Reports of Cases

OPINION OF ADVOCATE GENERAL
RICHARD DE LA TOUR
delivered on 16 September 2021 [1]

Case C-394/20

XY
v
Finanzamt V

(Request for a preliminary ruling from the Finanzgericht Düsseldorf (Finance Court, Düsseldorf, Germany))

(Reference for a preliminary ruling – Free movement of capital – Articles 63 and 65 TFEU – Inheritance tax – National inheritance tax legislation – Unequal treatment of residents and non-residents – Limited tax liability – Domestic real property – Pro-rated allowance for non-residents – Not a restriction – National legislation not providing for the debt arising out of reserved portions to be deductible – Absence of any economic connection to the taxed assets – Restriction – Unjustified)

I. Introduction

1. This request for a preliminary ruling concerns the interpretation of Article 63(1) and Article 65 TFEU.

2. It has been made by the Finanzgericht Düsseldorf (Finance Court, Düsseldorf, Germany) in proceedings between XY and Finanzamt V (Tax Office V, Germany), [2] concerning the calculation of inheritance tax on immovable property situated in Germany.

3. The questions referred to the Court follow on from its previous decisions in the field of inheritance tax, concerning the free circulation of capital guaranteed by the Treaty. They provide the Court with the opportunity to examine, in the light of the principles it has already identified, national legislation which has already been amended, in part, in order to take account of those principles. The referring court wishes to know whether (and if so, to what extent) it is permissible for unequal treatment to be given, based on the scope of the tax jurisdiction of the Member State concerned, to the grant of tax advantages deriving from personal allowances, or the deductibility of certain items which are connected to the inheritance as debts of the estate, depending on whether the tax liability is based on the entire estate of the deceased, or whether it is limited to domestic assets, situated within that Member State.

1 Original language: French.

2 'The Finanzamt'.

4. This new case thus underlines the fact that, despite the development of the Court's case-law, the interests at stake and the tensions with the treaty principles remain significant, in the absence of co-ordination of national tax rules, especially where a Member State opts to tax the worldwide assets of its tax residents, against a background where the free movement of EU citizens promotes the dispersal of the residential property and other assets making up their estates.

5. I will set out the reasons which lead me to consider that:

– it does not interfere with the free movement of capital guaranteed by the Treaty for legislation of a Member State to provide that, where neither the deceased nor the heir were tax resident in that State at the time of death, the heir is entitled an allowance that is proportional to the applicable tax base, provided that that legislation does not have the effect of diminishing the value of the assets transferred to the heir, which is a matter for the referring court to verify, and

– in the same situation, it is a restriction on the free movement of capital, which is not justified by an overriding reason in the public interest, for such legislation to prevent the value of reserved portions from being deducted as a debt, in a case of limited tax liability, from the inherited assets.

II. Legal background

A. German law

6. The Erbschaftsteuer- und Schenkungsteuergesetz (Law on inheritance and gift tax), in the version published on 27 February 1997,[3] most recently amended by Paragraph 4 of the Gesetz zur Bekämpfung der Steuerumgehung und zur Änderung weiterer steuerlicher Vorschriften (Law concerning measures to combat tax evasion and amending other tax provisions) of 23 June 2017,[4] provides in Paragraph 1, headed 'Taxable transactions':

'(1) Inheritance (or gift) tax shall apply to

1. acquisitions on death;

2. gifts *inter vivos*;

…'

7. Paragraph 2 of the ErbStG, headed 'Personal liability to tax', provides:

(1) Liability to tax arises

1. in the cases referred to in Paragraph 1(1), points 1 to 3, in relation to the entirety of the devolved assets (unlimited tax liability), where the deceased, at the date of his death, the donor, at the date of making the gift, or the acquirer, at the date of the chargeable event (Paragraph 9), is a resident. The following persons are regarded as residents:

3 BGBI. 1997 I, p. 378.

4 BGBI. 2017 I, p. 1682 ('the ErbStG').

(a) natural persons whose place of residence or habitual residence is in Germany,

(b) German nationals who have resided abroad continuously for not more than five years without a permanent residence in Germany,

…

3. in all other cases, in relation to devolved assets which are domestic assets within the meaning of Paragraph 121 of the Bewertungsgesetz [Law on valuation] (limited tax liability).

…'

8. Paragraph 3 of the ErbStG, which is headed 'Acquisitions on death', provides in subparagraph 1:

'Acquisitions on death include

1. an acquisition by way of inheritance …, by legacy … or on the basis of an asserted claim to a reserved portion (Paragraph 2303 et seq. of the Bürgerliches Gesetzbuch [(Civil Code, in the version published on 2 January 2002;[5] "the BGB")];

…'

9. Paragraph 10 of the ErbStG, headed 'Taxable acquisitions', provides:

'(1) Taxable acquisitions include the enrichment of the acquirer, unless it is exempt … In the cases referred to in Paragraph 3, enrichment includes the amount which results when the debts under the succession that are deductible pursuant to subparagraphs 3 to 9 … are deducted from the value of the entirety of the devolved assets, to the extent that they are subject to taxation under this Law.

…

(5) Unless otherwise provided for in subparagraphs 6 to 9, the following are deductible from the acquisition as debts under the succession:

1. the debts of the deceased …;

2. liabilities arising from legacies, obligations and asserted reserved portions and claims for compensation in relation to the inheritance;

…

(6) Debts and charges are, in so far as they are economically connected with assets that are not subject to taxation according to this Law, non-deductible. If the taxation is limited to individual assets (Paragraph 2(1)(3) …), only the debts and charges that are economically connected with those assets shall be deductible.'

[5] BGBI. 2002 I, p. 42, and corrigenda BGBl. 2002 I, p. 2909, and BGBl. 2003 I, p. 738.

10. Paragraph 15 of the ErbStG, which is headed 'Tax classes', provides in paragraph 1:

'According to the personal relationship between the recipient and the deceased or donor, the following three tax classes are distinguished:

Tax class I:

1. the spouse and the partner,

2. the children and stepchildren,

…'

11. Paragraph 16 of the ErbStG, which is headed 'Allowances', provides:

'(1) In cases of unlimited tax liability (Paragraph 2(1), point 1, and Paragraph 2(3)), the following acquisitions shall be exempt from tax

1. those of the spouse and partner, up to a value of EUR 500 000;

2. those of children in tax class I.2, and children of deceased children in Tax class I.2, up to a value of EUR 400 000;

…

(2) In the cases of limited tax liability provided for in Paragraph 2(1)(3), the amount of the allowance provided for in subparagraph 1 shall be reduced by a partial amount. This partial amount shall be equal to the ratio of the sum of the values of the assets acquired at the same time and not subject to limited tax liability and the devolved assets not subject to limited tax liability which have been accrued by the same person within 10 years to the value of the total assets accrued by the same person within 10 years. The earlier acquisitions shall be deemed to have their earlier value.'

12. Paragraph 121 of the Law on valuation, in the version applicable to the dispute in the main proceedings, is headed 'Domestic assets' and provides:

'Domestic assets include:

1. domestic agricultural and forestry assets;

2. immovable property within Germany;

…'

13. Paragraph 2303 of the BGB, which is headed 'Persons entitled to a reserved portion; amount of the reserved portion' provides in subparagraph 1:

'If a descendant of the deceased is excluded from the succession by a disposition of property upon death, he may demand the reserved portion from the heir. The reserved portion amounts to one half of the value of the share of the inheritance on intestacy.'

14. Paragraph 2311 of the BGB, which is headed 'Value of the estate', provides:

'(1) The reserved portion shall be calculated on the basis of the content and value of the estate at the time of the inheritance …

(2) The value shall, to the extent necessary, be determined by estimate. A valuation carried out by the deceased shall not be authoritative.'

B. Austrian law

15. Paragraph 756 of the Allgemeines bürgerliches Gesetzbuch (Civil Code, 'the ABGB'), in the version applicable to the main proceedings, provides:

'The reserved portion shall be the share of the value of the deceased's assets that is to be distributed to the person entitled to a reserved portion.'

16. Paragraph 759 of the ABGB provides:

'The reserved portion to which each person having a right to a reserved portion shall be entitled shall correspond to one half of that to which he would be entitled according to intestate succession.'

17. Under Paragraph 761(1) of the ABGB:

'The reserved portion shall be paid in cash …'

18. The German Government has stated in its written observations that there is no bilateral treaty between the Federal Republic of Germany and the Republic of Austria on the prevention of double imposition of inheritance tax. [6]

III. The main proceedings and the questions referred for a preliminary ruling

19. The applicant in the main proceedings is an Austrian national who is resident in Austria. She is the daughter of an Austrian national who died on 12 August 2018 in that Member State, of which he had been resident.

20. The deceased was the owner of three developed parcels of land and one undeveloped parcel of land in Germany. He had made a will naming the applicant as sole beneficiary of his estate, his wife and son being entitled only to reserved portions.

