Reports of Cases

OPINION OF ADVOCATE GENERAL
MENGOZZI
delivered on 12 June 2013[1]

**Case C-181/12**

**Yvon Welte**
**v**
**Finanzamt Velbert**

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

(Free movement of capital — Articles 56 EC, 57 EC and 58 EC — Inheritance tax — Deceased and heir resident in Switzerland — Direct investment — Investment in real estate — Standstill clause — Justification)

## I – Introduction

1. Are Articles 56 EC and 58 EC to be interpreted as precluding national legislation on inheritance tax under which, in cases where land situated within that Member State is acquired through inheritance by a non-resident person, that person is entitled to a tax-free amount of only EUR 2 000, whereas a tax-free amount of EUR 500 000 would apply if, at the time of the inheritance, the deceased person or the acquirer had a permanent residence in that Member State?

2. That is the question which the Finanzgericht Düsseldorf (Finance Court, Düsseldorf) has referred in the context of a dispute between Mr Welte, a Swiss national and resident, and the Finanzamt Velbert ('the Finanzamt'), concerning the estate of Mrs Welte-Schenkel, who died in Switzerland in 2009. She had been born in Germany but had acquired Swiss nationality and residence following her marriage to Mr Welte.

3. More specifically, Mr Welte, as his wife's sole heir, inherited from her estate land located in Düsseldorf,[2] which was valued at EUR 329 200 on the date of her death. Furthermore, the deceased had accounts with two banks in Germany, with a credit balance totalling EUR 33 689.72. She also had accounts with Swiss banks, with a credit balance equivalent in total to EUR 169 508.04.

4. No inheritance tax was levied on Mr Welte in Switzerland.

5. By notice of 31 October 2011, the Finanzamt set the inheritance tax payable by Mr Welte at EUR 41 450. That figure was arrived at by setting an allowance of EUR 2 000 against the basis of assessment determined solely by reference to the value of the land located in Düsseldorf, less a flat rate for inheritance costs (EUR 10 300).

1 — Original language: French.

2 — It should be noted that, during the hearing before the Court, the parties to the main proceedings stated that the family home of Mrs Welte-Schenkel's parents stood on that land, which she had inherited just a few months before her own death.

6. Under the German Law on inheritance and gift tax (Erbschaftsteuer- und Schenkungsteuergesetz; 'ErbStG'),[3] in situations where neither the deceased nor the heir resides in Germany, inheritance tax must be paid on acquisitions falling within the 'domestic assets' of the deceased for the purposes of Paragraph 121 of the Law on valuation (Bewertungsgesetz),[4] which include immovable property located in Germany (but not bank receivables[5]). Under Paragraph 16 ErbStG, spousal transfers enjoy an allowance of EUR 500 000 set against the basis of assessment, unless – as in the case before the referring court – the deceased and the acquirer are both non-residents, in which case the allowance is set at EUR 2 000 under in accordance with Paragraph 16(2) ErbStG. That difference is explained by the fact that, in cases where either the deceased or the heir resides in Germany, the tax liability covers all assets transferred, under Paragraph 2(1) ErbStG.

7. By decision of 23 January 2012, the Finanzamt rejected the complaint which Mr Welte lodged with a view to obtaining a tax-free allowance of EUR 500 000.

8. Mr Welte contested that decision before the Finanzgericht Düsseldorf, arguing that the unequal treatment of resident and non-resident payers of inheritance tax is incompatible with the free movement of capital guaranteed by the EC Treaty.

9. According to the referring court, there are doubts as to whether Paragraph 16(2) ErbStG is compatible with Articles 56(1) EC and 58 EC. Under Paragraph 16(2) ErbStG, Mr Welte, in his capacity as a taxable person with limited tax liability, is only entitled to an allowance of EUR 2 000 against the inheritance. If the deceased or Mr Welte had been resident in Germany on the date of the death, he would have been entitled to an allowance of EUR 500 000 and accordingly would not have had to pay any inheritance tax.

10. The referring court points out that, in *Mattner*,[6] the Court of Justice ruled that Articles 56 EC and 58 EC preclude the provision made under Article 16(2) ErbStG to the effect that, for the calculation of gift tax, the allowance to be set against the basis of assessment in the case of a gift of immovable property located in Germany is smaller where the donor and the donee were resident in another Member State on the date of the gift than if at least one of them had been resident in Germany on that date.

11. However, the referring court observes that, on the facts, the present case differs in two respects from the case which gave rise to the judgment in *Mattner*: (i) on the date of the death, the deceased and Mr Welte both resided, not in a Member State, but in a third country; and (ii) the property that Mr Welte inherited comprised not only the land belonging to the deceased, but also credit balances held in German and Swiss banks. The decision not to grant the full tax-free allowance of EUR 500 000 to Mr Welte was therefore justifiable since only a part of the estate located in Germany was taxed.

12. However, referring to the judgments in *A*[7] and *Mattner*, the national court is uncertain whether the unequal treatment in question between residents and non-residents can be justified by that line of reasoning. In particular, it believes that limiting the allowance granted to Mr Welte to EUR 2 000 goes beyond what is necessary to establish equal treatment with residents. In the circumstances, the value of

3 — In the version published on 27 February 1997 (BGBl. 1997 I, p. 378), as amended by Paragraph 1 of the Law reforming the rules on inheritance tax and valuation (Gesetzes zur Reform des Erbschaftsteuer- und Bewertungsrechts) of 24 December 2008 (BGBl. 2008 I, p. 3018).

