Reports of Cases

OPINION OF ADVOCATE GENERAL
WATHELET
delivered on 17 March 2016[1]

Case C-123/15

Max-Heinz Feilen
v
Finanzamt Fulda
(Request for a preliminary ruling from the

Bundesfinanzhof (Federal Finance Court, Germany))

(Request for a preliminary ruling — Taxation — Free movement of capital — Inheritance tax — Legislation of a Member State providing for a reduction in inheritance tax where the estate includes an asset that has already, in the previous ten years, formed part of an estate subject to inheritance tax in that same Member State — Asset inherited and taxed in another Member State)

1. This request for a preliminary ruling, made by the Bundesfinanzhof (Federal Finance Court, Germany), concerns the interpretation of Articles 63(1) TFEU and 65 TFEU. It has been made in the context of a dispute between Mr Feilen and the Finanzamt Fulda (Fulda Tax Office) concerning the latter's rejection of Mr Feilen's application for a reduction in the amount of inheritance tax payable on his mother's estate.

I – **Legal framework**

A – *EU law*

2. Article 1(1) of Directive 88/361/EEC[2] states:

'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.'

3. In Annex I to Directive 88/361, which lists the capital movements, heading XI, 'Personal Capital Movements', includes inheritances and legacies.

1 — Original language: French.

2 — Council Directive of 24 June 1988 for the implementation of Article 67 of the Treaty (OJ 1998 L 178, p. 5).

B – *German law*

4. The provisions of the Law on inheritance and gift tax (Erbschaftsteuer- und Schenkungsteuergesetz) applicable to the 2007 tax year. [3]

5. Paragraph 1(1)(1) of the ErbStG provides that inheritances are subject to that law as taxable events.

6. Pursuant to Paragraph 2(1)(1) to (3) of the ErbStG, liability to tax arises:

'1. in the cases referred to in Paragraph 1(1), points 1 to 3, in relation to the entire estate if the deceased, at the date of death, … or the recipient, at the date of the taxable event, is a resident. The following are deemed to be residents:

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

…

3. in all other cases, in relation to transferred assets which are domestic assets within the meaning of Paragraph 121 of the Law on valuation [Bewertungsgesetz]'.

7. Paragraph 15 of the ErbStG defines the tax classes. Subparagraph 1 thereof is worded as follows:

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

Tax class I:

1. the spouse or civil partner,

2. the children and step-children,

…'

8. With regard to reductions in inheritance tax, Paragraph 27 of the ErbStG lays down the following provisions:

3 — Provisions resulting from the version published on 27 February 1997 (BGBl. I 2007 I, p. 378) as last amended by the ancillary budget law (Haushaltsbegleitgesetz) of 29 December 2003 (*BGBl.* I 2003 I, p. 3076, 'the ErbStG').

‘1. Where a person in tax class I inherits an asset which, in the ten years preceding that acquisition, has already been transferred to a person in that tax class and has given rise to the imposition of inheritance tax under this law, the amount of tax payable is, subject to the provisions of subparagraph 3, reduced as follows:

by …%	where the period between the two dates on which the liability to tax arose is
50	less than 1 year
45	between 1 year and 2 years
40	between 2 years and 3 years
35	between 3 years and 4 years
30	between 4 years and 5 years
25	between 5 years and 6 years
20	between 6 years and 8 years
10	between 8 years and 10 years

2. …

3. The reduction referred to in subparagraph 1 may not exceed the amount which results from the application of the percentage rate specified in subparagraph 1 to the inheritance tax which the previous transferee paid in respect of the acquisition of the same asset.’

II – **The facts of the dispute in the main proceedings and the question referred for a preliminary ruling**

9. Mr Feilen, who is resident in Germany, is the sole heir of his mother, who died in 2007 in Germany, where she was last resident. His mother’s estate consisted mainly in her share in the estate of her deceased daughter, who died in 2004 in Austria, where the mother had also lived until the daughter’s death. The distribution of the daughter’s estate did not take place in Austria until after the mother’s death and so the inheritance tax on that succession, amounting to EUR 11961.91, was paid by Mr Feilen.

10. In his tax return relating to his inheritance from his mother, which he prepared in Germany, Mr Feilen claimed the inheritance tax paid in Austria as a liability of the estate and applied for a reduction, pursuant to Paragraph 27 of the ErbStG, in the amount of German inheritance tax due. In its assessment of 28 October 2009, the Tax Office, Fulda, deducted the inheritance tax paid in Austria from the basis of assessment, but refused to allow any reduction in the inheritance tax.

11. The Finanzgericht (Finance Court) dismissed the appeal which Mr Feilen brought against the decision of the Tax Office, Fulda, principally on the ground that Paragraph 27(1) of the ErbStG presupposes a previous inheritance subject to inheritance tax under that law and there had been none in this case, since the previous acquisition of the daughter’s assets by the mother had not given rise to inheritance tax in Germany. [4]

4 — At the time when the daughter died, neither the mother nor the daughter was resident in Germany, within the meaning of Paragraph 2(1)(1) of the ErbStG, and the daughter’s estate included only foreign assets for the purposes of Paragraph 2(3) of the ErbStG (as opposed to ‘domestic’ assets).

12. The referring court, before which an appeal on a point of law has been brought, expresses doubts regarding the consistency of Paragraph 27 of the ErbStG with EU law.

13. It observes, first of all, that the inheritance which the appellant in the main proceedings received might fall within the scope of the provisions of EU law on the free movement of capital. Indeed, inheritances, which consist in the transfer to one or more persons of assets left by a deceased person, fall within the scope of heading XI of Annex I to Directive 88/361 and thus constitute movements of capital within the meaning of Article 63 TFEU, except in cases where their constituent elements are confined within a single Member State.[5] According to the referring court, the succession from which Mr Feilen benefited should not be regarded as a purely domestic operation, since he acquired his mother's assets, which consisted mainly in her share of the daughter's estate in Austria, and thus of foreign assets.

14. Secondly, the referring court states that the refusal to allow a reduction in inheritance tax pursuant to Paragraph 27(1) of the ErbStG might constitute a restriction on the movement of capital, since its effect is to reduce the value of an estate which includes an asset subject to foreign inheritance tax.[6] However, it entertains doubts in that regard, in light of the judgment in *Block* (C-67/08, EU:C:2009:92), in which the Court, in a case involving double taxation, found that there was no restriction on the movement of capital under the ErbStG because the Member States are not obliged to adapt their own tax systems to the different tax systems of the other Member States and enjoy a certain autonomy in that area, provided that they comply with EU law.