[6] According to Watrin, C., 'Droits de succession et de donation', *La fiscalité des successions et des donations internationales: Théorie générale et applications en droit comparé*, Bruylant, Brussels, 2011, pp. 514 to 532, especially p. 525, the Germano-Austrian convention was annulled after the Republic of Austria ceased to impose inheritance tax, in 2008. For an overview of the inheritance and gift tax position in the Member States, and a list of those which do not impose inheritance tax, see Weber-Frisch, N., and Duquennois-Djoua, R., 'Domestic inheritance tax rules in EU Member States regarding cross-border successions', *ERA Forum*, Springer, Heidelberg, vol. 15, 2014, pp. 409 to 424, available at: https://link.springer.com/content/pdf/10.1007/s12027-014-0357-9.pdf, especially table 1, p. 410. As at 1 January 2021, there were six bilateral conventions concerning inheritance and gift tax in force in Germany – these are listed by the Bundesfinanzministerium (Federal Ministry of Finance, Germany), at: https://www.bundesfinanzministerium.de/Content/DE/Downloads/BMF_Schreiben/Internationales_Steuerrecht/Allgemeine_Informationen/2021-02-18-stand-DBA-1-januar-2021.pdf?__blob=publicationFile&v= 3 (p. 7).

21. As the person solely entitled under the will, the applicant entered into a written agreement to pay the deceased's wife and son the sums of EUR 1 700 000 and EUR 2 850 000, in settlement of their claims to reserved portions. In the inheritance tax return she submitted to the Finanzamt, she requested the deduction of 43% of the value of the liabilities arising from the reserved portions – an amount of EUR 1 956 500 – from the value of her inheritance, as debts under the succession. That calculation had been made by valuing the part of the estate consisting of real property subject to German inheritance tax at EUR 4 970 000, corresponding to 43% of the total value of the estate, which was EUR 11 592 598.10 including assets not subject to German inheritance tax, more specifically personal property in the form of investments and real property in Spain, which the applicant valued, in total, at EUR 6 622 598.10.

22. The Finanzamt assessed the inheritance tax payable by the applicant in respect of the land in Germany at EUR 642 333. It refused to deduct the reserved portions as debts under the succession on the ground that it is apparent from the second sentence of Paragraph 10(6) of the ErbStG that they have no economic connection with the assets making up the estate. Furthermore, its inheritance tax calculation was not based on the full allowance of EUR 400 000 which, in principle, is available to children of the deceased under point 2 of Paragraph 16(1) of the ErbStG, but on a reduced allowance of EUR 171 489 which reflected the deduction of a proportionate part, amounting to EUR 228 511, under Paragraph 16(2) of the ErbStG.

23. In the action she has brought before the referring court, the applicant seeks to have her inheritance tax liability reduced to EUR 227 181. She submits that she is entitled to the full allowance of EUR 400 000 provided for in point 2 of Paragraph 16(1) of the ErbStG, on the basis that Paragraph 16(2) of the ErbStG is contrary to EU law. She submits that it was also contrary to EU law for the Finanzamt to refuse to deduct at least a part of the amount she is obliged to pay in respect of the reserved portions, which she has quantified.

24. The referring court observes that, as the deceased and the applicant did not have their place of residence or habitual residence in Germany at the time of the death, the estate is only taxable in so far as it consists of land situated in that country.

25. In such a case of limited tax liability, the referring court questions whether Paragraph 16(2) and the second sentence of Paragraph 10(6) of the ErbStG are compatible with Article 63(1) and Article 65 TFEU.

26. It states, first, that Paragraph 16(2) of the ErbStG was introduced by the German legislature to reflect the judgment of 8 June 2016, *Hünnebeck*.[7] It observes that, in the judgments of 17 October 2013, *Welte*,[8] and of 4 September 2014, *Commission* v *Germany*,[9] the Court held, in relation to earlier versions of Paragraph 16(2), that the less favourable treatment of a beneficiary of the estate resulting from the allowance being limited to EUR 2 000 in cases of limited tax liability could not be justified by the need to preserve the coherence of the German tax system. The Court also held that there was no justification for treating beneficiaries of the estate differently depending on whether, based on their place of residence, they were subject to limited or unlimited tax liability.

7 C-479/14, EU:C:2016:412; 'the judgment in *Hünnebeck*'.

8 C-181/12, EU:C:2013:662; 'the judgment in *Welte*', paragraph 61. The referring court also refers to Opinion of Advocate General Mengozzi in *Welte* (C-181/12, EU:C:2013:384, points 84 et seq).

9 C-211/13, not published, EU:C:2014:2148, paragraph 49 et seq.

27. Second, the referring court raises the issue of unequal treatment of persons resident and not resident in Germany, arising from the second sentence of Paragraph 10(6) of the ErbStG. It states that that provision prevents the applicant from deducting the value of the liabilities arising from the reserved portions of the deceased's wife and child, as debts under the succession, from the acquisition on death.

28. Furthermore, under the case-law of the Bundesfinanzhof (Federal Finance Court, Germany), [10] the requirement for an economic connection imposed, as a condition of deductibility of debts and charges, by Paragraph 10(6) of the ErbStG, is not met in relation to the reserved portion. The same applies, the referring court indicates, to the entitlement to reserved portions which arises, in the present case, under Austrian law. In that regard, the referring court cites the case-law of the Court under which, in particular, no distinction is to be drawn, in the context of inheritance, between residents and non-residents, in provisions concerning the limited deductibility of debts. [11]

29. In those circumstances, the Finanzgericht Düsseldorf (Finance Court, Düsseldorf) decided to stay the proceedings and refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Must Articles 63(1) and 65 [TFEU] be interpreted as precluding national legislation of a Member State on the levying of inheritance tax which provides that, for the calculation of the tax, the allowance to be set against the taxable value in the case of an acquisition of land situated in that Member State is lower where the deceased and the heir had their place of residence or habitual residence in another Member State at the time of the death of the deceased than the allowance that would have been applicable if at least one of them had had his or her place of residence or habitual residence in the first Member State at that time?

(2) Must Articles 63(1) and 65 TFEU be interpreted as precluding national legislation of a Member State on the levying of inheritance tax which provides that, for the calculation of the tax, debts arising from reserved portions in the case of an acquisition of land situated in that Member State are not deductible where the deceased and the heir had their place of residence or habitual residence in another Member State at the time of the death of the deceased, whereas those debts would have been fully deductible from the value of the inheritance if at least the deceased or the heir had had his or her place of residence or habitual residence in the first Member State at the time of the death of the deceased?'

30. The German and Spanish Governments and the European Commission submitted written observations and, like the applicant, made oral submissions at the hearing on 9 June 2021.

10 The referring court cites the judgment of 22 July 2015, No II R 12/14.

11 The referring court cites, judgments of 11 December 2003, *Barbier* (C-364/01, EU:C:2003:665, paragraph 76); of 11 September 2008, *Eckelkamp and Others* (C-11/07, EU:C:2008:489, paragraph 46; 'the judgment in *Eckelkamp and Others*'), and of 11 September 2008, *Arens-Sikken* (C-43/07, EU:C:2008:490, paragraph 38; 'the judgment in *Arens-Sikken*').

IV. Analysis

31. The Court is asked to consider whether certain provisions of German inheritance tax law are compatible with Article 63(1) and Article 65 TFEU. Those provisions concern the impact of the deceased and the heir [12] being non-resident in Germany on the amount of the personal allowance to which the heir is entitled, and on the deductibility, as a debt under the succession, of the liability arising in respect of the reserved portions.

32. It is apparent from the information provided to the Court that, under German tax law, in the event of an acquisition on death, [13] tax is payable on the entirety of the devolved property, regardless of the State in which it is situated, if the deceased or the heir (or both) has a home or residence in Germany. [14] This is a case of unlimited tax liability. [15]

33. Where neither the deceased nor the heir has a home or residence in Germany, [16] the tax obligation relates to the domestic assets comprised in the inheritance, which include, in particular, any real property situated in Germany. This is a case of limited tax liability. [17]

34. The taxable enrichment (or tax base) is made up of the entirety of the inherited assets, [18] less items deductible as debts under the succession, [19] after allowances. [20] These exemptions or deductions differ depending on whether the condition of residence in Germany is met in relation to the deceased or the heir (or both).

35. The same does not apply to the tax charge. This is determined according to the relationship between the deceased and the heir, which in turn determines the tax class [21] and hence the tax rate which applies to a given tax base. [22]

36. As the referring court has raised the issue of unequal treatment of residents and non-residents in relation to transfer duties, on the basis that differences of treatment might constitute restrictions on the free movement of capital, I should point out that, according to settled case-law of the Court, inheritances, which consist in the transfer to one or more persons of assets left by a deceased person, constitute movements of capital within the meaning of Article 63 TFEU, except in cases where their constituent elements are confined within a single Member State. [23]

12 In this Opinion the term 'heir' is used in a broad sense, encompassing named beneficiaries and persons otherwise entitled to the estate.

13 See point 6 of this Opinion.

14 For the sake of simplicity, the term 'resident' is used in this Opinion to refer to that situation. On German law's broad conception of tax residence, see Weiss, M., 'The Influence of ECJ Case Law on the German Inheritance and Gift Tax Act', *European taxation*, IBFD Journal Articles, Amsterdam, 2016, vol. 56, pp. 444 to 450, especially point 2.1.2, p. 445.

