Case C-371/10

National Grid Indus BV

v

Inspecteur van de Belastingdienst Rijnmond/kantoor Rotterdam

(Reference for a preliminary ruling from the Gerechtshof Amsterdam)

(Transfer of a company's place of effective management to a Member State other than that in which it is incorporated – Freedom of establishment – Article 49 TFEU – Taxation of unrealised capital gains relating to the assets of a company transferring its place of management between Member States – Determination of the amount of tax at the time of the transfer of the place of management – Immediate recovery of the tax – Proportionality)

Summary of the Judgment

1. *Freedom of movement for persons – Freedom of establishment – Provisions of the Treaty – Scope – Transfer of the place of effective management of a company incorporated under national law to another Member State*

(Arts 49 TFEU and 54 TFEU)

2. *Freedom of movement for persons – Freedom of establishment – Restrictions – Tax legislation – Transfer of the place of effective management of a company incorporated under national law to another Member State*

(Art. 49 TFEU)

3. *Freedom of movement for persons – Freedom of establishment – Restrictions – Tax legislation – Transfer of the place of effective management of a company incorporated under national law to another Member State*

(Art. 49 TFEU)

1. A company incorporated under the law of a Member State which transfers its place of effective management to another Member State, without that transfer affecting its status of a company of the former Member State, may rely on Article 49 TFEU for the purpose of challenging the lawfulness of a tax imposed on it by the former Member State on the occasion of the transfer of the place of effective management.

A Member State does indeed have the power to define both the connecting factor required of a company if it is to be regarded as incorporated under its national law and as such capable of enjoying the right of establishment, and that required if the company is to be able subsequently to maintain that status. A Member State is therefore able, in the case of a company incorporated under its law, to make the company's right to retain its legal personality under the law of that State subject to restrictions on the transfer abroad of the company's place of effective management. However, that power does not mean that the Treaty rules on freedom of establishment do not apply to national legislation on the incorporation and winding up of companies.

(see paras 27, 30, 33, operative part 1)

2. Even though, according to their wording, the Treaty provisions on freedom of establishment are aimed at ensuring that foreign nationals are treated in the host Member State in the same way as nationals of that State, they also prohibit the Member State of origin from hindering the establishment in another Member State of one of its nationals or of a company incorporated under its legislation.

National legislation under which the transfer of the place of effective management of a company incorporated under national law to another Member State entails the immediate taxation of the unrealised capital gains relating to the assets transferred, whereas such gains are not taxed when such a company transfers its place of management within the territory of the Member State in question and will not be taxed until they are actually realised and to the extent that they are realised, establishes a difference of treatment as regards the taxation of capital gains and is liable to deter a company incorporated under national law from transferring its place of management to another Member State. That difference of treatment constitutes a restriction that is in principle prohibited by the Treaty provisions on freedom of establishment.

However, the transfer of the place of effective management of a company of one Member State to another Member State cannot mean that the Member State of origin has to abandon its right to tax a capital gain which arose within the ambit of its powers of taxation before the transfer. Such a measure is intended to prevent situations capable of jeopardising the right of the Member State of origin to exercise its powers of taxation in relation to activities carried on in its territory, and may therefore be justified on grounds connected with the preservation of the allocation of powers of taxation between the Member States, and is is appropriate for ensuring that allocation of powers of taxation between the Member States concerned.

(see paras 35, 37, 41, 46, 48)

3. Article 49 TFEU must be interpreted as:

– not precluding legislation of a Member State under which the amount of tax on unrealised capital gains relating to a company’s assets is fixed definitively, without taking account of decreases or increases in value which may occur subsequently, at the time when the company, because of the transfer of its place of effective management to another Member State, ceases to obtain profits taxable in the former Member State; it makes no difference that the unrealised capital gains that are taxed relate to exchange rate gains which cannot be reflected in the host Member State under the tax system in force there;

– precluding legislation of a Member State which prescribes the immediate recovery of tax on unrealised capital gains relating to assets of a company transferring its place of effective management to another Member State at the very time of that transfer.

National legislation offering a company transferring its place of effective management to another Member State the choice between, first, immediate payment of the amount of tax, which creates a disadvantage for that company in terms of cash flow but frees it from subsequent administrative burdens, and, secondly, deferred payment of the amount of tax, possibly together with interest in accordance with the applicable national legislation, which necessarily involves an administrative burden for the company in connection with tracing the transferred assets, would constitute a measure which, while being appropriate for ensuring the balanced allocation of powers of taxation between the Member States, would be less harmful to freedom of establishment than the immediate recovery of that tax.

(see paras 64, 73, 86, operative part 2)

JUDGMENT OF THE COURT (Grand Chamber)

29 November 2011 (*)

(Transfer of a company’s place of effective management to a Member State other than that in which it is incorporated – Freedom of establishment – Article 49 TFEU – Taxation of unrealised capital gains relating to the assets of a company transferring its place of management between Member States – Determination of the amount of tax at the time of the transfer of the place of management – Immediate recovery of the tax – Proportionality)

In Case C?371/10,

REFERENCE for a preliminary ruling under Article 267 TFEU from the Gerechtshof Amsterdam (Netherlands), made by decision of 15 July 2010, received at the Court on 26 July 2010, in the proceedings

National Grid Indus BV

v

Inspecteur van de Belastingdienst Rijnmond / kantoor Rotterdam,

THE COURT (Grand Chamber),

composed of A. Tizzano, President of the First Chamber, acting as President, J.N. Cunha Rodrigues, K. Lenaerts (Rapporteur) and A. Prechal, Presidents of Chambers, R. Silva de Lapuerta, K. Schiemann, E. Levits, A. Ó Caoimh, L. Bay Larsen, T. von Danwitz and M. Berger, Judges,

