OPINION OF ADVOCATE GENERAL JÄÄSKINEN
delivered on 29 April 2010[1]

I — Introduction

1. The reference for a preliminary ruling in this case was made by the Commercial, Financial and Economic Chamber of the Cour de Cassation (Court of Cassation) (France). It relates essentially to the interpretation of Article 40 of the Agreement on the European Economic Area ('EEA') of 2 May 1992 ('the EEA Agreement'),[2] in the context of the application of the tax legislation of a Member State to a company which is established in the Principality of Liechtenstein, a party to the EEA Agreement but not a Member State of the European Union (an 'EEA country'). The question has raised some interest among the Member States, nine of which have submitted written observations.

2. This case will allow the Court to enlarge upon the case-law laid down in *ELISA*[3] and *A*[4] concerning the justifications for restrictions on the free movement of capital in the context of direct taxation and to provide some clarification with regard to the rules applicable to situations involving EEA countries.

II — Legal context

A — *European Union law ('EU law')*

3. Article 56(1) EC prohibits, within the framework of the provisions set out in Chapter 4, all restrictions on the movement of capital and payments between Member States and between Member States and third countries.[5]

4. Article 57(1) EC provides as follows:

'1. The provisions of Article 56 shall be without prejudice to the application to third

1 — Original language: French.
2 — OJ 1994 L 1, p. 3.
3 — Case C-451/05 *Elisa* [2007] ECR I-8251.
4 — Case C-101/05 *A* [2007] ECR I-11531.
5 — Since the reference for a preliminary ruling is dated 10 February 2009, the provisions of the EC Treaty will be referred to in accordance with the numbering applicable before the entry into force of the Treaty on the Functioning of the European Union.

countries of any restrictions which exist on 31 December 1993 under national or Community 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.'

5. Article 58 EC provides:

'1. The provisions of Article 56 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 56.'

6. Article 4 of the EEA Agreement is worded as follows:

'Within the scope of application of this Agreement, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.'

7. Chapter 4 of the EEA Agreement, which concerns the free movement of capital, reflects the provisions of the EEC Treaty and of Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty (a provision repealed by the Treaty of Amsterdam),[6] in the version in

6 — OJ 1988 L 178, p. 5.

force before the amendments introduced by the Treaty on European Union. 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.'

8. Annex XII to the EEA Agreement declares Directive 88/361 applicable to the EEA. Annex I to Directive 88/361, which establishes the nomenclature in respect of movements of capital and which, in relation to the definition of 'capital movements', has retained its indicative value, [7] states that that concept covers transactions by which non-residents make investments in real estate on the national territory.

9. 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 [8] may be relied on by a Member State for the purposes of obtaining from the competent authorities of another Member State all the information required to enable it to make an accurate assessment of the amount of tax covered by that directive.

B — *National law*

10. Articles 990D et seq. of the Code général des impôts ('the French Tax Code') form part of the measures adopted by the French legislature to combat certain forms of tax fraud.

11. Article 990D of the French Tax Code is worded as follows: [9]

'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.

7 — See Case C-222/97 *Trummer and Mayer* [1999] ECR I-1661, paragraph 21.

8 — OJ 1977 L 336, p. 15, as amended by Council Directive 92/12/EEC of 25 February 1992 (OJ 1992 L 76, p. 1).

9 — In the version resulting from Law No 92-1376 of 30 December 1992 establishing a finance law for 1993 (*Journal officiel de la République française* of 31 December 1992, p. 18058).

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.'

12. Under Article 990E of the French Tax Code,[10] the tax provided for in Article 990D thereof is not applicable to the following:

'...

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 tax avoidance, declare each year, by 15 May at the latest, at the place established by the decree referred to in Article 990F, the location, description and value of the properties in their possession as at 1 January, the identity and the address of their members at the same date and the number of shares held by each of them;

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, if 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 990D or, in respect of the properties, rights or interests already owned as at 1 January 1993, by 15 May 1993 at the latest;

4. ... companies whose shares are included in the official listing or the secondary market listing of a French stock exchange or a foreign stock exchange governed by similar rules;

...'

