Arrêt de la Cour
Case C-9/02

Hughes de Lasteyrie du Saillant

v

Ministère de l'Économie, des Finances et de l'Industrie

(Reference for a preliminary ruling from the Conseil d'État (France))

(Freedom of establishment – Article 52 of the EC Treaty (now, after amendment, Article 43 EC) – Tax legislation – Transfer of tax residence to another Member State – Methods of taxing increased value of securities)

Summary of the Judgment

Freedom of movement for persons – Freedom of establishment – Tax legislation – Taxation of unrealised capital gains where tax residence transferred to another Member State – Not permissible – Justification – None

(EC Treaty, Art. 52 (now, after amendment, Art. 43 EC))

The principle of freedom of establishment laid down by Article 52 of the Treaty (now, after amendment, Article 43 EC) must be interpreted as precluding a Member State from establishing, in order to prevent a risk of tax avoidance, a mechanism for taxing latent, i.e. not yet realised, increases in value of company shares, where a taxpayer transfers his tax residence outside that State.

A taxpayer wishing to transfer his tax residence in exercise of the right guaranteed to him by that provision is subjected to disadvantageous treatment in comparison with a person who maintains his residence in that State where he becomes liable, simply by reason of such a transfer, to tax on income which has not yet been realised and which he therefore does not have, whereas, if he remained in that State, increases in value would become taxable only when, and to the extent that, they were actually realised.

That difference in treatment cannot be justified by the aim of preventing tax avoidance, since tax avoidance or evasion cannot be inferred generally from the fact that the tax residence of a physical person has been transferred to another Member State.

(see paras 38, 46, 50-51, 58, 69, operative part)

JUDGMENT OF THE COURT (Fifth Chamber)
11 March 2004(1)

(Freedom of establishment – Article 52 of the EC Treaty (now, after amendment, Article 43 EC) – Tax legislation – Transfer of residence for tax purposes to another Member State – Methods of taxing increased value of securities)

In Case C-9/02,
REFERENCE to the Court under Article 234 EC by the Conseil d'État (France) for a preliminary ruling in the proceedings pending before that court between
Hughes de Lasteyrie du Saillant

and

Ministère de l'Économie, des Finances et de l'Industrie,
on the interpretation of Article 52 of the EC Treaty (now, after amendment, Article 43 EC),

THE COURT (Fifth Chamber),,

composed of: C.W.A. Timmermans (Rapporteur), acting for the President of the Fifth Chamber, A. La Pergola and S. von Bahr, Judges,
Advocate General: J. Mischo,
Registrar: H.A. Rühl, Principal Administrator,
after considering the written observations submitted on behalf of:

– Mr de Lasteyrie du Saillant, by E. Ginter, avocat,
– the French Government, by G. de Bergues, F. Alabrune and P. Boussaroque, acting as Agents,
– the Danish Government, by J. Bering Liisberg, acting as Agent,
– the German Government, by W.-D. Plessing and M. Lumma, acting as Agents,
– the Netherlands Government, by H.G. Sevenster, acting as Agent,
– the Portuguese Government, by L. Fernandes and A. Seiça Neves, acting as Agents,
– the Commission of the European Communities, by R. Lyal and C. Giolito, acting as Agents,
after hearing the oral observations of Mr de Lasteyrie du Saillant, represented by E. Ginter and B. Michaud, avocat, the French Government, represented by P. Boussaroque and J.-L. Gautier, acting as Agents, the Netherlands Government, represented by S. Terstal, acting as Agent, and the Commission, represented by R. Lyal and C. Giolito, at the hearing on 13 February 2003,

having heard the Opinion of the Advocate General at the hearing on 13 March 2003,

gives the following

Judgment

1 By a decision of 14 December 2001, received at the Court on 14 January 2002, the Conseil d'État referred to the Court for a preliminary ruling under Article 234 EC a question on the interpretation of Article 52 of the EC Treaty (now, after amendment, Article 43 EC).
2 That question was raised in proceedings between Mr de Lasteyrie du Saillant ('Mr de Lasteyrie') and the Minister of the Economy, Finance and Industry concerning tax charged on an unrealised increase in the value of securities, which is due in the event of a taxpayer transferring his residence for tax purposes outside France.

Legal background

3 Article 24 of Law No 98-1266 of 30 December 1998, the Finance Law for 1999 (JORF of 31 December 1998, p. 20050), in the version in force as at the date of Decree No 99-590 of 6 July 1999, applying Article 24 of the Finance Law for 1999 in respect of the methods of taxing certain increases in the value of securities in the event of the transfer of residence for tax purposes outside France (JORF, 13 July 1999, p. 10407) provides:

'I. …

II: An Article 167a shall be inserted into the Code Général des Impôts as follows:

"Article 167a

I. – 1. Taxpayers normally resident for tax purposes in France for at least six of the ten previous years are taxable, at the date of the transfer of their residence from France, on the increases in value determined in the company securities referred to in Article 160.

