OPINION OF ADVOCATE GENERAL KOKOTT

delivered on 30 March 2006 [1]

I — Introduction

1. In the main proceedings Mr N. challenges the assessment and methods of enforcing income tax on profits from substantial shareholdings where residence is moved to another Member State. The Gerechtshof te Arnhem (Regional Court of Appeal, Arnhem) (Netherlands), which is hearing the dispute, is in doubt as to the compatibility of the relevant Netherlands provisions with the provisions of the Treaty as regards citizenship of the Union and on freedom of establishment and has therefore referred five questions to the Court. [2]

2. Under Netherlands law emigration from the Netherlands is equivalent to the disposal of shares. Accordingly, tax on the increase in value of the shares is assessed at the time of emigration, albeit it is then deferred for 10 years or until the date of actual disposal. The taxpayer was formerly obliged to provide security during the period of deferment, but this has been abrogated.

3. The Court has already considered a similar French provision concerning tax on emigration in the case of *De Lasteyrie du Saillant*. [3] Apart from the question as to whether its decision in that case may be applied to the Netherlands provisions, the detail of which is different, in the present case the question arises as to whether Mr N. can rely on freedom of establishment at all. When he emigrated from the Netherlands he was the sole shareholder in three companies resident in Curaçao (Netherlands Antilles). However, at his new place of residence in the United Kingdom Mr N. did not pursue any economic activity for a number of years.

1 — Original language: German.

2 — In a case with similar facts the Gerechtshof 's-Hertogenbosch (judgment dated 15 September 2005, V-N 2005/47.11) regarded the provisions concerning tax on emigration as infringing the Belgium-Netherlands double taxation treaty which applied in that case in conjunction with the Vienna Convention on the Law of Treaties and set aside the relevant tax notices on that basis alone, without considering Community law (see E. Kemmeren, 'Pending cases Filed by the Dutch Courts I', in M. Lang, J. Schuch and C. Staringer, *ECJ Recent Developments in Direct Taxation*, Vienna, 2006, p. 219, at pp. 230 f.).

3 — Case C-9/02 [2004] ECR I-2409.

4. Accordingly, the national court asks first as to the extent to which such provisions infringe Mr N.'s rights as a citizen of the Union. Implicitly, this raises the issue as to the relationship between the provisions concerning citizenship of the Union and concerning freedom of establishment.

5. Further questions relate to the requirements to release the security provided and to the justification for any restrictions on rights to free movement arising out of the taxation on emigration.

II — Relevant national law

6. The Wet inkomstenbelasting 1964 (Law on income tax 1964, 'Wet IB') provides that the taxable income of domestic taxpayers includes profits from substantial shareholdings. Article 20a(1) Wet IB provides in more detail as to what constitutes profits from a substantial shareholding, namely inter alia benefits gained from the disposal of shares (letter b). Article 20a(3) Wet IB provides that a substantial shareholding exists where the taxpayer holds 5% of the capital of a limited liability company, whether directly or indirectly. Article 20a(6)(i) Wet IB provides that ceasing to be a resident taxpayer, in other words emigration, constitutes a disposal of shares.

7. Article 20c(1) Wet IB provides that in general the benefits derived from the disposal shall be the difference between the acquisition and transfer price of the shares. If the charge to tax arises from emigration, the market value of the shares at that time takes the place of the sale price (Article 20c(4) Wet IB). In the case of immigration the market value of the shares at the time of the immigration takes the place of the purchase price as the acquisition price (Article 20c(7) Wet IB).

8. Article 20c(18) Wet IB enables ministerial orders providing inter alia for the conditions on which the tax may be reduced where a taxpayer who has been taxed on emigration returns to the Netherlands within 10 years.

9. Article 25 of the Invorderingswet 1990 (Law on the Collection of State Taxes 1990, 'IW') provides that tax on profits from a substantial shareholding assessed on emigration shall be deferred for 10 years on provision of security, the details to be laid

down by ministerial order. Article 28 IW provides that interest shall not be charged for the period of deferment.

10. Article 26(2) IW enables ministerial rules to provide in more detail for the reduction of deferred tax to the extent that tax on distributed dividends is paid in the Netherlands (letter (a)), to the extent that the profits are taxed abroad (letter (b)) and finally to the extent that tax is still outstanding after 10 years (letter (c)). The enabling powers were exercised to enact the Regulations on the Implementation of the Law on the Collection of State Taxes 1990.

11. Following the judgment in the case of *De Lasteyrie du Saillant*, on 13 April 2004 the State Secretary for Finance stated that where tax was deferred in the case of emigration to another Member State of the European Union it would no longer be necessary to provide any security. On 1 January 2005 new legislative provisions entered into force amending the legal position accordingly, and indeed with retroactive effect from 11 March 2004. [4]

12. Moreover, since then Article 26(5) IW in conjunction with the Implementation Regulations, which have been likewise amended, has provided for the tax to be reduced if the shareholding is sold within 10 years after emigration and by the time of the disposal its value has fallen without the shareholders having received any capital surpluses or reimbursement of any payments or investments. In those circumstances the deferred tax is reduced by one quarter of the difference between the value as of emigration and the value then current. Finally, a reduction is allowed if the profit on the disposal is taxed by another State under a double taxation treaty.

4 — Law of 16 December 2004 (*Staatsblad* 2004, p. 654) and Ministerial Order of 16 December 2004, No WDB2004/756M (*Staatscourant* 2004, p. 249).

III — Fact and questions referred

13. On 22 January 1997 Mr N. moved his permanent residence from the Netherlands to the United Kingdom, where he started to run a farm with an apple orchard in 2002. When he emigrated he was the sole shareholder in three limited liability companies established under Netherlands law (Besloten Vennootschappen) whose actual management and control has been exercised in Curaçao (Netherlands Antilles) since 22 January 1997.

14. For the year 1997 Mr N. declared taxable income of NLG 15 664 697. In addition to income from his own dwelling (NLG 765) this comprised principally income from

substantial shareholdings (NLG 15 663 932). A subsequent tax notice assessed his tax at NLG 3 918 275 and interest on the tax at NLG 228 429.

15. At Mr N.'s request these liabilities were deferred on his providing security. He provided security by pledging shares in one of his companies. After the State Secretary for Finance announced that security could no longer be required, following the judgment in *De Lasteyrie du Saillant*, on 7 June 2004 the tax authority wrote to Mr N. that the pledge could be regarded as released.

16. Mr N. challenged the tax notice for 1997 on the ground that taxing the profits from substantial shareholdings infringed Articles 18 EC and 43 EC. It was not only the obligation to grant security for the tax liability that restricted his free movement. Charging tax on account of his emigration was itself unlawful. Mr N. also challenged the assessment of interest and the provisions relating to reimbursement of legal costs in administrative law proceedings in which European law applied.

17. In essence, the defendant tax authority submitted that there was no cross-border economic activity and that Mr N. was therefore not entitled to rely on rights conferred by the EC Treaty. In any event, once the security had been released there was no longer any restriction. Moreover, the provisions were coherent and justified.

18. By order dated 27 October 2004 the Gerechtshof te Arnhem, which was hearing this dispute, referred the following questions to the Court for preliminary ruling under Article 234 EC:

'(1) Can a resident of a Member State who ceases to reside in that Member State in order to establish himself in another Member State rely, in proceedings against the Member State which he is leaving, on the application of Article 18 EC, solely on the ground that the serving of a tax assessment linked with his departure entails, or may entail, an obstacle to that departure?

(2) If the answer to Question 1 is in the negative, can a resident of a Member State who ceases to reside in that Member State in order to establish himself in another Member State rely, in proceedings against the Member State which he is leaving, on the application of Article 43 EC if it is not clear or plausible from the outset that

he will be pursuing in the other Member State an economic activity as referred to in that article? Is it relevant to the answer to the previous question that that activity will be pursued within a foreseeable period? If so, how long may that period be?

(3) If the answer to Question 1 or 2 is in the affirmative, does Article 18 EC or Article 43 EC preclude the relevant Netherlands legislation by virtue of which an assessment to income tax and social insurance contributions is served in respect of the deemed enjoyment of profit from a substantial shareholding, solely on the ground that a resident of the Netherlands who ceases to be a domestic taxpayer because he has moved his place of residence to another Member State is deemed to have disposed of those of his shares which form part of a substantial holding?

(4) If the answer to Question 3 is in the affirmative because of the fact that security has to be provided to enable a deferment of payment of the tax assessed, can the existing obstacle then be removed with retroactive effect through the release of the security provided? Does the answer to this question depend on whether the security is released on the basis of legislation or a rule of policy, whether or not adopted in the context of enforcement? Does the answer to this question depend on whether compensation is provided for any loss incurred as a result of the provision of security?

