OPINION OF ADVOCATE GENERAL KOKOTT
delivered on 8 September 2011[1]

I — Introduction

1. Is it compatible with the freedom of establishment if the transfer of the place of effective management of a company from one Member State to another, in contrast to a transfer of the place of management within one Member State, leads to an immediate tax charge on the undisclosed reserves? In that connection, is it relevant if the undisclosed reserves consist of currency profits which, after the transfer, are no longer apparent because the State to which the place of effective management is transferred is at the same time the State in whose currency the claim forming part of the company assets is expressed?

2. These questions, which are highly relevant for the internal market, concerning the permissibility under Union law of exit taxation of undertakings[2] have arisen in proceedings before the Gerechtshof Amsterdam between the Netherlands tax authorities and National Grid Indus BV ('National Grid Indus'), a company governed by Netherlands law which has transferred its place of effective management to the United Kingdom but is still regarded as a Netherlands company. In the financial respect, the dispute concerns a loan claim against a group company, expressed in pounds sterling, which forms part of the company assets. Unlike previously in the Netherlands, previous currency profits against the Dutch guilder or the euro no longer appear in the United Kingdom. Under

1 — Original language: German.

2 — On 19 December 2006 the Commission addressed to the Parliament and the Council a communication on exit taxation and the need for coordination of Member States' tax policies (COM[2006] 825 final). On 2 December 2008 the Council adopted a resolution on coordinating exit taxation (OJ 2008 C 323, p. 1). At present there are four actions pending before the Court which the Commission has brought concerning breach of Treaty obligations against Portugal (Case C-38/10), Spain (Case C-64/11), Denmark (Case C-261/11) and the Netherlands (Case C-301/11). The Commission has also taken steps against other Member States, see Commission press releases IP/10/299 of 18 March 2010 and IP/11/78 of 27 January 2011.

Netherlands law corporation tax is payable on currency profits if the company leaves the Netherlands.

3. The present case offers the Court an opportunity to clarify to what extent the cross-border transfer of a company's place of effective management is covered, if at all, by the freedom of establishment, particularly with reference to the *Daily Mail* [3] and *Cartesio* [4] judgments. It is also necessary to determine whether the case-law on the exit taxation of national persons (*Lasteyrie du Saillant* [5] and *N* [6]) can be applied to the transfer of companies.

II — Legal context

4. The context of this case in European Union law is formed by the provisions on the freedom of establishment. As the main proceedings concern the legality of a tax assessment of 2004 for the financial year 2000/2001, the questions referred must be answered by reference to the provisions of the treaties in the version of the Treaty of Amsterdam, [7] in particular Article 43 EC and not Article 49 TFEU. Provisions of the Netherlands laws on corporation tax and income tax are also relevant, as well as a double-taxation agreement.

A — *National law*

5. Article 2(4) of the Wet op de vennootschapsbelasting 1969 (Law on corporation tax 1969, 'VPB') creates a fiction with regard to the registered office of a company incorporated under Netherlands law. For the purposes of that law, it is treated as resident in the Netherlands. Therefore a company that transfers its place of effective management to another country remains liable to unlimited tax in the Netherlands.

6. Under Article 8 of the VPB, Article 16 of the Wet op de inkomstenbelasting (Law on income tax, 'IB') applies, by analogy, to the collection of corporation tax. Article 16 IB provides that benefits earned from the business which have not yet been taken into account

3 — Case 81/87 *Daily Mail and General Trust* ('*Daily Mail*') [1988] ECR 5483.

4 — Case C-210/06 *Cartesio* [2008] ECR I-9641.

5 — Case C-9/02 *de Lasteyrie du Saillant* [2004] ECR I-2409.

6 — Case C-470/04 *N* [2006] ECR I-7409.

7 — Signed on 2 October 1997 and entered into force on 1 May 1999.

are included in the profits for the calendar year in which the person on whose behalf the business is being run ceases to earn taxable profits from the business in the Netherlands (known as 'final settlement tax'). Therefore that date acts as the notional date on which the undisclosed reserves and the goodwill of the undertaking are realised.

B — *The Netherlands-United Kingdom Double Taxation Convention*

7. Under Articles 93 and 94 of the Netherlands Constitution, the Convention between the Government of the Kingdom of the Netherlands and the Government of the United Kingdom of Great Britain and Northern Ireland for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and capital gains ('DTC') [8] takes precedence over any national provisions to the contrary.

8. Under Article 4(3) DTC, where a company which, like National Grid Indus, is a resident of two States, having the place of incorporation in the Netherlands and the place of effective management in the United Kingdom, it is deemed to be resident only in the Contracting State 'in which its place of effective management' is situated. Under Article 7(1) DTC, the profits of the enterprise are taxable only in that State, unless they are attributable to a permanent establishment situated in the other Contracting State. Under Article 13(4) DTC, that power to tax also covers (unrealised) capital gains.

9. According to the settled case-law of the Hoge Raad der Nederlanden (Supreme Court of the Netherlands), as a consequence of the application of the DTC, a company such as National Grid Indus which transfers its place of effective management to the United Kingdom ceases to earn taxable profits from its undertaking in the Netherlands, so that the undisclosed reserves and the goodwill existing at the transfer date are subject to the final settlement tax by virtue of Article 8 VPB in conjunction with Article 16 IB.

III — Facts and questions referred

10. National Grid Indus was formed on 10 June 1996 as a limited liability company under Netherlands law, with its registered office under the articles of association in Rotterdam. It forms part of the National Grid Transco Group, whose controlling company

8 — *Tractatenblad* 1980, 205.

is resident in the United Kingdom and which owns inter alia electricity and gas supply systems in the United Kingdom and the United States of America. On the date of incorporation the British parent company invested in the capital of National Grid Indus an intragroup claim on a loan of GBP 33 113 000 in return for shares. National Grid Indus was to invest that amount in a Pakistani joint venture for an electricity project in Pakistan. However, that came to nothing and National Grid Indus limited its activity thereafter to the financing of group companies resident in England.

11. On 15 December 2000 National Grid Indus transferred its place of effective management and its entire business activity to London. It gave up its business offices in Rotterdam, the Dutch directors were replaced by three English directors, the Netherlands bank accounts were closed and a new account was opened with an English bank. According to the findings of the referring court, National Grid Indus continues to exist under both Netherlands law and English company law as a company governed by Netherlands law. [9] The United Kingdom tax authorities regard the company as resident in the United Kingdom since 15 December 2000, but from the viewpoint of Netherlands tax law there is a permanent establishment in the United Kingdom which belongs to a Netherlands company.

12. According to the findings of the referring court, there were rational grounds for transferring the place of effective management. First, the future rate of United Kingdom corporation tax on the loan interest received by National Grid Indus would no longer be higher than the rate at which the interest could be deducted by the debtor companies belonging to the group. Secondly, the currency risk in relation to the Dutch guilder and/or the euro would no longer exist after the move because in future the profits would be calculated only in pounds sterling. In addition, as the project in Pakistan had come to nothing, there was obviously no reason to maintain a branch establishment in the Netherlands in order to be able to profit from a Netherlands-Pakistan tax convention.

