Reports of Cases

JUDGMENT OF THE COURT (First Chamber)

12 October 2023*

(Reference for a preliminary ruling – Taxation – Free movement of capital – Articles 63 to 65 TFEU – Inheritance tax – Movement of capital between Member States and third countries – Immovable property located in a third country – More favourable tax treatment for immovable property located in a Member State or in a State which is party to the Agreement on the European Economic Area – Restriction – Justification – Housing policy – Effectiveness of fiscal supervision)

In Case C-670/21,

REQUEST for a preliminary ruling under Article 267 TFEU from the Finanzgericht Köln (Finance Court, Cologne, Germany), made by decision of 2 September 2021, received at the Court on 9 November 2021, in the proceedings

BA

v

Finanzamt X,

THE COURT (First Chamber),

composed of A. Arabadjiev, President of the Chamber, T. von Danwitz, P.G. Xuereb (Rapporteur), A. Kumin and I. Ziemele, Judges,

Advocate General: A.M. Collins,

Registrar: S. Beer, Administrator,

having regard to the written procedure and further to the hearing on 17 November 2022,

after considering the observations submitted on behalf of:

– BA, by F. Riedel, Rechtsanwalt,

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

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

* Language of the case: German.

after hearing the Opinion of the Advocate General at the sitting on 9 February 2023,

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 BA and Finanzamt X (Tax Office X, Germany) concerning the calculation of inheritance tax on property in a third country.

Legal context

European Union law

3 In the second recital to the Agreement on the European Economic Area of 2 May 1992 (OJ 1994 L 1, p. 3) ('the EEA Agreement'), the parties to that agreement reaffirmed 'the high priority attached to the privileged relationship between the European Community, its Member States and the [States of the European Free Trade Association (EFTA)], which is based on proximity, long-standing common values and European identity'.

German law

The ErbStG

4 The Erbschaftsteuer- und Schenkungsteuergesetz (Law on inheritance and gift tax), in the version published on 27 February 1997 (BGBl. 1997 I, p. 378), as amended by the Gesetz zur Reform des Erbschaftsteuer- und Bewertungsrechts (Law reforming the rules on inheritance tax and valuation) of 24 December 2008 (BGBl. 2008 I, p. 3018) ('the ErbStG'), provides, in point 1 of Paragraph 1(1) thereof, that 'acquisitions on death' are to be subject to inheritance tax.

5 Under Paragraph 2(1) of the ErbStG:

'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, 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 (unlimited tax liability).

The following persons are regarded as residents:

(a) natural persons having a permanent residence or their habitual residence within the country;

…'

6 Paragraph 3(1) of the ErbStG provides:

'Acquisitions on death include

1. an acquisition by way of inheritance (Paragraph 1922 of the Bürgerliches Gesetzbuch (Civil Code; "the BGB")), by legacy (Paragraph 2147 et seq. of the [BGB]) or on the basis of an asserted claim to a reserved portion (Paragraph 2303 et seq. of the [BGB]);

…'

7 Paragraph 9(1) of the ErbStG provides:

'Tax shall become chargeable,

1. in the case of acquisitions on death, on the death of the deceased

…'

8 Paragraph 10(1) and (6) of the ErbStG provides:

'(1) Taxable acquisitions include the enrichment of the acquirer, unless that enrichment is exempt (Paragraphs 5, 13, 13a, 13c, 16, 17 and 18). In the cases referred to in Paragraph 3, "enrichment" means, without prejudice to subparagraph 10, the amount obtained when the estate liabilities deductible under subparagraphs 3 to 9, the value of which is to be determined in accordance with Paragraph 12, are deducted from the value of the estate as a whole, to be determined in accordance with Paragraph 12, in so far as that value is taxable. …

…

(6) … Debts and charges which are economically linked to the assets exempted from tax under Paragraph 13c shall be deductible only up to the amount corresponding to the ratio between the value of those assets, to be valued after application of Paragraph 13c, and the value before application of Paragraph 13c.'

9 Paragraph 12(1), (3) and (7) of the ErbStG provides that:

'(1) The valuation shall be carried out, unless otherwise provided for in subparagraphs 2 to 7, in accordance with the provisions of Part I of the Bewertungsgesetz (BewG) (Allgemeine Bewertungsvorschriften) [(Law on valuation (General Valuation Rules)], in the version as published on 1 February 1991 (BGBl. [1991] I, p. 230), as last amended by Paragraph 2 of the [Gesetz zur Reform des Erbschaftsteuer- und Bewertungsrechts (Law reforming the rules on inheritance tax and valuation)] of 24 December 2008 (BGBl. [2008] I p. 3018), in the version in force respectively [("the BewG")].

