Reports of Cases

OPINION OF ADVOCATE GENERAL
CAMPOS SÁNCHEZ-BORDONA
delivered on 13 March 2025 [1]

Case C-142/24

Familienstiftung
v
Finanzamt Köln-West

(Request for a preliminary ruling from the Finanzgericht Köln (Finance Court, Cologne, Germany))

(Reference for a preliminary ruling – Article 40 of the Agreement on the European Economic Area – Article 63 of the FEU Treaty – Free movement of capital – Inheritance tax and gift tax – Taxation of the free *inter vivos* transfer of assets for the establishment of a family foundation – Family foundation registered in Liechtenstein – Taxation by way of gift tax levied in Germany – Unfavourable tax treatment of the foreign family foundation – Justification – Overriding reasons in the public interest – Cohesion of the tax system – Substitute inheritance tax – Proportionality)

1. German law allows family foundations to be set up in the interests of one or more families. Where the founder is resident in Germany, the transfer of assets to set up such a foundation by way of an *inter vivos* transaction is subject to gift tax, whether the foundation is established in Germany or in another country.

2. A family foundation established abroad by a resident of Germany receives a more onerous tax treatment than one established in Germany. That difference is based, according to the German authorities, on the fact that family foundations in that Member State are liable to the payment of a 'substitute inheritance tax' every 30 years, to which family foundations established abroad are not.

3. The referring court is called upon to resolve a dispute between, on the one hand, a family foundation established in Liechtenstein by a person resident in Germany and, on the other, the German tax authorities. In order to resolve that dispute, the referring court wishes to ascertain whether, in relation to gift tax, the tax legislation of that Member State respects the free movement of capital recognised in Article 40 of the Agreement on the European Economic Area of 2 May 1992. [2]

[1] Original language: Spanish.

[2] OJ 1994 L 1, p. 3 ('the EEA Agreement'). The Principality of Liechtenstein, among others, has been a party to that agreement since 1 May 1995 (Decision of the EEA Council No 1/95 of 10 March 1995 on the entry into force of the Agreement on the European Economic Area for the Principality of Liechtenstein (OJ 1995 L 86, p. 58)).

I. Legal framework

A. International law. EEA Agreement

4. Article 40 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 … Member States [of the European Communities] or … States [of the European Free Trade Association (EFTA)] 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'.

5. Annex XII, 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. [3]

B. European Union law. Directive 88/361

6. Pursuant to Article 1:

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

…'

7. Annex I contains the nomenclature of the capital movements referred to in Article 1. Point XI, devoted to 'Personal capital movements', includes, under B, 'Gifts and endowments'.

C. German law. ErbStG [4]

8. The Erbschaftsteuer- und Schenkungsteuergesetz (Law on inheritance tax and gift tax) ('the ErbStG') provides, in point 2 of subparagraph 1 of Paragraph 1 ('Taxable transactions'), that gifts *inter vivos* are subject to tax.

9. Also subject to tax under the ErbStG, pursuant to Paragraph 1(1)(4) thereof, are the assets of a foundation, provided that it is established essentially in the interests of one family or certain families, at intervals of 30 years.

10. According to Paragraph 2 ('Personal liability to tax'), liability to tax arises:

– In the cases referred to in Paragraph 1(1)(1) to Paragraph 1(1)(3), where the donor, at the date of making the gift, is a resident (*Inländer*), in relation to the entirety of the assets being

[3] OJ 1988 L 178, p. 5.

[4] As amended by the Gesetz zur Umsetzung der Beitreibungsrichtlinie sowie zur Änderung steuerlicher Vorschriften (Law transposing the Mutual Assistance Recovery Directive and amending taxation provisions) of 7 December 2011 (BeitrRLUmsG) (BGBl 2011 I, p. 2592).

transferred. Persons regarded as residents are, inter alia, natural persons whose domicile or habitual residence is in Germany.

– In the cases provided for in Paragraph 1(1)(4), where the foundation is managed or registered in Germany.

11. In accordance with point 8 of subparagraph 1 of Paragraph 7 ('Gifts *inter vivos*'), gifts *inter vivos* include the transfer of assets on the basis of an *inter vivos* act of foundation.

12. Pursuant to point 4 of subparagraph 1 of Paragraph 9 ('Chargeability of tax'), tax becomes chargeable, in the cases provided for in Paragraph 1(1)(4), at intervals of 30 years as from the date of the first transfer of assets to the foundation.

13. Subparagraph 1 of Paragraph 15 ('Tax classes') sets out the criteria for establishing the following tax classes, based on the personal relationship of the beneficiary to the deceased or the donor:

– Tax class I: spouse and civil partner; children and step-children; descendants of children and step-children; relatives in the ascending line, in the case of acquisitions on death.

– Tax class II: relatives in the ascending line, provided that they do not belong to tax class I; siblings; first-degree descendants of siblings; step-parents; sons- and daughters-in-law; parents-in-law; divorced spouse; and partner in a dissolved civil partnership.

– Tax class III: all other beneficiaries and restricted gifts.