13. While resident in the Netherlands, National Grid Indus earned, in relation to the loan of GBP 33 113 000, unrealised currency profits of NLG 22 128 160 (EUR 10 041 321) because of rises in the exchange rate of the pound sterling against the Dutch guilder. Until the transfer, National Grid Indus was able to show the loan in its tax balance sheets

9 — This is also confirmed by the written statements of the Netherlands Government and the United Kingdom Government.

at the historic rate, so that until then the currency profits had not been taxed.

14. As the business profits, including unrealised capital gains, would thereafter be taxable only in the United Kingdom under the DTC, the Netherlands tax authorities took the transfer of National Grid Indus as the occasion to charge final settlement tax on the unrealised currency profits pursuant to Article 16 IB in conjunction with Article 8 VPB. The tax assessed became payable on 27 April 2004, but interest was charged on the tax from 1 April 2001, the day following the company's last financial year in the Netherlands.

15. As the referring court, which has to give judgment on appeal in the action brought by National Grid Indus against the tax assessment, is uncertain as to whether the exit tax is compatible with the freedom of establishment, it has stayed the proceedings and referred the following questions to the Court for a preliminary ruling:

('1) If a Member State imposes on a company incorporated under the law of that Member State which transfers its place of effective management from that Member State to another Member State a final settlement tax in respect of that transfer, can that company, in the present state of Community law, rely on Article 43 EC (now Article 49 TFEU) against that Member State?

(2) If the first question must be answered in the affirmative: is a final settlement tax such as the one at issue, which is applied, without deferment and without the possibility of taking subsequent decreases in value into consideration, to the capital gains relating to the assets of the company which were transferred from the Member State of origin to the host Member State, as assessed at the time of the transfer of the place of management, contrary to Article 43 EC (now Article 49 TFEU), in the sense that such a final settlement tax cannot be justified by the necessity of allocating powers of taxation between the Member States?

(3) Does the answer to the previous question also depend on the circumstance that the final settlement tax in question relates to a (currency) profit which accrued under the tax jurisdiction of the Netherlands, whereas that profit cannot be reflected in the host Member State under the tax system in force there?'

16. National Grid Indus, the Netherlands, Danish, German, Spanish, French, Italian, Portuguese, Finnish, Swedish and United Kingdom Governments and the European Commission took part in the proceedings before the Court.

IV — Assessment

A — *The first question*

17. In essence, the first question from the referring court is whether a company can plead the freedom of establishment guaranteed in Article 43 EC (now Article 49 TFEU) as against the Member State under whose law it was incorporated where, when the company transfers its place of effective management to another Member State, the first Member State imposes a final settlement tax in the sense that corporation tax is payable on the capital gain, which has accrued but not yet been realised, on the transferred assets, without deferment and without the possibility of taking subsequent losses into consideration.

18. The Court has consistently held that the provisions of the Treaty concerning freedom of establishment apply also to measures of the Member State of origin which affect the establishment in another Member State of one of its nationals or of a company incorporated under its legislation. [10]

19. However, the governments concerned in the proceedings contend, on the basis of the *Daily Mail* [11] and *Cartesio* [12] judgments, that a company such as National Grid Indus which transfers its place of effective management to another Member State while maintaining its status as a company governed by the law of the State of incorporation cannot plead the freedom of establishment as against the State of incorporation. The Governments add that this also applies in relation to tax-law measures in connection with the transfer, such as the final settlement tax.

20. In fact, in the *Daily Mail* judgment of 1988 the Court held that the freedom of establishment confers no right on a company incorporated under the legislation of a Member State and having its registered office there to transfer its central management and control to another Member State. [13]

21. In the grounds of the judgment the Court made it clear that the freedom of establishment does not confer on companies incorporated under the law of a Member State a

10 — See, to that effect, *de Lasteyrie du Saillant*, cited in footnote 5, paragraph 42; Case C-418/07 *Papillon* [2008] ECR I-8947, paragraph 16; Case C-247/08 *Gaz de France - Berliner Investissement* [2009] ECR I-9225, paragraph 55; and Case C-311/08 *SGI* [2010] ECR I-487 paragraph 39.

11 — Cited in footnote 3.

12 — Cited in footnote 4.

13 — *Daily Mail*, cited in footnote 3, paragraph 25, and operative part 1.

right to transfer their central management and control to another Member State *while retaining their status as companies incorporated under the legislation of the first Member State*.[14] Companies exist only by virtue of the national legislation under which they are incorporated. Outside it they have no real existence.[15] The legislation of the Member States varies widely with regard to the factor connecting their companies with national territory and with regard to the question whether and, if so, how the registered office or real place of management of a company incorporated under national law may be transferred to another Member State.[16] The EEC Treaty regarded those differences as problems which were not resolved by the rules concerning the right of establishment. They were instead to be dealt with by future legislation or by conventions, but no solution has yet been found.[17]

22. In *Cartesio,* a judgment of 2008, the Court confirmed that the question whether a company possesses the nationality of the Member State under whose legislation it was incorporated and consequently whether it is entitled to enjoy the freedom of establishment can only be resolved by its national law.[18]

23. Thus a Member State has the power not to permit a company governed by its national law to retain that status if the company intends to reorganise itself in another Member State by moving its seat[19] to the territory of the latter, thereby breaking the connecting factor required under the national law of the Member State of incorporation.[20] The Court's reply to the particular question referred was to that effect, as it stated that the freedom of establishment does not preclude legislation of a Member State under which a company incorporated under the law of that Member State may not transfer its seat to another Member State whilst retaining its status as a company governed by the law of the Member State of incorporation.

24. In the present case, however, the question whether National Grid Indus is to continue to be regarded as a company incorporated under Netherlands law, notwithstanding leaving the Netherlands, is already answered with a clear 'yes'. The order for reference shows, and National Grid Indus and the Commission point

14 — *Daily Mail*, cited in footnote 3, paragraph 24, emphasis added.

15 — *Daily Mail*, cited in footnote 3, paragraph 19.

16 — *Daily Mail*, cited in footnote 3, paragraphs 20 and 23.

17 — *Daily Mail*, cited in footnote 3, paragraph 23.

18 — Cited in footnote 4, paragraphs 109 and 123.

19 — The Cartesio partnership wished to transfer its 'real' seat (judgment, paragraph 119), that is to say, its central administration (judgment, paragraphs 101 and 102; Advocate General Poiares Maduro refers in his Opinion, point 3, to 'operational headquarters') from Hungary to Italy. However, the specific issue in the case was that Cartesio's application to register the new 'seat' in the Hungarian commercial register was refused by the Hungarian commercial registry court. Consequently it was evidently not only a matter of transferring the actual seat, but also the seat of incorporation. It is not clear from the judgment whether any significance was attached to that circumstance. In the *Daily Mail* judgment, on the other hand, it was, it seems, solely a matter of transferring the 'central management and control', and there was no question of changing the registered office also.

20 — *Cartesio*, cited in footnote 4, paragraph 110.

out, that Netherlands law allows companies to emigrate while continuing to be subject to the law of the State of incorporation, unlike the Hungarian law which gave rise to the *Cartesio* case.

25. Consequently we have here a 'live'company which meets all the requirements of the law of the State of incorporation to continue to be regarded by the State as a company governed by national law. Why then should it not be able to plead the freedom of establishment as against the State in which it was incorporated?

