OPINION OF ADVOCATE GENERAL

MAZÁK

delivered on 13 March 2008 (1)

Case C-11/07

Hans Eckelkamp and Others

v

Belgische Staat

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

(Free movement of capital – Articles 56 EC and 58 EC – Restrictions –Inheritance tax – Deductibility of certain debts secured by a mortgage mandate – Refusal on the ground that the deceased was not a resident at the time of death)

I – **Introduction**

1. By the question referred for a preliminary ruling by judgment of 9 January 2007, the Hof van Beroep te Gent (Court of Appeal, Ghent) (Belgium) essentially wishes to ascertain whether the Belgian legislation on the taxation of inheritance is compatible with Articles 56 EC and 58 EC on the free movement of capital and Articles 12 EC, 17 EC and 18 EC on the freedom of the citizens of the Union to take up residence in another Member State. Specifically, the referring court wishes to know whether those Treaty provisions preclude national legislation under which – for the purposes of determining the basis of assessment of the tax due on the inheritance of an immovable property situated in the territory of the Member State concerned – account may be taken of certain charges, such as debts secured by the right conferred on a creditor to take out a mortgage against that immovable property, if the deceased was resident, at the time of death, in that Member State, but not if that person was resident in another Member State.

2. The issues raised in the present case are very similar to those in Case C?43/07 (2) – on which I am also delivering my Opinion today – which also concerns national legislation under which, for the purposes of assessing to tax the acquisition through inheritance of immovable property in the national territory, certain charges are not deductible if, at the time of his death, the deceased resided in another Member State.

3. In answering the questions referred in the present proceedings, the Court will have an opportunity to build and elaborate upon the existing case-law on inheritance taxation in the context of the free movement of capital, in particular that deriving from *Barbier* (3) and v*an Hilten-van der Heijden*. (4)

II – **The relevant legislation**

A – *Community law*

4. Article 56(1) EC (formerly Article 73b(1) of the EC Treaty) provides:

‘Within the framework of the provisions set out in this Chapter, all restrictions on the movement of capital between Member States and between Member States and third countries shall be prohibited.’

5. Article 58 EC (formerly Article 73d of the EC Treaty) provides:

‘1. The provisions of Article 56 [EC] shall be without prejudice to the right of Member States:

(a) 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;

…

3. The measures and procedures referred to in [paragraph 1] 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 [EC].’

6. Annex I to Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty (an article later repealed by the Treaty of Amsterdam), (5) entitled ‘Nomenclature of the capital movements referred to in Article 1 of the Directive’, refers to 13 different categories of capital movement. Under heading XI, entitled ‘Personal capital movements’, the following are listed:

‘…

D – Inheritances and legacies

…’

B – *National law*

7. In respect of succession duties, competence to establish the rate of taxation, the taxable amount, tax exemptions and tax reductions lies with the various regions of the Kingdom of Belgium.

8. Article 1 of the Flemish Code of Succession Duties (Wetboek Successierechten, ‘the WS’) draws a distinction, as regards the taxation of inheritance, on the basis of whether the person whose estate is being administered was resident, at the time of death, in Belgium or abroad. That article states:

‘The following taxes are hereby established:

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

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

Kingdom of Belgium.

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

9. Under Article 15 of the WS, inheritance duty is payable, after deduction of debts, on all the property, wherever located, owned by the deceased.

10. Article 18 of the WS, relating to non-residents, is worded as follows:

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

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

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

13. Under Article 41 of the WS:

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

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

14. Article 48(1) of the WS provides tables showing the rates which apply to inheritance duty and to the duty on the transfer of property *mortis causa* (transfer duty). The fourth subparagraph of Article 48(2) is worded as follows:

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

15. As regards succession duties, there is no agreement between Belgium and Germany for the avoidance of double taxation.

III – **Factual background, procedure and the question referred for a preliminary ruling**

16. Hans, Natalie, Monica, Saskia, Thomas, Jessica and Joris Eckelkamp, the appellants in the main proceedings (together referred to as 'the heirs') are the heirs of Ms Reintges Hildegard Eckelkamp ('Ms Eckelkamp'), who died in Düsseldorf on 30 December 2003.

