Case C-11/07

Hans Eckelkamp and Others

v

Belgische Staat

(Reference for a preliminary ruling from the Hof van Beroep te Gent)

(Free movement of capital ? Articles 56 EC and 58 EC – Inheritance tax ? National rules concerning the assessment of duties on the transfer of immovable property which do not allow for mortgage-related charges relating to the immovable property to be deducted from the value of that property on the ground that, at the time of death, the person whose estate is being administered was residing in another Member State ? Restriction ? Justification ? None)

Summary of the Judgment

1. *Preliminary rulings – Jurisdiction of the Court – Limits – Jurisdiction of the national court*

(Art. 234 EC)

2. *Preliminary rulings – Jurisdiction of the Court – Limits – Clearly irrelevant questions and hypothetical questions put in a context not permitting a useful answer*

(Art. 234 EC)

3. *Free movement of capital – Restrictions – Inheritance tax*

(Arts 56 EC and 58 EC)

1. In proceedings under Article 234 EC, which are 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. The Court of Justice is therefore empowered to rule on the interpretation or validity of Community provisions only on the basis of the facts which the national court puts before it. Similarly, it is solely for the national court, before which the dispute has been brought and which must assume responsibility for the forthcoming 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 concern the interpretation of Community law, the Court is in principle bound to give a ruling.

(see paras 27, 52)

2. In proceedings under Article 234 EC, the Court may refuse to rule on a question referred for a preliminary ruling by a national court only where it is quite obvious that the interpretation of Community law that is sought bears no relation to the facts of the main action or to its subject-matter, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it.

(see para. 28)

3. The combined provisions of Articles 56 EC and 58 EC must be interpreted as precluding national legislation concerning the assessment of inheritance and transfer duties payable in respect of an immovable property situated in a Member State, which makes no provision for the deductibility of debts secured on such property where the person whose estate is being administered was residing, at the time of death, not in that State but in another Member State, whereas provision is made for such deductibility where that person was, at that time, residing in the first-mentioned Member State, in which the immovable property included in the estate is situated.

Where such rules make the deductibility of certain debts secured on the immovable property in question dependent on the place where, at the time of death, the person whose estate is being administered was residing, the greater tax burden to which the inheritance of non-residents is consequently subject constitutes a restriction on the free movement of capital.

That difference in treatment cannot be justified on the ground that it concerns situations which are not objectively comparable. Where national legislation places the heirs of a person who, at the time of death, had the status of resident and those of a person who, at the time of death, had the status of non-resident on the same footing for the purposes of taxing an inherited immovable property which is situated in the Member State concerned, that legislation cannot, without giving rise to discrimination, treat those heirs differently in the taxation of that property so far as concerns the deductibility of charges secured on it. By treating the inheritances of those two categories of persons in the same way (except in relation to the deduction of debts) for the purposes of taxing their inheritance, the national legislature has in fact admitted that there is no objective difference between them in regard to the detailed rules and conditions relating to that taxation which could justify different treatment.

Moreover, the Member State in which the immovable property included in the estate is situated cannot, in order to justify a restriction on the free movement of capital arising from its legislation, rely on the existence of a possibility, beyond its control, of a tax credit being granted by another Member State – such as the Member State in which the person whose estate is being administered was residing at the time of death – which could, wholly or partly, offset the loss incurred by that person’s heirs as a result of the fact that, in the Member State in which the property inherited is situated, debts secured on that property are not deductible for the purposes of assessing transfer duties.

(see paras 46, 60, 63, 68, 71, operative part)

JUDGMENT OF THE COURT (Third Chamber)

11 September 2008 (*)

(Free movement of capital ? Articles 56 EC and 58 EC – Inheritance tax ? National rules concerning the assessment of duties on the transfer of immovable property which do not allow for

mortgage-related charges relating to the immovable property to be deducted from the value of that property on the ground that, at the time of death, the person whose estate is being administered was residing in another Member State ? Restriction ? Justification ? None)

In Case C?11/07,

REFERENCE for a preliminary ruling under Article 234 EC from the Hof van Beroep te Gent (Belgium), made by decision of 11 January 2007, received at the Court on 18 January 2007, in the proceedings