26. In that connection the governments concerned refer to the *Daily Mail* judgment, according to which neither the possibility of transferring the central management and control while retaining the company's status nor the rules concerning such transfer are covered by the freedom of establishment. Those rules included the relevant tax legislation of the exit State because the *Daily Mail* case involved the tax law aspects of the transfer of the place of management.

27. The *Daily Mail* case concerned a provision of the United Kingdom Income and Corporation Taxes Act 1970 which provided that a company that wished to transfer its residence for tax purposes (defined as 'the place in which its central management and control is located') to another country, while retaining its legal personality and its status as an English-law company, required the consent of the Treasury. [21] Any offence was punishable with a fine or term of imprisonment. [22] For the Daily Mail company, the transfer of central management and, consequently, of residence for tax purposes to another country would have had the advantage, which was the declared intention, that the capital gains on the securities which it intended to sell immediately would no longer be taxable in the United Kingdom. The Treasury proposed that the company should sell a significant part of the securities before transferring its residence for tax purposes out of the United Kingdom, which would have meant that the capital gains on those securities would have to be taxed in the United Kingdom. Daily Mail then instituted proceedings for a declaration that, by reason of the freedom of establishment, it was not required to obtain consent for transferring its residence abroad. [23]

28. The questions referred by the High Court in the *Daily Mail* case were expressly directed at the tax aspects of a transfer of the place of effective management. It was the Court of Justice that raised the problems of such a transfer to a more general level, in that the Court inferred from the first question that, in essence, the question was whether the

21 — *Daily Mail*, cited in footnote 3, paragraphs 4, 5 and 17.

22 — Report for the hearing, *Daily Mail*, cited in footnote 3, p. 5485.

23 — *Daily Mail*, cited in footnote 3, paragraph 7, and report for the hearing, pp. 5486 - 7.

freedom of establishment gives a company incorporated under the legislation of a Member State and having its registered office there the right to transfer its central management and control to another Member State. As the Court's reply was in the negative, the Court found that it was unnecessary to consider the tax-law aspects of a transfer separately.

29. However, those aspects were given more attention by Advocate General Darmon in his opinion in the same case, [24] in which he pointed out that it would be paradoxical if a Member State not requiring winding-up of the emigrating company, although it could have done so, were to find itself placed by Community law in a less favourable fiscal position precisely because its legislation on companies is more consistent with Community objectives in regard to the right of establishment.

30. Consequently the *Daily Mail* judgment certainly offers some support for the interpretation placed upon it by the governments concerned in the present case. However, the judgment must be read in the light of the Court's later case-law and, notwithstanding the facts of the case and the broad terms of the reply to the questions from the High Court, in my opinion it cannot be interpreted as meaning that the freedom of establishment does not set bounds to the treatment by the State of incorporation of a company that wishes to emigrate.

24 — Opinion in *Daily Mail,* cited in footnote 3, point 13.

31. First of all, mention must be made of the judgments in *Centros,* [25] *Überseering* [26] and *Inspire Art* [27] which show that a company which is duly formed in a Member State and wishes to transfer its entire business to another Member State may rely on the freedom of establishment as against the State to which it transfers. Therefore emigration as such is not a process that in principle falls outside the freedom of establishment.

32. Secondly, so far as the exit State is concerned, in *Cartesio* the Court did not examine in detail the question of what specific requirements or consequences may be laid down by a Member State for the transfer of a registered office where the status of a limited partnership under national law is retained.

33. However, otherwise than what might be presumed from the broad wording of the operative part of the *Daily Mail* judgment and contrary to the opinion of Advocate General Darmon in that case, it appears from *Cartesio* that the freedom of establishment may

25 — Case C-212/97 *Centros* [1999] ECR I-1459, paragraphs 17 and 18.

26 — Case C-208/00 *Überseering* [2002] ECR I-9919, paragraph 52 et seq.

27 — Case C-167//01 *Inspire Art* [2003] ECR I-10155, paragraph 95 et seq.

certainly be available as against the State of incorporation if a company wishes to transfer its place of effective management to another Member State.

34. In *Cartesio* the Court made it clear that a company which intends to transfer its registered office to another Member State with an attendant conversion into a corporate form governed by the law of the host State may rely on the freedom of establishment as against the exit State if that State requires its prior liquidation.[28] If the freedom of establishment is applicable in a situation of the transfer of a registered office which does not maintain the company's status but does maintain its continuity, the tax aspects of the transfer must also be determined on that basis.

35. Therefore it has been shown that the cross-border transfer of a registered office or place of management is not, as such, a process which is outside the scope of the freedom of establishment. Rather, the exit State must in principle, under European Union law, allow the emigration of companies incorporated under its law. It is only free to decide whether to permit the company to retain its status as a company incorporated under national law.

36. Against that background a Member State cannot be accorded the power to regulate, without being bound in any way by the freedom of establishment, the tax-law consequences of transferring a registered office or place of management, which the Member State permits while, of its own accord, allowing the company to retain its status. European Union law does not allow a Member State to prohibit emigration as such. The mere fact that a national rule allows emigration which maintains not only continuity but also the status of a company, which is more than is required by Union law, does not justify the conclusion that the further consequences attached to emigration by national law fall outside the ambit of the freedom of establishment. If the tax law consequences of emigration with continuity alone being maintained are to be measured against the freedom of establishment, the same must apply to emigration accompanied by maintenance of the status of a company.

37. I therefore propose that the reply to the first question should be that a company may rely on the freedom of establishment guaranteed by Article 43 EC (now Article 49 TFEU) against the Member State under whose law it was incorporated if that Member State imposes a final settlement tax on the occasion of the transfer of the company's place of effective management to another Member

28 — *Cartesio*, cited in footnote 4, paragraphs 111 to 113.

State in the sense that corporation tax is payable on the capital gains, which have accrued up to that date but not yet been realised, on the assets transferred, without deferment and without the possibility of future losses being taken into account.

B — *The second and third questions*

38. The second and third questions from the referring court are whether Article 43 EC (now Article 49 TFEU) precludes a final settlement tax of that kind or whether it may be justified by the need for a balanced allocation of powers of taxation between the Member States, and whether the fact that, in the present case, the capital gain is an unrealised currency profit which does not appear in the host Member State is relevant.

1. Existence of a restriction of the freedom of establishment

39. The referring court considers that the final settlement tax constitutes a restriction of the freedom of establishment and therefore asks only whether it may be justified. The Commission, referring to *de Lasteyrie du Saillant*, [29] and National Grid Indus, referring in addition to the judgment in *N*, [30] also consider that there is a restriction.

40. The German, French, Italian, Swedish and United Kingdom Governments, on the other hand, take the view that there is no restriction of the freedom of establishment. Some of them merely repeat the arguments based on the *Daily Mail* judgment which were put forward in connection with the question of the scope of the freedom of establishment. Other governments, however, contend that the situation of a company like National Grid Indus is not comparable to that of a company which transfers its registered office within the Member State where it was incorporated. The question of similarity is discussed from the viewpoint of discrimination and from that of a different form of restriction.