17. On 13 November 2002, Ms Eckelkamp had signed a document containing acknowledgement of a debt owed by her to Hans Eckelkamp. Moreover, by notarial act of 5 June 2003, Ms Eckelkamp had granted a mandate to encumber an immovable property situated in Knokke-Heist (Belgium) with a mortgage as security for repayment of that debt in the amount of EUR 220 000, plus EUR 11 000 in interest.

18. On 29 June 2004, the heirs made a declaration of Ms Eckelkamp's estate ('the declaration of estate' or 'the declaration') showing, under assets, that property as having a value of EUR 200 000. Under liabilities, the declaration showed 'nihil'.

19. On the basis of the declaration – and thus without taking account of Ms Eckelkamp's debt to Hans Eckelkamp – the transfer duties payable were estimated by decision of 14 July 2004 at EUR 110 000.04.

20. It appears from the file that, before the declaration of estate was made, there had been an exchange of e-mails between the Belgian tax authorities and the heirs, in which the tax authorities indicated that transfer duty (applicable where the deceased was a non-resident) is payable on the value of immovable property in Belgium without deduction of any debts and that, in consequence, the debt in issue should not be mentioned in the declaration.

21. After they had paid the succession duties, the heirs filed a tax claim on 7 October 2004 seeking, inter alia, annulment of the decision of 14 July 2004. That claim was dismissed by judgment of the Rechtbank van Eerste Aanleg te Brugge (Court of First Instance, Bruges) of 30 May 2005. In its judgment, the Rechtbank considered that the period prescribed in Article 40 of the WS for filing a declaration of estate had in any event expired on 1 July 2004, whereas the fiscal claim was not filed until 7 October 2004, which meant that the declaration of estate was final and no account could be taken of a liability which was not mentioned therein. The Rechtbank also took the view that the appellants should have included the debt concerned in the declaration as a liability in respect of which the rule laid down in Articles 1 and 2 of the WS, read in conjunction with Article 18 thereof, falls not to be applied, as being contrary to Community law.

22. The heirs thereupon brought appeal proceedings before the Hof van Beroep in respect of the judgment of the Rechtbank. In support of their appeal, they essentially submit that Community law has direct effect and that administrative authorities are obliged to reconsider decisions taken contrary to Community law. Article 41 of the WS cannot prevent Community law from producing its full effect. Relying on *Barbier*, (6) they further claim that the distinction drawn in Article 2(1) of the WS, read in conjunction with Article 18 thereof, between residents and non-residents of Belgium is contrary to the Treaty provisions on the free movement of capital. They maintain also that those rules of the WS are prejudicial to the freedom to take up residence in another Member State and are contrary to Article 12 EC, read in conjunction with Articles 17 EC and 18 EC. The Belgian State, the respondent in the main proceedings, disputes the restriction on the free movement of capital and contends that the situations of residents and non-residents are not comparable.

23. In the order for reference, the Hof van Beroep states that it is satisfied that Ms Eckelkamp actually had a debt of EUR 220 000 on the day of her death.

24. In those circumstances, the Hof van Beroep te Gent decided to stay the proceedings and to request the Court of Justice to give a preliminary ruling on the following question:

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

IV – **Legal analysis**

A – *Main submissions of the parties*

25. In the present proceedings, observations have been submitted by the heirs, the Belgian Government and the Commission, all of which were also represented at the hearing on 13 December 2007.

26. The heirs submit, first, that the Belgian legislation on the taxation of the acquisition of immovable property through inheritance is discriminatory and infringes Article 56 EC, read in conjunction with Article 58 EC, in that – for the purposes of calculating the basis of assessment – it allows account to be taken of certain debts if the deceased was resident in Belgium at the time of death, but not if the deceased was resident elsewhere. The heirs maintain that the situations of a resident and a non-resident are comparable in this context. They submit in that regard that the Belgian legislation in principle considers both residents and non-residents to be taxable persons for the purposes of levying succession duties. Referring to the case-law of the Court, (7) the heirs argue that, as a consequence, residents and non-residents must also be treated alike as regards the deductibility of charges or debts.

27. Secondly, the heirs submit – relying mainly on *Barbier* (8) – that the legislation at issue constitutes a restriction on the free movement of capital, as the provisions preventing the deduction of debts relating to immovable property have the effect of reducing the value of the inheritance where the deceased was a non-resident, while there is no such reduction if the deceased was resident in Belgium. Thus, a person resident in another Member State may be discouraged from investing in an immovable property situated in Belgium, knowing that his heirs will have to pay higher succession duties than if he had not invested in Belgium or if he had invested in a different way.

