OPINION OF ADVOCATE GENERAL STIX-HACKL delivered on 12 May 2005 [1]

I — Introductory remarks

1. The present proceedings constitute one of a series of cases, some of which are still pending, which concern the limits placed by Community law on Member States' sovereignty in tax matters. [2]

2. In the present case the national court essentially wishes to know whether the principle of free movement of capital precludes a national rule under which tax credits in respect of social security contributions are denied to non-residents if they do not have any income in that Member State in respect of which social security contributions are payable.

II — Legal framework

A — *Community law*

3. Article 56 EC (formerly Article 73b of the EC Treaty) prohibits all restrictions on the movement of capital and payments between Member States, and between the latter and non-member countries, subject to the relevant provisions of their tax law which distinguish between taxpayers with regard to their place of residence or the place where their capital is invested (Article 58(1)(a) EC — formerly Article 73d of the EC Treaty). In

1 — Original language: German.

2 — See, in particular, the Opinion of Advocate General Ruiz-Jarabo Colomer of 26 October 2004 in pending Case C-376/03 *D.*; see further the pending Cases C-152/03 *Ritter-Coulais*, Opinion of Advocate General Léger of 1 March 2005, C-403/03 *Schempp*, Opinion of Advocate General Geelhoed of 27 January 2005, C-446/03 *Marks & Spencer*, Opinion of Advocate General Poiares Maduro of 7 April 2005, C-513/03 *van Hilten — van der Heijden*, and C-8/04 *Bujura*. The subject-matter of *Bujura* also concerns the taxation of income from savings and investments in respect of non-residents in the Netherlands, albeit — in contrast to the present proceedings — in that case the main question is whether, as a matter of Community law, a Member State is required by reason of double taxation treaties not to differentiate between non-residents in comparable situations. See also the Opinion of Advocate General Léger of 14 April 2005 in Case C-253/03 *CLT-UFA*, judgment not yet delivered, and the pending cases — all concerning the free movement of capital — C-265/04 *Bouanich*, C-292/04 *Meilicke and Others*, and C-346/04 *Conijn*. Finally, see the pending Case C-290/04 *FKP Scorpio Konzertproduktionen* concerning the freedom to provide services.

any event, that proviso cannot be relied on for the purpose of adopting measures establishing arbitrary discrimination or a disguised restriction on the free movement of capital and payments (Article 58(3) EC).

4. The second indent of Article 293 EC (formerly Article 220 of the EC Treaty), for its part, gives Member States the power to ensure, by negotiation, that their nationals are not subjected to double taxation within the Community.

B — *National law*

5. Under the first subparagraph of Article 2.1 of the Wet op de inkomstenbelasting 2001 (Law on Income Tax 2001, hereinafter 'Wet IB 2001'), natural persons are regarded as liable to tax if they either reside in the Netherlands (residents) or, although not residing in the Netherlands, none the less receive income in the Netherlands (non-residents).

6. Article 2.3 of the Wet IB 2001 provides that income tax is to be charged on the following sources of income in so far as they have been received by the taxpayer in the relevant calendar year:

(a) taxable income from employment and home ownership;

(b) taxable income from a substantial interest in a company established in the Netherlands;

(c) taxable income from savings and investments.

7. Article 5.2 of the Wet IB 2001 treats as income from savings and investments the (notional) yield set at 4% presumed to derive from the average value of capital assets less liabilities held as calculated at the beginning and at the end of the calendar year, provided that such average value exceeds the tax-free allowance for capital assets. The aim of the tax-free allowance for capital assets, which at the time relevant to the main proceedings Article 5.5 of the Wet IB 2001 has fixed at EUR 17 600, is to avoid taxing the savings and investments of small savers.

8. A resident taxpayer is regarded as a matter of principle as an insured person who is liable to contribute to the Netherlands social security scheme. The same is true for non-residents who are required to pay Netherlands income tax on account of their employment in that State. Under

Article 6 of the Wet financiering volksverzekeringen (Law on the Financing of Social Security, hereinafter 'WFV'), an insured person is required as a matter of principle to contribute to that scheme. The social security contributions are calculated according to the income of the insured person which is derived from employment and home ownership. The social security contributions payable are those which are due after certain reductions have been applied.

9. Resident taxpayers have a right to a tax-free allowance for capital assets and to various deductions for income tax purposes. Furthermore, to the extent to which they are liable to make social security contributions, they have a right to a tax credit in respect of social security contributions (general old-age insurance, insurance for survivors and general insurance against special medical expenses), which are in the first instance to be set against social security contributions.

