax on capital.

87 By imposing the tax on all companies which do not satisfy that condition, the French legislation at issue in the main proceedings effectively taxes the immovable property owned by those companies as if they were ‘screens’ used by natural persons who would otherwise be liable to pay the tax on capital.

88 The disputed tax thus makes it possible to combat practices which have no other objective than to avoid payment of the tax on capital which would otherwise be payable by natural persons in France, or at least to make such practices less attractive. It is therefore appropriate to the objective of combating tax evasion.

89 It remains, however, to be determined whether the disputed tax goes further than is

necessary to achieve that objective.

90 On that point, the French Government states that a restrictive approach to the exemption from the disputed tax is made necessary by the difficulty encountered by the French tax authorities in proving tax evasion in the absence of reliable information which allows information supplied by taxpayers in their returns to be corroborated.

91 In that regard it must be recalled that, in accordance with settled case-law, the prevention of tax evasion can be accepted as justification only if the legislation is aimed at wholly artificial arrangements the objective of which is to circumvent the tax laws, which precludes any general presumption of tax evasion. Consequently, a general presumption of tax avoidance or tax evasion cannot justify a fiscal measure which compromises the objectives of the Treaty (see, to that effect, 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 and case-law cited there).

92 It is also in accordance with settled case-law of the Court that Directive 77/799 may be relied on by a Member State for the purposes of obtaining from the competent authorities of another Member State any information which is necessary to enable it to effect a correct assessment of the taxes covered by the directive (see *Cadbury Schweppes and Cadbury Schweppes Overseas*, paragraph 71, and *Commission* v *Denmark*, paragraph 52). Further, it follows from the answer given to the second question referred for a preliminary ruling that the disputed tax is covered by Directive 77/799.

93 It is admittedly clear from the answer given to the third question that, in the context of the main proceedings, the restriction on the scope of the Convention of 1 April 1958 is subject to the limitation on the exchange of information under Article 8(1) of Directive 77/799, with the result that the French tax authorities may find that it is impossible effectively to combat tax evasion in the case of holding companies incorporated under Luxembourg law.

94 However, it is also apparent from the case-law that, although Article 8(1) of Directive 77/799 does not oblige the tax authorities of the Member States to cooperate when the competent authorities are prevented by their laws or administrative practices from conducting enquiries or from collecting or using information for those States’ own purposes, the fact that it may be impossible to request that cooperation cannot justify refusal of a tax benefit.

95 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 (see *Commission* v *Denmark*, paragraph 54 and case-law cited there).

96 Thus, the taxpayer should not be excluded a priori from providing relevant documentary evidence enabling the tax authorities of the Member State imposing the tax to ascertain, clearly and precisely, that he is not attempting to avoid or evade the payment of taxes (see, to that effect, Case C?254/97 *Baxter and Others* [1999] ECR I?4809, paragraphs 19 and 20, and Case C?39/04 *Laboratoires Fournier* [2005] ECR I?2057, paragraph 25).

97 Moreover, in the circumstances of the main proceedings, the fact that it may be impossible directly to request the cooperation of the tax authorities of the Grand Duchy of Luxembourg may make it more difficult to check information.

98 However, that difficulty cannot justify a categorical refusal to grant a tax benefit in respect of

investments made by investors from that Member State. When the holding companies incorporated under Luxembourg law apply for exemption from the disputed tax, the French tax authorities may request those companies themselves to provide the evidence which they consider they need to be fully satisfied as to the transparency of those companies' rights of ownership and the structure of their shareholdings, irrespective of whether there is a convention on administrative assistance or a treaty containing a clause which prohibits discrimination in matters of taxation.

99 The French legislation at issue in the main proceedings in the present case does not allow companies which are excluded from the scope of a convention on administrative assistance and do not fall under a treaty containing a clause prohibiting discrimination in matters of taxation, but which invest in immovable property situated in France, to provide documentary evidence to establish the identity of their shareholders and any other information which the French tax authorities consider to be necessary. As a result, it is clear that that legislation wholly prevents those companies from demonstrating that their objective is not that of tax evasion.

100 It follows that the French Government could have adopted less restrictive measures in order to attain the objective of combating tax evasion.

101 Consequently, the disputed tax cannot be justified on the ground of combating tax evasion.

102 The answer to the first question must accordingly be that Article 73b of the Treaty must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which exempts companies established in France from the disputed tax, when, in respect of companies established in another Member State, it makes that exemption subject either to the existence of a convention on administrative assistance between the French Republic and that State for the purposes of combating tax avoidance and tax evasion or to the existence of a requirement in a treaty containing a clause prohibiting discrimination on grounds of nationality to the effect that those companies cannot be more heavily taxed than companies established in France, and when it does not allow the company established in another Member State to supply evidence to establish the identity of the natural persons who are its shareholders.

The fourth question

103 In view of the answers given by the Court to the first three questions, it is unnecessary to answer the fourth question referred by the national court.

Costs

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

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

1. **The tax on the commercial value of immovable property owned in France by legal persons is a tax which is similar in nature to those taxes referred to in Article 1(3) 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 and indirect taxation, as amended by Council Directive 92/12/EEC of 25 February 1992, which is levied on elements of capital within the meaning of Article 1(2) of that directive.**

2. **Directive 77/799, as amended by Directive 92/12, and in particular Article 8(1) thereof, does not preclude two Member States from binding themselves by means of an international convention, with the intention of avoiding double taxation and establishing rules for reciprocal administrative assistance in the area of taxes on income and capital,**

which excludes from its scope, in respect of one Member State, one category of taxpayers subject to a tax covered by that directive, if the competent authority of the Member State which should furnish information is prevented by its laws or administrative practices from collecting or using such information for that State's own purposes, this being a matter which it is for the national court to verify.

3. **Article 73b of the EC Treaty (now Article 56 EC) must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which exempts companies established in France from the tax on the commercial value of immovable property owned in France by legal persons, when, in respect of companies established in another Member State, it makes that exemption subject either to the existence of a convention on administrative assistance between the French Republic and that State for the purposes of combating tax avoidance and tax evasion or to the existence of a requirement in a treaty containing a clause prohibiting discrimination on grounds of nationality to the effect that those companies cannot be more heavily taxed than companies established in France, and which does not allow the company established in another Member State to supply evidence to establish the identity of the natural persons who are its shareholders.**

[Signatures]

* Language of the case: French.