Reports of Cases

JUDGMENT OF THE COURT (First Chamber)

13 November 2025 *

(Reference for a preliminary ruling – Free movement of capital – Inheritance and gift tax – Taxation of the *inter vivos* transfer of assets in order to set up a foundation – Family foundation with its seat in Liechtenstein – Coherence of the tax system)

In Case C-142/24,

REQUEST for a preliminary ruling under Article 267 TFEU from the Finanzgericht Köln (Finance Court, Cologne, Germany), made by decision of 30 November 2023, received at the Court on 23 February 2024, in the proceedings

Familienstiftung

v

Finanzamt Köln-West,

THE COURT (First Chamber),

composed of F. Biltgen, President of the Chamber, T. von Danwitz, Vice-President of the Court, acting as Judge of the First Chamber, I. Ziemele (Rapporteur), A. Kumin and S. Gervasoni, Judges,

Advocate General: M. Campos Sánchez-Bordona,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– Familienstiftung, by A. Janzen, J. Luxem and J. Rehorst, Rechtsanwälte,

– the German Government, by J. Möller and P.-L. Krüger, acting as Agents,

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

after hearing the Opinion of the Advocate General at the sitting on 13 March 2025,

gives the following

* Language of the case: German.

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 40 of the Agreement on the European Economic Area of 2 May 1992 (OJ 1994 L 1, p. 3), as amended by the Agreement on the participation of the Republic of Bulgaria and Romania in the European Economic Area (OJ 2007 L 221, p. 15) ('the EEA Agreement').

2 The request has been made in proceedings between Familienstiftung, a family foundation registered and managed in Liechtenstein ('the Foundation'), and Finanzamt Köln-West (Tax Office, West Cologne, Germany) ('the tax authority') concerning the amount of gift tax due by the Foundation for the year 2014.

Legal context

The EEA Agreement

3 The aim of the EEA Agreement, in accordance with Article 1 thereof, is to promote a continuous and balanced strengthening of trade and economic relations between the Contracting Parties with equal conditions of competition, and the respect of the same rules, with a view to creating a homogeneous European Economic Area (EEA). In order to attain those objectives, the association is to entail, in accordance with the provisions of the EEA Agreement, inter alia, the free movement of capital.

4 Article 6 of the EEA Agreement states:

'Without prejudice to future developments of case-law, the provisions of this Agreement, in so far as they are identical in substance to corresponding rules of the … [TFEU] … and to acts adopted in application of [that Treaty], shall, in their implementation and application, be interpreted in conformity with the relevant rulings of the Court of Justice of the European [Union] given prior to the date of signature of this Agreement.'

5 Article 31 of that agreement provides:

'1. Within the framework of the provisions of this Agreement, there shall be no restrictions on the freedom of establishment of nationals of an [EU] Member State or a [European Free Trade Association (EFTA)] State in the territory of any other of these States. This shall also apply to the setting up of agencies, branches or subsidiaries by nationals of any [EU] Member State or EFTA State established in the territory of any of these States.

Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of Article 34, second paragraph, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of Chapter 4.

2. Annexes VIII to XI contain specific provisions on the right of establishment.'

6 Article 40 of the agreement provides:

‘Within the framework of the provisions of this Agreement, there shall be no restrictions between the Contracting Parties on the movement of capital belonging to persons resident in [EU] Member States or EFTA States and no discrimination based on the nationality or on the place of residence of the parties or on the place where such capital is invested. Annex XII contains the provisions necessary to implement this Article.’

7 Annex XII to the EEA Agreement, entitled ‘Free movement of capital’, refers to Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty [article repealed by the Treaty of Amsterdam] (OJ 1988 L 178, p. 5).

Directive 88/361

8 Under Article 1(1) of Directive 88/361, capital movements are classified in accordance with the Nomenclature in Annex I thereto.

9 The capital movements listed in Annex I to Directive 88/361 include, under heading XI, ‘Personal capital movements’, which in turn include gifts and endowments as well as inheritances and legacies.

German law

10 Paragraph 1(1) of the Erbschaftsteuer- und Schenkungsteuergesetz (Law on inheritance tax and gift tax), as amended by the Gesetz zur Umsetzung der Beitreibungsrichtlinie sowie zur Änderung steuerlicher Vorschriften (Beitreibungsrichtlinie-Umsetzungsgesetz – BeitrRLUmsG) (Law transposing the Mutual Assistance Recovery Directive and amending taxation provisions) of 7 December 2011 (BGBl. I 2011, 2592) (‘the ErbStG’), provides:

‘Inheritance tax (gift tax) shall apply to:

1. acquisitions on death;

2. gifts *inter vivos*;

3. restricted gifts;

4. the assets of a foundation, provided that the foundation was established essentially in the interests of a family or certain families, and the assets of an association whose aim essentially pursues the pooling of assets in the interests of a family or certain families, at intervals of 30 years from the date laid down in Paragraph 9(1)(4).’