2. The increase in value to be determined shall be the difference between the value of the company securities at the date of transfer of residence for tax purposes outside France, determined in accordance with the rules laid down in Articles 758 and 885 T bis, and the price at which they were acquired by the taxpayer, or, if they were acquired for no consideration, their value as determined for the purposes of transfer duty.

Losses may not be offset against increases in value of the same kind occurring elsewhere.

3. The increase in value determined shall be declared under the conditions laid down in paragraph 2 of Article 167.

II.– 1. Payment of the tax on the increase in value determined may be deferred until the time of the transmission, redemption, repayment or cancellation of the company securities concerned.

Suspension of payment is subject to the condition that the taxpayer shall declare the amount of the increase in value determined in accordance with the conditions in I above, applies for the benefit of suspension, designates a representative established in France authorised to receive communications concerning the basis of assessment, collection of the tax and any disputes relating thereto, and, before his departure abroad, constitutes with the official responsible for collection guarantees sufficient to ensure recovery of the debt by the Treasury.

The suspension of payment provided for in this article has the effect of suspending the commencement of the statutory period within which to bring a recovery action until the date of the event causing it to expire. It is analogous to the suspension of payment provided for in Article L. 277 of the Book on Tax Procedures for applying Articles L.208, L.255 and L.279 of that book.

The tax in respect of which suspension of payment is applied for pursuant to this article shall not be taken into account in relation to the award or repayment of tax credits or to the withholding or deduction of tax other than by way of discharge.

2. Taxpayers benefiting from suspension of payment pursuant to this article are required to make the declaration referred to in paragraph 1 of Article 170. The cumulative amount of suspended tax shall be indicated on that declaration, to which shall be annexed a statement drawn up on a form issued by the administration showing the amount of tax relating to the securities concerned for which the suspension period has not expired, and also showing, in appropriate cases, the nature and the date of the event causing the suspension to expire.

3. Subject to 4 below, where the taxpayer benefits from the suspension of payment, the tax due pursuant to this article shall be paid before 1 March in the year following that in which the suspension expired.

However, the tax of which payment has been suspended may be demanded only up to the limit of its amount applied to the difference between, on the one hand, the price in the event of transfer or redemption, or the value in other cases, of the securities concerned as at the date of the event causing the suspension to expire, and, on the other hand, their price or acquisition value used for the application of I, 2 above. Exoneration is granted

automatically in respect of the remainder. In that case, the taxpayer shall provide the calculations used, in support of the declaration referred to in 2 above.
The tax paid locally by the taxpayer and relating to the increase in value actually realised outside France may be set off against the income tax established in France provided it is comparable with that tax.
4. Failure to produce the declaration and the statement referred to in 2 above, or the omission of all or part of the information that must be contained therein, results in the suspended tax becoming immediately payable.
III. At the expiry of five years from the date of departure, or at the date on which the taxpayer retransfers his place of residence for tax purposes to France, if earlier, exoneration shall be automatically granted in respect of the tax established pursuant to I in so far as it relates to increases in value in relation to company securities which, at that date, remain in the ownership of the taxpayer.
IV. The conditions for applying this article, and in particular the rules for avoiding double taxation of the increases in value determined, the obligations concerning declarations by taxpayers, and the methods of suspending payment, shall be determined by a decree in the Conseil d'État."
V. The provisions of this article shall apply to taxpayers who transfer their residence for tax purposes outside France after 9 September 1998.'
4 Article 160, I, of the Code Général des Impôts ('CGI') in the wording in force at the date of Decree No 99-590, is worded as follows:
'Where, during the life of a company, a partner, shareholder or holder of beneficial interests transfers all or part of his securities, the excess of the transfer price over the acquisition price – or the value as at 1 January 1949 if higher – is charged exclusively to income tax at the rate of 16%. In the case of transfer of one or more securities belonging to a series of securities acquired at different prices, the acquisition price to be used shall be the weighted average acquisition value of those securities. In the case of a transfer of securities after the closure of a share savings plan defined in Article 163d D or their withdrawal after the eighth year, the acquisition price shall be deemed to be equal to their value at the date on which the transferor ceased to benefit, in respect of those securities, from the advantages referred to in paragraphs 5a and 5b of Article 157 and in IV of Article 163d D.
The taxation of the increase in value thus realised is subject to the sole condition that the rights held directly or indirectly in company profits by the transferor or the transferor's spouse, their ascendants and descendents, must together have exceeded 25% of those profits at some time during the previous five years. However, where the transfer is made for the benefit of one of the persons referred to in this paragraph, the increase in value is exempt if all or part of those company securities are not resold to a third party within five years. Otherwise, the increase in value is taxed in the name of the first transferor in respect of the year of resale of securities to third parties.
…
Diminutions in value suffered in the course of a year may be offset only against increases in value of the same kind realised during the same year or the five years following.
…
Increases in value which are taxable pursuant to this article and diminutions in value must be declared under the conditions specified in paragraph 1 of Article 170 in accordance with rules to be established by decree.'
5 According to the first paragraph of Article 3 of Decree No 99-590:
'Taxpayers who transferred their residence for tax purposes outside France between 9 September 1998 and 31 December 1998 are required before 30 September 1999 to sign the amending declaration referred to in paragraph 2 of Article 167 of the Code Général des Impôts in respect of increases in value taxable pursuant to paragraph 1a of Article 167 and I of Article 167a of that code, and also the special form referred to in Article 91j of Annex II to the Code Général des Impôts.'

