OPINION OF ADVOCATE GENERAL MENGOZZI

delivered on 14 October 2008 [1]

I — Introduction

1. In this case, the Court is being asked, in essence, whether a gift in kind made by a person resident in a Member State to a foreign body [2] recognised as charitable in its Member State of origin falls within the scope of the provisions of the EC Treaty concerning the free movement of capital and, if so, whether the Member State in which the donor resides may, without infringing Articles 56 EC and 58 EC, allow a tax deduction on such a donation only if it is made to a body resident in that Member State.

2. The reference was made by the Bundesfinanzhof (Federal Finance Court, Germany) in the course of proceedings between Mr Hein Persche and the Finanzamt Lüdenscheid (District Tax Office, Lüdenscheid; 'the Finanzamt') regarding the deduction for tax purposes of a gift in kind made to a body established in Portugal and recognised as charitable in that Member State, in connection with the taxation of the income of the appellant in the main proceedings for the year 2003.

1 — Original language: French.

2 — In this Opinion, that term is used in a generic sense, that is to say, inter alia, irrespective of whether that body has public or private status under national law.

II — Legal framework

A — *Community legislation*

3. Under Article 56(1) EC, all restrictions on the movement of capital between Member States and between Member States and third countries are prohibited.

4. Article 58(1) EC provides:

'The provisions of Article 56 shall be without prejudice to the right of Member States:

(a) to apply the relevant provisions of their tax law which distinguish between taxpayers who are not in the same situation with regard to their place of residence or with regard to the place where their capital is invested;

(b) to take all requisite measures to prevent infringements of national law and regulations, in particular in the field of taxation and the prudential supervision of financial institutions,... or to take measures which are justified on grounds of public policy or public security.'

5. Article 58(3) EC provides that the measures and procedures referred to in Article 58(1) EC must not constitute a means of arbitrary discrimination or a disguised restriction on the free movement of capital and payments as defined in Article 56 EC.

6. Article 1(1) of Council Directive 77/799/EEC of 19 December 1977 concerning mutual assistance by the competent authorities of the Member States in the field of direct taxation, [3] as amended by Council Directive 92/12/EEC of 25 February 1992 on the general arrangements for products subject to excise duty and on the holding, movement and monitoring of such products, [4] ('Directive 77/799') provides:

'In accordance with this Directive the competent authorities of the Member State[s] shall exchange any information that may enable them to effect a correct assessment of taxes on income and capital...'

7. Article 2 of Directive 77/799 states:

'1. The competent authority of a Member State may request the competent authority of another Member State to forward the information referred to in Article 1(1) in a particular case. The competent authority of the requested State need not comply with the request if it appears that the competent authority of the State making the request has not exhausted its own usual sources of information, which it could have utilised, according to the circumstances, to obtain the information requested without running the risk of endangering the attainment of the sought after result.

2. For the purpose of forwarding the information referred to in paragraph 1, the competent authority of the requested Member State shall arrange for the conduct of any enquiries necessary to obtain such information.'

8. Article 8 of Directive 77/799 provides:

'1. This Directive shall impose no obligation to have enquiries carried out or to provide information if the Member State, which should furnish the information, would be prevented by its laws or administrative practices from carrying out these enquiries

3 — OJ 1977 L 336, p. 15.
4 — OJ 1992 L 76, p. 1.

or from collecting or using this information for its own purposes.

…

3. The competent authority of a Member State may refuse to provide information where the State concerned is unable, for practical or legal reasons, to provide similar information.'

B — *German tax law relating to personal income tax*

9. Under Paragraph 10b(1) of the Law on Income Tax (Einkommensteuergesetz; 'the EStG'), taxpayers may deduct, from the total amount of their income, as exceptional deductible expenses up to a certain amount, expenditure which promotes benevolent, church, religious or scientific charitable purposes, and purposes recognised as particularly worthy of support. Under Paragraph 10b(3) of the EStG, that also applies to gifts in kind.

10. Under Paragraph 49 of the Regulations implementing Income Tax (Einkommensteuer-Durchführungsverordnung), donations are deductible for tax purposes only if the recipient is a resident legal person governed by public law, a resident public office, a corporation, an unincorporated association or a fund listed in Paragraph 5(1)(9) of the Law on Corporation Tax (Körperschaftsteuergesetz). This latter provision defines the corporations, associations and funds ('the bodies') which are exempt from corporation tax, namely those which, in terms of their statutes and in the way they actually conduct their operations, pursue exclusively and directly charitable, benevolent or church purposes. However, Paragraph 5(2)(2) of the Law on Corporation Tax provides that that exemption applies only to bodies established in Germany.

11. Paragraph 50(1) of the Regulations implementing Income Tax provides that, subject to particular provisions relating to donations of up to EUR 100, donations within the meaning of Paragraph 10b of the Law on Income Tax may be deducted only if supported by an official form completed by the recipient body.

12. For the purposes of assessing the donor's liability to income tax, that form constitutes sufficient evidence that the recipient of the gift

satisfies the legal requirements. The donor's tax authorities are therefore not required to check that the recipient body fulfils the requirements for entitlement to the tax advantages.

13. Paragraphs 51 to 68 of the Regulations on Taxes (Abgabenordnung; 'the AO') define the purposes which a body must pursue and the manner in which those purposes must be pursued in order to benefit from the tax exemption.

14. Accordingly, Paragraph 52(1) and (2)(2) of the AO provides that a body carries on its activities for charitable purposes if its activities are intended to promote the interests of the general public, children or elderly people. In accordance with Paragraph 55 of the AO, the body must act altruistically, which means, for example, that its assets must be used exclusively and immediately for purposes treated favourably by tax law and not for the benefit of its members. Under Paragraph 59 of the AO, such a body cannot be entitled to the tax advantage in question unless its statutes show that it pursues exclusively and directly purposes that satisfy the requirements of Paragraphs 52 to 55 of the AO.

15. Under Paragraph 193 et seq. of the AO, whether the way a body actually conducts its operations complies with its statutes and whether its assets are used altruistically and immediately can be verified by an on-the-spot inspection. If the body satisfies the requirements for the tax exemption, it is entitled to issue donation certificates for the donations it receives, using the aforementioned officially approved form.

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

16. In his tax return for 2003, Mr Persche claimed the deduction, as an exceptional deductible expense, of a gift in kind of bed-linen and towels, and also Zimmer frames and toy cars for children. That donation was made to the Centro Popular de Lagoa (Portugal) ('the Centro Popular') in a total value of EUR 18 180. It was not stated where the applicant acquired and paid for the items listed. The Centro Popular is a retirement home to which a children's home has been added, situated in an area where the applicant owns a house which he himself uses each year.

17. The applicant enclosed with his tax return a document by which the Centro Popular confirmed receipt of that donation, and a declaration dated 21 March 2001 by the Director of the Faro (Portugal) District Centre for Solidarity and Social Security that in 1982 the Centro Popular was registered as a private social solidarity body with the General

Directorate of Social Services and that it was accordingly entitled to all exemptions and tax benefits conferred by Portuguese law on bodies recognised as charitable. The applicant submits that the original donation certificate is sufficient under Portguese law to entitle him to a tax deduction.