4 — In the version resulting from the Annual Tax Law (Jahressteuergesetz) of 20 December 2006 (BGBl. 2006 I, p. 2049), as amended by Paragraph 2 of the Law reforming the rules on inheritance tax and valuation of 24 December 2008.

5 — The charging of inheritance tax on bank receivables also appears to fall within the competence of the State of residence of the deceased pursuant to Article 8 of the Agreement between the Federal Republic of Germany and the Swiss Confederation of 30 November 1978 for the avoidance of double taxation with respect to inheritance tax (BGBl. 1980 II, p. 5895).

6 — Case C-510/08 *Mattner* [2010] ECR I-3553, paragraph 56.

7 — Case C-101/05 *A* [2007] ECR I-11531, paragraphs 27 and 31.

the land located in Düsseldorf (EUR 329 200), which was the only component taxed, accounts for approximately 62% of the total value of the estate (EUR 532 397). The fact that approximately 38% of the value of the estate was not taxed hardly justifies an allowance of EUR 2 000 instead of EUR 500 000.

13. Those are the circumstances in which the national court decided to stay proceedings and request a preliminary ruling on the question set out in point 1 above. Written observations have been submitted to the Court of Justice by Mr Welte, the German Government and the European Commission. The oral submissions of those parties, together with those of the Belgian Government, were also heard at the hearing on 13 March 2013.

## II – Analysis

### A – *The subject-matter of the question referred*

14. In his observations, Mr Welte suggested that the response to the question referred for a preliminary ruling should take account of the Agreement between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other, on the free movement of persons, which was signed at Luxembourg on 21 June 1999 and came into force on 1 June 2002[8] ('the Agreement on freedom of movement for persons').

15. It is true that, even though the national court has not referred any questions to the Court on the interpretation of that agreement, the Court is permitted, in order to provide a useful reply in the light of the factual and legal context of the case before the referring court and the observations submitted to it by the interested parties, to take into consideration rules of European Union ('EU') law to which the national court has not referred in its questions.[9]

16. However, to my mind, the referring court was right not to ask the Court about the interpretation of the Agreement on freedom of movement for persons, as Mr Welte's situation does not fall within the scope of that agreement.

17. On that point, it should be noted that the aim of the Agreement on freedom of movement for persons is, as stated in Article 1(a) to (d) thereof: to accord, for the benefit of nationals of the contracting parties, a right of entry, residence, access to work as employed persons, establishment on a self-employed basis and the right to stay in the territory of those parties; to facilitate the provision of services in the territory of the contracting parties; to accord a right of entry into, and residence in, the territory of the contracting parties to persons without an economic activity in the host country; and to accord the same living, employment and working conditions as those accorded to nationals.

18. As it is, it is common ground that Mr Welte, who resides in Switzerland, is not seeking to work or to establish himself in the territory of a Member State of the European Union, in any capacity, or to enjoy the provision of services, for the purposes of Article 1(a) to (c) of the Agreement on freedom of movement for persons. What Mr Welte is seeking is, rather, to have the tax advantages which are accorded to inheritances in Germany when either the deceased or the heir reside there on the date of the death extended to the estate he inherited from his wife.

8 — OJ 2002 L 114, p. 6.

9 — In that regard see, in particular, Case C-513/03 *van Hilten-van der Heijden* [2006] ECR I-1957, paragraphs 25 and 26 and the case-law cited, and Case C-70/09 *Hengartner and Gasser* [2010] ECR I-7233, paragraphs 27 and 28.

19. As regards access to the same living conditions as those accorded to nationals, provided for under Article 1(d) of the agreement, it is my belief – notwithstanding the fact that Mr Welte did not specify in his observations which provisions of the agreement he regarded as relevant for the purposes of the question referred – that only Article 25 of Annex I to that agreement, entitled 'Acquisition of immovable property', is likely to have a bearing on the matters to which the main proceedings relate.

20. However, the persons upon whom that provision confers a right to acquire immovable property on an equal footing with nationals of the host State are the nationals (natural persons) of a contracting party who have 'a right of residence' in the host State or who are 'frontier workers',[10] that is to say, persons who pursue an economic activity in that State without residing there. There is nothing in this case to suggest that Mr Welte satisfies any of those conditions. Furthermore, as regards, not just frontier workers, but the category of nationals who have a right to reside in the host State while not having their principal residence there, Article 25 of Annex I to the Agreement on freedom of movement for persons states that that agreement 'shall not affect the rules applying to pure capital investment' in force in the host State, a principle which should apply *a fortiori* – subject to observance of the provisions of the EC Treaty – to situations which do not fall within the scope of that agreement.

21. I therefore propose that, in its reply to the request for a preliminary ruling, the Court should not take the Agreement on freedom of movement for persons into consideration.

22. On the other hand, in view of the fact that Mr Welte is a resident of Switzerland, hence of a third country, and in the light of the case-law of the Court on free movement of capital, I think it would be useful for that reply to include some considerations on the interpretation of Article 57(1) EC, which – albeit not specifically mentioned by the referring court – was nevertheless discussed in the observations submitted by interested parties.

