CONFEDERATION
FISCALE
EUROPEENNE

Opinion Statement ECJ-TF 1/2015 of the CFE on the decisions of the European Court of Justice in Cases C-127/12, *Commission v. Spain*, and C-211/13, *Commission v. Germany*, concerning inheritance taxation

Prepared by the ECJ Task Force of the CFE
Submitted to the European Court of Justice, the European Commission and the EU Council in May 2015

The CFE (Confédération Fiscale Européenne) is the umbrella organisation representing the tax profession in Europe. Our members are 26 professional organisations from 21 European countries (18 EU member states) with more than 100,000 individual members. Our functions are to safeguard the professional interests of tax advisers, to assure the quality of tax services provided by tax advisers, to exchange information about national tax laws and professional law and to contribute to the coordination of tax law in Europe. The CFE is registered in the EU Transparency Register (no. 3543183647-05).

This is an Opinion Statement prepared by the CFE ECJ Task Force[1] concerning two decisions rendered by the ECJ in September 2014 regarding compatibility of inheritance taxation with the fundamental freedoms[2].

I. Issues and Preliminary Questions

1. The cases *Commission v. Spain* (C-127/12) and *Commission v. Germany* (C-211/13) have common features and in both cases the ECJ (second and third chamber) held that the two national measures at issue were contrary to the free movement of capital ensured under Art 63 TFEU and under Art 40 of the EEA Agreement. Both cases were decided without an opinion from the designated Advocates General, *Kokott* and *Mengozzi*, respectively.
2. With regard to Spanish legislation (C-127/12), the Commission addressed the "Impuesto sobre Sucesiones y Donaciones" (succession and donation tax). The Spanish tax is a national tax, but its management and collection was granted to Spain's 15 Autonomous Communities of general regime.[3] In addition, they are also entitled to introduce amendments (e.g. exemptions, credits and rates) reducing or increasing the tax liability. Up to present, most of the Autonomous Regions have used this possibility, introducing several and different tax advantages that are not available when the applicable rule is the State rule. Such distinction leads, in practice, to a lower effective tax for residents in such Autonomous Communities rather than for other EU residents and in some cases also for other Spaniards resident in other Autonomous Regions. This is because only national legislation applies in the cases laid down therein, that is, primarily in cases in which there is no personal or real connection with an Autonomous Community, or when the corresponding Autonomous Community of residence has not approved similar tax advantages. In all of the Autonomous Communities which have adopted succession and donation tax legislation, the tax burden born by the taxpayer is considerably lower than that imposed under national legislation, which leads to a difference in tax treatment of donations and successions between beneficiaries and donees resident in Spain and those not resident in Spain, between decedents resident in Spain and those not resident in Spain, and between donations and similar transfers of immovable property situated within and outside of Spain. The Commission hence argued that the national legislation at issue infringes Art 21 and 63 TFEU and Art 28 and 40 EEA.[4]
3. In respect of the German case (C-211/13), the Commission noted that the taxation of inheritances and gifts is mitigated under German law by relatively high tax-free allowances (€ 20,000 up to € 500,000), particularly in the case of inheritances and gifts between spouses, between parents and children and between certain relatives, but that these tax-free allowances are, however, applicable only if Germany exercises an unlimited right to tax whereas only a low, flat-rate tax-free allowance (€ 2,000) is applicable if the right to tax is limited. The Commission based

[1] Members of the Task Force are: Alfredo Garcia Prats, Daniel Gutmann, Volker Heydt, Eric Kemmeren, Georg Kofler (Chair), Michael Lang, Franck Le Mentec, João Félix Pinto Nogueira, Pasquale Pistone, Albert Rädler†, Stella Raventos-Calvo, Isabelle Richelle, Friedrich Roedler and Kelly Stricklin-Coutinho. Although the Opinion Statement has been drafted by the ECJ Task Force, its content does not necessarily reflect the position of all members of the group. In drafting this statement, the group was supported by Werner Haslehner and Alexander Rust.

