OPINION OF ADVOCATE GENERAL LÉGER

Delivered on 30 June 2005 [1]

1. This reference for a preliminary ruling seeks to enable the national court to determine the compatibility with the rules under the EC Treaty on the free movement of capital of the provision of the inheritance law of the Kingdom of the Netherlands which provides that a Dutch national who has transferred his residence outside that state is deemed, for the purposes of the taxation of his inheritance, still to be living there if he dies less than ten years after leaving the Netherlands.

2. The reference arises in the context of the litigation between the heirs of Mrs M.E.A. Van Hilten-van der Heijden [2] and the Netherlands Inland Revenue with regard to the inheritance duty claimed in respect of the deceased's estate.

3. Mrs Van Hilten, who had Dutch nationality and had lived in the Netherlands until 1988, had changed her residence, firstly to Belgium, and then from 1991 to Switzerland, where, from that time onwards, she was treated as having her tax residence.

4. She died on 22 November 1997, less than 10 years after having left the Netherlands. In accordance with the deemed residence established by Dutch inheritance law, she was treated as living in the Netherlands at the time of her death and her four heirs were assessed by the Dutch Inland Revenue for inheritance duty on the whole of the inheritance they received pursuant to the inheritance law of that Member State.

5. The heirs appealed to the Gerechtshof te 's-Hertogenbosch (Netherlands) against the refusal by the Inland Revenue of their claim. The national court considers that that the deemed residence provided for by Dutch law constitutes an obstacle to the free movement of capital. It has referred to the Court two preliminary questions aimed at enabling it to assess whether this national legislation could be justified by the articles of the Treaty

1 — Original language: French.

2 — Hereafter 'Mrs Van Hilten'.

which authorise Member States to maintain or adopt certain measures restricting that freedom.

I — Legal Context

A — *Community law*

6. The free movement of capital has been recognised in Community law in stages. Thus, Article 67(1) EEC,[3] in contrast with the provisions concerning the free movement of goods, persons and services, only required Member States to ease restrictions on movements of capital 'to the extent necessary for the proper functioning of the common market'.

7. Council Directive 88/361 EEC,[4] laid down the principle of the free movement of capital within the European Community, providing in Article 1 for the abolition of restrictions on movements of capital taking place between persons resident in the Member States, but subject to the limitations contained in its other provisions.

8. In order to facilitate the implementation of this freedom of movement, Directive 88/361 included in Annex I a non-exhaustive nomenclature of movements of capital. This nomenclature contains 13 headings, among which is heading XI, entitled 'Personal Capital Movements', which covers several transactions such as gifts and endowments, as well as, at item D, inheritances and legacies. Heading XIII, entitled 'Other Capital Movements', lists at item A death duties.

9. The Treaty on European Union replaced, with effect from 1 January 1994, the Articles of the EC Treaty relating to the free movement of capital by, in particular, Articles 73b to 73d of the Treaty,[5] which are the provisions applicable at the time of this case.

10. Article 73b of the Treaty confirms the principle of the free movement of capital established by Directive 88/361 and extends its scope to third countries, thus going

3 — Subsequently Article 67(1) of the EC Treaty, but repealed by the Treaty of Amsterdam.

4 — Directive of 24 June 1988, implementing Article 67 of the Treaty (OJ 1988 L 178, p. 5).

5 — Now, respectively, Articles 56 EC to 58 EC.

beyond the ambit of the other freedoms of movement. This article provides, in paragraph 1:

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

11. The Treaty nonetheless contains derogations from this principle in Articles 73c and 73d, on the interpretation of which turn in essence the questions asked by the national court.

12. Thus, Article 73c of the Treaty permits the Member States to continue in force restrictions on certain movements of capital between Member States and third countries. It states in paragraph 1:

'The provisions of Article 73b shall be without prejudice to the application to third 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.'

13. Article 73d of the Treaty permits Member States to apply or introduce certain restrictive measures on all movements of capital, both between Member States and between Member States and third countries. It provides:

'1. The provisions of Article 73b 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.

2. The provisions of this Chapter shall be without prejudice to the applicability of restrictions on the right of establishment which are compatible with this Treaty.

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 73b.'

14. The scope of the derogation contained in Article 73d of the Treaty was the subject of a declaration by the representatives of the governments of the Member States, [6] as follows:

'The Conference states that the right of the Member States to apply the relevant provisions of their tax law referred to in Article 73d(1)(a) of the Treaty establishing the European Community affect only the provisions which exist at the end of 1993. However, this declaration is only applicable to movements of capital and payments between Member States.'

6 — Treaty on European Union — Declaration on Article 73d of the Treaty establishing the European Community, annexed to the Final Act of the Treaty on European Union (OJ 1992 C 191, p. 99).

15. The Gerechtshof te 's-Hertogenbosch having cited Articles 57(1) EC and 58(3) EC in its preliminary questions, and this new numbering of the articles only being applicable from 1 May 1999, the date the Treaty of Amsterdam came into force, I take the references to be to the identical provisions of Articles 73c(1) and 73d(3) of the Treaty.

B — *The national provisions*

16. The provisions applicable in the present case are contained in the Inheritance Law of 1956 (Successiewet 1956). [7] According to Article 1 of the SW, inheritance duty is due on the value of all that is received by virtue of Dutch inheritance law because of the death of a person resident in the Netherlands at the time of death.

