OPINION OF ADVOCATE GENERAL MISCHO delivered on 13 March 2003 [1]

1. In the context of proceedings concerning the French provisions governing the taxation of certain capital gains in the event of a transfer of tax residence outside France, the Conseil d'État (Council of State) (France) has requested a preliminary ruling from the Court on a question concerning the freedom of establishment laid down by Article 52 of the EC Treaty (now, after amendment, Article 43 EC).

I — The legal context

2. Article 24 of the 1999 *Loi de finances* (Finance Law) (No 98-1266 of 30 December 1998) (JORF 303, 31 December 1998; 'the 1999 Finance Law'), in the version in force at the date of Decree No 99-590 of 6 July 1999 implementing Article 24 of the 1999 Finance Law concerning tax arrangements for certain capital gains on securities in the event of transfer of tax residence outside France (JORF 160, 13 July 1999, 'Decree No 99-590'), provides as follows:

1 — Original language: French.

'I. ...

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

"Article 167a

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

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

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

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

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

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

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

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

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

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

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

The tax paid locally by the taxpayer and relating to the increase in value actually realised outside France may be set off against the income tax established in France provided it is comparable with that tax.

4. Failure to produce the declaration and the statement referred to in 2 above, or the omission of all or part of the information that must be contained therein, results in the suspended tax becoming immediately payable.

III. At the expiry of five years from the date of departure, or at the date on which the taxpayer retransfers his place of residence for tax purposes to France, if earlier, exoneration shall be automatically granted in respect of the tax established pursuant to I in so far as it relates to increases in value in relation to company securities which, at that date, remain in the ownership of the taxpayer.

IV. The conditions for applying this article, and in particular the rules for avoiding double taxation of the increases in value determined, the obligations concerning declarations by taxpayers, and the methods of suspending payment, shall be determined by a decree in the Conseil d'État."

V. The provisions of this article shall apply to taxpayers who transfer their residence for tax purposes outside France after 9 September 1998.'

3. Article 160, I, of the Code général des impôts (General Tax Code; 'CGI'), in the version in force at the date of Decree No 99-590, is worded as follows:

'Where, during the life of a company, a partner, shareholder or holder of beneficial interests transfers all or part of his securities, the excess of the transfer price over the acquisition price — or the value as at 1 January 1949 if higher — is charged exclusively to income tax at the rate of 16%. In the case of transfer of one or more securities belonging to a series of securities acquired at different prices, the acquisition price to be used shall be the weighted average acquisition value of those securities. In the case of a transfer of securities after the closure of a share savings plan defined in Article 163d D or their withdrawal after the eighth year, the acquisition price shall be deemed to be equal to their value at the date on which the transferor ceased to benefit, in respect of those securities, from the advantages referred to in paragraphs 5a and 5b of Article 157 and in IV of Article 163d D.

The taxation of the increase in value thus realised is subject to the sole condition that the rights held directly or indirectly in company profits by the transferor or the transferor's spouse, their ascendants and descendents, must together have exceeded 25% of those profits at some time during the previous five years. However, where the transfer is made for the benefit of one of the persons referred to in this paragraph, the increase in value is exempt if all or part of those company securities are not resold to a third party within five years. Otherwise, the increase in value is taxed in the name of the first transferor in respect of the year of resale of securities to third parties.

...

Diminutions in value suffered in the course of a year may be offset only against increases in value of the same kind realised during the same year or the five years following.

...

Increases in value which are taxable pursuant to this article and diminutions in value must be declared under the conditions specified in paragraph 1 of Article 170 in accordance with rules to be established by decree.'

4. The first paragraph of Article 3 of Decree No 99-590 is worded as follows:

'Taxpayers who transferred their residence for tax purposes outside France between 9 September 1998 and 31 December 1998 are required before 30 September 1999 to sign the amending declaration referred to in paragraph 2 of Article 167 of the Code Général des Impôts in respect of increases in value taxable pursuant to paragraph 1a of Article 167 and I of Article 167a of that code, and also the special form referred to in Article 91j of Annex II to the Code Général des Impôts.'