10 — In the version resulting from Law No 92-1376.

13. At the material time, no convention of the type referred to in point(2) of Article 990E of the French Tax Code had been concluded between the French Republic and the Principality of Liechtenstein. [11]

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

14. Établissements Rimbaud SA ('Établissements Rimbaud'), which has its seat in Liechtenstein, owns immovable property in France. On that basis, it is, in principle, liable to pay the 3% tax introduced by Article 990D of the French Tax Code.

15. The French tax authorities recovered the tax in question from Établissements Rimbaud, initially for the years 1988 to 1997 and then for the years 1998 to 2000.

16. Établissements Rimbaud brought an action against the decisions refusing its applications for cancellation of the disputed tax. After its applications were dismissed by the Tribunal de grande instance d'Aix-en-Provence (Regional Court of Aix-en-Provence) and then by the Cour d'appel d'Aix-en-Provence (Court of Appeal, Aix-en-Provence), Établissements Rimbaud brought an appeal before the Cour de cassation.

17. In the context of its examination of that appeal, the Cour de cassation referred the following question to the Court for a preliminary ruling:

'Does Article 40 of the Agreement on the European Economic Area preclude legislation such as that imposed by Article 990D et seq. of the Code général des impôts, 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 European Economic Area which is not a Member State of the European Union, makes that exemption subject either to the existence of a convention on administrative assistance between France 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 legal persons cannot be more heavily taxed than companies established in France?'

IV — Procedure before the Court

18. The reference for a preliminary ruling was lodged at the Registry of the Court on 18 February 2009.

11 — The agreement between the French Government and the Government of Liechtenstein on the exchange of tax information, signed on 22 September 2009, has no bearing on the case before the referring court, since it postdates it.

19. Written observations have been lodged by Établissements Rimbaud, by the German, Estonian, Greek, Spanish, French, Italian, Netherlands, Swedish and United Kingdom Governments, and by the Commission of the European Communities, the Government of Liechtenstein and the EFTA Surveillance Authority.

20. At the hearing on 3 February 2010, the representative of Établissements Rimbaud, the Agents for the Estonian, Greek, Spanish, French, Swedish and United Kingdom Governments and the Agents for the Commission and the EFTA Surveillance Authority made their oral observations. [12]

V — Position of the parties

21. Établissements Rimbaud maintains that Article 40 of the EEA Agreement precludes legislation, such as Article 990D et seq. of the French Tax Code, 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 makes that exemption conditional, for companies whose seat is in an EEA country, upon discriminatory conditions.

22. Similarly, the EFTA Surveillance Authority, the Commission and the Government of Liechtenstein maintain that Article 40 of the EEA Agreement precludes national legislation such as that at issue in the main proceedings, since it does not allow the company established in an EEA country to provide evidence to establish the identity of the natural persons who are its shareholders.

23. By contrast, the Member States which have submitted written observations all take the view that Article 40 of the EEA Agreement does not preclude such legislation.

VI — Analysis

A — *Preliminary remarks*

24. It should be noted at the outset that the Court has already had occasion to analyse the provisions of the French Tax Code which are at issue in the case before the referring court. In *ELISA*, a judgment arising from a reference

12 — The Agent for the Government of Liechtenstein, who had announced that he would be present at the hearing, was finally unable to attend because of bad weather.

for a preliminary ruling from the Cour de cassation, the Court stated that, in relations between Member States, EU law precluded legislation such as the French legislation at issue. In the present case, which also originates from the Cour de cassation, the Court is therefore called upon to give a ruling only on the question whether the restriction likely to arise from the national provisions at issue can be justified under the EEA Agreement, that is to say, in a situation midway between, on the one hand, relations exclusively between EU Member States and, on the other, relations between EU Member States and non-EEA third countries.