28. Thirdly, and on the basis of similar arguments, the heirs submit that the Belgian legislation at issue runs counter to the rights of Union citizens, as laid down in Articles 12 EC and 18 EC, to take up residence in another Member State and not to be discriminated against.

29. Opposing the argument put forward by the Belgian Government that the present reference for a preliminary ruling should be declared inadmissible, the heirs argued at the oral hearing that the debt at issue is – also according to Belgian law – sufficiently closely linked with the immovable property in question. There is no relevant difference in that regard between a mortgage and the mortgage mandate at issue. They also emphasised that the debt of EUR 220 000 was not included in the declaration because, under Belgian law, it is prohibited to do so where the deceased was a non-resident and, what is more, because they had been told not to by the competent national authority (that being a source of information on which they could rely for the purposes of the principle of protection of legitimate expectations). (9)

30. The Belgian Government maintains, by contrast, that the present reference for a preliminary ruling should be declared inadmissible on the ground that the question referred is hypothetical and not relevant for the purposes of deciding the dispute in the main proceedings. It emphasises that the debt in question was not mentioned in the declaration of estate, which became final on expiry of the period allowed under the WS for filing it. Thus the central issue is in fact the expiry of the period for filing or correcting the declaration of estate, and the Hof van Beroep has not shown how, in those circumstances, it could take account of a preliminary ruling on the question referred. It appears from the case-law of the Court that, as a rule, Community law does not prevent the application of procedural rules provided for under national law, such as time-limits. (10)

31. On the substance of the case, the Belgian Government submits that the difference in treatment as regards debts, according to whether it is the inheritance of a resident or a non-resident, does not constitute an infringement of the Treaty provisions invoked in the present case. It emphasises that in relation to direct taxes, in particular as regards the taxation of acquisition through inheritance, the situations of residents and non-residents are, as a rule, not comparable.

32. The Belgian Government contends that only the Member State in which the deceased was resident is in a position to assess his economic situation in its entirety and to take account of all assets and debts in the calculation of succession duties. A debt such as that at issue is thus, in principle, always taken into account by the Member State of residence of the deceased. However, there is no legal framework at Community level for the coordination of the powers of the Member States in the area of inheritance taxation. The deduction of a debt such as that in issue in the Member State where the immovable property is situated could in fact lead to double-deduction, which Member States are allowed to prevent. In the present case, all debts forming part of the estate of the deceased are taken account of in Germany, the Member State where she resided.

33. According to the Belgian Government, the present case must be distinguished from *Barbier* (11) on the ground that in the latter case the debt that the heirs wanted to deduct constituted an inherent element of the immovable property taxable in the Member State where it was situated. In the present case, by contrast, there is no indication that the debt in question – which is only secured by a mortgage mandate and not a mortgage – would be sufficiently closely linked with the immovable property within the meaning of *Barbier*. That mortgage mandate relates in fact to all present and future estates of the person concerned.

34. In the event that the Member State in which the immovable property is situated should have to allow the deduction of debts attributable to that property, the Belgian Government contends that this should apply only if the debt is closely associated with the immovable property and if it is not also deductible in the Member State of residence of the deceased.

35. For similar reasons, the Belgian Government takes the view that the Belgian legislation in question is not contrary to Articles 12 EC, 17 EC and 18 EC.

36. The Commission submits that the distinction which is drawn, as regards the calculation of succession duties, between residents and non-residents of Belgium – with the effect that the inheritance of immovable property from a non-resident is subject to transfer duty without deduction of debts – constitutes a prohibited restriction on the free movement of capital. Such a provision could be regarded as compatible with the free movement of capital only if the difference in treatment applied to situations which are not objectively comparable or if it were justified by overriding reasons in the general interest. (12)

37. According to the Commission, the situations of a resident and a non-resident are, for present purposes, wholly comparable. In fact, the deceased’s status as a resident or non-resident

has no bearing on the value of the immovable property situated in Belgium and the related debts or the inheritance. As was clarified at the oral hearing, the Commission considers the debt in the present case to be directly linked, through the mortgage mandate, with the value of the immovable property.