11 Paragraph 2(1) of the ErbStG reads as follows:

‘Liability to tax arises

1. in the cases referred to in Paragraph 1(1)(1) to Paragraph 1(1)(3), in relation to the entirety of the transferred assets (unlimited tax liability), where the deceased at the date of his or her death, the donor at the date of making the gift, or the beneficiary at the date of the chargeable event (Paragraph 9), is a resident *(Inländer)*. The following are deemed to be residents:
(a) natural persons whose permanent or habitual residence is in Germany,

…

2. in the cases provided for in Paragraph 1(1)(4), where the foundation or association is managed or registered on national territory;

…'

12 Under Paragraph 7(1) of the ErbStG:

'The following shall be deemed to be gifts *inter vivos*

…

8. The transfer of assets on the basis of an *inter vivos* act establishing a foundation. The same applies to the creation or endowment of a fund governed by foreign law, with the aim of dedicating it to a particular purpose.

…'

13 Paragraph 9(1) of the ErbStG entitled 'Chargeability of tax' provides:

'Tax shall become chargeable:

…

2. for gifts *inter vivos*: at the time the gift is made;

…

4. In the cases referred to in Paragraph 1(1)(4), at intervals of 30 years as from the date of the first transfer of assets to the foundation or to the association. As concerns foundations or associations, where the date of the first transfer of assets is 1 January 1954 or an earlier date, tax is payable for the first time on 1 January 1984. As concerns foundations or associations for which tax is payable for the first time on 1 January 1984, the period of 30 years is calculated as from that date.'

14 Paragraph 10(1) of the ErbStG, entitled 'Taxable acquisition', is worded as follows:

'Any enrichment of the beneficiary is considered to be a taxable acquisition, unless it is tax-exempt … In the cases referred to in Paragraph 1(1)(4), the assets of the foundation or of the association shall be substituted for the acquisition.'

15 Paragraph 15 of the ErbStG provides:

‘(1) Based on the personal relationship between the beneficiary and the deceased or donor, the following three tax classes are distinguished:

Tax class I:

1. spouse and civil partner,

2. children and step-children,

3. descendants of children and step-children as referred to point 2,

4. relatives in the ascending line, in the case of acquisitions on death;

Tax class II:

1. relatives in the ascending line, provided that they do not belong to tax class I,

2. siblings;

3. first-degree descendants of siblings,

4. step-parents,

5. sons- and daughters-in-law,

6. parents-in-law,

7. divorced spouse and partner in a dissolved civil partnership;

Tax class III:

all other beneficiaries and restricted gifts.

…

(2) In the cases referred to in Paragraph 3(2)(1) and Paragraph 7(1)(8), taxation is based on the family relationship between the most distantly related beneficiary under the foundation charter and the deceased or the donor, provided that the foundation was established on national territory and essentially in the interests of a family or certain families. … In the cases referred to in Paragraph 1(1)(4), the allowance set out in Paragraph 16(1)(2) is doubled; the tax shall be determined on the basis of the rate of tax class I which would be applicable to half of the taxable assets.

…’

16 Paragraph 16 of the ErbStG, entitled ‘Allowances’, provides:

‘(1) In the event of unlimited tax liability (Paragraph 2(1)(1) and Paragraph 2(3)) the following acquisitions shall be exempt:

1. by the spouse and civil partner, up to EUR 500 000;

2. by children coming under tax class I, point 2, and by children of deceased children coming under tax class I, point 2, up to EUR 400 000;

3. by children of children coming under tax class I, point 2, up to EUR 200 000;

4. by the other persons in tax class I, up to EUR 100 000;

5. by persons in tax class II, up to EUR 20 000;

…

7. by the other persons in tax class III, up to EUR 20 000.’

17 Paragraph 19 of the ErbStG provides:

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

Value of the taxable acquisition (Paragraph 10) not exceeding EUR …	Percentage in tax class		
	I	II	III
75 000	7	15	30
300 000	11	20	30
600 000	15	25	30
6 000 000	19	30	30
13 000 000	23	35	50
26 000 000	27	40	50
More than 26 000 000	30	43	50

…’

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

18 The Foundation was established in Liechtenstein in 2014 in accordance with the law of that country by the founder, Ms Y, who resides in Germany. It has legal personality and has as its purpose to promote and support the common descendants of the founder and her deceased husband. The potential beneficiaries (recipients) of the Foundation are the founder and her children as well as those children’s children.

19 At the time of its establishment, the Foundation was endowed with assets which it could dispose of without approval from the founder. In particular, the Foundation's charter and the supplementary rules thereto did not foresee any power for the founder to take decisions on the investment or use of the Foundation's assets or the possibility to request that the assets be transferred back to her in whole or in part.