17. Article 3(1) of the SW provides:

'A Dutch national, who has lived in the Kingdom and who has died or who has made a gift within ten years after leaving the

7 — Stbl. 1956, p. 362, hereafter the 'SW'.

residence which he had in the Kingdom, is deemed to have lived in the Kingdom at the time of his death or the making of the gift.'

18. Furthermore, it is implied in the information provided by the national court and made explicit by the Dutch government as well as the Commission of the European Communities, that the Kingdom of the Netherlands has concluded bilateral conventions with several states intended to prevent the double taxation of inheritances, and in particular has concluded the convention of 1951 with the Swiss Confederation. [8] This convention contains, in the protocol annexed to it, the declaration that 'The state of the deceased's nationality at the time of death may levy inheritance duty as if the deceased had been resident there at that time, on condition that the deceased had in fact been so resident in the ten years before death and that he possessed that state's nationality at the time when he gave up his residence; in such a case, so much of the duty as the first state would not have levied if the deceased had not been a national of that state when he gave up his residence there, or at the time of his death, shall be reduced by the amount of duty due in the second state by reason of residence.'

19. On the other hand, when the situation in question is not covered by a bilateral convention, the provisions of the decree of 1989 preventing double taxation (Besluit ter voorkoming dubbele belasting 1989) are applicable. Under Article 13 of that decree, inheritance duty due in the Kingdom of the Netherlands is reduced by foreign inheritance duty. That implies that, if the foreign inheritance duty is higher than the Dutch duty, the latter is reduced to nil. In the opposite case, the amount due to the Kingdom of the Netherlands is limited to the difference between the inheritance duty due in that Member State and that paid by the heirs abroad.

II — The preliminary questions

20. The national court begins with the premise that the consequence of the reference to 'inheritances and legacies' in heading XI of the Nomenclature in Annex I to Directive 88/361 is that there is, in this instance, a movement of capital between a third country and a Member State in the main proceedings.

21. The national court indicates, however, that it is not sure whether a provision such as Article 3 of the SW can be covered by the exception provided for in Article 73c(1) of

8 — Convention between the Swiss Confederation and the Kingdom of the Netherlands with a view to avoiding double taxation in relation to inheritance duties, signed at the Hague on 12 November 1951, and its Protocol (Trb. 1951, 149, and 1952, 34).

the Treaty, bearing in mind in particular that this latter provision makes no reference to inheritances. The national court recalls that, according to the judgment of 14 December 1995 in the case of *Sanz de Lera & Others*.[9] Member States are not authorised to extend its field of application.

22. The national court points out, next, that Article 3 of the SW may fall within Article 73d(1) of the Treaty but that, according to paragraph (3) of that article, arbitrary discrimination or a disguised restriction on the free movement of capital is not justified.

23. The national court explains in that connection that it decided in a judgment delivered on 12 December 2002 that the deemed residence provided for in Article 3 of the SW restricts the free movement of capital or renders it less attractive. Thus, such deemed residence would restrict 'exit' to the extent that, in the event of the movement of the 'estate' to another Member State, it would lead to a disadvantage in the event of the estate devolving to the heirs in the ten years following emigration. Thus, the Kingdom of the Netherlands would levy duty within that period of ten years following the emigration of Dutch nationals where the duty on inheritances or gifts is lower abroad, while it would allow no repayment or credit in respect of higher inheritance duty paid abroad. Article 3 of the SW would therefore constitute a disguised restriction on cross-frontier inheritances and would be contrary to Community law.

24. The national court states that, in the same decision, it held that Article 3 of the SW also constitutes arbitrary discrimination, in that it makes a distinction between Dutch nationals and those of other Member States. Indeed, the former could only escape the application of this provision by renouncing their nationality. Moreover, the provision could not be justified by compelling reasons of public policy, because its sole purpose would be to prevent the Kingdom of the Netherlands from losing inheritance duty by reason of the departure of its nationals.

25. The national court states that, according to the case-law of the Court, measures likely to impose a heavier charge on a person leaving his Member State than that imposed on those who remain are prohibited. This prohibition on restrictions on departure, by means of taxation, has been recognised in connection with each of the freedoms of movement and, in so far as movements of capital are concerned, in Case C-35/98, *Verkooijen*.[10]

9 — Joined Cases C-163/94, C-165/94 and C-250/94 [1995] ECR I-4821, paragraph 44.

10 — [2000] ECR I-4071.

26. The national court is also concerned to determine the significance of the fact that the deceased was a citizen of the European Union and that the Treaty prohibits all discrimination based on nationality. Now, in the present case, there would be such discrimination since the inheritance of a Dutch national would always taxed more heavily than that of a national of another Member State.

27. Lastly, the national court questions whether the declaration concerning Article 73d of the Treaty, in particular the sentence according to which the declaration is applicable only to movements of capital and payments between Member States, implies that the legislation applicable to movements of capital between Member States and third countries is in no case covered by Article 73d(1) of the Treaty — or indeed whether that provision does cover legislation applicable to such movements of capital, without being limited to that existing at the end of 1993.

28. In the light of these considerations, the Gerechtshof te 's-Hertogenbosch has decided to refer the following questions to the Court for a preliminary ruling:

'(1) Does Article 3(1) of the SW constitute a permitted restriction within the meaning of Article 57(1) EC?

