JUDGMENT OF THE COURT (Fifth Chamber)

17 September 2015 (*)

(Reference for a preliminary ruling — Free movement of capital — Article 56 EC — Interim taxation of capital gains and income from the disposal of holdings by a national foundation — Refusal of right to deduct from the taxable amount gifts to non-resident beneficiaries exempt from tax in the Member State of the foundation under a double taxation convention)

In Case C?589/13,

REQUEST for a preliminary ruling under Article 267 TFEU from the Verwaltungsgerichtshof (Austria), made by decision of 23 October 2013, received at the Court on 19 November 2013, in the proceedings

F.E. Familienprivatstiftung Eisenstadt,

Intervener:

Unabhängiger Finanzsenat, Außenstelle Wien,

THE COURT (Fifth Chamber),

composed of T. von Danwitz, President of the Chamber, C. Vajda, A. Rosas (Rapporteur), E. Juhász and D. Šváby, Judges,

Advocate General: M. Wathelet,

Registrar: M. Aleksejev, Administrator,

having regard to the written procedure and further to the hearing on 21 January 2015,

after considering the observations submitted on behalf of:

– the Austrian Government, by C. Pesendorfer, J. Bauer and M. Klamert, acting as Agents,

– the European Commission, by A. Cordewener, W. Roels and M. Wasmeier, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 56(1) EC.

2 The request has been made in proceedings brought by F.E. Familienprivatstiftung Eisenstadt (‘the private foundation’) against the decision of the Unabhängiger Finanzsenat, Außenstelle Wien (Independent Finance Tribunal, External Section, Vienna, ‘the UFS’) that refused the private foundation the right to have gifts paid to beneficiaries resident in other Member States taken account of in calculating a tax to which the private foundation was subject in respect

of the 2001 and 2002 assessment periods.

Austrian Law

3 The Austrian legislation relevant to the case in the main proceedings concerns the taxation of private foundations in 2001 and 2002.

System of taxation of private foundations before 2001

4 Private foundations (Privatstiftungen) were introduced by the Austrian legislature in 1993 by means of the Privatstiftungsgesetz (Private Foundations Law, BGBl. No 694/1993).

5 Private foundations are subject to corporation tax. Nevertheless, on the basis of the legislation that was in force until the end of 2000, capital gains and income from holdings, when received by private foundations, were generally exempt from corporation tax at the level of the foundation. Taxation thus took place at the time when the income was transferred to the various beneficiaries as a result of gifts made by private foundations. Under Paragraph 27(1), point 7, of the Einkommensteuergesetz 1988 (Income Tax Law, 'the EStG 1988'), those gifts were considered, when received by their beneficiary, to be capital gains subject to capital gains tax at a rate of 25%.

System of taxation of private foundations from 2001 to 2004

6 The system of taxation of private foundations was amended from 2001 by the Budgetbegleitgesetz 2001 (Supplementary Budget Law, BGBl. I, No 142/2000), inter alia by the introduction of several new provisions in the Körperschaftsteuergesetz 1988 (Law on corporation tax 1988, 'the KStG 1988').

7 According to the explanatory memorandum to the Budgetbegleitgesetz 2001, those provisions were principally intended to reduce the complete exemption from corporation tax from which private foundations previously benefited and to levy a 'schedular' tax directly on those foundations at a reduced rate on certain private foundations' capital gains and income from holdings. That direct tax at a reduced rate has been termed as 'interim taxation' (Zwischensteuer, 'the interim tax').

8 Paragraph 13(3) of the KStG 1988, as amended by the Budgetbegleitgesetz 2001, states:

'In the case of [private] foundations which do not fall under Paragraph 5, points 6 or 7, or under Paragraph 7(3), the following are not to be taken into account either as earnings or as income, but are to be taxed separately in accordance with Paragraph 22(3):

1. domestic and foreign capital gains from

– cash deposits and other accounts with credit institutions (Paragraph 93(2), point 3, of the [EStG 1988]),

– debt securities within the meaning of Paragraph 93(3), points 1 to 3, of the [EStG 1988], if, when issued, they are offered, in law and in fact, to unspecified persons,

– debt securities within the meaning of Paragraph 93(3), points 4 and 5, of the [EStG 1988], in so far as such capital gains fall within the scope of income from capital assets within the meaning of Paragraph 27 of the [EStG 1988];

2. Income from the disposal of holdings within the meaning of Paragraph 31 of the [EStG 1988],

unless subparagraph 4 applies.

Tax shall not be payable (Paragraph 22(3)) on capital gains and income from the disposal of holdings in so far as gifts within the meaning of Paragraph 27(1), point 7, of the [EStG 1988] were made in the assessment period, capital gains tax was withheld from them and capital gains tax is not exempted on the basis of a double taxation convention.'