Advocate General: J. Kokott,

Registrar: M. Ferreira, Principal Administrator, having regard to the written procedure and further to the hearing on 21 June 2011,

after considering the observations submitted on behalf of:

– National Grid Indus BV, by F. Pötgens, belastingadviseur, and D. Hofland and E. Pijnacker Hordijk, advocaten,

– the Netherlands Government, by C. Wissels, M. de Ree and J. Langer, acting as Agents,

– the Danish Government, by C. Vang, acting as Agent,

– the German Government, by T. Henze and C. Blaschke, acting as Agents,

– the Spanish Government, by M. Muñoz Pérez, acting as Agent,

– the French Government, by G. de Bergues and N. Rouam, acting as Agents,

– the Italian Government, by G. Palmieri, acting as Agent, and P. Gentili, avvocato dello Stato,

– the Portuguese Government, by L. Inez Fernandes and J. Menezes Leitão, acting as Agents,

– the Finnish Government, by J. Heliskoski and M. Pere, acting as Agents,

– the Swedish Government, by A. Falk and S. Johannesson, acting as Agents,

– the United Kingdom Government, by S. Hathaway, acting as Agent, and K. Bacon, barrister,

– the European Commission, by W. Roels and R. Lyal, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 8 September 2011,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Article 49 TFEU.

2 The reference has been made in proceedings between National Grid Indus BV ('National Grid Indus'), a company incorporated under Netherlands law with its registered office in the Netherlands, and the Inspecteur van de Belastingsdienst Rijnmond / kantoor Rotterdam (Inspector of the Rijnmond tax service, Rotterdam office, 'the Inspector') concerning the taxation of the unrealised capital gains in relation to the assets of that company on the occasion of the transfer of its place of effective management to the United Kingdom.

Legal context

Convention for the avoidance of double taxation and the prevention of fiscal evasion

3 The Kingdom of the Netherlands and the United Kingdom of Great Britain and Northern Ireland have concluded a convention for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and capital gains ('the Convention').

4 Article 4 of the Convention provides:

'1. For the purposes of this Convention, the term "resident of one of the States" means any person who, under the laws of that State, is liable to tax therein by reason of his domicile, residence, place of management or any other criterion of a similar nature. …

…

3. Where by reason of the provisions of paragraph 1 a person other than an individual is a resident of both States, then it shall be deemed to be a resident of the State in which its place of effective management is situated.'

5 Under Article 7(1) of the Convention, '[t]he profits of an enterprise of one of the States shall be taxable only in that State unless the enterprise carries on business in the other State through a permanent establishment situated therein. If the enterprise carries on business as aforesaid, the profits of the enterprise may be taxed in the other State but only so much of them as is attributable to that permanent establishment.'

6 Article 13 of the Convention provides:

'1. Gains derived by a resident of one of the States from the alienation of immovable property … situated in the other State may be taxed in that other State.

2. Gains from the alienation of movable property forming part of the business property of a permanent establishment which an enterprise of one of the States has in the other State … including such gains from the alienation of such a permanent establishment (alone or with the whole enterprise) … may be taxed in that other State.

3. Gains from the alienation of ships or aircraft operated in international traffic … shall be taxable only in the State in which the place of effective management of the enterprise is situated.

4. Gains from the alienation of any property other than that referred to in paragraphs 1, 2 and 3 of this Article, shall be taxable only in the State of which the alienator is a resident.'

Netherlands legislation

7 Article 16 of the Law on income tax 1964 (Wet op de inkomstenbelasting 1964, 'the Wet IB') provides:

'Benefits derived from the business that have not yet been taken into account … are included in the profits for the calendar year in which the person on whose behalf the business is run ceases to derive profits from the business taxable in the Netherlands …'

8 In accordance with Article 8 of the Law on corporation tax 1969 (Wet op de vennootschapsbelasting 1969, 'the Wet VPB'), Article 16 of the Wet IB applies by analogy to the levying of corporation tax.

9 Under Article 2(4) of the Wet VPB, '[i]f a body has been established under Netherlands law, for the application of the present law … that body is still regarded as established in the Netherlands …'.

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

10 National Grid Indus is a limited liability company incorporated under Netherlands law. Until 15 December 2000 its place of effective management was in the Netherlands.

11 That company has since 10 June 1996 had a claim of GBP 33 113 000 against National Grid Company plc, a company established in the United Kingdom.

12 Following the rise in value of the pound sterling against the Dutch guilder, an unrealised exchange rate gain was generated on that claim. On 15 December 2000 the exchange rate gain was NLG 22 128 160.

13 On that date National Grid Indus transferred its place of effective management to the United Kingdom. In accordance with Article 2(4) of the Wet VPB, National Grid Indus in principle remained liable to tax indefinitely in the Netherlands, because it was incorporated under Netherlands law. However, by virtue of Article 4(3) of the Convention, which prevails over national law, National Grid Indus was deemed to be resident in the United Kingdom after the transfer of its place of effective management. Since after that transfer it no longer had a permanent establishment within the meaning of the Convention in the Netherlands, only the United Kingdom was entitled to tax its profits and capital gains after the transfer, in accordance with Articles 7(1) and 13(4) of the Convention.

14 As a result of the application of the Convention, National Grid Indus ceased to derive profits taxable in the Netherlands within the meaning of Article 16 of the Wet IB, so that under that provision, read in conjunction with Article 8 of the Wet VPB, there had to be a final settlement of the unrealised capital gains at the time of the transfer of the company's place of management. The Inspector thus decided that National Grid Indus should be taxed inter alia on the exchange rate gain mentioned in paragraph 12 above.