20 According to the referring court, the transfer of assets from the founder to the Foundation on the basis of the 2014 act establishing the Foundation constitutes a gift *inter vivos*, within the meaning of Paragraph 7(1)(8) of the ErbStG, which is subject to gift tax pursuant to Paragraph 1(1)(2) thereof. Under Paragraph 2(1)(1) of the ErbStG, the tax liability provided for by that law arises inter alia, where at the time of making the gift, the donor is a resident (*Inländer*). The founder, who had her permanent residence in Germany at the time of making the gift, was considered to be a German resident (*Inländer)* within the meaning of the second sentence of Paragraph 2(1)(1)(a) of the ErbStG. Under Paragraph 9(1)(2) of the ErbStG, the tax became chargeable at the date of transfer of the assets.

21 By letter of 16 April 2015, the Foundation informed the tax office of its establishment and submitted a tax declaration in relation to gift tax, claiming that it had been established essentially in the interests of the founder's family and that it should consequently be able to benefit, inter alia, from tax class I, pursuant to Paragraph 15(2) of the ErbStG. According to the Foundation, the condition set out in that provision concerning the establishment of the family foundation 'on national territory' should not be taken into account as it compromised the free movement of capital within the meaning of Article 40 of the EEA Agreement.

22 By decision of 22 November 2018, the tax office calculated the gift tax for 2014 without taking into account the family relationship between the beneficiaries and the founder. In order to determine that tax, the tax office applied tax class III and a tax rate of 30%.

23 After the administrative appeal introduced by the Foundation on 19 December 2018 was rejected by the tax office by decision of 6 January 2021, the Foundation brought an action before the Finanzgericht Köln (Finance Court, Cologne, Germany), which is the referring court.

24 That court states that, even though the Foundation is, according to its purpose and charter, a family foundation for the purposes of the first sentence of Paragraph 15(2) of the ErbStG, the preferential tax-class treatment laid down in that provision is not applicable to the Foundation, as it was not established on national territory, that is to say, on the territory of the Federal Republic of Germany. That preferential treatment would have enabled it to benefit from tax class I, from a reduction of the taxable amount subject to gift tax by way of an increased allowance for the grandchildren of the founder, in accordance with Paragraph 16(1)(3) of the ErbStG, and from a tax rate of 19%.

25 The referring court is of the opinion that there are doubts as to the compatibility of the condition relating to the establishment of a foundation on national territory with Article 40 of the EEA Agreement. In particular, that court is uncertain whether the restriction of the free movement of capital, which stems from the fact that a foundation established on national territory will, in the long term, have greater financial means at its disposal than a foundation having its seat abroad, may be justified by the need to ensure the coherence of the tax system.

26 According to that court, it can be inferred from the legislative history of Paragraph 1(1)(4) of the ErbStG and of Paragraph 15(2) of the ErbStG that, in the course of a reform of inheritance tax, the German legislature introduced the preferential tax-class treatment with a view to making the assets of family foundations subject to recurring taxation. The German legislature wished to establish a link between the preferential tax-class treatment in Paragraph 15(2) of the ErbStG, and the substitute inheritance tax provided for in Paragraph 1(1)(4) of the ErbStG, levied every 30 years and determined on the basis of the assets endowed to a foundation or to an association.

27 That legislature proceeded from the principle that the advantages granted by the preferential tax-class treatment would be offset by the disadvantages of that substitute inheritance tax. That latter tax pursues the objective of placing foundations on an equal footing with ordinary inheritances, but it can be levied only from national family foundations. The German legislature cannot impose substitute inheritance tax on foreign family foundations. Consequently, the referring court considers that the objective pursued by that legislature was to grant favourable treatment, upon their establishment, only to national family foundations which will subsequently be subject to that tax.

28 The referring court is uncertain however as to whether that legislative objective is sufficient to establish the existence of a direct, personal and material link, as required by the case-law of the Court, between the preferential tax-class treatment and the substitute inheritance tax, due to the uncertainty surrounding the subsequent taxation of a family foundation, both as to whether that taxation will take place as well as its amount, since not all national family foundations will necessarily still be in existence at the end of those 30 years and a foundation's assets may change unpredictably during that length of time.

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

'Must Article 40 of the [EEA Agreement] be interpreted as precluding a Member State's national legislation on the levying of inheritance [tax] and gift tax which applies the highest tax class (III) for the taxation of [a] transfer of assets to a foundation established abroad, [carried out on the basis of an *inter vivos* act establishing a foundation,] even where the foundation is established essentially in the interests of a family or certain families (family foundation), whereas for a family foundation established on national territory in an equivalent situation, the tax class depends on the relationship between the most distantly related [beneficiary] under the [foundation charter] and the donor (founder), which results, for family foundations established on national territory, in the application of the more favourable tax classes I or II?'

Consideration of the question referred

30 By its question, the referring court asks, in essence, whether Article 40 of the EEA Agreement must be interpreted as precluding national legislation which provides that, for the purposes of the taxation of a transfer of assets to a family foundation, the relationship between the most distantly related beneficiary under the foundation charter and the founder is taken into account only for resident foundations, which are subject to substitute inheritance tax, with the result that a more favourable tax class is applied to these foundations than that applied to foreign family foundations, which are not subject to that substitute inheritance tax.