[2] Judgments in cases C-127/12, Commission v. Spain (link), and C-211/13, Commission v. Germany (link).

[3] I.e., the Spanish inheritance and gift tax is a yielded tax, that is to say, a tax that is originally established by the central State but then partially yielded to the different Spanish Autonomous Regions, which at the same time, have the power to introduce amendments in the determination of the tax debt that corresponds to each of them. As for the provinces of the Basque Country and Navarre, a different system applies.

[4] Action brought on 7 March 2012 – European Commission v Kingdom of Spain (Case C-127/12), [2012] OJ C 126, p. 9; see also the Commission's Press Release "Taxation: Commission refers Spain to the Court of Justice over discriminatory inheritance and gift tax rules", IP/11/1278 (27 October 2011).

its application on the criteria which the ECJ set out in *Mattner*,[5] and argued that those rules are incompatible with Art 63 TFEU.[6]

II. The Judgments of the Court

4. In the case of *Commission v. Spain* (C-127/12) the Court in its judgment of 3 September 2014 declared that

> "by applying different tax treatment to donations and successions between beneficiaries and donees resident in Spain and those not resident in Spain, between bequeathers resident in Spain and those not resident in Spain, and between donations and similar transfers of immovable property situated within and outside of Spain, the Kingdom of Spain has failed to fulfil its obligations under Article 63 TFEU and Article 40 of the Agreement on the European Economic Area of 2 May 1992".[7]

The decision does not affect the rules of the Autonomous Regions but rather the national rules on Inheritance and Gift Tax, despite the fact that the Commission has used some of the examples of the application of the Autonomous Regions legislation to illustrate – and not to prove – the infringement. With this illustration, and without a proof in every situation, the ECJ held that in every case the attribution of partial legal competences to the Autonomous Regions conflicts with the free movement of capital, creating a restriction. Both the Commission and the ECJ evaluated jointly – and not on a case-by-case basis – the different situations. The simple possibility that, according to Spanish legislation, taxable persons receive a different tax treatment according to their residence may suffice to identify a restriction on the free movement of capital, regardless of whether all Autonomous regions have exercised the powers conferred by national law or not. The ECJ considers that there is no justification for that restriction to the free movement of capital. Following the previous case law, the ECJ adopts a restrictive interpretation of Article 65(1)(a) TFEU that allows differences of tax treatment considering the place of residence or the place of investment, to those situations where the difference does not create arbitrary discrimination or covert restrictions and, moreover, the differences are proportionate. As for the comparability, the ECJ considered that the situations of resident and non-resident taxpayers are objectively comparable despite the fact that they are subject to unlimited and limited tax liability, respectively, based on the fact that no objective difference exists as regards the taxation of immovable property located in Spain. For the ECJ, both resident and non-resident taxpayers and goods located in the territory and abroad are placed at the same level as regards the Inheritance and Gift Tax. As for a justification of that difference of treatment, the Court considers that no justification is admissible since Spain argues the possibility to apply a different treatment to movements with third non-member countries, but it has not proved how the lack of mutual assistance agreements could justify a legislation such as that at issue in the present case.

5. In the case of *Commission v. Germany* (C-211/13)[8] the Court in its judgment of 4 September 2014 declared that,

---

[5] Case C-510/08, *Mattner*, [2010] ECR I-3553.

[6] Action brought on 19 April 2013 – European Commission v Federal Republic of Germany (Case C-211/13), 82013] OJ C 171, p. 23; see also the Commission's Press Release "Taxation: Commission refers Germany to the Court of Justice for discriminatory inheritance tax provisions", IP/12/1018 (27 September 2012).

[7] [2014] OJ C 395, p. 3.

[8] EU:C:2014:2148.

