Case C-43/07

D.M.M.A. Arens-Sikken

v

Staatssecretaris van Financiën

(Reference for a preliminary ruling from the Hoge Raad der Nederlanden)

(Free movement of capital ? Articles 73b and 73d of the EC Treaty (now Articles 56 EC and 58 EC respectively) – National rules concerning inheritance duties and transfer duties which do not provide for the deduction, in the assessment of those duties, of overendowment debts resulting from a testamentary parental partition inter vivos where the person whose estate is being administered was not residing, at the time of death, in the Member State in which the immovable property included in the estate is situated – Restriction ? Justification ? None ? No bilateral agreement for the prevention of double taxation ? Consequences for the restriction of the free movement of capital of a lower level of compensation to prevent double taxation in that person's Member State of residence)

Summary of the Judgment

Free movement of capital – Restrictions – Inheritance tax

(EC Treaty, Arts 73b and 73d (now Arts 56 EC and 58 EC))

Articles 73b and 73d of the Treaty (subsequently, Articles 56 EC and 58 EC respectively) must be interpreted as precluding national rules concerning the assessment of inheritance duties and transfer duties payable in respect of an immovable property situated in a Member State, which, for the assessment of those duties, makes no provision for the deductibility of overendowment debts resulting from a testamentary parental partition *inter vivos* 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 residing, at the time of death, in the first-mentioned Member State, in which the immovable property included in the estate is situated, in so far as such rules apply a progressive rate of taxation and in so far as the combination of (i) the failure to take into account such debts and (ii) that progressive rate could result in a greater tax burden for heirs who are not in a position to rely on such deductibility.

The restriction on the free movement of capital arises as a result of the fact that such national rules, applied in conjunction with a progressive rate of taxation, result in different treatment, on apportionment of the tax burden, between the various heirs of a person who, at the time of death, was residing in the Member State concerned and the heirs of a person who, at the time of death, was not.

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.

That assessment is not affected by the fact that the rules of the Member State in which the person whose estate is being administered was residing at the time of death provide unilaterally for the possibility that a tax credit may be granted in respect of inheritance duties payable in another Member State on immovable property situated in that other State. The Member State in which the immovable property is situated cannot, in order to justify a restriction on the free movement of capital arising from its rules, 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, for the purposes of assessing transfer duties, no account is taken in the Member State in which that property is situated of overendowment debts resulting from a testamentary parental partition *inter vivos.*

(see paras 46, 54, 57, 60, 65, 67, operative parts 1-2)

JUDGMENT OF THE COURT (Third Chamber)

11 September 2008 (*)

(Free movement of capital ? Articles 73b and 73d of the EC Treaty (now Articles 56 EC and 58 EC respectively) – National rules concerning inheritance duties and transfer duties which do not provide for the deduction, in the assessment of those duties, of overendowment debts resulting from a testamentary parental partition inter vivos where the person whose estate is being administered was not residing, at the time of death, in the Member State in which the immovable property included in the estate is situated – Restriction ? Justification ? None ? No bilateral agreement for the prevention of double taxation ? Consequences for the restriction of the free movement of capital of a lower level of compensation to prevent double taxation in that person's Member State of residence)

In Case C?43/07,

REFERENCE for a preliminary ruling under Article 234 EC from the Hoge Raad der Nederlanden (Netherlands), made by decision of 12 January 2007, received at the Court on 2 February 2007, in the proceedings

D.M.M.A. Arens-Sikken

v

Staatssecretaris van Financiën,

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: M. Ferreira, Principal Administrator,

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

after considering the observations submitted on behalf of:

– the Netherlands Government, by C. Wissels and M. de Mol, acting as Agents,

– the Belgian Government, by L. Van den Broeck, acting as Agent, and by 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 73b and 73d of the EC Treaty (now Articles 56 EC and 58 EC respectively) relating to the free movement of capital.

2 The reference has been made in the course of proceedings between Ms Arens-Sikken, the wife of a Netherlands citizen who died in Italy, and the Staatssecretaris van Financiën (State Secretary for Finance) concerning the assessment of transfer duties payable in respect of an immovable property which the deceased owned in the Netherlands.