5. Article R.280-1 of the Book on Tax Procedures (Livre des Procédures Fiscales; 'the LPF'), which was inserted therein by Article 2 of Decree No 99-590, reads:

'Taxpayers wishing to benefit from the suspension of payment referred to in II of Article 167a of the Code Général des Impôts must send to the official at the Treasury with responsibility for non-residents draft guarantees in the forms specified in the second paragraph of Article R.277-1 not later than eight days before the date of the transfer of residence for tax purposes outside France. A receipt will be issued therefor.

The provisions of the third paragraph of Article R.277-1, of Articles R.277-2 to R.277-4, and of Article R.277-6 apply.'

6. Article R.277-1 of the LPF provides:

'The responsible official shall request the taxpayer who has applied for the suspension of tax to set up the guarantees referred to in Article L.277. The taxpayer has a period of 15 days from receipt of the official's request to give notification of the guarantees which he undertakes to set up.

Such guarantees may take the form of a cash payment into a Treasury suspense account, an acknowledgement of indebtedness in favour of the Treasury, the lodging of a deposit, securities, goods deposited at State-approved warehouses and subject to a warrant endorsed in favour of the Treasury, by mortgage charges, by pledging of business assets.

If the official considers that the guarantees offered by the taxpayer cannot be accepted because they do not meet the conditions laid down in the second paragraph, he shall notify his decision by registered letter.'

7. Under Article R.277-2 of the LPF:

'Should the guarantees set up depreciate in value or be found insufficient, the administration may at any time, under the same conditions as laid down in Articles L.277 and L.279, request the taxpayer by registered letter with advice of receipt, to top up the guarantee to ensure recovery of the contested sum. Should the taxpayer not satisfy that request within a month, proceedings for recovery of the tax shall be resumed.'

II — The main proceedings

8. Mr Hughes de Lasteyrie du Saillant ('the applicant in the main proceedings') left France on 12 September 1998 to live in Belgium. At that date he held or had held, at some time in the five years before he left France, directly or indirectly with members of his family group, shares carrying rights to more than 25% of the profits of a company subject to corporation tax and with its registered office in France. As the market value of the shares was at that time more than the acquisition price, the applicant in the main proceedings was liable to tax on the capital gains in accordance with Article 167 a of the CGI and the provisions implementing it.

9. Mr de Lasteyrie applied to the Conseil d'État for annulment of Decree No 99-590 on the ground that it was *ultra vires*, claiming that Article 167a of the CGI was unlawful because that article was contrary to Community law.

10. The Conseil d'État considers, first, that, contrary to the applicant's submission, those provisions do not have the object or effect of imposing any restrictions or conditions whatever on the freedom to leave and enter France of thepersons to whom they apply. Secondly, the Conseil d'État observes that Article 52 of the Treaty precludes the introduction by a Member State of rules which would have the effect of preventing some of its nationals from establishing themselves in another Member State.

11. The Conseil d'État goes on to note that Article 167a of the CGI provides that taxpayers about to transfer their tax residence outside France are, under the conditions it lays down, to be immediately assessed to tax on capital gains which have not yet been realised and which therefore would not be taxed if the taxpayers concerned kept their residence in France.

12. However, the Conseil d'État also observes that Article 167a of the CGI includes provisions ensuring that, in the case of deferred payment, those taxpayers will not ultimately have to bear a tax charge for which they would not have been liable, or a tax charge greater than that for which they would have been liable, if they had kept their tax residence in France. In addition, the provisions gave them, at the end of a five-year period, the benefit of tax relief if the corporate rights showing capital gains continued to form part of their assets. Finally, the persons concerned could request deferment of the payment of tax until the end of that period.

13. The Conseil d'État also points out that obtaining such deferment is subject to the condition that the taxpayer provides secur-

ity for the recovery of the tax. In view of the obligations entailed in providing such security, the Conseil d'État is unsure whether Community law precludes the provisions in question.

III — The question referred

14. The Conseil d'État took the view that the implications of the Community rules were uncertain and that a decision on that point was necessary in order to determine the case. It therefore decided to stay judgment and to refer the following question to the Court for a preliminary ruling pursuant to Article 234 EC:

'Does the principle of freedom of establishment laid down in Article 52 of the EC Treaty (now, after amendment, Article 43 EC) preclude the introduction by a Member State, for the purpose of preventing the risk of tax avoidance, of arrangements for taxing capital gains in the case of transfer of tax residence, such as described above [?]'