"by adopting and maintaining in force provisions under which only a low tax-free allowance is granted when inheritance and gift tax are applied to immoveable property situated in Germany where the deceased, at the time of death, the donor, at the time of the gift, or the beneficiary, at the time of the taxable event, resided on the territory of another member state, whereas a considerably higher tax-free allowance is granted where at least one of the two parties concerned resided in Germany at the relevant time, the Federal Republic of Germany has failed to fulfil its obligations under Article 63 TFEU".[9]

III. Comments

6. Inheritance and gift tax systems are not harmonized within the EU. Moreover, it might be noted that not all member states levy such taxes, and that their structures varies widely. Given the limited network of double taxation treaties in this area, this might lead to double or multiple taxation in cross-border cases[10] as well as discriminatory treatments of cross-border situations. More and more such cases arise, as already in 2010 more than 12 million EU citizens were resident in a member state different from their member state of origin, and immovable property owned by foreigners has increased significantly in the last years.[11] It was the task of the Court to set limits to national discriminatory measures based on the fundamental freedoms.[12] Moreover, in late 2011, the EU Commission described various reasons for double taxation scenarios and discriminations in its Communication on "Tackling cross-border inheritance tax obstacles within the EU"[13] and made recommendations regarding relief for double taxation of inheritances.[14] Inheritance and gift tax issues are also on the working programme of the Commission Group of experts on removing tax problems facing individuals who are active across borders within the EU.[15]
7. With regard to *Commission v. Spain*, it seems that the ECJ did not clearly state what aspects affect comparability between situations. Indeed, neither the Commission nor the ECJ made a concrete evaluation of the applicable Spanish legislation in *comparable* domestic situations, de-

---

9 [2014] OJ C 395, p. 15.

10 Already in 2005, the CFE has published an Opinion Statement on possible double taxation and other problems affecting the free movement of persons and capital within Europe resulting from inheritance tax, illustrated by the example of Germany and Spain, (link).

11 See the Commission's Communication COM(2011)864 final, p. 4.

12 See from the Court's case law in this area, e.g., Case, C-364/01, *The heirs of H. Barbier*, [2003] ECR I-15013 (consideration in Dutch inheritance tax of certain obligations for assessing the property's value in case of resident taxpayers denied to non-resident taxpayers); Case C-513/03, *van Hilten-van der Heijden*, [2006] ECR I-1957 (holding that Dutch inheritance tax on citizens for a period of 10 years after leaving the Netherlands and taking residence in Switzerland is in line with EU law); Case C-256/06, *Jäger*, [2008] ECR I-123 (holding that it is not in line with EU law if Germany imposes different regulations on the valuation of domestic and foreign real estate); Case C-11/07, *Eckelkamp*, [2008] ECR I-6845 (holding that Belgian legislation denying mortgage-related charges relating to the immovable property to be deducted from the value of that property in case of non-resident decedent while allowed for resident decendents is discriminatory); Case C-43/07, *Arens-Sikken*, [2008] ECR I-6887 (holding that it is not in line with EU law if the Netherlands do not allow a deduction of compensation payments to other heirs as estate debt if such deduction is disallowed only for non-residents); Case C-67/08, *Margarete Block*, [2009] ECR I-883 (finding that double taxation is in line with EU law if Spain taxes an estate because cash funds and bonds are deposited with a Spanish bank and Germany taxes the same estate because the descendant was resident in Germany at the time of death); Case C-510/08, *Mattner*, [2010] ECR I-3553 (holding that it is not in line with EU law if Germany grants a lower tax-free amount for non-residents than for residents); Case C‑31/11, *Scheunemann*, EU:C:2012:481 (holding that German legislation violates freedom of establishment by denying tax advantages to substantial shareholdings of a capital company if it is established in a third country acquired through inheritance); Case C-181/12, *Welte*, EU:C:2013:662 (holding that the German inheritance tax violates free movement of capital when an allowance against the taxable value of immovable property acquired through inheritance is denied when both the deceased and the heir are resident in a third country but applied when at least one of them is resident in Germany).