(5) If the answer to Question 3 is in the affirmative and the answer to the first question in 4 is negative, can the obstacle which then exists be justified?'

19. In addition the national court makes the following observation: 'For the answer to the question whether, in the event of a court finding in favour of a taxpayer on grounds of a violation of Community law, the Netherlands system of reimbursing legal costs (a flat-rate system) is contrary to Community law, the court endorses [in Dutch, "sluit ... aan"] the question on this subject referred to the EC Court by the Gerechtshof te 's-Hertogenbosch in Case C-376/03'.

20. After the Court handed down its judgment in Case C-376/03 *D.*,[5] by letter dated 12 July 2005, a copy of which was sent to the Court, Mr N. brought to the national court's attention the fact that the Court had not answered the question as to the lawfulness of the system of reimbursing legal costs. Given that the question had not been expressly

5 — [2005] ECR I-5281.

asked in the present proceedings, there was a risk that the Court would again not consider it. Mr N. therefore wondered whether the Gerechtshof te Arnhem should not supplement its reference for a preliminary ruling. However, to date the national court has not done so.

21. Mr N., the Danish, the Netherlands, the German and the Italian Governments and the Commission submitted written observations on the reference for a preliminary ruling. There was no oral hearing.

IV — Legal analysis

A — *Preliminary observation*

22. The national court has deliberately put the question as to the interpretation of Article 18 EC first. By this means it seeks to have clarified the relationship between the general freedom of movement conferred on citizens on the Union and the specific fundamental freedoms, in particular the freedom of establishment. Behind this is the fear that the specific guarantees of free movement of persons, namely free movement of workers, freedom of establishment and freedom to provide services, would lose much of their significance if citizenship of the Union conferred the same scope of protection and could be considered in precedence.

23. The Commission apparently does not share these doubts. In its observations it submitted that only the first question should be answered and that it was unnecessary to consider freedom of establishment.

24. In its case-law the Court has already developed a clear line of authority on the relationship between the guarantees relevant in the present case. According to it the right to free movement which is set out in general terms in Article 18 EC finds specific expression in Articles 39, 43 and 49 EC. [6] Accordingly the Court considers first the more specific guarantees and finds occasion to consider the general free movement of citizens of the Union only if the scope of application of the more specific provisions is not engaged. [7] The Court follows this order even where the question as to citizenship of the Union is expressly raised first. [8]

6 — Case C-193/94 *Skanavi and Chryssanthakopoulos* [1996] ECR I-929, paragraph 22; Case C-100/01 *Olazabal* [2002] ECR I-10981, paragraph 26; Case C-92/01 *Stylianakis* [2003] ECR I-1291, paragraph 18; and Case C-293/03 *My* [2004] ECR I-12013, paragraph 33.

7 — See the judgments cited above, footnote 6. If a specific fundamental freedom is applicable but the interference in it justified, it is by contrast unnecessary to consider the general right to free movement, because justification in that context depends on the same considerations.

8 — Case C-258/04 *Ioannidis* [2005] ECR I-8275, paragraph 20 ff.

25. Apart from general schematic considerations, it appears appropriate to consider the specific fundamental freedoms first because the right to free movement is subject to the restrictions and conditions provided for in the EC Treaty and in implementing provisions. It follows that the second question referred is to be considered first. It is only if freedom of establishment is not applicable in the present case that it is necessary to consider the first question as to the interpretation of Article 18 EC.

26. Regardless of which of the provisions is applicable, it must first be recalled that in enacting provisions in the area of direct taxation the Member States are required to observe Community law, notwithstanding that in the current state of Community law this area falls within the competence of the Member States. [9]

B — *The second question*

27. Article 43(2) EC provides that freedom of establishment includes the right to take up economic activities including setting up and managing undertakings, in particular companies within the meaning of Article 48(2) EC, by nationals of a Member State within the territory of another Member State.

28. By its second question the Gerechtshof te Arnhem asks whether it is possible to rely on freedom of establishment if, at the time the person concerned moves his residence, it is not yet foreseeable that he will take up self-employed activity in the State to which he moves. It also asks as to the extent to which subsequently taking up an economic activity is relevant. In doing so the national court is thinking of the agricultural operation which Mr N. took over approximately five years after emigrating from the Netherlands to the United Kingdom.

29. However, that is not the only thing Mr N. regards as economic activity. Instead, in his view his status as sole shareholder of three companies constitutes economic activity for the purposes of Article 43 EC. This argument is to be considered first, so that in the first instance the significance of the subsequent acquisition of the agricultural operation may be disregarded.

1. Ownership of shares in undertakings as economic activity within the meaning of Article 43 EC

30. In support of his argument that owning shares in undertakings is a relevant eco-

9 — As regards freedom of establishment, see Case C-446/03 *Marks and Spencer* [2006] ECR I-10837, paragraph 29, and *De Lasteyrie du Saillant* (cited above, footnote 3), paragraph 44; as regards free movement of citizens of the Union, see Case C-403/03 *Schempp* [2005] ECR I-6421, paragraph 19.

nomic activity for the purposes of freedom of establishment Mr N. refers to the judgment in *Baars*,[10] in which the Court defined freedom of establishment as follows:

'It is clear from the second paragraph of Article 52 of the Treaty [now Article 43 EC] that freedom of establishment includes the right to set up and manage undertakings, in particular companies or firms, in a Member State by a national of another Member State. So, a national of a Member State who has a holding in the capital of a company established in another Member State which gives him definite influence over the company's decisions and allows him to determine its activities is exercising his right of establishment.'

31. However, this confers only the freedom to set up or acquire an undertaking in another Member State and to manage the undertaking *at its seat*. This right is affected if the undertaking itself — for example if its moves its seat — is subjected to restrictions, or if the exercise of management functions is made more difficult. In addition it covers restrictions which make it more difficult for an investor to acquire a controlling shareholding in an undertaking which has its seat in another Member State and thus to pursue economic activity through that undertaking.

32. However, such restrictions are not up for debate in the present case. There is no connection between the disputed measure and any economic activity which Mr N. pursues through his undertakings in the Netherlands Antilles. By contrast, the tax was assessed when Mr N. moved his (private) residence. One cannot conclude from the Court's definition cited above that this event falls within the scope of application of freedom of establishment.

33. However, one might regard ownership of shares in an undertaking as a self-standing economic activity distinct from the activity of the undertaking. If so, Mr N. pursued this activity from his residence in the United Kingdom.

34. The Court has already considered the extent to which the mere ownership of shares in a company constitutes an economic activity in the context of competition law and in the application of the Sixth Directive. Most recently, in *Cassa di Risparmio di Firenze and Others*[11] it held that merely owning shares, even taken together with the

10 — Case C-251/98 [2000] ECR I-2787, paragraph 22. See also Case C-208/00 *Überseering* [2002] ECR I-9919, paragraph 77, and Case C-436/00 *X and Y* [2002] ECR I-10829, paragraph 37.

11 — Case C-222/04 [2006] ECR I-289, paragraph 111.

exercise of shareholders' rights and the receipt of dividends, was not an economic activity which made the shareholder itself an undertaking for the purposes of Article 87(1) EC. The question would be answered differently if the owner of the shares participated directly or indirectly in the management of the business. Similarly, the Court had already held that ownership of shares was not to be classified as an economic activity which was subject to value added tax. [12]

35. Applying these criteria by analogy, the scope of application of freedom of establishment would certainly be engaged if Mr N. influenced the management of the undertaking's business more than as a mere shareholder from his residence in the United Kingdom. The information provided by the national court and the parties does not give any indication about that. However, the fact that according to the findings in the reference for a preliminary ruling the actual management of the companies' business was carried on in the Netherlands Antilles and not in the United Kingdom indicates that he did not. Moreover, Mr N. does not appear to have held any office in the companies' management organs.

36. Even if the mere ownership of shares in an undertaking were to be regarded as economic activity emigration meant that his private residence moved too. In order to separate the scope of application of the freedom of establishment and of the general right to free movement of citizens of the Union (Article 18(1) EC) there must therefore be ascertained whether Mr N. moved his residence in order to pursue economic activity in the United Kingdom or whether he exercised his right to free movement without regard to any economic activity. [13] Although in principle freedom of establishment is to be considered first, it would be irrelevant if any economic activity were affected only by way of reaction to the change of residence.