IV — Discussion

A — *Applicability of Article 52 of the Treaty*

15. The German and Netherlands Governments submit that the order for reference does not show whether the applicant falls within the scope of Article 52 of the Treaty. They observe that Article 52 covers the taking-up and pursuit of activities as self-employed persons and that it is impossible to ascertain from the order whether the main proceedings relate to such activities.

16. On this point the Netherlands Government asserts that it is not clear whether the applicant in the main proceedings has such power in a company that he can be deemed to control it or whether he pursues an activity of some kind, for example as a director of such a company. According to the German Government, the mere fact of holding shares in companies or other securities is not equivalent to taking up or pursuing an activity as a self-employed person in the 'host State'.

17. In the opinion of both Governments, it is likewise not known whether the applicant's professional activities, if any, are carried out in France or in the new State of residence. Nor does the order for reference indicate whether he moved for private or

professional reasons. If he had merely transferred his residence, the *Werner* [2] judgment showed that that would not bring him within the ambit of the Treaty.

18. However, it must be said that, in the observations which he submitted to the Court and which were not disputed at the hearing, the applicant states that he transferred his tax residence to Belgium on 12 September 1998 in order to pursue his professional activity there. Therefore it must be concluded that the reply to the question whether the transfer of residence which gave rise to the tax in question in the main proceedings was within the ambit of the Treaty is in the affirmative.

19. However, the Commission correctly observes that it is not clear from the file whether the applicant's activity in Belgium was that of an employed person covered by Article 39 EC or not, in which case Article 43 EC would be applicable. As the national court, which, according to settled case-law, [3] alone must determine the relevance of the question which it puts to the Court, refers to the freedom of establishment, I propose to discuss the problem from that angle.

2 — Case C-112/91 [1993] ECR I-429.

3 — See, for example, the judgment in Case C-304/96 *Hera* [1997] ECR I-5685.

20. In any case, it must be observed, as the Commission also observes, that the foregoing reasoning with regard to Article 43 EC applies equally to Article 39 EC.

B — *The existence of a restriction on the freedom of establishment*

21. The French Government does not deny that an obstacle exists and concentrates its observations on the question of justification. The Danish and Netherlands Governments consider that there is no restriction on the freedom of establishment. Their reasoning is as follows.

22. In this connection the Danish Government notes that the French rules in question do not have the effect, whether directly or indirectly, of preventing French nationals from settling in another Member State and that there is no evidence that taxation of the capital gains in question limits the possibility of those nationals settling in another Member State.

23. The Danish and Netherlands Governments add that, in any case, the tax is not necessarily collected at the time of the

transfer of residence. The taxpayer could avoid it by providing security, a requirement which could not in itself be regarded as preventing French nationals from settling abroad.

24. The Netherlands Government also points out that the tax is automatically reduced, or even reduced to nil, if and to the extent that there has been no alienation of the stocks or shares in question after five years. The Government concludes that any restrictive effects would be too uncertain and indirect to be regarded as being capable of hindering the freedom of establishment. [4]

25. Consequently these various arguments involve two kinds of considerations: the measure in question does not prohibit a French national from exercising his freedom of movement and affects it only slightly.

26. However, it must be borne in mind that the fact that the rules in question do not have the object or effect of prohibiting a person from settling in another Member State cannot be decisive in the present case. It is clear from the Court's settled case-law that the freedom of establishment may be impeded by a national measure which does not entail prohibition but is likely to deter a businessman from exercising that freedom. [5]

27. This principle also applies, of course, to tax provisions. It is unnecessary to remind the Court that, although direct taxation is a matter falling within the competence of the Member States alone, it has consistently been held that they must exercise their powers in a manner consistent with Community law. [6]

28. Finally, it must be remembered that, as noted by all the interveners, the foregoing considerations are equally valid where the national measure in question is an act of the Member State of origin and not that of the destination State of a businessman wishing to exercise his freedom of establishment under Community law, which prohibits a Member State from hindering the establishment in another Member State of one of its nationals. [7]

29. Therefore it is necessary to determine whether the tax provisions referred to by

4 — See the judgment in Case C-266/96 *Corsica Ferries France* [1998] ECR I-3949, paragraph 31.

