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Opinion Statement ECJ-TF 1/2015 of the CFE on the Decisions of the European Court of Justice in *Commission v. Spain* (Case C-127/12) and *Commission v. Germany* (Case C-211/13) Concerning Inheritance Taxation

CFE ECJ Task Force[*]

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This is an Opinion Statement prepared by the CFE ECJ Task Force concerning two decisions given by the ECJ in September 2014 regarding the compatibility of inheritance taxation with the fundamental freedoms (*Commission v. Spain* (Case C-127/12) and *Commission v. Germany* (Case C-211/13)).

1. Issues and Preliminary Questions

The cases *Commission v. Spain* (C-127/12)[1] and *Commission v. Germany* (C-211/13)[2] have common features and, in both cases, the ECJ (second and third chambers) held that the two national measures at issue were contrary to the free movement of capital enshrined in article 63 of the Treaty on the Functioning of the European Union (TFEU) (2007)[3] and article 40 of the European Economic Area (EEA) Agreement (1993).[4] Both cases were decided without an Opinion from the designated Advocates General Kokott and Mengozzi, respectively.

With regard to Spanish legislation (Case C-127/12), the Commission addressed the succession and donation tax (*Impuesto sobre Sucesiones y Donaciones*). The Spanish tax is a national tax, but its management and collection was granted to Spain's 15 Autonomous Communities of general regime.[5] In addition, they are also entitled to introduce amendments (for example, exemptions, credits and rates) reducing or increasing tax liability. To date, most 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 a distinction leads, in practice, to a lower effective tax for residents in such Autonomous Communities in comparison to other EU residents and, in some instances, also for other Spaniards resident in other Autonomous Regions. This is because only national legislation applies in the situations laid down therein, that is, primarily in scenarios 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 that have adopted succession and donation tax legislation, the tax burden borne 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 articles 21 and 63 of the TFEU and articles 28 and 40 of the EEA Agreement.[6]

In respect of the German case (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 (EUR 20,000 up to EUR 500,000), particularly in respect of inheritances and gifts between spouses, between parents and children and between certain relatives, but that these tax-free allowances are applicable only if Germany exercises an unlimited right to tax, whereas only a low, flat-rate tax-free allowance (EUR 2,000) is applicable if the right to tax is limited. The Commission based its application on the criteria that the ECJ set out in *Mattner* (Case C-510/08)[7] and argued that those rules are incompatible with article 63 of the TFEU.[8]

2. The Decisions of the Court

In the case of *Commission v. Spain* the Court, in its decision of 3 September 2014, declared that:[9]

> […] 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.

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 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 or not all Autonomous Regions have exercised the powers conferred by national law. The ECJ considers that there is no justification for such a restriction on the free movement of capital. Following previous case law, the ECJ adopts a restrictive interpretation of article 65(1)(a) of the TFEU that allows for differences of tax treatment considering the place of residence or the place of investment, to those situations in which 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 on 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, although Spain has argued for the possibility to apply a different treatment to movements with third non-member countries, it has not proved how the lack of mutual assistance agreements could justify legislation such as that at issue in the present case.

In *Commission v. Germany* the Court, in its decision of 4 September 2014, declared that:[10]

> […] 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.

3. Comments

Inheritance and gift tax systems are not harmonized within the European Union. Moreover, it might be noted that not all Member States levy such taxes, and that their structures vary widely. Given the limited network of tax treaties in this area, this might lead to double or multiple taxation in cross-border situations,[11] as well as discriminatory treatment of cross-border situations. Such cases are increasingly arising; already in 2010 more than 12 million EU citizens were resident in a Member State different from their Member State of origin, and foreign ownership of immovable property has increased significantly in recent years.[12] It was the task of the Court to set limits to national discriminatory measures based on the fundamental freedoms.[13] Moreover, in late 2011, the EU Commission described various reasons for double taxation scenarios and discrimination in its Communication on Tackling cross-border inheritance tax obstacles within the EU[14] and made recommendations regarding relief from double taxation of inheritances.[15] 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 European Union.[16]

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 concretely evaluated the applicable Spanish legislation in *comparable* domestic situations, despite 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 *on the same level*, without considering it relevant that resident taxpayers are subject to unlimited tax liability and non-resident taxpayers are only subject to limited tax liability. It is 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 does not seem to fully equate the tax treatment of cross-border situations and domestic *comparable* situations in all related cross-border situations, which may lead to new disputes based on EU law.[17]

The Court's decision against Germany, however, did not come as a surprise, as the Court could confirm its decisions in *Mattner* (Case C-510/08) and *Welte* (Case C-181/12) 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, which amendment was passed on 7 December 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 European Union or the European Economic Area may opt for unlimited German inheritance or gift tax liability (section 2(3) of the Inheritance and Gift Tax Act).[18] The revision, however, did not meet the deadline set by the Commission in the current case so 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 regard to non-German assets.

