Reports of Cases

JUDGMENT OF THE COURT (Fifth Chamber)

21 December 2021 *

(Reference for a preliminary ruling – Free movement of capital – Articles 63 and 65 TFEU – National legislation on inheritance tax – Immovable property situated in a Member State – Limited tax liability – Different treatment of residents and non-residents – Right to an allowance on the taxable value – Proportionate reduction in the case of limited tax liability – Liabilities under reserved portions – No deduction in the case of limited tax liability)

In Case C-394/20,

REQUEST for a preliminary ruling under Article 267 TFEU from the Finanzgericht Düsseldorf (Finance Court, Düsseldorf, Germany), made by decision of 20 July 2020, received at the Court on 18 August 2020, in the proceedings

XY

v

Finanzamt V,

THE COURT (Fifth Chamber),

composed of E. Regan (Rapporteur), President of the Chamber, K. Lenaerts, President of the Court, acting as Judge of the Fifth Chamber, C. Lycourgos, President of the Fourth Chamber, I. Jarukaitis and M. Ilešič, Judges,

Advocate General: J. Richard de la Tour,

Registrar: C. Di Bella, Administrator,

having regard to the written procedure and further to the hearing on 9 June 2021,

after considering the observations submitted on behalf of:

– XY, by R. Weller, Steuerberater,

– the German Government, by J. Möller and R. Kanitz and by S. Costanzo, acting as Agents,

– the Spanish Government, by M.J. Ruiz Sánchez, acting as Agent,

* Language of the case: German.

– the European Commission, by W. Roels and B.-R. Killmann, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 16 September 2021,

gives the following

Judgment

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

2 The request has been made in proceedings between XY and Finanzamt V (Tax Office V, Germany) concerning the calculation of inheritance tax relating to immovable property situated in Germany.

Legal context

3 The Erbschaftsteuer- und Schenkungsteuergesetz (Law on inheritance and gift tax), in the version published on 27 February 1997 (BGB1. 1997 I, p. 378), as amended by the Gesetz zur Bekämpfung der Steuerumgehung und zur Änderung weiterer steuerlicher Vorschriften (Law combating tax evasion and amending other tax provisions) of 23 June 2017 (BGBl. 2017 I, p. 1682) ('the ErbStG'), provides, in Paragraph 1, entitled 'Taxable events':

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

1. acquisitions on death;

2. gifts *inter vivos*;

…'

4 Paragraph 2 of the ErbStG, entitled 'Personal liability to tax', provides:

'(1) Liability to tax arises

1. in the cases referred to in Paragraph 1(1)(1) to (3), in relation to the entirety of the devolved assets (unlimited tax liability), where the deceased, at the date of his or her 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:
   (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, subject to Paragraph 3, in relation to devolved assets which are domestic assets within the meaning of Paragraph 121 of the Bewertungsgesetz [(Law on valuation)] (limited tax liability).

…'

5 Paragraph 3 of the ErbStG, entitled 'Acquisitions on death', provides in subparagraph 1 thereof:

'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 (BGB1. 2002 I, p. 42, and corrigenda BGBl. 2002 I, p. 2909, and BGBl. 2003 I, p. 738) ("the BGB")];

…'

6 Paragraph 9 of the ErbStG provides that, in the case of acquisitions on death, tax shall become chargeable on the death of the deceased.

7 Under Paragraph 10 of the ErbStG, entitled 'Taxable acquisition':

'(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. …

…'

8 Paragraph 15 of the ErbStG, entitled 'Tax classes', provides:

'(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,

…’

9 Paragraph 16 of the ErbStG, entitled ‘Allowances’, states:

‘(1) In the cases of unlimited tax liability provided for in Paragraph 2(1)(1), and Paragraph 2(3), the following acquisitions shall remain exempt from tax

1. those of the spouse and of the partner in the amount of EUR 500 000;

2. those of children for the purposes of tax class I.2, and of children of deceased children for the purposes of tax class I.2, in the amount 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.

…’

10 Paragraph 37 of the ErbStG, entitled ‘Application of this Law’, provides in subparagraph 14 thereof:

‘… Paragraph 16(1) and (2), in the version applicable on 25 June 2017, shall apply to acquisitions in respect of which the tax becomes chargeable after 24 June 2017.’

