Case C-72/09

Établissements Rimbaud SA

v

Directeur général des impôts

and

Directeur des services fiscaux d'Aix-en-Provence

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

(Direct taxation – Free movement of capital – Legal persons established in a non-member State belonging to the European Economic Area – Ownership of immovable property located in a Member State – Tax on the market value of that property – Refusal of exemption – Combating tax evasion – Assessment in the light of the EEA Agreement)

Summary of the Judgment

1. *International agreements – Agreement on the European Economic Area – Free movement of capital – Legal scope identical to that of Community provisions*

(Art. 63 TFEU; EEA Agreement, Art. 40 and Annex XII)

2. *International agreements – Agreement on the European Economic Area – Free movement of capital – Restrictions – Tax legislation – Tax on the commercial value of immovable property owned by legal persons*

(EEA Agreement, Art. 40)

1. One of the principal aims of the Agreement on the European Economic Area (EEA Agreement) is to provide for the fullest possible realisation of the free movement of goods, persons, services and capital within the whole EEA, so that the internal market established within the European Union is extended to the States of the European Free Trade Association (EFTA States). From that angle, several provisions of the EEA Agreement are intended to ensure as uniform an interpretation thereof as may be throughout the EEA. It is for the Court, in that context, to ensure that the rules of the EEA Agreement identical in substance to those of the TFEU are interpreted uniformly within the Member States.

It is apparent from Article 40 of the EEA Agreement that the rules laid down therein prohibiting restrictions of the movement of capital and discrimination are identical, so far as concerns relations between the States party to the EEA Agreement, irrespective of whether they are members of the European Union or members of EFTA, to the rules under EU law regarding relations between the Member States.

It follows that, although restrictions on the free movement of capital between nationals of States party to the EEA Agreement must be assessed in the light of Article 40 of that Agreement and Annex XII thereto, those provisions have the same legal scope as Article 63 TFEU.

(see paras 20-22)

2. Article 40 of the Agreement on the European Economic Area does not preclude national legislation which exempts from the tax on the market value of immovable property located in a Member State of the European Union companies which have their seat in that Member State and which, in respect of a company which has its seat in a country belonging to the European Economic Area which is not a Member State of the European Union, makes that exemption conditional either on the existence of a convention on administrative assistance between the Member State and the non-member State for the purposes of combating tax evasion and avoidance or on the fact that, pursuant to a treaty containing a clause prohibiting discrimination on grounds of nationality, those legal persons must not be taxed more heavily than companies established in a Member State.

Although such legislation constitutes, for legal persons, a restriction of the free movement of capital which is, in principle, prohibited under Article 40 of the EEA Agreement, just as it is prohibited under Article 63 TFEU, the justification based on the fight against tax evasion and the need to safeguard the effectiveness of fiscal supervision are assessed differently, since the framework for cooperation between the competent authorities of the Member States established by Directive 77/799 concerning mutual assistance by the competent authorities of the Member States in the field of direct and indirect taxation does not exist between those authorities and the competent authorities of a non-member State when that State has not entered into any undertaking of mutual assistance. In those circumstances, it is, in principle, legitimate for a Member State to refuse to grant that advantage if – in particular, because that non-member State is not bound under an agreement to provide information – it proves impossible to obtain such information from that country.

(see paras 29, 41, 44, 52, operative part)

JUDGMENT OF THE COURT (Third Chamber)

28 October 2010 (*)

(Direct taxation – Free movement of capital – Legal persons established in a non-member State belonging to the European Economic Area – Ownership of immovable property located in a Member State – Tax on the market value of that property – Refusal of exemption – Combating tax evasion – Assessment in the light of the EEA Agreement)

In Case C?72/09,

REFERENCE for a preliminary ruling under Article 234 EC, by the Cour de cassation (France), made by decision of 10 February 2009, received at the Court on 18 February 2009, in the proceedings

Établissements Rimbaud SA

v

Directeur général des impôts,

Directeur des services fiscaux d'Aix-en-Provence,

THE COURT (Third Chamber),

composed of K. Lenaerts, President of the Chamber, E. Juhász, G. Arestis (Rapporteur), T. von Danwitz and D. Šváby, Judges,

Advocate General: N. Jääskinen,

Registrar: N. Nanchev, Administrator,

Having regard to the written procedure and further to the hearing on 3 February 2010,

after considering the observations submitted on behalf of:

– Établissements Rimbaud SA, by J.?P. Chevallier, avocat,

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

– the German Government, by M. Lumma and C. Blaschke, acting as Agents,

– the Estonian Government, by L. Uibo, acting as Agent,

– the Greek Government, by S. Spyropoulos and Z. Chatzipavlou and M. Tassopoulou, acting as Agents,

– the Spanish Government, by M. Muñoz Pérez, acting as Agent,

– the Italian Government, by I. Bruni, acting as Agent, and P. Gentili, avvocato dello Stato,

– the Netherlands Government, by C.M. Wissels and M. de Mol, acting as Agents,

– the Swedish Government, by A. Falk and A. Engman, acting as Agents,

– the United Kingdom Government, by I. Rao and I. Hutton, acting as Agents,

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

– the EFTA Surveillance Authority, by L. Armati and I. Hauger, and by B. Alterskjæn and X. Lewis, acting as Agents,

– the Principality of Liechtenstein, by S. Monauni?Tömördy, acting as Agent,

after hearing the Opinion of the Advocate General at the sitting on 29 April 2010,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Article 40 of the Agreement on the European Economic Area of 2 May 1992 (OJ 1994 L 1, p. 3; 'the EEA

Agreement’).

2 The reference has been made in the proceedings between Établissements Rimbaud SA (‘Rimbaud’), on the one hand, and the directeur général des impôts (Director-General of Taxes) and the directeur des services fiscaux of Aix?en?Provence (Director of Taxation, Aix-en-Provence) (collectively, ‘the French tax authorities’), on the other, concerning Rimbaud’s liability for the tax on the market value of immovable property in France owned by legal persons (‘the disputed tax’).

Legal context

The EEA Agreement

3 Article 40 of the EEA Agreement provides:

‘Within the framework of the provisions of this Agreement, there shall be no restrictions between the Contracting Parties on the movement of capital belonging to persons resident in EC Member States or EFTA States and no discrimination based on the nationality or on the place of residence of the parties or on the place where such capital is invested. Annex XII contains the provisions necessary to implement this Article.’

4 Annex XII to the EEA Agreement, entitled ‘Free movement of capital’, refers to Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 [repealed by the Treaty of Amsterdam] of the Treaty (OJ 1988 L 178, p. 5). Under Article 1(1) of that directive, capital movements are to be classified in accordance with the nomenclature in Annex I thereto.

National legislation

5 Article 990 D et seq. of the Code général des impôts (‘the French Tax Code’) are among the measures adopted by the French legislature to combat certain forms of tax avoidance.

6 Article 990 D of the French Tax Code provides:

‘Legal persons which, directly or through an intermediary, own one or more properties located in France or are the holders of rights *in rem* in respect of such property are liable to pay an annual tax of 3% on the commercial value of those properties or rights.

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 is itself an intermediary in the chain of interests, shall be deemed to own properties or to hold property rights in France through an intermediary. This provision applies irrespective of the number of intermediary legal persons.’

7 Article 990 E of the French Tax Code provides:

‘The tax provided for in Article 990 D is not applicable to:

1° Legal persons of which the immovable assets, within the meaning of Article 990 D, located 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;

2° 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° Legal persons which have their effective centre of management in France or … other legal persons which, by virtue of a treaty, must not be subject to a heavier tax burden, where they communicate each year, or they enter into and comply with an undertaking to communicate to the tax authorities, at the request of the latter, 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 number of shares or other rights held by each of them and evidence of their residence for tax purposes. The undertaking shall be entered into on the date of acquisition by the legal person of the property or property right, or of the interest referred to in Article 990 D or, in respect of properties, rights or interests already owned as at 1 January 1993, by 15 May 1993 at the latest; …'

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

8 Rimbaud, which has its seat in Liechtenstein, owns immovable property in France. On that basis, it is in principle liable to pay the disputed tax.

9 The French tax authorities recovered the disputed tax from Rimbaud for the years 1988 to 1997 and then for the years 1998 to 2000.

10 Following the dismissal of its appeals, Rimbaud brought actions against the French tax authorities. When the Cour d'appel d'Aix-en-Provence (Court of Appeal, Aix-en-Provence) ruled against it by judgment of 20 September 2005, Rimbaud brought an appeal before the Cour de cassation.