25. As regards the temporal aspect of this case, it should be noted that the Cour de Cassation has requested an interpretation of Article 40 of the EEA Agreement. Since the Principality of Liechtenstein has been party to the EEA Agreement since 1 May 1995, the Court is therefore called upon to interpret the legal rules in force from that date. [13]

26. As Advocate General Bot explained in his Opinion in *A*, [14] the movement of capital, between Member States on the one hand, and between Member States and third countries on the other hand, has been the subject of gradual liberalisation. In the Treaty establishing the European Economic Community, movement of capital within and outside the Community was the subject of separate provisions that were not strictly binding on the Member States. A significant step was taken with Directive 88/361, which provided for the complete and unconditional liberalisation of the movement of capital between Member States. As regards external relations, Directive 88/361 was less binding, since the Member States were required only to endeavour to attain with respect to third countries the same degree of liberalisation as that which applied within the Community.

27. The Treaty on European Union, signed at Maastricht on 7 February 1992, enshrined the free movement of capital as one of the fundamental freedoms guaranteed by the EC Treaty, not only as regards movements between the Member States but also between those States and third countries. Thus, under Article 56(1) EC, '[w]ithin 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'. That provision was applicable from 1 January 1994.

28. However, the EEA Agreement contains no provisions similar to those laid down in

13 — Before that date, the Principality of Liechtenstein was a third country to which no specific arrangement was applicable. After that date, certain transitional provisions for the implementation of directives were applicable (transposition period for certain Community directives).

14 — Opinion delivered on 11 September 2007, points 38 to 45.

Articles 57 EC and 58 EC. Nevertheless, there seems to me to be no doubt that the obligations of the Member States towards the EEA countries under Article 40 of the EEA Agreement cannot be more binding than the obligations under Article 58 EC. Furthermore, the principles of *lex posterior derogat legi priori* and *lex specialis derogat legi generali* seem to preclude any application of Article 57(1) EC to relations between the Member States and the Principality of Liechtenstein.

29. Accordingly, Article 57(1) EC does not appear to apply from the date of the entry into force of the EEA Agreement in respect of the third country in question.

30. Attention should be drawn to a second temporal aspect. It is apparent from the order for reference that the capital movement at issue in the main proceedings – namely, an investment in immovable property – predated the introduction of the free movement of capital both within the European Union and in relations between the Member States and EEA countries. Accordingly, since Établissements Rimbaud made the investment well before the relevant dates, it did not, strictly speaking, exercise the fundamental freedom in question. Nevertheless, that fact does not seem to me to have any bearing on the answer to be given by the Court to the Cour de Cassation concerning the system of rules applicable after the date of the entry into force of the EEA Agreement with respect to the Principality of Liechtenstein. [15] The effects of the free movement of capital should be the same for existing investments and for new investments, from the standpoint of their tax treatment.

31. For the purposes of my analysis, I shall first briefly discuss the case-law deriving from *ELISA* and *Ospelt and Schlössle Weissenberg* [16] on the free movement of capital in the field of direct taxation in relations between the Member States, on the one hand, and in relations between those States and the EEA countries, on the other hand; and I shall then compare the two systems of rules. Lastly, I shall analyse the justifications put forward in support of a difference in treatment.

B — *Case-law on the free movement of capital in the field of direct taxation*

32. As regards relations between the Member States, the Court ruled earlier in *ELISA* that 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 companies, when, in respect of companies established in

15 — It should be noted that Annex XII to the EEA Agreement does not generally distinguish between existing investments and new investments. That distinction is drawn only in specific cases, see, in particular, paragraph 1(e) of that annex, and Case C-300/01 *Salzmann* [2003] ECR I-4899, paragraph 4.

16 — Case C-452/01 [2003] ECR I-9743.