18. By its tax assessment for 2003, the Finanzamt refused the deduction claimed. It also rejected, as unfounded, the objection lodged against that assessment by the appellant in the main proceedings. The appeal which he brought before the Finanzgericht Münster (Finance Court, Münster) was also unsuccessful. The appellant in the main proceedings subsequently lodged an appeal before the Bundesfinanzhof.

19. In its order for reference, that court points out that the Finanzamt had to disallow the deduction of the donation in question on the dual ground that the recipient of the donation was not established in Germany and that the taxpayer did not provide a donation certificate in the form prescribed by the AO. The court is uncertain, however, whether a gift in kind of everyday consumer goods falls within the scope of application of Articles 56 EC to 58 EC and, if so, whether those articles preclude a Member State from allowing the deduction for tax purposes of such a gift only if the recipient is established in its national territory.

20. In that regard, the national court observes that the Court of Justice acknowledged, in its judgment in *Centro di Musicologia Walter Stauffer*,[5] that it is for the Member States to determine what are the interests of the general public they wish to promote by granting tax benefits. However, the national court points out that the Court of Justice started from the view expressed by the referring court in that case — another chamber of the Bundesfinanzhof — that the promotion of the interests of the general public within the meaning of Paragraph 52 of the AO does not mean that such measures have to benefit German nationals or residents. The referring court in the present case states that, in German law, that view is disputed.

21. The national court then points out that, in paragraph 49 of its judgment in *Centro di Musicologia Walter Stauffer*, the Court held that a Member State cannot invoke the requirement for effective fiscal supervision to justify a refusal to grant an exemption to a taxpayer established in another Member State since the former Member State may always require the taxpayer to provide the relevant supporting evidence. The national court points out in that regard that, according to the case-law of the Bundesverfassungsgericht (Federal Constitutional Court), for reasons of equal tax treatment, a tax assessment cannot depend solely on a declaration of, and information provided by, the taxable person, and the declaration procedure must be supplemented by on-the-spot inspections.

5 — Case C-386/04 [2006] ECR I-8203.

22. Against that background, the national court is uncertain, first, whether the mutual assistance required by Directive 77/799 can constrain the authorities of the Member State in which the body in question is established to carry out an on-the-spot inspection and, secondly, even if that were possible, whether it would not be contrary to the principle of proportionality to require the German tax authorities to carry out such checks in order to determine the deductibility for tax purposes of any donation, whatever its value, made to such a body.

23. In those circumstances, the Bundesfinanzhof decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Do donations [in kind] of everyday [consumer] goods by a national of a Member State to bodies which have their seat in a different Member State and, under the law of that Member State, are recognised as charitable, fall within the scope of the principle of free movement of capital (Article 56 EC)?

(2) If Question 1 is answered in the affirmative:

Having regard to the obligation of tax authorities to verify statements made by taxable persons and to the principle of proportionality (third paragraph of Article 5 EC), is it incompatible with the principle of free movement of capital (Article 56 EC) for the law of a Member State to confer a tax benefit on donations to charitable bodies only if the latter are resident in that Member State?

(3) If Question 2 is answered in the affirmative:

Does Directive 77/799 ... impose an obligation on the tax authorities of Member States to obtain assistance from the administrative authorities of another Member State in order to verify facts which have occurred in that other Member State, or can the procedural rules of a taxable person's home Member State require him to bear the burden of proof (objective burden of proof) in relation to facts which have occurred abroad?'

IV — Procedure before the Court

24. Pursuant to Article 23 of the Statute of the Court of Justice, written observations were submitted to the Court by the German, Greek, French and United Kingdom Governments and Ireland, as well as by the Commission of the European Communities and by the EFTA Surveillance Authority. Those parties, the Finanzamt and the Spanish Government presented oral argument at the hearing held on 17 June 2008.

V — Analysis

A — *The first question*

25. By its first question, the national court is asking whether a gift in kind made by a natural person, resident in one Member State, to a body established in another Member State may constitute a movement of capital within the meaning of Article 56 EC.

26. The Commission and the EFTA Surveillance Authority propose that this question be answered in the affirmative.

27. On the other hand, the governments which have submitted observations in this case submit that cross-border gifts in kind do not fall within the scope of Article 56 EC. For those governments, that article concerns only movements of capital effected in the exercise of an economic activity or the pursuit of an economic objective. They are movements of capital made for 'investment' or 'placement' purposes. The governments add that the nomenclature annexed to Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty, [6] which was repealed by the Treaty of Amsterdam, is only indicative and non-binding in character and, in any event, its Heading XI, entitled 'Personal capital movements', concerns only relations between natural persons. Moreover, according to Ireland, it is difficult to imagine that donations other than money donations were envisaged when Annex I to Directive 88/361 was adopted. Finally, the Greek Government maintains that a transfer of everyday consumer goods, which is not a means of payment and is not made for investment purposes, falls exclusively within the scope of the provisions of the Treaty relating to the free movement of goods.

28. I cannot agree with the arguments put forward by the intervening governments.

29. It is indeed true that the Treaty provides no definition of the term 'movement of capital'. It is also true that the Court has stated that the movements of capital referred to in Article 67 of the EEC Treaty (which, after amendment, became Article 73b of the EC Treaty, now Article 56 EC) are financial operations concerned *essentially* with the placement or investment of the funds in question rather than remuneration for a service. [7]

6 — OJ 1988 L 178, p. 5.

7 — See Joined Cases 286/82 and 26/83 *Luisi and Carbone* [1984] ECR 377, paragraph 21, and Case 308/86 *Lambert* [1988] ECR 4369, paragraph 10.

30. Nevertheless, it should be pointed out that, contrary to what the governments which have submitted observations in this case intimate, that definition does not require that every cross-border financial operation, in order to be classified as a movement of capital within the meaning of Article 56 EC, must pursue exclusively an investment or placement objective. Nor does it purport to cover all operations falling within the scope of the movement of capital. Rather, that definition, in the context in which it was given, is intended to identify where a transfer of assets constitutes not a movement of capital but a current payment, that is to say, the consideration in a transaction in the area of trade in goods and services, [8] a situation which, in any event, cannot include a gift in kind such as that in the main proceedings.

31. That said, I consider that both Directive 88/361 and the case-law of the Court of Justice militate in favour of classifying as movements of capital gifts in kind made between two natural or legal persons resident or established in different Member States.

32. In that regard, it is important to point out that the case-law of the Court regularly refers to the nomenclature annexed to Directive 88/361 to determine the material scope of the free movement of capital, subject to the qualification that that nomenclature retains its indicative value for defining the term 'movement of capital' and that the list set out therein is not exhaustive. [9] However, it is not disputed that the nomenclature provides, under point B of Heading XI, that gifts and endowments, like, among others, inheritances and legacies referred to in point D of that heading, are movements of capital to be included in the category of 'personal capital movements'.