15 National Grid Indus brought an action against the Inspector's decision in the Rechtbank Haarlem (District Court, Haarlem), which upheld the decision by judgment of 17 December 2007.

16 National Grid Indus thereupon appealed to the Gerechtshof Amsterdam (Regional Court of Appeal, Amsterdam) against the judgment of the Rechtbank Haarlem.

17 The Gerechtshof Amsterdam considers, first, that National Grid Indus may rely on freedom of establishment to challenge the tax consequences which the Netherlands, as the Member State of origin, attaches to the transfer of the company's place of effective management to another Member State. As the existence and functioning of the company as incorporated under Netherlands law are not affected by the national legislation at issue, the case in the main proceedings may be distinguished from Case 81/87 *Daily Mail and General Trust* [1988] ECR 5483 and Case C?210/06 *Cartesio* [2008] ECR I?9641. However, the point is not free from doubt.

18 The Gerechtshof Amsterdam considers, next, that a tax such as that at issue in the main proceedings is an obstacle to freedom of establishment. The national measure on which the tax is based might, however, be justified by the objective of ensuring the balanced allocation of powers of taxation between the Member States, in accordance with the principle of fiscal territoriality linked to a temporal component. It explains that Article 16 of the Wet IB is based on the idea that the entire profits of a resident company should be taxed in the Netherlands. When liability to tax in the Netherlands ceases as a result of the transfer of the place of effective management of the company concerned, the unrealised capital gains relating to the company's assets which have not yet been taxed in the Netherlands should be regarded as profit that has been made and should therefore be taxed.

19 The Gerechtshof Amsterdam considers, however, that it cannot be ruled out that, in accordance with Case C?9/02 *de Lasteyrie du Saillant* [2004] ECR I?2409 and Case C?470/04 *N* [2006] ECR I?7409, the final settlement tax as provided for by the legislation at issue in the main

proceedings could be regarded as disproportionate, given that it entails an immediately recoverable tax debt and takes no account of decreases in value occurring after the company has transferred its place of management. That court considers that this point too is open to doubt. It adds that deferring the tax until the time of actual realisation of the gains could create insurmountable problems in practice.

20 Finally, the Gerechtshof Amsterdam points out that in the present case no decrease in value can occur after the transfer of the place of effective management of National Grid Indus, since the transfer put an end to the exchange rate risk in respect of a debt expressed in sterling. After the transfer the company was obliged to calculate its taxable profits in sterling.

21 In those circumstances, the Gerechtshof Amsterdam decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

‘1. If a Member State imposes on a company incorporated under the law of that Member State which transfers its place of effective management from that Member State to another Member State a final settlement tax in respect of that transfer, can that company, in the present state of Community law, rely on Article 43 EC (now Article 49 TFEU) against that Member State?

2. If the first question must be answered in the affirmative: is a final settlement tax such as the one at issue, which is applied, without deferment and without the possibility of taking subsequent decreases in value into consideration, to the capital gains relating to the assets of the company which were transferred from the Member State of origin to the host Member State, as assessed at the time of the transfer of the place of management, contrary to Article 43 EC (now Article 49 TFEU), in the sense that such a final settlement tax cannot be justified by the necessity of allocating powers of taxation between the Member States?

3. Does the answer to the previous question also depend on the circumstance that the final settlement tax in question relates to a (currency) profit which accrued under the tax jurisdiction of the Netherlands, whereas that profit cannot be reflected in the host Member State under the tax system in force there?’

Consideration of the questions referred

Question 1

22 By its first question the referring court asks essentially whether a company incorporated under the law of a Member State which transfers its place of effective management to another Member State and is taxed by the former Member State on the occasion of that transfer can rely on Article 49 TFEU against that Member State.

23 The Netherlands, German, Italian, Portuguese, Finnish, Swedish and United Kingdom Governments submit that Article 49 TFEU leaves untouched the Member States’ power to enact legislation, including fiscal rules relating to transfers between Member States of the places of management of undertakings. The Court’s interpretation of that article in *Daily Mail and General Trust* and *Cartesio* does not concern solely the conditions of the incorporation and functioning of companies under national company law.

24 Those governments observe that National Grid Indus, simply by reason of the transfer of its place of effective management, ceases to be subject to the tax law of its Member State of origin. The Netherlands loses all tax jurisdiction in respect of income from that company’s activities. The tax at issue in the main proceedings is thus closely linked to the provisions of national company law which determine the conditions of the establishment of companies and the transfer of their

place of management, and the tax is a direct consequence of those provisions.

25 It must be recalled that, in accordance with Article 54 TFEU, companies or firms formed in accordance with the law of a Member State and having their registered office, central management or principal place of business within the European Union are to be treated, for the purposes of the rules of the FEU Treaty on freedom of establishment, in the same way as natural persons who are nationals of Member States.

26 In the absence of a uniform definition in European Union law of the companies which may enjoy the right of establishment on the basis of a single connecting factor determining the national law applicable to a company, the question whether Article 49 TFEU applies to a company which seeks to rely on the fundamental freedom enshrined in that article – like the question whether a natural person is a national of a Member State and hence entitled to enjoy that freedom – is a preliminary matter which, as European Union law now stands, can only be resolved by the applicable national law. Consequently, the question whether the company is faced with a restriction on the freedom of establishment within the meaning of Article 49 TFEU can arise only if it has been established, in the light of the conditions laid down in Article 54 TFEU, that the company actually has a right to that freedom (see *Daily Mail and General Trust*, paragraphs 19 to 23; Case C?208/00 *Überseering* [2002] ECR I?9919, paragraphs 67 to 70; and *Cartesio*, paragraph 109).