…

(3) Ownership of immovable property (Paragraph 19(1) of the [BewG]) must be assessed on the basis of the value determined on the reference day of valuation (Paragraph 11) in accordance with point 1 of the first sentence of Paragraph 151(1) of the [BewG].

…

(7) Foreign ownership of immovable property and foreign business assets shall be valued in accordance with Paragraph 31 of the [BewG].'

10 Paragraph 13c(1) and (3) of the ErbStG provides:

'(1) The real estate property referred to in subparagraph 3 shall be valued at 90% of its value.

…

(3) The reduced market value approach shall apply to real estate property or to the parts thereof which:

1. are leased for residential use,

2. are located in Germany, a Member State of the European Union or a State of the European Economic Area, and

3. do not form part of business assets or agricultural or forestry holding assets within the meaning of Paragraph 13a. …'

The BewG

11 Paragraph 9 of the BewG provides:

'(1) For the purposes of the assessments, unless otherwise specified, the market value should be taken as a basis.

(2) The market value is determined by the price at which an asset could be sold, depending on its nature, in normal commercial transactions. All circumstances affecting the price should be taken into account in this respect. Unusual or personal situations should not be taken into account.

…'

12 Paragraph 31(1) of the BewG states:

'The assessment of agricultural and forestry assets, immovable property and foreign business assets is governed by the provisions of Part One of this Law, in particular Paragraph 9 (market value). …'

13 Paragraph 151(1) and (4) of the BewG states:

'(1) The following shall be assessed separately (Paragraph 179 of the Abgabenordnung [(Tax Code)]):

1. the values of the possession of immovable property (Paragraphs 138 and 157),

…

(4) Foreign assets are not subject to separate assessment.'

14 Paragraph 177 of the BewG provides:

‘The assessments referred to in Paragraph 179 and Paragraphs 182 to 196 must be based on market value (Paragraph 9).’

The BGB

15 Paragraph 1030(1) of the BGB reads as follows:

‘An object may be encumbered in such a way that the person in whose favour the encumbrance is made is entitled to extract the fruits of that object (usufruct).’

16 Paragraph 2147 of the BGB provides:

‘The heir or a legatee may be entrusted with a legacy. Unless otherwise specified by the deceased, the heir shall be responsible for the legacy.’

17 Paragraph 2174 of the BGB provides:

‘A legacy shall establish a right for the legatee to demand from the person entrusted with the legacy delivery of the object bequeathed.’

18 Paragraph 2176 of the BGB provides:

‘The legatee’s claim shall arise (devolution of the legacy), without prejudice to the right to refuse a legacy at the time of death.’

The Tax Agreement between Germany and Canada

19 The Agreement between the Federal Republic of Germany and Canada for the Avoidance of Double Taxation with respect to Taxes on Income and certain other Taxes, the prevention of Fiscal Evasion and the Assistance in Tax Matters, concluded in Berlin on 19 April 2001 (BGBl. 2002 II, p. 670; ‘the Tax Agreement between Germany and Canada’), provides in Article 2 thereof, entitled ‘Taxes Covered’:

‘(1) This Agreement shall apply to taxes on income and on capital imposed by each Contracting State and, in the case of the Federal Republic of Germany, on behalf of its *Länder*, political subdivisions or local authorities, irrespective of the manner in which they are levied.

(2) There shall be regarded as taxes on income and on capital all taxes imposed on total income, on total capital, or on elements of income or of capital, including taxes on gains from the alienation of movable or immovable property, as well as taxes on capital appreciation.

(3) The existing taxes to which the Agreement shall apply are:

(a) in the case of Canada:

the taxes imposed by the Government of Canada under the Income Tax Act,

(hereinafter referred to as “Canadian tax”);

(b) in the case of the Federal Republic of Germany:

(aa) the income tax (Einkommensteuer),

(bb) the corporation tax (Körperschaftsteuer),

(cc) the capital tax (Vermögensteuer),

(dd) the trade tax (Gewerbesteuer), and

(ee) the solidarity surcharge (Solidaritätszuschlag);

(hereinafter referred to as "German tax").

4. The Agreement shall apply also to any identical or substantially similar taxes on income and to taxes on capital which are imposed after the date of signature of the Agreement in addition to, or in place of, the existing taxes. The competent authorities of the Contracting States shall notify each other of any significant changes which have been made to their respective taxation laws.'