Hans Eckelkamp,

Natalie Eckelkamp,

Monica Eckelkamp,

Saskia Eckelkamp,

Thomas Eckelkamp,

Jessica Eckelkamp,

Joris Eckelkamp

v

Belgische Staat,

THE COURT (Third Chamber),

composed of A. Rosas, President of the Chamber, J.N. Cunha Rodrigues, J. Klu?ka, A. Ó Caoimh (Rapporteur) and A. Arabadjiev, Judges,

Advocate General: J. Mazák,

Registrar: B. Fülöp, Administrator,

having regard to the written procedure and further to the hearing on 13 December 2007,

after considering the observations submitted on behalf of:

– H. Eckelkamp, N. Eckelkamp, M. Eckelkamp, S. Eckelkamp, T. Eckelkamp, J. Eckelkamp and J. Eckelkamp, by B. Coopman and M. Van Daele, advocaten,

– the Belgian Government, by L. Van den Broeck, acting as Agent, and A. Haelterman, advocaat,

– the Commission of the European Communities, by R. Lyal, A. Weimar and R. Troosters, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 13 March 2008,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Articles 12 EC, 17 EC, 18 EC, 56 EC and 58 EC.

2 The reference has been made in the course of proceedings between the heirs of a German citizen, Ms H. Eckelkamp, who died in Germany, and FOD Financiën, Administratie van de BTW, registratie en domeinen (Federal Public Finance Service, Administration of VAT, Registration and Public Property) concerning the latter's refusal, when assessing transfer duties payable in respect of an immovable property owned by Ms Eckelkamp in Belgium, to deduct the debts relating to that property on the ground that she was not resident in Belgium at the time of her death.

Legal context

Community legislation

3 Article 1 of Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty (subsequently, Article 67 of the EC Treaty, repealed by the Treaty of Amsterdam) (OJ 1988 L 178, p. 5) provides:

'1. Without prejudice to the following provisions, Member States shall abolish restrictions on movements of capital taking place between persons resident in Member States. To facilitate application of this Directive, capital movements shall be classified in accordance with the Nomenclature in Annex I.

2. Transfers in respect of capital movements shall be made on the same exchange rate conditions as those governing payments relating to current transactions.'

4 Among the capital movements listed in Annex I to Directive 88/361 are, under heading XI, 'Personal capital movements', which include inheritances and legacies.

National legislation

5 In Belgium, competence to establish, in relation to succession duties, the rate of taxation, the taxable amount, exemptions and reductions lies with the regions.

6 Article 1 of the Flemish Code of Succession Duties ('the Code') provides:

'The following taxes are hereby established:

(1) an inheritance duty on the value, after deduction of debts, of the whole of the gathered estate of an inhabitant of the Kingdom of Belgium;

(2) a duty on the transfer of property *mortis causa* on the value of immovable property situated in Belgium and pertaining to the gathered estate of a person who is not an inhabitant of the Kingdom of Belgium.

A person shall be deemed to be an inhabitant of the Kingdom of Belgium if, at the time of his death, he is domiciled in the Kingdom of Belgium or his assets are based there.'

7 Under Article 15 of the Code, inheritance duty is payable, after deduction of debts, on all the property, wherever located, owned by the deceased or absent person.

8 Article 18 of the Code, relating to persons who do not reside in Belgium, is worded as follows:

‘Duty on the transfer of property *mortis causa* shall be payable on all immovable property situated in Belgium and owned by the deceased or absent person, without account being taken of debts and liabilities of the estate.’

9 Under Article 29 of the Code, in order to be accepted as a liability, a debt must still exist on the day of death, which may be proved by any form of evidence which is admissible in respect of an act granting credit and creating a debt.

10 Article 40 of the Code provides that the period within which a declaration of estate must be filed is five months from the date of death, where death takes place in the Kingdom of Belgium, and six months from the date of death where death takes place in another country in Europe.

11 Under Article 41 of the Code:

‘The period within which the declaration of estate must be filed may be extended by the Director-General of Registration and Public Property.

A declaration filed within the period prescribed by statute or extended by the Director-General may be rectified provided that that period has not expired, unless the interested parties have expressly waived that right in a statement lodged in due accordance with legal requirements.’