11 Paragraph 121 of the Bewertungsgesetz (Law on valuation), in the version published on 1 February 1991 (BGB1. 1991 I, p. 230), as amended by the law of 4 November 2016, entitled ‘Domestic assets’, provides:

‘Domestic assets include:

1. domestic agricultural and forestry assets;

2. immovable property within Germany;

…’

12 Paragraph 2303 of the BGB, entitled ‘Persons entitled to a reserved portion; Amount of the reserved portion’, provides in subparagraph 1 thereof:

‘If a descendant of the deceased is excluded from the succession by a disposition of property upon death, he or she 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. …’

13 Paragraph 2311 of the BGB, entitled '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.'

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

14 The applicant in the main proceedings is an Austrian national who lives in Austria. She is the daughter of E, who was also an Austrian national who lived in Austria and who died on 12 August 2018.

15 The latter owned three developed parcels of land and one undeveloped parcel of land in Germany. He had made a will in which he had named his daughter as his sole heir, his wife and son being entitled to the reserved portions.

16 After the death of her father, the applicant in the main proceedings undertook, by agreement, to pay her mother and her brother the sums of EUR 1 700 000 and EUR 2 850 000 respectively, in order to settle their claims to the reserved portion. In the inheritance tax return she submitted to Tax Office V, she applied to have 43% of the amount of the liabilities under the reserved portions, in a total amount of EUR 1 956 500, deducted from the value of the estate as debts under the succession. She took the view that the share of the immovable property subject to inheritance tax in Germany represented 43% of the total value of the assets in the estate, amounting to EUR 11 592 598.10, which also included capital assets and immovable property in Spain.

17 Tax Office V set the amount of inheritance tax payable by the applicant in the main proceedings at EUR 642 333. In so doing, it charged tax only in respect of the immovable property situated in Germany. It refused to take account of the liabilities under the reserved portions as debts under the succession, on the ground that, in accordance with the second sentence of Paragraph 10(6) of the ErbStG, there was no economic link between those reserved portions and the immovable property forming part of the estate. Moreover, for the purposes of calculating inheritance tax, instead of the allowance of EUR 400 000 provided, in principle, for the children of the deceased under Paragraph 16(1)(2), of the ErbStG, it took account of a lower allowance under Paragraph 16(2) of the ErbStG.

18 By her action before the Finanzgericht Düsseldorf (Finance Court, Düsseldorf, Germany), the applicant in the main proceedings claims that she is entitled to the full allowance provided for in Paragraph 16(1)(2), of the ErbStG, arguing that Paragraph 16(2) of that provision is contrary to EU law. She avers, moreover, that the same is true of the refusal to deduct all or part of the value of the liabilities under the reserved portions, in the amount calculated by that applicant in the main proceedings, as debts under the succession.

19 The referring court states that resolution of the dispute before it depends on whether Paragraph 16(2) of the ErbStG and the second sentence of Paragraph 10(6) thereof, which apply in the event of limited liability to inheritance tax where, in circumstances such as those at issue

in the main proceedings, neither the deceased nor the heir had their place of residence or habitual residence in Germany at the time of death, are in accordance with Article 63(1) and Article 65 TFEU.

20 In the first place, that court states that Paragraph 16(2) of the ErbStG was introduced by the German legislature in order to give effect to the judgment of 8 June 2016, *Hünnebeck* (C-479/14, EU:C:2016:412). Under that provision and in accordance with Paragraph 37(14) of the ErbStG, in the case of acquisitions on death in respect of which the tax becomes chargeable after 24 June 2017, the allowance provided for in Paragraph 16(1) of the ErbStG is to be reduced by an amount calculated in accordance with Paragraph 16(2) thereof. However, the referring court doubts the compatibility of that new legislation with Article 63(1) and Article 65 TFEU, as interpreted by the Court.

21 In the second place, the referring court also questions the compatibility of the second sentence of Paragraph 10(6) of the ErbStG with those provisions.

