

JUDGMENT OF THE COURT (Second Chamber)

18 December 2014 (*)

(Reference for a preliminary ruling — Free movement of capital — Tax legislation — Gift tax — Exemption in respect of an ‘estate’ — No exemption in respect of property situated in the territory of another Member State)

In Case C-133/13,

REQUEST for a preliminary ruling under Article 267 TFEU from the Raad van State (Netherlands), made by decision of 13 March 2013, received at the Court on 18 March 2013, in the proceedings

Staatssecretaris van Economische Zaken,

Staatssecretaris van Financiën

v

Q,

THE COURT (Second Chamber),

composed of R. Silva de Lapuerta, President of the Chamber, M.K. Lenaerts, Vice-President of the Court, acting as Judge of the Second Chamber, J.-C. Bonichot (Rapporteur), A. Arabadjiev and J.L. da Cruz Vilaça, Judges,

Advocate General: J. Kokott,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 21 May 2014,

after considering the observations submitted on behalf of:

- Q, by A. Bakker and D. Smit, and by M. Hamer, advocaat,
- the Netherlands Government, by B. Koopman, K. Bulterman and J. Langer, acting as Agents,
- the German Government, by T. Henze and K. Petersen, acting as Agents,
- the Spanish Government, by A. Rubio González, acting as Agent,
- the French Government, by D. Colas and J.-S. Pilczer, acting as Agents,
- the Italian Government, by G. Palmieri, acting as Agent, and by P. Gentili, avvocato dello Stato,
- the United Kingdom Government, by S. Brighthouse, acting as Agent, and by R. Hill, Barrister,
- the European Commission, by W. Roels and W. Mölls, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 2 October 2014,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 63 TFEU.

2 The request has been made in proceedings between the Staatssecretaris van Economische Zaken (State Secretary for Economic Affairs) and the Staatssecretaris van Financiën (State Secretary for Finance), and Q concerning the refusal by the Netherlands authorities to recognise a property which the interested party owns in a Member State other than the Kingdom of the Netherlands as being an ‘estate’ (‘landgoed’), thus depriving her of the possibility of an exemption in respect of the gift of the property that she wishes to make.

Netherlands law

3 Article 1 of the Law on succession 1956 (Successiewet 1956; ‘the Law on succession’) provides:

‘1. In accordance with this law, the following taxes shall be levied:

...

2° gift tax on the value of what is obtained as a gift from someone who at the time of donation resided in the Netherlands;

...’

4 Article 5 of the Law on succession is worded as follows:

‘...

2. The gift tax is levied on what the donee receives, after the deduction of any charges and liabilities related to the donation, from which either the donor or a third party benefit.’

5 Article 1 of the Law on nature protection 1928 (Natuurschoonwet 1928; ‘the Law on nature protection’) provides:

‘1. For the purposes of this law:

a. “estate” means an immovable property situated in the Netherlands, wholly or partly covered by areas of nature, forests or other woodland — including those on which there is a country residence or other buildings appropriate to the character of the estate — in so far as the survival of that immovable property in its distinctive form is desirable for the conservation of the natural heritage;

b. “owner” means

1° the owner of an immovable property which is not subject to a limited usufruct or lease, except in the cases referred to in paragraph 3;

2° the usufructuary or lessee, except in the cases referred to in paragraph 3;

c. “beneficial ownership” means a system of rights and obligations relating to an immovable

property that represents an interest in that property. The interest incorporates at least some risk that the value may vary, and belongs to a person other than the owner under civil law. A grant of the mere right to delivery is not deemed to be a transfer of beneficial ownership;

- d. “our Minister” means our Minister for Economic Affairs, Agriculture and Innovation;
- e. “our Ministers” means our Minister for Economic Affairs, Agriculture and Innovation and our Minister for Finance.

2. By or in accordance with a general administrative measure, rules shall be laid down with regard to the conditions which an immovable property must satisfy in order to be regarded as an estate. Those conditions concern:

- a. the surface area of the immovable property, which may also include the surface area of an adjoining immovable property that is regarded as an estate or as forming such an estate together with the first immovable property, if there is a close historical link between both immovable properties;
- b. the minimum percentage of the surface area of the immovable property that must be covered by areas of nature, forests or other woodland, and the types of those areas of nature, forests and other woodland;
- c. the size and nature of the land not occupied by areas of nature, forests or other woodland, whether or not linked to the nature of the land immediately adjoining the immovable property;
- d. the method and type of construction;
- e. the type of use to which the land and buildings are put.