23. As is well known, Article 57(1) EC permits – subject to the conditions listed therein and notwithstanding the prohibition, laid down in Article 56(1) EC, on restrictions on the free movement of capital between Member States and third countries – restrictions existing on 31 December 1993 under national law to be maintained where the movement of capital in question involves 'direct investment – including in real estate – establishment, the provision of financial services or the admission of securities to capital markets'.

24. Admittedly, cross-border inheritances, as movements of capital of a 'personal' nature, according to the nomenclature annexed to Directive 88/361/EEC[11] – which, according to the case-law, can still be relied upon for guidance in the absence of any definition in the Treaty of the concept of 'movements of capital'[12] – are not among the categories specified in Article 57(1) EC, and Member States are not entitled to extend the material scope of that provision beyond the transactions mentioned therein.[13]

10 — See Case C-541/08 *Fokus Invest* [2010] ECR I-1025, paragraphs 35 and 36.

11 — See Heading XI of Annex I to Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty (article repealed by the Treaty of Amsterdam) (OJ 1988 L 178, p. 5), which covers, in particular, transactions transferring all or part of a person's assets, whether during their lifetime or after their death. On that basis, the Court has confirmed that an inheritance is a movement of capital for the purposes of Article 56(1) EC, whose constituent elements are not confined within a single Member State. See, in particular, *van Hilten-van der Heijden*, paragraph 42; Case C-11/07 *Eckelkamp and Others* [2008] ECR I-6845, paragraph 39; Case C-43/07 *Arens-Sikken* [2008] ECR I-6887, paragraph 30; Case C-67/08 *Block* [2009] ECR I-883, paragraph 20; and Case C-35/08 *Busley and Cibrian Fernandez* [2009] ECR I-9807, paragraph 18.

12 — See, in particular, *Eckelkamp and Others*, paragraph 38; *Arens-Sikken*, paragraph 29; and *Block*, paragraph 19.

13 — See, to that effect, Joined Cases C-163/94, C-165/94 and C-250/94 *Sanz de Lera and Others* [1995] ECR I-4821, paragraphs 35 to 37.

25. However, it is necessary to consider – as the Commission did in its observations – the possible implications for the present case of the reasoning adopted by the Court in *Scheunemann*,[14] in which it held, in essence, that the legal categorisation of the tax treatment of inheritances as falling under Article 63(1) TFEU (formerly Article 56(1) EC) is not automatic and depends on the assets making up the inheritance. However, if, as in *Scheunemann*, the nature of the assets making up the inheritance becomes the decisive test for determining which freedom of movement applies, it is reasonable to consider that, *a fortiori*, that test is equally relevant as regards the application, in relation to a particular freedom of movement, of the exceptions to that freedom.

26. In other words, although cross-border inheritances constitute movements of capital for the purposes of Article 56(1) EC and do not, as a rule, fall within the material scope of Article 57(1) EC, the application of the latter provision may be triggered if the nature of the assets making up the inheritance – in this case, immovable property – is brought into play.

27. Accordingly, I think it is necessary in this case to examine the applicability of Article 57(1) EC, after first determining whether the national measure in question constitutes a restriction on freedom of movement for the purposes of Article 56(1) EC.

B – *Whether there is a restriction on the movement of capital for the purposes of Article 56(1) EC*

28. The measures prohibited by Article 56(1) EC as being restrictions on the movement of capital include, in particular, those which are likely to deter non-residents from making investments in a Member State and those whose effect is to reduce the value of the inheritance of a resident of a State – including, therefore, a third country – other than the Member State in which the assets concerned are situated and which taxes the inheritance of those assets.[15]

29. In this instance, national tax legislation, such as that at issue in the main proceedings, under which a flat-rate allowance of EUR 2 000 is applied against the basis of assessment of the asset transfer if, on the date of the death, the deceased and the heir reside in a State other than the Member State where the taxed assets are located – while an allowance of EUR 500 000 would have applied if the deceased or the heir had resided in that Member State – has the effect, as in the case before the referring court, of imposing a higher overall tax burden on the inheritance of non-residents.[16]

30. A tax disadvantage of that nature is likely to deter non-residents from investing in the Member State where the taxed assets are located and, in particular, as in the main proceedings, to deter them from purchasing immovable property or retaining it as part of their estate. It therefore constitutes a restriction on the movement of capital for the purposes of Article 56(1) EC.

14 — Case C-31/11 *Scheunemann* [2012] ECR, paragraphs 21 to 23. In that case, the inheritance - transferred to a German national - consisted in a 100% stake in the capital of a company established in Canada, in respect of which German legislation excluded certain tax advantages. The Court held (see paragraphs 31 to 34 of the judgment) that, as a result, the holder of the stake was able to exert a definite influence over the decisions of the company and the direction of its activities. Consequently, the situation had to be examined in the light of freedom of establishment, which was not intended to apply to relations between Member States and third countries. It should be noted that the Court had already applied freedom of establishment to tax legislation on inheritance applicable to a family company at least 50% of whose share capital was held by the deceased: see Case C-464/05 *Geurts and Vogten* [2007] ECR I-9325, paragraphs 13 and 14.