37. A natural person who moves his residence to another Member State usually takes his movable property with him. Consequently, provisions which restrict free movement also indirectly restrict the movement of such items of property. None the less, such cases are not considered principally by reference to the provisions on free movement of goods, the reason being that the essence of the case is the exercise of free movement of persons. [14]

12 — See Case C-60/90 *Polysar Investments Netherlands* [1991] ECR I-3111, paragraph 13; Case C-80/95 *Harnas and Helm* [1997] ECR I-745, paragraphs 13 and 14; Case C-442/01 *KapHag* [2003] ECR I-6851, paragraph 38; and Case C-465/03 *Kretztechnik* [2005] ECR I-4357, paragraphs 19 and 20. In his Opinion in *Cassa di Risparmio di Firenze and Others* (cited above, footnote 11), point 88, Advocate General Jacobs referred to the parallels between competition law and value added tax law in considering the Commission's submissions.

13 — On the corresponding distinction between free movement of goods and freedom to provide services according to the principal purpose of the event, see Case C-275/92 *Schindler* [1994] ECR I-1039, paragraph 22; Case C-36/02 *Omega* [2004] ECR I-9609, paragraph 26; and Case C-20/03 *Burmanjer* [2005] ECR I-4133, paragraph 35.

14 — Accordingly, the Court has held that provisions relating to permits for motor vehicles which a worker takes with him when he moves fall within the scope of application of free movement of workers or, as the case may be, free movement of citizens of the Union and not free movement of goods. As to Article 39 EC see Case C-387/01 *Weigel* [2004] ECR I-4981, paragraphs 50 ff.; on Article 18 EC see Case C-365/02 *Lindfors* [2004] ECR I-7183, paragraphs 33 ff.

38. Moreover, the national court, correctly, did not analyse the provisions concerning tax on emigration by reference to free movement of capital. As the Court has recently held mere change of residence does not as such constitute a capital movement. [15] In any event, any transfer of capital takes second place to the exercise of free movement of persons.

39. The same applies to the relationship between freedom of establishment and the general right to free movement. If a natural person moves his residence to another Member State and in doing so takes property consisting of shares in companies with him he is exercising primarily his general right to free movement under Article 18 EC. Any potential economic activity arising out of his owning shares is affected only by way of reaction.

40. The economic activity Mr N. pursues through his shares is concentrated in the place where his undertakings are established. The theory put forward by Mr N. would lead to an artificial multiplication of places of establishment, in that in addition to the seat of the undertaking the shareholder's private residence would be treated as a further establishment. Indeed, Mr N. could have residences in a number of Member States. These would likewise be further business establishments in addition to the undertaking's seat in the Netherlands Antilles.

41. The judgments in *Daily Mail*, [16] *ICI* [17] and *X and Y*, [18] on which Mr N. relies, do not contradict these propositions. Those cases concerned not natural persons but companies. Given that as a rule companies pursue only commercial purposes, their situation is to be distinguished from that of natural persons whose residence has primarily private purposes. Moreover, by contrast with natural persons companies cannot rely on citizenship of the Union. Accordingly, where a company moves its seat, the only starting point is economic activity and thus an exercise of freedom of establishment.

42. The decision of the Court in *De Lasteyrie du Saillant* too does not gainsay

15 — Case C-513/03 *van Hilten-van der Heijden* [2006] ECR I-1957, paragraph 49. See also the Opinion of Advocate General Léger in that case, points 57, 58 and 68. However, on the wording of the nomenclature in the first indent of Annex I to Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty (OJ 1988 L 178, p. 5) in certain circumstances transfers of capital by a single person for his own account (for example, transfers of assets belonging to emigrants) may constitute a capital movement. As to the state of the debate in the literature, see D. Hohenwarter and P. Plansky, 'Besteuerung von Erbschaften nach Wegzug in einen Drittstaat im Gemeinschaftsrecht — Schlussanträge des GA Léger in der Rs. van Hilten–van der Heijden', *Steuer under Wirtschaft International (SWI)* (2005) 417, at 420 f.

16 — Case 81/87 *Daily Mail and General Trust* [1988] ECR 5483.

17 — Case C-264/96 [1998] ECR I-4695.

18 — Case C-200/98 [1999] ECR I-8261.

this conclusion. In the absence of any more details as to the economic activity of the person concerned, the Court based its decision solely on the fact that the national court considered that the provisions on freedom of establishment applied to the dispute before it. [19] Thus, the form in which the person concerned pursued an economic activity was left open. Consequently the Court did not need to give any view on whether the emigration of a natural person who did not pursue any economic activity other than owning shares was to be considered primarily by reference to freedom of establishment or to the general right to free movement.

2. Reliance on freedom of establishment against the home State where there is a long period of time between emigration and the taking up of economic activity

43. In essence the national court asks whether it is possible to rely on freedom of establishment if at the time of emigration it is not foreseeable that any economic activity will be taken up in the host State, and is in fact taken up only much later.

44. Article 43 EC precludes any national measure which, even though it is applicable without discrimination on the grounds of nationality, is liable to hamper or to render less attractive the exercise by citizens of the Union of freedom of establishment as guaranteed by the Treaty. [20]

45. The Court has consistently held that freedom of establishment has two purposes: first, it is intended to ensure that the host Member State treats persons as if they were nationals and prohibits them from restricting the pursuit of self-employed activity by nationals of other Member States; second, it prohibits the Member State of origin from hindering the establishment in another Member State of one of its nationals. [21]

46. On the first point, the obligations of the host Member State arise at the latest when a national of another Member State actually takes up self-employed activity there. It does not matter how long the person concerned has resided in the host Member State up until that time.

19 — *De Lasteyrie du Saillant* (cited above, footnote 3), paragraph 41; see also the discussion by Advocate General Mischo in his Opinion in that case, points 15 to 20. In result he left open the question as to which fundamental freedom applied in the case.

20 — Case C-19/92 *Kraus* [1993] ECR I-1663, paragraph 32; Case C-299/02 *Commission* v *Netherlands* [2004] ECR I-9761, paragraph 15; and Case C-140/03 *Commission* v *Greece* [2005] ECR I-3177, paragraph 27.

21 — See to that effect *Daily Mail and General Trust* (cited above, footnote 16), paragraph 16; *Baars* (cited above, footnote 10), paragraph 28; and *De Lasteyrie du Saillant* (cited above, footnote 3), paragraph 42.

47. However, the present case concerns the second point. In this context the national court raises first the question as to whether it is possible to rely on freedom of establishment only if the person has taken up self-employed activity or it is foreseeable that he will.

48. It must first be observed that emigration normally precedes establishment in the host Member State. If Article 43 EC did not confer any rights prior to establishment, as the German and Netherlands Governments submitted, reliance on freedom of establishment would be largely impossible against restrictions arising on emigration. However, the case-law cited is clearly contrary to this view. [22]

49. In addition the Court has already held that like Article 49 EC, Article 43 EC is applicable in advance of taking up an economic activity; these provisions thus guarantee that a national of a Member State may travel to and reside in another Member State in order to seek self-employed or employed activity. [23]

50. Accordingly, relying on freedom of establishment against one's home State in case of emigration cannot depend on already having become established in the host Member State. Instead, in this context future developments are in principle to be taken into account.

51. However, in order that the scope of application of freedom of establishment is not completely unlimited, when one has to look into the future it must be apparent on the basis of objective criteria that the disputed measure has a real connection to the taking up of self-employed activity. Such a connection may derive from the fact that the national provision regulates a profession. [24]

52. On the other hand, if the case concerns general provisions which do not have as their object access to or pursuit of self-employed activity, such as the Netherlands taxation provisions in the present case, the connection to freedom of establishment must be found elsewhere. In that situation what is decisive is whether at the time the person seeks to rely on freedom of establishment there is specific evidence of the taking up of self-employed activity in another Member

22 — See above, footnote 21.

23 — Case 48/75 *Royer* [1976] ECR 497, paragraphs 31 and 33.

24 — In *Kraus* (cited above, footnote 20, paragraph 18 ff.) the Court decided solely by reference to the fact that having an academic title awarded abroad constituted an advantage in terms of professional development not only for employees but also for self-employed persons. The Court regarded this as sufficient to allow the application of free movement of workers and of freedom of establishment.

State, as the German and the Netherlands Governments submitted. The purely hypothetical possibility that this might occur at some point is not sufficient to engage the scope of application of the freedom of establishment.

53. What specific evidence is acceptable to prove that self-employed activity will shortly be taken up, and the time-limit on when this is expected, cannot be laid down generally, but depends on the circumstances of the individual case. However, it is in any event clear from the reference for a preliminary ruling that when Mr N. emigrated in 1997 there was no relevant evidence.