...’

6 Article 2 of the Law on nature protection provides:

‘1. An owner wishing to have his immovable property designated as an estate shall apply to our Ministers by means of an application submitted to our Minister.

...

4. Our Ministers shall decide on the application by means of a joint decision.’

7 Article 7 of the Law on nature protection states:

‘1. If an immovable property which is deemed to be an estate forms part of an acquisition within the meaning of the [Law on succession] — provided the conditions as set out in the following paragraph are met — no recovery shall take place of the difference between the assessed gift tax or inheritance tax which is payable and the tax which would be payable if the immovable property were to be valued at half the market value which would have to be assigned to it at the time of its acquisition if it were encumbered with the burden of having to be maintained as such for a period of 25 years without the felling of any tall trees except as is necessary or customary according to the rules of normal forest management. By way of derogation therefrom, if the estate is accessible to the public in accordance with rules approved by our Ministers, the value of that estate shall be reduced to nil.

...’

8 Article 1 of the classification decision adopted pursuant to the Law on nature protection provides:

‘1. For the purposes of this decision:

- a. “estate” means any estate referred to in Article 1(1)(a) of the Law on nature protection ...;
- b. “woodland” means woodland not comprising arboricultural species, Christmas trees, dwarf-tree orchards or osieries;
- c. “country residence” means an immovable property on which is situated an originally fortified house, a castle, a country house or stately home, including any outbuildings, surrounded by a historic garden or park together forming an architectural whole of at least one hectare that was established before 1850 and is recognisable, if that complex, or at least one of its elements, is a protected historic building listed in a register referred to in Article 6(1) of the Law on the protection of historic buildings 1988;
- d. “areas of nature” means:
 - 1° heathland, moorland, marshland, mobile dunes, dune fields, salt meadows, tidal gullies, salt marshes, alluvial land, mud flats, ‘green’ beaches, reed beds, scrub, thickets, swamps, bogs, ponds, brooks, small rivers, pools, closed river channels, creeks, springs and water sources, in so far as they cannot be used as agricultural land;
 - 2° calcareous grasslands, flowering meadows of hills, of areas of sand or peat bog or of fluvial or alluvial areas, humid rough grasslands, marsh marigold meadows of river valleys or of areas of peat bog or clay soil, humid moderately nutrient-rich rough grasslands, dry rough grasslands of higher ground, dry dune grasslands poor in calcium, dry dune grasslands rich in calcium and inland salt pastures, in so far as they are not used as pasture land or hay meadows and have vegetation of a type that is characteristic of those grasslands.

...’

9 Article 2 of the classification decision made pursuant to the Law on nature protection provides:

‘1. For the purposes of designation as an estate, an immovable property must satisfy the following conditions:

- a. the immovable property must have a minimum surface area of 5 hectares;
- b. the land and water areas of which the immovable property is composed must form a contiguous area;
- c. at least 30% of the surface area of the immovable property must be covered by woodland or areas of nature;
- d. the use of the immovable property must not adversely affect the natural heritage.

2. In so far as the land, buildings or water areas of which the immovable property is composed, or the use made thereof, adversely affect the natural heritage, such land, buildings and water areas shall not be taken into account as immovable property for the purposes of designation as an estate.

...’