41. With regard to the arguments concerning similarity, I think it is otiose, when considering whether national tax rules that treat cross-border situations differently from domestic situations are compatible with the freedom of

29 — Cited in footnote 5, paragraphs 45 and 46.
30 — Cited in footnote 6.

establishment, to consider the same questions of law once from the viewpoint of discrimination and, as the case may be, once again from that of a different form of restriction. The question that should rather be asked is the single question whether the cross-border transfer of a place of management is treated less favourably for tax purposes than a transfer within a Member State. If that is so, and if therefore a cross-border transfer is at least less attractive than a transfer within a Member State, there is a restriction of the freedom of establishment.[31] However, the restriction is justified and therefore lawful provided that the situations are not objectively comparable or the unequal treatment is justified by an overriding reason in the general interest.[32]

42. In the present case, a final settlement tax is charged in the Netherlands when the place of the effective management of a company is transferred to another Member State. Corporation tax is payable on the capital gains which have accrued in the first Member State but have not up to then been realised on the assets transferred abroad, and the tax is payable without deferment and without the possibility of later losses being taken into account. If, on the other hand, the transfer is within the Netherlands, there is no final settlement tax. Tax is charged on capital gains only when they have been realised, for example, on selling the assets in question. That unequal treatment undoubtedly works to the disadvantage of cross-border transfers, a disadvantage which, financially seen, may even assume existential dimensions. Because of its deterrent effect, a final settlement tax such as that in the present case is likely to prevent exercise of the freedom of establishment guaranteed by European Union law and therefore represents a restriction of that freedom.[33]

2. Justification for the restriction

43. The reasons put forward by the governments in the present case for asserting that

31 — For the concept of 'restriction' in the area of tax law, see Kokott/Ost, 'Europäische Grundfreiheiten und nationales Steuerrecht', EuZW, 2011, p. 496.

32 — Case C-337/08 *X Holding* [2010] ECR I-1215, paragraphs 18 to 20; also Case C-414/06 *Lidl Belgium* [2008] ECR I-3601, paragraphs 23 to 26, where, however, the question of comparability was not addressed. This pattern is the same as that which the Court customarily follows in relation to direct taxes and the free movement of capital: see, for example, Joined Cases C-436/08 and C-437/08 *Haribo* [2011] ECR I-305, paragraphs 50, 52 and 58. There are parallels also in the case-law on the freedom to provide services: see, for instance, Case C-97/09 *Schmelz* [2010] ECR I-10465, paragraph 49.

33 — For exit tax on natural persons, see *de Lasteyrie du Saillant*, cited in footnote 5, paragraph 46, and *N*, cited in footnote 6, paragraph 34 et seq.

the cross-border and the internal transfer of a place of management are not comparable are, in essence, the same as the arguments for the existence of overriding reasons in the general interest. As, furthermore, according to the case-law, the question of similarity must be examined by reference to the objective of the national provision at issue, [34] I shall now go on only to consider, following the wording of the question referred, whether the restriction of the freedom of establishment constituted by the final settlement tax is justified by an objective in the general interest.

44. In order for a restriction of the freedom of establishment to be justified by an overriding reason in the general interest, the measure in question must be appropriate for ensuring the attainment of that objective and must not go beyond what is necessary to attain it. [35]

45. As appears from the second question, the referring court concentrates, with regard to the possible justification of the restriction which has been found of the freedom of establishment, on the maintenance of a balanced allocation between the Member States of the power to impose taxes. Consequently that ground of justification must be considered first, before I go on to look at other justifications put forward by the governments participating in the proceedings.

(a) Balanced allocation of powers of taxation

46. It has by now become settled case-law that a restriction of the freedom of establishment within the European Union may be justified in order to maintain the allocation of powers of taxation between the Member States. [36] In the absence of unifying or harmonising measures in Union law, the Member States retain the power to define, by treaty or unilaterally, the criteria for allocating their powers of taxation. [37] In that respect it is not unreasonable for the Member States to draw guidance from international practice and the

34 — *Papillon*, cited in footnote 10, paragraph 27, and *X Holding*, cited in footnote 32, paragraph 22.

35 — *N*, cited in footnote 6, paragraph 40; Case C-157/07 *Krankenheim Ruhesitz am Wannsee-Seniorenheimstatt* ('*Wannsee*') [2008] ECR I-8061, paragraph 40; and *X Holding*, cited in footnote 32, paragraphs 25 and 26.

36 — Case C-446/03 *Marks & Spencer* [2005] ECR I-10837, paragraph 40; Case C-231/05 *Oy AA* [2007] ECR I-6373, paragraph 51; *Lidl Belgium*, cited in footnote 32, paragraph 42; Case C-182/08 *Glaxo Wellcome* [2009] ECR I-8591, paragraphs 82 and 88; *X Holding*, cited in footnote 32, paragraphs 25 to 33; and *Haribo*, cited in footnote 32, paragraph 121.

37 — *Oy AA*, cited in footnote 36, paragraph 52; see also Case C-374/04 *Test Claimants in Class IV of the ACT Group Litigation* [2006] ECR I-11673, paragraph 52, and Case C-487/08 *Commission* v *Spain* [2010] I-4843, paragraph 38.

model conventions drawn up by the Organisation for Economic Development and Cooperation (OECD).[38]

(i) Objective of the final settlement tax and its suitability for attaining that objective

47. According to the referring court, the final settlement tax is based on the internationally recognised principle of territoriality,[39] in conjunction with a temporal component, and basically serves to allocate the power to tax. It aims to ensure that the whole profit earned by a company in the period when it was liable to tax in the Netherlands is also taxed there. For that purpose the unrealised capital gains which have accrued up to that point are deemed to have been realised on the date of exit. That kind of assessment at market value is not limited to the case of the transfer of the place of management, but also arises where individual assets are transferred to a foreign permanent establishment. As the host State normally assesses the company assets and liabilities at the market value when the company first becomes taxable in that State (known as 'step up'), double taxation would be avoided and subsequent losses in the host State would be taken into account. Taxation in that way is permissible according to taxation conventions based on the OECD model convention.

48. As appears from the Council decision of 8 December 2008, the combination of exit tax imposed by the exit State and 'step up' imposed by the host State constitutes a typical way of ensuring that undisclosed reserves are taxed (only) once. So far as can be seen, neither the DTC nor the OECD model convention contains an express provision for the case of a cross-border transfer of the place of management. However, the referring court cites the settled case-law of the Hoge Raad der Nederlanden to the effect that the application of the DTC to a Netherlands company which transfers its registered office to the United Kingdom has the consequence that the company ceases to earn taxable profits from its undertaking in the Netherlands. After the company leaves the Netherlands, the United Kingdom alone has the right to tax the undertaking's profits, including unrealised capital gains. The final settlement tax was introduced in order to prevent the unrealised capital gains which had accrued in the Netherlands from escaping tax there in that kind of situation. In the Netherlands, therefore, the DTC is obviously construed as meaning that the Netherlands loses the right to tax those undisclosed reserves in the future. Consequently, they are deemed to have

38 — *N*, cited in footnote 6, paragraph 45; Case C-513/03 *van Hilten-van der Heijden* [2006] ECR I-1957, paragraph 48; and *Lidl Belgium*, cited in footnote 32, paragraph 22.