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* (Case C-31/11), 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. 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 (article 63 of the TFEU and article 40 of the EEA Agreement) they undoubtedly have an impact on situations in respect of third countries (other than EEA countries).

4. The Statement

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.

The Confédération Fiscale Européenne also welcomes the initiatives of the Commission in the inheritance and gift tax field and, since few bilateral agreements exist in this area, 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.

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1. ES: ECJ, 3 Sept. 2014, Case C-127/12, *European Commission v. Kingdom of Spain,* ECJ Case Law IBFD.

2. DE: ECJ, 4 Sept. 2014, Case C-211/13, *European Commission v. Federal Republic of Germany*, ECJ Case Law IBFD.

3. Treaty on the Functioning of the European Union of 13 December 2007, OJ C115 (2008), EU Law IBFD.

4. Agreement on the European Economic Area of 17 March 1993, OJ L1 (1993), EU Law IBFD.

5. 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 regarding the determination of the tax debt that corresponds to each of them. A different system applies to the provinces of the Basque Country and Navarre.

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

7. DE: ECJ, 22 Apr. 2010, Case C-510/08, *Vera Mattner v. Finanzamt Velbert*, ECJ Case Law IBFD.

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

9. OJ C 395, p. 3 (2014).

10. *European Commission v. Federal Republic of Germany* (Case C-211/13), OJ C 395, p. 15 (2014).

11. In 2005, the CFE had already 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, available at http://www.cfe-eutax.org/sites/default/files/CFE_OS on possible double taxation.pdf.

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

13. *See*, from the Court's case law in this area, for example, NL: ECJ, 11 Dec. 2003, Case C-364/01, *The heirs of H. Barbier v. Inspecteur van de Belastingdienst Particulieren/Ondernemingen buitenland te Heerlen*, ECJ Case Law IBFD (consideration under Netherlands inheritance tax law of certain obligations in assessing the property's value in respect of resident taxpayers denied to non-resident taxpayers); NL: ECJ, 23 Feb. 2006, Case C-513/03, Heirs of M.E.A. van Hilten-van der Heijden v. Inspecteur van de Belastingdienst/Particulieren/Ondernemingen buitenland te Heerlen, ECJ Case Law IBFD (holding that

Netherlands inheritance tax on citizens for a period of ten years after leaving the Netherlands and taking residence in Switzerland is in line with EU law); DE: ECJ, 17 Jan. 2008, Case C-256/06, *Jäger*, ECJ Case Law IBFD (holding that it is not in line with EU law for Germany to impose different regulations on the valuation of domestic and foreign real estate); BE: ECJ, 11 Sept. 2008, Case C-11/07, *Hans Eckelkamp and Others v. Belgische Staat*, ECJ Case Law IBFD (holding that Belgian legislation denying a deduction for mortgage-related charges relating to immovable property from the value of that property in respect of a non-resident decedent while allowing the deduction to resident descendants is discriminatory); NL: ECJ, 11 Sept. 2008, Case C-43/07, *D. M. M. A. Arens-Sikken v. Staatssecretaris van Financiën*, ECJ Case Law IBFD (holding that it is not in line with EU law for the Netherlands not to allow a deduction for compensation payments to other heirs as an estate debt if such a deduction is disallowed only for non-residents); DE: ECJ, 12 Feb. 2009, Case C-67/08, *Margarete Block v. Finanzamt Kaufbeuren*, ECJ Case Law IBFD (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); *Mattner* (C-510/08) (holding that it is not in line with EU law for Germany to grant a lower tax-free amount for non-residents than for residents); DE: ECJ, 19 July 2012, Case C-31/11, *Marianne Scheunemann v. Finanzamt Bremerhaven*, ECJ Case Law IBFD (holding that German legislation violates the 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); DE: ECJ, 17 Oct. 2013, Case C-181/12, *Yvon Welte v. Finanzamt Velbert*, ECJ Case Law IBFD (holding that the German inheritance tax violates the free movement of capital when denying an allowance against the taxable value of immovable property acquired through inheritance when both the deceased and the heir are resident in a third country, but allowing it when at least one of them is resident in Germany).

14. COM(2011)864 final.

15. Commission Recommendation of 15 December 2011 regarding relief for double taxation of inheritances, 2011/856/EU, OJ 6/81 (2011).

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

17. For instance, in cases where the difference in treatment is linked to the residence of the deceased. In those cases, the Spanish rule implementing the ECJ's decision established that the tax law applicable 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. When an heir resident in Spain inherits from a resident deceased, however, 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.

18. DE: Inheritance and Gift Tax Act (*Erbschaftsteuergesetz* – ErbStG).

19. *See Commission v. Germany* (C-211/13), at para. 27.

20. *See also* European Commission Press Release, *Taxation: Commission refers Germany to the Court of Justice for discriminatory inheritance tax provisions*, IP/12/1018 (27 Sept. 2012).

21. *See Commission v. Spain* (C-127/12), paras. 56 and 84.
