OPINION OF MR ADVOCATE GENERAL LENZ
delivered on 10 February 1994 *

Mr President,
Members of the Court,

A — Introduction

1. This case arises from a reference to the Court for a preliminary ruling by the Hoge Raad der Nederlanden, made on a proposal from the Advocate General in the case, on the compatibility of an aspect of the Netherlands land transfer tax with Article 52 et seq. of the EEC Treaty.

2. The plaintiff in the main proceedings, Halliburton Services BV, which is established in the Netherlands, challenges a notice from the Netherlands Tax Administration by which the latter subsequently levied land transfer tax on the plaintiff in respect of the acquisition in the Netherlands of immovable property from Halliburton Company Germany GmbH.

3. The acquisition was part of a transaction in which Halliburton Company Germany GmbH transferred its undertaking, in so far as it was operated by its facilities in the Netherlands, to the plaintiff. The purpose was a reorganization of the international Halliburton Group whereby the 'Dutch' part of the German company was to be transferred to a Netherlands company. Within the group, Halliburton Inc. incorporated in the USA holds all the shares in the transferor (Halliburton Company Germany GmbH). Indirectly, namely via its wholly-owned subsidiary Halliburton Oilfield Services BV, it also holds all the shares in the transferee (Halliburton Services BV).

4. In view of those circumstances, the plaintiff takes the view that the acquisition of immovable property in question should be exempt from land transfer tax.

5. In that respect Article 15 of the Netherlands Wet op Belastingen van Rechtsverkeer (Law on the taxation of legal transactions) provides that the acquisition of immovable property 'on the internal reorganization of public limited companies and private limited companies' is exempt from land transfer tax.

* Original language: German.

Detailed conditions for exemption are contained in the Uitvoeringsbesluit Belastingen van Rechtsverkeer (Implementing Regulation on the taxation of transactions). Article 5(1) of that regulation provides that the acquisition must take place between companies in the same 'group'. According to Article 5(3) and (4):

'(3) "Group" means a company, the shares in which are not entirely or almost entirely, directly or indirectly, held by another company, together with any other companies in which it holds directly or indirectly all or nearly all of the shares.

(4) "Companies" means public companies limited by shares and private companies limited by shares.'

6. The plaintiff takes the view that the restriction of the exemption to public limited companies and private limited companies (incorporated under Netherlands law) is illegal.

7. In relation to that argument, the Hoge Raad first considered the significance of the legal form of the parent company for the purposes of the tax exemption sought by the plaintiff. It found that it would be contrary to the Double Taxation Agreement between the Netherlands and the USA if no exemption were granted on the ground that the parent company is neither a public nor a private limited company.

8. It then considered whether the legal form of Halliburton Company Germany GmbH as the transferor precluded the application of the exemption.

9. In order to resolve that doubt in the light of the provisions of the Treaty, it referred the following question to the Court for a preliminary ruling:

Where a Member State imposes a charge on the transfer of immovable property in that State or rights *in rem* relating thereto and allows relief where the transfer is part of an internal reorganization — see Articles 2 and 15(1)(h) of the Wet op Belastingen van Rechtsverkeer (Law on the taxation of legal transactions) in conjunction with Article 5 of the relevant implementing regulation (Uitvoeringsbesluit van Rechtsverkeer, 1986 version) — is it compatible with Article 7 of the Treaty establishing the European Economic Community, in conjunction with Articles 52 to 58 inclusive, for relief to be available if the transferor is a company incorporated under the laws of that Member State — in this case a 'naamloze vennootschap' or a 'besloten vennootschap met beperkte aansprakelijkheid' (a public or private limited company) — but not if it is a similar company incorporated under the laws of, and established in,

another Member State — in this case a 'Gesellschaft mit beschränkter Haftung'?

B — Analysis

10. *I.* In answering that question it may be observed, as the Commission pointed out in its observations, that the general prohibition in Article 7 of the Treaty (now Article 6 of the Treaty on European Union) does not apply in so far as Article 52 is applicable. [1] Examination of the present case must therefore begin with the latter provision.

11. *II. 1.* Whether the contested tax provision is contrary to Article 52 depends primarily on whether it impairs the right guaranteed by Article 52.