20 Article 26 of the Tax Agreement between Germany and Canada, entitled 'Exchange of information', provides:

'(1) The competent authorities of the Contracting States shall exchange such information as is relevant for carrying out the provisions of this Agreement or of the domestic laws in the Contracting States concerning taxes covered by the Agreement in so far as the taxation thereunder is not contrary to the Agreement. The exchange of information is not restricted by Article 1. Any information received by a Contracting State shall be treated as secret in the same manner as information obtained under the domestic laws of that State and shall be disclosed only to persons or authorities (including courts and administrative bodies) concerned with the assessment or collection of the taxes covered by the Agreement or, notwithstanding the provisions of paragraph 4, the taxes imposed by a "*Land*", or a political subdivision or local authority of a Contracting State that are substantially similar to the taxes covered by the Agreement. Such persons or authorities shall use the information only for such purposes. Such information may be disclosed in public court proceedings or in judicial decisions only if the competent authority of the Contracting State supplying the information raises no objection.

(2) In no case shall the provisions of paragraph 1 be construed so as to impose on a Contracting State the obligation:

(a) to carry out administrative measures at variance with the laws or the administrative practice of that or of the other Contracting State;

(b) to supply information which is not obtainable under the laws or in the normal course of the administration of that or of the other Contracting State;

(c) to supply information which would disclose any trade, business, industrial, commercial or professional secret or trade process, or information, the disclosure of which would be contrary to public policy (ordre public).

(3) The competent authorities of the Contracting States shall agree upon the principles and procedures relating to the exchange of personal data.

(4) For the purposes of this Article, the taxes covered by the Agreement are, notwithstanding the provisions of Article 2, all taxes imposed by a Contracting State.'

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

21 Mr A, a German resident, died in 2016. He bequeathed to his son, BA, also resident in Germany, by means of an authentic instrument drawn up in 2013, his half of a share in immovable property situated in Canada. The immovable property comprising that asset is let for residential purposes and does not form part of a business asset.

22 By decision of 17 July 2017, Tax Office X determined the amount of inheritance tax payable by BA in Germany on the entirety of the assets transferred. For the purpose of calculating that tax, the immovable property located in Canada was assessed at its full market value.

23 By letter of 19 March 2018, BA sought to amend the amount of the inheritance tax so that that property could be subject to tax at 90% of its market value, in accordance with Paragraph 13c(1) of the ErbStG. BA argued that the immovable property in question satisfied the conditions for entitlement to that tax advantage, with the sole exception of that provided for in Paragraph 13(3)(2), which requires the property to be located in Germany, another Member State or a State which is party to the EEA Agreement. He maintained that the latter provision infringed the free movement of capital between Member States and third countries enshrined in Article 63 TFEU.

24 By decision of 25 April 2018, Tax Office X rejected BA's request for amendment and then, by decision of 23 April 2019, the objection which BA had lodged.

25 Tax Office X took the view that the difference in treatment between immovable property let for residential purposes located in a non-Member State other than a State which is party to the EEA Agreement and property of the same kind located in Germany, another Member State or a State which is party to the EEA Agreement was not contrary to Article 63 TFEU.

26 The Court held, in its judgment of 22 April 2010, *Mattner* (C-510/08, EU:C:2010:216), that there is a restriction on the free movement of capital where an allowance to be set against taxable values depends on the place of residence of the persons concerned. Similarly, in its judgment of 17 January 2008, *Jäger* (C-256/06, EU:C:2008:20), it held that the grant of tax advantages in relation to inheritance tax on condition that the asset acquired by inheritance be located in the national territory constitutes a restriction on the free movement of capital prohibited, in principle, by Article 63 TFEU. However, Tax Office X took the view that that case-law did not apply to national legislation, such as that at issue in the main proceedings, which excludes from the scope of a tax advantage immovable property located in a non-Member State which is not party to the EEA Agreement.

27 On 24 May 2019, BA brought an action before the Finanzgericht Köln (Finance Court, Cologne, Germany), the referring court, seeking, in essence, annulment of the decision of 25 April 2018.

28 In the first place, the referring court asks whether a national provision which excludes from the grant of the tax advantage a property rented out for residential purposes in Canada is compatible with Article 63 TFEU. According to that court, the immovable property at issue satisfies all the conditions laid down by national law in order to benefit from the tax advantage provided for in

Paragraph 13c(1) and (3) of the ErbStG, with the exception of the condition that the property must be located in Germany, in another Member State or in a non-Member State which is party to the EEA Agreement.