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 Under Netherlands law, every estate is subject to tax. Article 1(1) of the Law on Succession (Successiewet) of 28 June 1956 (Stb. 1956, No 362; ‘the SW 1956’) drew a distinction on the basis of whether the person whose estate was being administered resided in the Netherlands or abroad at the time of death.

6 From 1 January 1992 to 31 December 2001, that provision was worded as follows:

‘In accordance with this law, the following taxes shall be levied:

1. Inheritance duty on the value of all the assets transferred by virtue of the right to inherit following the death of a person who resided in the Netherlands at the time of death. ...

2. Transfer duty on the value of the assets set out in Article 5(2) obtained as a gift or inheritance following the death of a person who did not reside in the Netherlands at the time of that gift or that death;

3. Gift duty …’

7 Article 5(2) of the SW 1956, in the version applicable from 8 December 1995 to 31 December 2000, provided:

‘Transfer duty is levied on the value of:

1. the domestic possessions referred to in Article 13 of the Law on the taxation of wealth [Wet op de vermogensbelasting] of 16 December 1964 [Stb. 1964, No 520; ‘the WB 1964’], after deducting any debts referred to in that article;

…’

8 The first indent of Article 13(1) of the WB 1964, in the version applicable from 1 January 1992 to 31 December 2000, defined ‘domestic possessions’ as including ‘immovable property situated in the Netherlands or rights relating thereto’ (in so far as they do not belong to a Netherlands undertaking).

9 Article 13(2)(b) of the WB 1964 allows the deduction of debts secured by a mortgage on immovable property situated in the Netherlands only in so far as the charges and the interest relating to those debts are taken into consideration in calculating gross domestic income under Article 49 of the Law on income tax (Wet op de inkomstenbelasting) of 16 December 1964 (Stb. 1964, No 519).

10 There is no agreement between the Kingdom of the Netherlands and the Italian Republic for the prevention of double taxation in relation to inheritance duties.

11 It is apparent from the observations of the Netherlands Government that the rate of inheritance duties is progressive in two respects: (i) it depends on the link between the taxpayer and the deceased; and (ii) it varies according to the value of the acquisition.

12 It is also apparent from those observations that, from 1 January 1985, the proportional rate of 6% applicable to transfer duties was replaced with the progressive rate applied to inheritance

and gift duties. As a consequence, the rate at which transfer duties are applied is also dually progressive, being determined on the basis of the link between the taxpayer and the deceased and, from that date, in accordance with the value of the acquisition.

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

13 Ms Arens?Sikken's husband died on 8 November 1998. At the time of his death, he had been living outside the Netherlands for more than 10 years and was residing in Italy.

14 As the deceased had made a will, his estate was divided in equal shares between Ms Arens?Sikken and the four children of their marriage.

15 However, as a result of a testamentary parental partition *inter vivos*, as provided for under the former Article 1167 of the Netherlands Civil Code, all assets and liabilities of the estate passed to Ms Arens?Sikken, as the surviving spouse.

16 According to the order for reference and the observations of the Netherlands Government, Ms Arens?Sikken received, as a result of that partition, assets and liabilities to a value exceeding the value of her legal share of the estate. In other words, she received an overendowment. Her children, on the other hand, incurred a deficit, as they did not receive any of the assets included in the estate. According to the testamentary parental partition *inter vivos*, Ms Arens?Sikken was obliged to pay her children the value of their shares of the inheritance in cash. She therefore assumed an overendowment debt in respect of each of her children, and they had claims against her as a result of their underendowment.

17 The estate included the deceased's share in an immovable property situated in the Netherlands; that share was worth NLG 475 000.

18 The deceased's heirs made a declaration for the purpose of transfer duties, taking as a basis the value of NLG 95 000 acquired by each of them, that is, one-fifth of the value of the immovable property of NLG 475 000.

19 However, the tax authority took the view that Ms Arens?Sikken had acquired the whole of the share of that immovable property included in the estate, and issued her with an assessment to transfer duty based on a value of NLG 475 000. Ms Arens?Sikken's children were not asked to pay any transfer duty.