33. Contrary to what the governments which have submitted observations before the Court maintain, it is not apparent from either the wording or scheme of Heading XI that the capital movements to which that heading refers include only financial transactions between natural persons and/or money transactions.

34. As regards the first point, I consider that the mere 'personal nature' of the transactions listed under Heading XI cannot have the consequence that only operations concluded between natural persons are covered by that heading. Moreover, it makes no sense to limit in that way the scope of the capital movements listed under Heading XI. It is difficult to accept, for example, that the settlement of

8 — See, in that regard, *Luisi and Carbone*, paragraph 23, and *Lambert*, paragraph 10.

9 — See, for example, Case C-222/97 *Trummer and Mayer* [1999] ECR I-1661, paragraph 21; Joined Cases C-515/99, C-519/99 to C-524/99 and C-526/99 to C-540/99 *Reisch and Others* [2002] ECR I-2157, paragraph 30; Case C-513/03 *van Hilten-van der Heijden* [2006] ECR I-1957, paragraph 39; *Centro di Musicologia Walter Stauffer*, paragraph 22; Case C-194/06 *Orange European Smallcap Fund* [2008] ECR I-3747, paragraph 100; and Case C-43/07 *Arens-Sikken* [2008] ECR I-6887, paragraph 29.

debts by immigrants in their previous country of residence, an operation covered by that heading, as are gifts, cannot include such a payment to legal persons. Also, it is somewhat contradictory to maintain, as do most of the governments which have submitted observations before the Court, that capital movements cover only operations with a purely economic objective and, simultaneously, to claim that, among operations of a personal nature, only those concluded between natural persons fall within the scope of the free movement of capital.

35. Generally, such a restriction on the scope to personal operations is hard to reconcile with the inherent nature of the free movement of capital, which is a freedom based on the object of the transactions rather than on the nature of the persons who carry them out. [10] It is also doubtless the reason why none of the intervening governments disputes the fact that that freedom may apply in a situation in which the beneficiary of the transactions at issue, namely the Centro Popular, does not pursue a profit-making purpose. It would, moreover, be difficult to adopt a contrary approach, in the light of the judgment in *Centro di Musicologia Walter Stauffer*, in which the Court accepted that the free movement of capital applied to operations carried out by a non-profit-making charitable foundation.

36. As regards the second point, it is important to emphasise that the Court has repeatedly held that inheritances, mentioned in point D of Heading XI, constituted movements of capital (in so far as their constituent elements are not confined within a single Member State), without drawing a distinction, for the purposes of the legal classification of those operations, according to whether the deceased's estate is composed of movable property or financial assets and/or immovable property. [11] In the judgment in *van Hilten-van der Heijden*, the Court, moreover, expressly accepted a broad material definition of the term 'inheritance', stating that such a transaction consisted of 'a transfer to the deceased's heirs of the ownership of the *various assets, rights, etc.*, of which that [person's] estate is composed'. [12]

37. It is difficult to see why it should be otherwise as regards the term 'gifts', referred to in point B of Heading XI in Annex I to Directive 88/361.

10 — See, to that effect, points 58 to 60 of the Opinion of Advocate General Stix-Hackl in *Centro di Musicologia Walter Stauffer*.

11 — See Case C-364/01 *Barbier* [2003] ECR I-15013, paragraph 58; *van Hilten-van der Heijden*, paragraphs 40 to 42; Case C-256/06 *Jäger* [2008] ECR I-123, paragraph 25; and *Arens-Sikken*, paragraphs 30 and 31.

12 — *Van Hilten-van der Heijden*, paragraph 41, and *Arens-Sikken*, paragraph 30 (emphasis added).

38. In short, gifts, like inheritances, consist in the transfer, without consideration, of the ownership of assets to third parties, irrespective of whether those assets are made movable or immovable. The fact that, in the main proceedings, the gift was made in the form of everyday consumer goods represents only a method of payment, and does not alter the fact that what is being transferred is the ownership of the donor's assets or part of his estate. [13]

39. Since I believe that such must be the meaning of the term 'gifts' in point B of Heading XI, I conclude that there is no obstacle to finding that gifts in kind constitute movements of capital within the meaning of Article 56 EC provided that their constituent elements are not confined within a single Member State, in line with what the Court has held with regard to inheritances and legacies.

40. Since it has been shown that Article 56 is applicable, the Greek Government's argument, that the provisions of the Treaty relating to the free movement of goods may be relevant, must therefore be rejected. [14] It need only be added in this connection that the fact which gave rise to the national restriction of which Mr Persche complains in the main proceedings is the giving of a donation to a charitable body situated outside Germany, [15] not the export of the everyday consumer goods which are the subject of the gift in question. [16]

41. For all those reasons, I propose that the answer to the first question should be that gifts of everyday consumer goods by a national of a Member State to a body which has its seat in another Member State and is, under the law of the latter Member State, recognised as charitable constitute movements of capital within the meaning of Article 56 EC.

B — *The second question referred*

42. By its second question, the national court asks whether, having regard, in particular, to the fact that the tax authorities must be able to verify statements made by taxable persons, and that they cannot be required to act in breach of the principle of proportionality, the provisions of the Treaty relating to the free

13 — The use of that method of payment often reflects the donor's wish not only to realise the value of his action in a personal and specific manner, but also to be completely sure that it is properly allocated by the donee.

14 — The free movement of capital and the free movement of goods seem, indeed, to be mutually exclusive. See, as regards means of payment, Case 7/78 *Thompson and Others* [1978] ECR 2247, paragraphs 21 to 26, and Joined Cases C-358/93 and C-416/93 *Bordessa and Others* [1995] ECR I-361, paragraph 12; see also, in respect of savings deposits, Case 267/86 *Van Eycke* [1988] ECR 4769, paragraph 25.

15 — It is also important to note that the German legislation at issue in the present case does not distinguish, for the purposes of the tax deductions which the donor may claim, between cash donations and those in kind to bodies pursuing charitable purposes.

16 — It should also be pointed out that the referring court provides no information as to whether those everyday consumer goods were purchased in Portugal or in another Member State.

movement of capital preclude legislation of a Member State which allows a deduction for tax purposes in respect of gifts to charitable bodies only if they have their seat in its national territory.

43. It is therefore a question, in essence, of deciding whether national legislation such as that at issue in the main proceedings constitutes a restriction on the free movement of capital and, if so, whether that restriction may nevertheless be regarded as compatible with that freedom either because it concerns situations which are not objectively comparable or because it is justified by an overriding reason in the public interest. [17]

1. The existence of a restriction on the movement of capital

44. According to settled case-law, although direct taxation falls within their competence, the Member States must exercise that competence consistently with Community law. [18]

45. Under Article 56 EC, all restrictions on the movement of capital between Member States are prohibited. Accordingly, measures imposed by a Member State which confer less favourable treatment on cross-border movements than on national movements and are, therefore, likely to discourage its residents from effecting capital movements in other Member States constitute restrictions on the movement of capital. [19]

46. It should be pointed out that the German legislation at issue in the main proceedings precludes the tax deduction of gifts made by German taxpayers to a foreign body recognised as charitable in the Member State in which it is established.