9 Under Paragraph 22(3) of the KStG 1988, as amended by the Budgetbegleitgesetz 2001, the rate of corporation tax for a private foundation's capital gains and other income taxable under Paragraph 13(3) of the KStG 1988 was 12.5%.

10 Under Paragraph 24(5) of the KStG 1988, as amended by the Budgetbegleitgesetz 2001:

'Corporation tax payable on capital gains and income within the meaning of Paragraph 13(3) and (4) shall be credited by way of assessment in accordance with the following provisions:

1. Corporation tax shall be determined and paid on the submission of a tax return after an assessment of the taxable amount.

2. Private foundations must have made gifts within the meaning of Paragraph 27(1), point 7, of the [EStG 1988] that are not exempted from tax within the meaning of the last sentence of Paragraph 13(3).

3. The tax credit shall be 12.5% of the taxable amount of the gifts for the purpose of withholding capital gains tax.

4. Private foundations shall maintain an account in which the corporation tax paid in each year, the amounts credited and the balance remaining after the deduction of each tax credit shall be recorded on an ongoing basis.

5. In the event of the dissolution of a private foundation, the whole of the amount eligible to be credited at the date of dissolution shall be the subject of a tax credit.'

Information relating to the system of interim taxation in Austrian law

11 The explanatory memorandum of the Budgetbegleitgesetz 2001, cited by the referring court, states, with regard to the interim tax:

'… from 2001[, i]nterest earned on deposit securities and debt securities is to be subject to a form of interim tax, and at a specially reduced rate. The tax falls due first when the income accrues. If gifts are (subsequently) made by a private foundation, however, a tax credit will be granted in accordance with the detailed statutory rules. Consequently, the amount of the gifts does not affect the overall tax charge.

The system is implemented by amendments to the law in two areas. First, the previous exemption provisions in Paragraph 13(2) [of the KStG 1988] are correspondingly modified. Previously exempt income will be taxed in the form of schedular taxation at a reduced rate of 12.5% (Paragraph 13(3) [of the KStG 1988]) by way of assessment. No tax will be due where distributions are made in the year when interest earnings accrue. Secondly, a tax credit at the same rate as that of the reduced tax is provided for in Paragraph 24(5) [of the KStG 1988]; this is effected by way of assessment. The tax credit presupposes, first, that the reduced tax has in fact been paid at the date when the tax return is submitted. In addition, there must be gifts from which capital gains tax has been withheld. The tax credit is granted at a rate of 12.5% of a gift, which is the same as the reduced rate of the tax. In terms of form, an account must be kept, detailing the movements and balance of

the sums that may be used for a tax credit.

For example: in 2001 a private foundation receives income from interest in the amount of 2 000 000 Austrian schillings (‘ATS’). Gifts in that year total ATS 500 000. Interim tax at a rate of 12.5%, that is to say ATS 187 500, is due. In 2002, income from interest amounts to ATS 2 500 000. No gifts are made in that year. Interim tax for 2002 is ATS 312 500. In 2003, income from interest is ATS 2 000 000 and gifts total ATS 2 100 000. No interim tax is due for that year. Consequently, 12.5% of ATS 100 000, that is to say ATS 12 500, is credited from the interim tax paid in 2001 and 2002.’

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

12 In 2001 and 2002 the private foundation, which is established under Austrian law, received capital gains and income from the disposal of holdings falling under the scope of the first sentence of Paragraph 13(3) of the KStG 1988, as amended by the Budgetbegleitgesetz 2001. At the same time, the private foundation made gifts during those two years to a person residing in Belgium and another residing in Germany.

13 In each of those two years, the private foundation withheld the capital gains tax at source at a rate of 25% to which the beneficiaries of those gifts were subject and transferred that amount to the Austrian tax authorities.

14 However, both of the foreign beneficiaries subsequently requested the Austrian tax authorities to reimburse the capital gains tax charged on their gifts on the basis of the double taxation convention in force between the Republic of Austria and their State of residence. The beneficiary residing in Belgium made his requests with regard to 2001 and 2002 and obtained a full reimbursement of the Austrian capital gains tax that had been withheld at source on the gifts that he had received. The beneficiary residing in Germany made his request only for 2001 and also obtained a full reimbursement of the corresponding capital gains tax.

15 In its tax return concerning corporation tax for 2001 and 2002, the private foundation reduced the amount of its capital gains and income derived from disposals of holdings that were in principle subject to ‘interim taxation’ under the first sentence of Paragraph 13(3) of the KStG 1988, as amended by the Budgetbegleitgesetz 2001, by deducting the gifts made to those two beneficiaries from its taxable amount for both years. Since the amount of those gifts was greater that the capital gains and income from disposals, the private foundation declared a taxable amount of EUR 0, on the basis of which it should have been exempted from paying any tax.