54. However, a feature of the disputed Netherlands provisions is that they do not impose a one-off burden on persons such as Mr N. by assessing them to tax when they emigrate. On the contrary, their effect continues for up to 10 years. During that period the deferred charge to tax continues to exist latently, and until the new provisions it was necessary to provide security for it. Finally, the tax can become payable if the shares are sold within 10 years after emigration.

55. The effects described above of the taxation arising on emigration continued to make it more difficult for Mr N. to take up self-employed activity. For example, he was not able to dispose of part of his property because it had been pledged in security. It follows that when he took up self-employed activity in the United Kingdom in 2002 Mr N. could rely on freedom of establishment against his home State.

56. Admittedly, when assessing the tax the Netherlands tax authorities could not take account of any future exercise of freedom of establishment. However, they would have been in a position to undo the effect of the taxing provisions with effect from the time freedom of establishment was actually exercised. They would be obliged to do so to the extent that the measures had turned out to be an unjustified restriction on freedom of establishment.

57. Accordingly, the second question is to be answered as follows: The scope of application of freedom of establishment as guaranteed by Article 43 EC is not engaged solely by the fact that a natural person who is the sole shareholder in a company moves his private residence from one Member State to another. However, a national of a Member State who ceases to reside in that State can rely on Article 43 EC against his home Member State if, at the point in time at which he relies on this fundamental freedom, there is specific evidence that it is foreseeable that he will take up self-employed activity in

another Member State. It is possible to rely on Article 43 EC against the home Member State so long as the disadvantageous measure which that State takes in connection with the emigration continues to have effect and to make it more difficult to become established in the host Member State.

C — *The first question*

58. By this question the Gerechtshof te Arnhem seeks to know whether a national of a Member State who moves his residence from his home State to another Member State may rely on Article 18 EC against his home State on the ground that the serving of a tax assessment linked with his departure entails, or may entail, an obstacle to that departure.

59. Given the answer suggested to the second question this question remains significant. This is because freedom of establishment, which was to be considered first, applies only once economic activity is taken up in the United Kingdom. Before that the only possibility is to rely on the general right of citizens of the Union to free movement.

60. Article 18(1) EC confers on every citizen of the Union the right, 'to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in [the EC Treaty] and by the measures adopted to give it effect'.

61. The national court is of the view that the present facts are distinguished from previous cases considered by the Court in that the potential obstacles to residence were not imposed by the host Member State, as they had been in *D'Hoop*[25] and *Lindfors.*[26] In addition, after Mr N. emigrated he no longer had any economic connection to his home State, unlike the situation in *Pusa.*[27]

62. Mr N. and the Commission submitted that Article 18 EC conferred a general right to free movement on which a citizen of the Union could rely against restrictions imposed by his home State. Principally the German Government opposed this. Its view was that Article 18 EC contained only a right to move and to reside in the narrower sense, and not a general prohibition on restrictions.

25 — Case C-224/98 [2002] ECR I-6191.
26 — Cited above, footnote 14.
27 — Case C-224/02 [2004] ECR I-5763.

63. In its consistent case-law the Court has emphasised that Union citizenship is destined to be the fundamental status of nationals of the Member States, enabling those who find themselves in the same situation to enjoy within the scope *ratione materiae* of the Treaty the same treatment in law irrespective of their nationality, subject to such exceptions as are expressly provided for. [28]

64. In *Pusa* the Court held that a citizen of the Union who had exercised his right to free movement under Article 18 EC could not on that account, in the Member State of which he was a national, receive treatment less favourable than he would enjoy if he had not exercised that right. Otherwise the person concerned could be deterred from availing himself of the right of residence guaranteed by Article 18 EC. [29] National legislation which had that effect infringed the principles which underpinned the status of a citizen of the Union, that is, the guarantee of the same treatment in law in the exercise of the freedom to move. [30]

65. So far as the classic fundamental freedoms are concerned the Court has normally considered such unequal treatment of facts having a cross-border aspect and purely domestic cases as a restriction. [31] There is much in favour of likewise treating such measures as prohibited restrictions when they fall within the scope of application of Article 18 EC. [32] It follows that all measures which obstruct the right of citizens of the Union to move and reside freely in other Member States [33] or which otherwise constitute an obstacle which might deter citizens of the Union from exercising this general right to free movement [34] are to be assessed by reference to Article 18(1) EC.

66. It is in any event clear that Member States may not prevent their own nationals from exercising the freedom of movement conferred by Article 18 EC by attaching to it disadvantageous consequences that would not arise if they remained within the territory. [35]

28 — See inter alia Case C-184/99 *Grzelczyk* [2001] ECR I-6193, paragraph 31; *D'Hoop* (cited above, footnote 25), paragraph 28; and *Pusa* (cited above, footnote 27), paragraph 16.

29 — *Pusa* (cited above, footnote 27), paragraphs 18 and 19, referring to *D'Hoop* (cited above, footnote 25), paragraphs 30 and 31.

30 — *Pusa* (cited above, footnote 27), paragraph 20, referring to *D'Hoop* (cited above, footnote 25), paragraphs 34 and 35.

31 — See in particular *De Lasteyrie du Saillant* (cited above, footnote 3), paragraph 45. To this effect see also Case C-319/02 *Manninen* [2004] ECR I-7477, paragraph 20 ff., and *Marks and Spencer* (cited above, footnote 9), paragraph 34.

32 — To the same effect see the Opinions of Advocate General Jacobs in *Pusa* (cited above, footnote 27), points 18 to 20 and 22, and in Case C-96/04 *Standesamt Stadt Niebüll*, pending before the Court, points 52 ff, as well as the Opinion of Advocate General Geelhoed in Case C-406/04 *De Cuyper*, pending before the Court, points 104 to 108. See also my Opinion in Case C-192/05 *Tas-Hagen and Tas*, pending before the Court, point 50.

33 — See *Schempp* (cited above, footnote 9), paragraph 43.

34 — See *Pusa* (cited above, footnote 27), paragraph 19.

35 — See the Opinion of Advocate General Jacobs in *Pusa* (cited above, footnote 27), point 22, and my Opinion in *Tas-Hagen and Tas* (cited above, footnote 32), point 51.

67. From the case-law cited it also appears that Article 18 EC does not apply only to restrictions on emigration, immigration and residence in the narrower sense, as the German Government submitted. [36] To be clear, free movement of citizens of the Union is a fundamental freedom which is to be interpreted broadly. [37] Article 18 EC would be deprived of practical effect if it had only this narrow scope of application and did not apply to any other provisions which could obstruct free movement. [38]

68. There remains to be clarified the extent to which the application of Article 18 EC against the home State depends on the continuing existence of an economic link to that State.

69. In *Pusa* the person concerned continued to receive a pension from his home State, Finland, after he had emigrated to Spain. In Finland a certain amount of this income was protected from being seized by creditors. The calculation of the amount of the protected minimum income took into account domestic but not Spanish income tax. Thus the national provision was linked to internal facts, specifically seizure of the pension paid in Finland. However, in that case too there was no active employment relationship any more in the home State.

70. It is precisely citizens of the Union who are not economically active on whom Article 18 EC confers a right to free movement. [39] This precludes making reliance on the right of free movement against one's home State necessarily depend on a present *economic* link to that State.

71. However, the measure must none the less impose a disadvantage on a citizen of the Union if he wishes to rely on Article 18 EC against his home State. The disadvantage may be economic but could consist in other things which impede emigration.

72. The present taxing event depends on circumstances which arose while Mr N. was resident in the Netherlands, specifically a profit from substantial shareholdings. The tax assessment took effect retroactively from the point in time immediately before his emigration. However, the effects of the tax assessment continue until 10 years after his emigration. [40] Accordingly, Mr N. continues to be affected by the disputed national measure which was taken solely in consequence of his exercising his right to free movement.

36 — See the Opinion of Advocate General Jacobs in *Pusa* (cited above, footnote 32), point 21.

37 — Case C-200/02 *Zhu and Chen* [2004] ECR I-9925, paragraph 31.

38 — *Pusa* (cited above, footnote 27), paragraph 19.

39 — Case C-413/99 *Baumbast and R* [2002] ECR I-7091, paragraphs 81, 83 and 84. To this effect see also Case C-456/02 *Trojani* [2004] ECR I-7573, paragraph 40, and Case C-209/03 *Bidar* [2005] ECR I-2119, paragraph 37.

40 — See above, points 54 and 55.