11 In those circumstances, the Cour de cassation decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'Does Article 40 of the [EEA Agreement] preclude legislation such as that imposed by Article 990 D et seq. of [the French Tax Code], in the version applicable at the material time, which exempts from the 3% tax on the market value of immovable property located in France companies which have their seat in France and which, in respect of a company which has its seat in a country in the [EEA] which is not a Member State of the European Union, makes that exemption conditional either on the existence of a convention on administrative assistance between [the French Republic] and that country for the purposes of combating tax evasion and tax avoidance or on the fact that, pursuant to a treaty containing a clause prohibiting discrimination on grounds of nationality, those legal persons must not be taxed more heavily than companies established in France?'

Consideration of the question referred for a preliminary ruling

12 By its question, the referring court asks, essentially, whether Article 40 of the EEA Agreement is to be interpreted as precluding national legislation such as that at issue in the main proceedings which exempts from the disputed tax companies which have their seat in the territory of a Member State of the European Union and which, in respect of a company which has its seat in the territory of an EEA country which is not a Member State of the European Union, makes that exemption conditional either on the existence of a convention on administrative assistance between the Member State and the non-member State for the purposes of combating tax evasion and tax avoidance or on the fact that, pursuant to a treaty containing a clause prohibiting discrimination on grounds of nationality, those legal persons must not be taxed more heavily than

companies established in that Member State.

13 It should be noted at the outset that Article 40 of the EEA Agreement entered into force in Liechtenstein on 1 May 1995 by Decision of the EEA Council No 1/95 of 10 March 1995 on the entry into force of the Agreement on the European Economic Area for the Principality of Liechtenstein (OJ 1995 L 86, p. 58). Consequently, the interpretation of that provision has no bearing in relation to chargeable events, for the purposes of the disputed tax, which occurred before that date.

14 Similarly, it should be noted that, the national legislation at issue in the main proceedings has already been examined by the Court in the light 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') and in the light of Article 63 TFEU, in Case C?451/05 *ELISA* [2007] ECR I?8251.

15 In the main proceedings, since Rimbaud is the owner of immovable property in France it is, in that capacity, liable in principle for the disputed tax under Article 990 D of the French Tax Code.

16 It should be noted, with regard to the category of capital movements in question, that Article 40 of the EEA Agreement states that the provisions necessary to implement that provision are to be found in Annex XII to that agreement. Annex XII states that Directive 88/361 and Annex I to that directive are applicable to the EEA.

17 According to settled case-law, capital movements include transactions by which non-residents make investments in immovable property in the territory of a Member State, as is clear from the nomenclature of capital movements, set out in Annex I to Council Directive 88/361, which retains its original indicative value for the purposes of defining the notion of capital movements (see, to that effect, Case C?222/97 *Trummer and Mayer* [1999] ECR I-1661, paragraph 21; Case C-464/98 *Stefan* [2001] ECR I-173, paragraph 5; Joined Cases C?515/99, C?519/99 to C?524/99 and C?526/99 to C?540/99 *Reisch and Others* [2002] ECR I?2157, paragraph 30; and Case C?386/04 *Centro di Musicologia Walter Stauffer* [2006] ECR I?8203, paragraph 22).

18 It is common ground that Rimbaud made an investment in immovable property in France. Such a cross-border investment is a capital movement within the meaning of that nomenclature (see, to that effect, *ELISA*, paragraph 60).

19 Consequently, Article 40 of the EEA Agreement and Annex XII thereto are applicable to a dispute such as that before the referring court, which relates to a transaction between nationals of States which are party to that Agreement. According to settled case-law, the Court may give an interpretation of those provisions where a reference is made by a court of a Member State of the European Union with regard to the scope within that Member State of an agreement which forms an integral part of the EU legal system (see Case C-321/97 *Andersson and Wåkerås-Andersson* [1999] ECR I-3551, paragraphs 26 to 31; Case C-300/01 *Salzmann* [2003] ECR I-4899, paragraph 65; and Case C?452/01 *Ospelt and Schlössle Weissenberg* [2003] ECR I?9743, paragraph 27).

20 One of the principal aims of the EEA Agreement is to provide for the fullest possible realisation of the free movement of goods, persons, services and capital within the whole EEA, so that the internal market established within the European Union is extended to the EFTA States. From that angle, several provisions of the EEA Agreement are intended to ensure as uniform an interpretation as possible thereof throughout the EEA (see Opinion 1/92 [1992] ECR I-2821). It is for the Court, in that context, to ensure that the rules of the EEA Agreement which are identical in substance to those of the TFEU are interpreted uniformly within the Member States (*Ospelt and Schlössle Weissenberg*

, paragraph 29).