12 Article 48(1) of the Code includes tables showing the rates which apply to inheritance duty and to the duty on the transfer of property *mortiscausa*. The fourth subparagraph of Article 48(2) is worded as follows:

‘Debts and funeral expenses shall be deducted as a matter of priority from the movable property and the assets referred to in Article 60a, unless the declarants prove that a debt was specially incurred for the purpose of acquiring or preserving immovable property.’

13 There is no agreement between the Kingdom of Belgium and the Federal Republic of Germany for the prevention of double taxation of succession duties.

The dispute in the main proceedings and the question referred for a preliminary ruling

14 The appellants in the main proceedings are the heirs of Ms Eckelkamp, who died in Düsseldorf (Germany) on 30 December 2003.

15 On 13 November 2002, Ms Eckelkamp had signed a document containing an acknowledgement of a debt which she owed to one of the appellants in the main proceedings, H. Eckelkamp. By notarial act of 5 June 2003, she granted him a mandate to encumber an immovable property situated in Knokke-Heist (Belgium) with a mortgage as security for that debt.

16 On 29 June 2004, the appellants in the main proceedings filed a declaration of estate in Belgium within the statutory time-limit of six months from the date of Ms Eckelkamp’s death, referring to that property, under assets of the estate, as having a value of EUR 200 000. Under estate liabilities, the entry in the declaration was ‘nil’.

17 It is apparent from the observations of the appellants in the main proceedings and of the Belgian Government that an exchange of e-mails had taken place between one of those appellants and the competent national tax authority before that declaration was filed. In the course of that exchange, the tax authority indicated that, according to the relevant provisions of the Flemish legislation, duty on the transfer of property *mortis causa* is payable on all the assets of the deceased situated in Belgium, without deduction of debts and liabilities of the estate. Since Ms

Eckelkamp was not residing in Belgium at the time of her death, no account could be taken of her debt for the purposes of assessment of transfer duties.

18 The duties on the transfer of property *mortis causa* at issue in the main proceedings were assessed on the basis of the declaration filed on 29 June 2004.

19 After the appellants in the main proceedings had paid those duties – which, according to their observations, they did 'without prejudice to any of their rights' – they lodged an *inter partes* application on 31 December 2004 with the Rechtbank van Eerste Aanleg te Brugge (Court of First Instance, Bruges) for the tax thus paid to be reassessed and, in particular, for Ms Eckelkamp's debt also to be taken into account in that assessment.

20 The Rechtbank van Eerste Aanleg te Brugge dismissed the *inter partes* application on 30 May 2005 on the ground that, at the time when that application was lodged, the period prescribed by the Code within which new information could be taken into consideration in determining the basis of assessment of the inheritance or transfer duties payable had expired.

21 The appellants in the main proceedings brought an appeal against that judgment before the Hof van Beroep te Gent (Court of Appeal, Ghent; 'the referring court'), claiming that the provisions of the Code concerning the assessment of duties on the transfer of property *mortis causa* are contrary to Community law. They maintain that those provisions constitute indirect discrimination on grounds of nationality and a restriction on the free movement of capital.

22 The Belgian State relied before the referring court on the fact that the period prescribed by the Code within which new information could be taken into consideration in determining the basis of assessment of transfer duty had expired, and maintained that, in any event, it had not been proved that the debt at issue still existed at the date of Ms Eckelkamp's death. Since Ms Eckelkamp was not residing in Belgium at the time of her death, no liabilities whatsoever could be deducted from the basic taxable amount for the purposes of transfer duty. Article 58 EC is without prejudice to the right of Member States to apply the relevant provisions of their tax legislation.

23 According to the referring court, it is clear from a private instrument dated 13 November 2002 and an authentic instrument dated 5 June 2003 that Ms Eckelkamp had incurred a debt of EUR 220 000.

24 Taking the view that the dispute in the main proceedings raises questions of interpretation of Community law, the Hof van Beroep te Gent decided to stay proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Do Article 12 EC, in conjunction with Articles 17 EC and 18 EC, and Article 56 EC, in conjunction with Article 57 EC, preclude national rules of a Member State under which, in the context of the acquisition, through inheritance, of immovable property situated in a Member State (the State in which the property is situated), that State imposes a tax on the value of the immovable property situated in that State, in respect of which that State allows a deduction corresponding to the value of charges on that immovable property (such as debts secured by the right conferred on a creditor to take out a mortgage against that immovable property) if the deceased, at the time of his demise, was resident in the State in which the property is situated, but not if the deceased, at the time of his demise, was living in a different Member State (the State of residence)?'