16 However, the Finanzamt (Finance Court) having jurisdiction in the case considered that to deduct the gifts made to the beneficiaries from its taxable amount was precluded by the first sentence of Paragraph 13(3) of the KStG 1988, as amended by the Budgetbegleitgesetz 2001, since those beneficiaries had been exempted from capital gains tax under a double taxation convention. As a result, the tax authorities charged interim tax at a rate of 12.5% on the capital gains and income from holdings derived in 2001 and 2002 under Paragraph 22(3) of the KStG 1988, as amended by the Budgetbegleitgesetz 2001.

17 The private foundation appealed before the UFS against the decisions concerning the corporation tax of which it had been notified for 2001 and 2002.

18 In the alternative, the private foundation claimed before the UFS that it should be granted a tax credit in the following years in the amount of the interim tax previously paid under Paragraph 24(5) of the KStG 1988, as amended by the Budgetbegleitgesetz 2001.

19 By decision of 10 June 2010, the UFS upheld the validity of the interim tax which had been levied on the private foundation at the then applicable rate of 12.5% of the taxable amount which had been not reduced by the gifts to the beneficiaries in Belgium and Germany in 2001 and to the beneficiary in Belgium in 2002.

20 In upholding the position of the tax authorities, the UFS took the view that, with regard to those gifts, exemption from capital gains tax was granted on the basis of double taxation conventions, which meant that the gifts could not be deducted from the taxable amount of the interim tax.

21 Nevertheless, the UFS partially upheld the private foundation's plea in the alternative that it should be granted a tax credit a posteriori for the interim tax due in 2001, under Paragraph 24(5) of the KStG 1988, as amended by the Budgetbegleitgesetz 2001, in respect of corporation tax for the 2002 tax year. The UFS thus considered that the gifts made in 2002 to the beneficiary residing in Belgium entitled the private foundation to such a partial tax credit.

22 The private foundation appealed against the decision of the UFS before the Verwaltungsgerichtshof (Administrative Court, Austria).

23 The private foundation claims before the referring court that it is contrary to the free movement of capital under Article 56 EC to preclude gifts on which the beneficiaries have been exempted from capital gains tax on the basis of a double taxation convention from being deducted from the taxable amount for the purposes of calculating the interim tax, even if the UFS accepts that gifts of the same type made in subsequent years may give rise to an entitlement to tax credits.

24 The referring court, which has already held that cross-border gifts by private foundations are movements of capital within the meaning of Article 56 EC, is of the view that it is very likely that to levy a tax on private foundations, which arises only in the case of gifts to foreign beneficiaries but not in the case of gifts to domestic beneficiaries, as the tax authorities and the UFS have decided to do in the case in the main proceedings, constitutes a restriction of the free movement of capital because it is likely to discourage similar cross-border arrangements whereas, in accordance with the principle of free movement, even a restriction of limited scope or minor importance is prohibited.

25 The referring court states that assessing whether the restriction of the free movement of capital brought about by Paragraph 13(3) of the KStG 1988, as amended by the Budgetbegleitgesetz 2001, is potentially justified is made more difficult by the fact that its purpose was never explained in the preparatory work leading to that law.

26 The referring court explains in that regard that the system of interim taxation aimed to overcome two problems relating to the system of taxing resident private foundations. The first problem was related to the ability to reinvest free of corporation tax since capital gains and income from disposals of holdings were, until the end of 2000, not taxed. The second was related to the fact that in Austria gifts to beneficiaries residing abroad were not taxed, since only the Member State of the beneficiaries' residence was entitled to tax those gifts under double taxation conventions.

27 In the present case, the referring court is of the view that, where the interim tax must be paid even if a gift is made, the system of interim taxation serves to alleviate the consequences of the second of the problems of that system of taxation, namely the lack of taxation in Austria.

28 In that regard, the referring court observes that the last sentence of Paragraph 13(3) of the

KStG 1988, as amended by the Budgetbegleitgesetz 2001, merely mitigated the problem but did not resolve it entirely because private foundations are not taxed definitively, but are required to pay a tax — the interim tax — which, under Paragraph 24(5) of the KStG 1988, as amended, will be the subject of a tax credit and reimbursed in full at the latest when the foundation is dissolved. Until that tax credit is granted, the private foundation at issue will not be able to reduce its taxable amount through gifts to beneficiaries who are exempt from tax under a double taxation convention.

29 The referring court does not rule out the possibility that such a restriction introduced by the national tax legislation may impair the free movement of capital referred to in Article 56 EC, but takes the view that the differences between the complex tax system on which it is required to give a ruling and similar cases examined in the relevant case-law of the Court of Justice are too great for that conclusion to be regarded as obvious.