21 It is apparent from Article 40 of the EEA Agreement that the rules laid down therein prohibiting restrictions on the movement of capital and discrimination are identical, so far as concerns relations between the States party to the EEA Agreement, irrespective of whether they are members of the European Union or members of EFTA, to the rules under EU law regarding relations between the Member States (*Ospelt and Schlössle Weissenberg*, paragraph 28).

22 It follows that, although restrictions on the free movement of capital between nationals of States party to the EEA Agreement must be assessed in the light of Article 40 of that Agreement and Annex XII thereto, those provisions have the same legal scope as Article 63 TFEU (see Case C?521/07 *Commission* v *Netherlands* [2009] ECR I?4873, paragraph 33).

23 It is relevant to point out 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 EU 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?1835, paragraph 19; Case C?157/05 *Holböck* [2007] ECR I?4051, paragraph 21; and *ELISA*, paragraph 68). By the same token, that competence does not allow Member States to apply measures which are contrary to the freedoms of movement guaranteed by similar provisions of the EEA Agreement.

Whether there is a restriction on movements of capital

24 As regards the question whether national legislation such as that at issue in the main proceedings constitutes a restriction on movements of capital, it has been held, in the case which gave rise to the judgment in *ELISA*, that the legislation at issue constitutes a restriction, prohibited by Article 63 TFEU, on the principle of the free movement of capital.

25 It has been held that exemption from the disputed tax, in the case of legal persons which do not have their centre of management in France – by contrast with other persons liable to the tax – is subject, pursuant to Article 990 E(2) and (3) of the French Tax Code, to an additional condition: a convention must have been concluded between the French Republic and the State concerned. In the absence of such a convention, a legal person which does not have its centre of management in France has no prospect of making a successful application for exemption from the disputed tax, pursuant to Articles 990 D and 990 E(2) and (3) of the French Tax Code. Given that only the States concerned can decide whether to bind themselves by means of conventions, the condition concerning the existence of a convention on administrative assistance or of a treaty may, *de facto*, entail for that category of legal persons a permanent regime of non-exemption from the disputed tax, making investment in immovable property in France less attractive for non-resident companies (see *ELISA*, paragraphs 75 to 77).

26 In the main proceedings, the exemption from the disputed tax for companies established in the non-member State concerned, provided for under Article 990 E of the French Tax Code, is conditional upon the conclusion of a convention on administrative assistance or a treaty between the French Republic and the Principality of Liechtenstein.

27 Yet, with respect to the exemption referred to in Article 990 E(2) of the French Tax Code, no convention on administrative assistance for the purposes of combating tax evasion and tax avoidance has been signed between those two States. Likewise, with respect to the exemption referred to in Article 990 E(3) of the French Tax Code, the French Republic and the Principality of Liechtenstein have not so far signed any treaty under which the legal persons concerned must not be taxed more heavily than legal persons which have their seat in France.

28 It follows that the requirements laid down in the national legislation at issue for exemption from the disputed tax automatically exclude non-resident companies established in Liechtenstein from the exemption and make investment in immovable property in France less attractive for those companies.

29 Accordingly, in a case such as that before the referring court, that legislation constitutes, for legal persons, a restriction on the free movement of capital which is in principle prohibited under Article 40 of the EEA Agreement, just as it is prohibited under Article 63 TFEU.

30 The French Government maintains that the disputed tax is designed in such a way as to deter taxpayers liable to pay it from avoiding the tax by setting up companies, which are to become the owners of immovable property in France, in States which have not concluded with the French Republic a convention on administrative assistance for the purposes of combating tax evasion and avoidance. The essential test for exemption is whether the French tax authorities can directly request from the foreign tax authorities all the information needed to corroborate the tax returns made by companies which own property rights, or other rights *in rem*, in immovable property located in France, in accordance with Article 990 E of the French Tax Code, as well as the tax returns made by natural persons who are resident for tax purposes in France in relation to immovable property which is subject to the tax.

31 The French Government explains that, by contrast with the obligations of mutual assistance imposed in the legal context of the European Union, EEA countries which are not Member States of the European Union are not required to transpose Directive 77/799 into national law. Accordingly, in the absence of a convention containing an administrative assistance clause or a treaty containing a clause prohibiting discrimination in matters of taxation, the French tax authorities are not in a position to make a request directly to the tax authorities of the Principality of Liechtenstein for all the necessary information.

32 It is necessary, therefore, to determine whether the restriction in question is justified by the public interest in combating tax evasion and the need to safeguard the effectiveness of fiscal supervision.