14. Paragraph 15(2) provides that, in the case of the foundations referred to in Paragraph 7(1)(8), taxation is based on the family relationship between the most distantly related beneficial owner under the instrument establishing the foundation and the deceased or the donor, provided that the foundation was established essentially in the interests of a family or certain families in Germany.

15. Subparagraph 1 of Paragraph 16 ('Allowances') governs the tax allowances that may be claimed in the event of unlimited liability to tax, in cases where the beneficiary is:

1. the spouse and civil partner, at EUR 500 000;

2. children coming under class I, point 2, and children of deceased children coming under class I, point 2, at EUR 400 000;

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

4. the other persons in tax class I, at EUR 100 000;

5. persons in tax class II, at EUR 20 000;

…

7. the other persons in tax class III, at EUR 20 000.

16. Paragraph 19 ('Tax rates') sets out the rates of tax by tax class and value of the taxable transfer. In the case of class I, the rates range from 7% to 30%; in the case of class II, from 15% to 43%; and, in the case of class III, from 30% to 50%.

II. Facts, dispute and question referred for a preliminary ruling

17. In 2014, Ms Y ('the founder'), resident in Germany, set up a family foundation in Liechtenstein in accordance with Liechtenstein law.

18. According to the articles of association of that foundation, its purpose is to promote and support the common children of the founder and her deceased husband. The beneficiaries of the foundation are the founder, the abovementioned common children and those children's children.

19. When setting up the foundation, the founder provided the foundation with assets, over which the foundation acquired full and unconditional capacity of free disposal. The founder lost the right to dispose of those assets, without the possibility of requesting that the assets be retransferred in whole or in part.

20. On 16 April 2015, the foundation notified the Finanzamt Köln-West (Tax Office, West Cologne, Germany; 'the tax authority') of the transaction and submitted a tax declaration in relation to gift tax.

21. As it was established essentially in the interests of the founder's family, the foundation maintained that, in order to calculate the gift tax debt, account had to be taken of the family relationship between the most distantly related beneficiary under the articles of association and the founder. On the basis of that criterion, it was appropriate to apply the allowances reducing the tax base and the tax rate corresponding to relatives in class I (the 'tax-class privilege').

22. On 22 November 2018, the tax authority rejected that proposition. It argued that:

– In order to benefit from the tax-class privilege for family foundations, the foundation must be established in Germany. If it is not, the legislation requires that the criteria corresponding to tax class III be applied, meaning a lesser allowance reducing the tax base and a higher tax rate.

– The difference in treatment is justified by the need to preserve the cohesion of the German tax system. The tax-class privilege granted on the setting-up of a national family foundation is provided for on the ground that those foundations are liable to pay substitute inheritance tax every 30 years. A family foundation permanently resident outside Germany is not liable to pay that tax.

23. On 19 December 2018, the foundation lodged an appeal with the tax authority, which was dismissed on 6 January 2021.

24. On 5 February 2021, the foundation brought an action before the Finanzgericht Köln (Finance Court, Cologne, Germany), claiming that the tax-class privilege concerning tax class I should be applied to it, even though the foundation was established outside Germany. Any other approach, it stated, would constitute an unjustified infringement of the right to the free movement of capital.

25. It is against this background that the Finanzgericht Köln (Finance Court, Cologne) has referred 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 an *inter vivos* transfer of assets to a foundation established abroad 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 beneficial owner under the foundation's articles of association 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?'

III. Procedure before the Court of Justice

26. The request for a preliminary ruling was registered at the Court on 23 February 2024.

27. Written observations have been lodged by the applicant foundation, the German Government and the European Commission.

28. The Court did not consider it necessary to hold a hearing.

IV. Assessment

29. In my analysis, I shall follow the method by which the Court repeatedly carries out the analysis of questions referred for a preliminary ruling in cases similar to this one. Its *modus operandi*, which proceeds in phases or stages, tends to begin, as a first step, by identifying the applicable freedom and any restriction of it which may have occurred. As a second step, it compares the situations at issue in order to determine whether they have been the subject of different treatment, which calls for a detailed study of the domestic rules on the basis of which that treatment was applied. Lastly, it examines the possible justifications, based on overriding reasons in the public interest, and the proportionality of the national measure restricting the freedom concerned.

A. Applicable freedom

30. The referring court asks the Court of Justice to determine whether the German rules at issue are compatible with Article 40 of the EEA Agreement, which concerns the free movement of capital. The German Government, on the other hand, maintains that the examination should be carried out from the point of view of the freedom of establishment.

31. According to the German Government:

– In the case of a transfer of assets with a view to setting up a family foundation, unlike in the case of a traditional gift, what stands front and centre is not the transfer of assets as such but the setting up of the foundation.

– The freedom of establishment provided for in Article 31 of the EEA Agreement guarantees the right to take up and pursue economic activities as self-employed persons and to set up and manage undertakings in Liechtenstein. The concept of establishment within the meaning of that article and within the meaning of Article 49 TFEU should be interpreted broadly. Consequently, the setting up of a foundation may also come within the scope of the freedom of establishment.