15. Thirdly, the referring court wonders about the possible justification for such a restriction. In this context, it wonders whether Paragraph 27(1) of the ErbStG establishes a difference in treatment that is permitted under Article 65(1)(a) TFEU or an arbitrary discrimination prohibited by Article 65(3) TFEU, and also whether the restriction which the ErbStG entails might be justified by an overriding reason in the public interest, namely the preservation of the coherence of the German tax system.

16. It was in those circumstances that the Bundesfinanzhof (Federal Finance Court) decided to stay the proceedings and to refer the following question to the Court:

'Does the free movement of capital guaranteed by Article 63(1) TFEU in conjunction with Article 65 TFEU preclude legislation of a Member State which provides for a reduction in inheritance tax in the case of an inheritance by persons in a particular tax class where the estate includes assets that were already acquired by persons in this tax class during the ten years preceding the acquisition and inheritance tax was assessed in the Member State in respect of this previous acquisition, whereas a tax reduction is excluded where inheritance tax was levied in another Member State in respect of the previous acquisition?'

III – **Procedure before the Court**

17. Written observations were submitted by Mr Feilen, the German, Spanish and United Kingdom Governments and by the European Commission. All the parties, with the exception of the Spanish Government, presented oral argument at the hearing on 27 January 2016.

5 — Judgment in *Welte* (C-181/12, EU:C:2013:662).

6 — Judgment in *Commission* v *Germany* (C-211/13, EU:C:2014:2148, paragraph 41).

IV – **Assessment**

A – *Summary of the observations of the parties*

18. *Mr Feilen* proposes that the Court should answer the question referred in the affirmative. He observes that, according to the case-law of the Court, successions do fall within the scope of the rules on the free movement of capital. He also submits that the situation in the case in the main proceedings is not comparable to that examined in the judgment in *Block* (C-67/08, EU:C:2009:92), since the present case does not involve parallel taxation producing a cumulative effect, but merely concerns the State in which the previous succession occurred. Moreover, Mr Feilen maintains that the restriction cannot be justified by any overriding reason in the public interest, such as the preservation of the coherence of the German tax system, because there is no direct link between the tax advantage (the grant of a reduction in inheritance tax) and a disadvantage (the taxation of the previous inheritance). Indeed, the reduction in inheritance tax is not granted on account of the national tax revenue previously generated.

19. *The German Government*, on the other hand, proposes that the Court should answer the question referred in the negative.

20. It submits that the national provision at issue does not constitute a restriction on the movement of capital, since the reduction in the value of the inheritance consisting in foreign assets is not a result of the application of that provision, and thus of taxation in Germany, but of the exercise in parallel by the Federal Republic of Germany and the Republic of Austria of their fiscal sovereignty. The German Government therefore considers that the solution adopted in the judgment in *Block* (C-67/08, EU:C:2009:92) may be applied in the present case, inasmuch as the Federal Republic of Germany is not obliged to adapt its own tax system so as to take account of inheritance tax paid in other Member States, even if that results in the double taxation of an inheritance.

21. In the alternative, the German Government argues that the so-called distinction drawn in Paragraph 27(1) of the ErbStG between a previous succession taxed in Germany and a previous succession taxed in another Member State does not constitute prohibited discrimination, since purely domestic situations and situations involving a cross-border element are not objectively comparable, since the Federal Republic of Germany does not have the same right to tax in both cases.

22. *The Spanish Government* also proposes that the Court should answer the question referred in the negative. It insists that there is an overriding reason in the public interest which justifies the distinction drawn in Paragraph 27(1) of the ErbStG with reference to the place in which the estate was taxed, and points, more specifically, to the need to preserve the coherence of the German tax system.

23. *The United Kingdom Government* concurs. It considers that the German legislation at issue does not create any restriction on the free movement of capital, since the Federal Republic of Germany did not apply to the foreign assets of the appellant's mother any higher inheritance tax than it applies to assets located exclusively in Germany According to the United Kingdom Government, the legislation at issue only imposes higher inheritance tax if the assets, regardless of their location, have not been subject in the previous ten years to German inheritance tax. That being so, it submits that the situation in the present case is similar to that examined in the judgment in *Block* (C-67/08, EU:C:2009:92), in that the double taxation is the result of the exercise in parallel by two Member States of their fiscal sovereignty.

24. The United Kingdom also maintains that the so-called restriction on the free movement of capital is justified by the need to preserve the coherence of the German tax system, and thus adopts the same position as the other governments regarding the existence of a direct link between the tax advantage and a particular tax levy.

25. *The Commission* proposes that the Court should answer the question referred in the affirmative.

26. The Commission submits that Paragraph 27(1) of the ErbStG does entail a restriction on the movement of capital, since, by treating subsequent acquisitions of a 'domestic' asset that has already been taxed in Germany more favourably, it contributes to reducing the value of assets inherited from another Member State.[7] Since such assets are subject to higher tax than 'domestic' assets, making investments in another Member State, keeping those investments there and bequeathing them to an heir in Germany would appear to be less profitable for the deceased and the heir. In that context, the Commission observes that the solution adopted in the judgment in *Block* (C-67/08, EU:C:2009:92) does not apply, since the facts of the present case are not comparable.

27. Lastly, the Commission considers that the measure at issue cannot be regarded as justified under the provisions of Article 65(1)(a) TFEU. There is, objectively speaking, no difference in the situations such as to justify discriminatory taxation in so far as concerns the level of inheritance tax payable on domestic assets and on foreign assets, since the calculation of the tax, in either case, is linked to the value of the assets included in the estate. The grant of the tax advantage only in respect of domestic assets is not necessitated by the *ratio legis* of Paragraph 27 of the ErbStG, which is to avoid the excessive diminution of family estates in the event of successive transfers during a relatively short period of time, regardless of where the assets are located.

28. Nor can there be any justification in this case, according to the Commission, by reference to the need to preserve the coherence of the tax system, because the tax liability does not fall on the same taxpayer as benefits from the tax advantage,[8] inasmuch as the person liable to pay the tax on the first succession in Austria was the appellant in his capacity as legal successor of the deceased, whereas the person liable to pay the tax on the second inheritance in Germany is the appellant in his own capacity.