6 Article R. 280-1 of the Book on Tax Procedures (Livre des Procédures Fiscales; 'the LPF'), which was inserted therein by Article 2 of Decree No 99-590 reads:
'Taxpayers wishing to benefit from the suspension of payment referred to in II of Article 167a of the Code Général des Impôts must send to the official at the Treasury with responsibility for non-residents draft guarantees in the forms specified in the second paragraph of Article R.277-1 not later than eight days before the date of the transfer of residence for tax purposes outside France. A receipt will be issued therefor.
The provisions of the third paragraph of Article R.277-1, of Articles R.277-2 to R.277-4, and of Article R.277-6 apply.'
7 Article R.277-1 of the LPF provides:
'The responsible official shall request the taxpayer who has applied for the suspension of tax to set up the guarantees referred to in Article L.277. The taxpayer has a period of 15 days from receipt of the official's request to give notification of the guarantees which he undertakes to set up.
Such guarantees may take the form of a cash payment into a Treasury suspense account, an acknowledgement of indebtedness in favour of the Treasury, the lodging of a deposit, securities, goods deposited at State-approved warehouses and subject to a warrant endorsed in favour of the Treasury, by mortgage charges, by pledging of business assets.
If the official considers that the guarantees offered by the taxpayer cannot be accepted because they do not meet the conditions laid down in the second paragraph, he shall notify his decision by registered letter.'
8 Under Article R.277-2 of the LPF:
'Should the guarantees set up depreciate in value or be found insufficient, the administration may at any time, under the same conditions as laid down in Articles L.277 and L.279, request the taxpayer by registered letter with advice of receipt, to top up the guarantee to ensure recovery of the contested sum. Should the taxpayer not satisfy that request within a month, proceedings for recovery of the tax shall be resumed.'
9 Article R.277-3 of the LPF reads:
'Where guarantees other than those referred to in Article R.277-1 are offered, they may be accepted, on the proposition of the official with responsibility for recovery, only by the Paymaster-General or the Collector-General of taxes for the Paris region in the case of direct taxes collected via the register, or by the Director of Tax Services or the Regional Director of Customs and Indirect Taxes, as the case may be, in the case of other taxes.'
10 Article R.277-4 of the LPF provides:
'The taxpayer may be permitted by the official with responsibility for recovery, at any time, to replace the guarantee he has set up with one of the other guarantees referred to in Article R.277-3, of at least equal value.'
11 Under Article R.277-6 of the LPF:
'A decree of the minister responsible for finance shall determine the conditions under which securities may be used as a guarantee, and in particular the nature of those securities and the amount for which they are allowed, that amount being calculated in accordance with the most recent value quoted on the day of deposit.'

The dispute in the main proceedings and the question referred for a preliminary ruling
12 Mr de Lasteyrie left France on 12 September 1998 in order to settle in Belgium. As at that date, he held, or had held at some time during the five years preceding his departure from France, either directly or indirectly with members of his family, securities conferring entitlement to more than 25% of the profits of a company subject to corporation tax and established in France. The market value of those securities being then higher than their acquisition price, Mr de Lasteyrie was taxed on the increase in value in accordance with Article 167a of the CGI and implementing provisions.
13 Mr de Lasteyrie applied to the Conseil d'État for the annulment of Decree No 99-590 on the ground of excess of powers, arguing that Article 167a of the CGI was unlawful because it was contrary to Community law.