27 A Member State thus has the power to define both the connecting factor required of a company if it is to be regarded as incorporated under its national law and as such capable of enjoying the right of establishment, and that required if the company is to be able subsequently to maintain that status (*Cartesio*, paragraph 110). A Member State is therefore able, in the case of a company incorporated under its law, to make the company's right to retain its legal personality under the law of that State subject to restrictions on the transfer abroad of the company's place of effective management (*Überseering*, paragraph 70).

28 In the case in the main proceedings, the transfer by National Grid Indus of its place of effective management to the United Kingdom did not, however, affect its status as a company incorporated under Netherlands law, in accordance with that law, which applies the incorporation theory to companies.

29 The Netherlands, German, Italian, Portuguese, Finnish, Swedish and United Kingdom Governments submit, however, that, if a Member State has power to require a company leaving its territory to be wound up and liquidated, it must also be regarded as having power to impose fiscal requirements if it applies the system – more advantageous from the point of view of the single market – of transferring the place of management while retaining legal personality.

30 However, the power referred to in paragraph 27 above does not mean that the Treaty rules on freedom of establishment do not apply to national legislation on the incorporation and winding up of companies (see *Cartesio*, paragraph 112).

31 The national legislation at issue in the main proceedings does not concern the determination of the conditions required by a Member State of a company incorporated under its law for that company to be able to retain its status of a company of that Member State after transferring its place of effective management to another Member State. The legislation confines itself to attaching tax consequences, for companies incorporated under national law, to a transfer of the place of management between Member States, without the transfer affecting their status of companies of the Member State in question.

32 In the main proceedings, since the transfer by National Grid Indus of its place of effective

management to the United Kingdom did not affect its status of a company incorporated under Netherlands law, the transfer did not affect that company's possibility of relying on Article 49 TFEU. As a company incorporated under the legislation of a Member State and having its registered office and central management within the European Union, it benefits, in accordance with Article 54 TFEU, from the Treaty provisions on freedom of establishment, and can thus rely on its rights under Article 49 TFEU, in particular for challenging the lawfulness of a tax imposed on it by that Member State on the occasion of the transfer of its place of effective management to another Member State.

33 The answer to Question 1 is therefore that a company incorporated under the law of a Member State which transfers its place of effective management to another Member State, without that transfer affecting its status of a company of the former Member State, may rely on Article 49 TFEU for the purpose of challenging the lawfulness of a tax imposed on it by the former Member State on the occasion of the transfer of the place of effective management.

Questions 2 and 3

34 By its second and third questions, which should be taken together, the referring court asks essentially whether Article 49 TFEU must be interpreted as precluding tax legislation of a Member State, such as that at issue in the main proceedings, under which unrealised capital gains relating to the assets of a company incorporated under the law of that Member State which transfers its place of effective management to another Member State are taxed by the former Member State at the time of the transfer, without that legislation providing for the payment of the tax imposed on that company to be deferred until the time when the gains are actually realised, or taking account of decreases in value that may occur after the transfer of the place of management. It also wishes to know whether the interpretation of Article 49 TFEU is affected by the fact that the unrealised capital gains that are taxed relate to exchange rate gains which cannot be reflected in the host Member State under the tax system in force there.

Existence of a restriction of freedom of establishment

35 Article 49 TFEU requires the abolition of restrictions on the freedom of establishment. Even though, according to their wording, the Treaty provisions on freedom of establishment are aimed at ensuring that foreign nationals are treated in the host Member State in the same way as nationals of that State, they also prohibit the Member State of origin from hindering the establishment in another Member State of one of its nationals or of a company incorporated under its legislation (see Case C?264/96 *ICI* [1998] ECR I?4695, paragraph 21; Case C?298/05 *Columbus Container Services* [2007] ECR I?10451, paragraph 33; Case C?157/07 *Krankenheim Ruhesitz am Wannsee?Seniorenheimstatt* [2008] ECR I?8061, paragraph 29; and Case C?96/08 *CIBA* [2010] ECR I?2911, paragraph 18).

36 It is also settled case-law that all measures which prohibit, impede or render less attractive the exercise of the freedom of establishment must be regarded as restrictions on that freedom (see Case C?442/02 *Caixa Bank France* [2004] ECR I?8961, paragraph 11; *Columbus Container Services*, paragraph 34; *Krankenheim Ruhesitz am Wannsee-Seniorenheimstatt*, paragraph 30; and *CIBA*, paragraph 19).

37 In the case in the main proceedings, it is clear that a company incorporated under Netherlands law wishing to transfer its place of effective management outside Netherlands territory, in the exercise of its right guaranteed by Article 49 TFEU, is placed at a disadvantage in terms of cash flow compared to a similar company retaining its place of effective management in the Netherlands. In accordance with the national legislation at issue in the main proceedings, the transfer of the place of effective management of a Netherlands company to another Member State

entails the immediate taxation of the unrealised capital gains relating to the assets transferred, whereas such gains are not taxed when such a company transfers its place of management within the Netherlands. The capital gains relating to the assets of a company transferring its place of management within the Netherlands are not taxed until they are actually realised and to the extent that they are realised. That difference of treatment relating to the taxation of capital gains is liable to deter a company incorporated under Netherlands law from transferring its place of management to another Member State (see, to that effect, *de Lasteyrie du Saillant*, paragraph 46, and *N*, paragraph 35).

38 That difference of treatment cannot be explained by an objective difference of situation. From the point of view of legislation of a Member State aiming to tax capital gains generated in its territory, the situation of a company incorporated under the law of that Member State which transfers its place of management to another Member State is similar to that of a company also incorporated under the law of the former Member State which keeps its place of management in that Member State, as regards the taxation of the capital gains relating to the assets which were generated in the former Member State before the transfer of the place of management.