B – *Assessment*

1. Does the succession at issue in the main proceedings fall within the scope of EU law and, more specifically, the rules on the free movement of capital?

29. As the Bundesfinanzhof (Federal Finance Court) itself suggests in the order for reference, this question must clearly be answered in the affirmative.

30. First of all, it should be noted that, according to consistent case-law, although direct taxes fall within the competence of the Member States, they must exercise that competence consistently with EU law.[9]

7 — The Commission refers to the judgment in *Jäger* (C-256/06, EU:C:2008:20, paragraph 30 et seq.).

8 — The Commission relies here on the judgment in *Welte* (C-181/12, EU:C:2013:662, paragraph 60).

9 — Judgments in *Commission* v *France* (C-334/02, EU:C:2004:129, paragraph 21), *Commission* v *Greece* (C-155/09, EU:C:2011:22, paragraph 39) and *Commission* v *Austria* (C-10/10, EU:C:2011:399, paragraph 23).

31. It is also clear from the 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 63 TFEU], except in cases where their constituent elements are confined within a single Member State'. [10]

32. Given the acquisition of foreign (Austrian) assets, the bequest to Mr Feilen obviously cannot be regarded as a purely domestic transaction.

33. It follows that it is necessary to examine next whether national legislation such as that at issue in the main proceedings constitutes a restriction on the movement of capital.

2. Does Paragraph 27(1) of the ErbStG constitute a restriction on the free movement of capital?

34. The existence a restriction on the free movement of capital presupposes different tax treatments of situations that are objectively comparable.

35. I would point out that, according to Article 65(1)(a) TFEU, Article 63 TFEU does not impinge upon the right of the 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. That exception to the fundamental principle of the free movement of capital must be interpreted strictly and may 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. A difference in treatment may be regarded as consistent with the Treaty provisions on the free movement of capital only where (i) it concerns situations which are not objectively comparable or (ii) it is justified by an overriding reason in the public interest. [11]

36. In the present case, the difference in tax treatment is evident.

37. Proceeding, as does the Bundesfinanzhof (Federal Finance Court), on the assumption that the provision in question must be interpreted as meaning that the tax relief is granted only if the previous acquisition has been taxed in Germany, I note that the legislation treats subsequent acquisitions of 'domestic assets' (by persons in tax class I [12]) that have already been assessed to inheritance tax in Germany on the occasion of a previous inheritance more favourably than subsequent acquisitions of 'foreign assets' the previous acquisition of which was not taxed in Germany but in another Member State.

38. Before deciding whether or not there is a restriction on the free movement of capital, it is useful to refer to some of the Court's judgments which the parties have cited extensively for the reason that they concern the German legislation on inheritance tax.

10 — See, in particular, the judgments in *Barbier* (C-364/01, EU:C:2003:665, paragraph 58), *van Hilten-van der Heijden* (C-513/03, EU:C:2006:131, paragraphs 40 to 42), *Scheunemann* (C-31/11, EU:C:2012:481, paragraph 22) and *Welte* (C-181/12, EU:C:2013:662, paragraph 20). For other examples, involving inheritance (or gift) taxes, see, inter alia, the judgments in *Geurts and Vogten* (C-464/05, EU:C:2007:631), *Jäger* (C-256/06, EU:C:2008:20), *Eckelkamp and Others* (C-11/07, EU:C:2008:489), *Arens-Sikken* (C-43/07, EU:C:2008:490), *Block* (C-67/08, EU:C:2009:92), *Mattner* (C-510/08, EU:C:2010:216), *Missionswerk Werner Heukelbach* (C-25/10, EU:C:2011:65), *Halley* (C-132/10, EU:C:2011:586), *Commission* v *Spain* (C-127/12, EU:C:2014:2130), *Welte* (C-181/12, EU:C:2013:662), *Commission* v *Germany* (C-211/13, EU:C:2014:2148), *Q* (C-133/13, EU:C:2014:2460) and *Grünewald* (C-559/13, EU:C:2015:109). See also the following pending cases: *Hünnebeck*, C-479/14 (my Opinion was delivered on 18 February 2016) and *Sparkasse Allgäu*, C-522/14 (see the Opinion of Advocate General Szpunar in *Sparkasse Allgäu* (C-522/14, EU:C:2015:786)).

11 — See the judgments in *Verkooijen* (C-35/98, EU:C:2000:294, paragraph 43), *Manninen* (C-319/02, EU:C:2004:484, paragraph 29) and *Hollmann* (C-443/06, EU:C:2007:600, paragraph 45).

12 — In accordance with Paragraph 15(1) of the ErbStG, the relatives of the *de cujus* who fall within 'tax class I' are the spouse or civil partner, the children and step-children, and the relatives in the ascending line in cases of inheritance.

39. In its judgment in *Jäger* (C-256/06, EU:C:2008:20, paragraph 32),[13] the Court held that, 'in the present case, the national provisions in issue in the main proceedings, in so far as they result in an inheritance consisting of agricultural land and forestry situated in another Member State being subject, in Germany, to inheritance tax that is higher than that which would be payable if the assets inherited were situated exclusively within the territory of that Member State, have the effect of restricting the movement of capital by reducing the value of an inheritance consisting of such an asset situated outside Germany'.

40. The Court was again called upon to examine the German rules contained in the ErbStG in *Welte* (C-181/12, EU:C:2013:662, paragraph 25) and *Commission* v *Germany* (C-211/13, EU:C:2014:2148, paragraph 43) and found that, since they made the application of a tax-free allowance in respect of the immovable property concerned dependent on the place of residence of the deceased or the heir at the time of death, they led to successions between non-residents including such property being subject to a higher tax liability than successions involving at least one resident, and therefore had the effect of reducing the value of such successions.[14]

41. In those cases, the Member State of residence of the deceased imposed on the foreign asset inheritance tax that was higher than that which would have been payable if the assets inherited had been situated exclusively within the Member State of residence of the deceased[15] (that Member State taxing both assets) or calculated the tax-free allowance in the case of a gift of immovable property located in Germany differently depending on whether or not the donor or the donee was resident in Germany (gift tax being payable in both cases).[16]

42. In all three judgments the Court concluded that there was no objective difference between the situation of persons none of whom resided in Germany and the situation in which at least one of them resided in that Member State, or between successions including property located in Germany and successions in which the property was located in another Member State, since the amount of inheritance tax relating to immovable property situated in Germany was calculated, pursuant to the ErbStG, on the basis of both the value of the property and the personal link between the deceased and the heir. Neither of those criteria depended on the place of residence of the parties of on the location of the assets. There was therefore no objective difference between the two situations capable of rendering the different tax treatment applied to them consistent with the Treaty.