(2) Does Article 3(1) of the SW constitute a prohibited means of arbitrary discrimination or a disguised restriction on the free movement of capital within the meaning of Article 58(3) EC where applicable to a capital movement between a Member State and a non-member country having regard also to the Declaration on Article 58 (ex-Article 73d) of the Treaty establishing the European Community adopted on the occasion of the signature of the Final Act and Declarations of the Intergovernmental Conferences on the European Union of 7 February 1992.'

III — Analysis

A — *The purpose of the reference*

29. It is noteworthy that the Gerectshof te 's-Hertogenbosch refers no question to the Court concerning the interpretation of Article 73b of the Treaty, to enable it to assess whether the legislation at issue is or is not a restriction on the free movement of capital within the meaning of this provision. As it appears from the order for reference, the national court considers that this question is settled, since it delivered a judgment on it on 12 December 2002. [11]

11 — In its written observations, the Dutch Government states that the Staatssecretaris van Financiën has appealed against this decision to the Hoge Raad der Nederlanden and that it has requested that court, if need be, to make a reference for a preliminary ruling (paragraph 33 of the written observations).

30. While, in accordance with settled case-law, it is for the national court to assess, in the specific circumstances of the case which are for it to decide, both the need for a preliminary ruling and the relevance of the questions it refers to the Court, the fact remains that it is the task of the Court to interpret all the provisions of Community law which appears to it necessary for the outcome of the main proceedings. [12]

31. In the present case, examination of the questions asked by the national court, intended to establish whether the national legislation at issue could be justified in the light of the provisions contained in Articles 73c(1) and 73d of the Treaty, makes it necessary to determine at the outset whether that legislation amounts to a restriction on the free movement of capital within the meaning of Article 73b(1) of the Treaty. [13] I begin, therefore, by considering that question.

B — *The applicability of Article 73b(1) of the Treaty*

32. In this case, the national court is faced with a provision of Dutch tax law, according to which a national of that Member State who gives up the residence which he had there to go and settle in another Member State or a third country and who dies less than ten years after giving up his residence is, for the taxation of his estate, treated as though he had remained resident in the Netherlands.

33. It is also apparent from the national court's reference that the inheritance duty due under Dutch law is calculated on the basis of the value of everything received by the heirs, that is the immovable property, wherever situated, as well as the movable goods, financial investments and bank accounts. [14] It also seems clear from the information in the file that, both by reason of bilateral conventions such as that made between the Kingdom of the Netherlands and the Swiss Confederation and the legislation of this Member State aimed at preventing double taxation, inheritance duty paid abroad by the heirs is deducted from the duty paid in the Netherlands.

34. As the Dutch government and the Commission state in their written observa-

12 — Case C-280/91 *Viessmann* [1993] ECR I-971, paragraph 17, and Case C-350/99 *Lange* [2001] ECR I-1061, paragraphs 20 to 25.

13 — See, for comparable examples, Case C-104/01 *Libertel* [2003] ECR I-3793 paragraph 22, and Case C-281/02 *Owusu* [2005] ECR I-1383, paragraph 23.

14 — In this case the inheritance comprises immovable property situated in the Netherlands, in Belgium and in Switzerland, quoted investments in Member States and third countries and credit balances in bank accounts opened in branches in the Netherlands and Belgium.

tions,[15] the application of the residence fiction in Article 3 of the SW, combined with these provisions, results in the estate of a Dutch national who has transferred his residence to another State being taxed no more heavily in the Netherlands than he would be if he had remained resident in that State.

35. Nonetheless, such legislation results in depriving the Dutch national, for ten years from his transfer of residence to another State, of the chance of benefiting from a possibly more favourable overall charge to inheritance tax by virtue of the legislation in force in his new State of residence and in States which impose duty on assets situated within their territory. Thus, in the present case, the legislation at issue results in the four heirs of the deceased being charged NLG 79 624 by the Dutch administration, after deduction of the inheritance tax they are liable to pay in Switzerland.

36. Inheritance tax may be regarded as belonging to the sphere of direct taxation, which remains within the competence of the Member States. It is thus a tax which is, in general, collected directly from the taxpayer, taking into account his family relationship with the deceased. In any event, even if it should be seen as an indirect tax within the meaning of Article 99 of the EC Treaty,[16] it must be noted that it has not been the subject of harmonisation measures pursuant to that provision. It thus falls to Member States to decide the terms and rates of this tax and to take the measures necessary, if need be by means of negotiations between them, to avoid the double taxation of their nationals. It is, moreover, settled case-law that the Member States must exercise their powers in the area of direct taxation, including when making double taxation conventions, in compliance with Community law and, in particular, the freedoms of movement required in the attainment of the internal market.[17]

37. In the present case, we know that the deceased was resident in Switzerland. Furthermore, she died on 22 November 1997, that is to say before the date of the conclusion and, therefore, the entry into force of the agreement between the European Community and its Member States of the one part, and the Swiss Confederation of

15 — Paragraph 29 of the Dutch Government's written observations, and paragraph 21 of the Commission's written observations.

16 — Now Article 93 EC.