22 In the context of the limited liability to inheritance tax, at issue in the main proceedings, Tax Office V charged tax only in respect of the domestic land assets. In that regard, Paragraph 10(6) of the ErbStG does not permit the applicant in the main proceedings to deduct the value of the liabilities to be met by her in respect of the reserved portions of her mother and her brother, as debts under the succession arising from acquisition on death, pursuant to Paragraph 10(5) of the ErbStG.

23 According to the case-law of the Bundesfinanzhof (Federal Finance Court, Germany), the economic link required by Paragraph 10(6) of the ErbStG in order to permit the deduction of debts and charges exists only where they can be attributed to certain assets included in the estate. According to that case-law, the fact that, in accordance with Paragraph 2311 of the BGB, the reserved portion is calculated on the basis of the value of the estate does not create such an economic link but, at most, a legal link.

24 That court states that if, at the date of death, the deceased or the applicant in the main proceedings had had their place of residence or habitual residence in Germany, that situation would give rise to the applicant in the main proceedings having unlimited tax liability, allowing her to deduct the whole of the liabilities under reserved portions from the estate acquired on death, as debts under the succession, on the basis of Paragraph 10(5)(2), of the ErbStG.

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

‘(1) Must Articles 63(1) and 65 of the Treaty on the Functioning of the European Union (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, liabilities under the 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 liabilities 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?'

The questions referred for a preliminary ruling

The first question

26 By its first question, the referring court asks, in essence, whether Articles 63 and 65 TFEU must be interpreted as precluding legislation of a Member State relating to the calculation of inheritance tax which provides that, in the case of acquisition of property situated in that Member State, where, on the date of death, neither the deceased nor the heir had their place of residence or habitual residence in that Member State, the allowance on the taxable value is to be reduced, in relation to the allowance applied where at least one of them, on that same date, had his or her place of residence or habitual residence in that Member State, in an amount corresponding to the share that represents the value of the asset that is not subject to tax in that same Member State in relation to the value of the entire estate.

27 According to the Court's settled case-law, although direct taxation, falls within their competence, Member States must nonetheless exercise that competence consistently with EU law and particularly the fundamental freedoms guaranteed by the FEU Treaty (see, inter alia, judgments of 23 February 2006, *van Hilten-van der Heijden*, C-513/03, EU:C:2006:131, paragraph 36 and the case-law cited; of 3 March 2021, *Promociones Oliva Park*, C-220/19, EU:C:2021:163, paragraph 73 and the case-law cited; and of 29 April 2021, *Veronsaajien oikeudenvalvontayksikkö (Income distributed by UCITS)*, C-480/19, EU:C:2021:334, paragraph 25 and the case-law cited).

28 Article 63(1) TFEU lays down a general prohibition on restrictions on the movement of capital between Member States and between Member States and third countries.

29 The tax levied on inheritances, which consist of the transfer to one or more persons of assets left by a deceased person, falls within the scope of the FEU Treaty provisions on the movement of capital, save where their constituent elements are confined to a single Member State (judgment of 26 May 2016, *Commission* v *Greece*, C-244/15, EU:C:2016:359, paragraph 25 and the case-law cited).

30 A situation in which a Member State applies inheritance tax to estate property situated on its territory, belonging to a person not residing there on the date of death and reverting to an heir who is also non-resident, cannot be regarded as a purely domestic situation. Consequently, such a situation falls within the scope of movement of capital, within the meaning of Article 63(1) TFEU.

31 It is therefore necessary to examine whether national legislation which provides, in the case of limited liability to inheritance tax, a reduction of the allowance on the taxable value, constitutes a restriction on the movement of capital within the meaning of Article 63(1) TFEU and, if so, whether such a restriction is justified.

The existence of a restriction within the meaning of Article 63 TFEU

32 As regards inheritances, the measures which constitute restrictions on the movement of capital include those which have the effect of reducing the value of the estate of a resident of a State other than the State in which the assets concerned are situated (judgment of 17 October 2013, *Welte*, C-181/12, EU:C:2013:662, paragraph 23 and the case-law cited).