12. According to the case-law, freedom of establishment pursuant to Article 58 of the Treaty includes the right of companies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Community to pursue their activities in the Member State concerned through a branch or agency. [2] The Court has further observed that the seat of companies serves as the connecting factor with the legal system of a particular State, like nationality in the case of natural persons. [3]

13. (a) The Commission takes the view that the contested rule adversely affects companies whose seat is in Member States other than the Netherlands in exercising the right so defined. It points out that the reorganization of groups, which is the subject of the tax provision, is frequently accompanied by winding-up of a cross-frontier nature. In the present case the German company *gave up* its Netherlands establishment. It was thus a 'negative' act of establishment by the company.

14. In doing so it encountered a tax obstacle with which a Netherlands public or private limited company would not have been confronted in similar circumstances. The Commission considers the obstacle to lie, *inter alia*, in the fact that the tax on the acquisition of immovable property could have an effect upon the purchase price received by the transferor.

1 — See the judgment in Case 2/74 *Reyners* v *Belgium* [1974] ECR 631, paragraphs 15 and 16, and the judgment in Case 305/87 *Commission* v *Greece* [1989] ECR 1461, paragraph 28.

2 — Judgment in Case 270/83 *Commission* v *France* [1986] ECR 273, paragraph 18; likewise the judgment in Case C-330/91 *Commerzbank* [1993] ECR I-4017, paragraph 13.

3 — See the previous footnote.

15. The Netherlands Government takes a different view. It observes that neither the acquisition of the establishment by the transferor nor its operation is adversely affected.

16. Furthermore it is not the transferor but the transferee who is liable for the land transfer tax. As regards the effect, if any, of the tax on the purchase price, it contends that (even in relation to the situation on the acquisition of the property by the transferor) the effect is the result not of the tax provision itself but of an agreement between the parties. In the oral procedure it further pointed out that in the transaction under consideration the reorganization of the group was the primary object, and was not frustrated by the contested provision.

17. (b) Those arguments first of all raise the question whether the disposal of assets which represent the whole or part of the branch of a company with its seat in another Member State falls within the scope of freedom of establishment.

18. In my view, that question must be answered in the affirmative. Every business which intends to set up a branch must also consider the costs and risks associated with the disposal of assets which comprise the whole or part of that branch. That normally includes the real property of a business, for it is part of its 'permanent presence', which distinguishes activities connected with an establishment from those related to the provision of services. [4] A business of that kind must consider the need to dispose of such property if there is a change in economic circumstances in relation to the time when the establishment was set up. Burdens which arise in that connection therefore affect, if only indirectly, the 'taking up' of activities as self-employed persons within the meaning of Article 52 and thus, so far as concerns companies from other Member States, their previously defined freedom to set up branches.

19. In that connection reference must also be made to the possibility of a company giving up an existing branch in a Member State other than that of its seat in order to set up a similar establishment in a third Member State. That situation is to be equated with the case covered by Article 52, in which an undertaking leaves the State in which it was originally established in order to set up an establishment in another Member State, [5] and thus also comes within that provision.

4 — See the judgment in Case 205/84 *Commission* v *Germany* [1986] ECR 3755.

5 — See the judgment in Case 81/87 *The Queen* v *Treasury and Commissioners of Inland Revenue, ex parte Daily Mail and General Trust PLC* [1988] ECR 5483, paragraph 19.

20. In so far as only a partial surrender of the assets of the establishment is involved, the 'pursuit' of activities within the meaning of Article 52 is also affected. It may be important for the economic development of an establishment to dispose of assets it no longer needs. Any obstacles to such a sale therefore fall within the scope of Article 52. [6]

21. The special feature of the sale at issue in the present case namely that it was part of the reorganization of a group — and in any case had to be in order to qualify for tax exemption — does not remove it from the scope of Article 52. The basic freedom guaranteed by that provision applies to all companies having their seat in a Member State, whether or not they belong to a group. For the purposes of that provision, therefore, it is irrelevant what economic considerations inspired the sale (covered by Article 52) or which company instigated it (the subsidiary or the parent company).