Admissibility of the reference for a preliminary ruling

25 The Belgian Government maintains that the reference for a preliminary ruling is inadmissible. It contends that, owing to the fact that the action for reassessment of the transfer

duties in question was brought out of time, the referring court would on no account be able to uphold the claim of the appellants in the main proceedings. The period within which they were allowed, under Belgian procedural rules, to amend the particulars on the basis of which transfer duties are assessed had already expired several months earlier. Consequently, an answer to the question referred is not only unnecessary but clearly irrelevant for the purposes of deciding the dispute in the main proceedings.

26 Moreover, the Belgian Government maintains that, at the stage which the main proceedings have reached, the question referred is purely hypothetical. At this stage, the referring court has not yet answered any of the questions that are critical for the determination of the dispute in the main proceedings concerning, in particular, the issue whether there is a link between the debt and the immovable property in question such as to indicate the existence of a charge on that property. In that regard, the Belgian Government pointed out at the hearing that, in the present case, there is no mortgage on the immovable property situated in Belgium, only a mortgage mandate which Ms Eckelkamp granted to her brother before her death. According to the Belgian Government, since a mortgage mandate is no more than a right granted to a third party with a view to the possible registration of a mortgage in respect of some immovable property, and no such registration has taken place, there is no charge on that immovable property within the meaning of the case-law of the Court. The question submitted is, therefore, hypothetical.

27 In that regard, it should be recalled that, in proceedings under Article 234 EC, which are 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. Similarly, it is solely for the national court, before which the dispute has been brought and which must assume responsibility for the forthcoming 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 concern the interpretation of Community law, the Court is in principle bound to give a ruling (Case C?145/03 *Keller* [2005] ECR I?2529, paragraph 33, and Case C?119/05 *Lucchini* [2007] ECR I?6199, paragraph 43).

28 The Court may refuse to rule on a question referred for a preliminary ruling by a national court only where it is quite obvious that the interpretation of Community law that is sought bears no relation to the facts of the main action or to its subject-matter, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (see, inter alia, Case C?379/98 *PreussenElektra* [2001] ECR I?2099, paragraph 39; Case C?390/99 *Canal Satélite Digital* [2002] ECR I?607, paragraph 19; and *Lucchini*, paragraph 44).

29 That is not the case here.

30 The Court is being called upon to clarify whether the national courts are required under Community law not to apply certain provisions of the Code relating to the assessment of duties on the transfer of property *mortis causa* which the appellants in the main proceedings regard as constituting a restriction on the free movement of capital. Clearly, therefore, the question submitted relates to the subject-matter of the main proceedings, as defined by the referring court, and the answer to that question may be useful to that court in enabling it to decide whether the provisions of the Code are in conformity with Community law.

31 Admittedly, the Belgian Government denies that there is a link between Ms Eckelkamp’s debt to her brother and the immovable property in question such as to indicate the existence of a charge on that property, and points out, moreover, that the periods prescribed under the relevant provisions of Belgian law for the submission of new information to be taken into consideration in

determining the basis of assessment of the transfer duties payable had expired by the date on which the action in the main proceedings was brought.

32 However, it must be borne in mind that the national court alone has jurisdiction to find and assess the facts in the case before it and to interpret and apply national law (see Case C?262/96 *Sürül* [1999] ECR I?2685, paragraph 95). It is for that court, not for the Court of Justice, to determine the scope and effect under Belgian law of a mortgage mandate and the consequences of such a mandate in regard to an immovable property left by way of inheritance and situated in Belgium.