10. Taxes and social security contributions are levied together. Category III taxable income is subject to a combined income levy. To this, a combined levying percentage and a combined tax credit are applied (Article 8.1 of the Wet IB 2001). As appears from Article 8.1(d) of the Wet IB 2001, the combined tax credit consists of the aggregate amount of the tax credit in respect of income tax and the tax credit in respect of social security schemes. In accordance with Article 8.3 of the Wet IB 2001, the tax credit in respect of income tax is that part of the general tax credit that relates to the general tax credit in the same way as the lowest-bracket tax rate relates to the combined levying percentage. The tax credits in respect of the social security schemes consist of that part of the general tax credit that relates to the general tax credit in the same way as the percentages of social security contributions established in accordance with the WFV (Article 8.4, 8.5 and 8.6 of the Wet IB 2001, in conjunction with Articles 10(2) and 11 of the WFV).

11. The second subparagraph of Article 2.7 of the Wet IB 2001, however, provides:

'If the taxpayer is also required to pay social security contributions and the tax credit in respect of the social security schemes calculated in accordance with Article 10(4) of the [WFV] cannot be offset entirely against the social security contributions calculated in accordance with Article 10(1) and (2) of the [WFV], the amount of income tax owed shall also be reduced by the amount not offset, after prior application of rules to prevent double taxation.'

12. It thus follows that a resident taxpayer who does not make any social security contributions, for example, because he derives no income from employment and

home ownership but only from savings and investments, receives not only the tax credit in respect of income tax but also the tax credits in respect of social security.

13. In the calculation of their taxable income from savings and investments non-resident taxpayers, unlike resident taxpayers, are, under Chapter 7 of the Wet IB 2001, not entitled to the tax-free allowance referred to in Article 5.5 of the Wet IB 2001. Under Chapter 7 of the Wet IB 2001, non-resident taxpayers are also not entitled to the general tax credit referred to in Article 8.2 of the Wet IB 2001.

14. Only if foreign taxpayers are insured persons under the Netherlands social security system are they then entitled to the tax credits in respect of social security, which in turn presupposes that they derive income from employment in the Netherlands and therefore make contributions to its social security system.

15. However, in accordance with Article 2.5 of the Wet IB 2001, non-resident taxpayers may opt, subject to certain conditions, for the application of the rules for resident taxpayers under the Wet IB 2001. When foreign taxpayers exercise this 'right of option', they are in principle entitled to the tax-free allowance and all tax credits, provided that they fulfil all other applicable requirements.

C — *The Convention for the Avoidance of Double Taxation between the Netherlands and Belgium*

16. According to this bilateral convention signed on 19 October 1970 [3] immovable assets are to be taxed in the State in which they are situated (Article 23(1) of the DTC).

17. Under Article 25(3) of the DTC, 'natural persons resident in one of the States ... shall be entitled in the other State to the personal deductions, tax-free allowances and reliefs which that State grants to its own residents on account of their personal circumstances or family responsibilities'.

3 — Overeenkomst tussen de regering van het Koninkrijk der Nederlanden en de regering van het Koninkrijk België tot het vermijden van dubbele belasting op het gebied van belastingen naar het inkomen en naar het vermogen en tot het vaststellen van enige andere regelen verband houdende met de belastingheffing, *Tractatenblad* 1970, p. 192 (Convention between the Kingdom of the Netherlands and the Kingdom of Belgium for the avoidance of double taxation in the field of taxes on income and capital and for the settlement of other matters in the field of taxation, hereinafter 'Double Taxation Convention' or 'DTC'.)

18. Foreign taxpayers who are resident in Belgium and who do not take advantage of the 'right of option' are, according to the order for reference, entitled to benefit from the DTC. The individual consequences arising from Article 25(3) of the DTC are explained in the ministerial order of 21 February 2002 [4] issued by the Staatsecretaris van Financiën (State Secretary for Finance).

III — Facts and procedure

19. Mr Blanckaert is a Belgian national and is resident in Belgium. He is, together with his wife, the owner of a holiday home in Retranchement in the Netherlands. He derives neither income from employment and home ownership in the Netherlands nor income from a substantial interest in a company established in the Netherlands. On account of his holiday home, however, he derives income from savings and investments in the Netherlands.

20. Mr Blanckaert is not an insured person under the Netherlands social security schemes and correspondingly is not regarded as liable to pay contributions in the Netherlands.

21. Mr Blanckaert receives less than 90% of his family income in the Netherlands. He has not taken advantage of the 'right of option' under Article 2.5 of the Wet IB 2001.

22. Mr Blanckaert was assessed by the Netherlands tax authorities as liable to pay income tax in respect of the year 2001 on a taxable income from savings and investments of EUR 1 610. The sum due was EUR 339. In calculating Mr Blanckaert's income from savings and investments the tax-free allowance was taken into account in accordance with the provisions of the Belgium-Netherlands DTC. Mr Blanckaert was also granted the general income tax credit in the sum of EUR 144. On the other hand, Mr Blanckaert was not granted the tax credits in respect of social security.

23. Mr Blanckaert had, however, claimed the full general tax credit of EUR 1 576, thus including the tax credits in respect of general old-age insurance, insurance for dependants and general insurance against special medical expenses.