15 See point 7 of this Opinion. See, as to the existence of identical tax arrangements in some Member States, Weber-Frisch, N., and Duquennois-Djoua, R., op. cit., especially tables 3 and 4, p. 416.

16 For the sake of simplicity, the term 'non-resident' is used in this Opinion with reference to that situation.

17 See points 7 to 12 of this Opinion. Consequently, all other assets, including, in particular, cash and bank deposits, are not subject to tax, even if they are held within Germany.

18 As regards the exemptions, see Weiss, M., op. cit., especially point 2.2, p. 445, where the circumstances in which inheritance of the family home is completely tax-exempt are set out. See also, as regards the example raised at the hearing, point 59 of this Opinion.

19 See point 9 of this Opinion.

20 See point 11 of this Opinion.

21 See point 10 of this Opinion.

22 See Paragraph 19(1) of the ErbStG, available at https://www.gesetze-im-internet.de/erbstg_1974/__19.html. For a detailed explanation of the determination of the tax rates, see Weiss, M., op. cit., especially point 2.2, pp. 445 and 446. In the present case, for an heir in class I (children), the tax rates vary from 7 to 30%. See also, for the stability of this rate – which also applies to spouses – the judgment in *Welte* (paragraph 5). The tax rates are the same whether or not the heir is resident.

23 See, in particular, judgment of 30 June 2016, *Feilen* (C-123/15, EU:C:2016:496, paragraph 16 and the case-law cited; 'the judgment in *Feilen*').

37. In the present case, it is common ground that the situation at issue in the main proceedings falls within Article 63(1) TFEU.

A. The first question referred

38. By its first question, the referring court asks, essentially, whether Article 63(1) and Article 65 TFEU are to be interpreted as precluding legislation of a Member State concerning inheritance tax which provides, in cases of limited tax liability, for a personal allowance that is pro-rated according to the proportion of the total estate that is subject to inheritance tax in that Member State, even though the personal allowance is not limited where the estate is fully taxable, as it is where either the deceased or the heir (or both) were resident, at the time of death, in the Member State concerned.

39. As the referring court rightly observes, the Court has already ruled on the issue of whether it is compatible with the free movement of capital for German tax legislation to provide for non-residents, subject to limited tax liability, to be entitled to a lower allowance than an heir who is subject to unlimited tax liability. [24]

40. The novel aspect of the request for a preliminary ruling is that it relates to the legislation applicable to inheritances where the taxable event occurred after 24 June 2017, [25] pursuant to which, in a case of limited tax liability, the allowance is pro-rated to reflect the proportion of the inheritance consisting of real property situated in Germany. [26]

41. I reiterate that, in the present case, the dispute relates to the grant of an allowance in an amount equivalent to about 43% of that provided for by Paragraph 16 of the ErbStG, or EUR 171 489, rather than EUR 400 000, corresponding to the proportion of the inheritance represented by real property situated in Germany which passed to the heir, who is resident in Austria, upon the death of her father, who was also resident in that Member State. [27]

42. It is therefore necessary to consider whether, as the Commission submits but the German Government does not accept, the national legislation at issue, under which the amount of the allowance is no longer fixed, as in the previous cases, but is proportional to the tax base, constitutes a restriction on the free movement of capital contrary to Article 63(1) TFEU. [28]

[24] See judgments of 22 April 2010, *Mattner* (C-510/08, EU:C:2010:216; 'the judgment in *Mattner*'); the judgment in *Welte*, and the judgment in *Hünnebeck*. In the situation considered in the judgment in *Mattner*, as well as those considered in the judgments in *Welte* and *Hünnebeck*, the allowance was significantly less in cases of limited tax liability than in caes of unlimited tax liability (in *Mattner*, it was EUR 1 100 instead of EUR 205 000, and in the two other cases it was EUR 2 000 instead of EUR 400 000 or EUR 500 000). The judgment in *Hünnebeck* concerns a particular tax mechanism (see point 51 of this Opinion). In paragraphs 24 to 26 of that judgment, the Court analysed the amendments made to that legislation following the judgment in *Mattner* and the judgment of 4 September 2014, *Commission* v *Germany* (C-211/13, not published, EU:C:2014:2148). See also, for a summary of the case-law of the Court in this area, van Vijfeijken, I., J.F.A., 'One Inheritance, One Tax', *EC Tax Review – Kluwer Law International*, Alphen-sur-le-Rhin, 2017, vol. 26, pp. 214 to 219, especially, p. 215.

[25] See Paragraph 37(14) of the ErbStG.

[26] In the case giving rise to the judgment in *Welte*, the referring court had stated in paragraph 16 of its request for a preliminary ruling that: 'the limitation of the tax-free amount to only EUR 2 000 in accordance with Paragraph 16(2) of the ErbStG goes beyond what is necessary for equal treatment with residents. In the present case, it is only the value of the land in Düsseldorf, which is EUR 329 200, that has been taxed, but this does represent 62% of the total value of the estate, which is EUR 532 397.76. It is therefore questionable whether the fact that approximately 38% of the value of the estate has not been taxed can serve as a justification for granting an allowance of only EUR 2 000, rather than EUR 500 000.'

[27] See point 22 of this Opinion.

[28] See judgment in *Feilen* (paragraph 19 and the case-law cited).

1. Whether there is a restriction on the free movement of capital for the purposes of Article 63 TFEU

43. In the judgment in *Welte*, the Court held that the national legislation at issue constituted a restriction on the free movement of capital [29] on the ground that, by making the application of a tax-free allowance in respect of the immovable property concerned dependent on the place of residence of the deceased and the heir at the time of the death, it led to succession between non-residents including such property being subject to a *higher tax burden* than that involving at least one resident, and therefore had the effect of reducing the value of the succession at issue. [30]

44. Specifically, as a person subject to limited tax liability, Mr Yvon Welte, the heir of his deceased wife, was only entitled to an allowance of EUR 2 000 with respect to the inheritance. If the deceased or Mr Welte himself had been resident in Germany at the time of the death, he would have been entitled to an allowance of EUR 500 000. No inheritance tax would then have been payable. [31]

45. The Court observed that the national legislation provided for the allowance against the tax base to be *less* than that which would have been applied if the deceased or the heir had been resident in Germany at the time of death. [32]

46. In making its ruling, the Court referred to three judgments, given between 2008 and 2011, in cases where non-residents were subject to a higher tax liability than residents, such that the value of an inheritance including the asset constituting the tax base was lower for a non-resident than for a resident. [33]

47. In the first of the judgments cited, *Eckelkamp and Others*, the request for a preliminary ruling related to national provisions under which an inheritance consisting of immovable property situated in Belgium was subject to transfer duties that were higher than the inheritance duties which would have been payable if the person whose estate was being administered had, at the time of death, been resident in that Member State. [34] In the particular case under consideration, transfer duties *mortis causa* were payable on all assets of the deceased situated in Belgium, *without deduction of a debt owed by the deceased to one of the heirs and secured on the asset in question*, because the deceased had not been resident in Belgium at the time of death. [35]

48. In the judgment in *Welte*, the second of those referred to in the judgment in *Mattner*, the dispute related to a version of the German legislation prior to that at issue in the main proceedings. That legislation provided for the *allowance against the taxable value to be lower* where the donor and donee were resident in another Member State than where one of them was resident in Germany. [36]

29 See judgment in *Welte* (paragraph 26).

30 See judgment in *Welte* (paragraph 25).

31 See judgment in *Welte* (paragraph 12) and footnote 26 to this Opinion.

32 See judgment in *Welte* (paragraph 24).

33 See judgment in *Welte* (paragraph 25).

34 See judgment in *Eckelkamp and Others* (paragraphs 45 and 46). In paragraph 8 of the judgment, Article 18 of the Wetboek Successierechten (Flemish Code of Succession Duties) is cited. This concerns non-residents and reads as follows: 'Duty on the transfer of property *mortis causa* shall be payable on all immovable property situated in Belgium and owned by the deceased or absent person, without account being taken of debts and liabilities of the estate.'

35 See judgment in *Eckelkamp and Others* (paragraph 17). The Court observed in paragraph 61 of the judgment that the calculation of the inheritance and transfer duties appeared to be directly linked to the value of the immovable property.

36 See judgment in *Mattner* (paragraphs 27 and 28, where reference is made, by analogy, to paragraphs 45 and 46 of the judgment in *Eckelkamp and Others*). See, in relation to the legislation at issue, footnote 24 to this Opinion. See also judgment of 4 September 2014, *Commission* v *Germany* (C-211/13, not published, EU:C:2014:2148, paragraphs 40 and 43).