47. There is little doubt, generally speaking, that the tax deduction of a gift has a significant influence on a donor's generosity. Moreover, most, if not all, Member States grant donors tax advantages, in various forms. By according such advantages, the Member States reduce the costs of the gift for the donor and therefore encourage him to repeat his gesture. If such an advantage is precluded, it is likely that fewer people will make gifts.

17 — See, to that effect, Case C-35/98 *Verkooijen* [2000] ECR I-4071, paragraph 43; Case C-319/02 *Manninen* [2004] ECR I-7477, paragraphs 28 and 29; *Centro di Musicologia Walter Stauffer*, paragraph 32; and Case C-443/06 *Hollmann* [2007] ECR I-8491, paragraph 45.

18 — See, in particular, *Centro di Musicologia Walter Stauffer*, paragraph 15, and Case C-101/05 *A* [2007] ECR I-11531, paragraph 19 and the case-law cited therein.

19 — See, to that effect, Case C-484/93 *Svensson and Gustavsson* [1995] ECR I-3955, paragraph 10; *Trummer and Mayer*, paragraph 26; Case C-439/97 *Sandoz* [1999] ECR I-7041, paragraph 19; Case C-478/98 *Commission* v *Belgium* [2000] ECR I-7587, paragraph 18; *van Hilten-van der Heijden*, paragraph 44; and Case C-370/05 *Festersen* [2007] ECR I-1129, paragraph 24.

48. Where, as in the present case, such an exclusion applies only to gifts to charitable bodies established outside the national territory, donors will prefer to turn, for the same purpose, to national bodies in order to obtain the benefit of the tax deductions. The German legislation is thereby liable to dissuade its residents from making gifts to foreign bodies recognised as charitable in their Member State of establishment. Such bodies are therefore undeniably rendered less attractive than their counterparts established in Germany.

49. It will be noted, moreover, that the governments which have submitted observations to the Court do not dispute that cross-border donations receive less favourable treatment. The French Government has even acknowledged that such a difference in treatment puts bodies situated in another Member State at a disadvantage and may thus constitute an obstacle to the free movement of capital. Indeed, for bodies established in other Member States, such legislation makes it more difficult to raise funds, because if donors who pay tax in Germany choose to make donations to such bodies, they will not be eligible for the tax advantages granted under that legislation.

50. Therefore, I consider that legislation such as that at issue in the main proceedings constitutes a restriction on the movement of capital which is, in principle, prohibited by Article 56(1) EC.

2. The justifications for the restriction on the movement of capital

51. In respect of the justifications for the restriction on the movement of capital referred to above, the Finanzamt and the governments which have submitted observations to the Court invoke the lack of objective comparability between the situations and the need to ensure effective fiscal supervision. These two types of justification are examined below.

(a) The justification relating to the lack of objective comparability between the situations

52. By virtue of Article 58(1)(a) EC, the provisions of Article 56 EC are without prejudice to the right of Member States to apply the relevant provisions of their tax law which distinguish between taxpayers who are not in the same situation with regard to their place of residence or with regard to the place where their capital is invested.

53. That article, as 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 making a distinction between taxpayers by reference to their place of residence or the Member State in which their capital is invested would auto-

matically be compatible with the Treaty. The derogation in Article 58(1)(a) EC is limited by Article 58(3) EC, which provides that the measures and procedures referred to in Article 58(1) and (2) must not constitute a means of arbitrary discrimination or a disguised restriction on the free movement of capital. [20]

54. It follows, as the Court has stated, that a distinction must be made between unequal treatment which is permitted under Article 58(1)(a) EC and arbitrary discrimination which is prohibited by Article 58(3) EC. [21] Only national rules under which differences in treatment relate to situations which are not objectively comparable fall within the former category.

55. It is important to note that the main proceedings concern the tax treatment, in Germany, of a donor who is a taxpayer in that Member State, not that of the body which was the recipient of the gift. The legislation at issue in the main proceedings does not establish any difference in treatment between *taxpayers* by reference to their place of residence, since the body which was the recipient of the donation does not pay taxes in Germany. On the other hand, the German legislation does not allow the tax deduction of gifts made by natural persons, German taxpayers, to a foreign body recognised as charitable in the Member State in which it has its seat. That legislation therefore creates a difference in the tax treatment of German taxpayers by reference to the place where their capital is invested. Therefore, whether such a difference in treatment between resident taxpayers is compatible with the free movement of capital depends on whether the recipient charitable body established abroad is in a situation which is objectively comparable to that of a charitable body established in Germany.

56. In that regard, the German, French and United Kingdom Governments and Ireland maintain that, for the purposes of Article 58(1)(a) EC, a body recognised as charitable which has its seat and activities in Germany is not in the same situation as a similar body which has neither its seat nor its activities in Germany.

57. More specifically, the German and French Governments point out that, if a Member State waives certain tax revenue by exempting charitable bodies situated in that State, it is because those bodies relieve it of certain charitable tasks which that Member State would otherwise have to undertake itself.

20 — See, to that effect, *Manninen*, paragraphs 26 and 28, and *Centro di Musicologia Walter Stauffer*, paragraphs 30 and 31.

21 — See, in particular, *Manninen*, paragraph 29; *Centro di Musicologia Walter Stauffer*, paragraph 32; and *Hollmann*, paragraph 44.

58. The German Government adds, in reference to the judgment in *Centro di Musicologia Walter Stauffer*, that a Member State may limit the grant of a tax advantage to bodies showing a sufficiently close link to the national territory. Although that government accepts that the promotion of the interests of the general public within the meaning of Paragraph 52 of the AO does not preclude the State from encouraging activities undertaken abroad, it nevertheless considers that that provision applies only to tasks for which the German State has chosen to take responsibility at international level, but does not cover all the activities which, if they were carried out in Germany, would fall within the meaning of 'charitable', such as promoting the welfare of children or elderly people.

59. In addition, the United Kingdom Government argues that gifts to national bodies and those to bodies situated in another Member State are not comparable in the sense that, first, Member States may apply different concepts of welfare and different requirements for the recognition of charitable status and, secondly, a Member State can itself check compliance with those requirements only in the case of national bodies.

60. These arguments are not persuasive, particularly having regard to the lessons flowing from the judgment in *Centro di Musicologia Walter Stauffer*.

61. As for the general argument put forward by the United Kingdom Government, that Member States are free to apply different concepts of welfare and requirements for the recognition of charitable works, it should be pointed out that, in the abovementioned judgment, the Court stated very clearly that the Member States were free to determine what are the interests of the general public they wish to promote by granting benefits to associations and foundations which pursue, altruistically, objects linked to such interests. As the Court also accepted, it is not a requirement under Community law for Member States *automatically* to confer on foreign foundations recognised as having charitable status in their Member State of origin the same status in their own territory. [22]

62. Therefore, to accept that the Member States have a discretion when determining the general interests they wish to promote and to refuse the automatic application of mutual recognition of the bodies recognised as charitable in the different Member States does not, contrary to what the United Kingdom Government appears to claim, solve the problem of the objective comparability between the situations of bodies established, admittedly, in different Member States, but which have as their objective — and this is not disputed in the main proceedings — the promotion of the same general interests, in this case, the welfare of children and elderly people.