33 In the present case, the national legislation at issue in the main proceedings provides that, where an estate includes immovable property situated in Germany and neither the deceased nor the heir is resident in that Member State at the date of death, the allowance on the taxable value is lower than would have been applied if the deceased or heir had, on that date, resided in that Member State. Indeed that allowance is reduced by an amount corresponding to the share represented by the value of the asset that is not subject to taxation in that same Member State in relation to the value of the entire estate.

34 Consequently, such legislation results in inheritances between non-residents being subject to a heavier tax burden than those involving at least one resident and, therefore, has the effect of reducing the value of the estate. It follows that national legislation such as that at issue in the main proceedings constitutes a restriction on the movement of capital within the meaning of Article 63(1) TFEU (see, inter alia, judgment of 17 October 2013, *Welte*, C-181/12, EU:C:2013:662, paragraphs 25 and 26 and the case-law cited).

The existence of a justification for the restriction on the free movement of capital under Article 65 TFEU

35 It follows from Article 65(1) TFEU, read in conjunction with Article 65(3) thereof, that Member States may distinguish in their national legislation between resident and non-resident taxpayers, provided that such a distinction does not constitute a means of arbitrary discrimination or a disguised restriction on the free movement of capital.

36 A distinction must therefore be drawn between the unequal treatment permitted under Article 65(1)(a) TFEU and the arbitrary discrimination prohibited by Article 65(3) thereof. In that regard, the case-law of the Court makes it clear that, in order for national tax rules to be regarded as compatible with the Treaty provisions on the free movement of capital, the difference in treatment must relate to situations which are not objectively comparable or which must be justifiable by an overriding reason in the public interest (see, to that effect, judgment of 30 June 2016, *Feilen*, C-123/15, EU:C:2016:496, paragraph 26 and the case-law cited). In the latter case, the difference in treatment must be appropriate for securing the attainment of the objective it pursues and must not go beyond what is necessary to attain it (see, to that effect, judgment of 22 November 2018, *Huijbrechts*, C-679/17, EU:C:2018:940, paragraph 30 and the case-law cited).

– *Comparability of the situations at issue*

37 The German Government claims that an inheritance involving non-residents and one involving a resident are objectively different situations. The difference in tax treatment between an estate involving non-residents and that involving a resident as regards inheritance tax relating to immovable property situated in Germany is thus objectively justified.

38 It should be noted that, under the legislation at issue in the main proceedings, the amount of inheritance tax relating to immovable property situated in Germany is calculated on the basis of both the value of that immovable property and the personal connection between the deceased and the heir. However, neither of those two criteria depends on their place of residence. Moreover, the national legislation at issue considers both the beneficiary of an estate administered between non-residents and the beneficiary of an estate involving at least one resident to be taxable persons for the purpose of collecting inheritance tax relating to immovable property in Germany. In both cases, for the purposes of calculating the amount of inheritance tax, determination of the class and the rate of tax stems from the same rules. Only as regards determination of the beneficiary's taxable enrichment does that legislation, for the purposes of calculating inheritance tax relating to immovable property situated in Germany, apply a difference in treatment between estates administered between non-residents and those involving a resident.

39 In such circumstances, it must be considered that, by placing on the same footing, for the purposes of taxation of immovable property, first, non-resident heirs who have acquired that property from a non-resident deceased and, secondly, non-resident or resident heirs who have acquired such an asset from a resident deceased and resident heirs who have acquired that same asset from a non-resident deceased, the national legislature itself considered that there was no objective difference in the situation between those two classes of heirs, in the light of detailed rules and conditions of taxation in respect of inheritance rights (see, to that effect, judgment of 17 October 2013, *Welte*, C-181/12, EU:C:2013:662, paragraph 51).

40 Indeed, as the German Government claims, first, German tax jurisdiction in cases of limited tax liability to inheritance tax applicable to inheritances between non-residents is limited to immovable property within Germany, whereas in cases of unlimited liability to that inheritance tax applicable to inheritances involving at least one resident, that jurisdiction extends to all of the devolved assets. Secondly, in the case in the main proceedings, unlike the provisions that were the subject of, inter alia, the judgment of 17 October 2013, *Welte* (C-181/12, EU:C:2013:662), the amount of the allowance applicable to partially taxable heirs is no longer determined on a flat-rate basis, but in proportion to the value of the asset over which that jurisdiction is exercised in relation to the value of the estate as a whole.

