JUDGMENT OF THE COURT (Third Chamber)

17 October 2013 (*)

(Free movement of capital – Articles 56 EC to 58 EC – Inheritance tax – Deceased person and heir resident in a third country – Estate – Immovable property located in a Member State – Right to an allowance against the taxable value – Different treatment of residents and non?residents)

In Case C?181/12,

REQUEST for a preliminary ruling under Article 267 TFEU from the Finanzgericht Düsseldorf (Germany), made by decision of 2 April 2012, received at the Court on 18 April 2012, in the proceedings

Yvon Welte

v

Finanzamt Velbert,

THE COURT (Third Chamber),

composed of M. Ileši?, President of the Chamber, C.G. Fernlund, A. Ó Caoimh (Rapporteur), C. Toader and E. Jaraši?nas, Judges,

Advocate General: P. Mengozzi,

Registrar: C. Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 13 March 2013,

after considering the observations submitted on behalf of:

– Y. Welte, by M. Duffner, Rechtsanwalt,

– the Finanzamt Velbert, by A. Ludwig, acting as Agent,

– the German Government, by A. Wiedmann and T. Henze, acting as Agents,

– the Belgian Government, by M. Jacobs and J.?C. Halleux, acting as Agents, assisted by A. Lepièce, avocate,

– the European Commission, by W. Mölls and W. Roels, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 12 June 2013,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Articles 56 EC and 58 EC.

2 The request has been made in the context of proceedings between Mr Welte, widower of a Swiss national deceased in Switzerland, and the Finanzamt Velbert (‘the Finanzamt’) concerning the assessment of inheritance tax relating to a piece of land in Germany, owned by the deceased, on which a house had been built.

Legal context

Union law

3 Article 1 of Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty (article repealed by the Treaty of Amsterdam) (OJ 1988 L 178, p. 5) provides as follows:

‘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 Directive 88/361 include, under heading I, ‘Direct investments’, under heading II, ‘Investments in real estate (not included under I)’ and, under heading XI, ‘Personal capital movements’, which include inheritances and legacies.

German law

5 The Law on inheritance and gift tax (Erbschaftsteuer- und Schenkungsteuergesetz), in the version published on 27 February 1997 (BGBl. 1997 I, p. 378), as amended by Article 1 of the Law reforming the rules on inheritance tax and valuation (Gesetz zur Reform des Erbschaftsteuer- und Bewertungsrechts) of 24 December 2008 (BGBl. 1997 I, p. 3018, ‘the ErbStG’), contains the following provisions:

‘Paragraph 1 Taxable events

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

1. acquisitions on death;

2. gifts inter vivos;

3. …

Paragraph 2 Personal liability to tax

(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 devolved assets, where the deceased at the date of his death, the donor at the date of making the gift, or the acquirer at the date of the chargeable event, is a resident.

The following persons are regarded as residents:

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

(b) German nationals who have resided abroad continuously for not more than five years without a permanent residence in Germany.

…

3. in all other cases, in relation to devolved assets which are domestic assets within the meaning of Paragraph 121 of the [Law on valuation (Bewertungsgesetz), “the BewG”].

…

Paragraph 3 Acquisitions on death

(1) Acquisitions on death include

1. an acquisition by way of inheritance …

…

Paragraph 15 Tax classes

(1) According to the personal relationship between the acquirer and the deceased or donor, the following three tax classes are distinguished:

Tax class I:

1. the spouse

…

Paragraph 16 Allowances

(1) In the cases provided for in Paragraph 2(1), point 1, the following acquisitions are exempt from tax:

1. by the spouse in the amount of EUR 500 000 …

…

(2) In the cases provided for in Paragraph 2(1), point 3, a tax-free amount of EUR 2 000 applies instead of the tax-free amount under subparagraph (1).