30 In those circumstances, the Verwaltungsgerichtshof has decided to stay proceedings and to refer the following question to the Court for a preliminary ruling:

‘Is Article 56 EC to be interpreted as precluding a system for the taxation of capital gains and income from the disposal of holdings of an Austrian private foundation in the case where that system provides for a tax charge to be imposed on the foundation in the form of an ‘interim tax’ in order to ensure single national taxation only in the case where, on the basis of a double taxation convention, the recipient of gifts from the private foundation is exempt from capital gains tax which in principle is chargeable on gifts?’

The question referred for a preliminary ruling

Preliminary observations

31 According to its wording, the question referred by the national court concerns the levying of the interim tax on resident private foundations where the beneficiaries of gifts made by those foundations are exempt from tax in Austria on the basis of a double taxation convention. That question is intended to ascertain whether Article 56 EC precludes a system such as that established for the levying of the interim taxation on foundations from 2001 which is at issue in the case in the main proceedings.

32 As is apparent from paragraphs 7, 11, 26 to 28 of the present judgment, the order for reference describes at some length the system of interim taxation at issue in the case in the main proceedings, which is a complex system in the light of which the referring court states that it refers its question and one which must be taken into consideration before the question itself can be fully understood.

33 In the light of that description, it appears that the doubts of the referring court relate, within the context of interim taxation which is charged on the capital gains and income from the disposal of holdings that a resident private foundation has received in the course of a given assessment period, to the right of such a foundation to deduct the amount of gifts made during that term from its taxable amount. That deduction is permitted only if the beneficiary of the gift is taxable in the Republic of Austria. However, such a deduction is refused to a foundation where the beneficiary of a gift resides in a Member State other than the Republic of Austria and relies on a double taxation convention in order to be exempted from Austrian capital gains tax.

34 As a result, by its question, the Verwaltungsgerichtshof asks, in essence, whether Article 56 EC must be interpreted as precluding tax legislation of a Member State such as that at issue in the case in the main proceedings under which, as regards interim tax which is charged on capital gains and income from the disposal of holdings of a resident private foundation, that foundation

has the right to deduct from its taxable amount only gifts made in the course of a given assessment period that have been the subject of a tax levied on the beneficiaries of those gifts in the Member State in which the foundation is taxed, whereas such a deduction is excluded by that national tax legislation where the beneficiaries reside in another Member State and are exempted, on the basis of a double taxation convention, from a tax that is otherwise charged on gifts in the Member State in which the foundation is taxed.

Restriction on the free movement of capital

35 According to the settled case-law of the Court, Article 56(1) EC lays down a general prohibition on restrictions on the movement of capital between Member States (judgments in *Persche*, C?318/07, EU:C:2009:33, paragraph 23, and *Mattner*, C?510/08, EU:C:2010:216, paragraph 18).

36 In the absence of a definition in the EC Treaty of 'movement of capital' for the purposes of Article 56(1) EC, the Court has recognised the nomenclature which forms Annex I to Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty [repealed by the Treaty of Amsterdam] (OJ 1988 L 178, p. 5) as having indicative value, even though that directive was adopted on the basis of Articles 69 and 70(1) of the EEC Treaty (later Articles 69 and 70(1) of the EC Treaty both of which were repealed by the Treaty of Amsterdam), it being understood that, in accordance with the introduction to that annex, the list it contains is not exhaustive. Gifts and endowments appear under heading XI, 'Personal capital movements', of that annex (judgments in *Persche*, C?318/07, EU:C:2009:33, paragraph 24; *Mattner*, C?510/08, EU:C:2010:216, paragraph 19; and *Commission* v *Spain*, C?127/12, EU:C:2014:2130, paragraph 52).

37 The Court has already held that the tax treatment of gifts, whether they are gifts of money, immovable property or movable property, falls under the provisions of the Treaty on the movement of capital, except where their constituent elements are confined within a single Member State (see, to that effect, judgments in *Persche*, C?318/07, EU:C:2009:33, paragraph 27; *Mattner*, C?510/08, EU:C:2010:216, paragraph 20; and *Q*, C?133/13, EU:C:2014:2460, paragraph 18).

38 The case in the main proceedings does not directly relate to the tax treatment of gifts in the sense of a difference in treatment between gifts made to resident recipients and gifts made to recipients resident in another Member State. It concerns the tax treatment of resident private foundations which differs according to whether the gifts that it makes are made to recipients residing in Austria or recipients residing in another Member State.

39 In the case in the main proceedings, in 2001 and 2002, the private foundation made gifts, in particular, to two recipients residing in a Member State other than the Republic of Austria. Those gifts involved payments being made without any consideration being given by the recipients. As the Commission correctly states, both the initial contribution of the assets to the foundation on its being set up by the founder as well as the subsequent payments made from those assets to the recipients fall within the concept of 'movement of capital' within the meaning of Article 56(1) EC.