73. It follows that the answer to the first question is that a national of a Member State who moves his residence from his home Member State to another Member State may rely against his home State on the right to free movement guaranteed by Article 18(1) EC if the serving of a tax assessment linked with his departure subjects him to a disadvantage compared to domestic taxpayers who have not exercised their right to free movement.

D — *The third and fifth questions*

74. In summary, the third and the fifth questions are intended to clarify the extent to which measures such as the tax assessment in dispute in the present case on unrealised profits from a substantial shareholding on emigration infringe Articles 43 and 18 EC. They would do so if they restricted the exercise of the right to free movement and the restriction were not justified.

1. Restriction

75. The analysis of the disputed provisions of Netherlands law must distinguish between the legal position up to the end of 2004 and the amended legal position which applied from 2005. There must first be considered the effects flowing from the assessment to tax at the time of emigration under the conditions which presently apply. The second stage is then to consider the additional circumstances which aggravated the effects of the assessment to tax prior to the change in the law, in particular the obligation to provide security.

76. In *De Lasteyrie du Saillant* the Court has already held that a provision which provides for tax to be charged on unrealised increases in value solely because a taxpayer moves his residence abroad is capable of restricting the exercise of freedom of establishment. [41] Specifically, it results in disadvantageous treatment of persons who have exercised their right to free movement as against taxpayers resident within the territory. Whereas the latter are not assessed to tax on profits from a substantial shareholding until they have disposed of their shares and actually realised their profits, in the case of Mr N. tax was assessed already when he emigrated.

77. The unequal treatment of those who have exercised their right to free movement also infringes Article 18 EC. [42]

41 — *De Lasteyrie du Saillant* (cited above, footnote 3), paragraphs 45 and 46.

42 — See above, point 65.

78. Admittedly, Mr N. need not pay the assessed tax immediately, but only if he actually disposes of his shares within the 10 years after his emigration. [43] However, apart from the longer period of time the Netherlands provision is not materially different from the French. Even taken on its own the tax assessment at the time of emigration constitutes a burden which applies only to persons who exercise their right to free movement.

79. The requirement to submit a tax declaration is an additional formality which can restrict emigration. [44] A resident taxpayer may have to submit a tax declaration at some point in relation to profits from substantial shareholdings, as the Netherlands Government submitted. However, this obligation applies to a resident taxpayer — so far as appears — only when he actually disposes of his shares. If he continues to own his shares he does not have to submit a tax declaration in relation to the latent (unrealised) profits.

80. Apart from that, until the law was amended in 2004 there were two further points. First, tax assessed on emigration was deferred only if security was provided. The Court has already held that such a measure aggravates the restrictive effect of a tax assessment. [45]

81. Second, decreases in the shares' value following emigration were originally not taken into account as reducing the amount of tax. This could have the consequence that the tax on the deemed profit assessed at the time of emigration which became due on a subsequent disposal of the shares could exceed the tax which would have been due on a disposal at the same time within the territory. This is because within the territory the tax would be levied on the (potentially lower) profit actually realised on the disposal.

82. The new provisions in 2004 were an improvement in both these regards. Accordingly, the extent to which the subsequent release of the security completely removed any restriction is to be considered in the context of the fourth question.

83. It is impossible to determine conclusively whether the amendment of Article 26(5) IW has resulted in completely equal

43 — It is assumed that the tax liability expires 10 years after his emigration (see Article 26 IW, cited above, point 10).

44 — On the nature of notification obligations and other formalities as restrictions, see Case C-118/96 *Safir* [1998] ECR I-1897, paragraphs 26 and 28.

45 — See *De Lasteyrie du Saillant* (cited above, footnote 3), paragraph 47.

treatment of reductions in value following emigration. This provision states that the deferred tax may be reduced by one quarter of the difference between the value as of emigration and the current value on disposal. On that basis tax on disposals within the territory and abroad would be equal only if the tax rate were 25%. The documents lodged do not indicate whether this is in fact the applicable rate in every case. Doubts might also arise if the tax reduction were left to the discretion of the authorities. [46]

84. It is for the national court, which is alone competent to interpret national law, to determine whether the provisions applicable on emigration to another Member State would produce the same amount of tax if a profit of the same amount were in fact realised as in a comparable purely domestic situation. [47]

85. Finally Mr N. considers it to be a disadvantage that the disputed notice charged interest on the tax. Interest on tax is charged if more than 15 months elapse between the period of assessment and the date the tax is assessed. It is different from enforcement interest which is charged in respect of the period between issue of the tax notice and payment of the tax. Enforcement interest was not charged in the present case so long as the tax was deferred.

86. Charging interest on tax is the normal consequence of the issue of a tax notice. As the national court correctly stated, charging interest on the tax does not constitute any specific additional disadvantage over and above any obstacle to the exercise of the right of free movement constituted by the assessment to tax on emigration. Interest on the tax is payable only with the rest of the tax debt, that is only if the shares are disposed of within 10 years after emigration. On a disposal within the territory a tax notice would likewise be issued and interest would be charged on the tax in accordance with the same provisions.

87. However, if charging interest on tax is not to constitute a disadvantage on the person emigrating it is necessary first that the claim for interest is appropriately reduced if the claim for tax is partially released in application of Article 26 IW. Second, it is necessary that there is no significant difference between the length of the assessment proceedings where tax is assessed on emigration and where it is assessed on the disposal of shares within the territory such that cross-border cases regularly involve higher claims for interest.

46 — In Case 175/88 *Biehl* [1990] ECR I-1779, paragraph 18, the Court held that the fact that it was within the scope of the tax authority's discretion to create a situation which conformed with Community law did not prevent there being a restriction.

47 — By contrast, in case of *increases* in value after emigration there is no reason to adjust the tax upwards, because to that extent the new State of residence has the right to charge tax.

2. Justification

88. A national provision which restricts freedom of establishment is lawful only if it pursues a legitimate aim compatible with the EC Treaty and is justified by pressing reasons of public interest. In addition the provision must be of such a nature as to achieve its aim and must not go beyond what is necessary for that purpose. [48] The same criteria apply to justification of an infringement of free movement of citizens of the Union. [49]

(a) Pressing reasons of public interest

89. The first step is to consider whether the aims pursued by the disputed provisions are motivated by mandatory reasons in the public interest. The national court has stated that according to the legislative materials the Netherlands provisions charging tax on emigration pursue two aims. On the one hand the provisions are intended to ensure coherent taxation of increases in value of substantial shareholdings which have occurred during residence within the territory, based on the principle of territoriality. On the other the measure is intended to deter transfers of residence motivated purely by tax considerations.

90. The governments participating in the present proceedings emphasise above all that the tax on emigration ensures a fair allocation of tax according to the principle of territoriality. In addition they claim the maintenance of the cohesion of the taxation system and effective fiscal supervision as further grounds of justification.

— Allocation of tax according to the principle of territoriality

91. As already stated, as Community law presently stands levying direct taxes is a matter for the Member States. [50] In particular, it is for them to decide which transactions to tax. In the absence of harmonisation by Community law the Member States are likewise at liberty to lay down the criteria for allocating power to tax by concluding double taxation treaties or by unilateral measures. [51] The second indent of Article 293 EC calls on them expressly to agree to eliminate double taxation within the Community.

48 — Cases C-250/95 *Future Participations and Singer* [1997] ECR I-2471, paragraph 26, *De Lasteyrie du Saillant* (cited above, footnote 3), paragraph 49, and *Marks and Spencer* (cited above, footnote 9) paragraph 35.

49 — See *D'Hoop* (cited above, footnote 25), paragraph 36, and *Pusa* (cited above, footnote 27), paragraph 16.

50 — See above, point 26.

51 — See Case C-336/96 *Gilly* [1998] ECR I-2793, paragraphs 24 and 30; Case C-385/00 *De Groot* [2002] ECR I-11819, paragraph 93; *D.* (cited above, footnote 5), paragraphs 50 and 51; and *van Hilten-van der Heijden* (cited above, footnote 15), paragraph 47.

92. In *Marks and Spencer* the Court recognised that preservation of the allocation of the power to impose taxes between Member States constituted a legitimate purpose which could justify restrictions on freedom of establishment.[52] In that context the principle of territoriality[53] — enshrined in international tax law and recognised by Community law — can be the determining principle on the basis of which the Member States allocate the power to impose taxes.

93. However, there is no clear definition of the principle of territoriality. One practical feature of the principle is that in general States subject only persons resident within their territory to unlimited taxation and in addition tax income of non-residents deriving from sources within the territory on the basis of a restricted tax liability.