24. Mr Blanckaert appealed against the relevant tax assessment, which was, however, confirmed by the responsible tax inspector. He contested that decision and commenced proceedings before the Gerechtshof te 's-Hertogenbosch ('s-Hertogenbosch Regional Court of Appeal).

4 — No CPP 2001 2745, BNB 2002/164.

25. By order of 4 December 2003 the Gerechtshof stayed the proceedings, seeking a preliminary reference from the Court on the following questions:

'(1) Is a non-resident taxpayer, who is a resident of a Member State and does not receive any income from employment in the Netherlands, but only from savings and investments, and who is therefore not obliged to pay, and does not pay, any social security contributions to the Netherlands social security schemes, entitled under EC law to Netherlands tax credits for national insurance schemes (general old-age insurance, general insurance for survivors and general insurance against special medical expenses) in the calculation of his taxable income from savings and investments, in the case where resident taxpayers are entitled to those tax credits in the calculation of their taxable income from savings and investments because they are regarded as insured persons and as obliged to make contributions to the Netherlands national insurance schemes, even if they do not receive any income in the Netherlands from employment, but only from savings and investments, and for that reason do not pay any social security contributions in the Netherlands either?

(2) In answering the first question, is it relevant that the non-resident taxpayer in question earns in excess of or less than 90% of his family income in the Netherlands? In particular:

(a) Is the *Schumacker* test for residents and non-residents applicable only in the case of subjective or person-related tax aspects, such as the right to a personal or family-related tax-free allowance, or does it also apply to non-person-related tax aspects, such as the tax rate?

(b) When deciding whether to treat a non-resident as a resident, are Member States allowed to apply a quantitative rule (such as the 90% rule), despite the fact that this does not guarantee that all discrimination will be removed?

(3) Is the right of option as referred to in Article 2.5 of the Wet IB 2001 an adequate procedural remedy which ensures that the party concerned may make use of his rights as guaranteed under the EC Treaty and rules out all forms of discrimination?

If so, is this also an adequate remedy in the present case, where the party concerned only receives income from savings and investments, given that the party concerned is unable to benefit from the right of option ...?'

IV — The questions referred

26. The Gerechtshof te 's-Hertogenbosch has referred a total of three questions. By its first question the Gerechtshof essentially wishes to know, in the circumstances of the present case and when assessing tax liability on income from savings and investment, to what extent it is lawful as a matter of Community law to differentiate between persons insured under the social security schemes and other persons as regards the grant of tax credits in respect of social security. The background to that question is that persons insured under social security schemes — with the notable exception of frontier workers — are as a rule residents, whereas non-residents are rarely likely to fall within the scope of the social security schemes of the State in question.

27. By its second question the referring court raises questions concerning the *Schumacker*[5] test in order to ascertain the extent to which resident and non-resident taxpayers are to be considered as being in a comparable situation. The third question concerns the option provided for by national law which permits non-resident taxpayers to opt for the same tax treatment as residents.

A — *Main arguments of the parties*

28. As regards the first question all of the parties, with the exception of Mr Blanckaert, argue that Community law does not preclude the rule of national law at issue under which a taxpayer resident in Belgium, who in the Netherlands receives income solely from savings and investments and is thus not liable to pay contributions to the Netherlands social security schemes, is not entitled to the tax credits in respect of social security whereas a resident taxpayer, who in the Netherlands derives income solely from savings and investments, is entitled to such credits.

29. The Netherlands Government, the German Government and the Commission essentially argue that the relevant credits constitute a matter for social security law. An

5 — Case C-279/93 [1995] ECR I-225.

objective difference exists between the situation of a non-resident taxpayer with income exclusively from savings and investments — such as, for example, Mr Blanckaert —, who is not an insured person under the Netherlands social security scheme and accordingly is not liable to pay contributions, and the situation of a resident taxpayer with income exclusively from savings and investments who is an insured person under the Netherlands social security scheme and as such is, as a rule, liable to pay contributions. The difference in treatment is justified on the basis of the different situations.

30. The Netherlands Government observes further that the entitlement to a reduction in social security contributions or to a tax credit in respect of social security contributions does not depend on where the individual concerned is resident. Rather, that entitlement depends upon whether the individual concerned — resident or non-resident — is insured under the national social security scheme. Thus, a non-resident can set off an unused portion, if any, of his tax credit in respect of social security against the amount of income tax which is due, provided that he is — for example, by reason of an employment relationship in the Netherlands — insured under the Netherlands social security system and is thus liable to pay contributions. On the other hand, a resident is not entitled to set off the credit if he is not an insured person, in particular by reason of the provisions of Council Regulation (EEC) No 1408/71, [6] under the national social security scheme.