20 The tax authority's decision was confirmed following an objection lodged by Ms Arens?Sikken.

21 Ms Arens?Sikken appealed to the Gerechtshof te 's?Hertogenbosch (the 's?Hertogenbosch Regional Court of Appeal) against the confirmation decision taken by the tax authority. In that appeal, she submitted that she should not be required to pay transfer duty assessed on the basis of a value of NLG 475 000, and that a lower value was appropriate on account of the overendowment debts.

22 The Gerechtshof te 's?Hertogenbosch held that, as far as Ms Arens?Sikken was concerned, the transfer duty attached to the inheritance of the immovable property under inheritance law. It ruled that the asset attributed to Ms Arens?Sikken by virtue of the testamentary parental partition *inter vivos* was the deceased's share in the immovable property in question.

23 Ms Arens?Sikken brought an appeal in cassation against the judgment of the Gerechtshof te 's?Hertogenbosch before the Hoge Raad der Nederlanden (Supreme Court of the Netherlands). In the order for reference, the Hoge Raad der Nederlanden held that the Gerechtshof te

’s?Hertogenbosch was right to rule that, for the purposes of collecting transfer duty, Ms Arens?Sikken was deemed to have acquired, in its entirety, the share in the immovable property assigned to her by virtue of Netherlands inheritance law. It held that, under the Netherlands rules on transfer duty, Ms Arens?Sikken may not deduct overendowment debts for the purposes of determining the basis of assessment (just as she may not deduct a proportion of all debts included in the estate). By contrast, if Ms Arens?Sikken’s husband had been residing in the Netherlands at the time of his death, she would have been able to have the overendowment debts (and all debts attaching to the estate) taken into account in the determination of the basis of assessment for the inheritance duties which would have been payable in that situation.

24 In those circumstances, the Hoge Raad der Nederlanden was uncertain whether the non-deductibility of overendowment debts in the determination of the basis of assessment for transfer duty amounts to an unlawful restriction on the free movement of capital. In that regard, it also wonders whether there is a sufficiently close link between the overendowment debts and the immovable property concerned, in accordance with the case-law of the Court in Case C?234/01 *Gerritse* [2003] ECR I?5933 and Case C?364/01 *Barbier* [2003] ECR I?15013.

25 Since it considered that the dispute raised questions of interpretation of Community law, the Hoge Raad der Nederlanden decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

‘(1) Must Articles 73b and 73d of the … Treaty … be interpreted as precluding a Member State from taxing the inheritance under inheritance law of immovable property situated in that Member State and forming part of the estate of a person resident in another Member State at the time of his death on the basis of the value of the immovable property without account being taken of overendowment debts owed by the inheritor by reason of a testamentary parental partition *inter vivos*?

(2) If the answer to the previous question is in the affirmative and if it must also be determined by means of a comparison whether and, if so, to what extent overendowment debts must be taken into account, what method of comparison ... must be used in a case such as the present to determine whether the inheritance duty which would have been levied if the testator had been resident in the Netherlands at the time of his death would have been less than the transfer duty?

(3) Does it make any difference to the analysis of the obligation possibly imposed by the EC Treaty on the Member State in which the immovable property is situated to permit the deduction of the overendowment debts in whole or in part whether that deduction leads to a smaller concession to prevent double taxation in the Member State which considers itself to have authority to tax the estate by virtue of the testator’s place of residence?’

The questions referred for a preliminary ruling

Questions 1 and 2

26 By those questions, the referring court asks, in essence, whether the combined provisions of Articles 73b and 73d of the Treaty are to be interpreted as precluding rules of a Member State, such as those at issue in the main proceedings, concerning the assessment of inheritance duties and transfer duties payable in respect of an immovable property situated in that Member State which, for the assessment of those duties, make no provision for the deductibility of overendowment debts resulting from a testamentary parental partition *inter vivos* 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 residing, at the time of death, in the first-

mentioned State.

27 If the answer to that question is in the affirmative and in the light of *Gerritse* and *Barbier*, the referring court also asks what method of comparison must be used in a situation such as that at issue in the main proceedings in order to determine whether the inheritance duty which would have been levied if the person whose estate is being administered had been resident in the Netherlands at the time of death would have been less than the transfer duty.