43. A number of parties have also cited the judgment in *Block* (C-67/08, EU:C:2009:92), the German and United Kingdom Governments submitting that that ruling is applicable, *mutatis mutandis*, in the present case. In that case, Mrs Block, a German resident, was obliged to pay German inheritance tax in respect of assets located in Spain which she had inherited and was unable to offset against that tax the inheritance tax she had paid in Spain, since there was no double taxation convention between Germany and Spain in matters of succession.

13 — See O'Shea, T., ECJ Nixes German Inheritance Valuation Rules, Tax Notes International, February 11, 2008, p. 468 et seq., Michel, V., Impôt sur les successions et situation du bien imposé, Europe, March 2008, p. 16, Leistentritt, M., Die Gewährung von Begünstigungen im Erbschaftsteuerrecht als möglicher Verstoss gegen den freien Kapitalverkehr, *European Law Reporter (ELR)*, 7-8/2008, p. 271 et seq., Kemmeren, E., The Netherlands: Infringement Procedure on Tax Facilities in Respect of Country Estates situated in the Netherlands, ECJ — Recent Developments in Direct Taxation 2012, Linde Verlag — Vienna, 2013, pp. 147 to 164.

14 — See, on the subject of the ErbStG and the question of its consistency with EU law, inter alia, Fraberger, Erbschaftssteuer und Gemeinschaftsrecht, SWI 1998, p. 302, Tumpel, Die europarechtlichen Vorgaben für eine Reform der Erbschafts- und Schenkungssteuer, SWI 2000, p. 27, Fellner, Erbschafts- und Schenkungssteuer: Bewertung von Auslandsimmobilien gemeinschaftsrechtswidrig?, RdW 2005, p. 449, Fellner, Bewertung von Grundbesitz gemeinschaftsrechtswidrig?, SWK 2006, p. 571, Fraberger/Burgstaller/Haslinger, Die Zukunft der Erbschafts- und Schenkungssteuer, taxlex 2007, p. 707 (715), and Petritz, M., ErbStG: Der EuGH und die Generalanwältin zur Bewertung von ausländischem Vermögen — Die Rs Jäger und Bauer, RdW 2008/125, p. 174.

15 — Judgment in *Jäger* (C-256/06, EU:C:2008:20, paragraph 32) and Opinion of Advocate General Mazák in *Jäger* (C-256/06, EU:C:2007:500, point 35).

16 — Judgments in *Welte* (C-181/12, EU:C:2013:662, paragraph 25) and *Commission* v *Germany* (C-211/13, EU:C:2014:2148, paragraph 43).

44. The Court found in that case that there was no restriction on the movement of capital, since a juridical double taxation such as that at issue was the result of the exercise in parallel by two Member States of their fiscal sovereignty.

45. In my view, the present case is somewhat different from the cases which led to the judgments just mentioned.

46. First of all, the juridical double taxation which gave rise to the judgment in *Block* (C-67/08, EU:C:2009:92) did not entail any differential tax treatment, since the German legislation treated all taxpayers in the same way. It is true that Mrs Block would have paid less tax if all the assets had been located in Germany, but the disadvantage to her did not arise from the German legislation. It arose, in fact, from the exercise in parallel by two Member States of their fiscal sovereignty. [17]

47. Secondly, by contrast with the cases which gave rise to the judgments in *Jäger* (C-256/06, EU:C:2008:20), *Welte* (C-181/12, EU:C:2013:662) and *Commission* v *Germany* (C-211/13, EU:C:2014:2148), the present case does not involve situations that are objectively comparable, those situations being that of a taxpayer residing in Germany who has inherited an asset that has already, in the previous ten years, been taxed in Germany and the situation of another taxpayer, also residing in Germany, who has inherited an asset that has already been taxed in that same period, but in a different Member State.

48. I would like, at this juncture, to recall some of the thoughts regarding this question of comparability which I set out in my Opinion in *Timac Agro Deutschland* (C-388/14, EU:C:2015:533, points 37 to 40):

‘37. … the respective situations of residents and non-residents are not comparable in relation to the tax system of a Member State if that Member State does not have, or does not exercise, the power to tax non-residents. [18]

38. It is that same requirement which accounts for the presumption laid down by the Court in its judgment in *Nordea Bank Danmark* (C-48/13, EU:C:2014:2087[, paragraph 24]), according to which “permanent establishments situated in another Member State … are not in a situation comparable to that of resident permanent establishments *in relation to measures laid down by a Member State in order to prevent or mitigate the double taxation of a resident company’s profits*” (my emphasis). [19]

39. This idea is not new. Thus, in its judgment in *Test Claimants in Class IV of the ACT Group Litigation* (C-374/04, EU:C:2006:773), the Court had already held that the individual shareholders of a parent company not resident in the United Kingdom could not benefit from the same tax credit as the individual shareholders of a parent company resident in the United Kingdom in respect of dividends paid by subsidiaries resident in the United Kingdom when no UK tax was levied on those outbound dividends. The Court had stated in its judgment that matters would be different if, pursuant to a double taxation convention or on the basis of a unilateral decision, the United Kingdom had retained the right to levy UK income tax on outbound dividends.

17 — Judgments in *Kerckhaert and Morres* (C-513/04, EU:C:2006:713, paragraph 20) and *Damseaux* (C-128/08, EU:C:2009:471, paragraph 26 et seq.).

18 — That thought was confirmed in paragraph 65 of the judgment in *Timac Agro Deutschland* (C-388/14, EU:C:2015:829): ‘since the Federal Republic of Germany does not exercise any tax powers over the profits of such a [non-resident] permanent establishment, the deduction of its losses no longer being permitted in Germany, the situation of a permanent establishment situated in Austria is not comparable to that of a permanent establishment situated in Germany in relation to measures laid down by the Federal Republic of Germany in order to prevent or mitigate the double taxation of a resident company’s profits’.

