JUDGMENT OF THE COURT (First Chamber)

8 June 2016 (*)

(Reference for a preliminary ruling — Free movement of capital — Articles 63 and 65 TFEU — Gift tax — Gift of immovable property situated within national territory — National law providing for a higher tax-free allowance for residents than for non-residents — Existence of an optional regime allowing any person resident in an EU Member State to benefit from the higher tax-free allowance)

In Case C-479/14,

REQUEST for a preliminary ruling under Article 267 TFEU from the Finanzgericht Düsseldorf (Finance Court, Düsseldorf, Germany), made by decision of 22 October 2014, received at the Court on 28 October 2014, in the proceedings

Sabine Hünnebeck

v

Finanzamt Krefeld,

THE COURT (First Chamber),

composed of R. Silva de Lapuerta, President of the Chamber, A. Arabadjiev, J.-C. Bonichot, S. Rodin and E. Regan (Rapporteur), Judges,

Advocate General: M. Wathelet,

Registrar: C. Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 16 December 2015,

after considering the observations submitted on behalf of:

– Ms Hünnebeck, by M. Sarburg, Rechtsanwalt,

– the German Government, by T. Henze and K. Petersen, acting as Agents,

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

after hearing the Opinion of the Advocate General at the sitting on 18 February 2016,

gives the following

Judgment

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

2 The request has been made in proceedings between Ms Sabine Hünnebeck and the Finanzamt

Krefeld (Tax Office, Krefeld), concerning the calculation of the transfer duties payable in respect of the gift of real property in Germany of which Ms Hünnebeck was a joint owner.

Legal context

EU law

3 Article 1 of Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty (an article repealed by the Treaty of Amsterdam) (OJ 1988 L 178, p. 5) provided:

‘1. Without prejudice to the following provisions, Member States shall abolish restrictions on movements of capital taking place between persons resident in Member States. To facilitate application of this Directive, capital movements shall be classified in accordance with the Nomenclature in Annex I.

2. Transfers in respect of capital movements shall be made on the same exchange rate conditions as those governing payments relating to current transactions.’

4 The capital movements listed in Annex I to that directive include, under heading XI of that annex entitled ‘personal capital movements’, gifts and endowments.

German law

5 The Erbschaftsteuer- und Schenkungsteuergesetz (Law on inheritance and gift tax), in the version published on 27 February 1997 (BGBl. 1997 I, p. 378), as last amended by Paragraph 11 of the Law of 7 December 2011 (BGBl. 2011 I, p. 2592; ‘the ErbStG’), provides in Paragraph 1, entitled ‘Taxable events’:

‘1. Inheritance (or gift) tax shall apply to

(1) transfers on death;

(2) gifts *inter vivos*;

(3) restricted gifts;

...

2. Unless provided otherwise, the provisions of the present Law relating to the transfer of assets on death shall apply also to gifts and restricted gifts, and the provisions relating to gifts shall apply also to restricted gifts *inter vivos*.’

6 Paragraph 2 of the ErbStG, entitled ‘Personal liability to tax’, provides:

‘(1) Liability to tax arises

1. in the cases referred to in Paragraph 1(1), points 1 to 3, in relation to the entirety of the transferred assets (unlimited tax liability), where the deceased, on the date of death, the donor, on the date of making the gift, or the beneficiary, on the date of the chargeable event (Paragraph 9), is a resident. The following persons are regarded as residents:

(a) natural persons whose place of residence or habitual residence is in Germany,

(b) German nationals who have resided abroad continuously for not more than five years

and who do not have a place of permanent residence in Germany.

...

3. in all other cases, subject to subparagraph (3), in relation to transferred assets which are domestic assets within the meaning of Paragraph 121 of the Bewertungsgesetz [Law on valuation, "the BewG"] (limited tax liability).

...