29 In the second place, the referring court asks whether a national measure which subjects immovable property located in a non-Member State other than a State which is party to the EEA Agreement to a higher rate of inheritance tax and which could constitute a restriction on the free movement of capital may be justified by the standstill clause laid down in Article 64 TFEU, on one of the grounds set out in Article 65 TFEU or by overriding reasons in the public interest.

30 First of all, according to that court, Article 64 TFEU does not appear to be applicable since the tax advantage provided for in Paragraph 13c(1) and (3) of the ErbStG was introduced on 24 December 2008, with effect from 1 January 2009 and, therefore, after 31 December 1993.

31 Next, the referring court considers that immovable property let for residential purposes which is located in Germany, another Member State, a State which is party to the EEA Agreement or another third country is in a comparable situation for the purpose of the application of Article 65(1)(a) TFEU.

32 Moreover, that court considers that it is difficult to justify the restriction on the free movement of capital on the basis of Article 65(1)(b) TFEU, which provides that Member States may take all requisite measures to prevent infringements of their laws and regulations, in particular in the field of taxation, since, under Article 26(4) of the Tax Agreement between Germany and Canada, those two States may exchange information in respect of all taxes levied in either of them.

33 Lastly, the referring court states that there appears to be no overriding reason in the public interest, for the purposes of Article 65(2) TFEU, capable of justifying the restriction on the free movement of capital stemming from the national legislation.

34 In those circumstances, the Finanzgericht Köln (Finance Court, Cologne) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

‘Are [Article] 63(1), [Article] 64 and [Article] 65 TFEU to be interpreted as precluding national legislation of a Member State on the levying of inheritance tax which, for the purposes of calculating inheritance tax, provides that developed immovable property forming part of personal assets which is located in a third country (in this case: Canada) and is let for residential purposes is to be taken into account at its full value, whereas immovable property forming part of personal assets which is located within the national territory, in a Member State of the European Union or in a State of the European Economic Area and is let for residential purposes is to be taken into account at only 90% of its value in the calculation of inheritance tax?’

Consideration of the question referred

35 By its question, the referring court asks, in essence, whether Articles 63 to 65 TFEU must be interpreted as precluding legislation of a Member State which provides that, for the purposes of calculating inheritance tax, developed immovable property forming part of personal assets which is located in a non-Member State other than a State which is party to the EEA Agreement and is

let for residential purposes is assessed at its full market value, whereas property of the same nature which is located within the national territory, in another Member State or in a State which is party to the EEA Agreement is assessed, for the purposes of that calculation, at 90% of its market value.

36 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 (judgment of 21 December 2021, *Finanzamt V (Inheritance – Partial allowance and deduction of reserved portions)*, C-394/20, EU:C:2021:1044, paragraph 27 and the case-law cited).

37 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.

38 According to settled case-law, the tax treatment of successions falls within the TFEU provisions on the movement of capital, except in cases where their constituent elements are confined within a single Member State (judgment of 22 November 2018, *Huijbrechts*, C-679/17, EU:C:2018:940, paragraph 16 and the case-law cited).

39 A situation in which a Member State applies inheritance tax to estate property located outside its territory, belonging to a person residing in its territory on the date of death and reverting to an heir who is also a resident of that Member State, 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.

40 It is therefore necessary to examine whether national legislation of a Member State which provides that, for the purposes of calculating inheritance tax, immovable property located in a non-Member State which is not party to the EEA Agreement is to be assessed at its full market value whereas such property located in that Member State is assessed, for the purposes of that calculation, at 90% of its market value constitutes a restriction on the movement of capital for the purposes of Article 63(1) TFEU and, if so, to ascertain whether such a restriction may be permitted under Article 64(1) TFEU or, where appropriate, be justified under Article 65 TFEU.

The existence of a restriction on the free movement of capital for the purposes of Article 63(1) TFEU

41 The Court has held, in relation to inheritance tax, that the fact that the grant of tax advantages is made subject to the condition that the asset transferred be situated in the national territory constitutes a restriction on the free movement of capital prohibited, in principle, by Article 63(1) TFEU (judgment of 18 December 2014, *Q*, C-133/13, EU:C:2014:2460, paragraph 20 and the case-law cited). Similarly, measures 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 also constitute such a restriction (judgment of 21 December 2021, *Finanzamt V (Inheritance – Partial allowance and deduction of reserved portions)*, C-394/20, EU:C:2021:1044, paragraph 32 and the case-law cited).

42 Furthermore, it should be recalled that the measures prohibited by Article 63(1) TFEU include those which are such as to discourage non-residents from making investments in a Member State or to discourage that Member State's residents from doing so in other States (judgment of 15 October 2009, *Busley and Cibrian Fernandez*, C-35/08, EU:C:2009:625, paragraph 20).