39 The Spanish, French and Portuguese Governments further submit that a company such as the applicant in the main proceedings does not suffer any disadvantage in comparison with a company that transfers its place of management within a Member State. In view of the fact that the exchange rate gain in Netherlands guilders on a claim expressed in sterling disappeared when the place of effective management of National Grid Indus was transferred to the United Kingdom, that company was, in the view of those governments, taxed on a capital gain that had been realised. A transfer of the place of management within the Member State concerned, by contrast, would not have given rise to the realisation of any capital gains.

40 That argument must be rejected. The tax at issue in the main proceedings is not charged on realised capital gains. The exchange rate gain that was taxed in the context of those proceedings relates to an unrealised capital gain which did not produce any income for National Grid Indus. Such an unrealised capital gain would not have been taxed if National Grid Indus had transferred its place of effective management within Netherlands territory.

41 It follows that the difference of treatment that is applied, in connection with the provisions of national law at issue in the main proceedings, to companies incorporated under Netherlands law transferring their place of effective management to another Member State in comparison with companies incorporated under Netherlands law transferring their place of effective management within Netherlands territory constitutes a restriction that is in principle prohibited by the Treat provisions on freedom of establishment.

Justification of the restriction of freedom of establishment

42 According to settled case-law, a restriction of freedom of establishment is permissible only if it is justified by overriding reasons in the public interest. It is further necessary, in such a case, that it should be appropriate to ensuring the attainment of the objective in question and not go beyond what is necessary to attain that objective (Case C?446/03 *Marks & Spencer* [2005] ECR I?10837, paragraph 35; Case C?196/04 *Cadbury Schweppes and Cadbury Schweppes Overseas* [2006] ECR I?7995, paragraph 47; Case C?524/04 *Test Claimants in the Thin Cap Group Litigation* [2007] ECR I?2107, paragraph 64; and Case C?303/07 *Aberdeen Property Fininvest Alpha* [2009] ECR I?5145, paragraph 57).

43 According to the referring court, the restriction of freedom of establishment is justified by the objective of ensuring the balanced allocation of powers of taxation between the Member States, in accordance with the principle of territoriality linked to a temporal component. The Member State

concerned is exercising its power of taxation solely in relation to the capital gains generated in its territory during the period in which National Grid Indus was resident there for tax purposes.

44 National Grid Indus argues, however, that such an objective cannot justify the restriction that has been established, since the tax at issue in the main proceedings does not relate to an actual gain.

45 It must be recalled, first, that preserving the allocation of powers of taxation between the Member States is a legitimate objective recognised by the Court (see, to that effect, *Marks & Spencer*, paragraph 45; *N*, paragraph 42; Case C?231/05 *Oy AA* [2007] ECR I?6373, paragraph 51; and Case C?414/06 *Lidl Belgium* [2008] ECR I?3601, paragraph 31). Secondly, it is settled case-law that, in the absence of any unifying or harmonising measures of the European Union, the Member States retain the power to define, by treaty or unilaterally, the criteria for allocating their powers of taxation, particularly with a view to eliminating double taxation (Case C?540/07 *Commission* v *Italy* [2009] ECR I?10983, paragraph 29 and the case-law cited).

46 The transfer of the place of effective management of a company of one Member State to another Member State cannot mean that the Member State of origin has to abandon its right to tax a capital gain which arose within the ambit of its powers of taxation before the transfer (see, to that effect, Case C?374/04 *Test Claimants in Class IV of the ACT Group Litigation* [2006] ECR I?11673, paragraph 59). The Court has thus held that, in accordance with the principle of fiscal territoriality linked to a temporal component, namely the taxpayer's residence for tax purposes within national territory during the period in which the capital gains arise, a Member State is entitled to charge tax on those gains at the time when the taxpayer leaves the country (see *N*, paragraph 46). Such a measure is intended to prevent situations capable of jeopardising the right of the Member State of origin to exercise its powers of taxation in relation to activities carried on in its territory, and may therefore be justified on grounds connected with the preservation of the allocation of powers of taxation between the Member States (see *Marks & Spencer*, paragraph 46; *Oy AA*, paragraph 54; and Case C?311/08 *SGI* [2010] ECR I?487, paragraph 60).

47 According to the order for reference, National Grid Indus was, in accordance with Article 7(1) of the Convention, regarded after the transfer of its place of effective management to the United Kingdom as a company resident in the United Kingdom. Since, by reason of that transfer, National Grid Indus ceased to make profits taxable in the Netherlands, a final settlement was drawn up, in accordance with Article 16 of the Wet IB, with respect to the capital gains relating to the company's assets in the Netherlands at the time of the transfer of its place of management to the United Kingdom. Capital gains realised after the transfer are taxed in the United Kingdom, in accordance with Article 13(4) of the Convention.

48 Having regard to those factors, legislation such as that at issue in the main proceedings is appropriate for ensuring the preservation of the allocation of powers of taxation between the Member States concerned. The final settlement tax levied at the time of the transfer of a company's place of effective management is intended to subject to the Member State of origin's tax on profits the unrealised capital gains which arose within the ambit of that State's power of taxation before the transfer of the place of management. Unrealised capital gains relating to an economic asset are thus taxed in the Member State in which they arose. Capital gains realised after the transfer of the company's place of management are taxed exclusively in the host Member State in which they have arisen, thus avoiding double taxation.

49 The argument put forward by National Grid Indus that the tax at issue in the main proceedings cannot be justified because it is charged on an unrealised capital gain, not a realised capital gain, must be rejected. As the governments which have submitted observations to the Court observe, a Member State is entitled to tax the economic value generated by an unrealised

capital gain in its territory even if the gain has not yet actually been realised.