(3) On the application of the beneficiary, the total acquisition of assets, including domestic assets within the meaning of Paragraph 121 of the [BewG] (subparagraph 1.3), shall, in its entirety, be treated as subject to unlimited tax liability if the deceased, at the date of death, the donor, at the date on which the gift was made, or the beneficiary, at the date of the chargeable event (Paragraph 9), has his or her place of residence in a Member State of the European Union or in a State to which the Agreement on the European Economic Area [of 2 May 1992 (OJ 1994 L 1, p. 3), "the EEA agreement"] is applicable. Where multiple transfers were made by the same person in the 10 years preceding the acquisition of assets and in the 10 years following such acquisition, those transfers shall also be treated as subject to unlimited tax liability and aggregated in accordance with Paragraph 14. …'

7 Paragraph 14(1) of the ErbstG, entitled 'Taking into account of previous transfers', provides:

'Multiple acquisitions of assets from the same person to the same beneficiary within 10 years shall be aggregated by adding to the value of the latest transferred asset the values of the previously transferred assets on the date of their transfer. From the transfer duties on the total amount shall be deducted the duties which would have been payable on the previously transferred assets, having regard to the personal circumstances of the beneficiary and on the basis of the provisions applicable on the date of the last transfer. …'

8 Paragraph 15(1) of the ErbStG, entitled 'Tax classes', provides:

'Depending on the personal relationship between the beneficiary and the deceased or donor, the following three tax classes are distinguished:

Tax class I:

(1) the spouse and partner,

(2) children and stepchildren,

…'

9 Paragraph 16, entitled 'Allowances', is worded as follows:

'1. Exempt in the event of unlimited tax liability (Paragraph 2(1), point 1, and Paragraph 2(3)) are transfers of assets to

(1) a spouse or partner in the amount of EUR 500 000;

(2) to children within the meaning of tax class I.2 and to the children of deceased children within the meaning of tax class I.2 in the amount of EUR 400 000;

…

2. In lieu of an allowance under Paragraph 16(1), in cases of limited tax liability (Paragraph 2(1), point 3) an allowance of EUR 2 000 shall be applicable.'

10 Under the heading 'Domestic assets', Paragraph 121 of the BewG, in the version published on 1 February 1991 (BGBl. 1991 I, p. 230), as amended most recently by Paragraph 10 of the Law of 7 December 2011 (BGBl. 2011 I, p. 2592), is worded as follows:

'Domestic assets include:

(1) domestic agricultural and forestry assets;

(2) real property situated within Germany;

…'

The dispute in the main proceedings and the question referred

11 Ms Hünnebeck and her two daughters are German nationals. They reside in Gloucestershire in the United Kingdom. Ms Hünnebeck has not lived in Germany since 1996. Her daughters have never lived in Germany.

12 Ms Hünnebeck was the 50% co-owner of real property situated in Düsseldorf in Germany. By an agreement of 20 September 2011 certified by a notary, Ms Hünnebeck transferred that portion of the property to her daughters in shares of 50% each. It was provided that Ms Hünnebeck would be liable for any gift tax which might become payable on that gift. On 12 January 2012, a lawyer acting as a guardian of Ms Hünnebeck's daughters, who are minors, granted his approval with respect to the declarations made in the agreement of 20 September 2011.

13 By two decisions of 31 May 2012, the Krefeld Tax Office set the amount of transfer duties payable by Ms Hünnebeck in respect of each share at EUR 146 509. In calculating the transfer duties, the Office deducted from the taxable value of each share the personal tax-free allowance of EUR 2 000 granted to persons with limited tax liability.

14 Ms Hünnebeck lodged an administrative appeal seeking to obtain, in respect of each of the shares given to her two children, the application of the personal tax-free allowance of EUR 400 000 available to persons with unlimited tax liability pursuant to Paragraph 16(1), point 2, of the ErbStG. That appeal was dismissed. Following that dismissal, Ms Hünnebeck brought an action before the Finanzgericht Düsseldorf (Finance Court, Düsseldorf, Germany) seeking to have that allowance applied. Before that court, Ms Hünnebeck submitted that she had not made a claim to the tax service for the allowance under Paragraph 2(3) of the ErbStG on the ground that that provision, which entered into force after the gifts had been made, was not applicable to her and required that account be taken of gifts made before the gift at issue in the main proceedings.

15 The Krefeld Tax Office contended, before that court, that Paragraph 2(3) of the ErbStG ensured that persons with unlimited tax liability and those with limited tax liability were treated equally in all respects.

16 The referring court has doubts as to whether Paragraph 16(2) of the ErbStG, also when read in conjunction with Paragraph 2(3) of that law, is compatible with Article 63(1) TFEU and Article 65 TFEU.