43 In the present case, the national legislation at issue in the main proceedings provides that, where an inheritance includes developed immovable property which forms part of personal assets and which is let for residential purposes, that property is assessed, for the purposes of calculating inheritance tax, not at its full market value but at 90% of that value, where it is located in the national territory, in another Member State or in a non-Member State which is party to the EEA Agreement. That legislation excludes from the tax advantage immovable property located in a non-Member State which is not party to the EEA Agreement.

44 Such legislation, which makes entitlement to the tax advantage dependent on the location of the assets contained in the inheritance, results in immovable property situated in a non-Member State other than a State which is party to the EEA Agreement being subject to a heavier tax burden than that situated within the national territory and, therefore, has the effect of reducing the value of that inheritance (see, to that effect, judgment of 17 January 2008, *Jäger*, C-256/06, EU:C:2008:20, paragraph 32).

45 Furthermore, that tax disadvantage is liable to discourage a natural person resident in Germany both from investing in an immovable property let for residential purposes that is situated in a non-Member State other than a State which is party to the EEA Agreement and from keeping any such property of which he or she is the proprietor (see, to that effect, judgment of 15 October 2009, *Busley and Cibrian Fernandez*, C-35/08, EU:C:2009:625, paragraph 27).

46 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, which, moreover, is not disputed by the German Government.

The application of Article 64(1) TFEU concerning restrictions on the free movement of capital with regard to third countries

47 The referring court is uncertain whether such a restriction, in so far as it concerns the movement of capital with a third country, may be allowed under Article 64(1) TFEU.

48 In that regard, it should be borne in mind that, under that provision, Article 63 TFEU is to be without prejudice to the application to third countries of any restrictions which exist on 31 December 1993 under national or EU law adopted in respect of the movement of capital to or from third countries involving direct investment – including in real estate –, establishment, the provision of financial services or the admission of securities to capital markets.

49 As regards the notion of 'restrictions which exist on 31 December 1993' in Article 64(1) TFEU, it should be borne in mind that any national provision adopted after that date is not, by that fact alone, automatically excluded from the derogation provided for in that provision. The Court has accepted that restrictions laid down in provisions adopted after that date which, in essence, are identical to previous legislation or which are limited to reducing or eliminating an obstacle to the exercise of rights and freedoms of movement in that legislation can be treated as equivalent to such restrictions 'which exist' (judgment of 26 February 2019, *X (Controlled companies established in third countries)*, C-135/17, EU:C:2019:136, paragraph 37 and the case-law cited).

50 In the present case, it should be noted that, according to the information provided by the referring court, the tax advantage at issue in the main proceedings, provided for in Paragraph 13c(1) and (3) of the ErbStG, was introduced for the first time into the German legal system on

24 December 2008, with effect from 1 January 2009. Therefore, as the German Government and the European Commission note, the standstill clause in Article 64(1) TFEU cannot apply to that national legislation, which was adopted after 31 December 1993.

51 Consequently, a restriction on the free movement of capital to a third country, such as the restriction at issue in the main proceedings, does not escape the application of Article 63(1) TFEU on the basis of Article 64(1) TFEU.

52 In those circumstances, it should be examined to what extent that restriction on the free movement of capital may be justified in the light of Article 65 TFEU.

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

53 Under Article 65(1)(a) TFEU, Article 63 TFEU is without prejudice to the right of Member States to apply the relevant provisions of their tax law which distinguish between taxpayers who are not in the same situation with regard to their residence or with regard to the place where their capital is invested.

54 That provision, in so far as it constitutes a derogation from the fundamental principle of the free movement of capital, must be interpreted strictly. Therefore, it cannot be interpreted as meaning that any tax legislation which makes a distinction between taxpayers on the basis of their place of residence or the State in which they invest their capital is automatically compatible with the FEU Treaty. The derogation provided for in Article 65(1)(a) TFEU is itself limited by Article 65(3) TFEU, which provides that the national provisions referred to in paragraph 1 of that article 'shall not constitute a means of arbitrary discrimination or a disguised restriction on the free movement of capital and payments as defined in Article 63 [TFEU]' (judgment of 27 April 2023, *L Fund*, C-537/20, EU:C:2023:339, paragraph 44 and the case-law cited).