31. Mr Blanckaert stressed at the hearing, however, that the national rule in question results in the unjustified unequal treatment of residents and non-residents since, in respect of income derived solely from savings and investments in the Netherlands, only residents — in their capacity as insured persons under the social security system — are entitled to credits in respect of social security contributions.

32. As regards the second question, the Netherlands Government and the German Government argue in the alternative that the national rule in question constitutes a subjective or person-related tax allowance. In the present case, that tax allowance cannot be granted because Mr Blanckaert did not earn his income exclusively or almost exclusively in the Netherlands. The Court has permitted the Member States to apply a quantitative rule (such as the 90% rule) in order to distinguish between the different situations of residents and non-residents.

33. Mr Blanckaert considers such a quantitative rule to be inapplicable in so far as its application would confirm the discrimination which he perceives to exist.

6 — Regulation of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community (OJ, English Special Edition 1971 (II), p. 416), as amended and updated by Council Regulation (EC) No 118/97 of 2 December 1996 (OJ 1997 L 28, p. 1).

34. As regards the third question, the Netherlands Government and the German Government take the view that, as Mr Blanckaert has not opted to be treated in the same way as a resident, the question is of a hypothetical nature.

B — *Legal appraisal*

35. It must first of all be considered whether the referring court has adequately indicated the Community law provisions which it seeks to have interpreted. If so, the main question in this case must then be considered, that is to say, the extent to which the principle of free movement of capital, guaranteed by Community law, precludes, for the purposes of granting tax credits, a difference in treatment between persons insured under social security schemes and others.

1. Admissibility of the preliminary reference and applicable Community law

36. The Gerechtshof does not refer in its questions to any particular provisions of Community law. In that regard, the reference can hardly be said to satisfy the requirements set out in case-law, according to which the national court must identify the provisions of Community law of which it seeks an interpretation. [7]

37. Those requirements cannot, however, be treated as an absolute rule; rather, the decisive question is whether the referring court places the Court of Justice in a position to provide a useful answer. [8] It is settled case-law that, 'in the context of the cooperation between the Court of Justice and the national courts established by Article 234 EC, it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted by the national court concern the interpretation of Community law, the Court of Justice is, in principle, bound to give a ruling.' [9]

38. In addition, the Court of Justice may deem it necessary, 'in order to provide a satisfactory answer to the national court which has referred a question to it, ... to

7 — See, for example, Case C-399/98 *Ordine degli Architetti* [2001] ECR I-5409, paragraph 105.

8 — See only the order in Case C-445/01 *Simoncello and Boerio* [2003] ECR I-1807, paragraphs 22, 23 and 30.

9 — See, in particular, Case C-415/93 *Bosman* [1995] ECR I-4921, paragraph 59; Case C-379/98 *PreussenElektra* [2001] ECR I-2099, paragraph 38; Case C-390/99 *Canal Satélite* [2002] ECR I-607, paragraph 18; and Case C-153/00 *der Weduwe* [2002] ECR I-11319, paragraph 31.

consider provisions of Community law to which the national court has not referred in its question'. [10]

39. The grounds of the present order for reference cite the Treaty provisions on the free movement of capital (Article 56 EC et seq.). The referring court also refers to the extent to which those provisions may preclude the provisions of national law at issue. In so doing it has set out its reasons for its choice of the provisions of Community law concerned of which it seeks an interpretation and has indicated the connection which it makes between those provisions and the provisions of national law to be applied in the proceedings pending before it. The reference for a preliminary ruling is therefore admissible.

40. The principle of the free movement of capital put forward by the national court also appears to be relevant. In that regard it is therefore sufficient to observe that an investment in real estate by a non-resident is listed in Section II(A) of Annex I to Council Directive 88/361/EEC. [11] Whilst that directive is not applicable *ratione temporis* to the present case, its annex is nevertheless regularly cited in the case-law of the Court in order to delineate the scope — even under the newly formulated Article 56 EC et seq. — of the principle of the free movement of capital. [12]

41. Against that background it appears possible to dispense with an examination — as suggested, for example, by the Commission — of the Treaty provisions concerning the freedom of establishment (Article 43 EC et seq.).

2. The principle of the free movement of capital

(a) The relationship between the free movement of capital and other fundamental freedoms

42. The free movement of capital (Article 56 EC et seq.) can be distinguished from the other fundamental freedoms at least in its formulation, in so far as, according to the wording of Article 56 EC, it constitutes a general prohibition of restrictions of free

10 — See, in particular, Case 35/85 *Tissier* [1986] ECR 1207, paragraph 9; Case C-315/88 *Bagli Pennacchiotti* [1990] ECR I-1323, paragraph 10; Case C-107/98 *Teckal* [1999] ECR I-8121, paragraph 39; and Joined Cases C-228/01 and C-289/01 *Bourrasse and Perchicot* [2002] ECR I-10213, paragraph 33.

11 — Directive of 24 June 1988 for the implementation of Article 67 of the Treaty (OJ 1988 L 178, p. 5).