– In the case of a family foundation, the family assets assigned to the foundation enjoy legal independence so that they can earn income for the benefit of the family members. Consequently, the setting up of a family foundation cannot be regarded as a mere movement of capital but should rather be considered to be a 'family establishment'. It follows that the transaction should be understood as coming within the scope of the freedom of establishment (Article 31 of the EEA Agreement) rather than within that of the free movement of capital.

32. The German Government nonetheless states that, despite its doubts, it 'will proceed from the principle that the free movement of capital is applicable to the dispute' and that its subsequent considerations can in any event be extrapolated to the freedom of establishment. [5]

33. The Court of Justice has repeatedly held that, '… in order to ascertain whether national legislation falls within one or the other of the freedoms of movement, the purpose of the legislation at issue must be taken into consideration'. [6]

34. The dispute which has given rise to the present reference for a preliminary ruling concerns the German legislation governing inheritance tax and gift tax. That legislation classifies the transfer of assets for the establishment of a family foundation as a gift (Paragraph 7(1)(8) of the ErbStG).

35. Gift tax is payable, in particular, on the free transfer of assets *inter vivos*, whether to a recipient or, as in this instance, to a family foundation. The fact that that transfer leads to a 'family establishment' with legal personality is a later, secondary consequence which will have its own consequences for tax purposes.

36. From the point of view of the free movement of capital, it makes no difference whether reference is made to Article 40 of the EEA Agreement or to Article 63 of the FEU Treaty, since both protect the same freedom. According to the Court:

– 'If 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 and Annex XII to that Agreement, those stipulations have the same legal scope as those of the substantially identical provisions of Article 56 EC …'. [7]

– '[Article 63(1) TFEU] prohibits all restrictions on the movement of capital between Member States and between Member States and non-member countries. While the [FEU] Treaty does not define "movement of capital", it is common ground that Directive 88/361, together with the nomenclature annexed to it, has indicative value for defining that term … Gifts and

[5] Paragraph 46 of the written observations of the German Government.

[6] Judgment of 19 July 2012, *A* (C-48/11, EU:C:2012:485, paragraph 17).

[7] Judgment of 11 June 2009, *Commission* v *Netherlands* (C-521/07, EU:C:2009:360, paragraph 33).

endowments appear in point XI, "Personal capital movements", of Annex I to Directive 88/361'. [8]

– 'Like the tax charged on inheritances, which consist in the transfer to one or more persons of assets left by a deceased person and likewise fall under that heading of Annex I to the directive …, the tax treatment of gifts, whether they are gifts of money, immovable property or movable property, therefore comes under the Treaty provisions on the movement of capital, except where their constituent elements are confined within a single Member State'. [9]

37. In the light of the foregoing, I am inclined to share the referring court's view that the question referred for a preliminary ruling must be analysed from the perspective of the free movement of capital.

B. Existence of a restriction

38. Paragraph 15(2) of the ErbStG provides that, in the case of a transfer of assets for the establishment of a national family foundation, the tax class is determined according to the closeness of the family relationship (classes I and II).

39. Family foundations established abroad, however, are relegated to tax class III, meaning that they benefit from lower allowances reducing the tax base and their liability to tax is based on higher rates.

40. With regard to inheritance tax, which, like gift tax, [10] is payable on free transfers of assets, the Court has previously held that legislation of a Member States similar to that at issue in the present case constitutes a restriction of the free movement of capital. [11]

41. The German Government acknowledges that, in that regard, its tax legislation contains a restriction on the free movement of capital. It sets out its reasoning in four steps: [12]

– Article 40 of the EEA Agreement imposes a general prohibition on restrictions on movements of capital between Member States and between Member States and third countries.

– Paragraph 15(2)(1) of the ErbStG subjects the establishment of a German family foundation to a reduced tax burden from which foundations established abroad are excluded. Considered in isolation, the establishment of the latter entities is subject to a higher tax burden.

– In the present case, that provision of the ErbStG subjects the establishment of a family foundation registered in Liechtenstein (the beneficiaries of which are exclusively direct-line descendants) to taxes that are higher than those which would be payable if the gift had been made on the same terms to a foundation registered or managed in Germany.

– The decrease in the value of the gift as a result of the application of the German rule entails a restriction of the movement of capital.

8 Judgment of 16 June 2011, *Commission* v *Austria* (C-10/10, EU:C:2011:399, paragraph 24).

9 Judgment of 22 April 2010, *Mattner* (C-510/08, EU:C:2010:216, paragraph 20).

10 The Court draws that parallel in the judgment of 22 April 2010, *Mattner* (C-510/08, EU:C:2010:216, paragraph 20).

11 Judgment of 30 June 2016, *Feilen* (C-123/15, EU:C:2016:496, paragraph 19).

12 Paragraphs 47 to 50 of its written observations.

42. In the light of that explicit acknowledgment by the German Government, in which regard it agrees with the Commission and the applicant foundation, I think it unnecessary to reflect any further on this.