…

Paragraph 19 Tax rates

(1) Inheritance tax is charged at the following rates:

Value of the taxable acquisition

(Paragraph 10)

Not exceeding EUR

Percentage in tax class

I

II

III

75 000

7

30

30

300 000

11

30

30

600 000

15

30

30

…’

6 Paragraph 121 of the BewG, in the version resulting from the Law on annual taxation (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, under the heading ‘Domestic assets’, states:

‘Domestic assets include:

…

2. immovable property within Germany;

…’

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

7 Mrs Welte-Schenkel, who was born in Germany but became a Swiss national after her marriage to Mr Welte, a Swiss national, died on 27 March 2009 in Switzerland, where she lived with her husband; he is her sole heir.

8 The deceased was the owner of a piece of land in Düsseldorf (Germany). The Finanzamt

Düsselorf-Süd assessed its value on the day of the deceased's death at EUR 329 200. It is apparent from the information submitted to the Court that that piece of land contains the house of the deceased's parents which the deceased inherited upon the death of her mother. The deceased also had accounts with two banks in Germany, which had a credit balance of EUR 33 689.72 in total. She also had accounts with Swiss banks, which had a credit balance equivalent to EUR 169 508.04 in total.

9 In a notice of 31 October 2011, the Finanzamt set the inheritance tax payable by Mr Welte at EUR 41 450. That figure was reached by applying, on the basis of the value of the land located in Düsseldorf, less a flat rate sum of EUR 10 300 for inheritance costs, a tax-free allowance of EUR 2 000 as provided for in Paragraph 16(2) of the ErbStG to cases of inheritance between non-residents.

10 By decision of 23 January 2012, the Finanzamt rejected the complaint lodged by Mr Welte with a view to obtaining the tax-free allowance of EUR 500 000 in favour of the spouse provided for in Paragraph 16(1) of the ErbStG where the inheritance involves at least one resident.

11 Mr Welte contested that decision before the Finanzgericht (Finance Court) 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.

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

13 The referring court points out that in Case C-510/08 *Mattner* [2010] ECR I-3553, paragraph 56, the Court ruled that Articles 56 EC and 58 EC preclude a provision such as Article 16(2) of the ErbStG in so far as it provides that, for the calculation of gift tax, the tax-free allowance 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.

14 However, the referring court observes that the present case differs in two respects from the case which gave rise to the judgment in *Mattner*. First, on the date of death, the deceased and Mr Welte resided in a third country rather than in a Member State of the European Union. Secondly, the property inherited by Mr Welte 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 tax-free allowance of EUR 500 000 to Mr Welte could therefore be justifiable since only part of the estate, located in Germany, was being taxed.

15 However, referring in that regard to the judgments in Case C-101/05 *A* [2007] ECR I-11531 and *Mattner*, the referring 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 of residents and non-residents. In the present case, the land in Düsseldorf, which constitutes the estate taxed in Germany, was valued at EUR 329 200, an amount which accounts for approximately 62% of the total value of the estate of EUR 532 397.76. The fact that approximately 38% of the value of the estate was not taxed hardly justifies an allowance of EUR 2 000 instead of an allowance of EUR 500 000.

16 In those circumstances, the Finanzgericht Düsseldorf decided to stay proceedings and to refer the following question to the Court for a preliminary ruling:

'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?'

Consideration of the question referred for a preliminary ruling

17 By its question, the referring court seeks to ascertain, in essence, whether Articles 56 EC and 58 EC must be interpreted as precluding legislation of a Member State relating to the calculation of inheritance tax which provides that, in the event of inheritance of immovable property in that State, in a case where, as in the main proceedings, the deceased and the heir had a permanent residence in a third country, such as the Swiss Confederation, at the time of the death, the tax-free allowance is 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.

18 Article 56(1) EC lays down a general prohibition on restrictions on the movement of capital between Member States and between Member States and third countries.