22 — *Centro di Musicologia Walter Stauffer*, paragraph 39.

63. However, it seems to me that the Court dealt with that issue in *Centro di Musicologia Walter Stauffer*, in a situation which, contrary to what the governments intervening in this case argue, does not differ significantly from that which the Court faces today.

64. It should be recalled that, in *Centro di Musicologia Walter Stauffer*, a foundation recognised as charitable in Italy asked the German tax authorities to accord it the tax treatment (exemption) afforded to foundations of the same kind established in Germany in respect of income from the rental of a building situated there. It is apparent from the judgment in that case that that foundation did not carry out any of its charitable activities in Germany, but that these benefited exclusively cultural relations between the Italian Republic and the Swiss Confederation, [23] and that it was refused the tax exemption in respect of rental income on the ground that it had neither its seat nor management in Germany. [24]

65. As for the objective comparability of that foundation's situation with that of a foundation established in Germany, the Court, first of all, rejected the arguments expressed, particularly by the German Government, to the effect that only foundations established in Germany assume tasks which would otherwise be carried out by that Member State, and that, for the purposes of granting certain tax advantages, there had to be a sufficiently close link between the foundations recognised as charitable and Germany or the German general public. It did so on the ground that Paragraph 52 of the AO sought the promotion of the interests of the general public without drawing a distinction as to whether those activities are carried out in Germany or abroad, since the national court which had made the reference for a preliminary ruling, the Bundesfinanzhof, had stated that that provision did not mean that measures to promote the interests of the general public must benefit German nationals or residents. [25]

66. I consider that assessment to be equally valid in the present case.

67. Indeed, although the German Government attempted to establish, in its written observations, that application of Paragraph 52 of the AO was limited to tasks for which the German State has chosen to take responsibility at international level, but did not cover all the activities which, if they were carried out on national territory, would fall within the concept of general interest, such as promoting the welfare of children or elderly people, the

23 — Paragraph 9.
24 — Paragraph 11.
25 — *Centro di Musicologia Walter Stauffer*, paragraphs 37 and 38.

fact remains, however, that, in its definition of the facts and the national legal framework, [26] the national court, except for its remark that there is debate on this issue in national law, did not cast doubt on the interpretation of Paragraph 52 of the AO accepted by that same court in *Centro di Musicologia Walter Stauffer*. Moreover, a restrictive interpretation of Paragraph 52 of the AO, limiting it to objectives of general interest with an international dimension, as proposed by the German Government, is difficult to support in the light of the rather limited cultural objectives pursued by the Centro di Musicologia Walter Stauffer foundation which were nevertheless recognised under German national law as being in the general interest, within the meaning of Paragraph 52 of the AO. [27]

68. I therefore consider, in line with what was stated in the judgment in *Centro di Musicologia Walter Stauffer*, that the existence of a sufficiently close link with the national territory, meaning that the measures to promote the interests of the general public must benefit German nationals or residents, is irrelevant to the decision in the main proceedings.

69. Thus, in the main proceedings, the fact, which is probable although not verified, that the activities of the Centro Popular benefit children and/or elderly people, of Portuguese nationality or, at least, resident in Portugal, is not a decisive factor as regards the examination of the objective comparability of the situation of that body, recognised as charitable, with that of an identical body established in Germany.

70. It is indeed true that the Centro Popular, unlike the Centro di Musicologia Walter Stauffer foundation, is not subject to tax, even partly, in Germany. I readily accept that being subject to assessment to income tax in Germany can mean that the national tax authorities receive greater cooperation from the body in question, since it will wish to obtain directly the tax advantages provided for under German law. However, I do not consider that that circumstance is of any consequence for the purposes of deciding whether non-resident bodies are in a situation comparable to that of resident bodies. Indeed, as the EFTA Surveillance Authority rightly pointed out at the hearing, the partial assessment to tax of the Centro di Musicologia Walter Stauffer foundation in Germany concerned not the information from which it could be determined whether that foundation pursued charitable objectives and satisfied the conditions imposed by the AO, information which was all in Italy, the Member State in which it had its seat and management, but only the tax payable in respect of its rental income received in Germany.

26 — It is settled case-law that that is the task of the national court: see, in particular, Case C-217/05 *Confederación Española de Empresarios de Estaciones de Servicio* [2006] ECR I-11987, paragraph 26 and the case-law cited therein.

27 — For the record, that foundation pursued objectives of education and training, by supporting instruction in the classical methods of production of stringed and bowed instruments, the history of music and musicology in general. It could establish one or more scholarships to enable Swiss young people to reside in Cremona (Italy) during the entire period of instruction.

71. I have therefore come to share the view held by the Commission and the EFTA Surveillance Authority, that, in the present case, it is necessary to ascertain whether the criteria laid down by the Court in paragraph 40 of the judgment in *Centro di Musicologia Walter Stauffer*, are fulfilled. More specifically, it is apparent from that paragraph that it is a matter for the national authorities of a Member State, including its courts, to determine whether a body recognised as having charitable status in another Member State also satisfies the requirements imposed for that purpose by the law of the former Member State and whether its object is to promote the very same interests of the general public, in which case that body will be in a situation objectively comparable to that of the bodies established in the territory of that Member State and must, as a rule, be entitled to equal treatment. [28]

72. In that regard, the order for reference shows that, during the tax year at issue, the Centro Popular pursued, in Portugal, the promotion of charitable objects identical to those recognised by Paragraph 52 of the AO. On the other hand, the national court provides no information regarding whether the Centro Popular complied with the conditions laid down in its statutes and with those imposed by the AO requiring the actual management of the body to be in accordance with the objects stated in its statutes.

28 — See *Centro di Musicologia Walter Stauffer*, paragraphs 40 and 41.

73. The reason for that lacuna is simple and intrinsically linked to the second question referred for a preliminary ruling, that is, that the national court wishes to ascertain whether the automatic refusal of the deduction of the gift made by Mr Persche to the Centro Popular on the ground that it is not established in Germany is compatible with the free movement of capital. The German legislation is based on the premiss that, *as a matter of principle*, bodies such as the Centro Popular are in a situation which is not objectively comparable to that of charitable bodies established in Germany.

74. However, there is no doubt that the arguments set out by the Court in paragraph 40 of the judgment in *Centro di Musicologia Walter Stauffer presuppose that it is possible to demonstrate* that the conditions laid down by the national legislation for the recognition of the charitable status of non-profit-making bodies are satisfied.