12 — See Case C-222/97 *Trummer and Meyer* [1999] ECR I-1661, paragraph 21: '... [I]nasmuch as Article 73b of the EC Treaty [now Article 56 EC] substantially reproduces the contents of Article 1 of Directive 88/361, and even though that directive was adopted on the basis of Articles 69 and 70(1) of the EEC Treaty, which have since been replaced by Article 73b et seq. of the EC Treaty, the nomenclature in respect of movements of capital annexed to Directive 88/361 still has the same indicative value, for the purposes of defining the notion of capital movements, as it did before the entry into force of Article 73b et seq., subject to the qualification, contained in the introduction to the nomenclature, that the list set out therein is not exhaustive.'

movement. Admittedly, that prohibition is limited in particular by Article 58(1)(a) EC, which essentially makes clear that the prohibition under Article 56 EC is without prejudice to the right of Member States to apply the relevant provisions of their tax law which distinguish between taxpayers who are not in the same situation with regard to their place of residence or with regard to the place where their capital is invested. [13] Article 58 (3) EC then clarifies that the distinctions which Member States may make between taxpayers with regard to their place of residence or the place where their capital is invested may not constitute a means of arbitrary discrimination or a disguised restriction on the free movement of capital. [14]

43. It was, however, only in *Manninen* [15] that the Court first had an opportunity to consider in the light of Articles 56 EC and 58 EC the powers of the Member States to legislate, as a matter of principle, in the field of direct taxation. One of the core principles set out in that judgment is that Article 58 EC allows a provision of tax legislation which distinguishes between taxpayers according to the place where their capital is invested only if the distinction which is thereby made is based upon an objective distinction or where the differentiation between comparable situations may be regarded as justified by overriding reasons in the general interest. [16] Such justification presupposes that the difference in treatment does not go beyond what is necessary in order to attain the objective of the legislation. [17]

44. From all of this it follows that restrictions on the free movement of capital are not prohibited as a matter of principle by Article 56 EC, but rather that they must be assessed in the light of the prohibition of discrimination derived from Article 58 EC according to which discrimination may, in an appropriate case, be justified — taking the principle of proportionality into account — by overriding reasons in the general interest.

45. In doctrinal terms it thus follows that the free movement of capital can be distinguished only prima facie from the other fundamental freedoms and it thus appears entirely appropriate to apply the case-law concerning those other fundamental freedoms to the field of direct taxation. [18] That case-law must therefore now be considered.

13 — Article 58(1)(b) EC contains a similar proviso in respect of powers to take action against, in particular, infringements of tax law, for the protection of public policy or public security and for obtaining information about capital movements.

14 — That point is recalled by the Court — albeit with regard to the earlier provision of Article 73d(3) of the EC Treaty — in Case C-35/98 *Verkooijen* [2000] ECR I-4071, at paragraph 44.

15 — Case C-319/02 *Manninen* [2004] ECR I-7477.

16 — *Manninen*, paragraphs 28 and 29.

17 — *Manninen*, paragraph 29.

18 — Advocate General Ruiz-Jarabo Colomer also comes to this conclusion in his Opinion cited in footnote 2, point 53 et seq.

(b) The Court's case-law concerning Community-law limitations on the legislative powers of Member States in the field of direct taxation

46. The Court's case-law concerning Community-law limitations on the legislative powers of Member States in the field of direct taxation has mainly been developed as a result of national provisions which distinguish either between resident and non-resident taxpayers [19] or, alternatively, according to the origin of the taxable income. [20]

47. In so doing the Court examined provisions of national law in the light of the principle of free movement, [21] the principle of the freedom of establishment [22] and the principle of the freedom to provide services. [23]

48. It is settled case-law that, whilst direct taxation does not as such fall within the purview of the Community, powers retained by the Member States in that field must be exercised consistently with Community law. [24] The fundamental freedoms prohibit not only overt discrimination on grounds of nationality but also all covert forms of discrimination which, by the application of other criteria of differentiation, lead in fact to the same result. [25]

49. They thus contain a prohibition of discrimination under which, in the absence of justification, the application of different rules to comparable situations or the application of the same rule to different situations is excluded. [26]

50. In regard to distinctions which national tax law may draw between residents and non-residents, the Court has stressed that national rules which grant persons residing within national territory certain benefits are liable to operate mainly to the detriment of nationals of other Member States, since non-

19 — Case C-175/88 *Biehl* [1990] ECR I-1779; Case C-151/94 *Commission* v *Luxembourg* [1995] ECR I-3685; Case C-80/94 *Wielockx* [1995] ECR I-2493; Case C-107/94 *Asscher* [1996] ECR I-3089; Case C-391/97 *Gschwind* [1999] ECR I-5451; Case C-87/99 *Zurstrassen* [2000] ECR I-3337; Case C-234/01 *Gerritse* [2003] ECR I-5933; Case C-209/01 *Schilling and Fleck-Schilling* [2003] ECR I-13389; and Case C-169/03 *Wallentin* [2004] ECR I-6443.