43. It can therefore be agreed that, under the German legislation, the tax burden represented by gift tax depends on the place where the family foundation is managed or registered. In consequence, a gift for the establishment of a family foundation registered in Germany is subject to a lower gift tax than that payable on the establishment of a family foundation registered in Liechtenstein, with the result that the value of the gift is reduced in the latter case.

44. In those circumstances, it is necessary to examine whether the restriction on the free movement of capital as described above can be justified in the light of Article 40 of the EEA Agreement (equivalent, *mutatis mutandis*, to Article 63 TFEU).

C. Justification of the restriction

45. In accordance with the method I referred to earlier, we must look, in the first place, at the comparability of the situations at issue and, if they are comparable, in the second place, at whether the different treatment of those situations can be justified by an overriding reason in the public interest. [13]

46. Thus, 'for national tax legislation such as that at issue … to be capable of being regarded as compatible with the provisions of the Treaty on the free movement of capital, it is necessary that the difference in treatment concern situations which are not objectively comparable or be justified by an overriding reason in the public interest'. [14]

1. Comparability of the situations

47. It is common ground that the establishment of a German family foundation is subject to gift tax, as is also the establishment of a foreign family foundation by a German resident. In the latter scenario, liability to gift tax arises through the interplay of several provisions of the ErbStG:

– In accordance with Paragraph 1(1)(2) and Paragraph 7(1)(8), respectively: (i) gifts *inter vivos* are subject to tax; and (ii) the transfer of assets for the establishment of a foundation *inter vivos* is regarded as a gift *inter vivos*. [15]

– Although a foreign family foundation does not meet the legal requirements necessary for the incurrence of personal tax liability under Paragraph 2(1)(1) of the ErbStG, such a tax liability is incurred also where the donor is a resident at the time of making the gift.

– Under letter (a) of the second sentence of Paragraph 2(1)(1) of the ErbStG, persons regarded as residents include, inter alia, natural persons whose domicile or habitual residence is in Germany. Since the founder (donor) was domiciled in Germany at the time of making the gift, a personal liability to tax is present. [16]

[13] Judgment of 12 October 2023, *BA (Inheritance – Public housing policy in the European Union)* (C-670/21, EU:C:2023:763, paragraph 56).

[14] Judgment of 17 September 2015, *F.E. Familienprivatstiftung Eisenstadt* (C-589/13, EU:C:2015:612, paragraph 58).

[15] Order for reference, paragraph 38.

[16] Order for reference, paragraph 41.

48. It is also common ground that, as a result of the application of those provisions, the tax burden associated with the establishment (by a German resident) of foundations registered abroad is higher than that associated with the establishment of foundations registered in Germany.

49. Thus, the same event (the transfer by a person resident in Germany of assets for the establishment of a foundation, whether German or foreign) triggers a liability to pay German gift tax in both cases. In principle, therefore, the situations are comparable.

50. The German Government states, however, that the situation of a national family foundation is not objectively comparable to that of a foreign family foundation. According to it, the German legislature was entitled to establish a tax privilege for national family foundations so as to offset the disadvantage of substitute inheritance tax, which is payable periodically only by national family foundations.

51. I do not share that view, which would make it impossible to analyse whether a difference in treatment constitutes an infringement of a fundamental freedom: to accept the German Government's proposition is to accept that the difference in treatment is, in itself, a factor determinative of the non-comparability of situations. The Court has previously rejected a similar line of reasoning by the German Government when ruling on another dispute concerning the application of the ErbStG. [17]

52. In order to determine whether the situations at issue are comparable, regard must be had to the event that triggers the principal liability to tax, irrespective of the place of residence of each of the persons liable to pay the tax.

53. In the present case, that taxable event (the transfer of assets for the establishment of a family foundation by a person resident in Germany) is subject to gift tax under the ErbStG, irrespective of whether the family foundation is established in that country or in Liechtenstein. The taxable event is, as I have said, the same in both cases.

54. Other factors that inform, in particular, the debt owed by way of that tax (such as allowances reducing the tax base and the tax rate) are not essential to the creation of the legal relationship for tax purposes. They serve only to modify the scope of the liability to pay the tax.

55. The referring court confirms that the situations are comparable: 'the liability to tax in respect of the transfer of assets on the basis of an act of foundation pursuant to Paragraph 7(1)(8) of the ErbStG encompasses both foundations established on national territory and the establishment, in the present case, of a Liechtenstein foundation. The situations are therefore objectively comparable'. [18]

56. In actual fact, the question referred for a preliminary ruling does not go so far as to seek a determination of whether the situations are comparable; the referring court accepts unreservedly that they are comparable. The only thing about which the referring court has doubts, and it states

[17] Judgment of 12 October 2023, *BA (Inheritance – Public housing policy in the European Union)* (C-670/21, EU:C:2023:763, paragraph 64): '… without prejudice to the assessment of whether the legislation at issue in the main proceedings might be justified by an overriding reason in the public interest, it would deprive Article 63(1) TFEU of all meaning if it were accepted that situations are not comparable solely because the immovable property in question is situated in a non-Member State other than a State which is party to the EEA Agreement, when that provision specifically prohibits restrictions on cross-border movements of capital'.