5 — See, for example, the judgment in Case C-251/98 *Baars* [2000] ECR I-2787.

6 — See, for example, the judgment in Case C-55/00 *Gottardo* [2002] ECR I-413.

7 — See the judgment in Case 81/87 *Daily Mail and General Trust* [1988] ECR 5483.

the order for reference, which do not prohibit a businessman from exercising his freedom of movement, are nevertheless capable of restricting the exercise of that freedom by deterring him from settling in another Member State.

30. However, as the applicant in the main proceedings and the Commission point out, the provisions in question give rise to considerable disadvantages for a taxpayer who wishes to leave France, as compared with a person who continues to reside in France.

31. Consequently, a taxpayer who wishes to transfer his tax residence outside France must first lodge a declaration of the latent capital gains on his securities, whereas a taxpayer who does not exercise his freedom of movement need not provide a declaration before a capital gain is realised. The declaration must be made within the 30 days preceding the transfer of residence outside France.

32. Secondly, and more importantly, a taxpayer wishing to leave France will be liable for immediate payment of the tax on such capital gains. He will therefore be under an obligation, merely by reason of transferring his tax residence outside France, to pay tax on a gain which has not yet been realised whereas, if he remained in France, the capital gains in question would be taxable only after realisation.

33. Consequently there is no doubt that such a system penalises taxpayers who leave France, as compared with those who remain, and introduces a clear difference in treatment. As the Commission rightly observes, this is a typical restriction on leaving France.

34. Contrary to the submissions of the Danish and Netherlands Governments, this conclusion is not altered by the arrangements connected with the tax.

35. The only way of avoiding immediate payment of the capital gains tax and thereby obtaining the same treatment, except for the obligation to submit a declaration, as taxpayers who are not leaving France is to obtain a deferment of payment. However, this is not automatic and is subject to conditions requiring the taxpayer who wishes to settle in another Member State to take certain steps and incur costs.

36. Accordingly he must lodge a specific application for deferment at the same time as making the latent capital gains declaration. On this point the applicant in the main proceedings states that failure to meet this time-limit means that it is impossible to obtain deferment. The taxpayer must also designate a tax representative with power to represent him vis-à-vis the tax author-

ities. Furthermore, he has an annual obligation to send the tax authorities a statement of changes in the capital gains in question, which by definition are unrealised. Any delay in doing so may likewise lead to forfeiture of the deferment.

37. Finally, and most importantly, a taxpayer wishing to transfer his tax residence to another Member State must provide suitable security to ensure recovery of the amount owed by the Treasury. As the applicant in the main proceedings observes, since the gains in question have, by definition, not yet been realised, the taxpayer in question will not have a source of income for the tax which is being claimed from him and he will therefore have to create the security required by designating other sources of income for that purpose.

38. In doing so he will be bound to incur costs in creating, for example, bank or mortgage guarantees. It is true that, as the Netherlands Government asserts, he can avoid costs of that kind by pledging the shares which have given rise to the claim for tax. However, both the applicant and the Commission submit, without being contradicted, that this is not possible in relation to shares which are not listed on a stock exchange, a situation which is by no means unusual where substantial holdings in companies are involved.

39. In this connection the Commission observed, without being contradicted, that stocks and shares are accepted as security for 100% of their value if they qualify for advances by the Banque de France, and for 60% of their price if they are other stocks and shares listed on a French stock exchange. Stocks and shares not listed on a French stock exchange are not accepted without a bank guarantee for full payment of the tax due.

40. I agree with the Commission that such a difference in treatment is manifestly discriminatory from the viewpoint of investors who are thus encouraged to hold shares in companies listed on French stock exchanges and from the viewpoint of the companies themselves, which become more attractive to such investors as a result.

41. The Commission adds that it is surprising that, on the one hand, the French Government considers that the basis for tax purposes is 100% of the value of the stocks or shares, whereas on the other it considers that the basis for the purpose of security is only 60% of the same value, or even nil.