19 In the absence of a definition of 'movement of capital' in the Treaty, the Court has recognised the nomenclature in Annex I to Directive 88/361 as having indicative value, it being understood that, as stated in the introduction to that annex, the list it contains is not exhaustive (see, inter alia, Case C-513/03 *van Hilten-van der Heijden* [2006] ECR I-1957, paragraph 39, and Case C-25/10 *Missionswerk Werner Heukelbach* [2011] ECR I-497, paragraph 15).

20 In that regard, it is apparent from settled case-law that inheritances, namely the transfer to one or more persons of assets left by a deceased person and falling under heading XI of Annex I to Directive 88/361, entitled 'Personal capital movements', constitute movements of capital within the meaning of Article 56 EC, except in cases where their constituent elements are confined within a single Member State (see, inter alia, Case C-364/01 *Barbier* [2003] ECR I-15013, paragraph 58; *van Hilten-van der Heijden*, paragraphs 40 to 42; and Case C-31/11 *Scheunemann* [2012] ECR, paragraph 22).

21 A situation in which a person resident in Switzerland at the time of his death leaves to another person also resident in Switzerland a group of assets including an immovable property situated in Germany which is the subject of an inheritance tax assessment in Germany cannot be regarded as a purely domestic situation. Consequently, the inheritance at issue in the main proceedings constitutes a transaction which is a movement of capital within the meaning of Article 56(1) EC.

22 It must therefore be examined, first, whether, as submitted by Mr Welte in the main proceedings and the European Commission in its written observations before the Court, national legislation such as that at issue in the main proceedings constitutes a restriction on the movement of capital.

The existence of a restriction on the free movement of capital within the meaning of Article 56(1) EC

23 It is apparent from settled case-law that, as regards inheritances, the measures which

Article 56(1) EC prohibits as being restrictions on the movement of capital include those whose effect is to reduce the value of the inheritance of a resident of a State other than the State in which the assets concerned are situated and which taxes the inheritance of those assets (see, inter alia, *Barbier*, paragraph 62; Case C-11/07 *Eckelkamp and Others* [2008] ECR I-6845, paragraph 44; Case C-43/07 *Arens-Sikken* [2008] ECR I-6887, paragraph 37; and *Missionswerk Werner Heukelbach*, paragraph 22).

24 In the present case, the national legislation at issue in the main proceedings provides that, in the case of an estate including an immovable property situated in Germany, where the deceased and the heir were not resident in that Member State at the time of the death, the tax-free allowance is less than that which would be applied if the deceased or the heir had been resident in Germany at that time.

25 It should be noted that such legislation, which makes the application of a tax-free allowance in respect of the immovable property concerned dependent on the place of residence of the deceased and the heir at the time of the death, leads to succession between non-residents including such property being subject to a higher tax liability than that involving at least one resident and therefore has the effect of reducing the value of that succession (see, by analogy, *Eckelkamp and Others*, paragraphs 45 and 46; *Mattner*, paragraphs 27 and 28; and *Missionswerk Werner Heukelbach*, paragraph 24).

26 Consequently, national legislation such as that at issue in the main proceedings constitutes a restriction on the free movement of capital within the meaning of Article 56(1) EC.

The application of Article 57(1) EC concerning restrictions on the free movement of capital with regard to third countries

27 The Belgian and German Governments and the Commission submit however that such a restriction, in so far as it concerns movements of capital with a third country, may be allowed under Article 57(1) EC.

28 It should be remembered that, under that provision, Article 56 EC is to be without prejudice to the application to third countries of any restrictions which exist on 31 December 1993 under national or Union law adopted in respect of the movement of capital to or from third countries involving direct investment – including in real estate – establishment, the provision of financial services or the admission of securities to capital markets.

29 In that regard, it must be observed that Article 57(1) EC, which sets out a restrictive list of movements of capital to which Article 56(1) EC may not apply, does not mention inheritances. Such a provision, in so far as it is an exception to the fundamental principle of the free movement of capital, must be interpreted strictly (see, by analogy, *Eckelkamp and Others*, paragraph 57).