19 — See paragraphs 27 and 64 of the judgment in *Timac Agro Deutschland* (C-388/14, EU:C:2015:829).

40. In the light of these considerations, the Court held that Articles 49 TFEU and 63 TFEU "do not prevent a Member State, on a distribution of dividends by a company resident in that State, from granting companies receiving those dividends which are also resident in that State a tax credit equal to the fraction of the corporation tax paid on the distributed profits by the company making the distribution, when it does not grant such a tax credit to companies receiving such dividends which are resident in another Member State and are not subject to tax on dividends in the first State"'. [20]

49. I concluded that, 'consequently, since there can be no tax advantage if there is no power of taxation, [21] the situation of a company such as Timac Agro does not seem to me to be comparable to that of a company established in Germany with a permanent establishment in Germany' [22] (point 74 of the Opinion).

50. In other words, the decisive criterion for determining whether national situations and cross-border situations are comparable is whether or not the Member State in question has a right to tax in both situations. [23]

51. Those conclusions may be applied to the present case. Indeed, as the German Government has rightly emphasised, in the context of a purely domestic situation, all acquisitions, including the previous acquisition and a subsequent acquisition, will fall under German tax jurisdiction. In a cross-border situation, by contrast, such as that at issue in the main proceedings, the Federal Republic of Germany does not have, and will not have had any right to tax the previous acquisition, its tax jurisdiction extending only to the subsequent acquisition. When it comes to exercise its powers of taxation, which will include the application of the reductions laid down in Paragraph 27 of the ErbStG, the Federal Republic of Germany will not therefore be obliged to take account of (previous) acquisitions not falling under its tax jurisdiction.

52. In other words, the Federal Republic of Germany is not reserving a more favourable inheritance tax treatment to national assets than to the foreign assets that it also taxes: it is not, in this case, taxing the foreign asset.

53. Since the situations are not comparable, the difference in tax treatment does not constitute a restriction on the free movement of capital.

3. Alternative analysis: the existence of a justification

54. In the event that the Court concludes that the situations are comparable, and that there is therefore a restriction, I think that that restriction would in any event be justified by an overriding reason in the public interest.

20 — Judgment in *Test Claimants in Class IV of the ACT Group Litigation* (C-374/04, EU:C:2006:773, paragraph 74). For a recent case in which the Court found that the objective difference in situation stemmed from the waiver by a Member State of the exercise of its powers of taxation over the dividends distributed by companies resident in another Member State following the conclusion of a double taxation convention, see judgment in *Kronos International* (C-47/12, EU:C:2014:2200, paragraphs 80 to 82).

21 — According to the principle set out in paragraph 24 of the judgment in *Nordea Bank Danmark* (C-48/13, EU:C:2014:2087) and previously applied in the judgment in *Test Claimants in Class IV of the ACT Group Litigation* (C-374/04, EU:C:2006:773).

22 — That conclusion applied only to the 1999 tax year (the second question referred for a preliminary ruling in the case which gave rise to the judgment in *Timac Agro Deutschland* (C-388/14, EU:C:2015:829)), since, in previous years, there had been an exercise of the power to tax and therefore comparability (the first question referred). In paragraph 28 of the judgment, the Court held (confirming my Opinion) that, by granting the same advantage to non-resident permanent establishments and resident permanent establishments alike, the Federal Republic of Germany had 'equated' the two, and the situations were therefore comparable.

23 — Judgments in *Nordea Bank Danmark* (C-48/13, EU:C:2014:2087, paragraph 24) and *Timac Agro Deutschland* (C-388/14, EU:C:2015:829, paragraph 65).

55. I shall now analyse the two reasons put forward in the written observations and at the hearing, which are the coherence of the German tax system and the need to ensure a balanced allocation of powers of taxation.

a) Fiscal coherence

56. The Court has already recognised that the need to maintain the coherence of a tax system can justify a restriction on the exercise of the freedoms of movement guaranteed by the Treaty. [24]

57. In this context, the Court has required that, in relation to the same taxpayer and the same tax, the tax system in question must create a direct link between the tax advantage concerned and a particular levy. [25] I shall now examine those three conditions, the most fundamental of which is that there must be a direct link between the tax advantage and a particular levy.

i) The direct link between the tax advantage in question and a particular levy

58. By enacting Paragraph 27 of the ErbStG, the German legislature adopted, for equitable reasons, a measure under which the German revenue waives part of the inheritance tax due to it on an acquisition, *on the ground that it has already levied inheritance tax in respect of the same asset on the occasion of a previous acquisition*, one that has taken place in the previous ten years, the reduction in tax decreasing in proportion to the number of years that have elapsed.

59. In that it provides for a reduction in inheritance tax on the occasion of a subsequent acquisition, Paragraph 27 of the ErbStG is intended partly to prevent the double taxation in Germany of an asset bequeathed more than once in a short space of time. Clearly, double taxation in Germany can only occur if there has been a first taxation in Germany.

60. In other words, as the Spanish and United Kingdom Governments have emphasised, the tax advantage arising from that reduction is intended to offset the tax levy on the previous acquisition. That advantage is linked to the fact that the taxation in Germany of the previous acquisition will have reduced the value of the subsequent acquisition.

61. I therefore concur with the Bundesfinanzhof (Federal Finance Court), which submits in the order for reference that there is a 'linking of tax charge (through the taxation of the previous acquisition) and tax reduction (on the taxation of the subsequent acquisition)'. [26]

62. On this point, it is possible to draw a parallel between the present case and the cases which gave rise to the judgments in *Commission* v *Hungary* (C-253/09, EU:C:2011:795) and *Commission* v *Belgium* (C-250/08, EU:C:2011:793).

63. Under Hungarian law, a proportional tax is levied on purchases of Hungarian real property intended to serve as a principal residence, the tax paid on the occasion of the first purchase being deducted from the tax due on a second purchase (and so on and so forth), so that it is assessed only on the difference in purchase price (somewhat in the manner of value added tax (VAT)). However, if the first purchase is made in another Member State, the Hungarian tax will be assessed on the full

24 — Judgments in *Bachmann* (C-204/90, EU:C:1992:35, paragraph 21), *Krankenheim Ruhesitz am Wannsee-Seniorenheimstatt* (C-157/07, EU:C:2008:588, paragraph 43), *Commission* v *Belgium* (C-250/08, EU:C:2011:793, paragraph 77), *Commission* v *Hungary* (C-253/09, EU:C:2011:795, paragraph 78) and *K* (C-322/11, EU:C:2013:716, paragraph 71).