41 However, those circumstances cannot alter the finding in paragraph 39 of the present judgment. In cases of unlimited liability to tax, the amount of the allowance on the taxable value provided for by the legislation at issue in the main proceedings does not vary at all according to the amount of the taxable value that falls within the German tax jurisdiction. As is clear from the documents submitted to the Court, that allowance, which is assessed on the basis of the family relationship that exists between the heir and the deceased, is granted automatically to each heir simply because he or she is subject to inheritance tax in Germany, in order to ensure that a part of the family estate is exempted by reduction of the total amount of the inheritance. As regards taxation resulting from exercise by the Federal Republic of Germany of its tax jurisdiction, an heir with limited tax liability is in a situation comparable to that of an heir with unlimited tax

liability since, just as the status of a taxable person does not depend on the place of residence, as the legislation at issue subjects any acquisition of immovable property situated in Germany to inheritance tax whether the deceased and the heir are resident or non-resident, neither the nature of the family relationship that connects them nor the objective of partial exemption of the family estate depends on the place of residence (see, to that effect, judgment of 17 October 2013, *Welte*, C-181/12, EU:C:2013:662, paragraph 53).

42 Thus, the beneficiary of an estate in respect of which the taxable value in Germany comprises immovable property equivalent to that in respect of which the applicant in the main proceedings is liable to inheritance tax, may, if he or she has acquired such property from a person resident in Germany with whom there was a family relationship or if, resident on that territory, he or she acquired that property from such a person who did not live there, unlike that applicant, rely on the full allowance provided for by the national legislation.

43 It follows that the circumstances relied on by the German Government are not such as to render objectively different, in the light of that allowance, the situation of the non-resident heir of a non-resident deceased 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 (see, to that effect, judgment of 17 October 2013, *Welte*, C-181/12, EU:C:2013:662, paragraph 55).

44 It follows from the foregoing that the difference in treatment relating to the benefit of an allowance such as that at issue in the main proceedings concerns objectively comparable situations.

– *Whether the restriction is justified by an overriding reason in the public interest*

45 The German Government submits that that difference in treatment may be justified, in particular, by the need to ensure the cohesion of its tax system.

46 In that regard, it should be recalled that the Court has recognised that the need to preserve the coherence of a tax system may justify a restriction on the exercise of the freedoms of movement guaranteed by the Treaty. However, for such a justification to be accepted, a direct link must be established between the granting of the tax advantage concerned and the offsetting of that advantage by a particular tax, the direct nature of that link falling to be examined in the light of the objective pursued by the legislation at issue (judgment of 17 October 2013, *Welte*, C-181/12, EU:C:2013:662, paragraph 59 and the case-law cited).

47 In this instance, as stated in paragraph 41 of the present judgment, the German Government claims that, in the context of inheritance tax, the purpose of which is to tax enrichment arising from acquisitions on death, the allowance provided for in Paragraph 16 of the ErbStG, the amount of which depends on the family relationship between the deceased and the heir, is intended to ensure the exemption of part of the family estate by reduction of the total amount of the inheritance. In particular, its objective is to ensure, in the case of members of a closely linked family, that each of those taxable persons is able to take advantage of the inheritance due to him or her by being partially exempted from inheritance tax, even totally exempted as regards acquisitions of minor importance within the family.

48 To that end, under Paragraph 16(1) of the ErbStG, the beneficiaries of the estate are in a position to take advantage of that allowance in full, where the tax charge to which it relates extends to the whole of the estate acquired.

49 By contrast, Paragraph 16(2) provides that the allowance the heir may claim by reason of his or her family tie with the deceased is to be reduced in proportion to the share of the enrichment in favour of the heir which is not subject to the tax jurisdiction of the Federal Republic of Germany.

50 Accordingly, legislation such as that at issue in the main proceedings establishes a direct link between the allowance on which the heir may rely and the extent of the tax jurisdiction exercised vis-à-vis the enrichment he or she derives from the acquisition on death.