31 It should be noted, at the outset, that one of the principal aims of the EEA Agreement is to bring about as fully as possible the free movement of goods, persons, services and capital within the whole EEA, so that the internal market established within the European Union is extended to the EFTA States. From that angle, several provisions of the EEA Agreement are intended to ensure as uniform an interpretation as possible thereof throughout the EEA. It is for the Court, in that context, to ensure that the rules of the EEA Agreement which are identical in substance to those of the TFEU are interpreted uniformly within the Member States (judgment of 19 July 2012, *A*, C-48/11, EU:C:2012:485, paragraph 15 and the case-law cited).

32 Furthermore, according to settled case-law, the Member States must exercise their competence in the field of direct taxation in compliance with EU law and, in particular, with the fundamental freedoms guaranteed by the TFEU (judgment of 26 September 2024, *Nord Vest Pro Sani Pro*, C-387/22, EU:C:2024:786, paragraph 38 and the case-law cited). By the same token, that competence does not allow Member States to apply measures which are contrary to the freedoms of movement guaranteed by similar provisions of the EEA Agreement (judgment of 19 July 2012, *A*, C-48/11, EU:C:2012:485, paragraph 16 and the case-law cited).

The applicable fundamental freedom

33 As the German Government argues that the situation at issue in the main proceedings must be assessed in the light of Article 31 of the EEA Agreement rather than Article 40 thereof, it is necessary to determine which fundamental freedom is applicable.

34 In that connection, the Court has already held that the rules prohibiting restrictions on the freedom of establishment, set out in Article 31 of the EEA Agreement, are identical to those imposed by Article 49 TFEU (judgment of 19 July 2012, *A*, C-48/11, EU:C:2012:485, paragraph 21 and the case-law cited).

35 By the same token, it is apparent from Article 40 of the EEA Agreement that the rules laid down therein prohibiting restrictions on the movement of capital and discrimination are identical, so far as concerns relations between the States party to the EEA Agreement, irrespective of whether they are members of the European Union or members of EFTA, to the rules under EU law regarding relations between the Member States (judgments of 23 September 2003, *Ospelt and Schlössle Weissenberg*, C-452/01, EU:C:2003:493, paragraph 28, and of 28 October 2010, *Établissement Rimbaud*, C-72/09, EU:C:2010:645, paragraph 21). It follows that, although restrictions on the free movement of capital between nationals of States party to the EEA Agreement must be assessed in the light of Article 40 of that Agreement and Annex XII thereto, those provisions have the same legal scope as Article 63 TFEU (judgments of 11 June 2009, *Commission* v *Netherlands*, C-521/07, EU:C:2009:360, paragraph 33, and of 28 October 2010, *Établissement Rimbaud*, C-72/09, EU:C:2010:645, paragraph 22).

36 In accordance with settled case-law, in order to ascertain whether national legislation falls within one or the other of the freedoms guaranteed by the TFEU or similar provisions of the EEA Agreement, the purpose of the legislation at issue must be taken into consideration (see, to that effect, judgment of 19 July 2012, *A*, C-48/11, EU:C:2012:485, paragraph 17).

37 As is apparent from the request for a preliminary ruling, the legislation at issue in the main proceedings governs the tax treatment of the transfer to a family foundation of the assets of the persons setting it up, a transaction defined as a gift *inter vivos*, within the meaning of Paragraph 7(1)(8) of the ErbStG, and subject to gift tax.

38 In the absence of a definition in the TFEU of 'movement of capital' for the purposes of Article 63(1) TFEU, the Court has recognised the Nomenclature which forms Annex I to Directive 88/361 as having indicative value, even though that directive was adopted on the basis of Article 69 and Article 70(1) of the EEC Treaty (later Article 69 and Article 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 (judgment of 17 September 2015, *F.E. Familienprivatstiftung Eisenstadt*, C-589/13, EU:C:2015:612, paragraph 36 and the case-law cited). Annex XII to the EEA Agreement, which contains the provisions necessary to implement Article 40 thereof, declares that Directive 88/361 and Annex I thereto are applicable to the EEA (judgment of 23 September 2003, *Ospelt and Schlössle Weissenberg*, C-452/01, EU:C:2003:493, paragraph 26).

39 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 TFEU on the movement of capital, except where their constituent elements are confined within a single Member State (judgment of 17 September 2015, *F.E. Familienprivatstiftung Eisenstadt*, C-589/13, EU:C:2015:612, paragraph 37 and the case-law cited).

40 Furthermore, it is apparent from the request for a preliminary ruling that the tax treatment of the transfer of assets to a family foundation must be assessed by taking into account the substitute inheritance tax, set out in Paragraph 1(1)(4) of the ErbStG, which resident foundations have to pay at certain intervals and which is intended to place resident foundations on an equal footing with ordinary inheritances.