14 The Conseil d'État first took the view, contrary to Mr de Lasteyrie's argument, that those provisions did not have either the object or the effect of placing any restrictions or conditions on the effective exercise by the persons concerned of the right to come and go. However, it pointed out that Article 52 of the Treaty precludes a Member State from establishing rules that have the effect of hindering the establishment of certain of its nationals in the territory of another Member State.
15 The Conseil d'État noted that Article 167a of the CGI provides, in accordance with the conditions laid down therein, that taxpayers intending to transfer their residence for tax purposes outside France are to be subject to immediate taxation on increases in value that have not yet been realised ('latent increases in value'), and would therefore not be taxed if those taxpayers retained their residence in France.
16 At the same time, the Conseil d'État noted that Article 167a of the CGI contains provisions which, in the case of suspension of payment, make it possible to avoid those taxpayers definitively having to bear a tax burden that they would not have had to bear, or which is heavier than they would have had to bear, if they had stayed in France, and which, moreover, exonerate those taxpayers the end of a five-year period, in so far as the company securities showing an increase in value are still part of those taxpayers' assets, the persons concerned having the ability to apply for suspension of payment of the tax up to that time.
17 The Conseil d'État finally stated that obtaining that suspension was conditional upon the taxpayers setting up guarantees sufficient to ensure recovery of the tax. Having regard to the constraints which the setting up of such guarantees might represent, the Conseil d'État is uncertain whether Community law precludes legislation such as that at issue in the case before it.
18 In those circumstances, taking the view that the dispute before it raised a serious difficulty as to the scope of the applicable Community rules, the Conseil d'État decided to suspend the proceedings and refer the following question to the Court of Justice for a preliminary ruling:
'Does the principle of freedom of establishment laid down in Article 52 of the EC Treaty (now, after amendment, Article 43 EC) preclude the introduction by a Member State, for the purpose of preventing the risk of tax avoidance, of arrangements for taxing capital gains in the case of transfer of tax residence, such as described above [?]'

The question referred
Observations submitted to the Court
19 The German and Netherlands Governments have submitted that the order for reference does not contain sufficient evidence that Mr de Lasteyrie used the freedom of establishment guaranteed by Article 52 of the Treaty, or, therefore, that he falls within the scope of that provision.
20 In his observations before the Court, Mr de Lasteyrie has indicated that he moved his tax residence to Belgium for the purpose of carrying on his profession there.
21 The Danish and German Governments argue that Article 167a of the CGI does not constitute an obstacle to the freedom of establishment. They argue that that provision is not discriminatory. Nor does it directly or indirectly prevent French nationals from establishing themselves in another Member State. According to the Danish Government, there is no evidence that the taxation of increased values at issue in the main proceedings limits the opportunities for French nationals to establish themselves in another Member State. It further argues that the fact that granting of suspension of payment of the tax is made subject to the establishment of guarantees cannot be regarded as a requirement capable in itself of exercising a major influence on the possibility of French nationals establishing themselves in another Member State.
22 Mr de Lasteyrie, the Portuguese Government and the Commission consider that the restrictive effects of Article 167a of the CGI constitute obstacles to the exercise of freedom of establishment. Unlike taxpayers who remain in France and are taxed on increases in

value only after they have been actually realised, those who transfer their residence abroad are taxed on latent increases in value. In respect of those taxpayers, the event giving rise to the charge to tax is the transfer of their tax residence outside France rather than the transfer of the securities concerned. This is therefore a typical restriction 'on leaving the territory'. Such a system penalises taxpayers who leave France in comparison with those who remain there and thereby introduces a discriminatory difference in treatment. The provisional nature of the taxation and the possibility of obtaining a suspension of payment do nothing to exclude such a restrictive effect, since the granting of that suspension is not automatic and is subject to the condition that a tax representative resident in France has to be designated. Moreover, the obligation to set up guarantees involves not only financial costs but, above all, the unavailability of the assets given as a guarantee. In Mr de Lasteyrie's submission, such an obligation in itself constitutes an obstacle to freedom of establishment.

23 The Netherlands Government considers that the obstacle to the freedom of establishment constituted by Article 167a of the CGI is very limited and, in any case, too uncertain and indirect to be regarded as capable of actually hindering such a freedom.

24 The French Government has concentrated its analysis on the possible justifications for such an obstacle. In that respect, it first argues that Article 167a of the CGI is not contrary to Article 52 of the Treaty, having regard to the objective pursued by that provision, namely the prevention of tax avoidance. In the government's submission, paragraph 26 of the judgment in Case C-264/96 *ICI* [1998] ECR I-4695 is authority for the proposition that legislation specifically aimed at excluding from a tax advantage purely artificial arrangements that are designed to circumvent tax law may constitute an imperative reason in the public interest. Therefore, it argues, a restriction on the freedom of establishment arising from a provision designed to thwart what is really an evasion of tax law may be regarded as complying with that freedom. This case concerns an example in the tax area of what the Court has regarded as the 'abusive exercise' of a right conferred by Community law (Case C-370/90 *Singh* [1992] ECR I-4265).