30 Both the German Government and the Commission, supported by the Belgian Government, point out, however, that Article 57(1) EC applies to movements of capital involving ‘direct investment – including in real estate’. They submit that an inheritance relating to an immovable property constitutes such an investment because the acquirer of such an inheritance, through the devolution of all the rights and obligations of the deceased to his heirs, replaces the deceased as regards the ownership of that property. An inheritance of that type therefore constitutes a form of acquisition of real estate which can be equated to an investment in real estate.

31 It must, however, be observed that, while, as has already been noted in paragraph 20 of this judgment, inheritances come under heading XI of Annex I to Directive 88/361 entitled ‘Personal capital movements’, both ‘direct investments’ and ‘investments in real estate’ come under separate

headings, namely headings I and II of that Annex respectively.

32 While those concepts are not defined in the Treaty, it is apparent from the list in heading I and the explanatory notes to it, whose indicative value has already been acknowledged by the Court, that the concept of direct investment concerns investments by natural or legal persons which serve to establish or maintain lasting and direct links between the person providing the capital and the company to which that capital is made available in order to carry out an economic activity (see, to that effect, Case C-157/05 *Holböck* [2007] ECR I-4051, paragraphs 34 and 35 and the case-law cited).

33 It is apparent from the very title of heading II of Annex I to Directive 88/361 that the ‘investments in real estate’ referred to in that heading do not include the direct investments referred to in heading I of that Annex.

34 In those circumstances it must be held that, as pointed out by the Advocate General at point 55 of his Opinion, Article 57(1) EC, in referring to ‘direct investment – including in real estate’, concerns only investments in real estate that constitute direct investments coming under heading I of Annex I to Directive 88/361.

35 By contrast, investments in real estate of a ‘patrimonial’ nature, such as that at issue in the main proceedings concerning the house of the parents of the deceased, made for private purposes unconnected with the carrying out of an economic activity do not fall within the scope of Article 57(1) EC.

36 Such a conclusion, which is consistent with the strict interpretation of that provision as a derogation from the free movement of capital, cannot be called into question by *Scheunemann*, contrary to the submissions of the Commission.

37 In paragraph 35 of that judgment, the Court did indeed hold that legislation of a Member State which, for the purposes of the calculation of inheritance tax, excludes the application of certain tax advantages to an estate in the form of a shareholding in a capital company established in a third country primarily affects the exercise of the freedom of establishment rather than the free movement of capital, where that holding enables the shareholder to exert a definite influence over the decisions of that company and to determine its activities. Consequently the Court did not rely on the nomenclature set out in Annex I to Directive 88/361 with a view to determining the fundamental freedom applicable to the situation in question.

38 The present case, by contrast, concerns the interpretation of a derogation from the free movement of capital in a situation where it is established that that freedom is applicable. While the fundamental freedoms recognised by the Treaty should be interpreted broadly, derogations from such a freedom must, as already stated in paragraphs 29 and 36 of this judgment, be interpreted strictly.

39 Consequently, a restriction such as that at issue in the main proceedings relating to the free movement to a third country such as the Swiss Confederation does not escape the application of Article 56(1) EC on the basis of Article 57(1) EC.

40 In those circumstances, it should be examined to what extent this restriction on the free movement of capital may be justified in the light of the provisions of the Treaty.

The existence of a justification for the restriction on the free movement of capital under Article 58(1) and (3) EC

41 According to Article 58(1)(a) EC, the provisions of Article 56 EC ‘shall 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’.

42 In so far as that provision of Article 58 EC 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 Member State in which they invest their capital is automatically compatible with the Treaty (see Case C?256/06 *Jäger* [2008] ECR I-123, paragraph 40; *Eckelkamp and Others*, paragraph 57; *Arens-Sikken*, paragraph 51; and *Mattner*, paragraph 32).