39 — See my Opinion in *N*, cited in footnote 6, point 92 et seq.

been realised on the date of the transfer and are attributed to the last domestic tax year.

49. So far as the OECD model convention is concerned, it may be inferred from the explanatory notes to the model convention that, in principle, it is not contrary to the convention for the transfer of an asset from a permanent establishment in a home State to the head office or a permanent establishment in another State to be treated as a disposal, so that unrealised capital gains which have accrued in the home State are taxed.[40]

50. Mention must also be made of the Merger Directive 2009/133,[41] under Article 12(1) of which the transfer of the registered office of a European company or European cooperative society from one Member State to another is not to give rise to any taxation of the unrealised capital gains on assets which remain effectively connected with a permanent establishment in the Member State from which the registered office has been transferred and play a part in generating the profits or losses taken into account for tax purposes. The referring court and some of the participating governments point out that this invites the converse inference that the directive does not prohibit an exit tax on the assets transferred abroad. However, the question of how far an exit tax is in fact permissible in the cases covered by the directive need not be decided here and must ultimately be clarified on the basis of primary law. In the present context the provision in the directive is of interest only in so far as it shows that the European Union legislature also allocates the power to tax between the Member States in such a way that the unrealised capital gains which have accrued in the exit Member State may be taxed there

51. Finally, it should be called to mind that in the *N* judgment[42] the Court accepted that the exit tax on natural persons at issue in that case was appropriate for allocating between the Member States the power to tax. According to those rules, the tax on unrealised capital gains on a substantial shareholding was assessed on the date of the transfer and was deferred until the actual disposal. The fact that the present case does not concern natural persons, but companies, and that the final settlement tax is payable immediately has no bearing on the question of appropriateness,

40 — Commentary, paragraph 21, on Article 7 OECD MC 2008, and paragraph 10, on Article 13 OECD MC 2010.

41 — Council Directive 2009/133/EC of 19 October 2009 on the common system of taxation applicable to mergers, division, partial division, transfers of assets and exchanges of shares concerning companies of different Member States and to the transfer of the registered office of an SE or SCE between Member States (OJ 1999 L 310, p. 34).

42 — *N*, cited in footnote 6, paragraphs 41 to 47.

but will be relevant for the question of necessity.

52. It must therefore be concluded that the final settlement tax is intended to maintain the balanced allocation of the power to tax between the Member States and is appropriate for attaining that objective in the general interest.

(ii) Necessity

53. It remains to consider whether a final settlement tax such as that at issue here is necessary for attaining the objective which it pursues.

54. Here a distinction must be made between the assessment and the collection of the tax due.

— Assessment of final settlement tax

55. The computation of the final settlement tax in the context of the tax assessment for the last tax year in the State of origin does not appear as such to be disproportionate. The fiction that the unrealised gains are realised on the date of transfer makes it possible to separate relatively quickly the proportion of tax due to the exit State from that due to the host State, without entailing significantly extra expense for the taxpayer as compared with a later assessment. [43]

56. It must also be borne in mind that the cross-border transfer of a place of management is not comparable with a domestic transfer so far as the tax assessment at the date of the transfer is concerned because, in the case of the latter (assuming that it is a single territory for tax purposes), the tax competence of the Member State concerned subsists unchanged. As the power to tax need not be allocated between different Member States in that case, it is sufficient if unrealised capital gains are taxed only at the time when they are actually realised.

— Collection of tax

57. However, it is rather more difficult to decide whether the immediate collection of the tax due is also consistent with the principle of proportionality.

43 — *N*, cited in footnote 6, paragraphs 49 and 50.

58. It follows from the judgment in *N*[44] that the exit taxation of natural persons by the Member State of origin who have a substantial shareholding in a company can be regarded as proportionate only if the tax due is deferred until the unrealised capital gains are realised, without security being required, and if later losses in value which have not already been taken into account the host State are taken into account.

59. National Grid Indus and the Commission consider that that case-law may be applied in principle to the exit taxation of undertakings. The Commission, referring to its communication of 19 December 2006 on exit taxation,[45] concedes however that the Member States are entitled to impose certain information obligations on emigrating companies, such as an annual declaration that the company assets are still in the possession of the foreign permanent establishment, together with a declaration at the time of disposal. The Mutual Assistance Directive[46] and the Debt Recovery Directive[47] enable the competent authorities to maintain effective tax inspection in relation to the emigrating company and to recover tax at the appropriate time.

60. However, in the opinion of the governments concerned the situation is different with regard to the transfer to another country of a company's place of management together with its assets. The governments consider that the immediate collection of tax on unrealised capital gains accruing in the State of origin is proportionate in particular because systematically keeping track of future changes in the assets in question is either impossible or would at least entail considerable effort and expense which would not be financially justifiable, either for the company or for the tax authorities. In addition, subsequent losses in value would be taken into account by 'step up' in the host State.

44 — Cited in footnote 6, paragraphs 49 and 50.

45 — Cited in footnote 2.

46 — Council Directive 77/799/EEC of 19 December 1977 concerning mutual assistance by the competent authorities of the Member State in the field of direct and indirect taxation (OJ 1977 L 336, p. 15), as amended by Council Directive 92/12/EEC of 25 February 1992 (OJ 1992 L 76, p. 1).

47 — Council Directive 76/308/EEC of 15 March 1976 on mutual assistance for the recovery of claims resulting from operations forming part of the system of financing the European Agricultural Guidance and Guarantee Fund, and of agricultural levies and customs duties (OJ 1976 L 73, p. 18), as amended by Council Directive 2001/44/EC of 15 June 2001 (OJ 2001 L 175, p. 17). Directive 76/308 was codified and replaced by Council Directive 2008/55/EC of 26 May 2008 on mutual assistance for the recovery of claims relating to certain levies, duties, taxes and other measures (OJ 2008 L 150, p. 28), which in turn was replaced by Council Directive 2010/24/EU of 16 March 2010 on mutual assistance for the recovery of claims relating to taxes, duties and other measures (OJ 2010 L 84, p. 1).

61. The Danish, Spanish and Finnish governments submit that company assets, unlike shares held by natural persons, are not often intended to be sold at a profit at a later date, but to be used in the production process. Typically, company assets will, in the course of time, decrease in value and eventually lose it altogether, in particular as a result of depreciation or obsolescence or, in the case of intellectual property, because the protection period expires. Consequently it makes no sense to refer to a later date such as that of a disposal.

62. In that connection, the Netherlands Government points out that realisation of the capital gains on fixed assets accruing in the exit State is sometimes gradual in the sense that those assets are subject to annual depreciation in the host State on the basis of the market value shown in the opening balance sheet. Capital gains on current assets are normally realised on the date of sale, but annual accounts do not indicate clearly when the stocks existing at the time of a transfer have actually been sold.

63. In the opinion of the Netherlands, German and Spanish governments, the mutual assistance and debt recovery procedures available under European Union law and bilaterally do not offer adequate ways of keeping continuous track of the many assets of an undertaking or even of merely verifying the correctness of the undertaking's own information and enforcing a tax demand at the right time. Such cooperation is made even more difficult by the differences between the rules of different Member States concerning the calculation of profit and the presentation of annual accounts.