49. The third judgment referred to in the judgment in *Welte* is that of 10 February 2011, *Missionswerk Werner Heukelbach*.[37] That decision related to national legislation providing that the reduced rate for succession duties could be applied only in the case of non-profit-making bodies which had their centre of operations in Belgium or in the Member State in which, at the time of death, the deceased actually resided or had his or her place of work, or in which he or she had previously actually resided or had his or her place of work.[38]

50. In those earlier decisions, the availability or reduction of the tax advantage represented by the deductibility of debts, by an allowance, or by a lower rate of tax, was directly dependent on a criterion of residence in the Member State assessing the inheritance tax. Consequently, supposing the value of the inheritance to be exactly the same, there was an obvious difference in the tax base as between residents and non-residents, with a corresponding reduction in the enrichment of non-residents. This was liable to discourage investment in the Member State concerned, under the case-law of the Court.[39]

51. I note, moreover, that the judgments in *Hünnebeck* and *Feilen*, which were delivered in 2016 after the judgment in *Welte*, are based on the same logic. In the first of those judgments, the Court held that 'the fact of taking into account a longer period for the aggregation of gifts between non-residents than for gifts in respect of which at least one party is a resident is liable, in some circumstances, to lead to the application of the allowance, in the first category of gifts, to a higher taxable value than for the second and, hence, the first category of gifts being subject to higher taxation on those gifts than would have been required for the second category of gifts. Such a mechanism has the effect of restricting the movement of capital because it is liable to reduce the value of a gift which includes such an asset'.[40]

52. In the judgment in *Feilen*, the Court observed that the 'legislation … makes entitlement to the reduction in inheritance tax dependent on the location of the assets contained in the estate of the earlier inheritance and on the place of residence of the deceased or the beneficiary at the time of that earlier inheritance. The consequence of this is that an inheritance involving assets which were located in another Member State at the time of a previous inheritance in which none of the parties was resident in Germany is subject to higher inheritance tax than that levied in the case of an inheritance involving only assets which were situated in Germany at the time of an earlier inheritance or involving assets which were situated in another Member State at the time of a previous inheritance at least one of the parties to which was resident in Germany'.[41]

53. Bearing in mind that the legislation considered in the judgments in *Mattner* and *Welte* has been amended and now provides, in cases of limited tax liability, for the amount of the allowance to depend on the value of the domestic assets subject to inheritance tax, can the Court's analysis in those decisions be applied to the present case?

37 C-25/10, EU:C:2011:65.

38 See judgment of 10 February 2011, *Missionswerk Werner Heukelbach* (C-25/10, EU:C:2011:65, paragraph 23).

39 In that regard, it could nevertheless be inferred from the facts of the disputes which led to those references for preliminary rulings being made to the Court that, in making their decisions as to their estates, the persons whose estates were being administered had not been concerned with inheritance tax.

40 Judgment in *Hünnebeck* (paragraph 45). In paragraph 41 of that judgment, the Court observed that 'the mechanism of taxation introduced by the adoption of Paragraph 2(3) of the ErbStG, allowing the beneficiary of a gift between non-residents to benefit from the higher tax-free allowance provided for in the case of gifts involving at least one resident, is of optional application and … the exercise of that option by the non-resident beneficiary involves the aggregation, for the purposes of calculating the tax payable in respect of the gift in question, of all the gifts received by that beneficiary from the same person over the course of the 10 years preceding and of the 10 years following that gift, whereas, for gifts involving at least one resident, only the gifts made within a period of 10 years are aggregated'. See also footnote 24 to this Opinion.

41 Judgment in *Feilen* (paragraph 21).

54. I do not think so. First, I note that this case contrasts with those which gave rise to the judgments in *Welte* and *Feilen*[42] in that the referring court has not provided the Court with anything to indicate that the value of the inheritance at issue is reduced, in comparison with an inheritance in which the deceased or the heir had been resident in Germany.

55. Second, I think account has to be taken of the fact that the legislation at issue no longer provides for a fixed allowance in an amount that is significantly lower for non-residents than for residents – a situation which clearly gave rise to a difference in tax liability in most inheritances.[43] Accordingly, it no longer follows simply from the wording of Paragraph 16 of the ErbStG that there is a difference in the treatment of residents and non-residents, save to the limited extent that the amount of the allowance granted on the basis of the family relationship is fixed in a case of unlimited tax liability, and does not depend on whether the estate is situated entirely in Germany, and that a non-resident heir of a non-resident deceased is never entitled to an allowance in the same amount as would have been available if at least one of them had been resident, regardless of where the other assets in the estate are situated.

56. The amendment to Paragraph 16 of the ErbStG provides justification, in my view, for investigating the difference in taxation that is ultimately liable to result from the national legislation at issue, taken as a whole, adopting an economic approach[44] consistent with the objective pursued by the national legislature, which was to create an inheritance tax exemption in respect of some or all of the inherited assets that are subject to the tax jurisdiction of Germany, based on the value of those assets.[45]

57. In other words, having regard to the criteria identified in the judgment in *Welte*, which I have set out above,[46] it is necessary in the present case to establish whether, in reality, the method by which the amount of the personal allowance is calculated, in cases of limited tax liability, results in a tax liability which is not equivalent to that borne in comparable situations.[47]

58. The parties differ on this point. The Commission, having lodged very general written observations in which it submitted that 'at first glance, granting non-resident heirs a pro-rated allowance constitutes … a restriction on the free movement of capital which, in principle, is prohibited by Article 63 TFEU', expressed support at the hearing for the submissions that the applicant made by reference to examples.

59. The applicant set out the following situation: a taxpayer who, on account of being domiciled in Germany, is subject to unlimited tax liability, leaves to his daughter, in his will, a rental property situated in Germany with a value of EUR 400 000, together with a house for personal use, also situated in Germany, with a value of EUR 500 000. The taxpayer's daughter goes on living in the house. The value of the estate is EUR 900 000. Under German inheritance law, there is an exemption of EUR 500 000 in respect of the single-family house. The remaining tax base of EUR 400 000

42 See judgments in *Welte* (paragraph 12) and *Feilen* (paragraph 21).

43 See footnote 24 to this Opinion.

44 See, to the same effect, Opinions of Advocate General Hogan in *Autoridade Tributária e Aduaneira (Tax on capital gains on real property)* (C-388/19, EU:C:2020:940, pointss 31, 54 and 74), and in *UBS Real Estate* (C-478/19 and C-479/19, EU:C:2021:148, point 63), concerning transcription and land registry taxes.

45 For a summary of the way in which the development of taxation in the Member States has been favourable to intra-family transmission, see Weber-Frisch, N. and Duquennois-Djoua, R., op. cit., especially paragraph 1.1.3, p. 413. See also, on the justifications for the different perspectives of the Member States on intergenerational estate transfer, Navez, E.-J., 'La fiscalité des successions face à l'évolution des systèmes fiscaux étatiques', *La fiscalité des successions et des donations internationales: Théorie générale et applications en droit comparé*, op. cit., pp. 50 to 72, especially p. 59.

46 See point 43 of this Opinion, and especially, for a concrete illustration, judgment in *Welte* (paragraph 54).

47 See, by analogy, the findings of the Court in the judgment in *Arens-Sikken* (paragraphs 34 and 35).

is subject to deduction of the daughter's allowance of EUR 400 000. The daughter therefore pays no tax. The applicant compared that situation to that of a taxpayer who is resident in the Netherlands and partially subject to tax. He leaves to his daughter, by will, a rental property situated in Germany with a value of EUR 400 000, and a family house used by him, situated in the Netherlands, with a value of EUR 500 000. The total value of the estate is EUR 900 000. Since the foreign assets are not taxable, the tax base is EUR 400 000, being the value of the rental property situated in Germany. In this case of limited tax liability, the personal allowance of EUR 400 000 is pro-rated based on the value of the estate. After deducting the allowance, a sum of EUR 222 223 remains. The applicable rate of inheritance tax is 11%, [48] and tax of EUR 24 444 is therefore payable in Germany.

60. I am not persuaded that the conclusion the applicant draws from this comparison is apposite. This is as follows: given an estate of exactly the same value, and given the same family relationship – or in other words in circumstances which are not objectively different in any respect – it leads, in the situations described, to the amount payable in respect of German inheritance tax being EUR 24 444 higher in a case of partial taxation than in a case of full taxation.

61. The difference in the location of the second property comprised in the inheritance cannot not be overlooked, nor can the difference in taxation which is due to the exemption available to an heir who is subject to unlimited tax liability. [49]

62. In contrast, I am persuaded by the arithmetical illustration provided by the German Government, which was not contradicted at the hearing – this is set out in paragraphs 54 to 59 of the written observations of the German Government in the following terms:

'54. By way of illustration, the example can be given of an estate subject to limited tax liability in which the taxable assets amount to EUR 430 000 and the non-taxable foreign assets amount to EUR 570 000, with the total value of the estate therefore standing at EUR 1 000 000.

55. Under Paragraph 16(2) of the ErbStG, the personal allowance (of EUR 400 000) provided for by Paragraph 16(1) of the ErbStG is reduced in proportion to the value of the assets not subject to German tax (EUR 570 000 of a total of EUR 1 000 000), or in other words by EUR 228 000 (57%). The deductible allowance is therefore EUR 172 000 [50] (EUR 400 000 – EUR 228 000). The taxable acquisition, before deducting debts under the succession, is therefore EUR 258 000 (EUR 430 000 – EUR 172 000). This means that the taxable acquisition represents 60% of the transferred assets subject, by reason of limited tax liability, to German inheritance tax (EUR 258 000 of EUR 430 000). In other words, the … (provisional) tax base (before deducting debts under the succession) represents 60% of the assets subject to tax.