75. Since it appears that no evidence for that purpose was requested or examined by the national authorities in the main proceedings, it follows, in my view, that the refusal to allow the tax deduction of a gift, such as that made by Mr Persche to the Centro Popular, on the ground that the recipient charitable body is not established in the national territory cannot be justified by the fact that that body is, *as a matter of principle*, in a situation which is not objectively comparable to that of bodies which pursue identical charitable objects and which are established in the national territory.

76. Since such a tax measure cannot be regarded as constituting unequal treatment permitted under Article 58(1)(a) EC, there remains to be examined whether it can be justified by the need to ensure effective fiscal supervision, as the national court and the governments which have lodged observations before the Court have suggested.

(b) The justification relating to the need to ensure effective fiscal supervision

77. The Court has consistently held that the need to guarantee the effectiveness of fiscal supervision constitutes an overriding requirement in the public interest capable of justifying a restriction on the exercise of the freedoms of movement guaranteed by the Treaty. [29]

78. It should also be recalled that, for a restrictive measure to be justified, it must comply with the principle of proportionality, in that it must be appropriate for securing the attainment of the objective it pursues and must not go beyond what is necessary to attain it. [30]

79. I note that, in the judgment in *Centro di Musicologia Walter Stauffer*, the Court rejected the arguments of the German and United Kingdom Governments and Ireland that it is difficult to ascertain whether, and to what extent, a charitable foundation which is established abroad actually fulfils the objects laid down in its statutes in accordance with national law, and that it is necessary to monitor the effective management of that foundation.

80. Accordingly, the Court held that, although it is for the Member States to ascertain whether a foundation meets the conditions imposed by national law, the fact that it may prove more difficult to carry out those checks in the case of a foundation established in another Member State constitutes a disadvantage of a purely administrative nature which is not sufficient to justify a refusal on the part of the authorities of the State concerned to grant such a foundation the same tax exemptions as are granted to a foundation of the same kind, which, in principle, has unlimited tax liability in that State. [31]

81. In that regard, the Court pointed out that the tax authorities concerned could require a charitable foundation claiming exemption from tax to provide relevant supporting evidence to enable those authorities to carry out the necessary checks, in particular as regards the monitoring of its effective management, for example, by requiring the

29 — See, in particular, Case C-250/95 *Futura Participations and Singer* [1997] ECR I-2471, paragraph 31; Case C-315/02 *Lenz* [2004] ECR I-7063, paragraphs 27 and 45; *Centro di Musicologia Walter Stauffer*, paragraph 47; and *A*, paragraph 55.

30 — See, in particular, *A*, paragraph 56 and the case-law cited therein.

31 — *Centro di Musicologia Walter Stauffer*, paragraph 48.

submission of annual accounts and an activity report. On the other hand, the Court ruled out the possibility that effective fiscal supervision could justify national legislation which *absolutely* prevents the taxpayer from submitting such evidence. [32] It also referred to the mutual assistance provided for by Directive 77/799, which affords the tax authorities of a Member State the right to call upon the authorities of another Member State in order to obtain all the information that may be necessary to effect a correct assessment of a taxpayer's liability to tax, including information as to whether that person may be granted a tax exemption. [33]

82. In the present case, the arguments developed, in particular, by the German and United Kingdom Governments and Ireland are not significantly different from those which the same governments put forward before the Court in *Centro di Musicologia Walter Stauffer*. I consider that the Court should respond to those arguments in the same way as it did in that case.

83. Admittedly, those governments strive to distinguish the present case from the situation in *Centro di Musicologia Walter Stauffer*. Thus, they maintain that, unlike the situation in that case, the taxpayer concerned is not the charitable body, but merely a donor, who will not generally have essential information regarding the management of the body which receives his donations. They also submit that, if the donor asks the body to provide him with that information, it is not easy for that body to comply with his request, since the effort expended in that task does not necessarily constitute a good use of the funds available to it. Moreover, they consider that Directive 77/799 is not an appropriate instrument for requesting the competent authorities of the Member State in which the body is established to carry out a comprehensive inspection to ensure that that body is complying with all the conditions laid down by the legislation of another Member State, including those relating to the actual management of that body's activities in accordance with its statutes. Finally, the United Kingdom Government adds that, unlike the infrequent case of a body owning immovable property in another Member State, which was before the Court in *Centro di Musicologia Walter Stauffer*, the deduction for tax purposes of donations made to bodies situated abroad might require the tax authorities of the Member States to check on thousands of bodies subject, in each of the Member States or associated entities of the Member States, to different conditions. In the light of the impossibility of carrying out such a task of verification, a Member State has at its disposal no measure less restrictive than a refusal to allow a tax deduction for gifts made to bodies abroad. The opposite solution would impose a disproportionate burden on the tax authorities.

32 — Ibid., paragraph 49.
33 — Ibid., paragraph 50 and the case-law cited therein.

84. Although I am not insensitive to some of those considerations, I doubt that they could justify the restriction on the free movement of capital described above.

85. It is true that, in the case of a gift to a charitable body established in Germany, it is not for the donor taxpayer to adduce evidence that the recipient manages its charitable activity in accordance with its statutes. Indeed, the Federal Republic of Germany has introduced a proof of donation form, issued by the recipient body, which the donor has only to attach to his tax return and/or his claim for a tax deduction. For assessing the donor's tax liability, the rule is therefore that the donation must be in accordance with national legislation and verification is only exceptional, since it is the charitable body which is subject to regular checks by means of periodical returns and possible on-the-spot inspections.

86. However, even if it is conceded, as the German Government argues, that it is more difficult to obtain the cooperation of a body established in another Member State, since that body is not itself partially subject to tax in the Member State in which the tax advantage is claimed, an absolute refusal to afford the donor, a German taxpayer, the opportunity to adduce, at the very least, proof relating to the statutes and effective management of the foreign body, on the ground that, *as a general rule*, such a donor does not have that information, is disproportionate to the objective which the German tax measure seeks to achieve. Indeed, I consider that it cannot be ruled out, a priori, that the donor, a German taxpayer, is able to provide relevant documentary evidence enabling the German tax authorities to ascertain, clearly and precisely, that the foreign body complies with the conditions laid down in its statutes and with those relating to its effective management imposed by the national legislation concerning the recognition of the charitable status of non-profit-making bodies. [34]

87. It is also difficult to accept the argument by, in particular, the United Kingdom Government that any check on charitable bodies established in other Member States would be impossible or, at least, involve a disproportionate administrative burden, so that the exclusion of the tax advantage at issue in the present case is the only appropriate measure for guaranteeing the effectiveness of fiscal supervision.

88. Admittedly, it is difficult to deny that according the taxpayers of one Member State the right to deduct donations which they make to charitable bodies established in other Member States is likely to involve an increase in the administrative burden on the tax authorities of the former Member State in their task of verifying whether the foreign

34 — See, to that effect, Case C-39/04 *Laboratoires Fournier* [2005] ECR I-2057, paragraph 25.

bodies concerned satisfy the conditions laid down by the national legislation. It is also likely that such a right will lead to a consequent adjustment in the administrative practices which have until now been focused, essentially, on purely internal situations.