15 — See, to that effect, inter alia, *Hilten-van der Heijden*, paragraph 44; *Block*, paragraph 24; and Case C-25/10 *Missionswerk Werner Heukelbach* [2011] ECR I-497, paragraph 22. *Hilten-van der Heijden* concerned the estate of a Dutch national with tax residence in Switzerland on the date of death.

16 — See also, to that effect, *Arens-Sikken*, paragraphs 38 and 40, concerning national rules applying a different calculation method to determine the inheritance tax actually due on the asset transfer depending on whether or not, on the date of death, the deceased was resident in the Member State where the immovable property in which the inheritance consisted was located.

31. Such a restriction might, however, be acceptable under EU law if the difference in treatment in which it is rooted concerned situations which are not objectively comparable,[17] as the German and Belgian Governments have argued in this case. According to those Governments, only the State of residence of the deceased, where the estate is being administered, is in a position to take the entire estate into consideration. In other words, they argue, owing to the fact that Germany exercises only limited tax powers over inheritances where, on the date of the death, neither the deceased nor the heir resided in that Member State – unlike the position as regards its own residents – logically, it can only grant a reduced allowance in those cases.

32. It should be noted that a similar argument was rejected by the Court in *Eckelkamp and Others*, *Arens-Sikken* and *Mattner*. The first two cases concerned the compatibility with free movement of capital of national rules on inheritance tax applicable to immovable property, under which treatment differed depending on the place of residence of the deceased, whilst the third case involved the German tax legislation at issue in the case currently under consideration in the event of an *inter vivos* gift of immovable property.

33. Notwithstanding the specific features of each of those cases, the Court's reasoning was essentially similar in that it held that the situation of residents and non-residents was objectively comparable in the three cases, owing to the cohesive nature of the national rules, which are based on an approach which can be summarised as follows: since the Member State generally applies identical tax rules and conditions to the property making up the inheritance or gift, regardless of the test of residence in that Member State on the part of the interested parties,[18] that test cannot then justify the introduction of different treatment as between residents and non-residents solely when it comes to determining and granting a tax advantage, whether that advantage takes the form of a deduction of charges encumbering the property (*Eckelkamp and Others* and *Arens-Sikken*) or a tax allowance (*Mattner*).[19]

34. It is true that, in the case before it, the referring court emphasised that Mrs Welte-Schenkel's estate includes immovable as well as movable property, which might appear to distinguish it from the three cases referred to above, all of which involved disputes concerning the transfer of a single item of immovable property.

35. However, I do not think that this necessarily leads to the conclusion that there is no objective comparability between the situation of non-residents and the situation of residents in Germany in these proceedings.

36. Indeed, in my view, that kind of consideration is dependent on procedural uncertainties or the delimitation of the dispute by the national court. In *Arens-Sikken*, although the questions referred for a preliminary ruling concerned only the tax treatment of shares in a building which had been handed down to the deceased, who did not reside in the Member State where the property was located (the Netherlands), the estate of the deceased also included other assets, the tax treatment of which was not covered by the reference for a preliminary ruling.[20] Furthermore, the tax powers of the Kingdom of the Netherlands were just as limited as those of the Federal Republic of Germany in the case currently under consideration. Thus, in the case of the estate of a deceased who was not resident in the Netherlands on the date of death – like the husband of Mrs Arens-Sikken – the tax powers of the Netherlands were confined to 'domestic possessions', that is to say, to immovable property situated in

17 — See, inter alia, *Mattner*, paragraph 30, and *Missionswerk Werner Heukelbach*, paragraph 29.

18 — In particular, family relationships and the value of the property determining the basis of assessment, thresholds and rates of taxation.

19 — See *Eckelkamp and Others*, paragraphs 62 to 63; *Arens-Sikken*, paragraphs 56 to 57; and *Mattner*, paragraphs 36 to 38, respectively.

20 — See *Arens-Sikken*, paragraph 17.

the Netherlands or rights relating thereto.[21] None the less, that did not prevent the Court from holding that the situation of non-resident taxpayers with limited tax liability in the Netherlands was objectively comparable to that of residents with full tax liability in that Member State, for the purposes of resolving the dispute.

37. In the main proceedings, it is common ground that the movable property included in Mrs Welte-Schenkel's estate was not taken into account in the basis of assessment in Germany, pursuant to German legislation, and that the dispute is therefore confined to the tax treatment of the land inherited by her husband.

38. In my opinion, that situation is not radically different from the taxation of an estate left to a German resident with full tax liability in Germany, whether as the spouse of the deceased or as the heir, where the estate comprises a single item of immovable property located in Germany. In those circumstances, even though the estate is limited, the disputed tax-free allowance of EUR 500 000 would nevertheless be granted to that German resident.