50 It must also be examined whether legislation such as that at issue in the main proceedings goes beyond what is necessary to attain the objective it pursues (Case C?262/09 *Meilicke* [2011] ECR I?0000, paragraph 42 and the case-law cited).

51 It should be recalled that under the national legislation at issue in the main proceedings both the establishment of the amount of the tax debt and the recovery of the tax take place at the time when the company ceases to obtain profits taxable in the Netherlands, in the present case the time of the transfer of the company's place of effective management to another Member State. In order to assess the proportionality of such legislation, a distinction must be drawn between the establishment of the amount of tax and the recovery of the tax.

– Definitive establishment of the amount of tax at the time when the company transfers its place of effective management to another Member State

52 As the Advocate General observes in points 55 and 56 of her Opinion, establishing the amount of tax at the time of the transfer of a company's place of effective management complies with the principle of proportionality, having regard to the objective of the national legislation at issue in the main proceedings, namely to subject to tax in the Member State of origin the capital gains which arose within the ambit of that State's power of taxation. It is proportionate for that Member State, for the purpose of safeguarding the exercise of its powers of taxation, to determine the tax due on the unrealised capital gains that have arisen in its territory at the time when its power of taxation in respect of the company in question ceases to exist, in the present case the time of the transfer of the company's place of effective management to another Member State.

53 The European Commission, referring to the judgment in *N*, submits, however, that from the point of view of the principle of proportionality the Member State of origin is required to take into account the decreases in value that occur between the time of the transfer of the company's place of management and the realisation of the assets concerned, if the host Member State's tax system does not take them into account.

54 It should be recalled that in *N*, which related to national legislation under which a private individual was subject, at the time of the transfer of his residence for tax purposes to another Member State, to tax on the unrealised capital gains relating to a substantial shareholding he had in a company, the Court held that, in order to be regarded as proportionate to the objective of ensuring a balanced allocation of powers of taxation between the Member States, a system of tax must take full account of decreases in value that may arise after the transfer of residence by the taxpayer concerned, unless those decreases have already been taken into account in the host Member State (*N*, paragraph 54).

55 Even though the transfer by National Grid Indus of its place of effective management to the United Kingdom put an end to the exchange rate risk for the claim at issue in the main proceedings, which was expressed in sterling, a decrease in value relating to that claim might none the less appear after the transfer if, for example, the company concerned did not obtain payment of the debt in full.

56 However, in contrast to the position in *N*, the failure of the Member State of origin to take into account, in the dispute in the main proceedings in the present case, decreases in value that occur after the transfer of a company's place of effective management cannot be regarded as disproportionate to the objective pursued by the national legislation at issue in those proceedings.

57 The assets of a company are assigned directly to economic activities that are intended to

produce a profit. Moreover, the extent of a company's taxable profits is partly influenced by the valuation of its assets in the balance sheet, in so far as depreciation reduces the basis of taxation.

58 Since, in a situation such as that at issue in the main proceedings, the profits of a company which transfers its place of effective management are, after the transfer, taxed exclusively in the host Member State, in accordance with the principle of fiscal territoriality linked to a temporal component, it is also for that Member State, in view of the above-mentioned connection between a company's assets and its taxable profits, and hence for reasons relating to the symmetry between the right to tax profits and the possibility of deducting losses, to take account in its tax system of fluctuations in the value of the assets of that company which occur after the date on which the Member State of origin loses all fiscal connection with the company.

59 In those circumstances, the Member State of origin, contrary to the Commission's submissions, is not obliged to take account of any exchange rate losses that may occur after the transfer by National Grid Indus of its place of effective management to the United Kingdom until the satisfaction or assignment of the claim held by that company. The tax due on the unrealised capital gains is determined at the time when the Member State of origin's power to tax the company ceases to exist, in the present case at the time of the transfer of the company's place of management. The taking into account by the Member State of origin either of an exchange rate gain or of an exchange rate loss occurring after the transfer of the place of effective management could not only call into question the balanced allocation of powers of taxation between the Member States but also lead to double taxation or double deduction of losses. That would in particular be the case if a company possessing a claim such as that at issue in the main proceedings, expressed in sterling, transferred its place of management from a Member State whose currency is the euro to another Member State in the euro zone.

60 The fact that, in a situation such as that at issue in the main proceedings, the transfer of the company's place of effective management to the United Kingdom meant that the exchange rate risk disappeared, since the claim which is expressed in sterling is also expressed in that currency in the company's balance sheet after that transfer, is of no relevance in this regard. It is in accordance with the principle of fiscal territoriality linked to a temporal component, namely residence for tax purposes in national territory during the period in which the taxable gain appeared, that the capital gain generated in the Member State of origin is taxed at the time of the transfer of the place of effective management of the company in question.

61 Moreover, as appears from paragraph 58 above, the tax system of the host Member State will in principle take account, at the time when the assets of the undertaking in question are realised, of capital gains and losses realised in relation to those assets after the transfer of the place of management. However, a possible omission by the host Member State to take account of decreases in value does not impose any obligation on the Member State of origin to revalue, at the time of realisation of the asset concerned, a tax debt which was definitively determined at the time when the company in question, because of the transfer of its place of effective management, ceased to be subject to tax in the latter Member State.