38. Moreover, no overriding reason relating to the general interest has been advanced which could justify the difference in treatment at issue. As regards, in particular, the alleged difficulty for the national authorities to verify the existence of debts where the deceased was resident in another Member State, it is in any event for the heirs to provide sufficient proof of such a debt. The Commission adds that a Member State cannot, in order to justify a restriction on the free movement of capital, rely on a tax credit or concession which another Member State may – if it so desires – provide for.

39. Finally, the Commission does not consider it necessary to answer the question referred with regard to Articles 12 EC, 17 EC or 18 EC.

B – *Appraisal*

1. Admissibility of the question referred

40. As to the objection of inadmissibility raised by the Belgian Government, it should be recalled that, according to settled case-law, it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. (13)

41. Where questions referred by national courts concern the interpretation of a provision of Community law, the Court of Justice is thus bound, in principle, to give a ruling unless it is obvious that the request for a preliminary ruling is in reality designed to induce the Court to give a ruling in a fictitious dispute, or to deliver advisory opinions on general or hypothetical questions, or that the interpretation of Community law requested bears no relation to the actual facts of the main action or its purpose, or that the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it. (14)

42. It should be noted that in the present case it is common ground that the debt in question was not mentioned by the heirs within the period allowed under the WS for filing or correcting the declaration of estate, which became final on the expiry of that period.

43. The Belgian Government has also pointed out – correctly – that Community law does not, as a rule, prevent the application of such time-limits provided for under national law. In that regard, it appears from the case-law that, in principle, both the fixing of reasonable time-limits as regards administrative or judicial proceedings and the rule that an administrative decision becomes final upon the expiry of such a time-limit are consistent with the requirements of the effectiveness of Community law, inasmuch as such procedural rules constitute an application of the fundamental principle of legal certainty. (15)

44. It is clear, however, from the case-file and from the submissions of the heirs that there is more to the present case than the mere fact that the time-limits laid down for the filing of the declaration of estate – which I do not consider to be objectionable as such – have not been complied with by the heirs. In particular, the non-inclusion of the debt in question appears to relate to the fact that Belgian inheritance legislation does not provide for the inclusion of such debts and, what is more, to the fact that the heirs were given information to that effect by the Belgian tax

authorities.

45. In the final analysis, therefore, the present dispute turns, rather than on the procedural provisions of the WS, on its material provisions, which were in turn possibly based, depending on the answer to be given to the question referred for a preliminary ruling, on an erroneous application of Community law. (16)

46. Against that background, it is far from established that, in deciding on the appeal brought by the heirs, the referring court would be prevented – solely on the ground that the declaration of estate became final without the debt in issue being mentioned – from taking account of a preliminary ruling on the question referred.

47. Accordingly, it is not obvious, within the meaning of the abovementioned case-law, that the question referred in the present proceedings is – as the Belgian Government contends – hypothetical or irrelevant for the purposes of delivering judgment in the main action.

48. To my mind, the question referred for a preliminary ruling is therefore admissible.

2. Substance

49. By its question, the referring court is essentially asking whether Community law, in particular the Treaty provisions relating to the freedom of Union citizens to take up residence in another Member State and to the free movement of capital, preclude national legislation on the taxation of inheritance, such as that at issue in the main proceedings, under which – for the purposes of determining the basis of assessment for the tax due on the inheritance of immovable property situated in the territory of the Member State concerned – account may be taken of certain charges, such as debts secured by the right conferred on a creditor to take out a mortgage against that immovable property, if the person from whom the immovable property has been inherited was resident, at the time of death, in that Member State (inheritance duty), but not if that person was resident in another Member State (17) (transfer duty).

50. As suggested by the parties to the present proceedings and in conformity with the relevant case-law of the Court concerning the taxation of acquisition through inheritance, I shall start by examining that question in relation to the free movement of capital. (18)

51. As a preliminary point it should also be noted that, as the Commission rightly observed, the Treaty provision most relevant to the circumstances of this case is Article 58 EC, read in conjunction with Article 56 EC, rather than Article 57 EC as suggested in the question referred.