94. The principle of territoriality is given expression also in the OECD Model Convention, and it is not unreasonable for Member States to allocate power to tax in accordance with it.[54] Thus Article 13(5) of the OECD Model Convention with respect to Taxes on Income and Capital provides that gains from the alienation of property — subject to certain exceptions which are not relevant here — shall be taxable only in the Contracting State of which the alienator is resident. Article 13(4) of the double taxation treaty between the Netherlands and the United Kingdom of 1980[55] allocates power to tax accordingly.

95. In divergence from this Article 13(5) of the double taxation treaty between the Netherlands and the United Kingdom[56] confers on a contracting State the right to levy according to its own revenue law a tax on gains from disposals by a person who is a resident of the other State but has resided in the first State during the five years preceding the disposal.

96. At first sight the double taxation treaty appears thus to permit a breach of the principle of territoriality. According to its wording the Netherlands could tax the whole of any profit realised on a disposal five years after emigration. Regardless of whether this is the correct interpretation of the treaty, the disputed Netherlands provisions do not go

52 — *Marks and Spencer* (cited above, footnote 9), paragraph 45.

53 — *Marks and Spencer* (cited above, footnote 9), paragraph 39. See also *Futura Participations and Singer* (cited above, footnote 48), paragraph 22.

54 — See *van Hilten-van der Heijden* (cited above, footnote 15), paragraph 48.

55 — SI 1980/1961.

56 — The provision has the following wording: 'The provisions of paragraph (4) shall not affect the right of either of the States to levy according to its own law a tax on gains from the alienation of any property derived by an individual who is a resident of the other State and has been a resident of the first-mentioned State at any time during the five years immediately preceding the alienation of the property.'

so far. Instead they provide in case of disposal for enforcement only of the tax assessed and deferred on emigration on the increases in value which occurred within the territory.

97. Thus, the Netherlands provisions take a clear territorial element as their starting point for the taxation and connect this to a temporal component, namely residence within the territory during the period in which the taxable profit arises. Even if the tax becomes due only when the taxpayer is no longer resident in the Netherlands, the provisions concerning tax on emigration may none the less be seen as consonant with the principle of territoriality.

98. It must also be remembered that it is left to the Member States to determine how they take territorial and temporal elements into account in the detail of allocating power to tax, provided that the cohesion of the tax system is maintained and there is no unlawful multiplicity of tax charges.

99. The possible discrepancy between the period of 5 years laid down by the double taxation treaty and the period of 10 years laid down by national law does not change the assessment of the statutory provisions under Community law. [57] This contradiction, if it is one, must be solved according to national law. [58]

100. At first sight this analysis of the provisions concerning tax on emigration appears to be precluded by the judgment in *De Lasteyrie du Saillant*. In that judgment the Court declined to find that maintaining the allocation of the power to tax could provide justification. [59] According to the submissions of the French Government the only purpose of the provisions then in dispute was to prevent tax evasion, and they were not aimed at 'ensuring generally that increases in value are to be taxed, in the case where a taxpayer transfers his tax residence outside France, in so far as the increases in value in question are acquired during the latter's stay on French territory'. [60]

57 — The extent to which there is in fact a contradiction here is unclear. The tax is assessed immediately before emigration, and payment is only enforced when deferment ends by virtue of an actual disposal. Therefore one might take the view that Article 13(5) of the double taxation treaty did not apply at all, given that the tax assessment formally occurred immediately prior to emigration and accordingly that tax was levied on a person still resident.

58 — In its judgment of 15 September 2005, V-N 2005/47.11 the Gerechtshof 's-Hertogenbosch regarded it as an infringement of the apparently similar double taxation treaty between the Netherlands and Belgium that after the treaty was concluded the length of time for assessing tax was unilaterally increased from 5 to 10 years by an amendment to the Wet IB (see above, footnote 2). On that point the Netherlands Government submitted that the Netherlands had sought to extend the period in the double taxation treaty likewise to 10 years, as had happened in the meantime in the conventions with Belgium and Portugal.

59 — See *De Lasteyrie du Saillant* (cited above, footnote 3), paragraph 68.

60 — *De Lasteyrie du Saillant* (cited above, footnote 3), paragraph 65.

101. By contrast, the Netherlands provisions are aimed not just at tax evasion. They are aimed also at enabling Netherlands taxes to be levied in practice according to the allocation of the power to tax lawfully agreed between the Netherlands and the United Kingdom. If tax were not assessed prior to emigration the profit arising during the period of residence in the Netherlands would have to be calculated at a later date. Depending on the time of the disposal this profit calculation could have to be made several years later, and as the German Government submitted this would cause significant practical difficulties.

103. On this point the Netherlands and the German Governments submitted that assessing tax on emigration offset a potential, unjustified advantage. But for the disputed provisions this could occur if on a subsequent disposal the home State could not charge the profits which had arisen in that State prior to emigration. At the same time the host State would also be prohibited from taxing the profits which had arisen prior to immigration.

104. In theory the Netherlands legislature could equally have structured the tax as a periodic charge payable at the end of every tax year on unrealised profits. However, it had decided to postpone the tax until the profits were realised by the disposal of the shares. But the deferment was on the basis that taxation would be possible at the time of disposal.

— Cohesion of the tax system

102. According to the case-law, for cohesion of the tax system to provide justification there must be a direct link between the grant of a tax advantage and the offsetting of that advantage by a fiscal levy. [61] Thus, provisions which prevent income from being taxed either more than once or not at all are in particular lawful. [62]

105. In assessing the argument based on cohesion the first case to consider is *X and Y*, [63] which concerned a provision with a purpose similar to that of the present provisions concerning tax on emigration. The provisions which were the subject of that dispute provided that where shares in a resident company were transferred to a company whose seat was abroad and which was controlled by the same shareholder tax was to be charged on the increase in the

61 — Case C-204/90 *Bachmann* [1992] ECR I-249, paragraphs 21 to 23; Case C-484/93 *Svensson and Gustavsson* [1995] ECR I-3955, paragraph 18; and Case C-168/01 *Bosal Holding* [2003] ECR I-9409, paragraphs 29 and 30.

62 — See my Opinion in *Manninen* (cited above, footnote 31), point 51.

63 — Cited above, footnote 10.

value of shares. The assessment was intended to ensure that the shareholding was not moved abroad without any latent increase in value being taxed within the territory. In that case the Court accepted that coherence of the tax system could justify the measure, and in the end rejected it only because immediate taxation was not the least restrictive means. [64]

106. It is true that in the present circumstances a coherent tax system would not be guaranteed if emigration made it impossible to levy tax on the profits on the shares which arose during the period of residence in the home State. To that extent cohesion of the tax system and the allocation of tax according to the principle of territoriality point in the same direction in the present case.

107. Moreover, the approach of the Netherlands tax system is coherent in that in the case of immigrating taxpayers taxation of profits on the disposal of substantial shareholdings is based on the value of the shareholding at the time of immigration ('*step-up*'). This method is consistent with the principle of territoriality because it takes account only of the profit which has arisen during the period of residence within the territory.

64 — *X and Y* (cited above, footnote 10), paragraphs 58 and 59.

108. Finally, the fact that the Netherlands provisions [65] allow taxes paid abroad to be taken into account [66] does not stop them being coherent. In so far as there is no infringement of any restrictions imposed by Community law a Member State is free to surrender its claim to tax in certain circumstances, in particular in the context of a bilateral relationship regulated by a double taxation treaty. Such partial exceptions serve to avoid double taxation and thereby even promote coherence. They do not generally call into question the tax claim and its general enforcement at all.

— Prevention of tax evasion and effective fiscal supervision

109. The Netherlands provisions concerning tax on emigration are also intended to prevent a taxpayer from avoiding tax by temporarily moving his residence. In principle this aim [67] is as legitimate as effective fiscal supervision. [68]

65 — See *De Lasteyrie du Saillant* (cited above, footnote 3), paragraph 66, albeit against the background that the French provision was intended solely to prevent evasion.

66 — Article 26(2) IW as in force prior to 2005, and Article 26(5) IW as amended.

67 — See most recently *Marks and Spencer* (cited above, footnote 9), paragraphs 49 to 51.

68 — *Futura Participations and Singer* (cited above, footnote 48), paragraph 31, and Case C-411/03 *SEVIC Systems* [2005] ECR I-10805, paragraph 28.

(b) Proportionality

110. In addition the measures must comply with the principle of proportionality, that is they must be suitable to achieve the aims they pursue and they must not go beyond what is necessary to achieve them. [69]

— Original legal position

111. First, one must consider the provisions in their original form, when deferment of the tax depended on the provision of security. In that form although they were suitable to achieve the specified purposes they were not necessary.