41 According to settled case-law, the tax treatment of successions falls within the provisions of the TFEU on the movement of capital, except in cases where the constituent elements are confined within a single Member State (judgment of 30 October 2025, *Attal et Associés*, C-321/24, EU:C:2025:836, paragraph 29 and the case-law cited).

42 Even if, as submitted by the German Government, the transaction of setting up a family foundation had as its objective the creation of a 'family establishment' in order to ensure long-term financial security for the family and its members, and to maintain the cohesion of family assets, according to settled case-law, where a national measure relates to the freedom of establishment and the free movement of capital at the same time, the Court will in principle examine the measure in dispute in relation to only one of those two freedoms if it appears, in the circumstances of the case in the main proceedings, that one of them is entirely secondary in relation to the other and may be considered together with it (judgment of 7 April 2022, *Veronsaajien oikeudenvalvontayksikkö (Exemption of contractual investment funds)*, C-342/20, EU:C:2022:276, paragraph 37 and the case-law cited).

43 However, it is apparent from the request for a preliminary ruling that the aspect of that transaction relating to the transfer of assets between generations – treated here as a gift *inter vivos* – is decisive, the setting up of a foundation merely being a means to achieve that end.

44 The legislation at issue in the main proceedings, therefore, is liable predominantly to affect the free movement of capital. Any restrictions on freedom of establishment resulting from that legislation are an inevitable consequence of the restriction on the free movement of capital and do not, therefore, justify an independent examination of that legislation in the light of Article 31 of

the EEA Agreement (see, to that effect, judgment of 7 April 2022, *Veronsaajien oikeudenvalvontayksikkö (Exemption of contractual investment funds)*, C-342/20, EU:C:2022:276, paragraph 47 and the case-law cited).

45 It is therefore necessary to examine the legislation at issue in the main proceedings in the light of Article 40 of the EEA Agreement.

Whether there is a restriction on the free movement of capital

46 It is clear from the case-law of the Court on inheritance that legislation of a Member State which makes the application of an inheritance tax advantage, such as a tax-free allowance, dependent on the place of residence of the deceased person or the heir, or on the location of the assets contained in the estate, constitutes a restriction on the free movement of capital, within the meaning of Article 63(1) TFEU, when it has the result that inheritances involving non-residents or containing assets located in another Member State are subject to a higher tax liability than that imposed on inheritances involving only residents or containing only assets located in the Member State of taxation, and which, therefore, has the effect of reducing the value of the inheritance (judgment of 30 June 2016, *Feilen*, C-123/15, EU:C:2016:496, paragraph 19 and the case-law cited).

47 The Court has also held that legislation which provides for a more favourable tax treatment of legacies made in favour of certain not-for-profit legal persons established on national territory than that of legacies left to similar entities established in other EU or EEA Member States, has the effect of reducing the value of the legacies bequeathed to not-for-profit legal persons established in EU or EEA Member States and therefore constitutes a restriction on the free movement of capital within the meaning of Article 63(1) TFEU (see, to that effect, judgment of 4 May 2017, *Commission* v *Greece*, C-98/16, EU:C:2017:346, paragraphs 32, 33 and 35).

48 It must be held, having regard to the case-law cited in paragraphs 46 and 47 of the present judgment, that – as regards the transfer of assets to a family foundation, equated to a gift *inter vivos* – rules providing for a more favourable tax treatment of gifts made to family foundations established on national territory than that of gifts made to similar entities established in Member States of the EEA, with the effect of reducing the value of the property gifted to that similar entity, constitute a restriction on the movement of capital within the meaning of Article 40 of the EEA Agreement.

49 Furthermore, it follows from settled case-law that 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 (judgment of 17 September 2015, *F.E. Familienprivatstiftung Eisenstadt*, C-589/13, EU:C:2015:612, paragraph 51 and the case-law cited).

50 In the present case, Paragraph 15(2) of the ErbStG provides for the application of the preferential tax-class treatment only to family foundations established on national territory. It is apparent from the request for a preliminary ruling that applying that preferential treatment to the Foundation would have enabled it to benefit from tax class I, from a reduction of the taxable amount subject to gift tax by way of an increased allowance for the grandchildren of the founder, in accordance with Paragraph 16(1)(3) of the ErbStG, and from a tax rate of 19%. However, since that foundation was established in Liechtenstein, the gift tax was determined without taking into account the family relationship between the beneficiaries of the foundation and the founder, and

tax class II, an allowance under Paragraph 16(1)(7) of the ErbStG and a tax rate of 30% was applied to the Foundation. Under Paragraph 16(1) of the ErbStG, cited by the referring court, the allowance provided for in point 3 of that provision amounts to EUR 200 000, while that provided for in point 7 of that provision amounts to EUR 20 000.