52. It should be recalled at the outset that, according to well-established case-law, although direct taxation falls within the competence of the Member States, they must none the less exercise that competence consistently with Community law. (19)

53. As regards, more particularly, the applicability *ratione materiae* of the Treaty provisions on the free movement of capital to a situation such at that at issue – which has not, in fact, been contested by the parties to the present proceedings – it is settled case-law that an inheritance is a movement of capital within the meaning of Article 56 EC (formerly Article 73b of the EC Treaty), except in cases where its constituent elements are confined within a single Member State. (20)

54. It suffices to note in that regard that the situation in the case before the Hof van Beroep te Gent is clearly not purely domestic in that it concerns the taxation of the acquisition of an immovable property through inheritance from a person resident, at the time of death, in a Member State other than Belgium, that is to say, other than the Member State in which the immovable

property is situated.

55. The inheritance at issue in the main proceedings therefore falls within the scope of the Treaty provisions on the free movement of capital.

56. It is thus necessary to examine whether national legislation such as that at issue amounts to a prohibited restriction on the free movement of capital.

57. In that regard, it should be noted that the Court held in *Barbier* – which also concerned the taxation of an immovable property acquired through inheritance from a non-resident – that measures prohibited by Article 56 EC as being restrictions on the movement of capital include those whose effect 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. (21)

58. In the present case it has not been disputed that – as the heirs and the Commission have submitted – the effect of the legislation under which debts such as those in issue in the main proceedings are not deductible in relation to immovable property inherited from a non-resident is to reduce the value of the inheritance in so far as it causes the inheritance to be subject, in Belgium, to a tax higher than that payable if the immovable property had been inherited from a person resident, at the time of death, in the territory of that Member State.

59. It follows that the national legislation on succession duties at issue – in so far as it makes the deductibility of certain debts conditional upon the immovable property concerned having been inherited from a person resident in that Member State – is, in principle, liable to restrict the free movement of capital.

60. It is therefore necessary to examine whether that restriction may be justified having regard to the provisions of the Treaty.

61. The Belgian Government relies essentially on two main arguments in order to show that the legislation at issue is compatible with the Treaty provisions on the free movement of capital and that the distinction on which it is based is justified. It maintains, first, relying on the *Schumacker* (22) case-law, that the differential treatment in question reflects an objective difference between the situations of a resident and a non-resident. Second, and closely related to that argument, it points out that, according to the rules on the allocation of powers of taxation, it falls to the Member State of residence of the deceased – which alone is in a position to assess his economic position in its entirety – to take account of all assets and debts relating to the inheritance, including debts such as those at issue.

62. In that respect, it is correct that, as the Belgian Government observed, the Court accepted in the *Schumacker* line of cases – thereby recognising the role of the criterion of residence as a connecting factor for purposes of the allocation of taxing powers – that, in relation to direct taxes, the respective situations of residents and non-residents are not, as a rule, comparable, so that, in tax law, it is possible that the taxpayer's residence may constitute a factor justifying national rules which entail different treatment as between resident and non-resident taxpayers. (23)

63. In the same vein, Article 58(1)(a) EC expressly provides that 'Article 56 [EC] 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 …'.

64. The Court has repeatedly emphasised, however, that that provision, in so far as it is an

exception to the fundamental principle of the free movement of capital, must be interpreted strictly and that not all tax legislation making 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. (24)

65. Also, the exception 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 Article 58(1) EC '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 [EC]'.

66. A distinction must therefore be drawn between unequal treatment which is permitted under Article 58(1)(a) EC and arbitrary discrimination which is prohibited by Article 58(3) EC. As follows in that regard from the case-law of the Court, for a national measure to be capable of being regarded as compatible with the Treaty provisions 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. (25)

67. As to the identification of situations which are objectively comparable with regard to a specific national tax measure, (26) it appears from the case-law, in particular, that where a Member State has chosen to impose a particular form of tax on non-residents as well as residents, it follows that residents and non-residents must also be considered comparable as regards any deductions relating to that taxation. (27) In the same context, the Court also considered it relevant to determine whether costs, charges or obligations, whose deductibility or taking into account with regard to a tax is at issue, are in a way 'directly linked' with the income, asset or taxable event on which that tax is levied. (28)

68. Against that background, it should be noted in the present case, first, that for the purposes of inheritance taxation with respect to immovable property situated in Belgium, both the estate of a resident and that of a non-resident are subject to tax under the WS. Although, in formal terms, it is 'inheritance duty' that is levied in the case of a resident and 'transfer duty' in the case of a non-resident, the fact remains, in my view, that residents and non-residents are in principle considered comparable, under Belgian inheritance tax legislation, as regards liability to succession duties on immovable property situated in Belgium.