[18] Paragraph 63 of the order for reference.

so expressly, is 'whether there are overriding reasons in the public interest justifying a restriction on the free movement of capital resulting from the first sentence of Paragraph 15(2) of the ErbStG'. [19]

2. Difference in the treatment of comparable situations

57. The determination of the tax debt under the ErbStG rests on how closely related the donor and the beneficiary are. For that purpose, Paragraph 15(1) provides for three tax classes. Class I covers the closest relatives (including children and grandchildren), class II covers the more distant relatives and class III covers other persons.

58. The tax class applicable to the establishment of family foundations is laid down in Paragraph 15(2) of the ErbStG, on the basis of the family relationship between the most distantly related beneficiary (under the articles of association) and the donor. However, that rule applies only to family foundations established in German territory.

59. The difference in treatment as between national and foreign foundations therefore arises because the national rule puts them in different tax classes. In the present case, the family foundation registered in Liechtenstein is taxed under class III (the residual class) rather than under class I, where it would have been placed had it been established in Germany. The relationship between the founder and her relatives therefore becomes irrelevant for those purposes.

60. The end result is that a foreign family foundation is liable for the payment of a higher amount of tax for two reasons:

– When it comes to calculating the tax base, it qualifies only for the allowances available to taxable persons under class III, which are significantly lower than those available under class I. [20]

– As regards the tax rate applicable to that basis, taxpayers in class III pay a higher percentage than those in class I. [21]

61. The referring court confirms that the national law leads to a difference in treatment, as described above, as between foundations established in Germany by German residents and those established by German residents in an EEA State. [22] It goes on to say that the double taxation agreement between Germany and Liechtenstein [23] does not remedy that situation. [24]

[19] Paragraph 64 of the order for reference.

[20] Paragraph 10 of the ErbStG takes account of the allowances provided for in Paragraph 16 for the calculation of the tax base. In the absence of more precise data, it would seem that, in the present case, the allowance reducing the tax base would be EUR 20 000 (class III) rather than EUR 200 000 (class I, for children of children).

[21] In accordance with Paragraph 19 of the ErbStG, the tax rate applicable to a value below EUR 75 000 would be 30% under class III rather than 7% under class I.

[22] Paragraphs 37 to 47 of the order for reference.

[23] Agreement concluded on 17 November 2011 between the Federal Republic of Germany and the Principality of Liechtenstein for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and on capital (BGBl. 2012 II, p. 1462).

[24] Paragraphs 46 and 47 of the order for reference.

3. Fiscal cohesion

62. The German Government justifies the legislation at issue by reference to the need to ensure cohesion in the national tax system. It argues that national family foundations, unlike foreign family foundations, are liable for substitute inheritance tax every 30 years.

63. According to the referring court,[25] in enacting the rule applicable here, the German legislature:

– 'Proceeded from the principle that the advantages granted by the tax-class privilege would be offset by the disadvantages of the substitute inheritance tax. In introducing the substitute inheritance tax, the legislature had the objective of placing foundation constructs on an equal footing, as regards inheritance taxation, with succession by natural persons, by means of recurring taxation.

– However, that rule could be laid down only in respect of national family foundations. With regard to family foundations established abroad, the German legislature had and has no means of levying substitute inheritance tax'.[26]

64. It would thus seem that the tax advantage conferred on national family foundations (the tax-class privilege) serves to offset the fiscal disadvantage of having to pay substitute inheritance tax every 30 years. The advantage and disadvantage in question relate to tax obligations arising within the family sphere and in connection with the same type of tax (in the present case, gift tax).

65. Is there any cohesion in extending that symmetry between advantage and disadvantage to family foundations established abroad by German residents? Since such foundations are not liable to pay substitute inheritance tax, is there any cohesion in subjecting them to one-off tax (at the time of establishment), which corresponds to that which their German counterparts cannot escape?

66. I have already described the mechanism by which the German legislature has confined the tax advantage exclusively to foundations established in Germany by German residents. It falls now to assess that advantage in the light of the case-law of the Court.

67. In the words of the Court:

– '… The need to preserve the cohesion of a tax system may justify a restriction on the exercise of the freedoms of movement guaranteed by the Treaty'.[27]

– 'However, … 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 levy …, with the direct nature of that link falling to be examined in the light of the objective pursued by the rules in question'.[28]

[25] The referring court carries out a detailed analysis of the history and parliamentary trajectory of both the tax-class privilege (first sentence of Paragraph 15(2) of the ErbStG) and the substitute inheritance tax (Paragraph 1(1)(4) of that law), which were introduced at the same time in 1974.

[26] Paragraph 76 of the order for reference.

[27] Judgment of 7 November 2013, *K* (C-322/11, EU:C:2013:716, paragraph 65).

[28] Judgment of 7 November 2013, *K* (C-322/11, EU:C:2013:716, paragraph 66).