42. However, it must be stressed that the hindrance in question here is connected

with the very existence of the obligation to provide security, which does not depend on the practical arrangements for doing so.

43. In any case, it appears that, although deferment must be regarded as an alternative and as a lesser penalty than the immediate payment of tax for taxpayers wishing to transfer their tax residence to another Member State, this option is only available subject to constraints which cannot be described as sufficiently uncertain and indirect not to be regarded as being capable of hindering the freedom of establishment of such taxpayers.

44. It follows from the foregoing that, to obtain deferment, they must meet the cost of fulfilling the various conditions upon which the grant of deferment depends, namely the designation of a tax representative, the preparation of declarations of changes in latent capital gains and, if necessary, the cost of providing bank or mortgage guarantees. In addition, they must in any case bear the burden of tying up part of their assets as security in favour of the Treasury, and perhaps not a negligible part either.

45. The fact that, after five years, a taxpayer affected by the provisions in question is entitled to the automatic remission of tax, together with repayment of the costs of providing security, unless he has in the meantime disposed of the shares giving rise to tax, is not in my opinion sufficient to outweigh the restrictive effect of the provisions in question because, during that entire period, the taxpayer will have lost the benefit of those of his assets which were pledged as security. That applies even here. In this particular case, the restrictive effect on the freedom of movement does not arise from being unable to sell or otherwise dispose of the shares, because that would give rise to tax even if the taxpayer remained in France, but from the fact that the shares are not available for other purposes which the owner may have, for example, using them as a surety.

46. Finally it must be observed that, according to the Commission, which has not been contradicted on this point, a tax system such as that laid down in Article 167a of the CGI also restricts the freedom of establishment in that it is an obstacle to restructuring, amalgamation or merger operations of the company of which the taxpayer residing abroad is a shareholder. Such operations necessarily entail the transfer or exchange of shares, the cancellation of previous shares and the issue of new ones. For taxpayers resident in France, capital gains tax on the transfer, redemption, reimbursement or cancellation of the corporate rights concerned may be deferred, subject to certain conditions laid down in Article 150-OA of the CGI. However, such deferment is not possible if residence is transferred abroad. The reason is that the shares on which tax has already been deferred at the date of the transfer of

residence become immediately taxable pursuant to Article 167a of the CGI. The same provision appears to exclude the benefit of deferred tax where shares are sold abroad.

47. However, I must agree with the French Government that the question from the national court does not refer to the provisions concerning capital gains tax which qualifies for deferred payment.

48. In any case, it must be concluded that the provisions mentioned by the order for reference give rise to differences in treatment for taxpayers with substantial shareholdings who wish to transfer their tax residence outside France, such differences being likely to restrict their freedom of establishment under the Treaty. Consequently it is necessary to determine whether there is any justification for those provisions which would remove them from the ambit of the prohibition laid down in Article 43 EC.

C — *Justification for the restriction*

49. It is common ground that Article 46 EC does not apply in the present case. On the other hand, regarding the possibility of justifying the restriction on the freedom of establishment by an overriding reason in the public interest such as those already accepted by the Court in tax matters, four arguments are put forward by the various interveners.

50. First, the Danish Government observes that the aim of the national rule in question is to prevent the fiscal erosion of the tax base of the Member State concerned, an objective which was recognised by the Court in the *Safir* judgment [8] as an overriding reason. The aim was said to be to prevent French taxpayers from deriving an advantage from the differences between the tax systems of the other Member States and that of France.

51. In this connection it must be observed that it has consistently been held that a diminution of tax revenue cannot be regarded as a matter of overriding public interest which may be relied upon in order to justify unequal treatment that is, in principle, incompatible with Article 43 EC. [9] Such an aim is of a purely economic nature and therefore cannot constitute an overriding reason in the public interest. [10] It

8 — Case C-118/96 [1998] ECR I-1897.

9 — See the judgments in Case C-264/96 *ICI* [1998] ECR I-4695, paragraph 28; Case C-307/97 *Saint-Gobain* [1999] ECR I-6161, paragraph 51, and Joined Cases C-397/98 and C-410/98 *Metallgesellschaft and Others* [2001] ECR I-1727, paragraph 59.