69. Secondly, although the applicable succession duties are formally levied on the value of the immovable property forming part of the estate of a non-resident, the fact that the inheritance is taxed in the hands of the heirs is not to be overlooked. Thus, the case does not exclusively concern the personal situation of the deceased and the responsibility of his Member State of residence to take account, in accordance with the residence principle invoked by the Belgian Government, of all his personal circumstances and obligations, as it is the heirs who are the taxable persons under the WS and liable to tax according to their share in the inheritance.

70. In particular, in a situation where the heirs were themselves resident in Belgium, and to whom the same non-deductibility rule would apparently apply as regards the inheritance of immovable property from a non-resident, one might well ask if the deceased's State of residence would really be in a better position to take into account obligations such as that in issue. In addition, as the Commission has pointed out, the burden of proof as to the existence of the debt concerned lies in any event with the heirs, whether or not the person to whose estate the debt belongs was a resident or not.

71. Finally, it should be noted that the debt at issue in the main proceedings is secured – according to the information provided by the parties and the referring court – by a mortgage mandate which enables the immovable property inherited to be encumbered with a corresponding

mortgage.

72. Although, as the Belgian Government has emphasised, the link in the present case between the immovable property and the obligation in question is obviously technically different from that, for example, between the obligation to transfer title and the estate at issue in *Barbier*, (29) I do not regard that difference as relevant in this context, nor do I consider it sufficient to enable the Court to distinguish the present case from that case. The fact remains that there is a link, in that the debts thus secured can in any event burden the immovable property concerned which is subject to tax. (30)

73. In the light of the foregoing considerations, it has not been shown that the mere fact that the deceased was not, at the time of death, resident in the Member State where immovable property forming part of his estate is situated could provide objective justification for denying an heir, in a situation as that before the referring court, the deduction of such a debt, if an heir in the same situation but inheriting from a resident would have the right to avail himself of such a tax advantage.

74. As regards, finally, the argument put forward by the Belgian Government that the taking account of the debt at issue may lead to double-deduction, it is settled case-law that a Community national cannot be deprived of the right to rely on the provisions of the Treaty on the ground that he is profiting from tax advantages which are legally provided by the rules in a Member State other than his State of residence. (31)

75. Since also no overriding reasons in the general interest have been advanced which could justify the legislation at issue, it must be concluded that the difference in tax treatment entailed amounts to arbitrary discrimination within the meaning of Article 58(3) EC and the abovementioned case-law (32) and is therefore incompatible with the Treaty provisions on the free movement of capital.

76. It is clear from the foregoing that it is unnecessary to examine the question referred in so far as it concerns the provisions of the Treaty relating to the freedom of Union citizens to take up residence in another Member State. (33)

77. To my mind, the answer to the question referred must therefore be that the Treaty provisions on the free movement of capital preclude national legislation such as that at issue in the main proceedings, under which – for the purposes of determining the basis of assessment of the tax due on the inheritance of an immovable property situated in the territory of the Member State concerned – account may be taken of certain charges, such as debts secured by the right conferred on a creditor to take out a mortgage against the immovable property inherited, if the person from whom the property has been inherited was resident, at the time of death, in that Member State, but not if that person was resident in another Member State.

V – **Conclusion**

78. For the reasons given above, I propose that the question referred by the Hof van Beroep te Gent should be answered as follows:

The Treaty provisions on the movement of capital preclude national legislation such as that at issue in the main proceedings, under which – for the purposes of determining the basis of assessment of the tax due on the inheritance of an immovable property situated in the territory of the Member State concerned – account may be taken of certain charges, such as debts secured by the right conferred on a creditor to take out a mortgage against the immovable property inherited, if the person from whom the property has been inherited was resident, at the time of

death, in that Member State, but not if that person was resident in another Member State.

1 – Original language: English.

2 – *Arens-Sikken*, pending before the Court.

3 – Case C?364/01 [2003] ECR I?15013.

4 – Case C?513/03 [2006] ECR I?1957.

5 – OJ 1988 L 178, p. 5.

6 – Cited in footnote 3.

7 – In particular Case 270/83 *Commission* v *France* [1986] ECR 273; Case C?307/97 *Saint-Gobain* [1999] ECR I?6161; and *Barbier*, cited in footnote 3.

8 – Cited in footnote 3, paragraph 62.