68. According to the referring court, it is doubtful whether the objective proclaimed by the German legislature is '… sufficient to support the conclusion that there is a direct, personal and material link between the tax-class privilege and the substitute inheritance tax, which the Court requires there to be in order for cohesion to be said to exist'. [29] An argument to the contrary, according to the referring court, 'might be that, because of the relatively long 30-year period, not all national family foundations will necessarily still be in existence at the end of that period, and a foundation's assets may change unpredictably during that length of time'. [30]

69. That argument (the 30-year cycle laid down for the periodic chargeability of substitute inheritance tax and the possibility of changes in the assets) forms the basis for some of the submissions made by the applicant foundation, according to which the difference of treatment is not justified.

70. The applicant foundation puts forward a series of submissions in support of its case, which it itself summarises under two headings: (a) the non-conformity of the German rule with Article 40 of the EEA Agreement and with Article 63 TFEU 'cannot be justified on grounds of the cohesion of the tax system' (paragraphs 6 to 32 of its written observations), and (b) 'the disproportionate nature of the difference in the taxation of family foundations' (paragraphs 33 to 36 of those written observations). [31]

71. I shall analyse each of those submissions separately, linking them, where necessary, to the doubts of the referring court which I have just reproduced.

72. The applicant foundation:

– asserts that there is no direct link between the tax advantage and the disadvantage, in itself and in terms of the final tax burden;

– claims that there is no fiscal cohesion following the reform of the German law governing foundations;

– alleges an absence of cohesion between the substitute inheritance tax and the tax-class privilege;

– states that the required offsetting between the grant of a benefit and the tax levy, in relation to the same taxpayer and the same tax category, is not present;

– refers to 'the protection of family assets as a corollary of the protection of marriage and the family';

– refers to the 'absence of any offsetting linked to the State'.

– alleges an 'absence of cohesion in the light of the scheme of the ErbStG'.

[29] Order for reference, paragraph 77.

[30] Order for reference, paragraph 77, *in fine*.

[31] In fact, it adds a third heading (paragraphs 37 and 38 of its written observations) concerning the case-law of the European Free Trade Association (EFTA) Court. That case-law, however, merely points out that the provisions relating to the free movement of capital (Article 40 of the EEA Agreement) which are fundamentally identical to those of the FEU Treaty (Article 63) are to be interpreted uniformly. That general submission has no bearing on the specific resolution of the dispute at issue here.

73. In my analysis of those submissions, [32] I shall dispense with the references they contain to the case-law of the Bundesverfassungsgericht (Federal Constitutional Court, Germany), since the matter at issue here is the conformity of the ErbStG with EU law, not national law.

74. So far as concerns the *direct link* between the tax advantage (the tax-class privilege) and the tax disadvantage (payment of substitute inheritance tax), [33] the answer will have to take into account the objective of the rule and the fact that they both affect the same taxpayer by reason of the same tax.

75. In my view, which I share with the German Government [34] and the Commission, [35] those conditions are present in this case: in the light of the objective of the rule, which is to create between the situations of various family foundations a symmetrical parity from the point of view of the tax burden borne by them, the taxpayer (the family foundation) [36] and the tax (on gifts) are the same.

76. It is true, however, that, as the referring court notes, the interval of time between the tax advantage and the tax disadvantage is considerable: the tax-class privilege is triggered at the time when the foundation is established, whereas substitute inheritance tax is payable after 30 years.

77. It is possible that that time lag might potentially break the direct link between the tax-class benefit and the levy in the form of the substitute inheritance tax in the case of taxpayers not exhibiting the characteristics of a family foundation, who would be subject to taxation which is 'remote and uncertain'. [37] In the case, conversely, of family foundations, such as the one at issue here, set up to last for several generations, [38] it is my view that the direct link is preserved, the levying of substitute inheritance tax keeping pace with generational change every 30 years. [39]

78. Moreover, when assessing the existence of that advantage/disadvantage relationship, the Court has previously accepted some temporal flexibility, for example, in the case of the deduction of insurance contributions (advantages) offset by the taxation (disadvantage) of pensions, annuities or capital sums payable by insurers. [40] Similarly, it has accepted the existence of a direct link between the reduction in inheritance tax under the ErbStG and the previous imposition of that tax. [41]

[32] In its pleadings, perhaps inevitably, the applicant foundation reiterates, under certain headings, arguments which it has already put forward under others.

[33] Paragraphs 7 to 9 of the written observations of the applicant foundation.

[34] Paragraphs 67 to 69 of the written observations of the German Government.

[35] Paragraph 46 of the written observations of the Commission.

[36] As the Commission states, the requirement that the taxpayer should be the same is tempered in the judgment of 30 June 2016, *Feilen* (C-123/15, EU:C:2016:496, paragraph 37): 'the objective pursued by Paragraph 27 of the ErbStG … is to reduce 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, by preventing partially the double taxation in Germany of assets more than once within a short space of time. With regard to that objective, there is … a direct link between the reduction in inheritance tax provided for by that paragraph and the previous imposition of inheritance tax, that tax advantage and that previous imposition relating to the same tax, the same asset, and the close relatives of the same family.'

[37] Judgment of 6 October 2015, *Finanzamt Linz* (C-66/14, EU:C:2015:661, paragraph 48). That case, however, was not concerned with the legislation relating specifically to inheritance or gifts.