28 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).

29 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).

30 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 *Barbier*, paragraph 58; *van Hilten?van der Heijden*, paragraph 42; and *Jäger*, paragraph 25).

31 A situation in which a person resident in Italy at the time of death leaves to persons resident in Italy or, as the case may be, in other Member States, an immovable property situated in the Netherlands and the subject of a transfer duty assessment in the Netherlands is certainly not a situation purely internal to a Member State.

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

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

34 In that regard, it should be borne in mind from the outset that, under the Netherlands rules, where the person whose estate is being administered was residing, at the time of death, in a Member State other than the Kingdom of the Netherlands, the overendowment debts resulting from a testamentary parental partition *inter vivos*, such as those assumed by Ms Arens-Sikken in the case in the main proceedings, cannot be deducted in the assessment of transfer duties relating to an immovable property left by way of inheritance. Consequently, the transfer duties which Ms Arens-Sikken was required to pay as a result of acquiring the immovable property through inheritance had to be assessed on the basis of a value of NLG 475 000, that is, the full value of that property.

35 By contrast, if the person whose estate is being administered was residing in the

Netherlands at the time of death, the assessment of inheritance duties payable in respect of an immovable property acquired by way of inheritance does take such debts into account. Thus, in a situation identical to that of Ms Arens-Sikken, in which there are four other heirs and an immovable property worth NLG 475 000 left by way of inheritance, the inheritance duties payable by the spouse assuming the overendowment debts would be assessed on the basis of NLG 95 000, representing one-fifth of the value of that property.

36 It follows from the case-law of the Court 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).

37 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).

38 It is true that, in circumstances such as those of the case before the referring court, for the purposes of applying the national rules, the taxable value of the immovable property left by way of inheritance remains the same, whether or not deductions are allowed in order to take account of a testamentary parental partition *inter vivos*. Nevertheless, as the Commission correctly maintained, as regards the method of assessment used to determine the amount of tax actually payable, the Netherlands rules make a distinction between persons who, at the time of death, were residing in the Member State concerned and those who, at the time of death, were not.

39 As is apparent from paragraphs 34 and 35 of the present judgment, if a resident of the Netherlands had left an immovable property situated there to five heirs, and had also entered into a testamentary parental partition *inter vivos*, the overall tax burden linked to that property would be shared by all the heirs, whereas, following the death of a non-resident, such as the husband of Ms Arens-Sikken, the overall tax burden is borne by one heir alone. As the Commission noted, in the first situation there would be a number of heirs and the amount paid by each of them would not necessarily exceed the threshold(s) for a higher rate of taxation, depending on the value of the immovable property concerned. By contrast, a levy based on the full value of an immovable property and imposed on a single heir who has assumed the overendowment debts resulting from a testamentary parental partition *inter vivos* could lead – and, arguably, *would* lead – to a higher rate of taxation being applied.

40 It follows that, on account of the progressive nature of the tax bands provided for under the Netherlands rules – which, as the Commission pointed out at the hearing, is not in itself improper – national rules such as those at issue in the main proceedings could make the inheritance of a non-resident subject to a higher overall tax burden.

41 That conclusion cannot be called into question by the Netherlands Government's argument that the rules which are applied in the Netherlands do not involve any restriction, as the difference in treatment invoked by Ms Arens-Sikken results from the way in which powers of taxation are allocated between the Member States. That circumstance is irrelevant in the light of the criteria resulting from the case-law referred to in paragraphs 36 and 37 of the present judgment. Moreover, the difference in treatment as regards the taking into account of overendowment debts flows solely from the application of the Netherlands rules at issue (see also, to that effect, *Jäger*, paragraph 34).

42 The Netherlands Government contends, however, that overendowment debts should not be regarded as directly linked to an immovable property, within the meaning of the judgments in *Gerritse* and *Barbier*. Those debts are not debts forming part of the estate, but debts assumed by the surviving spouse which arise after the death of the deceased in consequence of his will. Such debts do not encumber the immovable property, and creditors of the surviving spouse who assumes the overendowment debt would be unable to claim any right *in rem* in respect of that property.