17 The referring court notes that, in the judgment of 22 April 2010 in *Mattner* (C-510/08,

EU:C:2010:216), the Court has already ruled on the compatibility with EU law of Paragraph 16(2) of the ErbStG, in a version worded in almost identical terms to the relevant provision at issue in the main proceedings in the present case. The referring court considers that, having regard to that judgment alone, it must uphold the action before it, inasmuch as EU law precludes the combined application of Paragraph 2(1), point 3, and Paragraph 16(2) of the ErbStG, which resulted in the grant to Ms Hünnebeck and to her daughters of a tax-free allowance of EUR 2 000 by reason of the fact that they resided, as at the date of the gift at issue in the main proceedings, in the United Kingdom, whereas that tax-free allowance would have amounted to EUR 400 000, under the combined provisions of Paragraph 2(1), point 1(a), Paragraph 15(1) and Paragraph 16(1), point 2, of the ErbStG, if the donor or the beneficiaries had, as at that same date, been resident in Germany.

18 However, the referring court is unsure whether the position is different following the adoption of Paragraph 2(3) of the ErbStG by the German legislature in response to the judgment of 22 April 2010 in *Mattner* (C-510/08, EU:C:2010:216).

19 With reference to the line of authority established by the judgments of 12 December 2006 in *Test Claimants in the FII Group Litigation* (C-446/04, EU:C:2006:774, paragraph 162); of 18 March 2010 in *Gielen* (C-440/08, EU:C:2010:148, paragraph 53); and of 28 February 2013 in *Beker* (C-168/11, EU:C:2013:117, paragraph 62), the referring court takes the view that, while the Court has not yet ruled on that point, it has nonetheless held that a national law that is optional may be contrary to EU law. Consequently, that court considers it likely that the adoption of Paragraph 2(3) of the ErbStG is not capable of remedying the incompatibility of Paragraph 16(2) of the ErbStG with EU law on the ground, in particular, that that latter provision is automatically applied in the absence of an application by the taxable person.

20 The referring court also questions whether the rule set out in Paragraph 2(3) of the ErbStG is compatible with EU law.

21 First, under that provision, the beneficiary can make an application for the higher tax-free allowance only if, at the time of the transfer, the deceased, the donor or the beneficiary was resident in the territory of a Member State of the European Union or in a State to which the EEA Agreement applies, whereas the Court, in its judgment of 17 October 2013 in *Welte* (C-181/12, EU:C:2013:662) held that the provisions of EU law preclude legislation of a Member State relating to the calculation of inheritance tax which provides, in the event of inheritance of immovable property situated in that State, for the application of a tax-free allowance, in a case where, at the time of the death, the deceased and the heir had a permanent residence in a third country, which was less than the allowance which would have been applied if at least one of them had been resident in that Member State at that time.

22 Second, the referring court states that, in the case of multiple transfers from a single person in the 10 years preceding and the 10 years following the transfer of the assets, the second sentence of Paragraph 2(3) of the ErbStG requires that those multiple transfers also be treated as subject to unlimited tax liability and aggregated in accordance with Paragraph 14 of the ErbStG. Thus, whereas, in the case of taxable persons covered by Paragraph 2(1), point 1, of the ErbStG, the allowance applies to all the assets transferred by the same person within a period of 10 years, the period taken into account in the case of taxable persons covered by Paragraph 2(3) is 20 years.

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

‘Must Article 63(1) TFEU, read in conjunction with Article 65 TFEU, be interpreted as precluding legislation of a Member State which provides that, for the calculation of gift tax, the allowance to

be set against the taxable value in the case of a gift of real property situated in that Member State is lower in the case where the donor and the beneficiary had their place of residence in another Member State on the date of execution of the gift than the allowance which would have been applicable if at least one of them had had his or her place of residence in the former Member State on that date, even if other legislation of the Member State provides that, on the application of the beneficiary of the gift, the higher allowance is to be applied, on condition that account is taken of all assets transferred gratuitously by the donor 10 years prior to and within 10 years following the date of execution of the gift?'