22. In the result, sales of land for the purposes of the Netherlands tax rule in a situation such as this fall within the scope of Article 52.

23. (c) Next, it is necessary to consider whether the contested tax rule affects the right of establishment under that article.

24. (aa) In that respect it must be stated that the refusal to grant tax relief in the case of a sale by the transferor brings *disadvantages*. It cannot be denied that the taxing of the purchaser normally leads to pressure on the purchase price. It is therefore, to use the words of the Court in the *Kraus* judgment, 'likely to hinder or render less attractive the exercise by Community nationals of the basic freedoms guaranteed by the Treaty'. [7]

25. In that respect the causal link through which the disadvantage affects the company concerned is irrelevant. On that point I would refer to the *Segers* judgment [8] which was concerned with discrimination against *the staff* of the branch of a company having its seat in another Member State.

6 — See also the Council's General Programme for the abolition of restrictions on freedom of establishment (OJ, English Special Edition, Second Series IX, p. 7) and paragraph 22 of the judgment in *Commission* v *Greece*, ibid. (footnote 1): the right to acquire, use or dispose of immovable property on the territory of a Member State is the corollary of freedom of establishment.

7 — Judgment in Case C-19/92 *Kraus* v *Land Baden-Württemberg* [1993] ECR I-1663, paragraph 32.

8 — Case 79/85 *Segers* v *Bedrijfsvereniging voor Banken Verzekeringswezen, Groothandel en Vrije Beroepen* [1986] ECR 2375.

26. (bb) The obstacle to freedom of establishment so found, however, constitutes an impairment of the right conferred by Article 52 if 'the conditions laid down for its own nationals by the law of the country where such establishment is effected' [9] do not impose a comparable burden, with the result that discrimination is involved.

27. It follows from the provisions cited at the beginning of this Opinion, as interpreted by the Hoge Raad in the order of reference, that if the other conditions for tax exemption are fulfilled, such exemption is granted where the disposal is by a public or private limited company having its seat in the Netherlands but not if the transferor is a company which is incorporated under the law of another Member State and has its seat there. That constitutes discrimination which is prohibited by Article 52 if the companies excluded from the benefit of exemption are on the same footing, from the point of view of the scheme and purpose of that provision, as the Netherlands companies qualifying for exemption.

28. According to the wording and context of the question referred for a preliminary ruling, that condition is fulfilled in the case of the German transferor. The Hoge Raad assumes for the purposes of that question that the transferor is a company from another Member State 'similar' to a public or private limited company incorporated under Netherlands law.

29. In those circumstances there is undoubtedly an impairment, in the form of discrimination, of the right guaranteed by Article 52.

30. (cc) Should the Court have doubts as to whether the Hoge Raad is proceeding on the assumption that the German company is comparable to one of the two forms in which a company may be constituted under the Netherlands legislation, that would in no way preclude an infringement of Article 52.

31. According to the Netherlands legislation, tax exemption is denied from the outset if the transferor does not have its seat in the Netherlands but in another Member State. From the point of view of the scheme and purpose of the rule, whether the transferor is comparable to a public or private limited company incorporated under Netherlands law is, according to that legislation, irrelevant.

32. In that regard, the Netherlands Government observed that tax exemption is granted only if the companies concerned belong to the same 'group'. That term presupposes that the companies involved have a certain struc-

9 — See the wording of Article 52.

ture. In answer to a question from the Court, it explained the very different structures and agreements between the members of unlimited partnerships and limited partnerships. Accordingly, the Netherlands legislature did not consider it possible to lay down general rules for the purposes of tax exemption in the case of such partnerships or in the case of cooperatives and foundations. That was possible only in the case of public or private limited companies.

33. So far as the equal treatment of companies having their seat in another Member State is concerned, the Netherlands Government submits that it would be difficult to verify whether such a company had the same characteristics as a public or private limited company incorporated under Netherlands law. In answer to a question from the Court regarding the structural characteristics which a company having its seat in another Member State had to have in order to be assimilated to the companies incorporated under Netherlands law, the Netherlands Government specified the following four criteria:

— it must be a legal person;

— the capital must be in the form of shares;

— the liability of shareholders must be limited to their shareholding;

— all shareholders must in principle have a right to vote according to the nominal amount of their shares.