25 — Judgments in *Papillon* (C-418/07, EU:C:2008:659, paragraph 44), *Aberdeen Property Fininvest Alpha* (C-303/07, EU:C:2009:377, paragraph 72), *Commission* v *Belgium* (C-250/08, EU:C:2011:793, paragraph 71), *Test Claimants in the FII Group Litigation* (C-35/11, EU:C:2012:707, paragraph 57) and *K* (C-322/11, EU:C:2013:716, paragraph 66).

26 — In his Opinion in *Welte* (C-181/12, EU:C:2013:384, point 71), Advocate General Mengozzi speaks of a 'direct and logical symmetrical link'.

value of a second purchase made in Hungary. While the Court held that there was a restriction, it also held that it was justified by the coherence of the Hungarian tax system, since there was a direct link between the tax advantage granted on the occasion of a second purchase and the initial tax levy. [27]

64. The Court followed the same reasoning in its judgment in *Commission* v *Belgium* (C-250/08, EU:C:2011:793), delivered the same day, concerning a comparable Belgian system. It held in paragraph 73 of the judgment that 'it should be noted that, as the Kingdom of Belgium has no power of taxation on a purchase transaction which was carried out previously in another Member State by persons who decide to establish their new principal residence in the Flemish Region, the configuration of that tax advantage reflects a logical symmetry'. [28]

65. In the present case, it was the inheritance tax initially paid in Austria that reduced value of the subsequent inheritance, not any inheritance tax paid in Germany. Any reduction in the rate of German inheritance tax assessed on a subsequent acquisition only arises because it is linked to the asset value on which inheritance tax was assessed on the occasion of a previous acquisition. The taxes payable on the two successions relate to the same asset, in terms of value at least, if not in physical terms, although the chances of establishing that the assets are in fact one and the same are that much greater if the lapse of time between the two acquisitions is short.

ii) The tax advantage and the levy must relate to the same tax

66. This condition [29] is clearly fulfilled in the present case, since both the tax advantage and the levy relate to inheritance tax.

iii) Same taxpayer

67. This condition is rarely imposed as such. [30] The Court has even stated that the last two conditions, 'specifically, the same taxpayer and the same tax, have been considered sufficient … [in certain judgments] to establish that such a link exists', [31] that is to say, the link between the tax advantage and the levy'.

68. In its judgment in *Commission* v *Belgium* (C-250/08, EU:C:2011:793), after finding that there was a link between a tax advantage and a levy, the Court added, in paragraph 75, that 'that system involve[d], first, the same taxpayer, who ha[d] already paid the duties at issue and who [was] eligible for the offset and, second, an advantage awarded within the context of the same taxation'. As if those factors provided evidence of the direct link presented in paragraph 71 of the judgment as the only condition capable of enabling the justification of fiscal coherence to succeed.

69. In the present case, even though the direct link is clearly established, I note that the taxpayer who must pay the inheritance tax on the subsequent acquisition is obviously not the person who was liable to pay the inheritance tax on the previous inheritance, since that person, necessarily, is deceased.

27 — See Steichen, A., *Précis de droit fiscal communautaire*, Éditions Saint Paul, 2015, p. 90.

28 — This reasoning could have led the Court to conclude that the situations at issue were not comparable: see, by analogy, the judgment in *Krankenheim Ruhesitz am Wannsee-Seniorenheimstatt* (C-157/07, EU:C:2008:588, point 42). Had the Court concluded in these cases that, in reality, the situations were not comparable, that would have meant that there was no restriction on the free movement of persons and would have rendered it unnecessary to consider possible justifications (see points 34 to 53 of this Opinion).

29 — See the judgments in *Verkooijen* (C-35/98, EU:C:2000:294, paragraph 57), *Baars* (C-251/98, EU:C:2000:205, paragraph 40), and *Lenz* (C-315/02, EU:C:2004:446, paragraph 36).

30 — Judgments in *Bosal* (C-168/01, EU:C:2003:479, paragraph 35) and *Lenz* (C-315/02, EU:C:2004:446, paragraph 36).

31 — Judgment in *K* (C-322/11, EU:C:2013:716, paragraph 70).

70. Given that fact, I suggest that the Court interpret this condition with a degree of flexibility, as Advocate General Kokott has already suggested in her Opinion in *Manninen* (C-319/02, EU:C:2004:164), in which she stated that 'exceptionally, a link justifying the tax cohesion argument may exist if a charge on one taxpayer is offset by a relief for another'. [32]

71. Two aspects lead me to think that exceptional circumstances pertain in this instance. First of all, the rules at issue relate to the same tax base that is subject to inheritance tax. In the present case, that tax base consists in the property of Mrs Feilen's daughter, which her mother inherited and which passed to Mr Feilen when their mother died. Next, while the taxpayers are different, they are, necessarily, part of the same family and the objective of the German legislation is clearly to recognise that an inheritance which passes from generation to generation, between close relatives, is not normally assessed to inheritance tax against except after a certain period of time. In reality, the German legislation seeks to prevent, in fact and in law, the same inheritance being docked of a second, disproportionate levy within a short span of time. The Court has in fact held that the coherence of the tax system (and, more particular, the existence of a direct link between the tax advantage and the levy) must be examined in the light of the objective pursued by the rules in question. [33]

72. I would also note, for the sake of completeness, that the objective pursued by the rules in question would not necessarily be attained by extending the reduction in German tax to a situation such as that at issue in the main proceedings, in which inheritance tax has been paid in another Member State on a previous inheritance between close relatives in the previous ten years.