25 The government also points out that the adoption of Article 167a of the CGI was inspired by the behaviour of certain taxpayers in temporarily transferring their tax residence before transferring securities with the sole aim of avoiding payment of the tax on increases in value due in France. Moreover, given that the effectiveness of fiscal supervision constitutes an overriding requirement in the public interest (Case C-250/95 *Futura Participations and Singer* [1997] ECR I-2471, paragraph 31), the government considers that effectiveness in recovering a tax due, which constitutes a later stage than supervision in the area of fiscal procedure, should also be regarded as an overriding requirement.

26 The French Government further maintains that the absence of effective bilateral or multilateral international instruments, allowing a recovery action to be carried out identical to that carried out in national territory, contributes to making recovery of the tax problematic where the taxpayer lives in another Member State and justifies the adoption of Article 167a of the CGI. It maintains that, for the same reasons, it is necessary to make granting of the suspension of payment subject to the setting up of guarantees.

27 The French Government then argues that application of Article 167a of the CGI is proportionate to the aim pursued, since the constraints imposed on the taxpayer are limited in time. The tax charged is capable of becoming effective only within a period of five years following the date on which the taxpayer went abroad. At the end of that period, if the person concerned has not sold his securities, he is free of any tax obligation towards the French authorities. The establishment of a five-year period ensures the effectiveness of the system and prevents evasion by means of an establishment of short duration abroad.

28 Moreover, the methods by which the taxation was carried out were in no way disproportionate. Where suspension is refused, it is by reason of the taxpayer's own fault, because, for example, he has not made an appropriate declaration. If suspension is granted, the constraint imposed on the taxpayer arises from the obligation to establish

payment guarantees. The taxpayer concerned benefits from a suspension of payment in nearly all cases. In practice, the government argues, the taxpayer has no tax to pay at the time he transfers his tax residence outside France.
29 Finally, the French Government emphasises that, in the case of transfer of securities, the amount of the tax which may be demanded in France is calculated in such a way as to avoid any overtaxation. The tax on increases in value which the taxpayer may have to pay under the tax legislation of the host State is deducted from the tax on increased values due in France. Moreover, diminutions in value determined after the taxpayer's departure from France give rise to exoneration from the tax in respect of those amounts. Similarly, increases in value accruing after such departure are excluded from the assessment of the tax due in France.
30 The Danish, German and Netherlands Governments also consider that Article 167a of the CGI is justified by imperative reasons in the public interest and is justified by the aim pursued.
31 In that respect, the Danish Government refers in particular to the judgment in Case C-118/96 *Safir* [1998] ECR I-1897, paragraphs 25 and 33, in which the Court recognised protection of the tax base from fiscal erosion as an imperative reason justifying an obstacle to the freedom to provide services.
32 The German Government argues, first, that Article 167a of the CGI is based on the distribution of the power to impose taxes between the 'State of departure' and the 'State of destination'. The right of the 'State of departure' to tax increases in value of holdings in capital companies arises from the fact that those increases arise from the regular activity of the company in that latter State. Therefore, they are included in the assets of the taxpayer who, until his departure, is taxable in that State. Secondly, the German Government refers to paragraph 26 of the ICI judgment, referred to above, in which the Court generally recognised the possibility of justification based on the risk of tax avoidance.
33 The Netherlands Government argues that the limitation of the power to tax to increases in value realised in the taxpayer's State of residence, and the correlative taking into account of increases in value constituted in that State where securities are sold or the tax residence is transferred, complies with the principle of fiscal territoriality. It considers that the combined effect of the charging to tax when the taxpayer moves abroad and the requirement for a guarantee in order to obtain a suspension of payment, so as to ensure effective collection of the tax, is necessary in order to ensure the coherence of the national tax system. Such a ground might justify a provision restricting fundamental freedoms (Case C-204/90 *Bachmann* [1992] ECR I-249), since, in this case, there was a direct link between, on the one hand, the postponement of the annual taxation of the capital growth of the securities and, on the other, effective collection of the tax on the transfer of tax residence abroad. The Netherlands Government further considers that Article 167a of the CGI forms part of the fight against tax avoidance, seeking to prevent taxpayers from temporarily transferring their tax residence outside France in order to sell their securities without significant taxation of increases in value.
34 By contrast, Mr de Lasteyrie, the Portuguese Government and the Commission argue that the generalised and automatic presumption of avoidance contained in Article 167a of the CGI, involving immediate taxation of latent increases in value, has effects that go well beyond what is necessary in order effectively to combat tax evasion or avoidance and therefore constitutes a disproportionate obstacle to the freedom of establishment.
35 Mr de Lasteyrie notes that the agreements for the avoidance of double taxation concluded by the French Republic normally include a clause for 'assisting recovery', allowing the French tax authorities to use those provisions in order to recover a tax due from taxpayers who had transferred their tax residence to another Member State of the European Union. The Portuguese Government considers that, where a taxpayer transfers his tax residence to another Member State, the competent authorities are required to cooperate and to establish procedures for exchange of information to ensure that tax debts such as those at issue in the main proceedings are satisfied.