55 The Court has also held that a distinction must therefore be drawn between differences in treatment permitted under Article 65(1)(a) TFEU and discrimination prohibited by Article 65(3) TFEU. For national tax legislation to be considered compatible with the provisions of the FEU Treaty relating to the free movement of capital, the resulting difference in treatment must relate to situations which are not objectively comparable or be justified by an overriding reason relating to the public interest (judgments of 30 June 2016, *Feilen*, C-123/15, EU:C:2016:496, paragraph 26, and of 27 April 2023, *L Fund*, C-537/20, EU:C:2023:339, paragraph 45 and the case-law cited).

56 It is therefore necessary to examine, in the first place, the comparability of the situations at issue in the main proceedings and, if they are comparable, in the second place, whether the different treatment of those situations can be justified by an overriding reason in the public interest.

Comparability of the situations at issue

57 In the context of examining whether the situations concerned are comparable, the referring court considers that immovable property forming part of private assets let for residential purposes located in a non-Member State other than a State which is party to the EEA Agreement is in a situation objectively comparable to that of a property of the same nature in Germany, another Member State or a State which is party to the EEA Agreement. According to that court, the situations differ only in terms of the location of the immovable property.

58 The German Government, for its part, argues, in essence, that the respective situations of immovable property located, on the one hand, in a non-Member State which is not party to the EEA Agreement and, on the other, in Germany, in another Member State or in a State which is party to the EEA Agreement are not objectively comparable. The German legislature is not required to extend the tax advantage provided for by the national legislation at issue in the main proceedings, which is intended to promote affordable rented accommodation in Germany, in other Member States or in States which are party to the EEA Agreement, to immovable property situated in non-Member States which are not parties to that agreement. Apart from the fact that the situation in terms of rents may be very different in those latter States, that government submits, referring to the judgment of 18 December 2014, *Q* (C-133/13, EU:C:2014:2460, paragraph 27), that the difference in tax treatment between inheritances concerning, on the one hand, immovable property let for residential purposes located in those States and, on the other, similar assets located in Germany, another Member State or a State which is party to the EEA Agreement is inherent in the objective pursued by the German legislature.

59 It follows from the Court's case-law, first, that the comparability or otherwise of a cross-border situation with a domestic situation must be examined having regard to the objective pursued by the national provisions at issue and to the purpose and content of those provisions, and, second, that only the relevant distinguishing criteria established by the legislation at issue must be taken into account for the purpose of assessing whether the difference in treatment resulting from such legislation reflects a difference in objective situation (judgment of 27 April 2023, *L Fund*, C-537/20, EU:C:2023:339, paragraph 54 and the case-law cited).

60 It is apparent from the observations submitted to the Court by the German Government that the purpose of the national legislation at issue in the main proceedings is to reduce the tax burden on immovable property let for residential purposes which may compel heirs to sell such immovable property as a result of the inheritance tax for which they are liable, unlike institutional investors which are not subject to that tax.

61 The tax advantage resulting from that legislation concerns inheritances of all immovable property let for residential purposes, without distinction, located in Germany, another Member State or a State party to the EEA Agreement.

62 It is apparent from the documents before the Court that the calculation of inheritance tax is, under that legislation, directly linked to the market value of the assets included in the estate, with the result that there is objectively no difference in situation such as to justify unequal tax treatment so far as concerns the level of inheritance tax payable in relation to, respectively, an immovable property located in Germany, another Member State or a State which is party to the EEA Agreement and an immovable property located in a non-Member State other than States which are party to the EEA Agreement (see, to that effect, judgment of 17 January 2008, *Jäger*, C-256/06, EU:C:2008:20, paragraph 44).

63 Furthermore, there is nothing in the documents before the Court to support a finding that the immovable property forming part of private assets let for residential purposes in Canada is not in a situation comparable to that of such property let for residential purposes in Germany, in another Member State or in a State which is party to the EEA Agreement.

64 In those circumstances, and without prejudice to the assessment of whether the legislation at issue in the main proceedings might be justified by an overriding reason in the public interest, it would deprive Article 63(1) TFEU of all meaning if it were accepted that situations are not comparable

solely because the immovable property in question is situated in a non-Member State other than a State which is party to the EEA Agreement, when that provision specifically prohibits restrictions on cross-border movements of capital (see, to that effect, judgment of 26 February 2019, *X (Controlled companies established in third countries)*, C-135/17, EU:C:2019:136, paragraph 68).

65 In that regard, the situation at issue in the main proceedings in the present case is different from the situation which gave rise to the judgment of 18 December 2014, *Q* (C-133/13, EU:C:2014:2460), relied on by the German Government. The tax advantage at issue in the latter case was intended to preserve the integrity of certain rural estates forming part of the national cultural and historical heritage against any parcelling out or fundamental changes in the nature of those estates and applied only to gifts relating to those specific estates. By contrast, the tax advantage at issue in the main proceedings relates to inheritances of immovable property let for residential purposes in general.