51 Furthermore, having regard to the principles recalled in paragraph 36 of the present judgment, it must be noted, first, that that link is appropriate for securing the attainment of the objective pursued by that legislation. The legislation at issue in the main proceedings ensures that, for overall enrichment of the same value, the allowance granted represents an equivalent proportion of the share of the estate subject to taxation, whether the situation is that of unlimited or limited tax liability.

52 The effect of that legislation, by authorising an heir with limited tax liability to benefit from the full allowance, even though that allowance does not relate to a tax charge on the entirety of the enrichment resulting from the acquisition by way of inheritance, is thus to prevent the ability to pay tax of the person with limited tax liability from being systematically underestimated.

53 Secondly, that legislation does not go beyond what is necessary to attain the objective pursued, provided that advantage is taken of the allowance at issue in the main proceedings in proportion to the extent of the tax jurisdiction exercised by the Federal Republic of Germany in relation to the whole of the estate. In particular, it follows from that same legislation that, if the immovable property taxed by that Member State is equivalent to the entirety of that estate, the heir with limited tax liability is entitled, like an heir with unlimited tax liability, to benefit in full from the allowance provided for by reason of his or her family relationship with the deceased.

54 It follows that, unlike the legislation providing for a flat-rate allowance in the cases of limited tax liability at issue in the case that gave rise to the judgment of 17 October 2013, *Welte* (C-181/12, EU:C:2013:662), the restriction on the movement of capital, within the meaning of Article 63(1) TFEU, resulting from national legislation such as that at issue in the main proceedings, in so far as it relates to the allowance on the taxable value, is justified by the need to preserve the coherence of the tax system.

55 Therefore, the appropriate response to the first question is that Articles 63 and 65 TFEU must be interpreted as not precluding legislation of a Member State relating to the calculation of inheritance tax which provides that, in the event of acquisition of immovable property situated in a Member State, where, at the date of death, neither the deceased nor the heir had their place of residence or habitual residence in that Member State, the allowance on the taxable value is to be reduced, in relation to the allowance applied where at least one of them, on that date, had his or her place of residence or habitual residence in that Member State, by an amount corresponding to the share that represents the value of the estate that is not subject to tax in that same Member State in relation to the value of the whole estate.

The second question

56 By its second question, the referring court asks, in essence, whether Articles 63 and 65 TFEU must be interpreted as precluding legislation of a Member State relating to the calculation of inheritance tax which provides that, in the event of acquisition of immovable property situated in

a Member State, where, on the date of death, neither the deceased nor the heir had their place of residence or habitual residence in that Member State, the liabilities under the reserved portions are not deductible, as debts under the succession, from the value of the inheritance, whereas those obligations may be deducted in full if at least one of them, on that date, had their place of residence or habitual residence in that Member State.

57 It follows from the considerations set out in paragraphs 27 to 30 of the present judgment that it is necessary to examine whether such national legislation constitutes a restriction on the movement of capital within the meaning of Article 63(1) TFEU and, if it does, whether such a restriction is justified.

The existence of a restriction within the meaning of Article 63 TFEU

58 As was observed in paragraph 32 of the present judgment, in the case of inheritance, measures which constitute restrictions on the free movement of capital include those which have the effect of reducing the value of the inheritance of a resident of a Member State other than that in which the property concerned is situated.

59 In this instance, the national legislation at issue in the main proceedings provides that, in the case of an inheritance including immovable property situated in Germany, where neither the deceased nor the heir lived in that Member State on the date of death, that heir cannot deduct, as debts under the succession, the liabilities under the reserved portions, even though that deductibility is provided where the deceased lived in Germany on that date.

60 Consequently, such legislation, which makes the right to deduct from the taxable value of the inheritance the liabilities under the reserved portions corresponding to immovable property situated on national territory conditional upon the place of residence of the deceased and of the heir on the date of death, means that inheritances between non-residents relating to such property are subject to a heavier tax burden than those involving at least one resident and, therefore, has the effect of reducing the value of that inheritance. It follows that national legislation such as that at issue in the main proceedings constitutes a restriction on the movement of capital, within the meaning of Article 63(1) TFEU (see, by analogy, judgment of 11 September 2008, *Eckelkamp and Others*, C-11/07, EU:C:2008:489, paragraphs 45 and 46).