56. If, on the other hand, the allowance were not reduced, the taxable acquisition would amount to EUR 30 000 (EUR 430 000 less EUR 400 000). The taxable acquisition would then represent 6.97% of the transferred assets subject, by reason of limited tax liability, to German inheritance tax (EUR 30 000 of EUR 430 000); only 6.97% of the assets would thus be subject to tax . The taxable proportion of the total value of the estate (EUR 1 000 000) would be 3% (EUR 30 000 of EUR 1 000 000).

48 See footnote 22 to this Opinion.

49 In that regard, the German Government observed at the hearing that the situations were not comparable and that, in the circumstances envisaged in paragraph 54 of the judgment in *Welte*, an equivalent allowance would be available under the legislation at issue. See point 65 of this Opinion.

50 This corresponds to 43% of the allowance of EUR 400 000.

57. By comparison with unlimited tax liability, the situation would be considerably more favourable. If the acquisition was subject to unlimited tax liability, all of the devolved assets, including the foreign assets, would need to be taken into account. There would then be a taxable acquisition, before deduction of the debts under the succession, of EUR 600 000 (EUR 1 000 000 less EUR 400 000). The taxable acquisition would then, once again, represent 60% of the assets subject to tax (EUR 600 000 of EUR 1 000 000).

58. Pro-rating the allowance thus results in the tax base being made up of the same proportion of the estate subject to tax, which is therefore taxed in the same manner as in a case of unlimited tax liability.

59. It can just as clearly been seen that there is no less-favourable treatment when the tax liability of the applicant in the present case, calculated on the basis of the figures given and without regard to other circumstances (producing a liability of EUR 911 715),[51] is compared with that of a person subject to unlimited tax liability inheriting the same assets in … circumstances which are otherwise equivalent, which would be EUR 2 126 575.[52] Both in the case of limited tax liability with domestic assets of EUR 4 970 000 and in the case of unlimited tax liability with worldwide assets of EUR 11 592 598, the effective rate of tax is 18.34%.'

63. I would note, moreover, that the impact of the amendments to the national legislation, which entered into force on 24 June 2017,[53] must be examined in the light of the Court's reasoning as regards the comparability of the situations described in paragraphs 50 to 53 of the judgment in *Welte*.[54] The Court observed that *the fact that the taxable value* of the inheritance of a non-resident heir, where he or she is partially subject to inheritance tax in Germany, was in principle *less than that of a resident or non-resident heir who is wholly subject to that tax* in that Member State, did not call into question the finding that residence had no impact on the class or rate of tax, *since the amount of the tax-free allowance provided for in the legislation at issue did not vary at all in relation to the amount of the taxable value of the inheritance*, but remained the same regardless of that latter amount.

64. The Court observed in paragraph 55 of the judgment in *Welte* that the amount of the tax-free allowance did not depend on the amount of the taxable value, but was granted to the heir in his or her capacity as a taxable person, concluding that there was no difference, with regard to that allowance, in the positions of resident and non-resident heirs.

65. That reasoning has to be related, as the referring court has suggested, to Advocate General Mengozzi's analysis, set out in his Opinion in *Welte*,[55] of the hypothetical situation in which Mr Welte was entitled to the full allowance, despite the fact that the part of the estate subject to German tax which he had inherited did not represent – in contrast, generally speaking, to entirely domestic situations where the heir is subject to unlimited tax liability – the entire value

51 The tax liability has been calculated on the basis of the value of all the assets comprised in the estate, as declared by the applicant and given in the order of the referring court …

52 If we were to take the entire estate of EUR 11 592 598 less the allowance of EUR 400 000, we would obtain, under the mandatory rounding rules, a taxable acquisition of EUR 11 192 500, and the tax rate applicable under Paragraph 19(1) of the ErbStG would then in fact be higher, at 23%. For the purposes of comparison, we have nonetheless applied the same tax rate of 19%.

53 See point 40 of this Opinion.

54 I think it is permissible to have regard to those paragraphs, on the basis that the comparison of the situations is a general condition of the determination as to whether there is a difference of treatment. See also, to that effect, Opinion of Advocate General Hogan in *UBS Real Estate* (C-478/19 and C-479/19, EU:C:2021:148, points 57 and 62). See also Navez, E.-J., 'L'influence de la Cour de justice de l'UE', *La fiscalité des successions et des donations internationales: Théorie générale et applications en droit comparé*, op. cit., pp. 197 to 230, especially p. 214.

55 C-181/12, EU:C:2013:384 (points 83 and 84).

of the estate. Advocate General Mengozzi analysed that situation as follows: 'To my mind, that question must be answered in the affirmative. … Mr Welte's position does not seem to me to be significantly different from that of a German resident who is heir to the estate – administered in Germany – of a spouse, also a German resident on the date of death, *where the estate comprises a single item of immovable property*.[56] All other things being equal, the entire tax-free amount would have been granted to such a resident and that person would not have had to pay inheritance tax on the transfer of the property.'

66. In the present case, following the amendment of the German legislation considered by the Court in the judgment in *Welte*, it is objectively undeniable that, if the estate comprises a single item of real property situated in Germany, the tax liability is the same whether the inheritance concerns non-residents or whether at least one of those concerned is resident. In a situation where the estate also comprises assets situated outside Germany, the heir's tax liability is the same whether or not he or she is resident in Germany.[57] If the estate does not include any assets situated in Germany, the question of what allowance is available to a non-resident heir does not arise. Moreover, there is no need, at any stage in the analysis, to consider the tax liability arising in such a situation in the other State concerned.[58]

67. Nonetheless, it would seem, from the writings of certain German commentators who have expressed reservations about the compatibility of the legislation at issue with Article 63(1) and Article 65 TFEU, that there are other arguments to be taken into consideration besides those put to the Court.[59]

56 My italics. See judgment in *Welte* (paragraph 54) and footnote 49 to this Opinion.

57 At the hearing, the German Government presented a further example so as to illustrate of the consequences of making an allowance of the same amount available in cases of both limited and unlimited tax liability, and highlight the constitutional questions that would arise. This was as follows: an estate comprises two items of immovable property, one abroad and one in Germany, each of which is worth EUR 400 000, giving a total value of EUR 800 000. A child of the deceased is entitled, pursuant to Paragraph 16 of the ErbStG, to a personal allowance. In a case of full taxation, it is the entire estate, including both properties, that will be subject to German tax, being EUR 800 000 less the personal allowance of EUR 400 000, or 50% of the estate. In a case of limited tax liability, it is only the property situated in Germany, worth EUR 400 000, that is subject to German tax jurisdiction and German inheritance tax. If the entire allowance of EUR 400 000 was available, the tax base would be nil.

58 See point 108 of this Opinion.

59 See Billig, H., 'Die neuen Freibetragsregelungen für beschränkt Steuerpflichtige im ErbStG, Keine Vereinbarkeit mit dem Unionsrecht in Sicht', *NWB-Erben und Vermögen*, Herne, 2018, vol. 2, pp. 54 to 56, especially p. 55, which refers to the following articles: Stalleiken, J., and Holtz, M., 'Anwendungserlasse zum neuen Erbschaftsteuerrecht und aktuelle Änderungen des ErbStG', *ErbR*, Nomos, Baden-Baden, 2017, pp. 602 to 606; Halaczinsky, R., 'Gestaltungen zur Steuerminderung bei der beschränkten Erbschaftsteuerpflicht unter Berücksichtigung des Steuerumgehungsbekämpfungsgesetzes', *UVR*, Stotax Stollfuß Medien, Bonn, 2017, pp. 249 to 253; Bockhoff, B., and Flecke, L.-M., 'Erhöhte Freibeträge für beschränkt steuerpflichtige Erwerbe durch das StUmgBG ?', *ZEV*, Nomos, Baden-Baden, 2017, pp. 552 to 556, available at: https://beck-online.beck.de/Dokument?vpath=bibdata%2Fzeits%2Fzev%2F2017%2Fcont%2Fzev.2017.552.1.htm&pos= 1&hlwords=on&lasthit=True. The commentary in this last article contains worked examples. See, more specifically, paragraphs 4.1 and 4.2. The authors also draw attention, in paragraph 4.3 of the article, to the difficulties created by calculating the tax-exempt amount on the basis of worldwide assets. See, in that regard, in relation to Paragraph 21 of the ErbStG (which it cites): https://www.gesetze-im-internet.de/erbstg_1974/__21.html, commentary by Weiss, M., op. cit., especially paragraph 2.3, p. 446. See also judgment of 12 February 2009, *Block* (C-67/08, EU:C:2009:92). I note however, first, that both Billig, H., op. cit., paragraph 2, p. 54, and Bockhoff, B., and Flecke, L.-M., op. cit., paragraph 4.3, have pointed out that, in decision No II R 53/14 of 10 May 2017, which is available at: https://www.bundesfinanzhof.de/en/entscheidungen/entscheidungen-online/decision-detail/STRE201710186/, the Bundesfinanzhof (Federal Finance Court) held that the national legislature was obliged to provide for different allowances to be available to residents and non-residents. Furthermore, in decision No 3 K 163/19, of 22 July 2020, available at: https://www.rechtsprechung.niedersachsen.de/jportal/portal/page/bsndprod.psml?doc.id=STRE202075214&st=ent&doctyp=juris-r&showdoccase= 1&paramfromHL=true#focuspoint, the Niedersächsisches Finanzgericht (Finance Court, Land of Lower Saxony, Germany) referred in paragraph 44 to the divergent opinions of numerous other authors as to whether the amended Paragraph 16(2) of the ErbStG conformed to EU law.