10 — See, in particular, the judgment in Case C-35/98 *Verkooijen* [2000] ECR I-4071, paragraph 48.

follows that, as the French Government observes, the mere loss of revenue by the tax authorities arising from a change in tax residence cannot justify a restriction on the taxpayer's freedom of establishment.

52. The second argument relates to the prevention of tax avoidance and the effectiveness of fiscal supervision. One or the other of these is regarded by all the intervening governments, except that of Portugal, as an overriding reason in the public interest, such as to justify the restriction in question.

53. The French Government, which put forward the most detailed submissions on this point, explains that the contested provision aims to prevent what ought to be called an abuse of rights, namely, the fraudulent exercise by a taxpayer of his freedoms arising from Community law. On this point the French Government observes that a Member State is free to determine the arrangements for the taxation of capital gains as it thinks fit, particularly with regard to the rate of tax. It was therefore perfectly legitimate for each Member State to take appropriate measures to prevent the taxation of capital gains being rendered ineffective by conduct which was an abuse.

54. In the present case, such conduct appeared where a taxpayer temporarily transferred his tax residence outside France before selling shares with the sole purpose of avoiding the payment of capital gains tax due in France. That was not the normal exercise of the freedom of establishment, but an abuse of that freedom with the aim of circumventing tax law.

55. There were two reasons why the contested provision was justified by the need to ensure the effectiveness of fiscal controls. It aimed, first, to prevent the fraudulent conduct described above and, secondly, to ensure effective recovery of the tax. Recovery was made much more difficult and uncertain where the taxpayer resided outside France.

56. How much weight should be attached to these arguments?

57. There is no question that case-law has recognised that the effectiveness of fiscal supervision constitutes an overriding requirement capable of justifying a restriction on the exercise of fundamental freedoms. [11] This also applies to the prevention of tax avoidance. [12] Regarding the latter point, it must however be observed that, as the French Government itself points out, the same case-law shows that the only

11 — See, in particular, the judgment in Case C-250/95 *Futura Participations and Singer* [1997] ECR I-2471, paragraph 31.

12 — See the *ICI* and *Metallgesellschaft* judgments, cited above, and, to the same effect, the judgments in Case C-436/00 *X and Y* [2002] ECR I-10829, paragraph 61, and Case C-324/00 *Lankhorst-Hohorst* [2002] ECR I-11779, paragraph 37.

measures which may be justified are those which have the specific object of excluding any tax advantage for purely artificial schemes having the purpose of circumventing tax law.

58. There can be no doubt that the contested provision goes far beyond that limit. As the Commission rightly observes, also citing in this context the *Leur-Bloem* [13] and *Centros* [14] judgments, the national rule in question is aimed generally at any situation where a taxpayer with substantial shareholdings in a company subject to French corporation tax transfers his tax residence outside France for any reason whatever.

59. In this way, as the applicant in the main proceedings observes, an 'irrefutable presumption of tax evasion' is created in relation to any such taxpayer. However, the establishment of a taxpayer abroad does not of itself entail tax evasion [15] and it is for the tax authorities of the Member State concerned to prove a risk of tax avoidance in each case.

60. It follows that, to comply with the principle of proportionality, a national measure should not presume, as in the present case, that the freedom of establishment under Community law is being exercised fraudulently, although it could provide for the possibility of the tax authorities demonstrating on a case-by-case basis there is actual tax evasion or avoidance.

61. The disproportionate nature of the national rule also appears from the difference in treatment of a taxpayer who remains abroad for more than five years after leaving France, without selling his shares, and a taxpayer who, while remaining abroad for the same period, sells his shares before the end of the five years. Although they both leave France for the same long period, which tends to show that they are not necessarily motivated by an intention to escape tax, the first will pay no tax, unlike the second. As the Commission observes, there appears to be no difference, from the viewpoint of preventing artificial, and therefore temporary, relocation, between a person selling his shares after five years and one who sells them after four years or even one year.

62. However, the French Government asserts that a sale of shares shortly after leaving France is certain evidence of an intention to avoid tax. I do not agree. Leaving for another Member State with a view to taking up a new professional activity could entail considerable costs,

13 — Case C-28/95 [1997] ECR I-4161.