20 — *Verkooijen*, cited in footnote 14; Case C-422/01 *Skandia and Ramstedt* [2003] ECR I-6817; Case C-42/02 *Lindman* [2003] ECR I-13519; Case C-334/02 *Commission* v *France* [2004] ECR I-2229; Case C-315/02 *Lenz* [2004] ECR I-7063; and Case C-242/03 *Weidert and Paulus* [2004] ECR I-7379.

21 — See, for example, case *Schumacker*, cited in footnote 5, and *Wielockx*, *Asscher*, *Gschwind*, *Zurstrassen*, *Schilling and Fleck-Schilling*, *Wallentin*, all cited in foonote 19.

22 — See, for example, Case C-251/98 *Baars* [2000] ECR I-2787.

23 — See, for example, *Gerritse*, cited in footnote 19, *Skandia and Ramstedt*, cited in footnote 20, and *Lindman*, cited in footnote 20.

24 — See, simply, Case C-246/89 *Commission* v *United Kingdom* [1991] ECR I-4585, paragraph 12, and *Schilling and Fleck-Schilling*, citied in footnote 19, paragraph 22.

25 — See, in particular, Case 152/73 *Sotgiu* [1974] ECR 153, paragraph 11, and Case C-27/91 *Le Manoir* [1991] ECR I-5531, paragraph 10.

26 — See only *Schumacker*, cited in footnote 5, paragraph 30.

residents are in the majority of cases foreigners, with the result that national rules of that kind may constitute indirect discrimination on grounds of nationality. [27]

51. In the field of direct taxation the position of persons residing within national territory is, however, not generally comparable to that of non-residents since it is characterised by objective differences both as regards the source of the income and the ability to pay or the personal and family circumstances of the taxpayer. [28]

52. In this regard, what is decisive is whether subjective taxation criteria such as, for example, the personal circumstances and the family status of the taxpayer in the State of residence or in the State of employment, to the extent to which these differ, are capable of being taken into account in particular when liability to income tax is being assessed in the State of employment.

53. For example, in *Schumacker* the Court held that the positions of a non-resident and a resident taxpayer are not objectively different where the non-resident receives no significant income in the State of his residence and obtains the major part of his taxable income in the State of employment. In such a case the result is that the State of his residence is not in a position to grant him the benefits which result from taking his personal and family circumstances into account. For the non-resident that unequal treatment constitutes discrimination since his personal and family circumstances are taken into account neither in the State of residence nor in the State of employment.

54. A different picture emerges from those cases in which the taxable income to a significant extent does not in fact derive from the State of employment. Thus, the Court has recently held in this regard that: 'in relation to direct taxes, the situations of residents and of non-residents are generally not comparable, because the income received in the territory of a State by a non-resident is in most cases only a part of his total income, which is concentrated at his place of residence, and because a non-resident's personal ability to pay tax, determined by reference to his aggregate income and his personal and family circumstances, is easier to assess at the place where his personal and financial interests are centred, which in general is the place where he has his usual abode.' [29] As a result, the fact that 'a Member State does not grant to a non-resident certain tax benefits which it grants to a resident is not, as a rule, discriminatory having regard to the objective differences between the situations of residents and of

27 — See, inter alia, *Schumacker*, cited in footnote 5, paragraph 28, *Asscher*, cited in footnote 19, paragraph 38, and *Zurstrassen*, cited in footnote 19, paragraphs 19 and 20.

28 — *Schumacker*, cited in footnote 5, paragraphs 31 and 32; see also Case C-385/00 *de Groot* [2002] ECR I-11819, paragraph 90 et seq.

29 — See, inter alia, *Wallentin*, cited in footnote 19, paragraph 15 and the case-law cited therein.

non-residents, from the point of view both of the source of their income and of their personal ability to pay tax or their personal and family circumstances';[30] that said, discrimination on grounds of particular circumstances cannot be ruled out in individual cases.

55. Therefore, in so far as the situations of non-residents and residents are comparable, the question arises as to the extent to which differential treatment of residents and non-residents may objectively be justified, since such differential treatment can constitute indirect discrimination on grounds of nationality, that is, if one proceeds on the assumption that the nationals of a Member State are, as a rule, resident taxpayers.

(c) The existence of indirect discrimination against the applicant in the main proceedings

56. In the main proceedings indirect discrimination against the applicant could arise from the fact that he — as a non-resident — does not benefit from the tax credits in respect of social security contributions at issue since, as a non-resident without income from employment in the Netherlands, he does not require to be covered by the social security schemes in that State,[31] whereas a resident — irrespective of the sources of his income[32] — is, as a rule, required to be covered by the social security schemes and can correspondingly benefit from the tax credits at issue. Such a difference in treatment is not, however, — unlike in the case of *Schumacker* — directly related to the place of residence of the taxpayer.