34. The Netherlands Government added that tax relief in the case of companies from other Member States could be granted only if the relevant legislative provisions were harmonized at Community level. As yet Community law provided no uniform definition of the term 'group', which was therefore still a matter for the Member States.

35. In response to that argument, the Commission and, in the oral procedure, the plaintiff in the main proceedings relied on the following directives:

— Council Directive 69/335/EEC of 17 July 1969 concerning indirect taxes on the raising of capital; [10]

10 — OJ, English Special Edition 1969 (II), p. 412.

— Council Directive 89/667/EEC of 21 December 1989 on single-member private limited-liability companies; [11]

— 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; [12]

— 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. [13]

36. It would seem to follow, in their view, that a GmbH incorporated under German law is to be equated with a Netherlands company with limited liability.

37. With regard to that argument, it must first be observed that as yet there has been no harmonization under Community law so far as concerns taxation of land transfers. Nor, so far as I know, is there any Community legislation *in this sector* regulating equivalence between the forms in which companies may be constituted in the Member States.

38. That observation applies in particular to the aforesaid directives. It is true that the relevant provisions on the scope of each directive state which companies the directive covers. Moreover, some of those rules equate the German GmbH with limited liability companies under Netherlands law (cf. for example Directive 89/677). They are equated, however, only for the purposes of the rules of the *relevant directive*. That does not necessarily mean that such companies must also be assimilated in every respect for the purposes of the Netherlands transfer tax.

39. So far as concerns Directive 90/434 in particular, I should also like to point out that it covers the relevant companies only as debtors of certain *direct* taxes (cf. Article 3) and is applicable to the 'transfer of assets' only if it takes place in exchange for the transfer of securities representing the capital of the company receiving the transfer (Article 2(c] .

40. That does not, however, mean that in a situation such as this the national authorities can refuse the tax relief sought merely because there is no relevant Community legislation on the equivalence of like forms of

11 — OJ 1989 L 395, p. 40; this is the Twelfth Council Company Law Directive.
12 — OJ 1990 L 225, p. 1.
13 — OJ 1990 L 225, p. 6.

companies in the Member States. The practical effect of the prohibition of discrimination in Article 52 presupposes that in a case such as this they compare the legal form of the transferor company from another Member State with the forms of the national companies which qualify for exemption.

41. In that connection it is necessary to consider the argument of the Netherlands Government which is based on the difficulties which such a comparison could entail in view of the variety of legal forms in which companies may be constituted in the Member States. In that regard it must be acknowledged that such a comparison could give rise to administrative costs greater than in the case of a property transaction between two Netherlands companies belonging to the same group.

42. That in itself, however, is not sufficient to relieve a Member State of the obligation to make a comparison. That proposition may be inferred from the case-law of the Court concerning a similar case: the practice of a profession in a Member State depends on a professional qualification, but there is no Community legislation providing for the mutual recognition of qualifications in the field in question. In such a case Article 52 encompasses *inter alia* the following principle:

'... a Member State which receives a request to admit a person to a profession to which access, under national law, depends upon the possession of a diploma or a professional qualification must take into consideration the diplomas, certificates and other evidence of qualifications which the person concerned has acquired in order to exercise the same profession in another Member State by making a comparison between the specialized knowledge and abilities certified by those diplomas and the knowledge and qualifications required by the national rules.

That examination procedure must enable the authorities of the host Member State to assure themselves, on an objective basis, that the foreign diploma certifies that its holder has knowledge and qualifications which are, if not identical, at least equivalent to those certified by the national diploma. That assessment of the equivalence of the foreign diploma must be carried out exclusively in the light of the level of knowledge and qualifications which its holder can be assumed to possess in the light of that diploma, having regard to the nature and duration of the studies and practical training to which the diploma relates.' [14]

43. The Court has laid down a similar principle in relation to the provision of services,

14 — Judgment in Case C-340/89 *Vlassopoulou* [1991] ECR I-2357, paragraphs 16 and 17; in Case C-104/91 *Aguirre Borrell and Others* [1992] ECR I-3003, paragraphs 11 and 12.