17 — In particular, Case C-279/93 *Schumacker* [1995] ECR I-225, paragraph 21, and *Verkooijen* (paragraph 32 and the case-law referred to). See, as regards the obligation on Member States to comply with Community law when making double taxation conventions, Case C-385/00 *De Groot* [2002] ECR I-11819, paragraph 94.

the other part, on the free movement of persons. [18]

38. In consequence, even accepting that this agreement confers on the nationals of the signatory States rights which they can rely on before national courts, clearly it does not apply in this case, with the result that the only freedom of movement that the heirs of Mrs Van Hilten are entitled to rely on in respect of relations between Member States and third countries is the freedom of movement of capital. [19]

39. It is therefore very appropriate that the Gerechtshof te 's-Hertogenbosch refers solely in its reference for a preliminary ruling to the provisions of the Treaty relating to this freedom.

40. At issue then is the question whether such legislation amounts to a restriction on the free movement of capital within the meaning of Article 73b(1) of the Treaty. In other words, it must be determined whether Article 73b(1) of the Treaty is to be interpreted as meaning that it precludes legislation in a Member State, by which the estate of a national of that State, who has transferred abroad, less than ten years before the time of death, the residence which he had there, is taxed as if that national had continued to reside in that Member State.

41. Like the Dutch and German Governments as well as the Commission, I consider that Article 73b(1) does not preclude such legislation.

42. To explain my opinion, I will begin by identifying the kind of capital movement to which the legislation at issue relates, and then I will state the reasons why I consider that it does not amount to a restriction on such movement.

1. The movement of capital in question

43. Article 73b(1) of the Treaty prohibits restrictions on movements of capital between Member States and between Member States and third countries. It is essential then to specify the movement of capital affected by the legislation at issue. This

18 — OJ 2002 L 114, p. 6. This agreement was entered into on 21 June 1999, and entered into force on 1 June 2002. It is intended to give effect to the free movement of persons between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other part, supported by provisions in force in the European Community.

19 — In this regard, it must be noted here that the provisions of Article 73b(1) of the Treaty have direct effect, including as regards relations with third countries (*Sanz de Lera & Others*, paragraph 48).

matter has particular importance, since on it depends the extent to which the legislation at issue falls within the scope of Article 73b of the Treaty and, as I have noted, there is no freedom of movement other than the free movement of capital capable of being applied in this case.

44. The national court considers that there is a movement of capital in the present case, since inheritances are specified in the nomenclature contained in Annex I to Directive 88/361. The national court also considers also that the legislation at issue is in breach of the free movement of capital because it has the effect of impeding the departure for another State of the 'estate' ('de boedel') of assets which will make up the inheritance, [20] since, in the opinion of that court, in the event of the inheritance devolving within 10 years of that transfer, the residence fiction contained in that legislation would produce a disadvantage.

45. I deduce from these considerations that the national court considers that the movements of capital which the legislation at issue affects are, first, the inheritance, that is, the transmission of the estate to the heirs, and, second, the transfer of the estate to another State which would follow, it seems, from the transfer abroad by a Dutch national of his tax residence.

20 — See the judgment for reference at paragraph 4.7.

46. The Dutch government considers that there is in this case no movement of capital because, according to this provision, the factor which brings Dutch law into play is the moment of death, that is, the passing of title and the value of the estate at that point in time. There would not have been, at that stage, a movement of capital. Directive 88/361 would be applicable to all the actions required for the correct settlement of the heirs' rights in the inheritance of the assets in the estate and any division of it, and those events would involve movements of capital. But in this case, even taking the moment at which the deceased left the Netherlands, there would have been no action involving the free movement of capital, her change of residence having not affected the composition of her estate.

47. The Commission takes the view that, since the legislation at issue makes no distinction based on the location of the assets which make up the inheritance of the deceased, no restriction on the free movement of capital is possible. In the Commission's view, this legislation would fall rather within the scope of the freedom of movement of persons, in particular the freedom of establishment, if those freedoms had been applicable in this case.

48. I believe, however, that the legislation at issue could fall within Article 73b(1) of the Treaty in that it governs inheritance duty for Dutch nationals who have transferred their residence abroad and whose death has

occurred within the subsequent 10 years. Conversely, in the same way as the intervening parties mentioned above, I do not see that the transfer of residence abroad can in itself be regarded as a movement of capital. I base that view on the following considerations.

49. While it is true that the concept of 'movement of capital' is not defined in the Treaty, the fact remains that the case-law has provided a number of indications of its scope. First of all, in Joined Cases 286/82 and 26/83 *Luisi and Carbone*, [21] it was decided that movements of capital are financial transactions which consist in essence of the deposit or investment of the sum in question. In principle, therefore, they are financial transactions and they are distinct from current payments in that they are more in the nature of the creation of assets. From that may be deduced that the principle that the free movement of capital established by Community law is designed to enable Community nationals to benefit from the most favourable conditions which can be made available to them within the Community and in third countries for investing and depositing their capital.

50. It is, moreover, established case-law that the nomenclature contained in Annex I to Directive 88/361 still has the same indicative value for the purpose of defining the concept of movements of capital covered by that directive and that it should therefore be taken into account in the context of the interpretation of Article 73b(1) of the Treaty. [22]

51. When the headings of this nomenclature are examined, it is seen that they include a certain number of transactions which naturally come to mind when thinking of financial movements for the purpose of investment, such as acquisitions of real estate and stock market securities or monetary instruments or current account transactions with financial institutions.