The question referred for a preliminary ruling

Preliminary observations

24 In the first instance, it should be recalled that the mechanism established by the German legislature, by which, for the calculation of gift tax, the allowance to be set against the taxable value in the case of a gift of immovable property in that State is lower in the case where the donor and the beneficiary were resident in another Member State on the date of the gift than the allowance which would have applied if at least one of them had been resident in the former Member State on that date, was found by the Court to constitute an unjustified restriction on the free movement of capital in the judgment of 22 April 2010 in *Mattner* (C-510/08, EU:C:2010:216) and also gave rise to the judgment finding a failure to fulfil obligations of 4 September 2014 in *Commission* v *Germany* (C-211/13, EU:C:2014:2148).

25 In the present case, it is common ground that that mechanism still applies, failing a request by the beneficiary to benefit from the higher allowance, in the case of gifts between non-residents. There is no information in the case-file before the Court that could lead to the conclusion that that mechanism of taxation should be assessed differently in the context of the present preliminary reference.

26 However, while retaining that same mechanism of taxation, the national legislature amended Paragraph 2 of the ErbStG by adding a subparagraph 3 under which, in the case of a gift between non-residents, the beneficiary can request the benefit of the higher tax-free allowance provided in the case of gifts involving at least one resident.

27 In the second place, the object of the present request for a preliminary ruling should be clarified.

28 First, it must be noted that the Commission submits that the condition, laid down by the ErbStG, by which non-resident beneficiaries can request the application of the higher allowance only if the beneficiary or the donor is resident in an EU Member State or in a State to which the EEA Agreement applies, is contrary to the Court's case-law established by the judgment of 17 October 2013 in *Welte* (C-181/12, EU:C:2013:662), since such an allowance does not apply to transfers between donors and beneficiaries who are resident in third countries.

29 While the wording of the question does not expressly refer to that aspect of the national legislation at issue, it is clear from the request for a preliminary ruling that the referring court also had doubts, in that regard, as to whether the national law is compatible with EU law.

30 However, it should be borne in mind in that regard that, while questions on the interpretation of EU law referred by a national court, in the factual and legislative context which that court is responsible for defining and the accuracy of which is not a matter for the Court to determine, enjoy a presumption of relevance, the Court may refuse to rule on a question referred for a preliminary

ruling by a national court if it is quite obvious that the interpretation of EU law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (see, to that effect, judgment of 28 February 2013 in *Beker*, C-168/11, EU:C:2013:117, paragraph 19 and the case-law cited).

31 In the present case, it is common ground that Ms Hünnebeck and her two daughters, the beneficiaries of the gift in question, were all resident in the United Kingdom at the date on which that gift was made.

32 Accordingly, failing a connection with the facts of the case in the main proceedings, the matter of the alleged incompatibility, as set out in paragraph 28 above, is hypothetical and, hence, does not call for a reply by the Court in the context of the present proceedings.

33 Second, there is a disagreement as to the interpretation to be given to the national law at issue regarding the period to be taken into account for the aggregation of gifts under the hypothesis referred to in Paragraph 2(3) of the ErbStG.

34 The referring court takes the view that, on that hypothesis, the taxable value to which the allowance granted must be attributed is the sum of all the gifts made during the period of 20 years, whereas, on the hypothesis that the donor or the beneficiary are resident in Germany, that taxable value is the sum of all the gifts made during a period of 10 years.

35 The German Government, by contrast, takes issue with that interpretation of Paragraphs 2(3) and 14 of the ErbStG. According to it, in both the case of a gift between non-residents and that of a gift where at least one of the parties is a resident, all the gifts made in the 10 years preceding the last gift are aggregated. On the other hand, the application of those provisions at the request of the beneficiary would result in the full taxation of all assets transferred within a period of 20 years.

36 In that regard, it must be borne in mind that the national court alone has jurisdiction to find and assess the facts in the case before it and to interpret and apply national law (see the judgment of 11 September 2008 in *Eckelkamp and Others*, C-11/07, EU:C:2008:489, paragraph 32 and the case-law cited). It should also be borne in mind that the Court must in principle confine its examination to the matters which the court or tribunal making the reference has decided to submit to it. As regards the application of the relevant national law, the Court must, therefore, proceed on the basis of the situation which that court or tribunal considers to be established and it cannot be bound by suppositions raised by one of the parties to the main proceedings (judgment of 6 March 2003 in *Kaba*, C-466/00, EU:C:2003:127, paragraph 41). Consequently, it is for the referring court and not for the Court of Justice to determine the meaning and effect, in German law, of the national legislation at issue and, in particular, the legal consequences for non-resident beneficiaries of the application, at their request, of the higher allowance.