[38] Family foundations registered in Liechtenstein seem to be designed to develop their activities long-term, since one of their objectives is to safeguard wealth for generations. See H.S.H. Prince Michael von und zu Liechtenstein, 'Liechtenstein family foundations and financial privacy', *Trust and Trustees*, Vol. 16, Issue 6, Oxford University Press, Oxford, 2010, pp. 476 to 478.

[39] It being borne in mind that, statistically, life expectancy in Germany is around 80 years (https://www.destatis.de/EN/Themes/Society-Environment/Population/Deaths-Life-Expectancy/_node.html#268862).

[40] Judgments of 28 January 1992, *Bachman* (C-204/90, EU:C:1992:35) and of 28 January 1992, *Commission* v *Belgium* (C-300/90, EU:C:1992:37).

[41] Judgment of 30 June 2016, *Feilen* (C-123/15, EU:C:2016:496, paragraph 37, reproduced in footnote 36 to this Opinion).

79. As regards the *absence of fiscal cohesion following the reform of the German law governing foundations*, the applicant foundation states [42] that, since 1 July 2023, the German legislation [43] has allowed family foundations to be set up for a period of less than 30 years. It infers from that fact (such foundations would not be liable for substitute inheritance tax) that the direct link between the tax advantage and the substitute inheritance tax, which is payable every 30 years, is removed.

80. That argument might conceivably carry some weight if the present dispute concerned foundations established after 1 July 2023, which is not the case in this instance: the applicant foundation was set up in 2014 for the benefit of three generations. The objective expectation at the time of its establishment was therefore that it would last for more than 30 years. It is also important to bear in mind that a dispute arising under the legislation in force in 2014 cannot be resolved by relying on the amendments introduced under the 2021 Law on foundations. [44]

81. As regards the *absence of cohesion between the substitute inheritance tax and the tax-class privilege*, the applicant foundation's argument [45] is based on the parliamentary work cited by the referring court and on the reform of the rules governing foundations that was adopted in 2021.

82. The referring court itself infers from the passage through parliament of the reform of the 1974 ErbStG (under which both provisions, the one relating to the tax-class privilege and the one relating to the substitute inheritance tax, were introduced at the same time) that, for the national legislature, 'the advantages granted by the tax-class privilege would be offset by the disadvantages of the substitute inheritance tax'. [46] As regards the impact of the reform of the legislation governing foundations that was introduced in 2021, it is sufficient to refer to what has been stated above.

83. The applicant foundation also argues that *the essential offsetting between the grant of a benefit and the imposition of a tax in respect of the same taxpayer and in relation to the same tax category is not present.* [47]

84. In so far as it does not reiterate previous arguments, [48] that criticism of the ErbStG rests on the premiss that there is no 'exact' offsetting between the gift tax paid at the time of the foundation's establishment and the substitute inheritance tax; their respective tax bases may vary from one date to another.

[42] Paragraphs 10 and 11 of its written observations.

[43] Gesetz zur Vereinheitlichung des Stiftungsrechts und zur Änderung des Infektionsschutzgesetzes (Law unifying the law on foundations and amending the law on the prevention and combating of human infectious diseases) of 16 July 2021 (BGBl. I, p. 2947).

[44] If it were to be established that the German legislation has lacked cohesion since the reform of the rules governing foundations introduced in 2021, that does not mean that it was not cohesive in 2014, the year to which the material facts relate.

[45] Paragraphs 12 to 14 of its written observations.

[46] Paragraph 76 of the order for reference, reproduced in point 63 of this Opinion.

[47] Paragraphs 15 to 21 of its written observations.

[48] It does so with respect to the identification of the taxpayer, which I have already examined in previous points.

85. Mathematical equality ('exact amount') is, it is true, difficult to ensure. However, in so far as family foundations have the capacity to pursue economic activities [49] and become profitable so as to enable future beneficiary generations to enjoy at least the same level of wealth, [50] it is reasonable for the legislature to assume that the tax base of the initial gift will be at least equivalent to that which will serve as the point of reference for calculating the future substitute inheritance tax.

86. In the same vein, the applicant foundation argues that, from an economic point of view, the substitute inheritance tax is, in actual fact, a particular form of *wealth tax* and is not levied on transfers of assets, like gift tax is. Those are therefore different categories of tax.

87. The classification of tax categories is a matter for each national legal system. In the present case, the referring court has no hesitation in classifying the two taxes as homogenous types. It follows from the description of the national legal framework that the substitute inheritance tax operates according to the legal fiction that an intergenerational transfer of assets takes place every 30 years.

88. The applicant foundation's submissions on *the protection of family assets as a corollary of the protection of marriage and the family*, [51] which are based on decisions of the Bundesverfassungsgericht (Federal Constitutional Court), assert that the conditions laid down by that court as governing the need to safeguard the continuity of matrimonial and family assets are not met. As I have already stated, such submissions do not affect the analysis of the compatibility of the national rule with EU law.