43 In that regard, 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.

44 Similarly, in relation to Articles 49 EC and 50 EC, the Court has 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, *Gerritse*, paragraphs 27 and 28).

45 However, while it is true that in the case before the referring court, as that court itself points out, the overendowment debts are connected to the immovable property at issue, in so far as they arise because that property was acquired in its entirety by Ms Arens-Sikken by virtue of the testamentary parental partition *inter vivos*, it is not necessary, for the purposes of establishing the existence of a restriction prohibited in principle by Article 56(1) EC, to determine whether there is a direct link between the overendowment debts and the immovable property included in the estate. Unlike the cases referred to above, the present case relates to the consequences – which are different for the heirs – of national rules which draw a distinction, in apportioning the taxable amount following a testamentary parental partition *inter vivos*, according to whether or not the person whose estate is being administered was residing, at the time of death, in the Member State concerned.

46 In the present case, as is apparent from paragraphs 38 to 40 of the present judgment, the restriction on the free movement of capital arises as a result of the fact that national rules such as those at issue in the main proceedings, applied in conjunction with a progressive rate of taxation, result in different treatment, on apportionment of the tax burden, between the various heirs of a person who, at the time of death, was residing in the Member State concerned and the heirs of a person who, at the time of death, was not.

47 At the hearing, the Netherlands Government itself admitted that, in circumstances such as those of the case before the referring court, the failure to take into account the underendowment

claims of the other heirs of such a non-resident person could lead to a greater tax burden, in view of the fact that the transfer duties are levied solely on the surviving spouse.

48 It must also be noted that, in circumstances such as those of the case before the referring court, the impact of the restriction resulting from the fact that the surviving spouse is required to pay transfer duty on the full value of the immovable property without the overendowment debts being taken into account is exacerbated by the fact that – as is apparent from paragraph 12 of the present judgment and the written observations submitted to the Court by the Commission – the transfer duty is assessed not only on the basis of the value of the acquisition but also by taking account of the link between the taxpayer and the deceased. According to the Commission, the exemption for surviving spouses is normally substantial, unlike the exemption for children.

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

50 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’.

51 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).

52 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 in relation to inheritance and transfer duties payable in respect of an immovable property situated in the Kingdom of the Netherlands 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 (see, to that effect, *Manninen* , paragraph 29).

53 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 rules such as those at issue in the main proceedings – which, for the purposes of assessing inheritance tax, make a distinction as to the deductibility of overendowment debts 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).

54 In that respect, it must be stated that, contrary to the Netherlands Government’s contention, that difference in treatment cannot be justified on the ground that it concerns situations which are not objectively comparable.

55 In fact, the situation of the heirs of the deceased concerned in the main proceedings is comparable to that of any heir whose inheritance includes an immovable property situated in the Netherlands and left by a person who was residing in that State at the time of death.

56 The Netherlands 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 the Netherlands. It is only in respect of the deduction of overendowment debts resulting from a testamentary parental partition *inter vivos* that the inheritances of residents and non-residents are treated differently.

57 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?11/07 *Eckelkamp and Others*[2008] ECR I?0000, paragraph 63).

58 Finally, as regards the issue 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, it must be held that, subject to the arguments advanced in relation to Question 3, no such justification has been put forward by the Netherlands Government.

59 With regard to Question 2, it should be noted that the restriction on the free movement of capital lies in the fact that overendowment debts are not taken into account in the assessment of transfer duties, in conjunction with the fact that the progressive nature of the tax bands under the national rules could result in a higher overall tax burden than that which applies in the case of inheritance duties. Furthermore, that question contains a reference to *Gerritse* and *Barbier* which, as is apparent from paragraph 45 of the present judgment, are not relevant in the present case. Accordingly, there is no need to answer Question 2.