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 evasion and tax avoidance 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 provide evidence to establish the identity of the natural persons who are its shareholders. [17]

33. In *ELISA*, the Court established that there was a restriction on the principle of free movement of capital. The Court went on to consider whether that restriction was justified by an overriding requirement relating to the general interest. After confirming that the disputed tax made it possible to combat practices which have no objective other than to enable natural persons to avoid payment of the tax on capital in France, the Court analysed the proportionality of the measure. It noted that the disputed tax fell within the scope of the cooperation established by Directive 77/799 and also that the possibility for the taxpayer to provide documentary evidence should not be automatically ruled out. The Court concluded that, vis-à-vis other Member States, the French Republic could have adopted less restrictive measures in order to attain the objective of combating tax evasion.

34. However, Établissements Rimbaud is not established in a Member State, but in the Principality of Liechtenstein, which has been an EEA country since 1 May 1995.

35. In that connection, it should be noted that one of the principal aims of the EEA Agreement is to bring about as fully as possible the free movement of goods, persons, services and capital within the whole EEA, so that the internal market established within the territory of the Community is extended to the EFTA States. From that angle, a number of provisions in the EEA Agreement are intended to ensure that the interpretation

17 — See *ELISA*, paragraph 102. I would point out that, following *ELISA*, Article 990E of the French Tax Code was amended by Law No 2007-1824 of 25 December 2007 (JORF of 28 December 2007, p. 21482). In the version now applicable, Article 990E of the French Tax Code provides, inter alia, that the tax provided for in Article 990D is not applicable to '… 3. … legal entities: legal persons, bodies, trusts or similar institutions having their seat in France, in a Member State of the European Union or in a country or territory which has concluded a convention on administrative assistance with France for the purposes of combating tax evasion and tax avoidance or in a State which has concluded a treaty with France allowing them to enjoy the same treatment as entities having their seat in France …'

of that Agreement is as uniform as possible throughout the EEA. [18] It is for the Court, in that context, to ensure that the rules in the EEA Agreement which are identical in substance to those of the Treaty are interpreted uniformly within the EU Member States. [19]

36. Accordingly, although restrictions on the free movement of capital between nationals of States which are 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 and implications as Article 56 EC, [20] which is identical in substance, notwithstanding any differences which may exist in the wording of those provisions.

37. The Court also held that the concept of restrictions on movements of capital falls to be interpreted in the same way in relations between EU Member States and third countries, on the one hand, or exclusively between EU Member States, on the other. [21]

38. It seems clear to me that, in the case before the referring court, there is a difference in treatment in terms of the free movement of capital, depending on whether the seat of the company is located in France or in Liechtenstein.

39. It is settled case-law that discrimination arises through the application of different rules to comparable situations or the application of the same rule to different situations. [22]

40. In relation to direct taxes, the situation of residents and the situation of non-residents are not generally comparable. [23] As a consequence, a difference in treatment between resident taxpayers and non-resident taxpayers cannot be categorised, in itself, as discrimination for the purposes of the Treaty. [24]

41. As Advocate General Mazák stated in his Opinion in *ELISA*, [25] it is clear from the case-law of the Court that national tax legislation such as the legislation at issue in that case may be regarded as compatible with the Treaty provisions on the free movement of capital, if the difference in treatment concerns situations which are not objectively comparable. As regards the situation which gives rise to the obligation to pay the tax at issue in *ELISA* – that is to say, the direct or indirect ownership of immovable property in France, or the holding of rights *in rem* in relation to such property, by legal persons on 1 January of a given

18 — See Opinion 1/92 [1992] ECR I-2821.

19 — *Ospelt and Schlössle Weissenberg*, paragraph 29

20 — See Case C-521/07 *Commission* v *Netherlands* [2009] ECR I-4873, paragraph 33, and Case C-540/07 *Commission* v *Italy* [2009] ECR I-10983, paragraph 66.

21 — See *A*, paragraph 31, and the Opinion of Advocate General Bot, point 73 et seq.

22 — See Case C-279/93 *Schumacker* [1995] ECR I-225, paragraph 30; Case C-80/94 *Wielockx* [1995] ECR I-2493, paragraph 17; Case C-374/04 *Test Claimants in Class IV of the ACT Group Litigation* [2006] ECR I-11673, paragraph 46, and Case C-282/07 *Truck Center* [2008] ECR I-10767, paragraph 37.