73. As the United Kingdom has pointed out, it could be that the other Member State applies inheritance tax that is considerably lower than German inheritance tax. If the Federal Republic of Germany were under an obligation to grant the reduction at issue for the sole reason that inheritance tax has been paid in another Member State on the same assets in the previous ten years, it could be obliged to grant, on the occasion of the subsequent inheritance, a reduction greater than the amount of tax charged on the previous inheritance.

b) Preserving a balanced allocation of powers of taxation

74. A restriction on the free movement of capital may also be justified by the need to preserve a balanced allocation of powers of taxation. [34]

75. I confess that I have some difficulty in grasping the precise scope of this justification, which seems to me to have a somewhat special status in the case-law of the Court.

76. It is, first of all, the most recent of the justifications which the Court has accepted, in the field of direct taxation, for a restrictive measure or a measure which impinges upon one of the fundamental freedoms of movement.

32 — Point 61. See Hintsanen, L., and Pettersson, K., The Implications of the ECJ Holding the Denial of Finnish Imputation Credits in Cross-Border Situations to Be Incompatible with the EC Treaty in the *Manninen* Case, IBFD, April 2006, p. 130 (p. 132 et seq. 'rather than simply dismissing the fiscal cohesion defence on the basis that the same tax and the same taxpayer criteria were not satisfied, the ECJ felt it necessary to examine the legislation in the light of its objective. Whilst not discussed in detail in the ECJ judgment, [the Opinion] suggests that the fiscal cohesion defence may be applied in wider circumstances than previously thought and even in situations in which one taxpayer's tax burden is matched by another's relief').

33 — Judgments in *Papillon* (C-418/07, EU:C:2008:659, paragraph 44 and the case-law cited) and *K* (C-322/11, EU:C:2013:716, paragraph 69).

34 — See the judgment in *Commission* v *United Kingdom* (C-172/13, EU:C:2015:50, paragraph 24), which refers to the judgments in *Marks & Spencer* (C-446/03, EU:C:2005:763, paragraph 51), *Oy AA* (C-231/05, EU:C:2007:439, paragraphs 51, 57 and 60) and *A* (C-123/11, EU:C:2013:84, paragraph 46). See also the judgment in *X Holding* (C-337/08, EU:C:2010:89, paragraph 28 et seq.).

77. It is also the only such justification to have been accepted by the Court without any party having raised it, at least not in that form. This occurred in the judgment in *Marks & Spencer* (C-446/03, EU:C:2005:763, paragraph 43 et seq.)

78. To begin with, the Court would take it into consideration only if it was put forward in a case simultaneously with two other grounds of justification, namely the need to combat tax avoidance and the need to avoid the risk of taxpayers benefitting from the same advantage twice.

79. Later on, the Court no longer required the combination of the first two arguments (judgment in *Oy AA* (C-231/05, EU:C:2007:439, in particular, paragraph 60), and subsequently held, in its judgment in *X Holding* (C-337/08, EU:C:2010:89, paragraph 28 et seq.), that the preservation of the balanced allocation of powers of taxation could by itself serve as a ground of justification.

80. In so far as concerns the definition of this ground of justification, a large number of the Court's judgments indicate that the Member States may prevent taxpayers from being at liberty to choose between several national tax systems, which could compromise their right to exercise their fiscal sovereignty: [35]

— it was the legitimate prevention of 'loss shopping' in the judgment in *Marks & Spencer* (C-446/03, EU:C:2005:763), in which case, moreover, the proof that it was not possible for Marks & Spencer to choose between several national tax systems in which to set off the losses of its non-resident subsidiaries led the Court to hold that the United Kingdom legislation at issue was not proportionate (see, in particular, paragraph 53 et seq.);

— it was the case in the judgment in *Oy AA* (C-231/05, EU:C:2007:439), in which that choice could have been open to taxpayers for the deduction of intra-group financial transfers;

— it was the case in the judgment in *Lidl Belgium* (C-414/06, EU:C:2008:278, paragraph 52), in which the taxpayer had 'the right to elect to have the losses of [a] permanent establishment taken into account [either] in the Member State in which it [had] its seat or in another Member State; [36]

— it was also the case in the judgment in *Papillon* (C-418/07, EU:C:2008:659), in which the Court pointed out, in paragraph 39, that 'the question as to whether the profits and losses of companies belonging to the group in question should be taken into account arises only in relation to companies which are resident in a single Member State' and for 'the taking into account of losses recorded in one and the same Member State'. Since there was no choice between several national tax systems, the balanced allocation of powers of taxation was not accepted as justification;

— it was also the case in the judgment in *SGI* (C-311/08, EU:C:2010:26), in which the Court stated, in paragraph 63, that 'according to the choice made by companies having relationships of interdependence, the Member State of the company granting unusual or gratuitous advantages would be forced to renounce its right, in its capacity as the State of residence of that company, to tax its income in favour, possibly, of the Member State in which the recipient company has its establishment';

— it was again the case in the judgment in *X Holding* (C-337/08, EU:C:2010:89), in which case the Netherlands justified its legislation preventing a company from being at liberty to decide whether or not to form a tax entity with its non-resident subsidiary and also, with equal liberty, to dissolve such an entity from one year to the next depending on the advantages offered to it by one or other

35 — In its judgment in *Argenta Spaarbank* (C-350/11, EU:C:2013:447, paragraph 55), the Court speaks of 'the shifting of income normally taxable in one of those Member States to the other'.

36 — It was the lack of any ability to choose between several national tax systems that led to the Court's rejection of the justification based on the balanced allocation of powers of taxation in its judgment in *A* (C-123/11, EU:C:2013:84, paragraphs 48 to 55).

national tax system, either that in which the parent company was established or that in which the subsidiary was established: 'any extension of that advantage [namely, the formation of a tax entity] to cross-border situations would … have the effect of allowing parent companies to *choose freely* the Member State in which the losses of their non-resident subsidiary are to be taken into account' (my emphasis; paragraph 64 of the judgment);

— lastly, it has also been the case in all of the Court's case-law on exit taxes, from its judgment in *National Grid Indus* (C-371/10, EU:C:2011:785) onwards, in which the fundamental premiss is the taxpayer's decision to avoid capital gains tax by transferring his residence for tax purposes to another contrary where that tax does not exist or is lower.

81. If the definition of the justification of the balanced allocation of powers of taxation is in fact always based on the liberty of the taxpayer to choose one national tax system over another, then I fail to see how that justification could apply in the present case: it was not possible for either Mr Feilen or his mother to transfer from Austria to Germany or from Germany to Austria jurisdiction to tax either of the inheritances in question. Moreover, there is no question in this instance of the Federal Republic of Germany losing to the Republic of Austria any part of its powers of taxation.