14 — Case C-212/97 [1999] ECR I-1459.

15 — See the *Lankhorst-Hohorst* judgment, cited above, paragraph 37, the *ICI* judgment, cited above, paragraph 26, and the *Metallgesellschaft* judgment, cited above, paragraph 57.

which may be connected with the new activity or with the need to obtain accommodation, for example. It should not therefore be assumed that the mere fact of selling shares shortly after the transfer of residence is sufficient to show fraudulent intent. On the other hand, if the rapidity of the return to France were made the criterion, that would be more proportionate to the aim of preventing the taxpayer from avoiding tax by the simple expedient of a short stay in another Member State, during which the shares would be sold.

63. This consideration illustrates the second reason which brings me to conclude that the rules in question are disproportionate, namely the existence of measures which are less restrictive of the freedom of establishment and which are capable of achieving the alleged object of preventing temporary relocation.

64. What measures could these be? I think it would be sufficient for the national authorities to provide for tax on capital gains realised by a taxpayer who, after a relatively short stay in another Member State, returns to France after having sold his shares. The return after a short stay would show that it was temporary and would thwart exactly the conduct complained of by the French authorities, without affecting the situation of taxpayers whose only aim is to exercise in good faith their freedom of establishment in another Member State. By collecting the tax on the date of return, which would take place, by definition, shortly after the sale of the shares in the course of a brief stay in another Member State, the Member State concerned would, so to speak, draw the appropriate conclusion from the sham location where the capital gain is realised in another Member State by treating it as if it had actually taken place in France. This should also enable the Member State in question to overcome any difficulty in recovering the tax.

65. However, the French and Netherlands Governments argued at the hearing that, in paragraph 59 of the judgment in the case of *X and Y*, cited above, the Court observed that a surety or other security arrangements conformed with the requirements of Community law. However, it must be observed that in that case the Court considered such an arrangement in a different context, where there was no question of a need to envisage a proportionate measure in relation to a brief stay by a taxpayer in another Member State and his return.

66. It follows that measures exist which are less restrictive of the fundamental freedoms of Community law and which would make it possible to prevent tax evasion and to maintain the effectiveness of fiscal supervision.

67. With regard to the second objective in particular, for the sake of completeness I must add the following observations. As we have seen, the arrangements for providing

security give rise to discrimination against stocks and shares which are not listed on a French stock exchange, and such discrimination is unjustified by reference to the objective of effective fiscal supervision. Furthermore, the national rule in question takes no account of the existence of various means of facilitating the recovery of tax payable by a taxpayer who has transferred his tax residence to another Member State.

68. Accordingly, the applicant in the main proceedings points out that France has concluded conventions for the avoidance of double taxation with a large number of Member States, and such conventions generally include a so-called 'recovery assistance' clause whereby the signatory States undertake to provide mutual assistance for the recovery of the taxes referred to by the convention.

69. In addition, as the Court has held on numerous occasions and as the Commission observes, 'Council Directive 77/799/EEC of 19 December 1977 concerning mutual assistance by the competent authorities of the Member States in the field of direct taxation (OJ 1977 L 336, p. 15) provides for ways of obtaining information comparable to those existing between tax authorities at national level'. [16]

70. From all that has been said, it follows that the national rule in question cannot be justified by the fight against tax evasion or the need for effective fiscal supervision.

71. Thirdly, the Netherlands Government submits that the contested provision is justified by the need for the cohesion of the French tax system.

72. According to this Government, the circumstances of the present case do not differ fundamentally from those of the *Bachmann* case. [17] The Netherlands Government asserts that the latter case concerned an 'exemption' in the form of deductible premiums, in return for which later benefits would be taxed. Where it was impossible to ensure the later taxation of benefits, the 'exemption' in the form of deduction of premiums from income was not to be granted. Likewise, the present case is said to entail in reality a temporary exemption from tax on the increase in asset values constituted by capital gains, because that increase is not taxed until the gain is realised. Consequently the subsequent tax would compensate for the temporary exemption, which should not be granted where it was impossible to ensure later taxation because the taxpayer's fiscal residence had been transferred abroad.