62 It should be recalled in this connection that the Treaty offers no guarantee to a company covered by Article 54 TFEU that transferring its place of effective management to another Member State will be neutral as regards taxation. Given the relevant disparities in the tax legislation of the Member States, such a transfer may be to the company's advantage in terms of tax or not, according to circumstances (see, to that effect, Case C?365/02 *Lindfors* [2004] ECR I?7183, paragraph 34; Case C?403/03 *Schempp* [2005] ECR I?6421, paragraph 45; and Case C?194/06 *Orange European Smallcap Fund* [2008] ECR I?3747, paragraph 37). Freedom of establishment cannot therefore be understood as meaning that a Member State is required to draw up its tax

rules on the basis of those in another Member State in order to ensure, in all circumstances, taxation which removes any disparities arising from national tax rules (see Case C?293/06 *Deutsche Shell* [2008] ECR I?1129, paragraph 43).

63 Furthermore, the tax situation of a company such as that at issue in the main proceedings which has a claim expressed in sterling and transfers its place of effective management from the Netherlands to the United Kingdom, compared to that of a company having an identical claim but transferring its place of management within the Netherlands, is not necessarily to its disadvantage.

64 It follows from the foregoing that Article 49 TFEU does not preclude legislation of a Member State under which the amount of tax on unrealised capital gains relating to a company's assets is fixed definitively, without taking account of decreases or increases in value which may occur subsequently, at the time when the company, because of the transfer of its place of effective management to another Member State, ceases to obtain profits taxable in the former Member State. It makes no difference that the unrealised capital gains that are taxed relate to exchange rate gains which cannot be reflected in the host Member State under the tax system in force there.

– Immediate recovery of the tax at the time when the company transfers its place of effective management to another Member State

65 According to National Grid Indus and the Commission, the immediate recovery of the tax at the time of the transfer of a company's place of effective management to another Member State is disproportionate. The recovery of tax at the time when the capital gains are actually realised would be a less restrictive measure than that provided for by the legislation at issue in the main proceedings, and would not endanger the allocation of powers of taxation between the Member States.

66 The Commission adds that the administrative burden caused by the deferred recovery of tax would not be excessive. Merely an annual return by the company concerned stating that the company is still in possession of the assets transferred, accompanied by a declaration made at the time of the actual disposal of the asset, could suffice to enable the Member State of origin to recover, at the time of realisation of the asset, the tax due on the unrealised capital gain.

67 The ten governments which have submitted observations to the Court argue, on the other hand, that the immediate recovery of the tax debt at the time of the transfer of the company's place of effective management complies with the principle of proportionality. Postponement of its recovery until the time of the realisation of the capital gains would not be an equivalent and effective alternative solution, and could compromise the public interest objective pursued by the legislation at issue in the main proceedings. They point out that deferred recovery of the tax would necessarily mean that the various assets in respect of which a capital gain had been ascertained at the time of the transfer of the company's place of management might have to be traced in the host Member State until the time of realisation. Organising such tracing would involve an excessive burden both for the company and for the tax authorities.

68 On this point, it must be stated that recovery of the tax debt at the time of the actual realisation in the host Member State of the asset in respect of which a capital gain was established by the authorities of the Member State of origin on the occasion of the transfer of a company's place of effective management to the host Member State may avoid the cash-flow problems which could be produced by the immediate recovery of the tax due on unrealised capital gains.

69 As to the administrative burden that could be occasioned by the deferred recovery of tax, it should be noted that the transfer of a company's place of effective management may be accompanied by the transfer of a large number of assets. The Netherlands Government points out

that the situation at issue in the main proceedings is untypical, since it concerns only the capital gain relating to a claim held by National Grid Indus.

70 It follows, as the Advocate General observes in point 69 of her Opinion, that the asset situation of a company may appear so complex that an accurate cross-border tracing of the destiny of all the items making up the company's fixed and current assets until the unrealised capital gains incorporated into those assets are realised is almost impossible, and that such tracing will entail efforts representing a considerable or even excessive burden for the company in question.

71 It thus cannot be ruled out that the administrative burden that would be entailed by the annual return suggested by the Commission, which would necessarily relate to every asset in respect of which a capital gain was established at the time of the transfer of the place of effective management of the company concerned, would give rise as such, for that company, to a hindrance to freedom of establishment that would not necessarily be any less harmful to that freedom than the immediate recovery of the tax debt corresponding to the capital gain.

72 In other situations, on the other hand, the nature and extent of the company's assets would make it easy to carry out a cross-border tracing of the individual assets for which a capital gain was ascertained at the time when the company transferred its place of effective management to another Member State.

73 In those circumstances, national legislation offering a company transferring its place of effective management to another Member State the choice between, first, immediate payment of the amount of tax, which creates a disadvantage for that company in terms of cash flow but frees it from subsequent administrative burdens, and, secondly, deferred payment of the amount of tax, possibly together with interest in accordance with the applicable national legislation, which necessarily involves an administrative burden for the company in connection with tracing the transferred assets, would constitute a measure which, while being appropriate for ensuring the balanced allocation of powers of taxation between the Member States, would be less harmful to freedom of establishment than the measure at issue in the main proceedings. If a company were to consider that the administrative burden in connection with deferred recovery was excessive, it could opt for immediate payment of the tax.

74 However, account should also be taken of the risk of non-recovery of the tax, which increases with the passage of time. That risk may be taken into account by the Member State in question, in its national legislation applicable to deferred payments of tax debts, by measures such as the provision of a bank guarantee.

75 The governments which have submitted observations to the Court further submit that deferred payment of tax would represent, for the tax authorities of the Member States, an excessive burden in connection with tracing all the assets of a company in respect of which a capital gain had been ascertained at the time of the transfer of the company's place of effective management.