43 The derogation in Article 58(1)(a) EC is itself limited by Article 58(3) EC, 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 56’ (see *Jäger*, paragraph 41; *Eckelkamp and Others*, paragraph 58; *Arens-Sikken*, paragraph 52; and *Mattner*, paragraph 33).

44 A distinction must therefore be made between different treatment permitted under Article 58(1)(a) EC and arbitrary discrimination prohibited under Article 58(3) EC. It is apparent from settled case-law that, in order for national tax rules such as those at issue in the main proceedings – which, for the purposes of calculating inheritance tax, distinguish as to the amount of the tax-free allowance in respect of immovable property located in the Member State concerned according to whether the deceased or the heir resides in that State or whether they both reside in another Member State – to be 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 justifiable by overriding reasons in the public interest. In order to be justified, moreover, the difference in treatment must not go beyond what is necessary in order to attain the objective of the legislation in question (see Case C-319/02 *Manninen* [2004] ECR I-7477, paragraph 29; *Eckelkamp and Others*, paragraphs 58 and 59; *Arens-Sikken*, paragraphs 52 and 53; and *Mattner*, paragraph 34).

The comparability of the situations at issue

45 The German Government, supported by the Belgian Government, submits that an inheritance concerning non-residents and an inheritance involving a resident are objectively different situations. In the first situation, the acquirer of the inheritance, being partially subject to inheritance tax in Germany, is only taxed in that Member State on the assets listed in Article 121 of the BewG which are associated with that Member State and make up the ‘domestic assets’. By contrast, in the second case, the acquirer of the inheritance, being wholly subject to inheritance tax in Germany, is taxed in that Member State on all of the assets acquired, irrespective of their nature and location, by virtue of what is known as the ‘world assets’ principle.

46 According to those governments, the legislation at issue in the main proceedings is, in that regard, consistent with the case law resulting from Case C-279/93 *Schumacker* [1995] ECR I-225, according to which it is the State of residence which is in principle required to assess the resident’s overall ability to pay and to grant him, if necessary, tax-free allowances in view of his personal situation, the income received in the territory of a State by a non-resident being, in most cases, only a part of his total income. Likewise, in the present case, the basis of assessment for inheritance tax of a non-resident is in principle less than that of a resident.

47 The Belgian and German Governments also submit in this regard, in common with the

referring court, that, while the Court did not follow that line of argument in *Mattner*, which concerned the same difference in treatment as that at issue in the case in the main proceedings, that judgment did not concern the calculation of inheritance tax on the entire estate but the calculation of gift tax on a single immovable property, so that there was no objective difference in such a case between a gift falling under a limited tax liability scheme and a gift falling under an unlimited tax liability scheme.

48 It must, however, be pointed out that that line of argument has been dismissed by the Court not only, as those governments claim, as regards the calculation of transfer duties payable in respect of the gift of an immovable property (*Mattner*, paragraphs 35 to 38) but also as regards the calculation of inheritance tax payable in respect of such a property (*Jäger*, paragraph 44; *Eckelkamp and Others*, paragraphs 61 to 63; and *Arens-Sikken*, paragraphs 55 to 57).

49 In that regard, the Court held that, as regards the amount of inheritance tax payable in respect of immovable property in Germany, there is no objective difference justifying the unequal tax treatment of the situation in which neither person resides in that Member State and the situation in which at least one of them resides there. The amount of inheritance tax relating to an immovable property in Germany is calculated pursuant to the ErbStG on the basis both of the value of the property and of the personal link between the deceased and the inheritor. Neither of those criteria depends on the place of residence of the deceased and the inheritor (see, to that effect, *Jäger*, paragraph 44; *Eckelkamp and Others*, paragraph 61; and *Arens-Sikken*, paragraph 55).