66 Having regard to the foregoing considerations, the difference in treatment at issue in the main proceedings concerns situations that are objectively comparable.

The existence of an overriding reason in the public interest

67 It should be noted that, according to the Court's settled case-law, a restriction on the free movement of capital may be permitted if it is justified by overriding reasons relating to the public interest, is suitable for securing, in a consistent and systematic manner, the attainment of the objective which it pursues and does not go beyond what is necessary in order to attain that objective (see, to that effect, judgments of 18 June 2020, *Commission* v *Hungary (Transparency of associations)*, C-78/18, EU:C:2020:476, paragraph 76, and of 27 April 2023, *L Fund*, C-537/20, EU:C:2023:339, paragraph 66 and the case-law cited).

68 In the present case, it should be noted that, although the referring court does not rely on such reasons in the order for reference, the German Government submits that the restriction on the free movement of capital brought about by the national legislation at issue in the main proceedings is capable of being justified by two overriding reasons in the public interest, namely, first, the requirements related to the public housing policy of a Member State and, second, the need to guarantee the effectiveness of fiscal supervision.

– *The public housing policy of a Member State*

69 The German Government submits that the tax advantage provided for in Paragraph 13c(1) and (3) of the ErbStG is justified by requirements related to the housing policy pursued by that Member State. That provision reduces the inheritance tax for which heirs of immovable property let for residential purposes are liable and thus reduces the tax burden which may compel them to sell such property. In addition, it favours the letting of housing by individuals over the letting of housing by large institutional investors, which are not subject to inheritance tax. Thus, the tax advantage provided for by that provision is suitable for securing, in conjunction with other measures, the objective of enabling the population to gain access to affordable rented accommodation not only in Germany but also in other Member States and States which are party to the EEA Agreement, since access by the population to affordable rented accommodation is also a task of a European nature.

70 In that regard, it should be recalled that the Court has already accepted that requirements related to public housing policy in a Member State and to the financing of that policy can, in principle, constitute overriding reasons in the public interest (judgment of 1 October 2009, *Woningstichting Sint Servatius*, C-567/07, EU:C:2009:593, paragraph 30).

71 The Court has also held that, since the European Union has an economic and social purpose, the rights under the provisions of the FEU Treaty on the free movement of goods, persons, services and capital must be balanced against the objectives pursued by social policy, which includes, as is clear from the first paragraph of Article 151 TFEU, proper social protection (see, to that effect, judgment of 21 December 2016, *AGET Iraklis*, C-201/15, EU:C:2016:972, paragraph 77).

72 As regards the EEA Agreement, it reaffirms, as stated in its second recital, the special relationship between the European Union, its Member States and the EFTA States, which is based on proximity, long-standing common values and European identity. It is in the light of that special relationship that one of the principal objectives of the EEA Agreement must be understood, namely to provide for the fullest possible realisation of the free movement of goods, persons, services and capital within the whole of the European Economic Area (EEA), so that the internal market established within the European Union is extended to the EFTA States (judgment of 2 April 2020, *Ruska Federacija*, C-897/19 PPU, EU:C:2020:262, paragraph 50).

73 Thus, an objective relating to social policy, such as the promotion and provision of affordable rented accommodation in Member States and States which are party to the EEA Agreement, may, in principle, constitute an overriding reason in the public interest capable of justifying restrictions on the free movement of capital such as those established by the national legislation at issue in the main proceedings.

74 However, it is still necessary to ascertain, in accordance with the case-law referred to in paragraph 67 of the present judgment, whether the restriction on the free movement of capital brought about by the national legislation at issue in the main proceedings is suitable for securing, in a consistent and systematic manner, the attainment of the objective which it pursues and does not go beyond what is necessary in order to attain that objective.

75 In that regard, it is not apparent that a national measure, such as that provided for in Paragraph 13c(1) and (3) of the ErbStG, which draws a distinction according to whether immovable property let for residential purposes is located either within the national, EU or EEA territory or in the territory of a non-Member State other than a State which is a party to the EEA Agreement is suitable for securing, in a consistent and systematic manner, the attainment of the objective relied on by the German Government. As the Commission rightly observed at the hearing, instead of focusing on places where there is a particularly acute shortage of such housing, such as, in particular, in large German cities, Paragraph 13c of the ErbStG applies generally, including in States which are party to the EEA Agreement, and disregards whether the immovable property is located in a rural or urban area. Moreover, all categories of immovable property let for residential purposes, from the most basic to the most luxurious, may be valued at 90% of their market value for the purposes of calculating inheritance tax (see, to that effect, judgment of 15 October 2009, *Busley and Cibrian Fernandez*, C-35/08, EU:C:2009:625, paragraph 32).