76 That argument must be rejected.

77 It should be recalled, to begin with, that the tracing of assets relates only to the recovery of the tax debt, not to its ascertainment. As may be seen from paragraph 64 above, Article 49 TFEU does not preclude legislation of a Member State, such as that at issue in the main proceedings, under which the amount of tax due on capital gains relating to the assets of a company which ceases to obtain profits taxable in that Member State because of the transfer of its place of effective management to another Member State is fixed definitively at the time of that transfer. In

so far as a company which opts for deferred payment of the tax necessarily considers that tracing the assets in respect of which a capital gain has been ascertained at the time of the transfer of the place of management will not cause it an excessive administrative burden, the burden to be borne by the tax authorities of the Member State of origin in connection with checking the declarations relating to such tracing cannot be regarded as excessive either.

78 Next, contrary to the assertions of the Netherlands, German and Spanish Governments, the existing machinery for mutual assistance between the authorities of the Member States is sufficient to enable the Member State of origin to check the truthfulness of the returns made by companies which have opted for deferred payment of the tax. Since the tax is definitively determined at the time when the company, because of the transfer of its place of effective management, ceases to obtain profits taxable in the Member State of origin, the assistance of the host Member State will concern not the correct ascertainment of the tax but only its recovery. Article 4(1) of Council Directive 2008/55/EC of 26 May 2008 on mutual assistance for the recovery of claims relating to certain levies, duties, taxes and other measures (OJ 2008 L 150, p. 28) provides that '[a]t the request of the applicant authority, the requested authority shall provide any information which would be useful to the applicant authority in the recovery of its claim'. That directive thus enables the Member State of origin to obtain information from the competent authority of the host Member State on whether or not certain assets of a company which has transferred its place of effective management to the latter Member State have been realised, in so far as the information is necessary to enable the Member State of origin to recover a tax debt which arose at the time of that transfer. Moreover, Directive 2008/55, in particular Articles 5 to 9, provides the authorities of the Member State of origin with a framework of cooperation and assistance allowing them actually to recover the tax debt in the host Member State.

79 In addition, the German and Italian Governments submit that the national legislation at issue in the main proceedings is justified by the need to maintain the coherence of the national tax system. Charging tax on the unrealised capital gains at the time of the transfer of the place of effective management of the company in question to another Member State is the logical complement of the tax exemption previously granted in respect of those capital gains.

80 As the Advocate General observes in point 99 of her Opinion, the requirements of coherence of the tax system and the balanced allocation of powers of taxation coincide.

81 However, even assuming that the national legislation at issue in the main proceedings is capable of allowing the objective of maintaining the coherence of the tax system to be attained, it must be stated that only the determination of the amount of tax at the time of the transfer of a company's place of effective management, and not the immediate recovery of the tax, should be regarded as not going beyond what is necessary for achieving that objective.

82 Deferred recovery of the tax would not call into question the link existing in the Netherlands legislation between, on the one hand, the tax advantage represented by the exemption allowed to unrealised capital gains relating to assets as long as a company obtains profits taxable in the Netherlands and, on the other, the offsetting of that advantage by a charge to tax determined at the time when that company ceases to obtain such profits.

83 Finally, the German, Spanish, Portuguese, Finnish, Swedish and United Kingdom Governments rely on the risk of tax avoidance in order to justify the national legislation in question.

84 However, the mere fact that a company transfers its place of management to another Member State cannot set up a general presumption of tax evasion and justify a measure which compromises the exercise of a fundamental freedom guaranteed by the Treaty (see, to that effect, *ICI*, paragraph 26; Case C?478/98 *Commission* v *Belgium* [2000] ECR I-7587, paragraph 45;

Case C?436/00 *X and Y* [2002] ECR I?10829, paragraph 62; Case C?334/02 *Commission* v *France* [2004] ECR I?2229, paragraph 27; and *Cadbury Schweppes and Cadbury Schweppes Overseas*, paragraph 50).

85 It thus follows from the foregoing that legislation of a Member State, such as that at issue in the main proceedings, which prescribes the immediate recovery of tax on unrealised capital gains relating to assets of a company transferring its place of effective management to another Member State at the very time of that transfer is disproportionate.

86 Consequently, the answer to Questions 2 and 3 is that Article 49 TFEU must be interpreted as:

– not precluding legislation of a Member State under which the amount of tax on unrealised capital gains relating to a company's assets is fixed definitively, without taking account of decreases or increases in value which may occur subsequently, at the time when the company, because of the transfer of its place of effective management to another Member State, ceases to obtain profits taxable in the former Member State; it makes no difference that the unrealised capital gains that are taxed relate to exchange rate gains which cannot be reflected in the host Member State under the tax system in force there;

– precluding legislation of a Member State which prescribes the immediate recovery of tax on unrealised capital gains relating to assets of a company transferring its place of effective management to another Member State at the very time of that transfer.

Costs

87 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 (Grand Chamber) hereby rules:

1. **A company incorporated under the law of a Member State which transfers its place of effective management to another Member State, without that transfer affecting its status of a company of the former Member State, may rely on Article 49 TFEU for the purpose of challenging the lawfulness of a tax imposed on it by the former Member State on the occasion of the transfer of the place of effective management.**

2. **Article 49 TFEU must be interpreted as:**

– **not precluding legislation of a Member State under which the amount of tax on unrealised capital gains relating to a company's assets is fixed definitively, without taking account of decreases or increases in value which may occur subsequently, at the time when the company, because of the transfer of its place of effective management to another Member State, ceases to obtain profits taxable in the former Member State; it makes no difference that the unrealised capital gains that are taxed relate to exchange rate gains which cannot be reflected in the host Member State under the tax system in force there;**

– **precluding legislation of a Member State which prescribes the immediate recovery of tax on unrealised capital gains relating to assets of a company transferring its place of effective management to another Member State at the very time of that transfer.**

[Signatures]

* Language of the case: Dutch.