37 Accordingly, it must be held that, by its question, the referring court is asking, essentially, whether Articles 63 and 65 TFEU must be interpreted as precluding national rules that provide, in respect of gifts between non-residents, first, in the absence of a specific request by the beneficiary, for recourse to a method of calculation of taxation by application of a lower tax-free allowance and, second, at the request of such a beneficiary, for recourse to a method of calculation of taxation by application of the higher tax-free allowance which applies to gifts in respect of which at least one party is a resident, the exercise of that option by the non-resident beneficiary involving the aggregation, for the purpose of calculating the tax due on the gift in question, of all the gifts received by that beneficiary from the same person over the course of the 10 years preceding and of the 10 years following that gift.

The existence of a restriction on the free movement of capital

38 According to settled case-law, Article 63(1) TFEU lays down a general prohibition of restrictions on the movement of capital between Member States (see the judgment of 17 September 2015, *F.E. Familienprivatstiftung Eisenstadt*, C-589/13, EU:C:2015:612, paragraph 35 and the case-law cited).

39 In the present case, it is common ground that the gift at issue in the main proceedings was a transaction that comes within the scope of Article 63(1) TFEU.

40 As regards the question whether the law at issue amounts to a restriction within the meaning of that provision, it should be recalled that national provisions which determine the value of immovable property for the purposes of calculating the amount of tax payable when it is acquired as a gift not only may be capable of discouraging the purchase of immovable property in the Member State concerned but may also have the effect of reducing the value of a gift by a resident of a Member State other than that in which the property is located (see the judgment of 22 April 2010 in *Mattner*, C-510/08, EU:C:2010:216, paragraph 25).

41 In the present case, it is evident from the request for a preliminary ruling that, first, the mechanism of taxation introduced by the adoption of Paragraph 2(3) of the ErbStG, allowing the beneficiary of a gift between non-residents to benefit from the higher tax-free allowance provided for in the case of gifts involving at least one resident, is of optional application and, second, that the exercise of that option by the non-resident beneficiary involves the aggregation, for the purposes of calculating the tax payable in respect of the gift in question, of all the gifts received by that beneficiary from the same person over the course of the 10 years preceding and of the 10 years following that gift, whereas, for gifts involving at least one resident, only the gifts made within a period of 10 years are aggregated.

42 As regards the optional nature of that mechanism of taxation, it must be noted that, even if that mechanism were compatible with EU law, it is settled case-law that a national scheme that restricts the freedoms of movement may still be incompatible with EU law even if it is optional in application. The existence of an option which would possibly render a situation compatible with EU law does not, in itself, correct the unlawful nature of a system, such as the system provided for by the contested rules, which still includes a mechanism of taxation that is not compatible with that law. It should be added that this is even more so in the situation where, as in the present case, the mechanism incompatible with EU law is the one which is automatically applied in the case where the taxpayer fails to make a choice (see, to that effect, the judgment of 28 February 2013 in *Beker*, C-168/11, EU:C:2013:117, paragraph 62 and the case-law cited).

43 In order to provide a useful answer to the referring court in the context of the present case, it is necessary to examine the question of whether a mechanism of taxation, such as that introduced by the adoption of Paragraph 2(3) of the ErbStG, is compatible with the TFEU provisions relating to the free movement of capital.

44 In that respect, as regards the length of the period for the aggregation of gifts to be taken into account for the purposes of applying the higher allowance, while the higher allowance that is applied to gifts between non-residents at the request of beneficiaries is identical to that applied to gifts in respect of which at least one party is a resident, the fact nonetheless remains that the period taken into consideration for the aggregation of gifts differs depending on whether those gifts come within the first or the second of those categories.

45 In such circumstances, which it is for the referring court to confirm, it must be held, without it

being necessary to rule on the compatibility of a mechanism, such as that laid down in Paragraph 2(3) of the ErbStG, which subjects all transfers made by a non-resident to unlimited tax liability, that the fact of taking into account a longer period for the aggregation of gifts between non-residents than for gifts in respect of which at least one party is a resident is liable, in some circumstances, to lead to the application of the allowance, in the first category of gifts, to a higher taxable value than for the second and, hence, the first category of gifts being subject to higher taxation on those gifts than would have been required for the second category of gifts. Such a mechanism has the effect of restricting the movement of capital because it is liable to reduce the value of a gift which includes such an asset (see, by analogy, the judgment of 22 April 2010 in *Mattner*, C-510/08, EU:C:2010:216, paragraph 27).