The justification based on the fight against tax evasion and the need to safeguard the effectiveness of fiscal supervision

33 Concerning the justification based on the fight against tax evasion and the need to safeguard the effectiveness of fiscal supervision, it should be noted that a restriction on the free movement of capital is permissible on that ground only if it is appropriate to ensuring the attainment of the objective thus pursued and does not go beyond what is necessary to attain that objective (Case C?446/03 *Marks & Spencer* [2005] ECR I?10837, paragraph 35; Case C?196/04 *Cadbury Schweppes and Cadbury Schweppes Overseas* [2006] ECR I-?7995, paragraph 47; Case C?524/04 *Test Claimants in the Thin Cap Group Litigation* [2007] ECR I?2107, paragraph 64; and Case C?101/05 *A* [2007] ECR I?11531, paragraph 55).

34 Thus, a justification based on the fight against tax evasion is permissible only if it targets purely artificial contrivances, the aim of which is to circumvent tax law, and in consequence any general presumption of evasion is excluded. Accordingly, a general presumption of tax avoidance or evasion is insufficient to justify a tax measure which adversely affects the objectives of the Treaty (see, to that effect, Case C?478/98 *Commission* v *Belgium* [2000] ECR I?7587, paragraph 45, and *Cadbury Schweppes and Cadbury Schweppes Overseas*, paragraph 50 and the case-law cited).

35 A Member State may, therefore, apply measures which enable the amount owed by taxpayers to be ascertained clearly and precisely (see Case C?39/04 *Laboratoires Fournier* [2005] ECR I-2057, paragraph 24).

36 Regarding the national legislation at issue, the Court has already held – in *ELISA* – that that legislation is appropriate to the objective of combating tax evasion because it makes it possible to combat practices the sole aim of which is to enable natural persons to avoid paying the tax on capital in France, or at least to make such practices less attractive.

37 The Court nevertheless held that, where it is not possible for the French tax authorities to request, on the basis of a convention concluded with the Member State in whose territory the legal person concerned has its seat, the cooperation of the tax authorities of that Member State, there is no reason why the French tax authorities should not call upon the taxpayer to produce the evidence that they consider necessary for a correct assessment of the taxes and duties concerned and, as the case may be, refuse the exemption applied for if that evidence is not forthcoming.

38 It has been noted that the French legislation at issue in the main proceedings does not allow companies which are excluded from the scope of a convention on administrative assistance and which are not covered by a treaty containing a clause prohibiting discrimination in matters of taxation, but which invest in immovable property located in France, to provide documentary evidence of the identity of their shareholders and any other information which the French tax authorities consider to be necessary. As a result, the Court has held that that legislation prevents those companies from ever being able to demonstrate that their objective is not one of tax evasion. The Court concluded that the French Government could have adopted less restrictive measures in order to attain the objective of combating tax evasion and, as a consequence, that the disputed tax cannot be justified in terms of that objective (see *ELISA*, paragraphs 99 to 101).

39 It should nevertheless be noted that the case which gave rise to the judgment in *ELISA* involved a set of facts concerning Member States of the European Union, not non-member States. As a consequence, as was pointed out in paragraph 19 of this judgment, the answers provided by that judgment to the questions referred concern only relations between Member States of the European Union.

40 However, it should be borne in mind that the case-law concerning restrictions on the exercise of the freedoms of movement within the European Union cannot be transposed in its entirety to movements of capital between Member States and non-member States, since such movements take place in a different legal context (see *A*, paragraph 60, and Case C?540/07 *Commission* v *Italy* [2009] ECR I?10983, paragraph 69).

41 In that regard, it should be observed that the framework established by Directive 77/799 for cooperation between the competent authorities of the Member States does not exist between those authorities and the competent authorities of a non-member State where that State has not entered into any undertaking of mutual assistance (see *Commission* v *Italy*, paragraph 70)

42 Admittedly, Annex XXII to the EEA Agreement provides that the EFTA States are required to transpose into their national law the directives which harmonise company law, including those governing corporate accounting. Those measures offer the taxpayer the opportunity to produce reliable, verifiable data about a company established in a country which is party to the EEA Agreement. In the present case, however, it is common ground that Directive 77/799 does not apply as between the competent authorities of the Member States and those of the Principality of Liechtenstein.

43 Accordingly, in the case before the referring court, the French tax authorities are unable to obtain from the tax authorities of the Principality of Liechtenstein the information needed to exercise effective supervision of the information provided by the companies liable for payment of the tax in dispute.