39. In any event, even if the Court were to find that account should be taken of the fact that the property inherited by Mr Welte comprises various different kinds of assets, the fact remains – as the national court underlined – that the land in question represents approximately 62% of the total value of the estate and that the other components of the estate were not taxed. On the assumption that, in contrast to the Court's reasoning in *Eckelkamp and Others*, *Arens-Sikken* and *Mattner*, we were to accept the arguments put forward by the German Government to the effect that this case could, by analogy, fall within the scope of the case-law devolving from *Schumacker*[22] and *D*[23] – in terms of which, in the area of income and wealth tax, the situation of residents and the situation of non-residents are not, as a general rule, comparable[24] – the fact remains that, in the case before the referring court, most – indeed, almost all – of the taxed estate is located in the Member State where the land making up the inheritance is situated, and it is that Member State which, to my mind, is best placed to take account of the personal and family situation of the taxpayer for the purposes of applying the disputed tax allowance.[25] As the referring court stated, the fact that no tax was applied to the inheritance under the tax legislation of Mr Welte's State of residence should, by analogy with the case-law on income tax,[26] be assimilated to a situation where there is no inheritance 'income' in that State, with the result that it is the Member State where the immovable property– which accounts for almost the entire value of the estate – is located which is to take account of the personal and family situation of the taxpayer, failing which that situation would not be taken into consideration in either of the two States.[27]

40. In my view, it follows that, regardless of how the Court examines the question of the objective comparability of the situation of residents and non-residents in this case, it has to arrive at the same conclusion and, accordingly, to find that the measure at issue in the main proceedings constitutes a restriction on the free movement of capital, which can be permitted only if it is covered by the 'standstill' provided for in Article 57(1) EC or if it can be justified by an overriding reason in the public interest.

21 — Idem, paragraphs 7 and 8.

22 — Case C-279/93 *Schumacker* [1995] ECR I-225, paragraphs 31, 32 and 34. See also Case C-391/97 *Gschwind* [1999] ECR I-5451, paragraphs 22 and 23.

23 — Case C-376/03 *D* [2005] ECR I-5821, paragraph 38.

24 — However, doubts may be voiced about such an analogy as, unlike income or wealth tax, inheritance tax depends not on the taxpayer's ability to pay, but on the family relationship with the deceased and the value of the estate.

25 — In the area of income tax, see, by analogy, *Schumacker*, paragraphs 36 and 37, and *Gschwind*, paragraph 27.

26 — See, inter alia, Case C-169/03 *Wallentin* [2004] ECR I-6443, paragraphs 17 and 18; Case C-329/05 *Meindl* [2007] ECR I-1107, paragraph 26; and Case C-39/10 *Commission* v *Estonia* [2012] ECR, paragraph 53.

27 — See, by analogy, inter alia, *Wallentin*, paragraph 17, and *Commission* v *Estonia*, paragraph 53.

## C – *The applicability of Article 57(1) EC*

41. As I have already pointed out, Article 57(1) EC enables Member States to maintain, *vis-à-vis* third countries, restrictions existing on 31 December 1993 on the movement of capital involving 'direct investment – including in real estate'.

42. Whilst there is no doubt that the Swiss Confederation must be categorised as a third country for the purposes of that provision, [28] the question whether the German rules at issue fall within the temporal and material scope of the standstill clause is less straightforward.

43. As regards the temporal scope of Article 57(1) EC, it should be noted that the version of the ErbStG at issue postdates 31 December 1993.

44. However, the Court of Justice has already held that a national measure adopted after that date is not, by that fact alone, automatically excluded from the derogation laid down in EU law. That derogation also covers provisions which are, in substance, identical to the earlier legislation or which merely reduce or eliminate an obstacle to the exercise of EU rights and freedoms in that legislation. By contrast, the derogation does not cover legislation based on a conceptual approach which differs from that of the law previously in force on 31 December 1993 and establishes new procedures. In those circumstances, such legislation cannot be treated as legislation existing on that date. [29]

45. In this instance, it follows from the reply given by the referring court to the Court of Justice's request for clarification that, except for the level of the allowances granted under the ErbStG, the difference in treatment at issue already existed in the version of the law published on 19 February 1991 and amended on 21 December 1993.

46. Consequently, with the exception of the level of the allowances, the version of the ErbStG in place after 31 December 1993 was identical, in substance and conceptual approach, to that in force prior to that date. The fact that the level of the allowances had been amended and, as the Commission pointed out, that the difference between the allowances had increased, does not mean that the conceptual approach of the law had changed after 31 December 1993 or that new procedures had been introduced affecting third country nationals from that date, as contemplated by the case-law referred to above.

47. In view of the information supplied by the referring court, the *ratione temporis* condition laid down in Article 57(1) EC has therefore been met.

48. However, I am of the opinion that the legislation does not fall within the material scope of that provision. That view is based on the following considerations.

49. First, there are legitimate doubts as to whether capital movements in the form of inheritances of third country nationals regulated by the tax legislation of a Member State entail 'direct investment – including in real estate' for the purposes of Article 57(1) EC.

28 — It should be noted that Article 57(1) EC does not apply to the other three members of the European Free Trade Association (EFTA), namely Iceland, Norway and Liechtenstein – which are parties to the Agreement on the European Economic Area (EEA) – since, in their relations *inter se* and with EU Member States, the movement of capital is governed by Article 40 of that agreement, which is, in substance, identical to Article 56(1) EC: see Case C-452/01 *Ospelt and Schlössle Weissenberg* [2003] ECR I-9743, paragraphs 30 to 32, and the order in Case C-476/10 *projektart and Others* [2011] ECR I-5615, paragraphs 36 to 38, which specifically contrasts the position of the Swiss Confederation with that of the other three EFTA States party to the EEA Agreement.