51 Legislation which makes the preferential tax-class treatment applicable only to resident family foundations results in a higher tax liability for the transfer of assets to a non-resident family foundation than for the transfer to a resident family foundation, which, first, has the effect of reducing the value of the property transferred to a non-resident family foundation and, second, enables a resident family foundation to have greater financial means at its disposal than those available to non-resident family foundations. It follows that such national legislation constitutes a restriction on the movement of capital within the meaning of Article 40 of the EEA Agreement.

52 Under Article 65(1)(a) TFEU, Article 63 TFEU, which lays down a general prohibition on restrictions on the movement of capital between Member States and between Member States and third countries (judgment of 30 April 2025, *Finanzamt für Großbetriebe*, C-602/23, EU:C:2025:290, paragraph 44 and the case-law cited), is without prejudice to 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 residence or with regard to the place where their capital is invested.

53 It is apparent, however, from settled case-law that Article 65(1)(a) TFEU, in so far as it is a derogation from the fundamental principle of the free movement of capital, must be interpreted strictly. That provision cannot therefore be interpreted as meaning that all tax legislation which draws a distinction between taxpayers based on their place of residence or the State in which they invest their capital is automatically compatible with the Treaty (judgment of 27 February 2025, *Dyrektor Krajowej Informacji Skarbowej (Management form of a UCI)*, C-18/23, EU:C:2025:119, paragraph 76 and the case-law cited).

54 The differences in treatment permitted by Article 65(1)(a) TFEU must not constitute, according to Article 65(3) TFEU, a means of arbitrary discrimination or a disguised restriction. Such differences in treatment are permissible only if they relate to situations which are not objectively comparable, or, otherwise, if they are justified by an overriding reason in the public interest and proportionate to that objective, which means that they are suitable for securing, in a consistent and systematic manner, the attainment of the objective pursued and do not go beyond what is necessary in order to attain it (see, to that effect, judgments of 4 October 2024, *Staatssecretaris van Financiën (Interest in respect of an intra-group loan)*, C-585/22, EU:C:2024:822, paragraph 33, and of 27 February 2025, *Dyrektor Krajowej Informacji Skarbowej (Management form of a UCI)*, C-18/23, EU:C:2025:119, paragraphs 77 and 90 and the case-law cited).

55 Taking into consideration the fact, referred to in paragraph 35 of the present judgment, that the rules prohibiting restrictions on the movement of capital and discrimination set out in Article 40 of the EEA Agreement have, so far as concerns relations between the States party to that agreement, irrespective of whether they are members of the European Union or members of EFTA, the same legal scope as the rules under EU law for the relationship between the Member States, it must be ascertained whether the difference in treatment introduced by the legislation at issue in the main proceedings relates to situations which are not objectively comparable, or, otherwise, whether it is justified by an overriding reason in the public interest.

Whether the situations are objectively comparable

56 It is clear from the case-law of the Court, first, that the comparability or otherwise of a cross-border situation with a domestic situation must be examined having regard to the objective pursued by the provisions of the national legislation concerned and to the purpose and content of those provisions, and, second, that only the relevant distinguishing criteria established by that legislation must be taken into account for the purpose of assessing whether the difference in treatment resulting from that legislation reflects a difference in objective situation (judgment of 30 April 2025, *Finanzamt für Großbetriebe*, C-602/23, EU:C:2025:290, paragraph 52 and the case-law cited).

57 In that regard, the German Government submits that the objective of Paragraph 15(2) of the ErbStG is to grant an advantage only to family foundations established in Germany, since only their assets, unlike those of foundations established in other States, are subject to recurrent taxation by way of the substitute inheritance tax. Substitute inheritance tax is, according to the information provided in the request for a preliminary ruling, paid recurrently by resident family foundations, in order to place the transfer of assets through family foundations on an equal footing with ordinary inheritances, which are subject to inheritance tax under the ErbStG. The German Government specifies in that regard that the substitute inheritance tax aims to prevent a situation in which the transfer of assets from one generation to another completely avoids inheritance tax by means of the establishment of a family foundation and thus benefits from an unjustified tax advantage compared to ordinary inheritances. The situation of non-resident foundations which are not subject to German tax jurisdiction and which cannot be subjected to that substitute tax, is therefore not comparable to that of resident foundations which are subject to that tax.

58 Without prejudice to the potential relevance, for the assessment of whether the legislation at issue in the main proceedings might be justified by an overriding reason in the public interest, of the fact that non-resident foundations are not subject to a recurring tax by way of substitute inheritance tax, it must be noted, first of all, that the preferential tax-class treatment relates to the taxation of the transfer to a family foundation of the assets of the persons setting up that foundation.

59 As stated in paragraph 37 of the present judgment, the transfer of assets from the founder to the foundation is considered to be a gift *inter vivos* and is subject to gift tax. Liability to tax arises if the person setting up a family foundation is, at the time of making the gift, a German resident and it arises with respect to the entirety of the transferred assets.