82. Furthermore, the Court has frequently refused the justification of the balanced allocation of powers of taxation where, as in the case in *Papillon* (C-418/07, EU:C:2008:659), only one tax system was at issue:

— that was the case in its judgment in *Amurta* (C-379/05, EU:C:2007:655, paragraph 59), in which the Court held that, 'where a Member State has chosen not to tax recipient companies established in its territory in respect of this type of income, it cannot rely on the argument that there is a need to safeguard the balanced allocation between the Member States of the power to tax in order to justify the taxation of recipient companies established in another Member State', and in its judgment in *Santander Asset Management SGIIC and Others* (C-338/11 to C-347/11, EU:C:2012:286, paragraph 48), in which it held that 'where a Member State has chosen not to tax resident UCITS in receipt of nationally-sourced dividends, it cannot rely on the argument that there is a need to ensure a balanced allocation between the Member States of the power to tax in order to justify the taxation of non-resident UCITS in receipt of such income';[37]

— in its judgment in *Rewe Zentralfinanz* (C-347/04, EU:C:2007:194, paragraph 43), the Court held that, 'accordingly, an argument based on the balanced allocation of the power to impose taxes between the Member States cannot in itself justify a Member State systematically refusing to grant a tax advantage to a resident parent company, on the ground that that company has developed a cross-border economic activity which does not have the immediate result of generating tax revenues for that State';

— the same reasoning appears in the judgment in *Groupe Steria* (C-386/14, EU:C:2015:524, paragraph 29), in which the Court held that 'the difference in treatment concern[ed] only incoming dividends, received by resident parent companies, so that what [was] concerned [was] the fiscal sovereignty *of one and the same Member State*' (my emphasis).

83. In the light of those judgments, in which the need to preserve a balanced allocation of powers of taxation was not accepted as justification for a restrictive fiscal measure, I see no reason to accept that same justification in the present case, in which the German tax system alone is at issue, which had nothing to do with the previous inheritance and applies only to the subsequent inheritance.

37 — See also the judgments in *Commission* v *Belgium* (C-387/11, EU:C:2012:670, paragraphs 76 to 79) and *Emerging Markets Series of DFA Investment Trust Company* (C-190/12, EU:C:2014:249, paragraph 99).

84. However, in certain other judgments, and in particular the judgments in *Philips Electronics UK* (C-18/11, EU:C:2012:532) and *Nordea Bank Danmark* (C-48/13, EU:C:2014:2087), even though the Court did not accept the justification in question, it seems to have defined it more broadly, as '[safeguarding] the symmetry between the right to tax profits and the right to deduct losses' (*Philips Electronics UK* (C-18/11, EU:C:2012:532, paragraph 24), a form of words which appears again in the judgment in *Nordea Bank Danmark* (C-48/13, EU:C:2014:2087, paragraph 32 et seq.).

85. On the basis of that much broader concept, in accordance with which there is no longer any requirement for the taxpayer to be at liberty to 'opt' for one tax system over another, it might also be claimed that, since the Federal Republic of Germany had no fiscal jurisdiction over the previous inheritance, it obviously has no obligation to take account of that succession in the subsequent inheritance. Nevertheless, I think it more logical to pursue that reasoning in the context of the examination of the comparability of the situations, as I did earlier, before considering the justifications.

86. It may also be worth emphasising that, in 2004, when the mother inherited part of her daughter's estate, and in 2007, when the appellant inherited from his mother, the provisions of the Convention of 4 October 1954 between the Republic of Austria and the Federal Republic of Germany for the avoidance of double taxation with respect to taxes on inheritances still applied. In that convention, the two Member States agreed upon an appropriate allocation of their powers of taxation. In accordance with Article 5(1) of the convention, the right to tax an inheritance belonged to the Member State in which the *de cujus* was resident at the time of death, except in so far as concerned immovable property or the assets of a business.

87. Accordingly, it was the Republic of Austria that had the right to tax the acquisition by the mother of the daughter's estate, since the daughter was residing in Austria when she died in 2004. The Federal Republic of Germany had the right to tax the acquisition of the mother's estate, since she was residing in Germany in 2007. That clear, appropriate allocation of the powers of taxation would be called into question if the Federal Republic of Germany were required to surrender in part its right to tax the subsequent acquisition in 2007 and consequently to reduce the inheritance tax on the ground that Austria had exercised its powers of taxation with regard to the daughter's bequest in 2004.

88. Having said that, is it in fact a 'balanced' allocation of powers of taxation that the Federal Republic of Germany seeks? Is it not, rather, the application, pure and simple, of the allocation *tout court* of fiscal jurisdiction between the Federal Republic of Germany and the Republic of Austria, which, in a manner of speaking, arises prior to the exercise of fiscal sovereignty? That seems to be proved, moreover, by the fact that the allocation of fiscal jurisdiction may be based on connecting factors which may normally give rise to discrimination or restrictions such as nationality or residence (see the judgment in *Gilly*, C-336/96, EU:C:1998:221). [38]

89. In conclusion, while the present case indeed involves the application by the Federal Republic of Germany and the Republic of Austria of the allocation of fiscal jurisdiction which they have agreed between themselves, I do not think it necessary to refer to the (balanced) allocation of powers of taxation in order to conclude that (German) legislation such as that at issue in the main proceedings is not inconsistent with EU law.

38 — Paragraph 71 of the judgment in *F.E. Familienprivatstiftung Eisenstadt* (C-589/13, EU:C:2015:612) confirms that reasoning: 'having abandoned [in double taxation conventions] 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'.

V – **Conclusion**

90. For those reasons, I propose that the Court should answer the question referred by the Bundesfinanzhof as follows:

The free movement of capital guaranteed by Article 63(1) TFEU, combined with Article 65 TFEU, does not preclude legislation of a Member State which, in the event of a bequest to a person falling within a particular tax class, provides for a reduction in inheritance tax if the estate contains an asset which, in the previous ten years, has already been bequeathed to a beneficiary falling within the same tax class and that previous inheritance was subject to inheritance tax in that same Member State, whereas it provides for no such reduction if the previous inheritance gave rise to the imposition of inheritance tax only in another Member State.