33 Furthermore, it is apparent from the case-file submitted to the Court that, first, the absence of a reference to the disputed debt in the declaration filed by the appellants in the main proceedings was based on the provisions of the Code, which make no provision for the inclusion of such debts where the person whose estate is being administered was not residing in Belgium at the time of death ? provisions which led the national court to refer a question concerning the interpretation of Community law for a preliminary ruling. Second, prior to the filing of the declaration of estate at issue, the competent authorities had informed the appellants in the main proceedings that Ms Eckelkamp's debt could not be taken into account for the purposes of assessing duties on the transfer of property *mortis causa*, as she was not residing in Belgium at the date of her death. Third, as is apparent from paragraph 19 of the present judgment, that declaration appears to have been made by the appellants in the main proceedings without prejudice to any of their rights.

34 Moreover, the system of references for a preliminary ruling is based on a dialogue between one court and another, the initiation of which depends entirely on the national court's assessment as to whether a reference is appropriate and necessary (see Case C?2/06 *Kempter* [2008] ECR I?0000, paragraph 42). While it is true that the national court found that the declaration made by the heirs became final on expiry of the statutory period for filing such declarations, it is nevertheless possible to glean from the question referred the factors necessary for an interpretation of Community law which the national court considers might usefully be applied in order to resolve, in accordance with that law, the dispute before it (see, to that effect, Case 132/81 *Vlaeminck* [1982] ECR 2953, paragraphs 13 and 14).

35 It follows that the reference for a preliminary ruling must be considered to be admissible.

The question referred for a preliminary ruling

36 By its question, the referring court asks in essence whether the provisions of Articles 12 EC, 17 EC and 18 EC, and those of Articles 56 EC and 58 EC, are to be interpreted as precluding legislation of a Member State, such as that at issue in the main proceedings, concerning the assessment of transfer and inheritance duties payable in respect of an immovable property situated in that Member State which makes no provision for the deductibility of debts secured on such property where the person whose estate is being administered was residing, at the time of death, not in that State, in which the immovable property is situated, but in another Member State, whereas provision is made for such deductibility where the person concerned was, at the time of death, residing in the first-mentioned State.

37 Article 56(1) EC lays down a general prohibition on restrictions on the movement of capital between Member States (Joined Cases C?463/04 and C?464/04 *Federconsumatori and Others* [2007] ECR I?0000, paragraph 19 and the case-law cited).

38 In the absence of a definition in the EC Treaty of 'movement of capital' for the purposes of Article 56(1) EC, the Court has previously recognised the nomenclature annexed to Directive

88/361 as having indicative value, even though the latter was adopted on the basis of Articles 69 and 70(1) of the EEC Treaty (subsequently, Articles 69 and 70(1) of the EC Treaty, repealed by the Treaty of Amsterdam), subject to the qualification, contained in the introduction to the nomenclature, that the list set out therein is not exhaustive (see, in particular, Case C?513/03 *van Hilten?van der Heijden* [2006] ECR I?1957, paragraph 39; Case C?452/04 *FidiumFinanz* [2006] ECR I?9521, paragraph 41; *Federconsumatori and Others*, paragraph 20; and Case C?256/06 *Jäger* [2008] ECR I?0000, paragraph 24).

39 In that regard, the Court – noting, in particular, that inheritances consisting in the transfer to one or more persons of assets left by a deceased person or, in other words, a transfer to the heirs of ownership of the various items of property, rights, and so on which make up those assets fall under heading XI of Annex I to Directive 88/361, entitled 'Personal capital movements' – has held that an inheritance is a movement of capital for the purposes of Article 56 EC, except in cases where its constituent elements are confined within a single Member State (see Case C?364/01 *Barbier* [2003] ECR I?15013, paragraph 58; *Hilten?van der Heijden*, paragraph 42; and *Jäger*, paragraph 25).

40 A situation in which a person resident in Germany at the time of death leaves to persons resident in Germany and in the Netherlands an immovable property situated in Belgium and the subject of a transfer duty assessment in Belgium is certainly not a situation purely internal to a Member State.

41 Consequently, the inheritance at issue in the main proceedings constitutes a movement of capital for the purposes of Article 56(1) EC.

42 It is necessary to examine, first, whether, as the appellants in the main proceedings and the Commission of the European Communities maintain, national rules such as those at issue in the main proceedings amount to a restriction on the movement of capital.

43 In that regard, it should be borne in mind that the effect of national rules which determine the value of immovable property for the purposes of assessing the amount of tax payable when it is acquired through inheritance may be not only to discourage the purchase of immovable property situated in the Member State concerned, but also to reduce the value of the inheritance of a resident of a Member State other than that in which that property is situated (see, to that effect, *Barbier*, paragraph 62, and *Jäger*, paragraph 30).