23 — See *Schumacker,* paragraph 31; *Wielockx*, paragraph 18; and *Truck Center*, paragraph 38.

24 — See *Wielockx*, paragraph 19; Case C-170/05 *Denkavit Internationaal and Denkavit France* [2006] ECR I-11949, paragraph 24; and *Truck Center*, paragraph 39.

25 — Points 86 to 92 of the Opinion.

year – legal persons whose effective centre of management is in France and legal persons whose effective centre of management is outside France are on the same footing in relation to the taxation of immovable property. Accordingly, when it comes to the grant of an advantage in respect of the same tax, such as an exemption, those rules cannot treat such persons differently without giving rise to discrimination: by treating the two types of legal person in the same way for the purposes of taxing their immovable property, the French legislature has in fact acknowledged that there is no objective difference between their positions as regards the detailed rules and conditions relating to that taxation which could justify different treatment. Accordingly, in circumstances such as those in *ELISA*, the effect of the national legislation at issue is to treat differently legal persons which are in objectively comparable situations.

42. It seems to me that that line of reasoning of Advocate General Mazák can be directly transposed to the present case.

43. The question which arises, therefore, is whether such a difference in treatment can be justified in the light of the relevant legal framework.

C — *Permissible restrictions under Article 40 of the EEA Agreement*

44. I consider that the interpretation and application of Article 40 of the EEA Agreement must, in the field of direct taxation, take into account the particular features of the legal framework applicable to the individual case, that is to say, as regards the present case, the absence of provisions relating to administrative tax cooperation under the EEA Agreement, on the one hand, and the absence of a tax convention between the Member State concerned and the EEA country concerned, on the other hand.

45. The Court has recognised that a restriction on the free movement of capital between a Member State and the EEA countries was justified by an overriding requirement relating to the general interest, namely, that of combating tax evasion. [26]

46. Thus, the case-law relating to restrictions on the exercise of freedom of movement within the European Union cannot be transposed in its entirety to movements of capital between the Member States and third countries, since the legal context of such movements is different. [27]

26 — See *Commission* v *Italy*, paragraph 68.
27 — See, to that effect, *A*, paragraph 60.

47. In the present case, it should first be noted that no framework for cooperation, comparable to that established between the competent authorities of the various Member States by Directive 77/799, exists between the competent authorities of a Member State and those of a third country – even where it is party to the EEA – if that country has given no undertaking of mutual assistance.

48. It is common ground that, during the relevant period, no additional arrangements for the exchange of information existed between the French Republic and the Principality of Liechtenstein.

49. At the hearing, the EFTA Surveillance Authority referred to the difference that it discerns between, on the one hand, the taxation of a company's dividends, which constitute a 'mobile' tax basis, and, on the other hand, the taxation of a company's immovable property, which is located in a particular place – in the present case, France – and will remain so.

50. Even though it appears undeniable that the fixed nature of the tax basis of a property tax is important in the context of tax policy, it must be noted that property tax is a form of tax levied on elements of capital. [28] In paying that tax, an owner of immovable property is contributing, in particular, to the financing of costs relating to the physical and social infrastructure from which he benefits. It therefore seems to me, for reasons related to the differences between the taxation of dividends and property taxes, that the possibility of transposing the Court's interpretation in *Commission* v *Italy* cannot be ruled out.

51. The main issue in the present case is whether the difference between EU Member States and the EEA countries is such as to justify a difference in the treatment applied by national legislation to taxpayers in other EU Member States as compared with those in the EEA countries. Although *ELISA* is concerned only with relations between EU Member States, [29] the question arises whether the approach followed in that judgment also applies to relations between EU Member States and the EEA countries or whether the latter are to be assimilated to other third countries.