52. In any event, the nomenclature is not limited to these types of operation and only to the transfers of finance related to them. As explained in the introduction to it, it is intended to be very broad in scope in order not restrict 'the scope of the principle of full liberalisation of capital movements'. According to the introduction, the nomenclature covers all the operations necessary for the purposes of capital movements, such as the conclusion and performance of the transaction and related transfers. Moreover, this

21 — [1984] ECR 377, paragraph 21.

22 — Case C-222/97 *Trummer and Mayer* [1999] ECR I-1661, paragraph 21; Case C-464/98 *Stefan* [2001] ECR I-173, paragraph 5, and 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.

nomenclature includes transactions between two parties as well as those performed by a single person for his own account. It also includes operations to liquidate or assign assets built up.

53. Under heading XI entitled 'Personal Capital Movements', the nomenclature mentions particularly operations by which a person can transmit his property in whole or in part, either *inter vivos* by means of loans, gifts, endowments and dowries, or on death by means of inheritances and legacies. The transmission of the ownership of property thus constitutes a movement of capital. As the Court has confirmed in its judgment of 11 December 2003 in Case C-364/01 *Barbier*,[23] the transmission of property by inheritance is a movement of capital within the meaning of the Treaty.

54. In addition, I do not think that the reasoning of the Dutch government, according to which Article 3 of the SW involves at this stage no movement of capital, can be accepted. This reasoning rests, in my opinion, on an analysis of this provision which is partial or incomplete. In providing for Dutch nationals living abroad for less than ten years before their death to be subject to the inheritance law of the Kingdom of the Netherlands, this legislation also has the effect of determining the amount of their liability to inheritance duty. That is exactly what it is designed to do. As may be seen from the observations of the Dutch Government, this legislation seeks to combat a form of tax avoidance which consists of transferring residence to another State in anticipation of death.

55. Moreover, unless I am mistaken in the interpretation of the Dutch legislation, the inheritance duty can only be recovered from the heirs if they do not renounce their rights to the inheritance in question. Thus, according to the account of the national law given by the national court, inheritance duty is calculated on the value of *everything received*[24] by virtue of the national law. It appears therefore open to objection to claim that there has not, in the present case, been a movement of capital when, if the plaintiffs in the main proceedings deny liability for the duty assessed on them, it is precisely because they have received their share of the property of the deceased. There has then indeed been a transfer of the property of the deceased to her heirs.

56. I consider, in consequence, that the legislation at issue can fall within the scope of Article 73b(1) of the Treaty in that it has the effect of determining the inheritance

23 — [2003] ECR I-15013, paragraph 58.

24 — My emphasis.

duty liability of Dutch nationals who have transferred their residence abroad and who have died within ten years of doing so.

57. On the other hand, I do not think that the transfer of residence alone can be regarded as a movement of capital or as being accompanied by a concomitant movement of capital, within the meaning of Article 73b(1) of the Treaty. The national court's analysis, that the legislation at issue is an obstacle to the 'exit' of all the property which will make up the inheritance when a Dutch national transfers his residence abroad amounts, in my view, to saying that the departure abroad of such a person automatically involves a transfer of his property to the State where he has fixed his new residence. Or put another way, the movement of the owner of the property would involve a concomitant movement of the whole of that property. I do not believe that that analysis can be accepted.

58. The movements of capital described in the nomenclature, as we have seen, concern investments made within the national territory by a non-resident or those made abroad by a resident, or related transactions. They must thus be associated with a financial movement. Now, the transfer of residence from one State to another does not in itself constitute a financial movement. Looking at the property of the deceased as it was at the time of the transfer of her residence from the Netherlands, it comprised buildings situated both in that Member State and in Belgium or in Switzerland, quoted shares in the Netherlands, in Germany, in Switzerland and in the United States as well as bank accounts in branches of Dutch and Belgian banking institutions established in the European Community.[25] I think it is incorrect to say that this property would have been transferred to Switzerland at the same time as the deceased transferred her residence to that State. The content of this estate of property as regards the places where the buildings were, the composition of her portfolio of shares and the location of her accounts in the various banking institutions, was not affected by the fact of her change of residence alone. There was not, moreover, at this stage, any passing of title to the property. It follows that, at the time of transfer of the deceased's residence to Belgium and then to Switzerland, there was not, by reason of this transfer alone, any movement of capital.

59. In consequence, the only movement of capital which, in my opinion, can be seen in this case is confined to the transfer by inheritance of the property of the deceased to her heirs.

60. At this point in my analysis, I do not see it as necessary to offer a view on whether this

25 — Judgment of the referring court, paragraph 2.5.

movement of capital really has a cross-frontier character since, as I will show presently, the legislation at issue involves no restriction on the free movement of capital.

2. The absence of restriction

61. Article 73b(1) of the Treaty is very wide in scope since it covers, let us recall, 'all restrictions' on movements of capital. It is clear from the case-law that not only are direct restrictions thus forbidden, namely national restrictions which prohibit the investment envisaged [26] or which subject it to a system of prior authorisation, [27] but also measures which merely dissuade the beneficiaries of the freedom of movement established by the Treaty to take advantage of the rights which it gives. [28] It is likewise settled that, like the other freedoms of movement guaranteed by the Treaty, the free movement of capital prohibits not only discriminatory measures, namely measures taken by a Member State applying only to investors nationals of another Member State, [29] but also those which are apt to dissuade its own nationals or residents from making investments in other Member States. [30]

62. In *Barbier*, the Court laid down guidelines about when national fiscal legislation concerning duty on inheritances is of a kind to amount to a restriction on the free movement of capital. The Court considered that, although inheritance duties are paid by the heirs, they are factors which are taken into account by any person making an investment decision.