44 As regards inheritances, the case-law has confirmed that the measures prohibited by Article 56(1) EC as being restrictions on the movement of capital include those the effect of which is to reduce the value of the inheritance of a resident of a State other than the Member State in which the assets concerned are situated and which taxes the inheritance of those assets (*van Hilten?van der Heijden*, paragraph 44, and *Jäger*, paragraph 31).

45 In the present case, the national rules at issue in the main proceedings – in so far as they result in an inheritance consisting of immovable property situated in the Kingdom of Belgium being subject to transfer duties that are higher than the inheritance duties payable if the person whose estate is being administered had, at the time of death, been residing in that Member State – have the effect of restricting the movement of capital by reducing the value of an inheritance which includes such an asset.

46 Where those rules make the deductibility of certain debts secured on the immovable property in question dependent on the place where, at the time of death, the person whose estate is being administered was residing, the greater tax burden to which the inheritance of non-residents is consequently subject constitutes a restriction on the free movement of capital.

47 That conclusion cannot be called into question by the Belgian Government's argument that the Code does not constitute a restriction inasmuch as there is an objective difference between the situations of residents and non-residents as regards the assessment of inheritance and transfer duties, since only the Member State in which the person whose estate is being administered was residing can, logically, be in a position to take account, in the assessment of inheritance tax, of all components of the estate: assets, liabilities, movable property and immovable property. That circumstance is irrelevant in the light of the criteria resulting from the case-law referred to in paragraphs 43 and 44 of the present judgment (see also, to that effect, *Jäger*, paragraph 34).

48 The Belgian Government contends, however, that, unlike the case which gave rise to the judgment in *Barbier*, the case in the main proceedings is characterised by the absence of an unconditional obligation to transfer legal title to the immovable property in question, and also by the absence both of the prior transfer of financial ownership of that property and of a charge on that property, since the mortgage mandate relied on by the appellants in the main proceedings does not in any way constitute a debt encumbering that immovable property, within the meaning of that judgment.

49 It must be borne in mind that, in the case giving rise to the judgment in *Barbier*, the question referred concerned the assessment of tax payable on the inheritance of immovable property situated in a Member State and the taking into account, for the purposes of assessing the property's value, of the fact that the holder of the legal title was under an unconditional obligation to transfer that title to a third party who had financial ownership of the property. That debt was therefore directly linked to the immovable property included in the estate.

50 Similarly, in relation to Articles 49 EC and 50 EC, the Court has already held that national rules which, in matters of taxation, refuse to allow non-residents to deduct business expenses which are directly linked to the activity that generated the taxable income in the Member State concerned, while allowing residents to do so, risk operating mainly to the detriment of nationals of other Member States and are contrary to those articles (see, to that effect, Case C?234/01 *Gerritse* [2003] ECR I?5933, paragraphs 27 and 28).

51 At the hearing before the Court, both the appellants in the main proceedings and the Commission submitted that, by virtue of the mortgage mandate at issue, there was sufficient connection between the immovable property inherited and the debt in question. The Commission acknowledged, however, that, once the mortgage mandate no longer encumbers the immovable property concerned, which is situated in Belgium, but other immovable properties, the link between the debt and that immovable property could be called into question.

52 However, according to the wording of the question referred by the national court, a debt secured by a mortgage mandate relating to an immovable property constitutes a charge on that property. In proceedings under Article 234 EC, the Court of Justice is empowered to rule on the interpretation or validity of Community provisions only on the basis of the facts which the national court puts before it (see, to that effect, Case C?235/95 *Dumon and Froment* [1998] ECR I?4531, paragraph 25).

53 As is apparent from paragraph 32 of the present judgment, it is for the referring court, not for the Court of Justice, to ascertain the nature and effect under Belgian law of a mortgage mandate

such as that at issue in the main proceedings, and to determine whether there is in fact a direct link between the debt being relied on and the immovable property to which the assessment of transfer duties that is at issue in the main proceedings relates.