89. However, I do not think that the effectiveness of fiscal supervision would be jeopardised if the Member States had to authorise such a right in order to comply with Community law.

90. First of all, such a verification would not have to be initiated unless two prior conditions are satisfied. First, the initiation of such a verification on the part of the national tax authorities presupposes that the national legislation, in the same way as the German legislation, establishes no link (or, at least, establishes a particularly remote link) between the activities of the charitable bodies and the national territory and/or the promotion of the interests of the nationals or inhabitants of the donor's Member State. Secondly, it also presupposes that the charitable object promoted by the foreign body is also recognised as such by the donor's Member State.

91. Next, and in so far as the donor's Member State makes the tax deduction of the donation conditional on the recipient body being effectively managed in accordance with its statutes, the tax authorities will be entitled, as has already been stated, to require the taxpayer to provide relevant supporting documents enabling it to verify whether that requirement is satisfied. In the absence of such supporting documents, and subject to the conditions set out in point 110 of this Opinion, the tax authorities will be fully entitled to refuse the tax advantage claimed.

92. Furthermore, if the verification of the status and effective management of the body has to be carried out, it is apparent from the documents before the Court that, in the case of bodies established in Germany, documentary checks are usually sufficient. In particular, although the governments which have lodged observations in this case have specifically stressed the difficulty of carrying out on-the-spot inspections of foreign bodies, it appears that such checks are undertaken, at least as regards the Federal Republic of Germany, as the German Government itself concedes, on bodies established in Germany only if the tax authorities suspect irregularities in the effective management of those bodies. Under the principle of equal treatment, it should be no different in the case of bodies established in other Member States which are in a situation objectively comparable to that of national bodies.

93. I therefore consider that according the same tax treatment to gifts to foreign bodies recognised as charitable in their Member

State of establishment as to gifts made to national bodies which are in an objectively comparable situation should not impose a disproportionate administrative burden on the tax authorities of the donor's Member State.

94. Admittedly, it may be that, irrespective of the type of check to be carried out, the tax authorities of the donor's Member State will need, at least initially, the assistance, in some cases, of the competent authorities of the Member State in which the recipient body is established, unless their own information or the documentary evidence provided by the donor with, where appropriate, the collaboration of the recipient body is sufficient. [35]

95. In that regard, nor can I accept the argument of the intervening governments to the effect that the allegedly inappropriate nature of the mutual assistance established by Directive 77/799 would justify, in circumstances such as those of the main proceedings, the automatic refusal to allow the tax deduction of a donation made to a body established in another Member State.

96. Contrary to what those governments assert, the fact that Article 2(1) of Directive 77/799 grants the competent authority of a Member State the right to ask the competent authority of another Member State to forward the information referred to in Article 1(1) of that directive, 'in a particular case', that is to say, the information necessary to effect a correct assessment of a taxpayer's liability to tax including information as to whether that person may be granted a tax exemption, [36] does not mean that that provision may restrict such a request to information only of a specific kind or limited to the amount of tax payable by the taxpayer.

97. On the contrary, since, in order to determine correctly whether or not a tax deduction should be allowed in respect of a German donor, the tax authorities of a Member State would have to obtain information concerning the effective management in accordance with its statutes of the recipient body situated in the requested Member State, I consider that there is nothing to prevent the former authorities from requesting that kind of information from the competent autho-

35 — It cannot be ruled out, a priori, that the supporting documents provided by the donor will be sufficient, particularly if the recipient body is internationally well known and carries out, through its national branches, identical charitable activities in various Member States. Moreover, in cases, which are far from isolated, in which the donor repeats his charitable gesture year after year to the same body, the verification ought to be easier after the first year. Also, as is apparent from the facts in the main proceedings (see point 16 of this Opinion), the making of donations to a foreign body whose charitable activities are local in nature may arise from personal links established by the donor with that body and/or with the locality in which that body is situated. Probably, in such a case, those links will enable the donor to obtain the collaboration of that body and thus enable him to gather much relevant information for the tax authorities of his Member State of residence.

36 — See, in that regard, *Centro di Musicologia Walter Stauffer*, paragraph 50 and the case-law cited therein.

rities of the latter Member State. Indeed, Article 1(1) of Directive 77/799 specifies that the cooperation between national authorities is to relate to '*any* information that *may* enable them to effect a correct assessment of taxes on income' to which the taxpayer is liable. [37] It should also be stated that recourse to the mutual assistance provided for by Directive 77/799 in such circumstances does not, of course, affect the powers of the tax authorities of the donor's Member State to assess, in particular, whether the conditions to which the legislation of that Member State subjects the deduction of a donation are fulfilled. [38]

98. Naturally, it is conceivable, in the light of the restrictions on the exchange of information laid down in Article 8 of Directive 77/799, that the information sought from the competent authorities of the requested Member State is not forwarded or, if it is, is not always sufficient to enable verification of the supporting documents already provided by the taxpayer.

99. However, it is important to note that the Court has already held that a Member State cannot rely on the fact that it may be impossible to seek cooperation from another Member State in conducting inquiries or collecting information in order to justify a refusal to grant a tax advantage, since the tax authorities are entitled to request from the taxpayer the evidence that they consider they need to effect a correct assessment of the taxes concerned. [39] That assertion must extend, a fortiori, to the argument, which is used to justify an automatic refusal to allow a tax deduction to a taxpayer from one Member State who makes a donation to a charitable body situated in another Member State, that the system for exchanging tax information is inadequate.

100. In any event, and subject to the assessments given in point 110 of this Opinion, the tax authorities of the donor's Member State should be entitled to refuse the tax advantage claimed if they are unable to verify, in a clear and precise manner, the information with which the donor has provided them. [40]

101. On the other hand, an automatic refusal to allow the tax deduction sought in the main proceedings, without allowing the donor to adduce evidence that the foreign recipient body, recognised as charitable in the Member State in which it has its seat, may satisfy the conditions imposed by German law relating to the objects set out in its statutes and the

37 — Emphasis added.

38 — See, to that effect, Case C-184/05 *Twoh International* [2007] ECR I-7897, paragraph 36 and the case-law cited therein.

39 — See, in particular, *A*, paragraph 58.

40 — *Centro di Musicologia Walter Stauffer*, paragraphs 48 and 49, and *A*, paragraphs 58 and 59.

effective management of national bodies of the same kind, seems to me disproportionate in relation to the aim of guaranteeing the effectiveness of fiscal supervision.

102. For all those reasons, I consider that the answer to the second question referred for a preliminary ruling should be that Articles 56 EC and 58 EC preclude legislation of a Member State under which a deduction for tax purposes cannot be allowed in respect of a gift made by one of its taxpayers unless the recipient charitable body is established in that Member State, without permitting the donor to adduce evidence that the recipient body, established in another Member State and, under the law of that Member State, recognised as charitable, may satisfy the conditions imposed by the legislation of the former Member State on bodies of the same kind situated in its territory.