68. These arguments confirm, it seems to me, that the finding of unequal tax treatment of inheritances [60] has to be based on an overall analysis of the tax system and all the inputs into the calculation of the effective rate of tax [61] that is payable on the *enrichment* of the heir, taking into consideration its nature as a discrete event, occurring only once, and the lack of any link with the taxpayer's activity.

69. In those circumstances, subject to the matters that will need to be verified by the referring court, I do not consider that the national legislation at issue, by virtue of introducing a rule pro-rating the allowance available to a non-resident heir, constitutes a restriction on the free movement of capital for the purposes of Article 63 TFEU.

70. If, however, based purely on a finding that the allowance is a tax advantage linked to the family relationship between the deceased and the taxpayer (the heir), the amount of which is determined without regard, in a case of unlimited tax liability, to the value of the inheritance, [62] the Court were to hold that the legislation at issue in the main proceedings results in less advantageous treatment of the heir in a case of limited tax liability, which is liable to discourages persons who are not resident in Germany from investing in that Member State, and thus to restrict the free movement of capital, it would then be necessary to establish whether that difference of treatment concerns situations which are not objectively comparable or whether it is justified by an overriding reason in the public interest. [63]

2. Whether the situations are objectively comparable

71. In the judgment in *Welte*, the Court observed that the national legislation at issue treated inheritances in the same way, except in relation to the amount of the allowance available to the heir, regardless of whether the heir or the deceased were residents. [64]

72. The Court rejected an argument based on the taxable value of the inheritance and the fact that this might include the entire estate or be limited to real property situated in Germany, observing that the amount of the allowance was fixed in both cases. [65] It also based its decision on the

60 In that regard, it is important to take account of the real nature of inheritance tax, which, in general, distinguishes it from income tax. This flows from the circumstances in which assets pass by way of inheritance and justifies an examination of the tax arrangements. See, to that effect, judgment in *Eckelkamp and Others* (paragraph 63).

61 See, to that effect, in relation to the application of the allowance where some of the constituent parts of the inheritance are exempt or where no tax is payable under a double tax treaty, judgment of the Bundesfinanzhof (Federal Finance Court) No II R 53/14 of 10 May 2017 (paragraphs 29, 32 and 33).

62 In other words, without regard to whether or not the tax liability would be greater. See, with regard to that consideration, points 43 and 46 of this Opinion.

63 See, especially for the comprehensive summary of the applicable principles, judgment of 26 May 2016, *Commission* v *Greece* (C-244/15, EU:C:2016:359, paragraphs 33 to 35 and the case-law cited).

64 See judgment in *Welte* (paragraph 51). In paragraph 50 of that judgment, the Court observed that the class and rate of tax were determined by rules under which there was no difference of treatment based on residence. See also judgment of 26 May 2016 in *Commission* v *Greece* (C-244/15, EU:C:2016:359, paragraph 36).

65 See judgment in *Welte* (paragraph 53).

observations that the status of the taxable person did not depend on residence,[66] that the allowance was intended to reduce the total amount of inheritance tax,[67] and that it was granted to the heir on the basis of his or her status as a taxable person.[68]

73. The Court held, on that basis, that 'the fact that the non-resident heir of a non-resident deceased has limited tax liability does not … make the situation of that heir objectively different from that of the non-resident heir of a resident deceased or from that of the resident heir of a resident or non-resident deceased',[69] and that, accordingly, 'the situation of Mr Welte is comparable to the situation of any heir who acquires by inheritance an immovable property located in Germany from a deceased person who was residing in that Member State and with whom a spousal link existed and comparable to the situation of an heir residing in Germany who acquires it from a deceased spouse who was not residing in that Member State'.[70]

74. In the case of an estate made up entirely of domestic assets situated in Germany, the only difference flowing from the legislation at issue in the judgment in *Welte* between the heirs according to their place of residence or that of the deceased related to the amount of the allowance, which was EUR 2 000 for non-residents and EUR 500 000 for residents.[71]

75. With that in mind, it does not seem to me that the decision of the Court in the judgment in *Welte* can be applied to the situation under consideration in the main proceedings. To do so would be to disregard the fact that the tax advantage depends on the actual tax burden borne by the taxpayer, which differs depending on the place of residence of the taxpayer or the deceased. The fact that the allowance is pro-rated means that it corresponds to the eventual level of enrichment of residents and non-residents which is the purpose of inheritance tax,[72] within the limits of Germany's tax jurisdiction,[73] represented by worldwide assets in the first case and part of the inheritance in the second. In that regard, I refer to the arguments set out above.[74]

66 See judgment in *Welte* (paragraph 53). It seems to me that this observation should be limited to non-residents as, in the case of an estate consisting only of foreign assets, it is only residents who are taxable.

67 See judgment in *Welte* (paragraph 53). It should be noted that, while the national legislation does not provide for the tax rate to vary according to whether the tax liability is limited or unlimited, an inheritance comprising worldwide assets with a smaller proportion of domestic assets would be taxed at a higher rate than would be applied to the domestic assets alone. See, by way of illustration, footnote 52 to this Opinion.

68 See judgment in *Welte* (paragraph 55).

69 Judgment in *Welte* (paragraph 55).

70 Judgment in *Welte* (paragraph 56).

71 See point 44 of this Opinion, and the judgment in *Welte* (paragraph 54).

72 See point 9 of this Opinion. I note, in that regard, that this system has the advantage, in conformity with EU law, of adapting the tax system to the diversity of the situations of non-residents, and especially to the situation in which the majority of the taxable assets are situated within the Member State concerned.

73 See judgment of 12 February 2009, *Block* (C-67/08, EU:C:2009:92, paragraphs 30 and 31). See also, by way of comparison, as to the matters taken into account in calculating inheritance tax in a case where the same assets are inherited more than once within ten years, and pass to an heir who is resident in Germany, judgment in *Feilen* (paragraph 27), and footnote 79 to this Opinion.

74 See points 62, 63 and 68 of this Opinion.

76. Consequently, to the extent that this subsidiary point arises I suggest that the Court should hold that, in a tax system under which the amount of the allowance depends on the scope of taxation, the situations are not objectively comparable.[75]

77. An alternative approach, which would be very much in line with the judgment in *Welte*, would therefore be to regard the non-resident heir of a non-resident deceased as being, as a matter of principle, comparable to that of a resident heir or resident deceased, on the ground that, under the relevant tax system, the status of taxable person does not depend on the place of residence, and the tax class and allowance are determined solely on the basis of the family relationship.

78. If it were to take that approach, the Court would need to consider whether legislation such as that at issue in the main proceedings may be objectively justified by overriding reasons in the public interest, as the German Government maintains in the alternative.

3. Whether there is an overriding reason in the public interest

79. The German Government submits that the legislation at issue is justified by overriding reasons in the public interest, namely the need to preserve the coherence of German inheritance tax legislation and to ensure a balanced distribution of tax powers as between the Member States.

80. As regards the justification based on the principle of coherence of the tax system,[76] the Court has considered this in relation to an earlier version of the legislation at issue in the main proceedings, rejecting it on the ground that 'it suffices to state that the tax advantage resulting, in the Member State in which the inherited immovable property is located, from the application of a full allowance against the taxable value in a case where that inheritance involves at least one resident of that State is not offset in that State by any particular tax charge by way of inheritance tax'.[77]

81. In the present case, the German Government relies mainly on the decision of the Court in the judgment in *Feilen*.[78] It submits, by analogy, that there is a logical symmetry – and therefore a direct link – between the reduced amount of the allowance and the proportion of the inherited assets on which German inheritance tax is payable.

[75] See, for arguments concerning the difference in the tax bases applicable to residents and non-residents, or in other words the fact that the tax base is comprised of the entire inheritance in the case of a resident but limited to domestic assets in the case of a non-resident, with particular reference to equal treatment, the preparatory work relating to the Entwurf eines Gesetzes zur Bekämpfung der Steuerumgehung und zur Änderung weiterer steuerlicher Vorschriften (Draft law concerning measures to combat tax evasion and amending other tax provisions), Bundestag document 18/11132, available at: https://dserver.bundestag.de/btd/18/111/1811132.pdf (p. 35), which the Commission cited in its written observations. See, for the citations relevant to the 2017 reforms, point 6 of this Opinion. See also, for the background to the legislature's intervention, Billig, H., op. cit., especially pp. 54 and 55. I note however that the Commission changed its stance at the hearing, submitting by reference to the judgment in *Welte* (paragraph 53) that the allowance must always be the same, regardless of the value of the inheritance and the proportion of the estate which is taxed in Germany. It emphasised that the family relationship on the basis of which the allowance is granted does not change depending on whether the taxpayer is resident or non-resident. Furthermore, given that, for a non-resident heir, Germany's tax jurisdiction does not extend to worldwide assets, the Commission submits that those assets cannot be taken into account in calculating the reduced allowance.