54 In any event, it must be held that the fact that the deductibility of debts secured on an immovable property is conditional upon the person whose estate is being administered having been resident, at the time of death, in the State in which that immovable property is situated constitutes a restriction on the free movement of capital which is prohibited, in principle, under Article 56(1) EC.

55 Next, it is necessary to consider whether the restriction on the free movement of capital thus established can be justified under the provisions of the Treaty.

56 In that respect, it should be noted that, under Article 58(1)(a) EC, 'Article 56 shall be 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'.

57 That provision of Article 58 EC, in so far as it is a derogation from the fundamental principle of the free movement of capital, must be interpreted strictly. It cannot therefore be interpreted as meaning that all tax legislation which draws a distinction between taxpayers based on their place of residence or the Member State in which they invest their capital is automatically compatible with the Treaty (see *Jäger*, paragraph 40).

58 The derogation provided for in Article 58(1)(a) EC is itself limited by Article 58(3) EC, which provides that the national provisions referred to in paragraph 1 of that article 'shall not constitute a means of arbitrary discrimination or a disguised restriction on the free movement of capital and payments as defined in Article 56' (see Case C?35/98 *Verkooijen* [2000] ECR I?4071, paragraph 44; Case C?319/02 *Manninen* [2004] ECR I?7477, paragraph 28; and *Jäger*, paragraph 41). Moreover, in order to be justified, the difference in treatment established in relation to inheritance and transfer duties payable in respect of an immovable property situated in the Kingdom of Belgium between the person who, at the time of death, was residing in that Member State and the person who, at the time of death, was residing in another Member State, must not go beyond what is necessary to achieve the objective pursued by the legislation at issue.

59 A distinction must therefore be made between the unequal treatment permitted under Article 58(1)(a) EC and the arbitrary discrimination prohibited under Article 58(3) EC. According to the case-law, in order for national tax legislation such as that at issue in the main proceedings – which, for the purposes of assessing inheritance tax, makes a distinction with regard to the deductibility of debts secured on an immovable property situated in the Member State concerned according to whether the person whose estate is being administered was residing in that Member State or in another Member State at the time of death – to be considered compatible with the provisions of the Treaty on the free movement of capital, the difference in treatment must concern situations which are not objectively comparable or be justified by overriding reasons in the general interest (see *Verkooijen*, paragraph 43; *Manninen*, paragraph 29; and *Jäger*, paragraph 43).

60 In that respect, it must be stated first that, contrary to the Belgian Government's contention, which is set out in paragraph 47 of the present judgment, that difference in treatment cannot be justified on the ground that it concerns situations which are not objectively comparable.

61 Subject to the investigations to be undertaken by the national court as to the nature and effect of a mortgage mandate and as to whether the mandate at issue in the main proceedings constitutes a charge on the immovable property in question – as it would appear on the basis of

the case-file – the assessment of inheritance and transfer duties is, under that legislation, directly linked to the value of that immovable property. In that case, there cannot objectively be any difference in situation such as to justify unequal tax treatment so far as concerns the level of inheritance and transfer duties payable in relation to, respectively, an immovable property situated in Belgium which belongs to a person residing in that Member State at the time of death, and an immovable property belonging to a person residing in another Member State at the time of death. Accordingly, the situation of Ms Eckelkamp's heirs is comparable to that of any heir whose inheritance includes an immovable property situated in Belgium and left by a person who was residing in that State at the time of death (see, to that effect, *Jäger*, paragraph 44).

62 As the appellants in the main proceedings have stated, the Belgian legislation deems, in principle, both the heirs of resident persons and the heirs of persons who were non-resident at the time of death to be taxable persons for the purposes of collecting inheritance and/or transfer duties on immovable properties situated in Belgium. It is only in respect of the deduction of debts from the inheritance of non-residents that non-residents and residents are treated differently.