64. The Italian Government considers that the Court's case-law relating to exit taxation of natural persons is not applicable to exit taxation of undertakings because natural persons and undertakings are fundamentally subject to different tax regimes. Whereas, in the case of natural persons, in principle only the actual income is taxed, undertakings are taxed on the basis of a balance sheet showing assets and liabilities. Increased values of assets are in principle directly reflected in the balance sheet and are therefore taxable immediately. Only exceptionally can the original value of an asset be maintained in the accounts until the unrealised capital gains are realised. The first requirement for this is that the undertaking should keep its place of management in its home State and so continue to be subject to domestic taxation.

65. The Finnish Government points out in addition that, unlike natural persons, legal persons maintain a less constant identity. Mergers, restructuring, changes in legal form, formation of subsidiaries and transfers of business divisions to other companies may make it considerably more difficult for the exit State to maintain continuous tax supervision.

66. First of all, it must be observed that the arguments of the governments concerned pointing out the difficulties of keeping track of changes are based on a standardised approach which assumes that undertakings, particularly companies, as a rule have a very complex asset situation. In contrast, the present case shows that, in certain circumstances, the asset situation of undertakings which is relevant for tax purposes, irrespective of whether the undertaking is operated by a legal person or a natural person, may rather be simple. Likewise there can obviously be private individuals whose asset situation is just as complex as that of an undertaking, in the sense outlined by the governments concerned.

67. As the main proceedings appear to involve only a claim in respect of a loan, which is relatively easy to trace, the difficulties of tracing alleged by the governments are basically irrelevant to the present case. The nature and size of the taxable asset do not on their own militate against adopting the solution found by the Court in *N* and regarding the immediate collection of the tax claim on the unrealised capital gain as disproportionate.

68. However, as it is legitimate up to a point for the legislature to adopt a standardised approach, the referring court has formulated its second question in general terms, and it is possible that in the main proceedings the referring court will also have to give a decision on the exit taxation of other assets, I would not simply wish to disregard the arguments in question.

Impossibility or difficulty of tracing assets

69. It appears perfectly possible that the asset situation of an undertaking may be so complex that the precise cross-border tracing of all the fixed and current assets of an undertaking until the unrealised capital gains in those assets are realised is almost impossible or involves an effort which the tax authorities cannot reasonably be expected to make and would also entail a considerable burden for the companies concerned.

70. Where that is the case, the Commission's proposal of information from the company itself is not a real alternative because both the provision of the information and the checking of its accuracy could be beyond what can reasonably be expected. It is true that existing measures for the harmonisation of company accounts [48] as well as the Mutual Assistance Directive [49] and the Claims Recovery Directives [50] simplify matters somewhat, but they do not essentially solve the problem.

71. If there is no reasonable way of determining when unrealised capital gains are actually realised and whether there have been any relevant losses in value in the meantime, deferment is not a more moderate and equally appropriate means of securing the tax claim of the exit State, irrespective of the question of 'step up'. There would be no indication of the date up to which deferment could be considered. Therefore immediate collection of the tax would have to be regarded as proportionate and hence permissible in the light of the freedom of establishment.

Straightforward tracing of assets

72. If, on the other hand, it is relatively easy to trace across the border the nature and amount of the undertaking's assets up to the realisation of unrealised capital gains, it is disproportionate to collect immediately the tax due on the gains. An undertaking that transfers its place of management and its entire business activity to another country has the same interest as a company that remains in its home State in being required to pay tax on unrealised capital gains only when they have actually been realised. By contrast, the interest of the exit State in enforcing its tax claim will not be unduly prejudiced if, in the case of an emigrating undertaking too, it waits until the date of the actual realisation of the unrealised capital gains, which it can easily ascertain.

73. Cross-border recovery will generally, no doubt, be more difficult than compulsory recovery in the home State. The German, Spanish and French governments refer to

48 — Fourth Council Directive 78/660/EEC of 25 July 1978 based on Article 54(3)(g) of the Treaty on the annual accounts of certain types of companies (OJ 1978 L 222, p. 11) and the Seventh Council Directive 83/349/EEC of 13 June 1983 based on Article 54(3)(g) of the Treaty on consolidated accounts (OJ 1983 L 193, p. 1), to which the Court referred in Case C-101/05 *A* [2007] ECR I-11531, paragraph 62.

49 — Cited in footnote 46.

50 — Cited in footnote 47.

the *Truck Center*[51] judgment, in which the Court, regarding inter alia the possibility of compulsory recovery, approved a collection procedure for non-resident taxpayers which is different from that for resident taxpayers, namely a withholding tax.

74. In the present case, however, it is not a question of a mere collection procedure, but of whether it goes beyond what is necessary if emigrating companies, merely because of transferring to another Member State, to have to pay, directly and finally, tax on unrealised capital gains on assets which can easily be identified, whereas companies remaining in the home State have to pay a similar tax only much later or not at all. It must be borne in mind that an emigrating company which retains its status remains a company governed by domestic law, and such a company may very well incur penalties under the registration rules if it fails to meet its tax obligations. In addition, the host State can, if necessary, use the procedures of the Claims Recovery Directives.[52]

75. The Italian Government's observations concerning the special features of the taxation of undertakings do not lead to a different conclusion. Even if the constitution of undisclosed reserves were regarded as exceptional, the position is that companies which transfer their place of management within their home State have the benefit of that exception, whereas it is denied to emigrating companies. Those factors are irrelevant for the question of whether that unequal treatment is proportionate or whether the deferment of tax should be considered as a more moderate procedure. The Finnish Government's argument concerning the more frequent changes of identity of undertakings is also not so persuasive as to indicate that immediate collection of the final settlement tax would be proportionate. If there is no problem in keeping track of the assets, it would probably not be difficult either in the cases put forward by the Finnish Government.

Subsequent losses

76. If the tax is to be deferred, the further problem arises of how any losses in value arising after the transfer are to be treated. In

51 — Case C-282/07 *Truck Center* [2008] ECR I-10767, paragraphs 47 and 48.

52 — Cited in footnote 47.

N[53] the Court decided, in relation to the exit taxation of a natural person who had a substantial shareholding, that such losses must be taken fully into account unless they have already been taken into account in the host State. However, a more nuanced approach may have to be taken in relation to the emigration of undertakings.

77. If the host State provides for a 'step up', that is to say, if it shows the assets in the opening balance sheet at their market value, it must be presumed that future losses will be taken into account there. The exit State could then collect the full tax assessed in the event of a transfer if and when gains are realised, for example, on a disposal.

78. However, if the host State does not take a later loss into account, that does not necessarily mean that the exit State must allow for it in full. Which of the two States has to take account of a loss of value is a central issue of the balanced allocation of the power to tax between the Member States, which, in principle, remain competent to decide that question in the absence of harmonisation measures in European Union law. The principle of territoriality suggests that it is for the host State to take account of losses arising under its fiscal jurisdiction. Consequently it is not possible to give an answer in general terms to the question whether the fact that the exit State does not take account of subsequent losses makes the exit tax disproportionate.

Currency profit no longer shown in the host State

79. So far as the currency profit at issue in the main proceedings is concerned, the referring court observes that it became final with the transfer of National Grid Indus to the United Kingdom. As the company's profits were thereafter expressed solely in pounds sterling, no later losses could arise.