52. There are two aspects of the *ELISA* judgment which seem to me to be of importance for the purposes of the present case and from which the parties have drawn conflicting inferences. The first aspect concerns the possibility, based on the principle of proportionality, that the taxpayer could make up for the absence of a formal framework for cooperation between tax authorities – or the fact that it is not applicable in a specific case – by providing information directly to the tax authorities. The second aspect concerns the

28 — *ELISA*, paragraphs 35 to 37.

29 — *ELISA*, paragraph 10.

importance to be attached to the existence of such a formal framework in EU legislation.

53. I have some reservations about extending the scope of *ELISA* to the present case, in that that judgment envisages the possibility of replacing the mechanisms laid down for cooperation between the tax authorities of the various States with documentary evidence provided by the taxpayer. [30]

54. An efficient and fair direct taxation system can function only on the basis of trust in the information declared by taxpayers. That can be achieved only if the authorities have appropriate means of verifying the accuracy of the information provided by taxpayers, using other sources of information such as public records, tax inspections relating to the taxpayer's accounts or even, where appropriate, information provided by foreign tax authorities. In order for the information supplied by taxpayers to be reliable, it must also be verifiable by the authorities. [31] To require that the information provided by a taxpayer should be verifiable does not seem to me to be contrary, generally speaking, to the principle of proportionality.

55. Furthermore, in a tax system founded on the principle of legality, the tax authorities cannot refuse to take into account information supplied by a taxpayer without giving reasons for such a refusal. Since it seems inconceivable that the Court would have wished to grant such discretion to the tax authorities, it might be asked what criteria those authorities might use in order to determine that information is insufficient and that it is therefore necessary to produce the additional documentary evidence referred to in paragraph 99 of the judgment in *ELISA*, if – by definition – they are unable to verify the accuracy of the information concerned in the absence of any tax cooperation arrangements with the authorities of the State concerned.

56. The allocation of the burden of proof in tax law is a complex issue. So far as EU law is concerned, the case-law may be summarised as follows: the burden of proof concerning the absence of a legitimate objective justifying a tax arrangement falls on the tax authorities, but they may make certain presumptions as to the existence of an artificial arrangement. [32] It must always be possible for taxpayers to rebut such presumptions by proving the truth of the commercial objectives pursued by the arrangement in question. However, the

30 — *ELISA*, paragraphs 93 to 96.

31 — See *A*, paragraphs 61 and 62, in which the Court emphasises that it is important that the evidence should be reliable and verifiable.

32 — See, on the case-law, Weber, D., *Tax Avoidance and the EC Treaty Freedoms*, Kluwer Law International, 2005, p. 161 et seq., and the Commission Communication entitled 'The application of anti-abuse measures in the area of direct taxation – within the EU and in relation to third countries', COM(2007) 785 final, p. 3.

authorities are not bound by evidence which is not verifiable.

57. Furthermore, it is reasonable that a taxpayer should have to prove to the requisite legal standard that the conditions required for the enjoyment of exemptions and other tax advantages have been met. Article 990E of the French Tax Code seems to me to be consistent with that approach. The exemption is granted to any legal person supplying specific information, in so far as that evidence can be verified by the tax authorities, whether directly or in cooperation with the authorities of the other States concerned.

58. It is not my intention to call the *ELISA* judgment into question as regards relations between the Member States. None the less, I cannot propose that the Court's interpretation in that judgment be extended to cover relations with the EEA countries or other third countries, since, from the standpoint of the principle of proportionality, there is no material difference to my mind between the situations of taxpayers resident in those two categories of country. The Commission seems to be suggesting that the proportionality test does not apply to EEA countries in situations where there is no adequate information exchange relationship with the EEA country concerned. [33]

59. Furthermore, the Court's position in *A* concerning the effect of Community harmonisation measures on company accounts needs to be clarified. The Court's analysis must, in my view, be placed back in its proper context. [34] It seems to me that the Court's statements on that point refer to situations where a taxpayer provides documentary evidence to the tax authorities which they are not in a position to verify with the assistance of foreign tax authorities. The Court in no way regarded that situation as 'normal' or 'desirable': it merely emphasised that, in such a situation, the accounting records provided