44 It follows that, where the legislation of a Member State makes the grant of a tax advantage dependent on satisfying requirements, compliance with which can be verified only by obtaining information from the competent authorities of an EEA country which is not a Member State of the European Union, it is in principle legitimate for the Member State to refuse to grant that advantage if – in particular, because that non-member State is not bound under an agreement to provide information – it proves impossible to obtain such information from that country.

45 As regards, in particular, the question whether the French tax authorities should, as the Commission maintains, conduct a case-by-case assessment of the information provided by a company established in an EEA country, it should be noted that it is apparent from *ELISA* that, in the context of the European Union, a categorical refusal to grant a tax advantage is not justified, as there is no reason why the French tax authorities should not call upon the taxpayer to produce the evidence that they consider necessary for a correct assessment of the taxes and duties concerned and, as the case may be, refuse the exemption applied for if that evidence is not forthcoming.

46 That case-law does not apply, however, to the different situation of a company established in the Principality of Liechtenstein. Even though, in the situation which was under consideration in *ELISA*, the Luxembourg authorities were not, by virtue of Article 8(1) of Directive 77/799, under any obligation in principle to provide information, the fact remains that the regulatory framework is quite different.

47 First, under Article 1(1) of Directive 77/799, the competent authorities of the Member States are to exchange any information that may enable them to effect a correct assessment of taxes on income and on capital, and any information relating to the establishment of taxes on insurance premiums. In order to implement that exchange of information, Directive 77/799 sets up a regulatory framework, Article 3 providing for the automatic exchange of information and Article 4 for the spontaneous exchange of information. Directive 77/799 also lays down time-limits for forwarding information (Article 5), and provides for cooperation by State officials (Article 6), for consultation (Article 9) and the pooling of experience (Article 10).

48 It is thus only by way of derogation that Article 8 of Directive 77/799, entitled ‘Limits to exchange of information’, provides for exceptions to the exchange of information. Since that provision provides for a derogation, it falls to be narrowly construed. Furthermore, by virtue of the principle of cooperation in good faith, the Member States are required truly to engage in the exchange of information provided for under Directive 77/799.

49 In that regulatory framework, the possibility acknowledged in *ELISA* that the taxpayer can produce evidence which the French tax authorities must consider thus emerges as a measure intended to prevent the limit which, through the application of Article 8, has been imposed by the general system for the exchange of information, from acting to the detriment of the taxpayer.

50 Although, therefore, that possibility is based on the existence of a general system for the exchange of information, as introduced by Directive 77/799, and accordingly dependent on such a system, the existence of a right of that kind cannot be recognised in the case of a taxpayer in circumstances such as those of the case before the referring court, which are characterised by the lack of any obligation on the tax authorities of the Principality of Liechtenstein to lend assistance.

51 In those circumstances, legislation such as that at issue in the main proceedings must be regarded as justified, vis-à-vis a country which is party to the EEA Agreement, for overriding reasons relating to the general interest in combating tax evasion and the need to safeguard the effectiveness of fiscal supervision, and as appropriate to ensuring the attainment of the objective pursued, without going beyond what is necessary to attain that objective.

52 It follows from the foregoing that Article 40 of the EEA Agreement does not preclude national legislation such as that at issue in the main proceedings, which exempts from the disputed tax companies which have their seat in a Member State of the European Union and which, in respect of a company which has its seat in the territory of an EEA country which is not a Member State of the European Union, makes that exemption conditional either on the existence of a convention on administrative assistance between the Member State and the non-member State for the purposes of combating tax evasion and avoidance or on the fact that, pursuant to a treaty containing a clause prohibiting discrimination on grounds of nationality, those legal persons must not be taxed more heavily than companies established in that Member State.

Costs

53 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 (Third Chamber) hereby rules:

Article 40 of the Agreement on the European Economic Area of 2 May 1992 does not preclude national legislation such as that at issue in the main proceedings, which exempts from the tax on the market value of immovable property located in a Member State of the European Union companies which have their seat in that Member State and which, in respect of a company which has its seat in a country belonging to the European Economic Area which is not a Member State of the European Union, makes that exemption conditional either on the existence of a convention on administrative assistance between the Member State and the non-member State for the purposes of combating tax evasion and avoidance or on the fact that, pursuant to a treaty containing a clause prohibiting discrimination on grounds of nationality, those legal persons must not be taxed more heavily than companies established in that Member State.

[Signatures]

* Language of the case: French.