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

- 10 Q, who is resident in the Netherlands for tax purposes, is the owner of a property situated in the United Kingdom ('The Bean House') which she intends to give to her son as a gift.
- 11 Under Netherlands legislation, such a gift could, in whole or in part, be exempt from tax on the condition, in particular, that 'The Bean House' is an estate within the meaning of the Law on nature protection and, therefore, that it is situated in the Netherlands.
- 12 Q unsuccessfully applied to the Netherlands tax authorities for such recognition to be granted.
- 13 The court at first instance before which the matter was brought by Q held that the right to an exemption from gift tax cannot be limited to estates situated in the Netherlands. According to that court, the impediment to the free movement of capital resulting from such a limitation is justified neither by that Member State's interest in the protection of its natural and cultural heritage, nor by the need to guarantee the effectiveness of fiscal supervision.
- 14 In appeal proceedings brought by the Staatssecretaris van Economische Zaken and the Staatssecretaris van Financiën before the Raad van State (Council of State), which also considers there to be a restriction on the free movement of capital, the Raad van State questions the justification identified by the first-instance court. The Netherlands tax authorities maintained that the impediment was justified on account of the practical difficulties posed by fiscal controls in a Member State other than the Kingdom of the Netherlands, including the need to check whether the owners are complying with their commitment to maintain the estate over a period of 25 years. In that regard, the Raad van State queries the extent to which the authorities of other Member States would be obliged to assist the Netherlands authorities in relation to their controls.
- 15 In those circumstances the Raad van State decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:
- '(1) Does the importance of the conservation of national natural heritage and cultural and historical heritage, as addressed in the [Law on nature protection], constitute an overriding reason in the public interest which justifies a scheme whereby the application of an exemption from gift tax (tax benefit) is limited to estates situated in the Netherlands?
- (2) (a) May the authorities of a Member State, in the context of an investigation into whether an immovable property situated in another Member State may be designated as an estate for the purposes of the [Law on nature protection], rely on Council Directive 2010/24/EU of 16 March 2010 concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures [(OJ 2010 L 84, p. 1)] for assistance from the authorities of the Member State in which the immovable property is situated, when the designation as an estate pursuant to that law will result in an exemption being granted from the recovery of the gift tax which will be payable upon donation of that immovable property?
- (b) If question 2(a) must be answered in the affirmative, must the concept of "administrative enquiry" in Article 3(7) of Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC [(OJ 2011 L 64, p. 1)] be interpreted as meaning that it also covers an on-site investigation?
- (c) If question 2(b) must be answered in the affirmative, may clarification of the term "administrative enquiries" in Article 5(1) of [Directive 2010/24] be sought in the

definition of the term “administrative enquiry” in Article 3(7) of [Directive 2011/16]?

- (3) If question 2(a), question 2(b) or question 2(c) must be answered in the negative, should the principle of sincere cooperation, as laid down in Article 4(3) TEU, considered in conjunction with Article 167(2) TFEU, be interpreted as meaning that, when a Member State requests another Member State to provide assistance with the investigation of whether an immovable property situated in that other Member State may be designated as an estate for the purposes of a law which has as its aim the conservation and protection of national natural heritage and cultural and historical heritage, the requested Member State is obliged to provide that assistance?
- (4) Can a restriction on the free movement of capital be justified by invoking the need to guarantee effective fiscal controls, if it appears that the only risk to effectiveness of those controls is the need for national authorities to travel to another Member State for the period of 25 years referred to in Article 7(1) of the [Law on nature protection] in order to carry out the necessary controls there?’

Consideration of the questions referred

- 16 By its questions, which it is appropriate to consider together, the referring court asks, in essence, whether Article 63 TFEU must be interpreted as precluding legislation of a Member State, such as that at issue in the main proceedings, under which an exemption from gift tax relating to certain protected sites is limited to those sites which are situated in the territory of that Member State.
- 17 Under Article 63(1) TFEU, all restrictions on the movement of capital between Member States and between Member States and third countries are to be prohibited.
- 18 The Court has already held that the tax treatment of gifts, whether they are gifts of money, immovable property or movable property, comes under the provisions of the FEU Treaty on the movement of capital, except where their constituent elements are confined within a single Member State (see judgment in *Mattner*, C-510/08, EU:C:2010:216, paragraph 20).
- 19 It follows from this that a situation, such as that at issue in the main proceedings, in which a person residing in a Member State makes a gift of an immovable property situated in another Member State falls within the scope of Article 63(1) TFEU.
- 20 The Court has already held, in relation to inheritance tax, that the fact that the grant of tax advantages is made subject to the condition that the asset transferred be situated in the national territory constitutes a restriction on the free movement of capital prohibited, in principle, by Article 63(1) TFEU (see judgment in *Jäger*, C-256/06, EU:C:2008:20, paragraphs 28 to 35). Similarly, in the case of gifts, measures whose effect is to reduce the value of a gift by a resident of a Member State other than that in which the property concerned is located and which taxes the gift of that property also constitute such a restriction (see judgment in *Mattner*, EU:C:2010:216, paragraph 26).
- 21 Consequently, in so far as national provisions such as those at issue in the main proceedings make the application of an exemption from gift tax subject to the condition that the immovable property concerned be situated in the national territory, the greater tax burden on a gift made by a person residing in a Member State when that gift is of a property situated in another Member State constitutes a restriction on the free movement of capital.
- 22 In order for such a restriction to be deemed to be compatible with the Treaty provisions on the free