76 Furthermore, it is not apparent from the documents before the Court that the legislation at issue in the main proceedings requires heirs to retain their housing for a specified period and to use it for rental purposes, so that they may, after obtaining the tax advantage at issue in the main proceedings, sell that housing or use it as a second home.

77 In those circumstances, the tax advantage at issue in the main proceedings cannot be regarded as justified by the objective of promoting and providing affordable rented accommodation in Member States and States which are party to the EEA Agreement.

– *The need to guarantee the effectiveness of fiscal supervision*

78 The Court has consistently held that the need to guarantee the effectiveness of fiscal supervision constitutes an overriding reason in the public interest capable of justifying a restriction on the free movement of capital (judgment of 26 February 2019, *X (Controlled companies established in third countries)*, C-135/17, EU:C:2019:136, paragraph 74 and the case-law cited).

79 It must be recalled that the case-law concerning restrictions on the exercise of the freedoms of movement within the European Union cannot be transposed in its entirety to movements of capital between Member States and third countries, since such movements take place in a different legal context (judgment of 26 February 2019, *X (Controlled companies established in third countries)*, C-135/17, EU:C:2019:136, paragraph 90 and the case-law cited).

80 In particular, where the legislation of a Member State makes the grant of a tax advantage dependent on satisfying conditions compliance with which can be verified only by obtaining information from the competent authorities of a non-Member State other than a State which is party to the EEA Agreement, it is in principle legitimate for the Member State to refuse to grant that advantage if – in particular, because that non-member State is not bound under an agreement to provide information – it proves impossible to obtain the requisite information from it (judgment of 10 February 2011, *Haribo Lakritzen Hans Riegel and Österreichische Salinen*, C-436/08 and C-437/08, EU:C:2011:61, paragraph 67 and the case-law cited).

81 According to the national legislation at issue in the main proceedings, the tax advantage at issue is granted where the immovable property is let for residential purposes.

82 It should be noted that it is apparent from the order for reference that, under Article 26(4) of the Tax Agreement between Germany and Canada, the taxes referred to in that agreement are, notwithstanding the provisions of Article 2 of that agreement, all taxes imposed by a contracting State. In that regard, Paragraph 11 of the Protocol to the [Tax Agreement between Germany and Canada] (BGBl. II 2002, p. 703) provides that, with reference to Article 26, it is understood that, if information is requested by a Contracting State in accordance with that article, the other Contracting State is to endeavour to obtain the information to which the request relates in the same way as if its own taxation were involved notwithstanding the fact that the other State does not, at that time, need such information. Furthermore, the possibility of recourse to Article 26(4) of the Tax Agreement between Germany and Canada was confirmed by the German Government at the hearing.

83 Consequently, the German authorities are in a position to ask the competent Canadian authorities for the information necessary to verify that the conditions laid down in Paragraph 13c of the ErbStG are satisfied in order to grant the tax advantage at issue in the main proceedings when the immovable property is located in Canada. In that regard, it is also apparent from the order for reference that there are no difficulties in the context of that exchange of information.

84 It follows that the need to guarantee the effectiveness of fiscal supervision cannot justify the restriction on the free movement of capital brought about by the national legislation at issue in the main proceedings.

85 In the light of all the foregoing considerations, the answer to the question referred is that Articles 63 to 65 TFEU must be interpreted as precluding legislation of a Member State which provides that, for the purposes of calculating inheritance tax, developed immovable property forming part of personal assets which is located in a non-Member State other than a State which is party to the EEA Agreement and is let for residential purposes is assessed at its full market value, whereas property of the same nature which is located within the national territory, in another Member State or in a State which is party to the EEA Agreement is assessed, for the purposes of that calculation, at 90% of its market value.

Costs

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

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

Articles 63 to 65 TFEU must be interpreted as precluding legislation of a Member State which provides that, for the purposes of calculating inheritance tax, developed immovable property forming part of personal assets which is located in a non-Member State other than a State which is party to the Agreement on the European Economic Area of 2 May 1992 and is let for residential purposes is assessed at its full market value, whereas property of the same nature which is located within the national territory, in another Member State or in a State which is party to the Agreement on the European Economic Area is assessed, for the purposes of that calculation, at 90% of its market value.

[Signatures]