40 It follows that a situation such as that in the case in the main proceedings in which a private foundation established in Austria makes gifts to two recipients, one residing in Belgium and the other in Germany, concerns, both for 2001 and 2002, international movements of capital, which may not be the subject of any restriction under Article 56(1) EC.

41 It must therefore be examined, in the first place, whether, as submitted by the private foundation in the case in the main proceedings and the Commission in its written observations before the Court, national legislation such as that at issue in the case in the main proceedings

constitutes a restriction on the movement of capital.

42 The system established by Paragraph 13(3) of the KStG 1988, as amended by the Budgetbegleitgesetz 2001, involves a difference of treatment between resident private foundations in their right to an immediate reduction in the interim tax according to whether the beneficiaries of the gifts that they make in the course of a given tax year are or not subject to Austrian capital gains tax.

43 Although, as the Austrian Government claims, gifts for which such a right to immediate reduction or immediate reimbursement is excluded can also include gifts to beneficiaries residing in Austria where those beneficiaries are exempted from capital gains tax, they cover in particular gifts made to non-resident beneficiaries in so far as, under the model double taxation convention drafted by the Organisation for Economic Co-operation and Development (OECD), gifts are considered to be income within the meaning of Article 21(1) of that model convention, and are not taxable in Austria since they are subject to the exclusive powers of taxation of the State of residence of the beneficiary.

44 As the Commission submits, such movements of capital are restricted by the last sentence of Paragraph 13(3) of the KStG 1988, as amended by the Budgetbegleitgesetz 2001, which is applicable to the case in the main proceedings.

45 Since a resident private foundation is entitled to a reduction of, and even exemption from, the interim tax on gifts that it has made to national beneficiaries as a result of the deductibility of those types of gifts from the taxable amount of that tax, such a foundation will, all other things being equal, always have greater financial means at its disposal that can be used either immediately to make additional gifts to resident beneficiaries or used to obtain additional income, which will enable it subsequently to grant larger gifts to the same beneficiaries.

46 In addition, the unfavourable tax treatment which follows from the application of the last sentence of Paragraph 13(3) of the KStG 1988, as amended by the Budgetbegleitgesetz 2001, in the case of gifts to beneficiaries exempt from capital gains tax in Austria as a result of a double taxation convention concluded between the beneficiaries' Member State of residence and the Republic of Austria, is capable of leading to a restriction at the level of the foundation itself.

47 A foundation which has beneficiaries residing in the national territory and others residing in another Member State would therefore be discouraged from making gifts to the latter because, without being able to benefit from a tax reduction or reimbursement in connection with those gifts, the interim tax charged on its income reduces the aggregate financial means at its disposal both for generating income and for making gifts to resident beneficiaries. At the level of the foundation, this would lead to a distortion in the resulting selection, from a tax point of view, between international gifts which are less advantageous and national gifts which are more advantageous.

48 Furthermore, in so far as gifts to beneficiaries residing in another Member State will lead to interim taxation being levied at a rate of 12.5% on his foundation, it is from the founder's point of view less advantageous from the outset to set up a private foundation with beneficiaries residing in another Member State than setting up an equivalent foundation with beneficiaries residing only in Austria.

49 In this context, it is clear that it is not necessary for the tax charge to be excessive or definitive for tax legislation to be regarded as forming a prohibited restriction of a fundamental freedom.

50 According to the settled case-law of the Court, a restriction on a fundamental freedom is

prohibited by the Treaty, even if it is of limited scope or minor importance (see, to that effect, regarding the free movement of capital, judgment in *Dijkman and Dijkman-Lavaleije*, C?233/09, EU:C:2010:397, paragraph 42; and, regarding the freedom of establishment, judgments in *Commission* v *France*, C?34/98, EU:C:2000:84, paragraph 49, and *de Lasteyrie du Saillant*, C?9/02, EU:C:2004:138, paragraph 43).

51 A cash-flow disadvantage which arises from a cross-border situation can form a restriction on a fundamental freedom where such a disadvantage does not arise in a purely national situation (see, to that effect, judgments in *Metallgesellschaft and Others*, C?397/98 and C?410/98, EU:C:2001:134, paragraphs 44, 54 and 76; *X and Y*, C?436/00, EU:C:2002:704, paragraphs 36 and 37; *Rewe Zentralfinanz*, C?347/04, EU:C:2007:194, paragraphs 26 to 30; *National Grid Indus*, C?371/10, EU:C:2011:785, paragraphs 36 and 37; *DMC*, C?164/12, EU:C:2014:20, paragraphs 40 to 43; and *Commission* v *Germany*, C?591/13, EU:C:2015:230, paragraphs 55 to 61).