namely that freedom to provide services may be restricted by provisions which are justified by the general interest but only

'in so far as that interest is not safeguarded by the provisions to which the provider of a service is subject in the Member State of his establishment.' [15]

44. From that, the Court drew the conclusion that the conditions laid down by the relevant legislation of the State in which the service is provided

'may not duplicate equivalent statutory conditions which have already been satisfied in the State in which the undertaking is established and ... the supervisory authority of the State in which the service is provided must take into account supervision and verifications which have already been carried out in the Member State of establishment.' [16]

45. In my view, those principles imply that the host State cannot simply refer to 'difficulties' of verification if the exercise of the basic freedoms depends on its own provisions being compared with those of the State of origin. On the contrary, it is possible to propound the *rule* that it is *obliged* to undertake such verification and must accordingly accept the additional administrative costs involved.

46. An *exception* on the ground that such verification could give rise to unreasonable costs should be accepted, if at all, only in rare cases. Since in such cases the trader concerned relies on a rule of law favourable to him, he has the burden of proving that his claim is justified; in the present case, that a German GmbH satisfies the four criteria set out above. He must therefore furnish all the appropriate evidence and the host State may refuse to grant the relief sought if it is not convinced of the objective nature of the evidence submitted.

47. So far as concerns that evidence, the present case prompts an additional observation. It is true, as I have shown, that there are as yet no Community provisions on the harmonization or mutual recognition [17] of land transfer tax. Nevertheless the Member State concerned must have regard to the conclusions which may be drawn for these

15 — See the judgment in Case 279/80 *Webb* [1981] ECR 3305, paragraph 17; in Case 205/84 *Commission* v *Germany* [1986] ECR 3755, paragraph 27.

16 — Paragraph 47 of the judgment in *Commission* v *Germany*, cited in the previous footnote.

17 — For the sake of completeness, it should be noted that the Agreement of 29 February 1968 (pursuant to Article 220 of the Treaty) on the mutual recognition of companies and legal persons (*Bundesgesetzblatt* 1972 II, p. 370) has not as yet entered into force.

purposes from Community legislation in other sectors, even if they are limited to specific matters.

48. As regards two of the four criteria which the transferor must satisfy, [18] I should like, by way of example, to refer to Directive 89/667. It is clear from Article 2 that the capital of companies which, like the GmbH under German law, fall within the directive's scope is divided into company shares. Furthermore, it is apparent from the fifth recital in the preamble to the directive that the liability of shareholders is in principle limited to their shareholding.

49. (dd) The conclusion to be drawn from those considerations is that in the present case the right conferred by Article 52 would in any event be impaired if tax relief were refused, although, in the terms used by the Hoge Raad, the transferor is a company from another Member State 'corresponding' to a public or private limited company under Netherlands law. That would clearly be a case of unlawful discrimination.

50. Freedom of establishment would also be impaired if, although equivalence between the form in which the transferor was constituted and the form of the two Netherlands companies had yet to be established, no provision were made for verifying such equivalence or such verification were refused on other grounds.

51. *2.* No reasons have been given to justify such impairment of the freedom of establishment and they are not otherwise apparent. In particular, there is nothing to indicate that the strict [19] conditions laid down by Article 56 of the Treaty have been fulfilled.

C — Conclusion

52. For the aforementioned reasons, I propose that the question submitted by the Hoge Raad should be answered as follows:

Where a Member State imposes a charge on the acquisition of immovable property situated in that State or rights *in rem* relating thereto and allows relief where the

18 — See paragraph 33, above.

19 — Cf. the judgment in Case 30/77 *Bouchereau* [1977] ECR 1999, paragraph 35.

acquisition is part of an internal reorganization of a group if the companies within it are constituted in one of the specified legal forms, it is contrary to Articles 52 and 58 of the EEC Treaty for relief to be granted where the transferor is a company incorporated under the law of that Member State but not if the transferor is a similar company incorporated under the law of, and established in, another Member State.

If the transferor is a company incorporated under the law of, and established in, another Member State and it applies for such tax relief, the first Member State must examine whether the features of the transferor correspond to those of the companies constituted in the prescribed legal forms.