16 — See, for example, the judgment in Case C-279/93 *Schumacker* [1995] ECR I-225, paragraph 45.

17 — Case C-204/90 [1992] ECR I-249.

73. There are several reasons why I do not accept this argument.

74. First, it disregards the fact that, as we have just seen, the transfer of a taxpayer's fiscal residence to another Member State does not necessarily prejudice the recovery of tax.

75. It also appears that the difference in the treatment of residents and (future) non-residents is not confined to the mere bringing forward of the date for payment of tax which would be due in any case. As a taxpayer who leaves France for more than five years is no longer liable to tax in any case, he cannot be said to have been required merely to pay tax in advance.

76. In addition, the applicability of the less favourable rules on the deductibility of losses under the second paragraph of Article 167a I, 2, of the CGI shows that it is not merely a matter of bringing forward the payment of tax.

77. However, even if that were the case, it would not follow that advance payment would be justified by the requirement to safeguard the cohesion of the tax system. Accordingly, in the *Metallgesellschaft* judgment cited above, the Court held that provisions requiring only non-resident companies to pay tax in advance were contrary to the Treaty.

78. Furthermore, the Commission contended at the hearing, without being challenged on this point, that, in so far as the provisions in question impose capital gains tax on taxpayers who are no longer resident, those provisions conflict with the requirement of cohesion of the tax system because the system recognises the principle of taxation of capital gains by the taxpayer's State of residence, which is applied in particular in the Franco-Belgian double taxation convention.

79. Finally and most importantly, it must be noted that the French capital gains tax rules do not aim to tax, sooner or later, asset increases. There are special rules on the taxation of wealth. As the applicant in the main proceedings observes, the basic rule governing the taxation of capital gains in the French tax system is to tax capital gains which are realised, that is to say, income, and not the periodic taxation of an increase, if any, in asset values. Therefore, because the contested rule provides, in the case of (future) non-residents, for a tax levied on latent capital gains, and not on gains which have been realised, the contested rule is an exception to the cohesion of

the tax system in question and cannot therefore be regarded as necessary for it.

80. Fourth, it is necessary to consider the German Government's argument that account must be taken of the fact that the tax system in question is at the same time a system for the distribution of taxation powers between the State of departure and the host State. According to the German Government, the object of the provision in question is to ensure the payment of tax on capital gains arising up to the date of the taxpayer's departure. The right of the State of departure to tax such capital gains is due to the fact that they have lawfully originated from the company's activity in that State.

81. However, it has consistently been held that, although the Member States are free to determine the criteria for the distribution of taxation powers, they must nevertheless exercise their taxation powers consistently with Community law. [18]

82. It must also be borne in mind that the distribution of taxation powers among the Member States is not at issue in this case. The subject-matter of the case is not the right of the French authorities to safeguard the tax on capital gains by acting against relocations made solely with a view to avoiding tax, but the question whether the measures adopted for that purpose are consistent with the requirements of the freedom of establishment.

83. Therefore the situation differs from that in the *Gilly* case [19] cited by the German Government. In that case a criterion for the allocation of taxation powers, which could operate to the advantage or disadvantage of the taxpayers concerned, depending on their particular situation, was at issue. The present case, by contrast, relates to national rules which do not necessarily flow from the allocation of taxation powers between Member States and which are, furthermore, systematically to the disadvantage of taxpayers wishing to exercise their rights under Community law.

84. It follows from the foregoing reasoning that the contested provision constitutes a restriction inconsistent with Article 43 EC and that it cannot be justified by an overriding reason in the public interest.

18 — See the judgment in the *Saint-Gobain* case, cited above, paragraphs 57 and 58.

19 — See the judgment in Case C-336/96 [1998] ECR I-2793.

V — Conclusion

85. On the foregoing grounds I propose that the reply to the question from the Conseil d'État should be as follows:

'Article 52 of the EC Treaty (now, after amendment, Article 43 EC) precludes national legislation such as that at issue in the main proceedings which lays down rules, affecting all taxpayers who transfer their tax residence to another Member State, for the immediate taxation of capital gains which have not yet been realised'.