112. Certainly, the security made it easier to enforce tax against a non-resident. If, following emigration, tax became payable in consequence of the sale of the shares the finance authorities could if necessary realise the security. This removed the risk of tax evasion and ensured the effectiveness of fiscal supervision. The taxpayer would remain in contact with the finance authorities of his home State after moving his residence to another Member State at any event because at the relevant time he would want his security to be released.

113. However, there are less restrictive means available which are less expensive for the taxpayer and which are a lesser restriction on the exercise of free movement. In the first place, Directive 77/799/EEC [70] provides that a Member State may obtain from the competent authorities of another Member State all the information enabling it to ascertain the correct amount of income tax. [71] Second, Directive 76/308/EEC [72] places an obligation on the Member States of mutual cooperation in the enforcement of demands for income and capital taxes.

114. In practice these cooperation mechanisms may not function in an efficient and satisfactory manner. However, the Member States cannot rely on deficiencies in the cooperation between their tax authorities in

69 — See the case-law cited above, footnote 48.

70 — Council Directive 77/799/EEC of 19 December 1977 concerning mutual assistance by the competent authorities of the Member States in the field of direct taxation (OJ 1977 L 336, p. 15) as amended by Council Directive 2004/106/EC of 16 November 2004 (OJ 2004 L 359, p. 30) (Directive on mutual assistance)

71 — See Case C-55/98 *Vestergaard* [1999] ECR I-7641, paragraph 26, and Case C-422/01 *Skandia and Ramstedt* [2003] ECR I-6817, paragraph 42.

72 — 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 the 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).

order to justify restrictions on fundamental freedoms.

115. The failure of the provisions as originally in force to take sufficient account of reductions in profit following emigration is also not justified.

— The amended legal position

116. By contrast, as presently in force the Netherlands provisions concerning tax on emigration satisfy the principle of proportionality. The restriction consists solely in the tax assessment linked to emigration. However, thereafter the tax is deferred without any security being provided. In addition provision is made for a reduction in tax to take account of subsequent reductions in value.

117. It would be disproportionate if the tax were assessed on emigration solely in order to counter the risk of tax evasion. This is because tax evasion or tax fraud cannot be inferred generally from the fact that a physical person wishes to transfer his tax residence to another Member State. [73]

118. However, the provisions also pursue the aim of implementing a tax system which is based on the principle of territoriality and is coherent. As amended the charge to tax is no longer an inappropriate obstacle to emigration. It is suitable and necessary in order to be able to subject the profit on a substantial shareholding to tax on a subsequent disposal.

119. It is not apparent that there is any less burdensome and legally and factually possible means of taxing the increase in value of shares which has occurred up to the time of emigration. In particular, it appears hardly possible for the home State to assess the tax after emigration at the time of actual disposal.

120. Even if it were in law possible to assess the tax on the shares due to the Netherlands only subsequently, at the time of disposal, this would not be a less burdensome means less disadvantageous to the taxpayer. This is because the taxpayer would have to retain not only evidence for the subsequent calculation of value but also of deductible costs

73 — *De Lasteyrie du Saillant* (cited above, footnote 3), paragraph 50, and *X and Y* (cited above, footnote 10), paragraph 61.

connected to the profit up to the time of emigration. For that reason the early, temporary determination of tax is ultimately also in the interests of the taxpayer.

121. Finally, it is to be observed that the Netherlands provisions are clearly different from the French provisions which the Court had to consider in *De Lasteyrie du Saillant*, in terms of both their purpose and — since 2005 — their structure. They are intended to enable the practical implementation of a coherent system of taxation allocated according to the principle of territoriality, and not only to prevent tax evasion.

122. Following the abrogation of the obligation to provide security they restrict emigration only insignificantly, by virtue of the temporary assessment of tax. In any event if on disposal the host State does not seek to tax the profits which arose prior to the change of residence (in other words likewise applies the *step-up* principle) there is no double taxation. Even in the light of the judgment in *De Lasteyrie du Saillant* the fundamental freedoms do not preclude arranging the taxation of profits from substantial shareholdings in the way the Netherlands provisions as in force since 2005 do.

123. Accordingly, the answer to the third and fifth questions is that Articles 18(1) and 43 EC do not preclude a provision of a Member State by virtue of which tax is assessed on profits from a substantial shareholding immediately before residence is moved to another Member State

— if the assessed tax is deferred until the shares are actually disposed of without any further conditions being met, and

— if it is ensured that the tax in fact levied on a disposal following emigration is not higher than the tax which would have been levied on disposal within the territory assuming all other circumstances to be the same.

E — *The fourth question*

124. By its fourth question the national court asks in substance what a Member State must do to remove any consequences of the fact that in breach of Community law

the tax used to be deferred only on provision of security.

125. Before answering the fourth question it is to be recalled that the tax assessment linked to emigration still exists as such and — as held above — is lawful. The fact that the tax assessment was originally linked with an obligation to provide security does not affect its lawfulness. On the contrary, one must clearly distinguish between the tax assessment and the fact that the tax liability was deferred only on provision of security.

126. According to the national court the security which was demanded in breach of Community law has been released. In addition the obligation to provide security has been removed from the statutory provisions. Mr N. raises doubts that the release of the pledged shares was executed in proper form. However, this question is for the national court to answer by reference to national law.

127. Thus, all that remains for the Court to decide is whether the release of the security — as the national court puts it — removes the obstacle with retroactive effect. In substance the question amounts to whether the release of the security is in itself sufficient or whether Community law requires in addition that all other disadvantages flowing from the provision of security are eliminated.

128. It is to be observed that providing security may involve cost. If cash is pledged the person concerned misses out on interest. Bank guarantees involve fees. Pledging property such as shares can reduce the taxpayer's credit rating and mean that he is offered less favourable terms when seeking credit. Releasing the security is not enough to compensate for such financial losses.

129. However, so far as appears Mr N. has not claimed any such losses. Accordingly, one might argue that the fourth question raises a hypothetical problem and therefore need not be answered by the Court. None the less, for the sake of completeness I shall discuss this question briefly.

130. The release of a security is similar to the repayment of taxes levied in breach of Community law. The Court has consistently held that the details means of effecting this depend on national law; however, they must not be less favourable than the rules governing similar domestic actions (principle of equivalence) and they must not render

virtually impossible or excessively difficult the exercise of rights conferred by Community law (principle of effectiveness).[74]

131. The principle of equivalence requires that in addition to releasing the security the Netherlands treasury is under an obligation to reimburse the costs of providing the security if national law provides for this in comparable domestic situations. It is not possible to infer more extensive claims from the principle of equivalence. The main point is the release of the security itself, which is apparently not made more difficult by national law. The principle of equivalence does not confer a general right to have consequences undone.

132. Thus, the Court has already held that all ancillary questions in relation to the reimbursement of charges improperly levied, such as payment of interest, are determined by national law.[75] If the Community law principle of effectiveness required the Member States to compensate all disadvantages and losses suffered in consequence of an infringement of Community law, the specific conditions the Court has laid down as regards Member States' liability for infringements of Community law would be circumvented.

133. The principles applicable to Member States' liability for infringements of Community law[76] provide a further basis for any claims over and above the release of the security. Liability arises where three conditions are satisfied: the rule of law infringed must be intended to confer rights on individuals; the breach must be sufficiently serious; and there must be a direct causal link between the breach of the obligation incumbent on the State and the loss or damage sustained by the injured parties.[77]

134. Given that the Community law analysis of tax on emigration was largely unclear until the judgment in *De Lasteyrie du Saillant* was handed down, one could hardly regard an

74 — See Case 33/76 *Rewe* [1976] ECR 1-1989, paragraph 5; Case C-312/93 *Peterbroeck* [1995] ECR I-4599, paragraph 12; Case C-231/96 *Edis* [1998] ECR I-4951, paragraphs 19 and 34; and Joined Cases C-397/98 and C-410/98 *Metallgesellschaft and Others* [2001] ECR I-1727, paragraph 85.

75 — Joined Cases C-279/96, C-280/96 and C-281/96 *Ansaldo Energia* [1998] ECR I-5025, paragraph 28, and *Metallgesellschaft* (cited above, footnote 74), paragraph 85. See also Joined Cases C-216/99 and 222/99 *Prisco and CASER* [2002] ECR I-6761, paragraphs 70 ff.

76 — Joined Cases C-46/93 and 48/93 *Brasserie du Pêcheur and Factortame* [1996] ECR I-1029; Case C-424/97 *Haim* [2000] ECR I-5123, paragraphs 26 and 36 ff.; and Case C-63/01 *Evans* [2003] ECR I-14447, paragraphs 82 ff.