57. The provision of national law at issue does not at any rate make direct reference to the place of residence of the taxpayer. The possibility of obtaining income tax credit in accordance with the conditions set out in the second subparagraph of Article 2.7 of the Wet IB 2001 — that is to say, in those cases in which the tax credits in respect of social security could not be fully set off against social security contributions — depends, according to the wording of that provision, on whether the taxpayer is also required to be covered by the social security schemes. That in turn depends on whether he is resident in the Netherlands *or* whether he receives income from employment per-

30 — *Wallentin*, paragraph 16 and the case-law cited therein.

31 — Cover under social security schemes is compulsory for those persons who reside in the Netherlands or who receive income from employment in the Netherlands (see Article 6 of the Algemene Ouderdomswet (Law on the general old-age insurance); Article 3 of the Algemene Nabestaandenwet (Law on general insurance for dependants) and Article 5 of the Algemene Wet Bijzondere Ziektekosten (Law on general insurance against special medical expenses)).

32 — In accordance with the provisions cited in footnote 31, cover under the social security schemes is compulsory for a resident, irrespective of his income, if any, from employment. Under Article 7 of the WFV an insured person is required, as a rule, to make contributions — although under Article 8 of that law only income received from employment and home ownership is taken into account. Therefore a resident taxpayer is, as a rule, an insured person under the social security schemes; if, however, he does not receive any income from work he is not required to make contributions.

formed within the Netherlands. It follows, however, that a non-resident can also benefit from the tax credits at issue — that is to say, in accordance with the conditions set out in the second subparagraph of Article 2.7 of the Wet IB 2001, which does not directly distinguish according to the place of residence — and in particular when he receives income from employment on Netherlands territory. The Netherlands Government confirmed this once again at the hearing.

58. The relevant tax credits were therefore denied to Mr Blanckaert not, for example, because he was non-resident but because, as a non-resident, in the absence of income from employment in the Netherlands, he was not required to be covered by the social security schemes of that State.

59. It is true that it could be objected that the provision at issue indirectly makes reference to the place of residence in so far as non-residents who receive income only from savings and investments are not required to be covered by the social security schemes, whereas residents in that position fall within the Netherlands social security system. To that it must however be replied that in such a situation a distinction is not being drawn according to the place of residence in so far as receiving income from employment renders a person — even if, and especially when, non-resident — liable to be covered by the social security schemes.

60. As a result, it must be held that, in the circumstances of the main proceedings — that is to say, as a non-resident without income from employment — Mr Blanckaert is not in a situation which would be comparable to that of a resident without income from employment, since as a matter of national law — here the Volksverzekeringswet (Law on social security) — residents only are required to be covered by the social security schemes.

61. In that regard it is also significant that even residents do not always benefit from the tax credits at issue. The Netherlands Government has indicated that even residents, if they are not insured under a particular branch of the social security system, cannot benefit from the corresponding tax credit. Thus, according to information provided by the Netherlands Government, a person who, for example, has reached the age of 65 years is no longer an insured person within the insurance scheme for old-age pensions and correspondingly can no longer benefit from the tax credit in respect of that scheme. Given its objective — that is to say, guaranteeing a subsistence minimum [33] — the provision at issue appears therefore to be consistent.

62. As regards the consistency of the national provision, it must further be observed that the possibility of benefiting

33 — According to the observations of the Agent of the Netherlands Government at the hearing.

from the tax credits in respect of social security schemes sought by Mr Blanckaert would — without justification — place a non-resident without income from employment in a better position than a resident without income from employment, since the set-off of the relevant tax credits against income tax provided for by the second subparagraph of Article 2.7 of the Wet IB 2001 applies only in those circumstances in which it was not possible to set them off against social security contributions, and is thus of a subsidiary nature. Since a non-resident without income from employment is not liable to make contributions, a possible set-off of tax credits in respect of social security against income tax would from the outset not be of a subsidiary nature. It would furthermore be contrary to the system since such a person is not covered by the social security schemes in the Netherlands, with the result that ultimately non-residents would be given precedence over residents who are not covered by the social security schemes. [34]

63. Irrespective of the question of comparability, it might however be questionable whether it is justifiable to differentiate between non-residents and residents in so far as only the latter, in the event of not receiving any income from employment (and thus without being required to make contributions), regularly possess the characteristic of being insured persons under the social security schemes.

34 — See the example above, point 61.

(d) Objective justification of the differential treatment

64. Ultimately, Mr Blanckaert feels that he has been discriminated against since, according to Netherlands law, a person without income from employment — depending on whether he is resident or not — is treated as being, or as not being, an insured person under the social security scheme. If, however, a person is not insured under the social security scheme, the possibility for that person to reduce income tax payable by transferring the tax credits in respect of social security which have not been set against social security contributions does not apply.