The existence of a justification for the restriction on the free movement of capital under Article 65 TFEU

61 Therefore, it is necessary to examine whether the restriction on the free movement of capital thus established can be justified under Article 65(1)(a) TFEU and, in the light of the grounds set out in paragraphs 35 and 36 of the present judgment, whether the difference in treatment concerns situations which are not objectively comparable or whether it meets an overriding reason in the public interest and, if so, whether it is appropriate for securing the attainment of the objective that it pursues and does not go beyond what is necessary to achieve that objective.

– *Comparability of the situations at issue*

62 As is apparent from paragraphs 37 to 39 of the present judgment, as regards the amount of inheritance tax due in respect of immovable property situated in Germany, there is no objective difference between, respectively, inheritances between persons none of whom, at the date of death, resides in that Member State and inheritances between persons at least one of whom, at the date of death, resides in that State.

63 That assessment cannot be called into question by the German Government's argument that, unlike the case-law arising from, inter alia, the judgment of 11 September 2008, *Eckelkamp and Others* (C-11/07, EU:C:2008:489), and concerning the deductibility of charges on immovable property subject to inheritance tax, the liabilities under the reserved portions have no direct connection with the property situated in Germany that is subject to inheritance tax.

64 Irrespective of their classification under national law, the liabilities under the reserved portions relate, at least in part, to immovable property situated in Germany and over which, therefore, the Federal Republic of Germany exercises its tax jurisdiction.

65 It follows from the foregoing that the difference in treatment relating to the deductibility of liabilities under the reserved portions such as that at issue in the main proceedings concerns objectively comparable situations.

– *Whether the restriction is justified by an overriding reason in the public interest*

66 The German Government submits that that difference in treatment may be justified, in the first place, by the need to ensure the cohesion of its tax system.

67 As was noted in paragraph 46 of the present judgment, the need to preserve the coherence of a tax system may justify a restriction on the exercise of the freedoms of movement guaranteed by the Treaty. However, for such a justification to be allowed, a direct link must be established between the tax advantage concerned and the offsetting of that advantage by a particular tax charge, the direct nature of that link falling to be examined in the light of the objective pursued by the legislation in question.

68 In the present case, the German Government claims that the provisions relating to the deductibility of liabilities under the reserved portions are intended to enable the actual patrimonial increase resulting from the acquisition on death and in respect of which inheritance tax is due to be determined.

69 The difference in treatment arising from the legislation at issue in the main proceedings cannot be justified by the need to preserve the coherence of the German tax system, in so far as, as the Advocate General observed in point 104 of his Opinion, Paragraph 10(6) of the ErbStG has the effect of precluding the deduction of the liabilities under the reserved portions where, at the date of death, neither the deceased nor the beneficiary of the inheritance had their place of residence or their habitual residence in Germany, even though, as is apparent from paragraph 64 of the present judgment, those liabilities demonstrate, at least in part, a sufficient connection with the elements of the whole estate over which the Federal Republic of Germany exercises its tax jurisdiction and correspond to a portion of the whole estate not constituting an enrichment in favour of heirs with limited tax liability.

70 The German Government claims, in the second place, that a difference in treatment such as that at issue in the main proceedings may be justified by the principle of territoriality and by the need to ensure a balanced allocation of the Member States' powers to impose taxes, which is indeed a legitimate objective recognised by the Court (judgment of 8 June 2016, *Hünnebeck*, C-479/14, EU:C:2016:412, paragraph 65).

71 However, it must be noted that the difference in treatment relating to the deductibility of the liabilities under the reserved portions at issue in the main proceedings arises solely from the application of the German legislation concerned. Moreover, the German Government does not set out the reasons why the taking into account of liabilities under the reserved portions, where those portions relate to property over which the Federal Republic of Germany exercises its tax jurisdiction in the context of limited taxation, would give rise to that Member State renouncing one part of that jurisdiction in favour of other Member States or would affect the taxation power of that Member State (see, to that effect, judgments of 8 June 2016, *Hünnebeck*, C-479/14, EU:C:2016:412, paragraph 66 and the case-law cited, and of 22 June 2017, *Bechtel*, C-20/16, EU:C:2017:488, paragraph 70).