80. The Netherlands, German and Portuguese governments consider that in that case immediate collection of the tax is all the more justified whereas, in the Commission's opinion, the unrealised currency profits may be taxed only when the loan is repaid.

81. National Grid Indus considers that the unrealised currency profit ceased to exist at the time of the transfer. It was a notional

53 — Cited in footnote 6, paragraph 54.

profit which never existed in economic terms, but existed only for tax purposes. As the taxable profit in the United Kingdom is now calculated only in pounds sterling, the unrealised currency profit was, because of the transfer, not realised but, on the contrary, was finally extinguished.

82. I can find nothing in European Union law which suggests that the Member States should be denied the right to tax unrealised currency profits that accrued during a period when an undertaking was operating in its territory. Since, as the Court found in *Deutsche Shell*, [54] Member States may be obliged to take account of currency losses for tax purposes, it must also be open to them, on grounds of tax symmetry, to tax currency profits, even if they are only unrealised profits. As the German Government has observed, even an unrealised currency profit represents genuine economic value because it may enhance the company's financial standing. Furthermore, if there were no possibility of taxing unrealised currency profits, there would be a risk that they would not be taxed at all despite actually being realised at a later date, if they did not appear for tax purposes in the host State, as in the present case.

83. If the undertaking emigrates to another Member State where the currency profit no longer appears for tax purposes, that cannot yet be regarded as realising the profit, however. Until the loan is repaid, the undertaking does not have at its disposal the liquid funds from the loan in order to settle the tax claim, any more than does a company which remains in the home State.

84. However, the currency profits do not cease to exist either on the date of the transfer. If the loan were repaid after the transfer, the emigrating company would have at its disposal the liquid funds with which to settle the tax claim, just as would a company which remains in the home State. The fact that the currency profits no longer appear for tax purposes in the host State cannot have the consequence that the exit State's tax claim is wiped out.

85. However, it is questionable whether such an unrealised currency profit must in fact be regarded as having crystallized on the date of transfer, or whether changes in the exchange rate between the loan currency and the host State's currency must continue to be taken

54 — Case C-293/06 *Deutsche Shell* [2008] ECR I-1129, paragraph 44.

into account until the loan is actually repaid, if subsequent currency losses should arise.

86. On that point it must be said that, in the nature of things, it follows that subsequent currency losses can be taken into account only by the exit State. They do not appear at all in the host State for tax purposes, any more than the earlier currency gains.

87. In a case such as the present, where it is relatively easy to follow any changes affecting the loan claim up to the date of repayment or any other form of realisation, it would go beyond what is necessary in order to maintain the balanced allocation of the power to impose taxes if the exit State did not take account of subsequent exchange rate losses and if it were therefore to charge emigrating undertakings more tax than those remaining in the home State. According to the principle of territoriality, the power to impose taxes in relation to the loan claim on the date when the currency losses arise lies in principle with the host State. However, as changes in exchange rates, whether upwards or down, do not appear there for tax purposes, whereas in purely domestic situations the exit State takes changes into account until the date of actual realisation of the unrealised currency profit, the exit State retains, even after an undertaking emigrates, the right to take account of currency losses in connection with the tax which it has assessed on previous currency profits on the same loan claim. Consequently in that eventuality there is no risk of losses being taken into account twice; rather, where there is a cross-border situation, the currency losses would otherwise not be taken into account at all.

88. Therefore it follows that the exit tax on the unrealised currency profits arising on a foreign currency claim which no longer appear for tax purposes in the host State may be regarded as proportionate only if the tax claim is deferred to the date when an undertaking remaining in the home State would have to pay tax on such profits, and currency losses arising up to that date are taken into account.

(iii) Interim conclusion

89. A final settlement tax such as that in question here is justified by the need for a balanced allocation between the Member States of the power to impose taxes if it is not reasonably possible to keep track of the assets of the emigrating undertaking, by reason of their nature and/or amount, until the date when the unrealised capital gains accruing in the State of origin are actually realised. If it is comparatively simple to keep track of them, collection of the final settlement tax

before the date of realisation of unrealised capital gains is disproportionate. The question whether, in that case, subsequent losses in value must be taken into account can be answered only by reference to the particular circumstances.

90. If the undertaking's assets consist basically of a foreign currency loan and if the unrealised currency profits accruing in the State of origin no longer appear for tax purposes in the host State, the final settlement tax must be deferred until the date when an undertaking remaining in the State of origin would have to pay tax on such profits, and currency losses arising would have to be taken into account.

(b) Coherence of the tax system

91. The German and Italian Governments also submit that the final settlement tax is justified by the need to maintain the coherence of the national tax system.

92. In the opinion of the German Government, there is a direct connection between the advantage that undisclosed reserves are not taxed on the annual balance sheet date and the disadvantage that they are revealed and taxed as at the date of transfer. Those are two sides of the same coin. The Netherlands rules reflect a logical symmetry within the meaning of the *Wannsee* judgment[55] since the final settlement tax constitutes the logical complement to the preceding tax exemption of the unrealised capital gains.

93. The Italian Government, on the other hand, sees a direct connection between the final settlement tax and the tax deductions which an undertaking has been able to make, particularly in the form of writing off the cost price of assets, until the transfer. The final settlement tax merely offsets the revenue shortfall previously sustained by the State as a result of the tax advantages allowed in that way. The transfer is the last possible date for making that adjustment.

94. The Court has in settled case-law recognised the need to preserve the coherence of the national tax system as an overriding

55 — Cited in footnote 35, paragraph 42.

reason in the public interest,[56] although, so far as can be seen, it has allowed it to prevail in only two cases.[57]

95. For an argument based on such a justification to succeed, the Court requires that a direct link be present between a tax advantage and the offsetting of that advantage by a particular tax levy, with the direct nature of that link falling to be examined in the light of the objective pursued by the rules in question.[58]

96. In the *Wannsee* judgment,[59] the Court found a direct, personal and material connection between the deduction, which had initially been allowed, by an undertaking of losses by a permanent establishment in another country, and the later adding-back of those losses when that establishment made profits once again.

97. Coherence in that sense appears also to be the purpose of the Netherlands tax provisions in the present case. It appears from the legislative documents reproduced in the order for reference that the Netherlands legislature intended to take into account the commercial practice whereby, as a going concern is involved, the effects of the annual profit computation on subsequent years are taken into account. Therefore certain profits would be carried forward to the future. That would be accepted for tax purposes in the expectation that they could be taxed at a later date. Such undisclosed reserves may arise from capital gains which are not revealed at first because the asset is shown at the book value in the tax balance sheet or because depreciation was allowed which exceeded the actual loss in value of the asset. In both cases the State concerned has a justified interest in taxing the undisclosed reserves at a later date.

98. Unlike the French exit tax with which the Court was concerned in *de Lasteyrie du Saillant*,[60] finding that it was not justified on the ground of coherence, the Netherlands final settlement tax has the purpose of ensuring generally that, where a taxable undertaking transfers its place of management to

56 — Case C-319/02 *Manninen* [2004] ECR I-7477, paragraph 42; *Papillon*, cited in footnote 10, paragraph 43; and Case C-287/10 *Tankreederei I* [2010] ECR I-14233, paragraph 23.