C — *The third question referred*

103. By its third question, the national court is asking, in essence, whether, in order to clarify a factual situation which has occurred within the jurisdiction of another Member State, the tax authorities of the Member State of the donor taxpayer are obliged to seek the mutual assistance provided for by Directive 77/799 or whether they are entitled to let the burden of proof rest on the donor taxpayer, in accordance with the national procedural law.

104. The observations I have made in points 94 to 100 of this Opinion have already answered this question to some extent.

105. As the Court has held, it is apparent from both the purpose and content of Directive 77/799 that the mutual assistance for which it provides is only the possibility of national tax authorities requesting information which they cannot obtain for themselves. Such a request does not in any way constitute an obligation. It is for each Member State to assess the specific cases in which information concerning transactions by taxable persons in its territory is lacking and to decide whether those cases justify submitting a request for information to another Member State. [41]

106. Moreover, as I have already emphasised, the Court has held that there is nothing to prevent the tax authorities of a Member State from requiring the taxpayer claiming the tax deduction to provide the relevant supporting documents which will enable them to carry out the necessary checks. [42]

41 — See *Twoh International*, paragraph 32.

42 — *Centro di Musicologia Walter Stauffer*, paragraph 49. See also, to that effect, *Twoh International*, paragraph 35, and *A*, paragraph 58.

107. In my view, the basis for those assessments is the residual power of the Member States to establish, in accordance with their procedural rules, as part of an administrative procedure to determine the amount of tax payable, the rules of evidence applicable, including the allocation of the burden of proof between the taxpayer and the national tax authorities. [43]

108. However, the problem raised by the national court seems to be the relationship between the burden of proving that the conditions for granting the tax advantage are met, which, as a rule, rests on the taxpayer, and the possibility afforded to the tax authorities under national law of refusing, without further examination, the advantage in question, in the absence of such proof.

109. In that regard, although the Commission and the EFTA Surveillance Authority concede that Directive 77/799 does not in itself oblige the Member States to have recourse to the mechanisms for which it provides, they nevertheless submit that, in the sphere of application of a fundamental freedom, such as the free movement of capital, national tax authorities may not systematically ignore the opportunities offered by that directive, by simply refusing the tax advantage claimed if the taxpayer is unable to adduce all the necessary evidence, in spite of the fact that he has fully cooperated in seeking that evidence.

110. I am inclined to share that view in the specific context of the present case, that is to say, where the evidence requested for allowing a tax advantage does not directly concern the taxpayer who claims it, but a third party, in this instance the body which received the gift, and which is established in another Member State. In my view, in such a situation the national authorities cannot systematically refuse to grant the tax advantage if the evidence requested from the taxpayer has not been adduced, without first taking into account the difficulties encountered by that taxpayer in collecting the evidence requested in spite of all the efforts he has already made, and without examining, in the light of those difficulties, whether it is actually possible to obtain that evidence with the assistance of the competent authorities of another Member State within the framework of Directive 77/799 or, where appropriate, in the context of the application of a bilateral tax convention. Of course, in that situation, it will be for the national court to ascertain, in each specific case, whether the refusal to allow the tax deduction claimed, without resorting to the cooperation between national authorities introduced by Directive 77/799, is based on a serious assessment of the abovementioned factors.

111. I think that this approach is appropriate for ensuring a balance between the requirements of the effective application of the free

43 — See, by analogy, Case C-55/06 *Arcor* [2008] ECR I-2931, paragraph 187.

movement of capital in a case such as that in the main proceedings and the current restrictions on mutual assistance between the tax authorities of the Member States provided for by Directive 77/799.

112. I therefore consider that the answer to the third question referred for a preliminary ruling should be that the tax authorities of a Member State cannot be obliged to have recourse to the cooperation mechanisms provided for by Directive 77/799 in order to clarify a factual situation which has occurred within the jurisdiction of another Member State and are entitled to require a taxpayer, in accordance with the procedural rules of their own Member State, to adduce the evidence they consider necessary to make a correct assessment of the tax payable by that taxpayer, including granting him a tax deduction. However, in order to ensure the effective application of the free movement of capital and where the evidence requested from the taxpayer concerns the status and/or the effective management of a donee body, recognised as charitable and established in another Member State, the tax authorities of the former Member State cannot refuse to allow the taxpayer the tax deduction without first having taken into account the difficulties encountered by that taxpayer in collecting the evidence requested in spite of all the efforts he has already made, and without examining, in the light of those difficulties, whether it is actually possible to obtain that evidence with the assistance of the competent authorities of another Member State within the framework of Directive 77/799 or, where appropriate, in the context of the application of a bilateral tax convention. It is for the national court to ascertain, in each specific case, whether the refusal to allow the tax deduction claimed, without resorting to the cooperation between national authorities introduced by Directive 77/799, is based on a serious assessment of the abovementioned factors.

VI — Conclusion

113. In the light of the foregoing considerations, I propose that the Court give the following answers to the questions referred to it by the Bundesfinanzhof:

(1) Gifts of everyday consumer goods by a national of a Member State to a body which has its seat in another Member State and is, under the law of the latter Member State, recognised as charitable constitute movements of capital within the meaning of Article 56 EC.

(2) Articles 56 EC and 58 EC must be interpreted as precluding legislation of a Member State under which a deduction for tax purposes cannot be allowed in respect of a gift made by one of its taxpayers unless the recipient charitable body is established in that Member State, without permitting the donor to adduce evidence that the recipient body, established in another Member State and, under the law of that Member State, recognised as charitable, may satisfy the conditions imposed by the legislation of the former Member State on bodies of the same kind situated in its territory.

(3) The tax authorities of a Member State cannot be obliged to have recourse to the cooperation mechanisms provided for by Council Directive 77/799/EEC of 19 December 1977 concerning mutual assistance by the competent authorities of the Member States in the field of direct taxation, as amended by Council Directive 92/12/EEC of 25 February 1992 on the general arrangements for products subject to excise duty and on the holding, movement and monitoring of such products, in order to clarify a factual situation which has occurred within the jurisdiction of another Member State and are entitled to require a taxpayer, in accordance with the procedural rules of their own Member State, to adduce the evidence they consider necessary to make a correct assessment of the tax payable by that taxpayer, including granting him a tax deduction. However, in order to ensure the effective application of the free movement of capital and where the evidence requested from the taxpayer concerns the status and/or the effective management of a donee body, recognised as charitable and established in another Member State, the tax authorities of the former Member State cannot refuse to allow the taxpayer the tax deduction without first having taken into account the difficulties encountered by that taxpayer in collecting the evidence requested in spite of all the efforts he has already made, and without examining, in the light of those difficulties, whether it is actually possible to obtain that evidence with the assistance of the competent authorities of another Member State within the framework of Directive 77/799 or, where appropriate, in the context of the application of a bilateral tax convention. It is for the national court to ascertain, in each specific case, whether the refusal to allow the tax deduction claimed, without resorting to the cooperation between national authorities introduced by Directive 77/799, is based on a serious assessment of the abovementioned factors.