33 — See the Commission Communication, footnote 32, p. 6: 'Anti-abuse measures must therefore be accurately targeted at wholly artificial arrangements designed to circumvent national legislation (or Community rules as transposed into national legislation). This is also the case with regard to the application of anti-abuse rules in relation to EEA States (except for situations where there is no adequate information exchange relationship with the EEA State concerned). In order to ensure that such rules are not disproportionate to the objective of curbing abuse and to guarantee legal certainty, adequate safeguards must be provided so that taxpayers have the opportunity to provide evidence of any commercial justifications that there may be for their arrangements.'

34 — Judgment in *A*, paragraph 62: 'In the second place, as the Advocate General pointed out at points 141 to 143 of his Opinion, with regard to the documentary evidence which the taxpayer may provide to enable the tax authorities to ascertain whether the requirements under national legislation are satisfied, the Community harmonisation measures on company accounts which apply in the Member States allow the taxpayer to produce reliable and verifiable evidence on the structure or activities of a company established in another Member State, whereas the taxpayer is not ensured of such an opportunity in the case of a company established in a third country which is not required to apply those Community measures.'

by a company established in an EEA country are more reliable than those provided by a company established in a third country which does not apply the same rules. The Court therefore made a comparative assessment. It should be pointed out that taxpayers in the Member States cannot demand that a company be taxed purely on the basis of its own accounts, even though they are a crucial starting point, subject to compliance with the accounting rules.

60. As regards the identification of shareholders, it should be noted that the directives adopted in the field of accounting are not concerned with the identity of shareholders. That issue is addressed by Directive 2004/109/EC, but only as regards notification of the acquisition or disposal of major holdings on a regulated market. [35] In any event, the identification of shareholders is a complex issue and the approaches adopted in the various Member States differ considerably, ranging from compulsory registration of shares to the possibility of issuing bearer shares.

61. In addition, attention should be drawn to the effects of the two principles underpinning the EEA Agreement: the principle of non-discrimination and the principle of uniform interpretation.

62. The free movement of capital is quite obviously covered by the Treaty and by the EEA Agreement. [36] In the case of taxation, those two systems are different. Under EU law, direct taxation falls within the competence of the Member States but they must exercise that competence consistently with EU law. [37] Nevertheless, the European Union has always had a measure of competence to adopt measures to approximate the tax provisions of the Member States, including those relating to direct taxation. That competence has been exercised for a considerable time. [38] As regards the EEA Agreement, which does

35 — Directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC (OJ 2004 L 390, p. 38, Articles 9 to 16).

36 — See, in particular, *Ospelt and Schlössle Weissenberg*, paragraph 31.

37 — See, inter alia, Case C-446/03 *Marks & Spencer* [2005] ECR I-10837, paragraph 29, and *Commission* v *Italy*, paragraph 28.

38 — See, in particular, Council Directive 90/434/EEC of 23 July 1990 on the common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States (OJ 1990 L 225, p. 1), repealed by Council Directive 2009/133/EC of 19 October 2009 (OJ 2009 L 310, p. 34); Council Directive 90/435/EEC of 23 July 1990 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States (OJ 1990 L 225, p. 6); Convention on the elimination of double taxation in connection with the adjustment of profits of associated enterprises (90/436/EEC) (OJ 1990 L 225, p. 10); Council Directive 2003/48/EC of 3 June 2003 on taxation of savings income in the form of interest payments (OJ 2003 L 157, p. 38), and Council Directive 2003/49/EC of 3 June 2003 on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States (OJ 2003 L 157, p. 49).

not incorporate all the elements and areas of the legal order of the European Union, the regulation of direct taxation is, *a fortiori*, less strict. [39]

63. To my way of thinking, the fact that the EEA Agreement does not cover direct taxation and makes no provision for a framework for administrative cooperation in the field of taxation means that there is a difference in the legal context.