29 — See, to that effect, Case C-157/05 *Holböck* [2007] ECR I-4051, paragraph 41; *A*, paragraph 49; and *Fokus Invest*, paragraph 42. See also Case C-384/09 *Prunus and Polonium* [2011] ECR I-3319, paragraph 36.

50. As I have mentioned, in the absence of a definition of 'capital movement', the Court has, so far, consistently relied on the definitions contained in the nomenclature in Annex I to Directive 88/361 and the associated explanatory notes in order to interpret both Article 56 EC and Article 57 EC.[30] Whilst inheritances fall under category XI of that nomenclature, entitled 'personal capital movements', direct investments – which, according to the explanatory notes, are regarded as '[i]nvestments of all kinds … which serve to establish or to maintain lasting and direct links between the person providing the capital and the entrepreneur to whom or the undertaking to which the capital is made available in order to carry on an economic activity' – fall under category I of the nomenclature.

51. In addition, as a derogation from a freedom provided for under EU law, which is, moreover, particularly broad, Article 57(1) EC must be narrowly construed.[31] Accordingly, I do not think that that provision can cover cross-border inheritances involving third country nationals.

52. Secondly, even if I were to endorse the Commission's arguments, expanded, by analogy, on the basis of *Scheunemann* – according to which the legal rules governing cross-border inheritances are dependent on the stuff of such inheritances, that is to say, in this case, immovable property[32] – that reasoning does not, in my opinion, bring Article 57(1) EC into play in circumstances such as those in the case before the referring court.

53. On that point, too, reference must be made to the nomenclature and the accompanying explanatory notes.

54. According to the nomenclature, investments in real estate covered by category II, which are defined in the explanatory notes as '[p]urchases of buildings and land and the construction of buildings by private persons for gain or personal use', are investments 'not included in category I', that is to say, not direct investments.

55. Thus, the reference in Article 57(1) EC to 'direct investment – including in real estate'[33] should be construed as covering investments in real estate which constitute direct investments, that is to say – to paraphrase the explanatory notes – investments in real estate of such a kind as to establish or to maintain direct links with an entrepreneur or an undertaking in order to engage in an economic activity.

56. By contrast, investments in real estate of a financial nature, which are unconnected with the pursuit of an economic activity, do not fall within the scope of Article 57(1) EC.

57. In my view, the soundness of that approach is borne out by three additional considerations.

58. First, it is justified by the need to construe the derogation laid down in Article 57(1) EC narrowly, so as not to deprive the very broad freedom conferred under Article 56(1) EC of much of its effectiveness.

30 — See, inter alia, *Holböck*, paragraph 34 and the case-law cited.

31 — See also, to that effect, point 64 of the Opinion of Advocate General Cruz Villalón in *Prunus and Polonium*.

32 — So far as this point is relevant, it should be noted that, unlike the inheritance of company shares, which may, according to the decisions in *Geurts and Vogten* and *Scheunemann*, fall within the ambit of freedom of establishment, the Court has as yet always held that cross-border inheritances involving both movable and immovable property or those involving only immovable property fall under free movement of capital: in that regard, see, inter alia, *Busley and Cibrian Fernandez*, paragraph 18 and the case-law cited.

33 — This footnote is not applicable to the English-language version.

59. Secondly, it can be explained by the need to interpret Article 57(1) EC (formerly Article 73c EC) consistently with other provisions of primary law, especially the Protocol on the acquisition of property in Denmark, annexed to the Treaty on European Union, signed at Maastricht on 7 February 1992,[34] and the Act of Accession to the European Union of Austria, Finland and Sweden.[35] Under those acts, those Member States were permitted, notwithstanding the Treaty provisions, to maintain – as a transitional measure for Austria, Finland and Sweden – their national legislation in force regarding secondary residences.[36] Obviously, the negotiation and adoption of those acts would have been unnecessary if Article 73c EC had covered investments in real estate of a financial nature that were unrelated to the exercise of an economic activity.

60. Thirdly and lastly, although the narrow interpretation of the concept of investments in real estate that I propose here is not drawn from the case-law of the Court,[37] it is not incompatible with the case-law.

61. Indeed, neither *Fokus Invest* nor *Prunus and Polonium* – both of which involved the acquisition of immovable property by third country nationals – is, in my view, of decisive importance for the purposes of construing the material scope of Article 57(1) EC; nor have they even resolved the question as to whether that provision covers investments in real estate unconnected with the exercise of an economic activity.

62. Thus, *Fokus Invest* concerned the acquisition, by an Austrian real estate investment company, of shares in a building giving it ownership of a large number of flats and parking spaces which were let. At the time of the events giving rise to the case before the referring court, all of the shares in that company were held by Swiss limited liability companies.[38] Although the Court held that the Austrian rules on prior authorisation for this type of real estate acquisition fell within the scope of Article 64(1) TFEU (formerly Article 57(1) EC) and therefore permitted in the case of companies established in the Swiss Confederation, the main action was indisputably linked to the exercise of an economic activity in a Member State on the part of legal persons established in a third country.

63. Admittedly, there are some sections in the *Fokus Invest* judgment which might suggest that the Court was prepared to uphold the rules on prior authorisation irrespective of the circumstances underlying the main action. However, those appraisals are not wholly conclusive, in my view, and the specificity with which the Court described the facts giving rise to the case indicates that it would not have arrived at the same conclusion if the real estate investment in question had only involved the acquisition of a single asset for purely financial purposes.