26 — See, in reference to a national measure launching a public loan and excluding from the opportunity to subscribe to this loan those resident in the territory of the Member State in question, the judgment in Case C-478/98 *Commission* v *Belgium* [2000] ECR I-7587, paragraph 19, and, as regards national privatisation measures prohibiting nationals of other Member States from acquiring shares in privatised undertakings beyond a certain predetermined amount, Case C-367/98 *Commission* v *Portugal* [2002] ECR I-4731, paragraphs 40 to 42.

27 — See, as regards national legislation subjecting direct foreign investment to a system of prior authorisation, Case C-54/99 *Church of Scientology* [2000] ECR I-1335, paragraph 14, and the acquisition of immovable property Case C-302/97 *Konle* [1999] ECR I-3099, paragraph 39, and *Reisch and Others*, paragraph 32.

28 — See, in connection with a national measure reserving the benefit of preferential interest rates on a loan for the construction or improvement of housing only to borrowers who contracted with a credit institution approved by the Member State, Case C-484/93 *Svensson and Gustavsson* [1995] ECR I-3955, paragraph 10, and with the legislation of a Member State subjecting to stamp duty loans concluded without the drawing up of a formal record only when contracted outside the national territory, Case C-439/97 *Sandoz* [1999] ECR I-7041, paragraph 31.

29 — See *Konle*, paragraph 23, in relation to the legislation of a Member State exempting only the nationals of that State from the obligation of obtaining an authorisation to acquire a developed site and, to the same effect, Case C-423/98 *Albore* [2000] ECR I-5965, paragraph 16. See also the judgments cited above in *Church of Scientology*, paragraph 14, and *Commission* v *Portugal*, paragraphs 40 to 42.

30 — See, in particular, *Svensson and Gustavsson*, paragraph 10, *Sandoz*, paragraph 19 and *Commission* v *Belgium* paragraph 18.

63. This case turned on provisions of Dutch law which treated differently, in relation to inheritance duty or taxes connected to it, immovable property situated in the Netherlands depending on whether the deceased lived in that State or not. In accordance with its provisions, in valuing the inheritance for the purposes of calculating the basis of assessment it was not possible to deduct the value of immovable property whose economic ownership had been passed to another legal person other than when the deceased lived in the Netherlands, such a possibility being excluded if the deceased was not a resident. [31]

64. The Court considered that these provisions constituted a restriction on the free movement of capital for the following reasons: first, they were of a kind to discourage the purchase of immovable property situated in the Member State in question as well as the transfer of economic ownership in such property to other persons by a resident of another Member State; and on the other hand, they had the result of reducing the value of the inheritance of a person residing in a Member State other than that where the property is located.

65. In the present case, it is common ground that the legislation at issue, in contrast to the legislation at issue in *Barbier*, does not, as regards property situated in the Netherlands, provide taxation conditions for Dutch nationals who have transferred their residence abroad which differ from those applying to nationals who have remained in that State. This legislation has the effect of imposing liability on all the property making up the inheritance of Dutch nationals who have transferred their tax residence abroad less than ten years before their death, as though they had continued to reside in the Netherlands. Nor does this legislation provide for taxation conditions which differ according to the location of the deceased's immovable property or the principal place of business of the undertakings with which capital has been invested. It is therefore different from that at issue in *Verkooijen*, which is referred to in the reference for a preliminary ruling, under which exemption from the income tax chargeable on dividends paid to individuals was subject to the condition that the dividends were paid by companies whose principal place of business was in the Member State concerned.

66. In the absence of such distinctions in the legislation at issue, I do not see therefore how it could discourage a Dutch national from making investments from the Netherlands into other States or into the Netherlands from other States. Therefore, such legislation does not, in my view, amount to a restriction on the free movement of capital within the meaning of Article 73b(1) of the Treaty.

31 — In 1970, Mr Barbier, a Dutch national, had left his residence in the Netherlands to live in Belgium. Between 1970 and 1988, while he continued to reside in Belgium, he bought buildings in the Netherlands. In 1988, he transferred the so-called 'economic' ownership to Dutch private companies which he controlled. For the calculation of inheritance duty, the Inland Revenue took into account the value of all these buildings.

67. I do not think that the reasons for which the national court has reached the opposite conclusion affect my view. The Gerechtshof te 's-Hertogenbosch considered the national legislation to be in breach of this provision of Treaty because, on the one hand, it would amount to an 'exit barrier' to the estate of property intended constituting the actual inheritance and, on the other, it would be discriminatory against Dutch nationals. I do not consider that this reasoning can be accepted.

68. As regards first of all the existence of an 'exit barrier', as has been seen already, the only movement of capital affected by the legislation at issue is the transmission of the deceased's property to her heirs by way of inheritance. The transfer of residence does not constitute in itself a movement of capital. Therefore if, as the national court states, the legislation at issue amounted to an 'exit barrier' at the time of transfer of residence, that obstacle would not affect the exit of all the property making-up the inheritance but only that of the person in question. In such a situation, as the Commission argues, no incompatibility between the legislation at issue and Community law can be recognised in regard to the rules of the Treaty on the free movement of capital, which are the only ones applicable in this case. Such incompatibility could only be recognised in relation to the free movement of persons or, where appropriate, the right to reside in another Member State conferred by the status of citizen of the European Union under Article 8a of the EC Treaty, [32] which would have supposed in this case that Mrs Van Hilten, at the time of her death, had been established not in Switzerland but in another Member State.