36 According to the Commission, Article 167a of the CGI, by its general character, does not allow it to be determined, on a case by case basis, whether the transfer has actually been inspired by the aim of avoiding taxes. That provision is not in any way specifically aimed at excluding from a tax advantage purely artificial arrangements designed to circumvent tax law, since it envisages, generally, any situation in which a taxpayer with substantial holdings in a company subject to corporation tax, transfers his tax residence outside France 'for whatever reason'. In that respect, however, Case C-212/97 *Centros* [1999] ECR I-1459 shows that it is for the competent administration to prove the existence of evasion on a case by case basis.
37 Mr de Lasteyrie and the Commission both argue that the suspension of payment is not granted automatically and that the taxpayer must, in any case, be capable of providing guarantees capable of ensuring payment of the tax. Those measures are, they submit, clearly not proportionate to the aim pursued. Legislation of other Member States, such as the United Kingdom of Great Britain and Northern Ireland and the Kingdom of Sweden, shows that solutions less restrictive of the freedom of establishment are possible. As for the system of guarantees, the Commission also argues that it is discriminatory having regard to the impossibility of lodging as a guarantee securities that are not quoted on a French stock exchange without a bank guarantee ensuring full payment of the taxes due.
Reply of the Court
38 Article 167a of the CGI establishes the principle that, on the date on which a taxpayer transfers his tax residence outside France, tax is to be charged on increases in value of company securities, such increases being determined by the difference between the value of those securities at the date of that transfer and their acquisition price. That taxation applies only to taxpayers who hold, directly or indirectly with members of their family, rights over the profits of a company exceeding 25% of such profits at any time during the five years preceding the abovementioned date. The special feature of that provision resides in the fact that it concerns the taxation of latent increases in value.
39 It needs to be examined, first, whether Article 167a of the CGI, which thus establishes taxation on latent increases in value solely on the ground that a taxpayer has transferred his tax residence outside France, is capable of restricting the exercise of freedom of establishment within the meaning of Article 52 of the Treaty.
40 In that respect, it should be noted that Article 52 of the Treaty constitutes one of the fundamental provisions of Community law and has been directly applicable in the Member States since the end of the transitional period. Under that provision, freedom of establishment for nationals of a Member State on the territory of another Member State includes the right to take up and pursue activities as self-employed persons and to set up and manage undertakings under the conditions laid down for its own nationals by the law of the country where such establishment is effected (Case 270/83 *Commission* v *France* [1986] ECR 273, paragraph 13; Case C-311/97 *Royal Bank of Scotland* [1999] ECR I-2651, paragraph 22; Case C-251/98 *Baars* [2000] ECR I-2787, paragraph 27).
41 In reply to the doubts expressed by certain governments as to the applicability of that provision to the dispute in the main proceedings, and in the absence of sufficient information on that point in the documents presented before the Court, it should be noted that, in proceedings under Article 234 EC, which is based on a clear separation of functions between the national courts and the Court of Justice, any assessment of the facts in the case is a matter for the national court (see, in particular, Case C-326/00 *IKA* [2003] ECR I-1703, paragraph 27 and case-law cited therein), and that, in this case, the referring court appears to have concluded that Article 52 of the Treaty applies to the dispute before it.
42 Even if, like the other provisions concerning freedom of establishment, Article 52 of the Treaty is, according to its terms, aimed particularly at ensuring that foreign nationals are treated in the host Member State in the same way as nationals of that State, it also prohibits the Member State of origin from hindering the establishment in another Member State of one of its own nationals (see *Baars*, paragraph 28, and case-law cited therein).