60 It follows that the Federal Republic of Germany exercises its power to impose taxes with regard to the transfer of assets from a person residing within its territory to a family foundation irrespective of the place where the foundation is situated. Thus, as regards the incurrence of tax liability with respect to transfers of assets to a family foundation, the legislation at issue in the main proceedings places the situations where such a foundation is situated on national territory on the same footing as the situations where the foundation is situated in another State.

61 Next, it is only with regard to the application of the tax rate, which follows from the tax class, and the application of allowances reducing the taxable amount subject to gift tax that that legislation differentiates between the family foundations established on national territory and those established in another State.

62 That tax class and those allowances depend on the family relationship between the donor and the most distantly related beneficiary, which is a factor without any connection to the place where the family foundation was set up and may be relevant for both foundations established on national territory and those established in another State.

63 Consequently, in the light of the legislation at issue in the main proceedings, in so far as concerns the taxation of the transfer to a family foundation of the assets of a resident establishing that foundation, the situation of a resident foundation is objectively comparable to that of a non-resident foundation.

64 Lastly, the objective, put forward by the German Government, of granting an advantage only to resident family foundations, on the ground that only their assets, unlike those of non-resident foundations, are subject to recurring taxation by way of substitute inheritance tax, is necessarily and closely linked to the setting up of domestic family foundations, so that to accept that situations are not comparable solely because a foundation is established in another State, when Article 63(1) TFEU specifically prohibits restrictions on cross-border movements of capital, would deprive that provision of all meaning (see, to that effect, judgments of 26 February 2019, *X (Controlled companies established in third countries)*, C-135/17, EU:C:2019:136, paragraph 68; of 9 September 2021, *Real Vida Seguros*, C-449/20, EU:C:2021:721, paragraph 36; and of 12 October 2023, *BA (Inheritance – Public housing policy in the European Union)*, C-670/21, EU:C:2023:763, paragraph 64).

65 It follows that the difference in treatment introduced by the legislation at issue in the main proceedings relates to situations which are objectively comparable.

Justification

Whether there is an overriding reason in the public interest

66 According to settled case-law, a restriction on the free movement of capital may be permitted if it is justified by overriding reasons relating to the public interest, is suitable for securing the attainment of the objective which it pursues and does not go beyond what is necessary in order to attain that objective (judgment of 27 April 2023, *L Fund*, C-537/20, EU:C:2023:339, paragraph 66 and the case-law cited).

67 It is thus necessary to examine whether the legislation at issue in the main proceedings can be objectively justified by an overriding reason in the general interest, such as the need to preserve the coherence of the tax system invoked by the referring court and the German Government.

68 In that regard, in order for an argument based on such a justification to succeed, a direct link must be established between the tax advantage concerned and the offsetting of that advantage by a particular tax charge, the direct nature of that link falling to be examined in the light of the objective pursued by the legislation in question (judgments of 21 December 2021, *Finanzamt V (Inheritance – Partial allowance and deduction of reserved portions)*, C-394/20, EU:C:2021:1044, paragraph 46, and of 21 December 2023, *Cofidis*, C-340/22, EU:C:2023:1019, paragraph 55 and the case-law cited).

69 In the present case, the referring court states that it follows from the legislative history of Paragraph 15(2) of the ErbStG and of Paragraph 1(1)(4) of the ErbStG that the German legislature intended to establish a link between, on the one hand, the advantage consisting in the application to resident family foundations of a more favourable tax class, a reduction of the taxable amount subject to gift tax by way of an increased allowance and a lower tax rate, and, on the other hand, the substitute inheritance tax provided for in Paragraph 1(1)(4) of the ErbStG, levied at certain intervals, in order to place the transfer of assets through a family foundation on an equal footing with ordinary inheritances. However, since the Federal Republic of Germany does not have tax jurisdiction in relation to foreign family foundations, only resident family foundations may be subject to substitute inheritance tax.

70 In the light of those considerations, it is apparent that, by providing that only resident family foundations, which are subsequently subject to substitute inheritance tax, may benefit from the preferential tax-class treatment, the configuration of that tax advantage reflects a logical symmetry, as that advantage is offset by a specific tax charge, relating to the same tax and the same taxpayer. That logic would be disturbed if that tax advantage were also to benefit non-resident family foundations which are not subject to substitute inheritance tax in Germany (see, by analogy, judgment of 30 June 2016, *Feilen*, C-123/15, EU:C:2016:496, paragraph 33 and the case-law cited).

71 Furthermore, since substitute inheritance tax is levied at intervals of 30 years as from the date of the first transfer of assets to the resident family foundation, in accordance with Paragraph 9(1)(4) of the ErbStG, it is not uncertain in nature, and that mechanism reflects, first, the objective pursued by the legislation at issue in the main proceedings to place the transfer of assets through family foundations on an equal footing with ordinary inheritances, and, second, the fact that such foundations generally tend to last for several generations.

72 It follows that, under the tax regime for family foundations, there is a direct link between the advantage in the form of preferential tax-class treatment, granted to resident family foundations, and the substitute inheritance tax, applied recurrently to the assets of those foundations only.