50 The German legislation also considers, in principle, both the heir in a succession between non-residents and the heir in a succession involving at least one resident to be taxable persons for the purpose of collecting inheritance tax relating to immovable property in Germany. Only with respect to the allowance applied to the taxable value does that legislation, for the purposes of calculating inheritance tax relating to immovable property in Germany, apply different treatment to succession between non-residents and succession involving a resident. By contrast, the determination of the class and rate of tax laid down in Paragraphs 15 and 19 of the ErbStG follows the same rules.

51 Where, for the purposes of taxing immovable property acquired by inheritance and located in the Member State concerned, national legislation places on the same footing (i) non-resident heirs who have acquired the property from a non?resident deceased and (ii) non-resident or resident heirs who have acquired it from a resident deceased and resident heirs who have acquired it from a non-resident deceased it cannot, without infringing the requirements of European Union law, treat those heirs differently in connection with that tax as regards the application of a tax-free allowance in respect of the immovable property. By treating inheritances of those two classes of persons in the same way except in relation to the amount of the allowance which an heir may receive, the national legislature accepted that there was no objective difference between them as regards the detailed rules and conditions of charging inheritance tax which could justify a difference in treatment (see, by analogy, *Eckelkamp and Others*, paragraph 63; *Arens-Sikken*, paragraph 57; and *Mattner*, paragraph 38).

52 Admittedly, as the Belgian and German Governments argue, the taxable value of the inheritance of a non-resident heir, where he is partially subject to inheritance tax in Germany, is ‘in principle’, in the words used by those governments, less than that of a resident or non-resident heir who is wholly subject to that tax in that Member State.

53 However, that fact cannot call into question the foregoing considerations since the amount 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 inheritance but remains the same

regardless of that latter amount. As is clear from the documents submitted to the Court, that allowance is automatically granted to each heir simply because they are subject to inheritance tax in Germany, so as to ensure that part of the estate is exempted through the reduction of the total amount of the inheritance. However, just as the status of a taxable person does not in any way depend on the place of residence – the legislation at issue subjecting any acquisition of an immovable property located in Germany to inheritance tax whether the deceased and heir be resident or non-resident – the aim of partial exemption of the estate affects all those subject to inheritance tax in Germany in the same way, whether they be resident or non-resident, since that exemption aims to reduce the total amount of the inheritance.

54 Consequently, the recipient of an inheritance whose taxable value in Germany is limited, like that of Mr Welte in the case in the main proceedings, to an immovable property located in that Member State could, unlike Mr Welte, rely on the tax-free allowance of EUR 500 000 if he acquired such a property from a person residing in Germany with whom a spousal link existed or if he resided in Germany and acquired that property from such a person who was not residing there.

55 It follows that, as the amount of the tax-free allowance does not depend on the amount of the taxable value but is granted to the heir in his capacity as a taxable person, the fact that the non-resident heir of a non-resident deceased has limited tax liability does not, for the purposes of that allowance, make the situation of that heir objectively different from that of the non?resident heir of a resident deceased or from that of the resident heir of a resident or non?resident deceased.

56 It follows that, in the case in the main proceedings, the situation of Mr Welte is comparable to the situation of any heir who acquires by inheritance an immovable property located in Germany from a deceased person who was residing in that Member State and with whom a spousal link existed and comparable to the situation of an heir residing in Germany who acquires it from a deceased spouse who was not residing in that Member State.

57 It is therefore necessary to consider whether legislation such as that at issue in the main proceedings can be objectively justified by overriding reasons in the public interest, as the German Government maintains in the alternative.

The existence of an overriding reason in the public interest

58 Firstly, the German Government maintains that the national legislation at issue in the main proceedings satisfies the principle of fiscal coherence. In the rules on limited tax liability, the advantage of the reduced taxable value is offset by the disadvantage resulting from a reduced allowance, whereas, in the rules on unlimited tax liability, the advantage of a higher allowance is offset by the disadvantage resulting from a broader taxable value.