46 It is also necessary to note that such a situation is made even worse by the fact that, unlike gifts in respect of which at least one resident is a party, in the calculation of the taxation of which only gifts made earlier may be aggregated, thus enabling the taxable person to predict the amount of tax payable, in the case of gifts between non-residents the aggregation of transfers also applies to those that will occur over the course of the 10 years following the gift in question, which thus places those beneficiaries in the position of not knowing what tax on asset transfers will later be payable. In that regard, Ms Hünnebeck states that she did not ask to benefit from the higher allowance under Paragraph 2(3) of the ErbStG in particular due to that unforeseeability.

47 It must be held that such a lack of foreseeability may have the effect of deterring non-residents from acquiring or maintaining property situated in that Member State, given that the later transfer of those assets to other non-residents would place the latter in a position of uncertainty for a longer time as regards the future taxation that might be demanded by that Member State (see, by analogy, the judgment of 15 September 2011 in *Halley*, C-132/10, EU:C:2011:586, paragraphs 22 to 25).

48 In those circumstances, subject to the checks to be carried out by the referring court as to the length of the period to be taken into account for the purpose of the application, at the request of non-resident beneficiaries, of the higher tax-free allowance, which involves the interpretation and application of German law, it must be held that, as regards the length of the period for the aggregation of the gifts to be taken into account for the application of the higher allowance, the tax treatment of gifts between non-residents that is less favourable than that of gifts in respect of which at least one of the parties is a resident, constitutes a restriction on the free movement of capital that is prohibited, in principle, by Article 63(1) TFEU.

49 Furthermore, it must be held that, contrary to the submission made by the German Government, that difference in treatment cannot be considered to be compatible with the TFEU provisions relating to the free movement of capital on the ground that it relates to situations that are not objectively comparable. In particular, the German Government submits that the situation of residents and that of non-residents are not comparable as regards their respective tax bases. Those two categories of taxable persons cannot, according to that Government, be treated in exactly the same way by reason of the principle of territoriality.

50 In that regard, it must be recalled that, according to Article 65(1)(a) TFEU, Article 63 TFEU is to be ‘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’.

51 In so far as that provision of Article 65 TFEU derogates from the fundamental principle of the free movement of capital, it must be interpreted strictly. It cannot therefore be interpreted as meaning that all tax legislation which draws a distinction between taxpayers on the basis of their place of residence or the State in which they invest their capital is automatically compatible with the Treaty

(see the judgment of 17 October 2013 in *Welte*, C-181/12, EU:C:2013:662, paragraph 42 and the case-law cited).

52 The derogation provided for in Article 65(1)(a) TFEU is itself limited by Article 65(3) TFEU, which provides that the national provisions referred to in paragraph 1 of that article 'shall not constitute a means of arbitrary discrimination or a disguised restriction on the free movement of capital and payments as defined in Article 63 [TFEU]' (see the judgment of 17 October 2013 in *Welte*, C-181/12, EU:C:2013:662, paragraph 43 and the case-law cited).

53 A distinction must therefore be made between differing treatment permitted under Article 65(1)(a) TFEU and arbitrary discrimination prohibited under Article 65(3) TFEU. The settled case-law of the Court establishes that, in order for national tax legislation, such as that at issue in the main proceedings — which, as regards the period to be taken into consideration for the application of the allowance on the tax value of immovable property situated in that Member State, draws a distinction according to whether the donor or beneficiary reside in that Member State or are both resident in another Member State — to be capable of being regarded as compatible with the Treaty provisions on the free movement of capital, the difference in treatment must concern situations which are not objectively comparable or be justified by overriding reasons in the general interest. In order to be justified, moreover, the difference in treatment between those two categories of gifts must not go beyond what is necessary in order to attain the objective of the legislation in question (see, to that effect, the judgment of 17 October 2013 in *Welte*, C-181/12, EU:C:2013:662, paragraph 44 and the case-law cited).