Proportionality

73 With regard to the principle of proportionality, even though it is ultimately for the referring court, which has sole jurisdiction to assess the facts of the main proceedings and interpret the national legislation, to determine whether and to what extent such legislation satisfies the conditions stemming from that principle, the Court, which is called on to provide answers of use to that court, may provide guidance based on the documents relating to the main proceedings and on the written observations which have been submitted to it, in order to enable the court in question to give judgment (judgment of 7 September 2022, *Cilevičs and Others*, C-391/20, EU:C:2022:638, paragraphs 72 and 73 and the case-law cited).

74 It follows from the observations of the German Government that the introduction of substitute inheritance tax, levied every 30 years, reflects the principle that assets are subject to inheritance tax once every generation. The fact that, just like a natural person's assets, the assets of a family foundation may increase or decrease in individual cases cannot call into question the appropriateness of the legislation at issue in the main proceedings for ensuring the attainment of the objective pursued, as family foundations are generally intended to guarantee long-term financial security for the family and its members, and to maintain the cohesion of the family's assets.

75 The appropriateness of the legislation at issue in the main proceedings for securing the attainment of the objective pursued also is not called into question by the fact that, due to a potential increase or decrease of the assets of a resident family foundation, there is some uncertainty as to the amount which will be levied by way of substitute inheritance tax. Since the tax rate applied to resident family foundations, at the time when they are established, corresponds to the normal tax rate for gifts made between persons with a family relationship, in accordance with the objective of placing those foundations on an equal footing with ordinary inheritances, and since substitute inheritance tax follows the same logic, the advantage obtained when setting up a resident family foundation corresponds to the future disadvantage of having to bear the substitute inheritance tax.

76 As regards the necessity of the legislation at issue in the main proceedings, the Court has already held that legislation of a Member State in the field of inheritance that links an advantage to the scope of the tax jurisdiction of that Member State does not go beyond what is necessary to achieve the objective pursued, such as the objective of reducing to a certain extent the tax burden on an inheritance involving assets transferred between close relatives which had already given rise to a previous imposition or of ensuring, in the case of members of a closely linked family, that each of those taxable persons is able to take advantage of the inheritance due to him or her by being partially exempted from inheritance tax, or even totally exempted as regards transfers of minor importance within the family (see, to that effect, judgments of 30 June 2016, *Feilen*, C-123/15, EU:C:2016:496, paragraph 40, and of 21 December 2021, *Finanzamt V (Inheritance – Partial allowance and deduction of reserved portions)*, C-394/20, EU:C:2021:1044, paragraphs 47 and 53).

77 Therefore, by limiting the advantage of the preferential tax-class treatment to situations where the Federal Republic of Germany subsequently has the power to tax the assets of the family foundation, the legislation at issue in the main proceedings does not go beyond what is necessary to attain the objective pursued.

78 It will be for the referring court to ascertain, whether the legislation at issue in the main proceedings complies with the principle of proportionality *stricto sensu*, meaning that the legislation is not disproportionate to the objective pursued. In that regard, first, since the Federal Republic of Germany does not have powers of taxation over non-resident family foundations, to limit the grant of a more favourable tax class to situations where the transfer of assets to a family foundation can give rise to later taxation by way of substitute inheritance tax appears proportionate in the light of that objective (see, to that effect, judgment of 30 June 2016, *Feilen*, C-123/15, EU:C:2016:496, paragraph 40 and the case-law cited).

79 Second, nothing in the documents before the Court indicates that, assessed over time, the application of the legislation at issue in the main proceedings would systematically give rise to a significantly higher tax burden for transfers of assets to a non-resident family foundation, which would, if it were the case, call into question the proportionality of that legislation.

80 In the light of the foregoing, the answer to the question referred for a preliminary ruling is that Article 40 of the EEA Agreement must be interpreted as not precluding national legislation which provides that, for the purposes of the taxation of a transfer of assets to a family foundation, the relationship between the most distantly related beneficiary under the foundation charter and the founder is taken into account only for resident foundations, which are subject to substitute inheritance tax, with the result that a more favourable tax class is applied to these foundations

than that applied to foreign family foundations, which are not subject to that substitute inheritance tax, provided that the legislation in question complies with the principle of proportionality.

Costs

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

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

Article 40 of the Agreement on the European Economic Area of 2 May 1992, as amended by the Agreement on the participation of the Republic of Bulgaria and Romania in the European Economic Area, must be interpreted as not precluding national legislation which provides that, for the purposes of the taxation of a transfer of assets to a family foundation, the relationship between the most distantly related beneficiary under the foundation charter and the founder is taken into account only for resident foundations, which are subject to substitute inheritance tax, with the result that a more favourable tax class is applied to these foundations than that applied to foreign family foundations, which are not subject to that substitute inheritance tax, provided that the legislation in question complies with the principle of proportionality.

[Signatures]