64. Similarly, *Prunus and Polonium*, the main issue in which was the scope *ratione personae* of Article 64(1) EC – that is to say, whether an overseas country and territory of a Member State should, *vis-à-vis* another Member State, be regarded as a third country for the purposes of that provision – concerned the levying of a tax on the ownership of immovable property which, in that case, was commercially exploited through a French company, Prunus, which had become the vehicle through

34 — OJ 1992 C 224, p. 104 (consolidated version).

35 — OJ 1994 C 241, p. 21.

36 — See, for Austria, Finland and Sweden, Articles 70, 87 and 114 of the Act of Accession, respectively.

37 — That approach is none the less shared by several French administrative courts: see, inter alia, the judgment of 7 October 2011 of the Cour administrative d'appel de Paris in *Caisse autonome des travailleurs salariés de Monaco*, *Droit fiscal*, 2011, no. 49, comm. 616, concl. Ph. Blanc, and the judgment of 13 March 2012 of the Cour administrative d'appel de Marseille in *Min. c. M. Graetz*, *Droit fiscal*, 2012, no. 25, comm. 342 Ch. Laroche, concl. G. Guidal. No French courts have yet referred a question for a preliminary ruling on this point. In addition, a significant number of French academic writers on tax appear to endorse the approach of those courts: in that regard see, in particular, Maitrot de la Motte, A., 'La libre circulation des capitaux et l'imposition des plus-values de cessions immobilières par des résidents d'États tiers à l'UE', *Droit fiscal*, 2011, no. 18, comm. 338; Dinh, E., 'Les investissements immobiliers sont-ils des investissements directs au sens de l'article 64 TFUE ('clause de gel')? À propos de TA Montreuil, 8 décembre 2011, Mme Beaufour', *Droit fiscal*, 2012, no. 25, 339 and Laroche, Ch., 'Article 164 C du CGI et liberté de circulation des capitaux: ça chauffe pour la clause de gel!', *Droit fiscal*, 2012, no. 25, comm. 342.

38 — *Fokus Invest*, paragraph 18.

which its parent companies, established in the British Virgin Islands, directly invested in real estate.[39] To my mind, it is against that background that the Court was able to conclude, without stating specific grounds in its judgment as regards the material scope of Article 64(1) TFEU, that the restrictions resulting from the disputed tax were permissible under that provision with respect to overseas countries and territories.[40]

65. In view of all of those considerations, I am of the opinion that the German legislation at issue in the main proceedings, which governs the tax treatment of an inheritance between third country nationals, which consists in immovable property located in Germany, does not satisfy the condition *ratione materiae* laid down in Article 57(1) EC.

66. In those circumstances, it must be determined whether such legislation can nevertheless be justified by overriding reasons in the public interest.

D – *Whether the restriction is justified by overriding reasons in the public interest*

67. The German Government submits that the legislation at issue is consistent both with the maintenance of fiscal cohesion and with the need to ensure the effectiveness of fiscal supervision.

68. As regards the first justification put forward, the German Government states that, whereas under the rules on limited tax liability, the advantage of a lower basis of assessment is offset by the disadvantage of a lower allowance, under the rules on unlimited tax liability, the advantage of a higher allowance is offset by the disadvantage of a higher basis of assessment. *Mattner* adds nothing more. The facts giving rise to that judgment were not the same, since, in the case of a transfer by gift which, as a general rule, involves only a single asset, the differences between the rules on limited tax liability and unlimited tax liability are not apparent.

69. That argument is unconvincing.

70. Although the Court has recognised that the need to safeguard fiscal cohesion is capable of justifying a restriction on the free movement of capital,[41] the permissibility of such a restriction is conditional upon the existence of a direct link between the tax advantage in question and the offsetting of that advantage by a particular tax levy.[42]

71. In my view, however, that condition is not met here. As I have already explained, the allowance of EUR 500 000 is granted to German residents irrespective of the value of the estate. Accordingly, there is no direct link between that allowance and a particular tax levy. Furthermore, the allowance of EUR 500 000 would also be granted to a German resident inheriting a single item of immovable property even though, on account of the deceased's place of residence on the date of death, the estate was located abroad, without the Federal Republic of Germany being able, for various reasons, to tax that estate. In this case, therefore, there is no direct and logical symmetrical link between the tax advantage and a particular tax levy.

72. The purported justification in terms of the need to safeguard the cohesion of the tax system at issue must therefore be rejected.

39 — In that regard, see point 44 of the Opinion of Advocate General Cruz Villalón in *Prunus and Polonium*.

40 — *Prunus and Polonium*, paragraph 37.

41 — See, inter alia, Case C-182/08 *Glaxo Wellcome* [2009] ECR I-8591, paragraph 77, and Case C-250/08 *Commission* v *Belgium* [2011] ECR I-12341, paragraph 70.

42 — See *Glaxo Wellcome*, paragraph 78, and *Commission* v *Belgium*, paragraph 71.

73. The same goes for the second justification put forward by the German Government, namely, the need to ensure the effectiveness of fiscal supervision.[43]

74. It is true that, as the German Government pointed out, 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[44] does not apply to relations between Member States and the competent authorities of third countries.