[76] In that regard, the Court pointed out in the judgment in *Feilen* (paragraph 30), first, that it had already recognised that the need to maintain the coherence of a tax system may justify a restriction on the exercise of the freedoms of movement guaranteed by the Treaty, and second, that for an argument based on such a justification to succeed, a direct link must be established between the tax advantage concerned and the offsetting of that advantage by a particular tax levy, with the direct nature of that link falling to be examined in the light of the objective pursued by the rules in question.

[77] Judgment in *Welte* (paragraph 60 and the case-law cited in relation to gifts). On the lack of a justification for such an offsetting mechanism, in relation to the taking into account, for the application of a higher allowance, of a period of 10 years preceding the gift in respect of which at least one resident in Germany is a party, see also judgment in *Hünnebeck* (paragraph 63).

[78] The German Government referred more specifically to the judgment in *Feilen* (paragraphs 30 and 37).

82. However, the Court's decision in that judgment related to a situation – very different from that under consideration in the main proceedings – where it was only in respect of the reduction of potentially cumulative inheritance tax that the legislation at issue treated beneficiaries of the estate differently depending on whether or not the assets in question had been situated in Germany when previously inherited, and whether they had passed, on that occasion, between parties who were resident in that country. [79]

83. In such a case, it is clear that a tax advantage is offset by a tax levy. That cannot be said of the allowance mechanism, which is intended to exempt heirs from all taxation in most cases, without any quid pro quo. The Court pointed out that the tax rationale was based on inheritance tax having been collected in respect of a previous inheritance in the same Member State. [80] Accordingly, in the absence of detailed submissions from the German Government as to why it considers that the situation at issue in the main proceedings differs from that considered in *Welte* in such a way that the judgment in that case can be distinguished, I suggest that the Court should hold that the legislation at issue in the main proceedings cannot be justified by the need to preserve the coherence of the German tax system.

84. As regards the justification based on the principle of territoriality and the claimed need to ensure a balanced allocation of the Member States' powers to impose taxes, the Court has held that this is a legitimate objective, [81] but that no such justification exists where the unequal treatment results from the application of the national legislation in question alone, or where it has not been demonstrated that it is necessary to safeguard the power of the Member State concerned to impose taxes. [82]

85. In the present case, the German Government submits that, in the absence of unifying or harmonising EU measures in the field of inheritance tax, it has exercised its power to define, unilaterally, the basis on which the power of taxation is allocated as regards inheritances with cross-border elements. The German Government adds that it drew on recognised tax principles [83] and distinguished between cases of unlimited tax liability, encompassing worldwide inherited assets, and cases of limited tax liability, relating only to the inheritance of domestic assets meeting certain criteria. Through that allocation of powers, it was pursuing the objective of preventing [84] or correcting [85] double taxation as well as that of avoiding double non-taxation of part of the estate.

79 See judgment in *Feilen* (paragraph 27). The Court pointed out that the situation in question was one in which the legislation 'places on the same footing persons [in a particular tax class] and resident in the national territory who acquire by inheritance an estate involving assets that had already been acquired by persons in that tax class during the ten years preceding the acquisition, irrespective of where the assets are located or where the beneficiaries thereof were resident at the time of that previous inheritance'. As to the facts of that case, it is stated at paragraph 17 of the judgment that the estate at issue included an asset previously inherited by Mr Feilen's mother from his sister, in Austria, where that asset was then located and where his sister and mother were resident at the time of the sister's death. It was because inheritance tax on that asset had been collected in Austria, and not in Germany, that the inheritance tax reduction provided for by the national legislation was not granted to Mr Feilen.

80 See judgment in *Feilen* (paragraph 33).

81 See judgment in *Hünnebeck* (paragraph 65 and the case-law cited).

82 See judgment in *Hünnebeck* (paragraph 66). In relation to the legislation at issue, see footnote 24 to this Opinion.

83 The German Government refers to the model convention on estates and inheritances and on gifts published by the Organisation for Economic Co-operation and Development (OECD). See, in that regard, judgment of 23 February 2006, *van Hilten-van der Heijden* (C-513/03, EU:C:2006:131, paragraph 48).

84 The German Government observes, by way of example, that foreign assets are not taxed in a case of limited tax liability.

85 The German Government observes, by way of example, that foreign inheritance tax can be imputed under Paragraph 21 of the ErbStG, or can be deducted as a debt under the succession.

86. In my view, the German Government has demonstrated that the unequal treatment is necessary to safeguard its power of taxation and is proportionate to the objective pursued in so far as it takes account of the difference in the tax base.

87. Regard must be had to the fact that the personal allowances are based on the proportion of the estate that is subject to German inheritance tax, and therefore reflect Germany's tax jurisdiction as it relates to non-residents, as compared to residents.

88. It follows, though in my view this is a subsidiary point, that the restriction on the movement of capital resulting from national legislation such as that at issue in the main proceedings is justified by the principle of territoriality.

B. The second question referred

89. By its second question, the referring court asks, essentially, whether Article 63(1) and Article 65 TFEU are to be interpreted as precluding legislation of a Member State concerning the calculation of inheritance tax which provides, in a case where tax liability is limited to domestic real property, as it is where neither the deceased nor the heir were resident in that Member State at the time of death, that the value of liabilities arising from the reserved portions is not deductible – even as to a proportionate part – from the value of the assets passing by reason of death, even though the value of those liabilities is fully deductible in a case where the inheritance is subject to unlimited tax liability, as it is where the deceased or the heir (or both) were resident in that Member State at the time of death.

90. The German Government admits that the legislation at issue constitutes a restriction on the free movement of capital within the meaning of Article 63(1) TFEU.

91. As the referring court has pointed out, under the second sentence of Paragraph 10(6) of the ErbStG, the applicant is unable to deduct the value of the liabilities arising from the reserved portions of her mother and brother, and which she must satisfy, as liabilities attaching to the inheritance. Under that provision, in a case of *limited tax liability*, it is only the debts and expenses which are economically connected to the taxed assets that are deductible. [86]

92. Furthermore, the referring court observes that, under the case-law of the Bundesfinanzhof (Federal Finance Court), there is no economic connection, as required by the first and second sentences of Paragraph 10(6) of the ErbStG, between the specific assets included in the estate and the reserved portion, even though the reserved portion is calculated on the basis of the value of the estate. [87]

93. In those circumstances, as has already been pointed out, before a national measure can be regarded as compatible with the Treaty provisions on the free movement of capital, it is necessary to verify that the difference in treatment concerns situations which are not objectively comparable, or that it is justified by overriding reasons in the public interest. [88]

[86] See point 27 of this Opinion.

[87] See point 28 of this Opinion.

[88] See point 70 of this Opinion.

1. Whether the situations are objectively comparable

94. As the German Government and the Commission have observed, the legislation at issue is similar to that considered by the Court in the judgment in *Arens-Sikken*. In the case which gave rise to that judgment, the national legislation provided that, where the person whose estate was being administered had been residing, at the time of death, in another Member State, the overendowment debts resulting from a testamentary parental partition *inter vivos* could not be deducted in the assessment of transfer duties relating to an immovable property left by way of inheritance. [89]

95. The Court considered, amongst other things, arguments that overendowment debts should not be regarded as directly linked to an immovable property, within the meaning of the judgments of 12 June 2003, *Gerritse* [90] and of 11 December 2003, *Barbier*, [91] that such debts were not debts forming part of the estate, but debts assumed by the surviving spouse which arose after the death of the deceased in consequence of his or her will, and that such debts did not encumber the immovable property, and creditors of the surviving spouse who assumes the overendowment debt would be unable to claim any right *in rem* in respect of that property. [92]

96. However, while, in the case which gave rise to the judgment in *Arens-Sikken*, the Court observed that the overendowment debts were connected to the immovable property at issue, it did not determine whether there was a direct link between the overendowment debts and the immovable property included in the estate. It considered that it was sufficient to examine the unequal treatment arising from the national rules at issue, which apportioned the tax burden differently, as between the various heirs, depending on whether the deceased had been resident or non-resident in the Member State in question at the time of death. [93]

97. In my view it follows that, contrary to the submissions of the German Government, regarding the reserved portions, the Court did not hold, as it did in the judgment in *Eckelkamp and Others*, [94] that it was for the referring court to establish whether there was a direct link between the liability relied on and the assets taxed.

89 See judgment in *Arens-Sikken* (paragraph 34). In paragraph 16 of that judgment, it is stated that Ms Arens-Sikken received, as a result of a testamentary parental partition *inter vivos*, assets and liabilities to a value exceeding the value of her legal share of the estate. In other words, she received an overendowment. Her children, on the other hand, incurred a deficit, as they did not receive any of the assets included in the estate. According to the partition, Ms Arens-Sikken was obliged to pay her children the value of their shares of the inheritance in cash. She therefore assumed an overendowment debt in respect of each of her children, and they had claims against her as a result of their underendowment. Under the Dutch system of transfer duties, if the deceased had been residing in the Member State of taxation at the time of his death, Ms Arens-Sikken would have been able to have the overendowment debts (and all debts attaching to the estate) taken into account *in the determination of the basis of assessment for the inheritance duties* which would have been payable in that situation (paragraph 23 of the judgment).