69. Even supposing such had been the case, I do not believe that the legislation at issue could have been understood as an impediment to the exercise by Dutch nationals of the right to carry on an economic activity in another Member State, or of the right to reside there, which their status as citizens of the European Union confers upon them.

70. As has been seen, what the plaintiffs in the main proceedings and the national court object to in the legislation at issue is, in reality, that it deprives Dutch nationals who transfer their residence abroad, if they die within ten years of the transfer, of the chance of benefiting from a possibly more favourable taxation of their inheritance, by reason of the legislation in force in the new State of residence and in States which tax property situated within their territory. It is clear, indeed, that this legislation has the effect of applying to such nationals the same

32 — Now, after amendment, Article 18 EC.

treatment as if they had remained in the Netherlands. [33]

71. The legislation at issue is thus in accordance with the present requirements of Community law, as evidenced by the case-law cited by the national court. According to that case-law, Member States may not apply to their nationals taking advantage of the freedoms of movement given by Community law, a less favourable treatment than that they would have received if they not taken advantage of those freedoms. In taxation matters, the Member States are therefore prohibited from applying to taxpayers who go to undertake an economic activity in another Member State, either as salaried employees or on their own account, to provide services there or otherwise within the freedom of establishment, treatment which is less favourable than they would have received had they undertaken their activities within the national territory. [34] That case-law can be applied to the situation of nationals of a Member State who take advantage of the rights of movement and of residence in another Member State which their status as citizens of the European Union confers on them. [35]

72. At all events, Community law in its present state does not require the Member State of origin to provide for its nationals who thus take advantage of the freedoms of movement and residence conferred by the Treaty more favourable treatment than if they had remained within the national territory. [36] In the present case, the Kingdom of the Netherlands, in ensuring by means of bilateral conventions or its own legislation, that foreign inheritance duties are deducted from those that are due to it, complies, in my opinion, with its obligation to ensure that its nationals who transfer their residence to another Member State in the context of exercising, as citizens of the European Union, freedom of movement or their right to reside in another Member State are not treated less favourably than those who remain within the national territory.

73. Consistently with this case law, I do not consider either that the Dutch legislation can be faulted for not providing for the reimbursement of the excess inheritance duty which may fall due if the amount due abroad exceeds that due in the Netherlands. If, in such a case, the transfer of residence could be seen as disadvantageous, that disadvantage is due principally to the absence of

33 — It has been seen that the application of Article 3 of the SW, taken together with the convention made between the Kingdom of the Netherlands and the Swiss Confederation or indeed the Dutch legislation regarding double taxation, results in the amount of duty payable in the Kingdom of the Netherlands on the inheritance of Dutch nationals being identical to what it would have been if they had continued to reside in that Member State.

34 — See, for a recent example of an 'exit' barrier in the tax context, Case C-9/02 *De Lasteyrie du Saillant* [2004] ECR I-2409, paragraph 45, in connection with national legislation requiring taxpayers wishing to transfer their residence outside the Member State in question to pay tax on unrealised capital gains on certain stocks and shares.

35 — See Case C-224/02 *Pusa* [2004] ECR I-5763, paragraphs 18 to 20, and Case C-365/02 *Lindfors* [2004] ECR I-7183, paragraph 35.

36 — This statement in no way lessens the obligation of the State of establishment or residence to treat such nationals as favourably as its own nationals in the same situation.

harmonisation of the national legislations on inheritance duty. Given the absence of such harmonisation, the Treaty cannot guarantee to a citizen of the Union that the transfer of his activities or simply of his residence to a State other than that in which he lived previously should be perfectly neutral as regards taxation. [37]

74. Therefore, the fact that, for Dutch nationals who have transferred their residence abroad within ten years of their death, their inheritance is taxed in the Netherlands as if they had remained in that State, cannot be considered to be an obstacle to their exercise of the freedoms of movement and residence conferred on them by the Treaty.

75. According to the national court, the discriminatory character of the legislation at issue results from the fact that it applies only to Dutch nationals. The latter are disadvantaged by comparison with the nationals of other Member States, who have also been resident in the Netherlands but have then transferred their residence abroad. There would thus be discrimination based on nationality, contrary to Article 6 of the EC Treaty [38] and Article 8a of the Treaty, since Dutch nationals are citizens of the Union like the nationals of other Member States, and that status is designed to be fundamental for them. According to the national court, the case-law on Articles 6 and 8a of the Treaty concerning discrimination should be transposed to the context in which Article 73b is applied, as that is a particular expression of the principle of non-discrimination.

76. I consider, together with the Dutch and German governments and the Commission, that this view cannot be accepted. As has been seen, direct taxation remains within the competence of the Member States. They therefore retain the ability decide among themselves the criteria for the distribution of their power of taxation with a view to eliminating double taxation, [39] subject to complying with Community law. It has been held that, in the absence of unification measures or the harmonisation of the competence of Member States to eliminate double taxation among them, the criterion of nationality may be accepted as a criterion of fiscal relevance without its taking on a discriminatory character. [40] It is appropriate to apply this case-law in the particular

37 — See, to that effect, Case C-336/96 *Gilly* [1998] ECR I-2793, paragraph 47, and *Lindfors*, paragraph 34.