movement of capital, it is, in particular, necessary that the difference in treatment relate to situations which are not objectively comparable, such comparability being required to be assessed on the basis of the object and content of the national provisions at issue in the main proceedings (see judgment in *X Holding*, C-337/08, EU:C:2010:89, paragraphs 20 and 22).

- 23 The Court considers this to be so in the case at issue in the main proceedings.
- 24 The object of the exemption from gift tax provided for by the Netherlands rules at issue in the main proceedings is to protect the integrity of the estates that are typical of the traditional Netherlands landscape ('landgoed') against any parcelling out or fundamental changes in the nature of those estates that might result from donors being obliged, in order to pay the tax on the transfer, to break up an estate to dispose of part of it, or to operate it in a way that would adversely affect its particular character.
- 25 The tax advantage associated with the transfer of a 'landgoed' thus has the aim, as the referring court itself noted, of conserving the national natural heritage, which includes the aim of conserving the cultural and historical heritage. That aim can, in particular, be inferred from the definition of 'estate' in Article 1(1)(a) of the Law on nature protection, according to which areas on which there is a house or other buildings appropriate to the character of the estate may be regarded as an integral part of the estate, as well as from the definition of a 'country residence' forming part of a 'landgoed' in Article 1 of the classification decision, according to which the complex must be surrounded by a historic garden or park established before 1850 and must include at least one element that is a listed historic building for the purposes of Article 6(1) of the Law on the protection of historic buildings 1988.
- 26 It is apparent from the file submitted to the Court that the gift at issue in the main proceedings concerns a property situated in the United Kingdom of approximately 18 hectares including historic buildings listed under the relevant legislation in the United Kingdom.
- 27 However, in the light of the aim pursued by the national legislation at issue, a taxpayer proposing to make a gift of a 'landgoed' which includes a 'country residence' cannot be regarded as being in a situation that is objectively comparable to that of a taxpayer proposing, as in the main proceedings, to make a gift of a property situated in the territory of another Member State, even if that property includes historic buildings listed under the legislation applicable in the latter Member State. Since the tax advantage at issue in the main proceedings is intended to preserve the integrity of certain properties forming part of the national cultural and historical heritage, the resultant disadvantage for a taxpayer in the second of those two situations is thus inherent in the objective pursued by the Netherlands legislature.
- 28 As stated in paragraph 33 of the judgment delivered today in *X* (C-87/13), the position could be different only if such a taxpayer were to establish that, although a property is situated in the territory of a State other than the Kingdom of the Netherlands, it nevertheless forms part of the Netherlands cultural and historical heritage and that that circumstance would render it capable of being protected under the Law on nature protection but for the fact that it is situated outside national territory.
- 29 Having regard to the foregoing considerations, the answer to the questions referred is that Article 63 TFEU must be interpreted as not precluding legislation of a Member State, such as that at issue in the main proceedings, under which an exemption from gift tax relating to certain properties that are protected on account of their forming part of the national cultural and historical heritage is limited to those properties situated in the territory of that Member State, provided that that exemption is not excluded in the case of properties that may form part of the cultural and historical

heritage of that Member State despite being located in the territory of another State.

Costs

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

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

Article 63 TFEU must be interpreted as not precluding legislation of a Member State, such as that at issue in the main proceedings, under which an exemption from gift tax relating to certain properties that are protected on account of their forming part of the national cultural and historical heritage is limited to those properties situated in the territory of that Member State, provided that that exemption is not excluded in the case of properties that may form part of the cultural and historical heritage of that Member State despite being located in the territory of another State.

[Signatures]

* Language of the case: Dutch.