52 A difference of treatment concerning the calculation of the interim tax is capable of resulting in a disadvantage in terms of cash-flow for a resident private foundation wishing to make gifts to recipients residing in another Member State and can therefore form a restriction on fundamental freedoms if the private foundation at issue does not incur the same disadvantage in a purely national situation. The private foundation in the case in the main proceedings incurred a cash-flow disadvantage of that kind arising from gifts that it made to beneficiaries residing in Belgium and Germany in 2001 and 2002, and that disadvantage has not been offset by the tax credit upheld by the UFS, which attributed part of the interim tax due for 2001 to that due in 2002.

53 The application of the last sentence of Paragraph 13(3) of the KStG 1988, as amended by the Budgetbegleitgesetz 2001, therefore leads to a restriction of the free movement of capital, which is, in principle, prohibited by Article 56 EC.

54 It must, however, be considered, in the second place, whether that restriction on the free movement of capital is capable of being objectively justified having regard to the provisions of the Treaty.

55 In that regard, under 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’.

56 In so far as Article 58(1)(a) EC is a derogation 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 (judgments in *Mattner*, C?510/08, EU:C:2010:216, paragraph 32, and *Santander Asset Management SGIIC and Others*, C?338/11 to C?347/11, EU:C:2012:286, paragraph 21).

57 The derogation in Article 58(1)(a) EC is itself limited by Article 58(3) EC, which states 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’ (judgments in *Mattner*, C?510/08, EU:C:2010:216, paragraph 33, and *Santander Asset Management SGIIC and Others*, C?338/11 to C?347/11, EU:C:2012:286, paragraph 22).

58 The differences in treatment authorised by Article 58(1)(a) EC must therefore be distinguished from discrimination prohibited by Article 58(3) EC. The case-law of the Court shows that, for national tax legislation such as that at issue in the case in the main proceedings to be

capable of being regarded as compatible with the provisions of the Treaty on the free movement of capital, it is necessary that the difference in treatment concern situations which are not objectively comparable or be justified by an overriding reason in the public 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, judgments in *Manninen*, C?319/02, EU:C:2004:484, paragraph 29; *Mattner*, C?510/08, EU:C:2010:216, paragraph 34; and *Santander Asset Management SGIIC and Others*, C?338/11 to C?347/11, EU:C:2012:286, paragraph 23).

Whether the situations are comparable

59 The Austrian Government claims that the legislation at issue in the main proceedings does not constitute a restriction of the free movement of capital because the situation of a private foundation making gifts to beneficiaries that are residents of a Member State with which the Republic of Austria has concluded a double taxation convention on the basis of the OECD convention model is not objectively comparable to that of a private foundation making gifts to resident beneficiaries.

60 According to that government, in the case of gifts to non-resident beneficiaries, the situation of a resident private foundation that principally falls within the scope of the powers of taxation of the Austrian State is, at the most, comparable to the situation of such a foundation in the case of gifts to resident beneficiaries where that Member State can exercise its powers of taxation principally over those gifts as far as they concern non-resident beneficiaries.

61 However, that would not be the case as a general rule since it appears from the double taxation conventions that follow the OECD model that the Republic of Austria does not have powers of taxation over gifts to non-resident beneficiaries. Consequently, since the situations are not comparable, there is no reason in such cases for applying, at the level of the foundation, the system of granting tax credit with regard to the interim tax which is granted in the case of gifts to resident beneficiaries in order to prevent economic double taxation and to ensure systematic single taxation in the national territory.

62 In that regard, contrary to the submissions of the Austrian Government, the difference in treatment is not explained by a difference in objective situation as far as the foundation is concerned.

63 As stated by the Commission, having regard to Article 58(1)(a) EC, the making of gifts by Austrian private foundations to resident beneficiaries is a situation objectively comparable to that where the same foundations make gifts to beneficiaries residing in another Member State. In both cases, the gifts are made from the assets of the private foundation or from increases in those assets resulting from their investment.

64 Furthermore, under the double taxation conventions that it has concluded with the Kingdom of Belgium on the one hand and the Federal Republic of Germany on the other, which, in accordance with the OECD convention model, determine the exclusive right, for each of the contracting States, to tax the beneficiaries of gifts residing in its territory, the Republic of Austria renounced the exercise of its powers of taxation over gifts to persons residing in those two other Member States. It cannot therefore invoke a difference in objective situation between resident private foundations whereby the beneficiaries of gifts that those foundations make are either resident in Austria and taxable there, or resident in one of those other two Member States and not subject to its powers of taxation, in order to subject foundations making gifts to the latter to a specific tax on the ground that those beneficiaries are not subject to its tax jurisdiction.