38 — Now, after amendment, Article 12 EC.

39 — *Gilly*, paragraph 30.

40 — Ibidem.

context of the taxation of inheritances, which is also within the competence of the Member States as a matter of direct taxation and which has not been the subject of unification or harmonisation measures designed to eliminate double taxation.

77. In the light of these considerations, the Kingdom of the Netherlands is entitled to lay down rules applicable to its own nationals concerning the taxation of their inheritances, including the case where such nationals leave the national territory, subject always to exercising that right in compliance with Community law which, as has been seen previously, is not to prejudice the application of the provisions of the Treaty concerning the freedoms of movement and of residence in other Member States.

78. I do not consider that the citizenship of the Union and the Court's interpretation of the rights conferred by it are of a kind to call into question this competence of the Member States and the limitations to it which are thus applicable. Indeed, as is evident from the case law of the Court, the status of citizen of the Union is intended to be the fundamental status of the nationals of Member States and it reinforces the prohibition of discrimination, since it permits such nationals who find themselves in the same situation to obtain the same legal treatment in relation to the same matters, regardless of their nationality and without prejudice to the exceptions expressly laid down in that regard. [41]

79. However, this status does not replace the nationality of Member States. Since the possession of the latter is a condition *sine qua non* for citizenship of the Union, that capacity which is common to all those who belong to the Union does not dissolve the connection which each person has with the Member State whose nationality he possesses. Moreover, the capacity of citizen of the Union can only confer the rights which belong to it, as they are set out in the Treaty. In the present state of Community law, the status of citizen of the Union imposes on the Member States in relation to their own nationals the same limitations with regard to direct taxation as those which result from the freedoms of movement contained in the Treaty. This status thus requires them not to apply to their nationals, taking advantage of the freedoms of movement and of residence which are conferred on them by Article 8a of the Treaty, treatment which is less favourable than that which they would have received had they not taken advantage of these freedoms.

80. As has been seen previously, the status of citizen of the Union would not result in the recognition for Dutch nationals who have transferred their residence to another

41 — See, in particular, Case C-184/99 *Grzelczyk* [2001] ECR I-6193, paragraph 31; Case C-224/98 *D'Hoop* [2002] ECR I-6191, paragraph 28; Case C-148/02 *Garcia Avello* [2003] ECR I-11613, paragraphs 22 and 23, and *Pusa*, paragraph 16.

Member State of the right to have their inheritance taxed solely under the (possibly more favourable) law of their new State of residence.

81. It follows that the citizenship of the Union does not call into question the power of the Kingdom of the Netherlands to lay down criteria for the application of its national legislation concerning inheritance duty. The fact that the legislation at issue only applies to Dutch nationals who have been resident in the Netherlands, and not to the nationals of other Member States who have also been resident in the Netherlands, does not therefore constitute discrimination based on nationality within the meaning of Article 6 of the Treaty.

82. Lastly, it has also been accepted that, in the exercise of their sovereignty in tax matters, it was not unreasonable for Member States to base their policy on international practice and the model convention drawn up by the Organisation for Economic Cooperation and Development (OECD). [42] I bear in mind that the Dutch legislation is in line with the system described in the commentaries on the articles of the model double taxation convention of 1982 concerning inheritances and gifts, drawn up by the Fiscal Affairs Committee of the OECD. [43]

83. In the light of these considerations, I propose that the reply to the national court should be that Article 73b(1) of the Treaty must be interpreted as meaning that it does not preclude legislation of a Member State by which the estate of a national of that State who has transferred abroad the residence which he had in that State less than ten years before his death is taxed as if that national had continued to reside in that State.

84. Since the legislation at issue does not, in my opinion, constitute a restriction on the movement of capital, there is no need to consider whether it could be justified under Articles 73c and 73d of the Treaty. Those questions are not of relevance in resolving the main proceedings. I do not therefore see it as necessary to consider the questions asked in the reference for a preliminary ruling by the national court.

42 — *Gilly*, paragraph 31.

43 — It is apparent from the commentaries that the system under which states, in order to avoid certain of their nationals, in anticipation of their death, transferring their residence to another State with the sole object of avoiding inheritance duty in their State of origin, provide for the taxation of everything contained in the estates of their nationals, even if they are resident abroad, seems justified to prevent tax avoidance. It is however necessary to lay down a maximum period of 10 years between the transfer of residence abroad and death. Moreover, in the circumstances, the State which levies duties on the basis of nationality must allow credit for the duties levied in the State where the deceased was resident and in States which tax property located within their territory *(Model Double Taxation Convention concerning inheritances and gifts*, OECD, Paris, 1983, commentaries on Articles 4, 7, 9a and 9b).

IV — Conclusion

85. On the basis of the foregoing considerations, I suggest that the Court replies as follows to the questions referred by the Gerechtshof te 's-Hertogenbosch:

'Article 73b(1) of the EC Treaty (now Article 56(1) EC) must be interpreted as meaning that it does not preclude legislation of a Member State by which the inheritance of a national of that State who has transferred abroad the residence which he had in that State less than ten years before his death is taxed as if that national had continued to reside in that State.'