9 – In that regard, reference was made to Joined Cases C?181/04 to C?183/04 *Elmeka* [2006] ECR I?8167.

10 – With reference to Case 45/76 *Comet* [1976] ECR 2043, paragraph 19.

11 – Cited in footnote 3.

12 – Case C?512/03 *Blanckaert* [2005] ECR I?7685, paragraph 42.

13 – See to that effect in particular Case C?275/06 *Promusicae* [2008] ECR I?0000, paragraph 36; Case C?236/98 *Jämställdhetsombudsmannen* [2000] ECR I?2189, paragraph 30; and Case C?261/95 *Palmisani* [1997] ECR I?4025, paragraph 18.

14 – See to that effect, in particular *Promusicae*, cited in footnote 13, paragraph 37, and Case C?217/05 *Confederación Española de Empresarios de Estaciones de Servicio* [2006] ECR I?11987, paragraph 16 and the case-law cited.

15 – See to that effect in particular *Palmisani*, cited in footnote 13, paragraph 28; Case C?453/00 *Kühne & Heitz* [2004] ECR I?837, paragraph 24; and *Comet*, cited in footnote 10, paragraph 18.

16 – In addition, the dispute in the main proceedings may raise, as the heirs have argued, issues of the protection of legitimate expectations.

17 – That is to say, resident at the time of death in a Member State other than the Member State where the immovable property concerned is situated.

18 – Cf. in that regard inter alia *Barbier*, cited in footnote 3, paragraphs 57, 58 and 75. The following assessment corresponds, in so far as the two cases are structurally similar, essentially to that in my Opinion in *Arens-Sikken*, cited in footnote 2, to which I may refer where appropriate.

19 – See, inter alia, Case C?319/02 *Manninen* [2004] ECR I?7477, paragraph 19; Case C?386/04 *Centro di Musicologia Walter Stauffer* [2006] ECR I?8203, paragraph 15; and Case C?347/04 *Rewe Zentralfinanz* [2007] ECR I?2647, paragraph 21.

20 – See, to that effect, inter alia Case C?256/06 *Jäger* [2008] ECR I?0000, paragraph 25, and *van Hilten-van der Heijden*, cited in footnote 4, paragraph 42.

21 – See to that effect *Barbier*, cited in footnote 3, paragraph 62; *van Hilten-van der Heijden*, cited in footnote 4, paragraph 44; and, most recently, *Jäger*, cited in footnote 20, paragraph 30.

22 – Case C?279/93 [1995] ECR I?225.

23 – See to that effect *Schumacker*, cited in footnote 22, paragraphs 31 and 33.

24 – See, for example, Case C?446/03 *Marks & Spencer* ?2005? ECR I?10837, paragraph 37; *Manninen*, cited in footnote 19, paragraph 28; and *Jäger*, cited in footnote 20, paragraph 40.

25 – See to that effect, inter alia, *Manninen*, cited in footnote 19, paragraphs 28 and 29; Case C?35/98 *Verkooijen* ?2000? ECR I?4071, paragraph 43; Case C?376/03 *D.* [2005] ECR I?5821, paragraph 25; and *Blanckaert*, cited in footnote 12, paragraph 42.

26 – See, as to that, in greater detail my Opinion in *Arens-Sikken*, cited in footnote 2, points 73 to 77.

27 – See, to this effect, *Commission* v *France*, cited in footnote 7, paragraph 20; Case C?170/05 *Denkavit* [2006] ECR I?11949, paragraph 35; see also Opinion of Advocate General Lenz in Case C?250/95 *Futura Participations and Singer* [1997] ECR I?2471, points 38 and 39.

28 – See, to that effect, inter alia Case C?234/01 *Gerritse* [2003] ECR I?5933, paragraphs 27 and 28; Case C?265/04 *Bouanich* [2006] ECR I?923, paragraph 40; and *Jäger*, cited in footnote 20, paragraph 44.

29 – Cited in footnote 3.

30 – See in that regard my Opinion in *Arens-Sikken*, cited in footnote 2, point 79 and footnote 35.

31 – Inter alia *Barbier*, cited in footnote 3, paragraph 71. See, as to that, in greater detail also my Opinion in *Arens-Sikken*, cited in footnote 2, points 66 and 86 to 89.

32 – See point 67 above.

33 – See to that effect *Barbier*, cited in footnote 3, paragraph 75.