60 In the light of the foregoing, the answer to Question 1 must be that Articles 73b and 73d of the Treaty must be interpreted as precluding national rules, such as those at issue in the main proceedings, concerning the assessment of inheritance duties and transfer duties payable in respect of an immovable property situated in a Member State, which, for the assessment of those duties, make no provision for the deductibility of overendowment debts resulting from a testamentary parental partition *inter vivos* 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 residing, at the time of death, in the first-mentioned Member State, in which the immovable property included in the estate is situated, in so far as such rules apply a progressive rate of taxation and in so far as the combination of (i) the failure to take into account such debts and (ii) that progressive rate could result in a greater tax burden for heirs who are not in a position to rely on such deductibility.

Question 3

61 By this question, the referring court asks, in essence, whether the answer to Question 1 might be different if the Member State in which the person whose estate is being administered was residing at the time of death grants, under rules applicable in its territory on the prevention of double taxation, a tax credit in respect of inheritance duties payable in another Member State on assets situated in the territory of that other State.

62 It is clear from the case-law of the Court that, under the second indent of Article 293 EC, the abolition of double taxation is one of the objectives of the European Community to be attained by the Member States. In the absence of unifying or harmonising measures at Community level for the elimination of double taxation, the Member States retain competence for determining the criteria for taxation on income and wealth with a view to eliminating double taxation by means, inter alia, of international agreements. In those circumstances, the Member States remain at liberty to determine the connecting factors for the allocation of fiscal jurisdiction by means of bilateral agreements (see Case C?336/96 *Gilly* [1998] ECR I?2793, paragraphs 24 and 30; Case C?307/97 *Saint-Gobain ZN* [1999] ECR I?6161, paragraph 57; Case C?265/04 *Bouanich*[2006] ECR I?923, paragraph 49; and also *Denkavit Internationaal and Denkavit France*, paragraph 43).

63 As regards the exercise of the power of taxation so allocated, the Member States may not, however, disregard Community rules (*Saint-Gobain ZN*, paragraph 58; *Bouanich*, paragraph 50; and also *Denkavit Internationaal and Denkavit France*, paragraph 44).

64 Nevertheless, even on the assumption that such a bilateral agreement between the Member State in which the person whose estate is being administered was residing at the time of death, and the State in which the immovable property inherited under the laws of the latter State is situated, could neutralise the effects of the restriction on the free movement of capital identified in the context of the answer to Question 1, it must be noted that there is no agreement between the Kingdom of the Netherlands and the Italian Republic for the prevention of double taxation of succession duties.

65 In those circumstances, it is sufficient to note that the Member State in which the immovable property is situated cannot, in order to justify a restriction on the free movement of capital arising from its rules, 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, for the purposes of assessing transfer duties, no account is taken in the Member State in which that property is situated of overendowment debts resulting from a testamentary parental partition *inter vivos* (see, to that effect, *Eckelkamp and Others*, paragraph 68).

66 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 his 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).

67 In the light of the foregoing considerations, the answer to Question 3 must be that the answer to Question 1 is not affected by the fact that the rules of the Member State in which the person whose estate is being administered was residing at the time of death provide unilaterally for the possibility that a tax credit may be granted in respect of inheritance duties payable in another Member State on immovable property situated in that other State.

Costs

68 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. 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:

1. **Articles 73b and 73d of the Treaty (subsequently, Articles 56 EC and 58 EC respectively) must be interpreted as precluding national rules, such as those at issue in the main proceedings, concerning the assessment of inheritance duties and transfer duties payable in respect of an immovable property situated in a Member State, which, for the assessment of those duties, makes no provision for the deductibility of overendowment debts resulting from a testamentary parental partition *inter vivos* 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 residing, at the time of death, in the first-mentioned Member State, in which the immovable property included in the estate is situated, in so far as such rules apply a progressive rate of taxation and in so far as the combination of (i) the failure to take into account such debts and (ii) that progressive rate could result in a greater tax burden for heirs who are not in a position to rely on such deductibility.**

2. **The answer set out in point 1 of the operative part of this judgment is not affected by the fact that the rules of the Member State in which the person whose estate is being administered was residing at the time of death provide unilaterally for the possibility that a tax credit may be granted in respect of inheritance duties payable in another Member State on immovable property situated in that other State.**

[Signatures]

* Language of the case: Dutch.