65 In addition, even if it were also necessary to take the beneficiaries of those foundations' gifts into account, it is clear from the order for reference that the system of interim tax was intended to create a 'schedular' system of taxation at the level of the foundation whilst attributing only a temporary nature to the tax in order to counteract the tendency of private foundations to 'reinvest'. In line with its 'temporary' nature, that tax was required to be reimbursed in full at the latest when the private foundation is dissolved since it resulted in a tax credit in favour of the foundation corresponding to the amount that it had paid in respect of the interim tax. The place of residence of the beneficiary of a gift was irrelevant in that regard.

An overriding reason in the public interest

66 It must be determined, also, whether the restriction on the movement of capital which is the result of national legislation such as that at issue in the case in the main proceedings may be objectively justified by an overriding reason in the general interest.

67 In the first place, it is necessary to ascertain whether the difference in treatment at issue in the main proceedings may be justified by the need to preserve the balanced allocation of powers of taxation between the Member States, as the Austrian Government claims.

68 It should be recalled in that regard that preservation of a balanced allocation of powers of taxation between Member States is a legitimate objective recognised by the Court. Moreover, it is settled case-law of the Court that, in the absence of any unifying or harmonising measures adopted by the European Union, the Member States retain the power to define, by treaty or unilaterally, the criteria for allocating their powers of taxation, particularly with a view to eliminating double taxation (judgments in *DMC*, C?164/12, EU:C:2014:20, paragraphs 46 and 47; *Commission* v *Germany*, C?591/13, EU:C:2015:230, paragraph 64; and *Grünewald*, C?559/13, EU:C:2015:109, paragraph 40).

69 However, in circumstances such as those of the case in the main proceedings, that justification does not appear to be established.

70 A justification concerning the necessity to preserve a balanced allocation of powers of taxation between Member States may be sanctioned, in particular, where the tax regime at issue is designed to prevent conduct capable of jeopardising the right of a Member State to exercise its tax jurisdiction in relation to activities carried out in its territory (see, to that effect, judgments in *Rewe Zentralfinanz*, C?347/04, EU:C:2007:194, paragraph 42; *Oy AA*, C?231/05, EU:C:2007:439, paragraph 54; and *Aberdeen Property Fininvest Alpha*, C?303/07, EU:C:2009:377, paragraph 66).

71 In the present case, as was stated in paragraph 64 of the present judgment, the issue of the allocation of powers of taxation between the Republic of Austria and the Kingdom of Belgium, on the one hand, and the Federal Republic of Germany, on the other hand, is governed by double taxation conventions concluded with both of those Member States which, in accordance with the OECD convention model, determine the exclusive right, for each of the contracting States, to tax the beneficiaries of gifts residing in its territory. In other words, having abandoned its powers of taxation on gifts to persons residing in those Member States, the Republic of Austria cannot rely on a balanced allocation of powers of taxation in order to levy a specific tax on foundations that make gifts to such persons on the basis that those persons are not subject to its tax jurisdiction. That Member State has therefore freely accepted the allocation of powers of taxation that results from the terms of the double taxation conventions that it has concluded with the Kingdom of Belgium and the Federal Republic of Germany respectively.

72 In a situation such as that of the present case, a tax charge is levied at the level of the

private foundation without the possibility of deduction or reimbursement regarding gifts made to beneficiaries that, on the ground of a double taxation convention, are not subject to capital gains tax in Austria. The Austrian Government submits that the restrictive effects of the last sentence of Paragraph 13(3) of the KStG 1988, as amended by the Budgetbegleitgesetz 2001, can be justified by the fact that that paragraph ensures single taxation of certain capital gains and income from holdings derived by a private foundation in Austria.

73 In that regard, it is relevant to note that, in several cases concerning situations in which a Member State had attempted to counterbalance its inability to impose a tax on another taxpayer, in particular cases giving rise to the judgments in *Lankhorst-Hohorst* (C?324/00, EU:C:2002:749) and *Glaxo Wellcome* (C?182/08, EU:C:2009:559), the Court considered the reasons that had been invoked in order to justify the restriction effected by the national law at issue, in particular, the argument that national legislation was intended to ensure the single taxation of certain income in the Member State. In none of those cases, however, did the Court recognise a principle of single taxation as a distinct justification.

74 Furthermore, in the case giving rise to the judgment in *Argenta Spaarbank* (C?350/11, EU:C:2013:447), which concerned the tax treatment of corporation tax and the taking of losses into account, the Court held, in paragraph 51 of that judgment, that the fact that under a double taxation convention the profits attributable to a permanent establishment situated in a Member State are solely taxable in that Member State and that, consequently, the other Member State to the convention cannot exercise its power to tax in relation to the profits attributable to that permanent establishment cannot systematically justify any refusal to grant an advantage to the company established in the territory of the latter Member State to which the permanent establishment belongs.