90 C-234/01, EU:C:2003:340. This judgment relates to national rules which, in matters of taxation, refuse to allow non-residents to deduct business expenses which are directly linked to the activity that generated the taxable income in the Member State concerned.

91 C-364/01, EU:C:2003:665. In that case, the national legislation at issue, which related to the calculation of the tax due on the inheritance of immovable property situated in the Member State concerned, provided that, for the purposes of valuing the property, the fact that the deceased was under an unconditional obligation to transfer legal title to another person who had financial ownership of that property could be taken into account if, at the time of death, the deceased resided in that Member State, but not if he or she resided in another Member State.

92 See judgment in *Arens-Sikken* (paragraph 42). In the circumstances of that case, as the Court stated in paragraphs 35 and 39 of the judgment, if the deceased had been resident in the Netherlands at the time of his death, the tax burden would have been shared by the heirs. Simply because he had not been resident in that Member State, the tax burden was borne by one heir alone.

93 See judgment in *Arens-Sikken* (paragraph 45).

94 See judgment in *Eckelkamp and Others* (paragraph 53).

98. The German Government submits that, under the national case-law,[95] the right to the reserved portions attaches to the estate as a whole, and that there is therefore no link between the individual domestic assets and that liability. It adds that the non-deductibility of debts which are not economically connected to the assets that are taxable in a case of limited tax liability is intended as a means of attaining the objective pursued by Paragraph 10 of the ErbStG, under which it is only the net increase in wealth resulting from the inheritance of assets that can be used as the tax base for inheritance tax.

99. These arguments in support of the view that the situations are not comparable – which are essentially the same as those advanced by the Spanish government, in that they relate to the difference in the tax base – are not persuasive. Like the Commission, I would observe that in a situation where the entire inheritance consists of a single item of immovable property situated in Germany, the liability relating to the reserved portions will be deductible if the heir or the deceased was resident, and will be non-deductible if neither of them was resident. Thus, adopting the same logic I proposed in relation to the application of the allowance to the inherited assets,[96] it is apparent that a connection must be maintained between the enrichment of the heir, the taxation of that enrichment and the tax advantage that is granted. Otherwise, the heir is taxed on a fraction of the value of assets which are not acquired or, in other words, on a portion of enrichment that has no concrete existence.

100. Accordingly, I suggest that the Court should hold, by analogy with the interpretation adopted in the judgment in *Arens-Sikken*,[97] that where national legislation places the heirs of a person who, at the time of death, had the status of resident and those of a person who, at the time of death, had the status of non-resident on the same footing for the purposes of taxing an inherited immovable property which is situated in the Member State concerned, that legislation cannot, without giving rise to discrimination, treat those heirs differently in the taxation of that property with respect to the deductibility of expenses relating to the inheritance.

2. Whether there is an overriding reason in the public interest

101. The German Government submits in the alternative that the national legislation at issue is justified by the same overriding reasons in the public interest that it relies on in connection with the allowance.[98] It argues, principally, that the application of a different system of deduction of debts attaching to the inheritance is consistent with the German tax base.

102. In the same way as in relation to the allowance, as regards the preservation of the coherence of the tax system, the German Government refers to the judgment in *Feilen* and simply submits that the reduction can only be granted in cases where the assets in question are taxed in Germany.

95 I note, in that regard, that the Commission stated the following in its written observations: 'while the German finance courts do not regard the reserved portion as economically connected to the inherited assets [see order for reference (paragraph 36)], a notice issued by the German tax authorities states the opposite: "In the case of claims to a reserved portion, these is an economic connection with the individual inherited assets, regardless of the extent to which those assets are taxable or tax-exempt, and this charge is therefore covered by the limitation on deduction. In the case of other general liabilities attaching to the inheritance, however, there is no such economic connection with the individual inherited assets."' Decisions to that effect of the superior tax offices of the Länder of 25 June 2009, *Bundessteuerblatt* (official tax journal) 2009 I, p. 713, 'Zu § 10 ErbStG', section 1 'Limitation on the deduction of debts and charges', paragraph 2, available at: https://datenbank.nwb.de/Dokument/Anzeigen/347085/.

96 See point 56 of this Opinion.

97 See paragraph 57 of that judgment, where the Court referred by analogy to the judgment in *Eckelkamp and Others*. In paragraph 56 of the judgment in *Arens-Sikken*, the Court observed that under the legislation at issue 'it is only in respect of the deduction of overendowment debts resulting from a testamentary parental partition *inter vivos* that the inheritances of residents and non-residents are treated differently'.

98 See point 79 of this Opinion.

103. First, I would refer to my analysis as to how that judgment is to be applied in the situation at issue in the main proceedings, which is equally relevant to the deductibility of the reserved portions.[99] Second, in relation to offsetting, which is an element in the test applied by the Court where the coherence of the tax system is relied on,[100] I note that the German Government has not put forward any particular matter for the Court's consideration.

104. By analogy with the Court's judgment in *Eckelkamp and Others*,[101] it should be stated that the national legislation at issue in the main proceedings simply excludes altogether the deduction of the liability relating to the reserved portions,[102] even where the entirety of the taxable inheritance is situated in Germany, without consideration of any matter other than the residence of the deceased or heir, where this is not in Germany.

105. In connection with its reliance on the principle of territoriality and the need to ensure a balanced distribution of the power of taxation as between the Member States, the German Government submits that the deduction of such a liability would go beyond its tax jurisdiction, and that the possibility of double-deduction of the liability has to be taken into account.

106. However, in its case-law on the free movement of capital and inheritance tax, the Court has held that a citizen cannot be deprived of the right to rely on the provisions of the Treaty on the ground that he or she is profiting from tax advantages which are legally provided for by the rules in force in a Member State other than his or her State of residence,[103] in the absence of a double taxation treaty.[104]

107. It should be borne in mind that there is no bilateral treaty between the Federal Republic of Germany and the Republic of Austria concerning inheritance tax.[105]

108. In those circumstances, my view is that the Member State in which an immovable property included in the inheritance is situated cannot, in order to justify a restriction on the free movement of capital arising from its legislation, rely on the possibility, beyond its control, of a tax advantage being granted to the heir by another Member State – such as the Member State in which the person whose estate is being administered was residing at the time of death – which could, wholly or partly, offset the loss incurred by that person's heir as a result of the fact that, in the Member State in which the property inherited is situated, liabilities relating to reserved portions are not deductible for the purposes of assessing inheritance tax.[106]

109. Accordingly, I consider that the systematic non-deductibility, as regards persons not resident within the national territory, of liabilities relating to reserved portions from the value of the assets passing by reason of death, in cases of limited tax liability, without regard, even for the purposes of pro-rating, to the tax base, even though the tax base is defined, in Paragraph 10(1) of

99 See points 82 to 83 of this Opinion.

100 See point 80 of this Opinion.

101 See judgment in *Eckelkamp and Others* (paragraph 70).

102 It should be noted that, in certain cases, the deduction may be in proportion to the tax-exempt amount. In its written observations, the German Government stated that, under the third sentence of Paragraph 10(6) of the ErbStG, if the asset is only partly tax-exempt, the debts and charges attaching to it must be allocated proportionately. See also Weiss, M., op. cit., especially paragraph 2.1.1, p. 445.

103 See judgment in *Eckelkamp and Others* (paragraph 66 and the case-law cited there).

104 For a summary of the Court's case-law in that area, and of the Commission's recommendation of 15 December 2011 (C(2011) 8819 final) regarding relief for double taxation of inheritances, as well as considerations relevant to the economic analysis of cross-border inheritances, see van Vijfeijken, I., J.F.A., op. cit., especially pp. 214 to 217.

105 See point 18 of this Opinion.

106 See, by analogy, judgment in *Arens-Sikken* (paragraph 65 and the case-law cited).

the ErbStG, with a view to capturing the enrichment of the heir, constitutes a restriction of the free movement of capital, for the purposes of Article 63 TFEU, which is not justified by an overriding reason in the public interest.

V. Conclusion

110. In the light of the foregoing considerations, I suggest that the Court should answer the questions referred by the Finanzgericht Düsseldorf (Finance Court, Düsseldorf, Germany) as follows:

(1) Article 63(1) and Article 65 TFEU are to be interpreted as not precluding legislation of a Member State concerning inheritance tax which provides, in cases where the tax liability is limited to domestic real property, as it is where neither the deceased nor the heir were resident in that Member State at the time of death, for a personal allowance that is pro-rated according to the proportion of the total estate that is subject to inheritance tax in that Member State, even though the personal allowance is not limited where the estate is fully taxable, as it is where either the deceased or the heir (or both) were resident, at the time of death.

(2) Article 63(1) and Article 65 TFEU are to be interpreted as precluding legislation of a Member State concerning the calculation of inheritance tax which provides, in a case where tax liability is limited to domestic real property, as it is where neither the deceased nor the heir were resident in that Member State at the time of death, that the value of liabilities arising from the reserved portions is not deductible – even as to a proportionate part – from the value of the assets passing by reason of death, even though the value of those liabilities is fully deductible in a case where the inheritance is subject to unlimited tax liability, as it is where the deceased or the heir (or both) were resident in that Member State at the time of death.