13 COM(2011)864 final.

14 Commission Recommendation C/2011/8819

15 See *http://ec.europa.eu/taxation_customs/taxation/individuals/expert_group/*.

spite the fact that some Spanish domestic situations (involving two or more Autonomous Regions) may suffer a tax treatment similar to that of cross-border situations. Moreover, the ECJ did not further specify comparability requirements for each of the different cross-border situations, as it seems to have assumed that cross-border and domestic situations are generally comparable based on the fact that they are put *at the same level*, without considering relevant the fact that resident taxpayers are subject to unlimited tax liability and non-resident taxpayers are only subject to limited tax liability. It also unclear whether the amendment to the Spanish inheritance tax law passed on 27 November 2014 will remedy the discrimination found by the Court. Specifically, the Spanish law amendment seems to not fully equate the tax treatment of cross-border situations and domestic *comparable* situations in all the related cross border situations, which may lead to new disputes based on EU Law.[16]

8. On the other hand, the Courts decision against Germany did not come as a surprise, as the Court could confirm its judgments in *Mattner*[17] and *Welte*[18] and find that the different tax allowances under the limited and unlimited German inheritance tax violated the free movement of capital. It might, however, be noted that Germany has amended its legislation to remedy the discrimination against foreigners and the amendment was passed on December 7, 2011. Under the new provisions, heirs or donees who fall under the limited inheritance or gift tax liability in Germany and are resident in a member state of the EU or the European Economic Area (EEA) may opt for unlimited German inheritance or gift tax liability (§ 2(3) ErbStG). However, the revision did not meet the deadline set by the Commission in the current case so that the Court ruled on the "old" system,[19] and it also seems that the Commission was not completely satisfied by the German amendment.[20] Indeed, and as the Commission points out, it seems that exercising the "new" option under German law could lead to an additional burden with respect to non-German assets.

9. Finally, some issues remain unclear. While it seems clear that the Court's holdings cover EEA situations,[21]. nothing was said regarding third-countries. In *Scheunemann*, for example, the Court found that business property situated in Canada can be valued for inheritance tax reasons at a higher level than property situated in Germany, as the primarily affected freedom was the freedom of establishment.[22] In *Commission v. Spain*, however, the restriction was found in the comparison between resident and non-resident heirs, donees and decedents, regardless of their place of residence, and between immovable property located in Spain or abroad, regardless of the location of the property abroad. As the cases discussed in this Opinion Statement were decided in the context of the free movement of capital (Art 63 TFEU and Art 40 EEA) they undoubtedly have an impact on situations in respect of third countries (other than EEA countries).

---

[16] For instance, in cases where the difference in treatment is linked with the residence of the deceased. In those cases the Spanish rule implementing the ECJ's decision established that the applicable tax law to heirs resident in Spain inheriting from a non-resident deceased will be the one approved by the Autonomous Community that holds the highest value of the assets and rights of the estate located in Spain. However, when an heir resident in Spain inherits from a resident deceased, the applicable rule is the one approved by the Autonomous Community of residence of the deceased. If the highest valued assets and rights are located in an Autonomous Community that apply less favourable tax benefits than those of the Community of residence of the deceased, a discriminatory treatment (according to the ECJ decision) continues to arise.

[17] Case C-510/08, *Mattner*, [2010] ECR I-3553.

[18] Case C-181/12, *Welte*, EU:C:2013:662.

[19] See para. 27 of the Court's judgment in C‑211/13, *Commission v. Germany*.

[20] See also the Commission's press release "Taxation: Commission refers Germany to the Court of Justice for discriminatory inheritance tax provisions", IP/12/1018 (27 September 2012).

[21] See paras 56 and 84 of the Court's judgment in C-127/12, *Commission v. Spain*.

[22] Case C‑31/11, *Scheunemann*, EU:C:2012:481.

IV. The Statement

10. The Confédération Fiscale Européenne welcomes the outcome of the ECJ's decisions in these two cases on inheritance and gift taxes in light of the free movement of capital and expects the member states to adjust their domestic laws accordingly.
11. The Confédération Fiscale Européenne welcomes the initiatives of the Commission in the inheritance and gift taxes field and, since only few bilateral agreements in this area exist, it urges the Commission to propose Union measures and member states to at least adopt unilateral measures to eliminate double taxation in the field of inheritances and gifts.