75 Such a refusal would be tantamount to justifying a difference in treatment solely on the ground that a company established in a Member State has developed a cross-border economic activity which is not liable to generate tax revenue for that Member State (see, to that effect, judgment in *Argenta Spaarbank*, C?350/11, EU:C:2013:447, paragraph 52 and the case-law cited).

76 In the same way, the Court has held that any advantage resulting from the low taxation to which a subsidiary established in a Member State other than the one in which the parent company was incorporated is subject cannot by itself authorise that Member State to offset that advantage by less favourable tax treatment of the parent company. The need to prevent the reduction of tax revenue is indeed not one of the grounds listed in Article 46(1) EC or a matter of overriding general interest which would justify a restriction on a freedom introduced by the Treaty (see, to that effect, judgment in *Cadbury Schweppes and Cadbury Schweppes Overseas*, C?196/04, EU:C:2006:544, paragraph 49).

77 Such considerations are also relevant in the context of the case in the main proceedings, concerning a difference in tax treatment of foundations according to whether the gifts that they have made lead to their beneficiaries being taxed in Austria.

78 In any event, as far as gifts to foreign beneficiaries under the last sentence of Paragraph 13(3) of the KStG 1988, as amended by the Budgetbegleitgesetz 2001, are concerned, the interim tax levied on the private foundation does not ensure the single taxation of the income mentioned in the first sentence of that provision.

79 As is stated in paragraph 28 of the present judgment, it appears from the order for reference that the tax charge thereby levied on the private foundation is not definitive. According to the Verwaltungsgerichtshof, since the interim tax at issue in the case in the main proceedings applies

at the level of the private foundation, the problem created by the double taxation convention at the level of the beneficiary is mitigated but is not resolved entirely because private foundations are not taxed definitively, but are required to pay a tax which, under Paragraph 24(5) of the KStG 1988, as amended by the Budgetbegleitgesetz 2001, will be the subject of tax credit at the latest when the foundation is dissolved.

80 In the second place, the difference in treatment at issue in the case in the main proceedings also cannot be justified by the need to safeguard the coherency of the national tax regime.

81 For an argument based on such a justification to succeed, the Court requires a direct link to be established between the tax advantage concerned and the offsetting of that advantage by a particular tax, and the directness of that link to be assessed with regard to the purpose of the legislation at issue (see, to that effect, judgments in *Papillon*, C?418/07, EU:C:2008:659, paragraphs 43 and 44; *Commission* v *Germany*, C?211/13, EU:C:2014:2148, paragraph 55; and *Grünewald*, C?559/13, EU:C:2015:109, paragraph 47).

82 There is no such a direct link in the present case for several reasons.

83 First, there is no such direct link when it is a question, in particular, of different taxes or the tax treatment of different taxpayers (see, to that effect, judgments in *DI. VI. Finanziaria di Diego della Valle & C.*, C?380/11, EU:C:2012:552, paragraph 47, and *Grünewald*, C?559/13, EU:C:2015:109, paragraph 49). That is the case here since the deduction of the amount corresponding to the gifts made by the private foundation subject to the interim tax and the taxation of the beneficiaries for those gifts necessarily concern different taxpayers.

84 In addition, as submitted by the Commission, whereas the tax advantage of the beneficiary residing in another Member State consists in a permanent exception from Austrian capital gains tax, for an amount that varies under each double taxation convention, a private foundation suffers only a temporary disadvantage due to the interim tax.

85 In the light of the foregoing considerations taken as a whole, the answer to the question referred is that Article 56 EC must be interpreted as precluding tax legislation of a Member State, such as that at issue in the main proceedings under which, as regards interim tax which is charged on capital gains and income from the disposal of holdings of a resident private foundation, that foundation has the right to deduct from its taxable amount only gifts made in the course of a given assessment period that have been the subject of a tax levied within that period on the beneficiaries of those gifts in the Member State in which the foundation is taxed, whereas such a deduction is excluded by that national tax legislation where the beneficiaries reside in another Member State and are exempt, on the basis of a double taxation convention, from a tax that is otherwise charged on gifts in the Member State in which the foundation is taxed.

Costs

86 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 (Fifth Chamber) hereby rules:

Article 56 EC must be interpreted as precluding tax legislation of a Member State, such as that at issue in the main proceedings under which, as regards interim tax which is charged on capital gains and income from the disposal of holdings of a resident private foundation, that foundation has the right to deduct from its taxable amount only gifts made in the course of a given assessment period that have been the subject of a tax levied within that period on the beneficiaries of those gifts in the Member State in which the foundation is

taxed, whereas such a deduction is excluded by that national tax legislation where the beneficiaries reside in another Member State and are exempt, on the basis of a double taxation convention, from a tax that is otherwise charged on gifts in the Member State in which the foundation is taxed.

[Signatures]

* Language of the case: German.