65. Both the Commission and the Governments of the Netherlands and Germany have emphasised that the provision at issue must be categorised as a rule of social security law and not of tax law, which would imply the exclusive legislative competence of the Member States. It appears, however, to be irrelevant whether the provision at issue is categorised as belonging to the one or the other area of law in so far as, in the area of social security law, Member States are also required to exercise their powers in accordance with Community law principles. [35]

35 — Case C-158/96 *Kohll* [1998] ECR I-1931, paragraph 19, and Case C-157/99 *Smits and Peerbooms* [2001] ECR I-5473, paragraph 46. See on this also von Maydell, 'Der Einfluss des europäischen und internationalen Rechts auf das deutsche Sozialrecht', *http://www.soc.nii.ac.jp/jassl/profmaydell1.pdf.*

66. Rather, according to the Court's consistent case-law it appears to be of relevance that 'Community law does not detract from the powers of Member States to organise their social security systems'. [36] From that the Court concludes that 'in the absence of harmonisation at Community level, ... the legislation of each Member State ... determine[s], first, the conditions concerning the right or duty to be insured with a social security scheme' [37] 'and, second, the conditions for entitlement to benefits'. [38] It is thus for Member States alone to determine the scope and reach of a corresponding obligation to be covered by a social security scheme.

67. As regards the financing of social security schemes, the powers of Member States are additionally restricted by the coordinating provisions of Regulation No 1408/71. Those coordinating provisions include in particular the prohibition of double contributions under Article 13 [39] and the corresponding provisions conferring competence on a Member State. [40]

68. Even if one assumes, as Mr Blanckaert does, that the provision at issue differentiates between residents and non-residents in so far as it treats both groups differently where the taxpayer receives only income from savings and investments in the Netherlands — and in particular in so far as it restricts the set-off of tax credits in respect of social security to the income tax of residents, who may be insured persons without being required to pay social security contributions — this differential treatment does not appear to be without objective justification.

69. In my opinion, in determining the financing of its social security schemes, the Netherlands State did not have to adhere to any principles going beyond those of Regulation No 1408/71. In particular, Community law does not contain any duty whatsoever to take income from savings and investments into account in the financing of social security schemes. [41] Nor, on the other hand,

36 — Case 238/82 *Duphar* [1984] ECR 523, paragraph 16, and Case C-70/95 *Sodemare and Others* [1997] ECR I-3395, paragraph 27; see also *Kohll*, cited in footnote 35, paragraph 17; and *Smits and Peerbooms*, cited in footnote 35, paragraph 44.

37 — Case 110/79 *Coonan* [1980] ECR 1445, paragraph 12; Case C-349/87 *Paraschi* [1991] ECR I-4501, paragraph 15; *Kohll*, cited in footnote 35, paragraph 18; and *Smits and Peerbooms*, cited in footnote 35, paragraph 45.

38 — Joined Cases C-4/95 and C-5/95 *Stöber and Piosa Pereira* [1997] ECR I-511, paragraph 36; *Kohll*, cited in footnote 35, paragraph 18; and *Smits and Peerbooms*, cited in footnote 35, paragraph 45.

39 — In Case C-169/98 *Commission* v *France* [2000] ECR I-1049 the Court held, for example, that a national provision which the relevant Member State considered to be a tax provision was incompatible with the prohibition of double contributions laid down in Article 13 of Regulation No 1408/71.

40 — See Article 13(2)(a) of Regulation No 1408/71: 'a person employed in the territory of one Member State shall be subject to the legislation of that State even if he resides in the territory of another Member State or if the registered office or place of business of the undertaking or individual employing him is situated in the territory of another Member State'.

41 — If, however, a Member State decides to do so, it must comply with the prohibition of double contributions under Article 13 of Regulation No 1408/71 (see *Commission* v *France*, cited in footnote 39).

can a duty be construed as a matter of Community law to exclude from a social security scheme persons who are not required to pay contributions.

70. The differential treatment of taxpayers without income from employment for the purposes of the application of tax credits in respect of social security in accordance with their status as insured persons under the social security schemes, as is the case here, is therefore objectively justified, in particular on account of the characteristics of the national social security scheme, the compatibility of which with Community law requirements, for example those of Regulation No 1408/71, cannot be brought into question.

71. The second and third questions need not therefore be examined.

V — Conclusion

72. In the light of the foregoing, I propose that the Court should answer the first question as follows:

Articles 56 EC and 58 EC concerning the free movement of capital within the Community do not preclude a national rule which, for income tax purposes, grants resident taxpayers a tax credit in respect of expenditure connected with social security schemes but denies that tax credit to non-resident taxpayers, in so far as such differentiation is not based upon the place of residence of the taxpayer but upon his status as an insured person under a national social security scheme, without it being relevant in that regard whether the person concerned is or is not required to pay contributions.