54 As regards the legal provisions at issue in the main proceedings, according to the case-file submitted to the Court the amount of the tax on gifts of immovable property in Germany is calculated under the ErbStG on the basis both of the value of the property and of the family relationship, if any, between the donor and the beneficiary. Neither of those criteria depends on the place of residence of the donor or the beneficiary. Therefore, as the Advocate General observes in point 62 of his Opinion, as regards the gift tax payable in respect of immovable property in Germany which is the object of a gift, there is no objective difference justifying unequal tax treatment between a situation in which no party to the gift resides in that Member State and one in which at least one of those parties resides in that State. Therefore, the situation of Ms Hünnebeck's daughters is comparable to that of any beneficiary who acquires immovable property in Germany by way of a gift from a person resident in Germany with whom there is a parent-child relationship, and also to that of any beneficiary residing in Germany who receives such a gift from such a person who does not reside there (see, by analogy, the judgment of 22 April 2010 in *Mattner*, C-510/08, EU:C:2010:216, paragraph 36).

55 The German legislation in principle regards both the beneficiary of a gift between non-residents and the beneficiary of a gift involving at least one resident as taxpayers for the purposes of charging gift tax on gifts of immovable property in Germany. It is only with respect to the period to be taken into account for the allowance against the taxable value that that legislation, for the purposes of calculating that tax, applies different treatment to gifts made between non-residents and those in respect of which at least one party is a resident. By contrast, it is not disputed that the determination of the class and rate of tax is made in accordance with the same rules for both those categories of gifts (see, by analogy, the judgment of 22 April 2010 in *Mattner*, C-510/08, EU:C:2010:216, paragraph 37).

56 Where national legislation places on the same footing, for the purposes of taxing immovable property acquired by gift which is located in the Member State concerned, on the one hand, non-resident beneficiaries who have acquired the property from a non-resident donor, and, on the other

hand, non-resident or resident beneficiaries who have acquired such property from a resident donor and resident beneficiaries who have acquired it from a non-resident donor, that national legislation cannot — without infringing the requirements of EU law — treat those beneficiaries differently in connection with that tax as regards the application of an allowance against the taxable value of the immovable property. By treating gifts to those two classes of persons in the same way, except in relation to the period to be taken into account for the application of the allowance from which the beneficiary may benefit, the national legislature has, in effect, accepted that there is no objective difference between them in regard to the detailed rules and conditions of charging gift tax such as could justify a difference in treatment (see, by analogy, the judgment of 22 April 2010 in *Mattner*, C-510/08, EU:C:2010:216, paragraph 38).

57 Admittedly, as the German Government argues in essence, the taxable value of the gift to a non-resident beneficiary, where he is partially subject to gift tax in Germany, is, in principle, less than that of a resident or non-resident beneficiary who is wholly subject to that tax in that Member State (see, by analogy, the judgment of 17 October 2013 in *Welte*, C-181/12, EU:C:2013:662, paragraph 52).

58 However, that fact cannot call into question the foregoing considerations, as is clear from the case-law of the Court (see, inter alia, the judgment of 3 September 2014 in *Commission* v *Spain*, C-127/12, not published, EU:C:2014:2130, paragraphs 77 and 78), *a fortiori* since the period to be taken into account for the application of the tax-free allowance provided for in the legislation at issue in the main proceedings does not vary at all in relation to the amount of the taxable value of the gift, but remains the same regardless of that latter amount.

59 It follows that, as the relevant period to be taken into account for the application of the tax-free allowance does not depend on the amount of the taxable value but applies to the beneficiary in his capacity as a taxable person, the characteristics pertaining to the tax liability of the non-resident beneficiary who receives a gift from a non-resident donor are not such as to make the situation of that beneficiary, as regards that period, objectively different from that of a non-resident beneficiary who receives a gift from a resident donor or from that of a resident beneficiary who receives a gift from a non-resident donor (see, by analogy, the judgment of 17 October 2013 in *Welte*, C-181/12, EU:C:2013:662, paragraph 55).

60 It is thus necessary to examine whether the restriction on the movement of capital, such as that established in paragraph 48 of this judgment, may be objectively justified by an overriding reason in the general interest.

Whether the restriction is justified by an overriding reason in the general interest

61 As to whether there is possible justification on the basis of an overriding reason in the general interest for the restriction consisting of the less favourable treatment of non-residents as regards the period for the aggregation of gifts to be taken into account for the purposes of the higher tax-free allowance, the grounds put forward by the German Government are not well founded.