63 Where national legislation places the heirs of a person who, at the time of death, had the status of resident and those of a person who, at the time of death, had the status of non-resident on the same footing for the purposes of taxing an inherited immovable property which is situated in the Member State concerned, that legislation cannot, without giving rise to discrimination, treat those heirs differently in the taxation of that property so far as concerns the deductibility of charges secured on it. By treating the inheritances of those two categories of persons in the same way (except in relation to the deduction of debts) for the purposes of taxing their inheritance, the national legislature has in fact admitted that there is no objective difference between them in regard to the detailed rules and conditions relating to that taxation which could justify different treatment (see, by analogy, in relation to the right of establishment, Case 270/83 *Commission* v *France* [1986] ECR 273, paragraph 20, and Case C?170/05 *Denkavit Internationaal and Denkavit France* [2006] ECR I?11949, paragraph 35; and, in relation to the free movement of capital and inheritance duties, Case C?43/07 *Arens-Sikken* [2008] ECR I?0000, paragraph 57).

64 It is necessary, finally, to examine whether the restriction on the movement of capital resulting from legislation such as that at issue in the main proceedings may be objectively justified by an overriding reason in the general interest.

65 The Belgian Government contends that, in view of the German legislation applicable to a deceased's assets, the debt in respect of which the appellants are claiming a deduction in Belgium would, in practice, be deducted twice, which, according to the case-law of the Court of Justice (Case C?446/03 *Marks & Spencer* [2005] ECR I?10837), is to be avoided.

66 In that regard, it must be borne in mind, first of all, that the Court has, in its case-law on the free movement of capital and inheritance duties, held that a citizen cannot be deprived of the right to rely on the provisions of the Treaty on the ground that he is profiting from tax advantages which are legally provided for by the rules in force in a Member State other than his State of residence (*Barbier*, paragraph 71).

67 Next, as has been noted in paragraph 13 of the present judgment, there is no agreement between the Kingdom of Belgium and the Federal Republic of Germany for the prevention of double taxation of succession duties.

68 The Member State in which the immovable property included in the estate is situated cannot, in order to justify a restriction on the free movement of capital arising from its legislation, rely on the existence of a possibility, beyond its control, of a tax credit being granted by another Member State – such as the Member State in which the person whose estate is being

administered was residing at the time of death – which could, wholly or partly, offset the loss incurred by that person's heirs as a result of the fact that, in the Member State in which the property inherited is situated, debts secured on that property are not deductible for the purposes of assessing transfer duties (see, to that effect, *Arens?Sikken*, paragraph 65).

69 A Member State cannot rely on the existence of a tax advantage granted unilaterally by another Member State – in the present case, the Member State in which the person concerned was residing at the time of her death – in order to escape its obligations under the Treaty and, in particular, under the Treaty provisions relating to the free movement of capital (see, to that effect, Case C?379/05 *Amurta* [2007] ECR I?0000, paragraph 78).

70 Finally, it is apparent from the case-file submitted to the Court that, in relation to the assessment of transfer duties, the national legislation at issue in the main proceedings simply excludes altogether the deduction of debts secured on immovable property left as inheritance where the person concerned was not, at the time of death, residing in that Member State, in which the property included in the estate is situated, without the treatment of those debts and, in particular, the absence of a tax credit in another Member State, such as the Member State in which the deceased was residing, being taken into consideration.

71 The answer to the question referred for a preliminary ruling must therefore be that the combined provisions of Articles 56 EC and 58 EC must be interpreted as precluding national legislation, such as that at issue in the main proceedings, concerning the assessment of inheritance and transfer duties payable in respect of an immovable property situated in a Member State, which makes no provision for the deductibility of debts secured on such property where the person whose estate is being administered was residing, at the time of death, not in that State but in another Member State, whereas provision is made for such deductibility where that person was, at that time, residing in the first-mentioned Member State, in which the immovable property included in the estate is situated.

72 Having regard to the foregoing, there is no need to answer the question referred for a preliminary ruling in so far as it concerns the interpretation of Articles 12 EC, 17 EC and 18 EC.

Costs

73 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. The costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Third Chamber) hereby rules:

The combined provisions of Articles 56 EC and 58 EC must be interpreted as precluding national legislation, such as that at issue in the main proceedings, concerning the assessment of inheritance and transfer duties payable in respect of an immovable property situated in a Member State, which makes no provision for the deductibility of debts secured on such property where the person whose estate is being administered was residing, at the time of death, not in that State but in another Member State, whereas provision is made for such deductibility where that person was, at that time, residing in the first-mentioned Member State, in which the immovable property included in the estate is situated.

[Signatures]

* Language of the case: Dutch.