72 In so far as that Member State argues that such a difference in treatment is justified in order to avoid double deduction of liabilities relating to the reserved portions, it must be recalled, first of all, that a national of a Member State cannot be deprived of the possibility of relying on the provisions of the FEU Treaty on the ground that he or she is profiting from tax advantages legally provided by the rules in force in a Member State other than that in which he or she resides (judgment of 22 April 2010, *Mattner*, C-510/08, EU:C:2010:216, paragraph 41 and the case-law cited).

73 Next, as the German Government stated in its written observations and subject to verification by the referring court, there is no bilateral convention between the Federal Republic of Germany and the Republic of Austria on the taxation of inheritance tax. In those circumstances, the Member State in the territory on which the immovable property that is the subject of the inheritance is situated cannot, in order to justify a restriction on the free movement of capital stemming from its appropriate legislation, rely on the possibility, beyond its control, of the heir benefiting from a similar deduction granted by another Member State, which may, in whole or in part, offset the harm suffered by the latter due to the Member State in which that immovable property is situated not taking into account, when calculating the inheritance tax, liabilities under the reserved portions (see, inter alia, judgments of 11 September 2008, *Eckelkamp and Others*, C-11/07, EU:C:2008:489, paragraphs 67 and 68; of 11 September 2008, *Arens-Sikken*, C-43/07, EU:C:2008:490, paragraphs 64 and 65; and of 22 April 2010, *Mattner*, C-510/08, EU:C:2010:216, paragraph 42).

74 A Member State cannot rely on the existence of an advantage granted unilaterally by another Member State in order to escape its obligations under the FEU Treaty, in particular under its provisions relating to the free movement of capital (see, inter alia, judgment of 22 April 2010, *Mattner*, C-510/08, EU:C:2010:216, paragraph 43 and the case-law cited).

75 It follows that the restriction on the movement of capital, within the meaning of Article 63(1) TFEU, resulting from national legislation such as that at issue in the main proceedings, in so far as it relates to the non-deductibility of the liabilities under the reserved portions, cannot be justified either by the need to preserve the coherence of the German tax system or by the principle of territoriality and the need to ensure a balanced allocation of the Member States' powers to impose taxes.

76 Therefore, it is appropriate to reply to the second question that Articles 63 and 65 TFEU must be interpreted as precluding legislation of a Member State on the calculation of inheritance tax which provides that, in the event of transfer of immovable property situated on national territory, where, at the date of death, neither the deceased nor the heir had their place of residence or habitual residence in that Member State, the liabilities arising from the reserved portions are not deductible, as debts under the succession, from the value of the estate, although those obligations may be deducted in full if at least one of them, at that same date, had his or her place of residence or habitual residence in that Member State.

Costs

77 Since these proceedings are, for the parties to the main proceedings, a step in the actions pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fifth Chamber) hereby rules:

1. **Articles 63 and 65 TFEU must be interpreted as not precluding legislation of a Member State on the calculation of inheritance tax which provides that, in the event of acquisition of immovable property situated on national territory, where, at the date of death, neither the deceased nor the heir had their place of residence or habitual residence in that Member State, the allowance on the taxable value is to be reduced, in relation to the allowance applied where at least one of them, on that same date, had his or her place of residence or habitual residence in that Member State, by an amount corresponding to the share that represents the value of the estate that is not subject to tax in that same Member State in relation to the value of the whole estate.**

2. **Articles 63 and 65 TFEU must be interpreted as precluding legislation of a Member State on the calculation of inheritance tax which provides that, in the event of acquisition of immovable property situated on national territory, where, at the date of death, neither the deceased nor the heir had their place of residence or their habitual residence in that Member State, the liabilities under the reserved portions are not deductible, as debts under the succession, from the value of the inheritance, although those liabilities may be deducted in full if at least one of them, on that date, had his or her place of residence or habitual residence in that Member State.**

[Signatures]