62 In the first place, as regards the ground based on the need to safeguard the coherence of the German tax system, it should be recalled that the Court has, it is true, held that that ground may justify a restriction on the exercise of the fundamental freedoms guaranteed by the Treaty. However, in order for such a justification to be accepted, a direct link must be established between the granting of the tax advantage concerned and the offsetting of that advantage by a particular tax charge (see the judgment of 22 April 2010 in *Mattner*, C-510/08, EU:C:2010:216, paragraph 53 and the case-law cited).

63 In the present case, it suffices to state that, while the German Government merely submits, in very general terms, that Paragraph 2(3) of the ErbStG led to ‘a complete alteration’ of the personal gift tax regime for non-resident beneficiaries and all the advantages and disadvantages resulting from one or the other of the two personal tax regimes in respect of which the non-resident beneficiary could opt ‘to be compensated’, it fails to demonstrate how the aggregation of the gifts over a period of 20 years, where the beneficiary seeks to avail of the higher tax-free allowance, might be considered to be an appropriate means by which to achieve the objective of safeguarding the coherence of the German tax system. In that regard, it must be noted that the tax advantage derived from taking into account, for the application of the higher allowance, a period of 10 years preceding the gift in respect of which at least one resident in Germany is a party is not offset by any particular tax relating to gift tax (see, by analogy, the judgments of 22 April 2010 in *Mattner*, C-510/08, EU:C:2010:216, paragraph 54, and of 17 October 2013 in *Welte*, C-181/12, EU:C:2013:662, paragraph 60).

64 It follows that a restriction, such as the one identified in paragraph 48 of the present judgment, cannot be justified by the need to preserve the coherence of the German tax system.

65 As regards, in the second place, the justification based on the principle of territoriality and the alleged need to ensure a balanced allocation of the Member States’ powers to impose taxes, it should be recalled that that is a legitimate objective recognised by the Court (judgment of 7 November 2013 in *K*, C-322/11, EU:C:2013:716, paragraph 50 and the case-law cited).

66 However, it must be observed that, in the present case, the unequal treatment as regards the period to be taken into account for the application of the higher tax-free allowance results from the application of the German legislation in question alone (see, to that effect, the judgment of 11 September 2008 in *Arens-Sikken*, C-43/07, EU:C:2008:490, paragraph 41). Furthermore, the German Government fails to demonstrate that that difference in treatment is necessary in order to safeguard the power of the Federal Republic of Germany to impose taxes. Thus, the German Government is wrong to rely on such a justification.

67 It must therefore be held that, in the present case, it has not been established that a restriction such as that identified in paragraph 48 above allows the achievement of objectives of an overriding general interest which the German Government claims to pursue.

68 Having regard to all of the foregoing considerations, the answer to the question referred is that Articles 63 and 65 TFEU must be interpreted as precluding rules of national law that provide, in respect of gifts between non-residents, in the absence of a specific request by the beneficiary, for recourse to a method of calculation of taxation by application of a lower tax-free allowance. Those articles also preclude, in any event, rules of national law which provide, at the request of such a beneficiary, for recourse to a method of calculation of taxation by application of a higher tax-free allowance which applies to gifts in respect of which at least one party is a resident, the exercise of that option by the non-resident beneficiary involving the aggregation, for the purpose of the calculation of tax due on the gift in question, of all the gifts received by that beneficiary from the same person over the course of the 10 years preceding and the 10 years following that gift.

Costs

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

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

Articles 63 and 65 TFEU must be interpreted as precluding rules of national law that provide, in respect of gifts between non-residents, in the absence of a specific request by the beneficiary, for recourse to a method of calculation of taxation by application of a lower tax-free allowance. Those articles also preclude, in any event, rules of national law which provide, at the request of such a beneficiary, for recourse to a method of calculation of taxation by application of a higher tax-free allowance which applies to gifts in respect of which at least one party is a resident, the exercise of that option by the non-resident beneficiary involving the aggregation, for the purpose of the calculation of tax due on the gift in question, of all the gifts received by that beneficiary from the same person over the course of the 10 years preceding and the 10 years following that gift.

[Signatures]

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* Language of the case: German.