64. Moreover, the framework for administrative cooperation in the field of taxation which was implemented with the adoption of Directive 77/977, and then strengthened by successive amendments to that directive, is currently being revised by the legislature on the basis of a Commission proposal. [40] Even before that proposal was adopted, the framework established by the European Union in that field is clearly already at an entirely different level from that applicable in relations with third countries, including the EEA countries. As between EU Member States, it does not seem to me to be an exaggeration to refer to the emergence of cooperation akin to solidarity in the field of taxation, which, although far from exhaustive, constitutes a single and developing framework. [41]

65. Accordingly, it seems to me that the difference identified at the level of the legal framework for tax cooperation fully justifies the difference in treatment as between relations exclusively between EU Member States, on the one hand, and those between EU Member States and the EEA countries, on the other hand.

66. In those circumstances, I propose that the Court reply to the Cour de cassation to the effect that Article 40 of the EEA Agreement does not preclude national legislation such as that at issue in the main proceedings.

67. So far as the dispute before the referring court is concerned, I would like, lastly, to add that it emerged at the hearing that Établissements Rimbaud is a company whose sole shareholder is a Swiss national who uses the property concerned as a secondary residence.

39 — For a broader interpretation, see EFTA Court judgment of 23 November 2004, *Fokus Bank ASA* (E-1/04, Report of EFTA Court, p. 15), paragraph 20 et seq.

40 — See proposal for a Council Directive on administrative cooperation in the field of taxation (COM(2009) 29 final).

41 — As the Court noted in *A*, paragraph 61, relations between the Member States take place against a common legal background, characterised by the existence of Community legislation, such as Directive 77/799, which laid down reciprocal obligations of mutual assistance. Even though, in the fields governed by that directive, the obligation to provide assistance is not unlimited, the fact remains that that directive established a framework for cooperation between the competent authorities of the Member States which does not exist between those authorities and the competent authorities of a third country where the latter has given no undertaking of mutual assistance.

The French tax authorities are probably aware of those details. It might reasonably be asked whether, in those circumstances, it does not seem unfair and disproportionate to allow the French authorities to deny that company the opportunity to establish the truth of that evidence.

68. Nevertheless, I shall avoid drawing such a conclusion. In some specific cases, the application of tax provisions imposing formal conditions may appear unfair. However, it does not seem to me inconceivable that a situation in which a national of a third country invests in immovable property located in a Member State and uses that property for private purposes, and does so through a company established in Liechtenstein of which he is the sole shareholder, might involve a wholly artificial arrangement. [42]

69. In any event, it is not for the Court to give a ruling on the taxation of the appellant in the case before the referring court. Furthermore, the Court does not have access to all the relevant facts in that regard. The Court's role is to give an interpretation of Article 40 of the EEA Agreement which is also applicable to cases involving an identical or similar factual situation. The interpretation of the EEA Agreement that I am proposing to the Court obviously does not preclude the application of national provisions seeking to remedy unfair individual tax situations, in so far as national legal systems incorporate such provisions.

42 — See, inter alia, Case C-196/04 *Cadbury Schweppes and Cadbury Schweppes Overseas* [2006] ECR I-7995, paragraphs 55 and 68, and Case C-524/04 *Test Claimants in the Thin Cap Group Litigation* [2007] ECR I-2107, paragraphs 72 and 74.

VII — Conclusion

70. In the light of all the foregoing considerations, I therefore propose that the question referred by the Cour de cassation for a preliminary ruling should be answered as follows:

Article 40 of the Agreement on the European Economic Area of 2 May 1992 does not preclude legislation such as that laid down in Article 990D et seq. of the French Code général des impôts, 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 State which belongs to the European Economic Area and which is not a Member State of the European Union, 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 evasion and tax avoidance or to the existence of a requirement in a treaty containing a clause prohibiting discrimination on grounds of nationality to the effect that those legal persons cannot be more heavily taxed than companies established in France.