77 — *Haim* (cited above, footnote 76), paragraph 36, and *Evans* (cited above, footnote 76), paragraph 83.

infringement prior to that date as being sufficiently serious.

135. It follows that the fourth question should be answered as follows: If a Member State, in breach of Community law, links the deferment of a tax demand to the provision of security, it can be required, in addition to releasing the security, to compensate the taxpayer for financial losses he has suffered in consequence of providing security, to the extent that national law provides for such claims in similar cases. In addition in principle a claim for damages can exist according to the principles of Member States' liability for infringements of Community law.

F — *Whether to consider the issue as to the provision concerning reimbursement of legal costs*

136. The operative part of the reference for preliminary ruling encompasses only the five questions cited on the provisions concerning tax on emigration. It is not clear how the reference in the order's grounds to the question raised in the case of *D.* as to the lawfulness of a flat rate for reimbursing legal costs is to be interpreted.

137. The wording ('endorses the question', in Dutch, 'sluit ... aan') might be understood as meaning that the national court wishes also to refer this question, in any event if it is not answered by the judgment in *D.* On the other hand one could interpret the passage as a whole as meaning that having regard to the reference in *D.* the court is choosing not to refer the same question to the Court of new. It appears that all the parties to the proceedings understood it to mean the latter, none of them having discussed this point.

138. I am also of the view that the national court did not want to refer this question again. This appears from the fact that whereas the rest of the reference is explained in detail, there is no more detailed information or reasoning in relation to this point. Moreover the national court did not supplement its reference following the issue of the judgment in *D.*, notwithstanding that the Court did not give a view as to the question of reimbursing legal costs.

139. If the question is none the less to be regarded as having been referred, I consider it to be inadmissible in this form.

140. Neither Article 234 EC nor any other procedural provisions lay down specific requirements as to the form of a reference for preliminary ruling. In particular, although clearly recommended it is not mandatory to state the questions together in a separate section of the order for reference. [78] Nor is the Court prohibited from working out which elements of Community law require an interpretation having regard to the subject-matter of the dispute, in the event of questions having been improperly formulated. [79]

141. However, the Court has consistently held that the national court must define the factual and legislative context of the questions it is asking or, at the very least, explain the factual circumstances on which those questions are based. [80] The information provided in decisions making references must not only enable the Court to reply usefully but also give the governments of the Member States and other interested parties the opportunity to submit observations pursuant to Article 23 of the Statute of the Court of Justice. [81]

142. The reference for preliminary ruling contains neither a description of the legal position in the Netherlands nor the amount of the actual legal costs and the amount of any reimbursement of those costs.

143. In particular cases the Court has supplemented incomplete information by drawing on knowledge obtained in other references for preliminary ruling. Here it might draw on the reference by the Gerechtshof te 's-Hertogenbosch in *D.*

144. However, the circumstances of these cases were special. In *Crispoltoni* the Court was able to refer to proceedings in which the same persons were parties. [82] The judgments in *Albany* [83] and *Brentjens'* [84] concerned a statutory provision which had been the subject of a series of references for a preliminary ruling. The Court pointed out that the missing information, of which the Court was aware from one of the parallel sets of proceedings, had been brought to the

78 — See point 24 of the information note on references from national courts for a preliminary ruling, OJ 2005 C 143, p. 1.

79 — Case 83/78 *Pigs Marketing Board* [1978] ECR 2347, paragraph 26, and order in Joined Cases C-307/00 to C-311/00 *Oliehandel Koewelt and Others* [2003] ECR I-1821, paragraph 105.

80 — Joined Cases C-320/90 to C-322/90 *Telemarsicabruzzo and Others* [1993] ECR I-393, paragraph 6; Case C-176/96 *Lehtonen and Castors Braine* [2000] ECR I-2681, paragraph 22; *My* (cited above, footnote 6), paragraph 17, and orders in Case C-157/92 *Banchero* [1993] ECR I-1085, paragraph 4, Case C-66/97 *Banco de Fomento e Exterior* [1997] ECR I-3757, paragraph 7, and Joined Cases C-438/03, C-439/03, C-509/03 and C-2/04 *Cannito and Others* [2004] ECR I-1605, paragraph 6.

81 — *Lehtonen and Castors Braine* (cited above, footnote 80), paragraph 23; and *My* (cited above, footnote 6), paragraph 17; and the orders in *Banchero* (cited above, footnote 80), paragraph 5, and *Cannito* (cited above, footnote 80), paragraph 8.

82 — Joined Cases C-133/93, C-300/93 and C-362/93 *Crispoltoni and Others* [1994] ECR I-4863, paragraph 18.

83 — Case C-67/96 [1999] ECR I-5751, paragraph 42

84 — Joined Cases C-115/97 to C-117/97 [1999] ECR I-6025, paragraph 41.

notice of the parties in the Report for the Hearing. [85] However, there was no Report for the Hearing in the present case, because there was no oral hearing.

145. It appears that it is only in the case of *Europièces* [86] that the Court has pointed out that it is aware of a particular national provision from other proceedings without having regard to whether the parties had equivalent knowledge. In the light of the subsequent judgments which put the possibility for the parties to obtain such knowledge at the forefront it is not possible to give this judgment a decisive importance.

146. Because of the form of the question either it was not clear to the parties that the question as to the provision on legal costs formed part of the subject-matter of the reference at all, or the parties did not have the information necessary to enable them to reach a view. However, the lawfulness of such rules on legal costs could be important for a number of Member States. Accordingly the Court should not answer this question where the Member States have not had an effective opportunity to make submissions.

147. It is open to the Gerechtshof te Arnhem to seise the Court anew in relation to the provision on legal costs and to provide the necessary information in that reference. Indeed, if it is the court of last instance in relation to the decision on legal costs, for example because an appeal directed exclusively against a decision on legal costs is not competent, it may even be under an obligation to make another reference.

148. If the Court none the less wishes to consider the substance of the provision on legal costs, I think that the guidelines laid down by Advocate General Ruiz-Jarabo Colomer in his Opinion in *D.* [87] were correct, and I adopt them. He pointed out in particular that the Community law principle of effectiveness could preclude a provision for flat-rate reimbursement of legal costs if in practice it rendered enforcement of a claim founded on Community law excessively difficult. Whether this is so in the case of the Netherlands provision can be answered in the present proceedings only by the Gerechtshof te Arnhem, not least because the Court does not have any information as to any discrepancy between the amount of the claim for reimbursement and the costs actually incurred.

85 — *Brentjens'* (cited above, footnote 84), paragraph 42; and *Albany* (cited above, footnote 83), paragraph 43. To this effect see also Joined Cases C-51/96 and C-191/97 *Deliège* [2000] ECR I-2549, paragraph 38.

86 — Case C-399/96 [1998] ECR I-6965, paragraph 24.

87 — Cited above, footnote 5, points 107 to 112.

V — Conclusion

149. In conclusion I suggest that the questions referred by the Gerechtshof te Arnhem should be answered as follows:

(1) The scope of application of freedom of establishment as guaranteed by Article 43 EC is not engaged solely by the fact that a natural person who is the sole shareholder in a company moves his private residence from one Member State to another. However, a national of a Member State who ceases to reside in that State can rely on Article 43 EC against his home Member State if, at the point in time at which he relies on this fundamental freedom, there is specific evidence that it is foreseeable that he will take up self-employed activity in another Member State. It is possible to rely on Article 43 EC against the home Member State so long as the disadvantageous measure which that State takes in connection with the emigration continues to have effect and to make it more difficult to become established in the host Member State.

(2) A national of a Member State who moves his residence from his home Member State to another Member State may rely against his home State on the right to free movement guaranteed by Article 18(1) EC if the serving of a tax assessment linked with his departure places him at a disadvantage compared to domestic taxpayers who have not exercised their right to free movement.

(3) Articles 18(1) and 43 EC do not preclude a provision of a Member State by virtue of which tax is assessed on profits from a substantial shareholding immediately before residence is moved to another Member State

— if the assessed tax is deferred until the shares are actually disposed of without any further conditions being met, and

— if it is ensured that the tax in fact levied on a disposal following emigration is not higher than the tax which would have been levied on disposal within the territory, assuming all other circumstances to be the same.

(4) If a Member State, in breach of Community law, links the deferment of a tax demand to the provision of security, it can be required, in addition to releasing the security, to compensate the taxpayer for financial losses he has suffered in consequence of providing security, to the extent that national law provides for such claims in similar cases. In addition, there may be in principle a claim for damages according to the principles of Member States' liability for infringements of Community law.