43 Moreover, a restriction on freedom of establishment is prohibited by Article 52 of the Treaty even if of limited scope or minor importance (see, to that effect, *Commission* v *France*, cited above, paragraph 21, and Case C-34/98 *Commission* v *France* [2000] ECR I-995, paragraph 49).
44 Moreover, the prohibition on Member States establishing restrictions on the freedom of establishment also applies to tax provisions. According to consistent case-law, even if, in the current state of Community law, direct taxation does not as such fall within the scope of the Community's jurisdiction, Member States must nevertheless exercise their retained powers in compliance with Community law (Case C-279/93 *Schumacker* [1995] ECR I-225, paragraph 21; *ICI*, cited above, paragraph 19; Case C-436/00 *X and Y* [2002] ECR I-10829, paragraph 32).
45 In this case, even if Article 167a of the CGI does not prevent a French taxpayer from exercising his right of establishment, this provision is nevertheless of such a kind as to restrict the exercise of that right, having at the very least a dissuasive effect on taxpayers wishing to establish themselves in another Member State.
46 A taxpayer wishing to transfer his tax residence outside French territory, in exercise of the right guaranteed to him by Article 52 of the Treaty, is subjected to disadvantageous treatment in comparison with a person who maintains his residence in France. That taxpayer becomes liable, simply by reason of such a transfer, to tax on income which has not yet been realised and which he therefore does not have, whereas, if he remained in France, increases in value would become taxable only when, and to the extent that, they were actually realised. That difference in treatment concerning the taxation of increases in value, which is capable of having considerable repercussions on the assets of a taxpayer wishing to transfer his tax residence outside France, is likely to discourage a taxpayer from carrying out such a transfer.
47 An examination of the rules for applying that measure confirms that conclusion. Although it is possible to benefit from suspension of payment, that is not automatic and it is subject to strict conditions such as those described by the Advocate General in points 36 and 37 of his Opinion, including, in particular, conditions as to the setting up of guarantees. Those guarantees in themselves constitute a restrictive effect, in that they deprive the taxpayer of the enjoyment of the assets given as a guarantee.
48 It follows from the above that the measure at issue in the main proceedings is liable to hinder the freedom of establishment.
49 It should be noted, secondly, that a measure which is liable to hinder the freedom of establishment laid down by Article 52 of the Treaty can be allowed only if it pursues a legitimate objective compatible with the Treaty and is justified by imperative reasons in the public interest. It is further necessary, in such a case, that its application must be appropriate to ensuring the attainment of the objective thus pursued and must not go beyond what is necessary to attain it (see *Futura Participations and Singer*, paragraph 26, and the case-law cited therein, and *X and Y*, paragraph 49).
50 As regards justification based on the aim of preventing tax avoidance, referred to by the national court in its question, it should be noted that Article 167a of the CGI is not specifically designed to exclude from a tax advantage purely artificial arrangements aimed at circumventing French tax law, but is aimed generally at any situation in which a taxpayer with substantial holdings in a company subject to corporation tax transfers his tax residence outside France for any reason whatever (see, to that effect, *ICI*, paragraph 26, and *X and Y*, paragraph 61).
51 However, the transfer of a physical person's tax residence outside the territory of a Member State does not, in itself, imply tax avoidance. Tax avoidance or evasion cannot be inferred generally from the fact that the tax residence of a physical person has been transferred to another Member State and cannot justify a fiscal measure which compromises the exercise of a fundamental freedom guaranteed by the Treaty (see, to that effect, Case C-478/98 *Commission* v *Belgium* [2000] ECR I-7587, paragraph 45; *X and Y*, cited above, paragraph 62).