57 — First, Case C-204/90 *Bachmann* [1992] ECR I-249, paragraph 35, and Case C-300/90 *Commission* v *Belgium* [1992] ECR I-305, paragraph 21, which relate to the same Belgian provisions concerning the deductibility of insurance contributions and, secondly, *Wannsee*, cited in footnote 35, paragraph 43.

58 — See the cases cited in the two previous footnotes.

59 — Cited in footnote 35, paragraph 55.

60 — Cited in footnote 5, paragraph 65.

another country, capital gains which accrued while the company was resident in the Netherlands are taxed.

99. If the Netherlands, because of the transfer, were no longer able to tax the unrealised capital gains accrued during the period of residence of National Grid Indus in its territory, coherence of the tax system would not be possible. To that extent, the objective of coherence of the tax system and the balanced allocation of the power to impose tax coincide.[61]

100. Consequently the final settlement tax is also appropriate for maintaining the coherence of Netherlands tax law. With regard to the question of necessity, the foregoing observations concerning the allocation of powers of taxation apply.

(c) Prevention of tax avoidance

101. Various governments which have taken part in the procedure have put forward the prevention of tax avoidance as a further overriding reason in the public interest which could justify the restriction of the freedom of establishment arising from the Netherlands final settlement tax.

102. However, the prevention of tax avoidance may be considered an independent ground of justification only where the restrictive measure specifically aims to prevent conduct involving the creation of wholly artificial arrangements which do not reflect economic reality, with a view to escaping the tax normally due on the profits generated by activities carried out on national territory.[62]

103. On that point it must be made clear that the cross-border transfer of the place of management of a legal person is not to be regarded in itself as tax avoidance,[63] even if it is motivated by tax considerations. For companies to seek to profit from differences between national tax systems is a legitimate form of economic conduct and is indeed inevitable in an internal market in which taxation of

61 — See my Opinion in *N*, cited in footnote 6, point 106.

62 — See, to that effect, Case C-524/04 *Test Claimants in the Thin Cap Group Litigation* [2007] ECR I-2107, paragraph 72 et seq.; Case C-303/07 *Aberdeen Property Fininvest Alpha* [2009] ECR I-5145, paragraphs 63 and 64., and *SGI*, cited in footnote 10, paragraphs 65 and 66.

63 — For the cross-border transfer of the residence of a natural person, see *de Lasteyrie du Saillant*, cited in footnote 5, paragraph 51; also in that connection, Case C-196/04 *Cadbury Schweppes and Cadbury Schweppes Overseas* [2006] ECR I-7995, paragraph 36 et seq.

corporations is not harmonised.[64] Accordingly it is settled case-law that revenue shortfalls do not constitute an overriding reason in the public interest.[65] Therefore the transfer of a company's place of management to another Member State can no more than the opening of a second establishment in another Member State in itself justify a general presumption of tax avoidance.

104. It is not clear from the order for reference that the Netherlands final settlement tax is specifically directed at purely artificial arrangements in the sense described above. Rather it appears to be charged in all cases of the cross-border transfer of the place of management. With regard to National Grid Indus, the referring court expressly observes that there were rational grounds for the transfer.[66] In addition, the Netherlands Government's written observations state that it is not relying on the prevention of tax avoidance as a ground justifying the final settlement tax.

105. Consequently the provisions in question cannot be justified by the prevention of tax avoidance. In so far as the final settlement tax is nevertheless intended to serve to prevent tax avoidance, without however aiming specifically at purely artificial arrangements, sufficient account is taken of that aspect in relation to the ground of justification of the balanced allocation of powers of taxation.[67]

(d) Further grounds of justification

106. In addition to the grounds of justification that have already been discussed, the governments concerned have put forward other grounds, namely the avoidance of taking losses into account twice, effective tax supervision and the effective recovery of tax. Additional examination of those grounds is unnecessary in view of the foregoing observations concerning maintaining the balanced allocation of the power to impose taxes and the coherence of the national tax system.

64 — See my Opinion in *Oy AA*, cited in footnote 36, point 62, and the Opinion of Advocate General Geelhoed in *Test Claimants in the Thin Cap Group Litigation*, cited in footnote 62, point 63; see also *de Lasteyrie du Saillant*, cited in footnote 5, paragraph 60, and *Deutsche Shell*, cited in footnote 54, paragraph 43.

65 — Case C-324/00 *Lankhorst-Hohorst* [2002] ECR I-11779, paragraph 36; *de Lasteyrie du Saillant*, cited in footnote 5, paragraph 51; and *Cadbury Schweppes and Cadbury Schweppes Overseas*, cited in footnote 63, paragraph 49.

66 — See paragraph 12 above.

67 — *SGI*, cited in footnote 10, paragraph 66, in which both grounds of justification were considered together.

3. Conclusion on the second and third questions

107. I therefore propose that the reply to the second and third questions should be that a final settlement tax such as that at issue in the main proceedings is justified by the need for a balanced allocation between the Member States of powers of taxation and for maintaining the coherence of the national tax system, if it is not reasonably possible to keep track of the assets of the emigrating undertaking, by reason of their nature and/or amount, until the date when the unrealised capital gains accruing in the State of origin are actually realised. If it is comparatively simple to keep track of them, collection of the final settlement tax before the date of realisation of unrealised capital gains is disproportionate. The question whether, in that case, subsequent losses in value must be taken into account can be answered only by reference to the particular circumstances. If the undertaking's assets consist basically of a foreign-currency loan and if the unrealised currency profits accruing in the State of origin no longer appear for tax purposes in the host State, the final settlement tax must be deferred until the date when an undertaking remaining in the State of origin would have to pay tax on such profits, and currency losses arising up to then must be taken into account.

V — Conclusion

108. In the light of the foregoing, I propose that the Court should answer the questions referred by the Gerechtshof Amsterdam as follows:

'1. A company may rely on the freedom of establishment guaranteed by Article 43 EC (now Article 49 TFEU) against the Member State under whose law it was

incorporated if that Member State imposes a final settlement tax on the occasion of the transfer of the company's place of effective management to another Member State in the sense that corporation tax is payable on the capital gains, which have accrued up to that date but not yet been realised, on the assets transferred, without deferment and without the possibility of future losses being taken into account.

2. Such final settlement tax is justified by the need for a balanced allocation between the Member States of powers of taxation and for maintaining the coherence of the national tax system, if it is not reasonably possible to keep track of the assets of the emigrating undertaking, by reason of their nature and/or amount, until the date when the unrealised capital gains accruing in the State of origin are actually realised. If it is comparatively simple to keep track of them, collection of the final settlement tax before the date of realisation of unrealised capital gains is disproportionate. The question whether, in that case, subsequent losses in value must be taken into account, can be answered only by reference to the particular circumstances.

3. If the undertakings assets consist basically of a foreign-currency loan and if the unrealised currency profits accruing in the State of origin no longer appear for tax purposes in the host State, the final settlement tax must be deferred until the date when an undertaking remaining in the State of origin would have to pay tax on such profits, and currency losses arising up to then must be taken into account.'