75. However, even in the context of relations between the tax authorities of Member States, the cooperation arrangements established by the directive cover, not information on the payment of inheritance and transfer duties, but only information on income and wealth tax, and – since 2004 – the taxation of insurance premiums.

76. It should also be noted that the information referred to by the German Government – which, it maintains, must be notified to the estate beneficiary and the reliability of which must be checked with the assistance of the tax authorities of the State where the estate is being administered – mainly concerns death certificates and other documents issued by civil registrars in the State of residence of the deceased. Even though there is reason to doubt whether such information could effectively fall within the scope of cooperation between tax authorities, it could nevertheless be obtained, as the Commission rightly pointed out, under Article 13 of the Agreement of 30 November 1978 between the Federal Republic of Germany and the Swiss Confederation for the avoidance of double taxation with respect to inheritance tax.

77. Irrespective of this, official documents and information of that kind, which do not, as a general rule, require a complex assessment, can easily be forwarded by the heir without there being any need to rely – for the purposes of granting a tax allowance – on the systematic cooperation of the competent authorities of the third country concerned. All the same, I recall that, according to the legislation at issue, the tax-free allowance of EUR 500 000 would be granted to an heir, resident in Germany, who inherits property located in a third country from a person who, on the date of death, resided in that third country. It is paradoxical, at the very least, that the German authorities see no reason not to grant such an allowance in those circumstances, when they rely just as much on the cooperation of the heir to obtain information concerning the death and the estate of the non-resident spouse in the situation where, as in the case before the referring court, they refuse to grant the tax allowance in question.

78. Accordingly, neither of the two public interest objectives put forward by the German Government can, in my opinion, succeed.

79. There is therefore no need to consider the proportionality of the national rules at issue.

80. However, if the Court considers it necessary to rule on that issue, I endorse the observations of the Commission to the effect that the relevant national rules go beyond what is necessary to accomplish the public interest objectives relied on. In particular, while, in the main action, the estate located in Germany and subject to tax there represents over 60% of the value of the inheritance, the flat-rate allowance of EUR 2 000 granted to Mr Welte represents no more than 0.4% of the allowance to which he would have been entitled had he resided in Germany when his wife died. Such unequal treatment is manifestly disproportionate in the light of each of the public interests relied on by the German Government.

43 — The Court has recognised that this ground is capable of justifying restrictions on the freedoms of movement conferred by EU law: see, inter alia, Joined Cases C-155/08 and C-157/08 *X and Passenheim-van Schoot* [2009] ECR I-5093, paragraph 45 and the case law cited.

44 — OJ 1977 L 336, p. 15. This directive has been amended on several occasions, most recently on 20 November 2006 (OJ 2006 L 363, p. 129). The cooperation established by the directive also covers the taxation of insurance premiums, as reflected in its title following the amendment of 16 November 2004.

81. Responsibility for determining the appropriate level or rate at which the tax-free amount should be set in the case of persons not residing in Germany, in order to ensure that the national rules at issue are proportionate, lies with the competent authorities of the Member State imposing the tax.

82. In Mr Welte's case, it cannot be ruled out that the referring court, which is responsible for deciding on the dispute before it, might have to decline to allow application of the flat-rate allowance, in the exercise of jurisdiction that goes beyond that of merely annulling the contested decision.

83. Assuming that the referring court enjoys such jurisdiction, the difficulty that it would face would be to decide whether the principle of equal treatment as between residents and non-residents requires it to grant the full allowance of EUR 500 000, even though the part of the estate taxed in Germany and inherited by Mr Welte does not account for the total amount of the inheritance, in contrast to the position which obtains, as a general rule, where the situation is wholly internal to that Member State and concerns taxpayers with full liability.

84. To my mind, that question must be answered in the affirmative. As I have already mentioned, Mr Welte's position does not seem to me to be significantly different from that of a German resident who is heir to the estate – administered in Germany – of a spouse, also a German resident on the date of death, where the estate comprises a single item of immovable property. All other things being equal, the entire tax-free amount would have been granted to such a resident and that person would not have had to pay inheritance tax on the transfer of the property.

85. Furthermore, given the circumstances of the case before the referring court, particularly the significance of the property inherited by Mr Welte in terms of the total value of the estate administered following the death of his wife, the Federal Republic of Germany appears to be best placed to take the personal and family situation of the taxpayer into consideration. In this case, and by analogy with the proposition advanced in my Opinion in *Beker et Beker*,[45] which was endorsed by the Court in paragraph 60 of the related judgment, the tax allowance should be applied in full to the part of the estate inherited in that Member State.

## III – Conclusion

86. For all of the above reasons, I propose that the Court should reply as follows to the question referred by the Finanzgericht Düsseldorf:

Articles 56 EC, 57 EC and 58 EC are to be interpreted as precluding national legislation on inheritance tax under which, in cases where land situated within that Member State is acquired through inheritance by a non-resident person, that person is entitled to a tax-free amount of EUR 2 000, whereas a tax-free amount of EUR 500 000 would have been granted if, at the time of the death, the deceased or the acquirer had resided in that Member State.

45 — See point 54 of my Opinion delivered on 12 July 2012 in Case C-168/11 *Beker and Beker* [2013] ECR.