89. The applicant foundation also maintains that there is an *absence of offsetting linked to the State*, [52] as the basis for its claim that such offsetting (between the tax-class privilege and the substitute inheritance tax) should be examined from the point of view of a single State, not from the point of view of 'transnational considerations'. According to it, the German tax authority 'indirectly passes on' the tax burden to the foreign States in which the family foundations are registered.

90. I myself, however, can find nothing to indicate that the ErbStG scheme at issue has the effect of indirectly passing on the tax burden to States other than Germany.

91. Lastly, the applicant foundation refers to the *absence of cohesion in the light of the scheme of the ErbStG*. [53] In making that submission, it states that the guiding principle of the ErbStG is to treat tax advantages and tax burdens equally, irrespective of the place where the taxpayer is domiciled for tax purposes or resident. On that basis, granting the tax privilege only to German family foundations would need to be justified by an overriding reason under both national law and EU law. According to it, no such overriding reason exists; such a reason, it submits, also cannot be found in Article 65 TFEU.

[49] The German Government recognises that family foundations seek to raise income for the benefit of family members (paragraph 45 of its written observations). In its submission, the nature of family foundations as businesses is confirmed by the fact that their income is subject to corporation tax. See Meinecke, P., 'The German and the Liechtenstein family foundation after the German foundation law reform', *Trust and Trustees*, Vol. 29, Issue 6, Oxford University Press, Oxford, 2023, pp. 540 to 552.

[50] See Haag, M., and Tischendorf, M., 'The German family foundation: concept, legal framework, and taxation', *Trust and Trustees*, Vol. 26, Issue 6, Oxford University Press, Oxford, 2020, pp. 534 to 541.

[51] Paragraphs 22 and 23 of its written observations.

[52] Paragraphs 24 and 25 of its written observations.

[53] Paragraphs 26 to 32 of its written observations.

92. That argument, as set out above, is circular if its purpose is precisely to attempt to demonstrate why the overriding reason of ensuring the cohesion of the national tax system does not apply in relation to the rules of the ErbStG on family foundations.

4. Proportionality

93. So far as concerns the proportionality of restrictions on the free movement of capital, the Court requires that the difference in treatment 'must be appropriate for ensuring attainment of the objective pursued and must not go beyond what is necessary to achieve that objective'. [54]

94. According to the applicant foundation, even if the restriction on the free movement of capital (arising from the difference in treatment for tax purposes as between one group of foundations and another) were recognised as being justified, that difference would not be proportionate.

95. In that regard, it contends, in turn, that the rule at issue is unsuitable for attaining its objective [55] and that it is possible to adopt less restrictive measures to achieve the same ends. [56]

96. As regards the suitability of the mechanism adopted by the ErbStG for ensuring the attainment of its objectives, the applicant foundation submits that 'there are reasons to doubt whether the difference in taxation contributes towards the objective in question'. In elaborating on that submission, however, it simply states, without providing further details, that the unsuitability stems from the fact that 'the national legislation does not consistently and systematically ensure that the objective is attained', [57] thus raising once again the same objection that has already been analysed.

97. In maintaining that the cohesion of the tax system can be ensured by less restrictive provisions, the applicant foundation proposes as alternatives that: (a) the substitute inheritance tax and the tax-class privilege be extended to foreign family foundations; (b) the substitute inheritance tax be designed as a wealth tax; and (c) the substitute inheritance tax be modified as a moderated annual tax, levied in the same way on national and foreign family foundations at the time of their establishment. [58]

98. In my opinion, which I again share with the Commission, [59] to adopt any of the above alternatives would be to accept that family foundations registered abroad must bear the tax disadvantage arising from the substitute inheritance tax. However, since Germany loses its fiscal competence in respect of a family foundation registered abroad as soon as that foundation is established (and the corresponding assets are transferred to it), such solutions are not readily viable.

99. The less restrictive alternatives which the applicant foundation suggests are therefore affected by the same problem: the German State cannot access family foundations registered abroad, which remain outside the scope of the exercise of its powers of taxation.

[54] Judgment of 21 December 2016, *Masco Denmark and Damixa* (C-593/14, EU:C:2016:984, paragraph 33).

[55] Paragraph 34 of its written observations.

[56] Paragraphs 35 and 36 of its written observations.

[57] Paragraph 34 of its written observations.

[58] Paragraph 36 of its written observations.

[59] Paragraph 47 of its written observations.

V. Conclusion

100. In the light of the foregoing, I propose that the answer to the question raised by the Finanzgericht Köln (Finance Court, Cologne, Germany) should be as follows:

Article 40 of the Agreement on the European Economic Area of 2 May 1992

must be interpreted as not precluding legislation of a Member State of the European Union which, in laying down the rules governing the gift tax applicable to the establishment by a resident of that Member State of a foundation registered in a State belonging to the European Economic Area, and in order to maintain the fiscal cohesion of that legislation, imposes tax conditions which are more onerous than those applicable to the establishment of a foundation in the abovementioned Member State, as a symmetrical counterbalance to the fact that the foundation registered abroad is not liable to pay substitute inheritance tax, which, conversely, is payable by foundations registered in that Member State.