52 Article 167a of the CGI cannot, therefore, without greatly exceeding what is necessary in order to achieve the aim which it pursues, assume an intention to circumvent French tax law on the part of every taxpayer who transfers his tax domicile outside France.
53 Similarly, a taxpayer who sells his securities before the expiry of the five-year period following his departure from France will also be liable for the tax under Article 167a of the CGI, even if he has no intention of returning to that Member State and continues to live abroad after the expiry of that period.
54 Moreover, the objective envisaged, namely preventing a taxpayer from temporarily transferring his tax residence before selling securities with the sole aim of avoiding payment of the tax on increases in value due in France, may be achieved by measures that are less coercive or less restrictive of the freedom of establishment, relating specifically to the risk of such a temporary transfer. As the Advocate General has pointed out in paragraph 64 of his Opinion, the French authorities could, for example, provide for the taxation of taxpayers returning to France after realising their increases in value during a relatively brief stay in another Member State, which would avoid affecting the position of taxpayers having no aim other than the bona fide exercise of their freedom of establishment in another Member State.
55 The detailed rules for applying Article 167a do not permit any other conclusion.
56 As stated in paragraph 47 of this judgment, the suspension of payment is not automatic but is subject to strict conditions, such as the obligation to make a declaration within the prescribed period, to designate a representative established in France and set up guarantees sufficient to ensure recovery of the tax.
57 In so far as application of those conditions involves restrictions on the exercise of the right of establishment, neither can the objective of preventing tax avoidance, which is not capable of justifying the system of taxation laid down by Article 167a of the CGI, be relied upon in support of those conditions, which are intended to implement that system.
58 Therefore, Article 52 of the Treaty precludes a Member State from establishing, for the purposes of preventing a risk of tax avoidance, a mechanism for taxing latent increases in value, such as that established by Article 167a of the CGI, where a taxpayer transfers his tax residence outside that State.
59 Nevertheless, the Danish Government argues that the aim of Article 167a of the CGI is to prevent fiscal erosion of the tax base of the Member State concerned, by preventing taxpayers from deriving advantage from differences which exist between the tax systems of the Member States.
60 In that respect, it is sufficient to recall that, in accordance with settled case-law, diminution of tax receipts cannot be regarded as a matter of overriding general interest which may be relied upon in order to justify a measure which is, in principle, contrary to a fundamental freedom (*ICI*, cited above, paragraph 28; Joined Cases C-397/98 and C-410/98 *Metallgesellschaft and Others* [2001] ECR I-1727, paragraph 59). Therefore, a simple loss of receipts suffered by a Member State because a taxpayer has moved his tax residence to another Member State, where the tax system is different and may be more advantageous for him, cannot in itself justify a restriction on the right of establishment.
61 The Netherlands Government argues that the combined effect of taxation at the time of removal abroad and the requirement for guarantees to which the grant of suspension of actual payment of the tax is made subject is necessary to ensure the coherence of the French tax system, since there is a direct link between, on the one hand, the postponement of the annual taxation of the growth in capital corresponding to the securities and, on the other, the actual collection of the tax at the time when the taxpayer moves his tax residence abroad.
62 The Court has, it is true, acknowledged that, in order to maintain the link between the deductibility of premiums and the taxation of sums due from insurers in the implementation of insurance contracts, tax deductibility of the premiums is subject to the condition that they be paid in that State (*Bachmann*, cited above, paragraphs 21 to 23; Case C-300/90 *Commission* v *Belgium* [1992] ECR I-305, paragraphs 14 to 20).

63 It cannot, however, be argued that Article 167a of the CGI is similarly justified by the need to preserve the coherence of the French tax system.
64 In that respect, it should be noted that, as the French Government states in its written observations, Article 167a of the CGI is designed to prevent temporary transfers of tax residence outside France exclusively for tax reasons. The adoption of that article was prompted by the behaviour of certain taxpayers in temporarily transferring their tax residence before selling securities, for the sole purpose of avoiding payment of tax on the increase in value in respect of which they are liable for tax in France.
65 Article 167a of the CGI does not therefore appear to be 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.
66 That finding is supported by the fact that the tax system at issue in the main proceedings allows exoneration in respect of all taxation to which increases in value, where realised, have been subject in the country to which the taxpayer transferred his tax residence. Such taxation might have the consequence that realised increases in value, including the part of them acquired during the taxpayer's stay in France, are entirely taxed in that country.
67 In those circumstances, the premiss on which the Netherlands Government's argument concerning fiscal coherence is based does not hold true having regard to the aim pursued by the tax system laid down by Article 167a of the CGI. Therefore, justification for such a system based on an objective of fiscal coherence, which, moreover, the French Government has not argued, cannot be accepted.
68 Concerning the German Government's argument that account should be taken of the allocation of tax powers between the State of departure and the host State, it is sufficient to note, as the Advocate General has done in point 82 of his Opinion, that the dispute does not concern either the allocation of the power to tax between Member States or the right of the French authorities to tax latent increases in value when wishing to react to artificial transfers of tax residence, but the question whether measures adopted to that end comply with the requirements of the freedom of establishment.
69 Therefore, the answer to the question referred must be that the principle of freedom of establishment laid down by Article 52 of the Treaty must be interpreted as precluding a Member State from establishing, in order to prevent a risk of tax avoidance, a mechanism for taxing latent increases in value such as that laid down by Article 167a of the CGI, where a taxpayer transfers his tax residence outside that State.

Costs
70 The costs incurred by the French, Danish, German, Netherlands and Portuguese Governments and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the action/proceedings pending before the national court, the decision on costs is a matter for that court.
On those grounds,

THE COURT (Fifth Chamber),

in answer to the question referred to it by the Conseil d'État by decision of 14 December 2001, hereby rules:
The principle of freedom of establishment laid down by Article 52 of the EC Treaty (now, after amendment, Article 43 EC) must be interpreted as precluding a Member State from establishing, in order to prevent a risk of tax avoidance, a mechanism for taxing as yet unrealised increases in value such as that laid down by Article 167a of the French Code Général des Impôts, where a taxpayer transfers his tax residence outside that State.

Timmermans

La Pergola

von Bahr

Delivered in open court in Luxembourg on 11 March 2004.
R. Grass

V. Skouris

Registrar

President

1 – Language of the case: French.