59 On this point, it should be recalled that the Court has indeed held that the need to preserve the coherence of a tax system may justify a restriction on the exercise of the fundamental freedoms guaranteed by the Treaty. However, for such a justification to be accepted, a direct link has to be established between the granting of the tax advantage concerned and the offsetting of that advantage by a particular tax (see *Manninen*, paragraph 42, and Case C?182/08 *Glaxo Wellcome* [2009] ECR I?8591, paragraphs 77 and 78).

60 In the present case, it suffices to state that the tax advantage resulting, in the Member State in which the inherited immovable property is located, from the application of a full allowance against the taxable value in a case where that inheritance involves at least one resident of that State is not offset in that State by any particular tax charge by way of inheritance tax (see, by analogy, *Mattner*, paragraph 54).

61 The legislation at issue in the main proceedings cannot therefore be justified by the need to preserve the coherence of the German tax system.

62 Secondly, the German Government argues that the national rules at issue in the main proceedings serve the effectiveness of fiscal supervision. 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 (OJ 1977 L 336, p. 15) establishes a framework for cooperation between the competent authorities of the Member States, which does not exist between those authorities and the competent authorities of a third State where the latter has given no undertaking of mutual assistance. The German tax authorities are not able to ascertain with certainty the inheritance of a deceased person who was living in Switzerland. In particular, the obligations of civil registrars to declare the deaths, of courts and notaries to declare the measures taken in the event of death or to issue death certificates, and of some depositories or fund managers to make a declaration, apply only in Germany. In those circumstances the national tax authorities can only reproduce the information provided by the inheritor and cannot check it.

63 According to the case-law of the Court, where the legislation of a Member State makes the grant of a tax advantage dependent on satisfying requirements, compliance with which can be verified only by obtaining information from the competent authorities of a third country, it is in principle legitimate for the Member State to refuse to grant that advantage if – in particular, because that third country is not bound under an agreement to provide information – it proves impossible to obtain such information from that country (see *A*, paragraph 63; Case C?72/09 *Établissements Rimbaud* [2010] ECR I-10659, paragraph 44; and Case C-48/11 *A* [2012] ECR, paragraph 36).

64 However, as the Advocate General has observed at points 76 and 77 of his Opinion, the information referred to by the German Government, which concerns in particular death certificates and other documents issued by civil registrars in the State where the succession takes place, can be forwarded by the heirs or, if necessary, by the tax authorities of that State as part of the application of a bilateral agreement for the avoidance of double taxation and does not, as a general rule, require a complex assessment.

65 In any event, in accordance with the national legislation, an heir residing in Germany receives the full tax-free allowance when he acquires by succession an immovable property located in that Member State from a person who was residing, at the moment of his death, in a third country.

66 However, such a succession also requires, like the succession at issue in the main proceedings, the inspection by the competent German authorities of the information concerning a deceased person residing in a third country.

67 In those circumstances, the German Government cannot claim that the national legislation at issue in the main proceedings, in so far as it deprives the heir of an estate passing between residents of a third country, such as the Swiss Confederation, of the benefit of the full tax?free allowance is necessary to preserve the effectiveness of fiscal supervision.

68 The answer to the question referred is therefore that Articles 56 EC and 58 EC must be interpreted as precluding legislation of a Member State relating to the calculation of inheritance tax which provides that, in the event of inheritance of immovable property in that State, in a case where, as in the main proceedings, the deceased and the heir had a permanent residence in a third country, such as the Swiss Confederation, at the time of the death, the tax-free allowance is 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.

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 (Third Chamber) hereby rules:

Articles 56 EC and 58 EC must be interpreted as precluding legislation of a Member State relating to the calculation of inheritance tax which provides that, in the event of inheritance of immovable property in that State, in a case where, as in the main proceedings, the deceased and the heir had a permanent residence in a third country, such as the Swiss Confederation, at the time of the death, the tax-free allowance is 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.

[Signatures]

* Language of the case: German.