Reports of Cases

OPINION OF ADVOCATE GENERAL
KOKOTT
delivered on 2 October 2014[1]

Case C-133/13

Staatssecretaris van Economische Zaken
Staatssecretaris van Financiën
v
Q

(Request for a preliminary ruling from the Raad van State (Kingdom of the Netherlands))

(Tax law — Free movement of capital (Article 63(1) TFEU) — National gift tax — Tax benefits for 'estates' situated on national territory — Conservation of national natural and cultural heritage — Effectiveness of fiscal supervision — Cross-border mutual assistance in tax matters — Scope of Directives 2010/24/EU and 2011/16/EU — Concept of 'administrative enquiries' pursuant to the second subparagraph of Article 5(1) of Directive 2010/24/EU and Article 3(7) of Directive 2011/16/EU — Limits of the obligation to carry out enquiries)

I – **Introduction**

1. Where the Member States tax a transfer of assets in the form of an inheritance or gift, the burden can be so high that the recipient has to sell part of the assets in order to be able to pay the tax due. However, in the case of certain assets, the Member States step back from those consequences and grant benefits in order to conserve the transferred assets as a whole.

2. This is the case here, where the Kingdom of the Netherlands wishes to preserve the integrity of certain immovable properties even after their transfer, which is subject to tax. If an immovable property constitutes 'natural heritage', the tax can be halved or even waived entirely, provided that the new owner preserves the heritage in the long term. However, the Kingdom of the Netherlands is interested in its own natural heritage only. If a Netherlands national transfers a foreign immovable property which is subject to gift tax, no tax advantage is granted to him.

3. The Court must now clarify whether a scheme of that kind is compatible with the fundamental freedoms. In so doing, it is not only the permissibility of a tax incentive that is limited to national objectives that must be investigated. To that extent there are certain similarities with pending Case C-87/13, on which I recently delivered my Opinion.[2] In addition, the present case raises questions regarding the limits of the administrative cooperation between the Member States if foreign immovable properties are also to benefit, since, for the purposes of the tax benefit, the conservation of natural heritage at an immovable property must be monitored over a long period.

1 — Original language: German.

2 — See my Opinion in *X* (C-87/13, EU:C:2014:2164).

II – **Legal context**

A – *EU law*

4. Article 2(1) of Council Directive 2010/24/EU of 16 March 2010 concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures [3] ('Recovery Directive 2010/24') defines the scope of the directive as follows:

'This Directive shall apply to claims relating to the following:

a) all taxes and duties of any kind levied by … a Member State …;

…'

5. Article 5(1) of Recovery Directive 2010/24 offers the possibility of a 'request for information':

'At the request of the applicant authority, the requested authority shall provide any information which is foreseeably relevant to the applicant authority in the recovery of its claims as referred to in Article 2.

For the purpose of providing that information, the requested authority shall arrange for the carrying-out of any administrative enquiries necessary to obtain it.'

6. Alongside Recovery Directive 2010/24, there is also, in the field of cross-border mutual assistance in tax matters, Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC [4] ('Cooperation Directive 2011/16'). Article 1(1) thereof defines its 'subject matter':

'This Directive lays down the rules and procedures under which the Member States shall cooperate with each other with a view to exchanging information that is foreseeably relevant to the administration and enforcement of the domestic laws of the Member States concerning the taxes referred to in Article 2.'

7. The 'scope' of Cooperation Directive 2011/16 is set out in Article 2 thereof:

'(1) This Directive shall apply to all taxes of any kind levied by, or on behalf of, a Member State …

(2) Notwithstanding paragraph 1, this Directive shall not apply to value added tax and customs duties, or to excise duties covered by other Union legislation on administrative cooperation between Member States. This Directive shall also not apply to compulsory social security contributions …

…'

8. A possible form of cross-border mutual assistance is provided for in Article 5 of Cooperation Directive 2011/16:

'At the request of the requesting authority, the requested authority shall communicate to the requesting authority any information referred to in Article 1(1) that it has in its possession or that it obtains as a result of administrative enquiries.'

3 — OJ 2010 L 84, p. 1.
4 — OJ 2011 L 64, p. 1.

9. Article 3(7) of Cooperation Directive 2011/16 defines 'administrative enquiry' for the purposes of that directive as 'all controls, checks and other action taken by Member States in the performance of their duties with a view to ensuring the proper application of tax legislation'.

B – *National law*

10. In the Netherlands, pursuant to Article 1(1)(2) of the Successiewet 1956 (Law on succession), gift tax is to be levied 'on the value of what is obtained as a gift from someone who at the time of donation resided in the Netherlands'.

11. The first sentence of Article 7(1) of the Natuurschoonwet 1928 (Law on nature protection) provides for the following tax advantage:

'If an immovable property which is deemed to be an estate forms part of an acquisition within the meaning of the Successiewet 1956 … no recovery shall take place of the difference between the assessed gift tax or inheritance tax which is payable and the tax which would be payable if the immovable property were to be valued at half the market value which would have to be assigned to it at the time of its acquisition if it were encumbered with the burden of having to be maintained as such for a period of 25 years without the felling of any tall trees except as is necessary or customary according to the rules of normal forest management.'

12. In accordance with the second sentence of that provision, the economic value for the purposes of the first sentence is to be reduced to nil if the estate is accessible to the public. As a result, no gift tax is levied.

13. Article 1(1)(a) of the Natuurschoonwet 1928 defines an 'estate' as: 'an immovable property situated in the Netherlands, wholly or partly covered by areas of nature, forests or other woodland — including those on which there is a country residence or other buildings appropriate to the character of the estate — in so far as the survival of that immovable property in its distinctive form is desirable for the conservation of the natural heritage'.

14. Pursuant to Article 1(2) of the Natuurschoonwet 1928, an administrative regulation is to define in greater detail the conditions under which an immovable property is to be regarded as an estate. In accordance with Article 2(1) of that administrative regulation (Rangschikkingsbesluit Natuurschoonwet 1928), four conditions must be satisfied. The immovable property must cover at least 5 hectares; the land and water areas of the immovable property must form a contiguous area; at least 30% of the surface area of the immovable property must be covered by woodland or other areas of nature; the use of the immovable property is not to adversely affect the natural heritage. Article 1(1) of the administrative regulation defines in detail inter alia the woodland and other areas of nature which are worthy of protection.

15. Pursuant to Article 2 of the Natuurschoonwet 1928, an owner may apply to the Ministers responsible for a declaration that his immovable property constitutes an estate within the meaning of that law.

III – **Dispute in the main proceedings**

16. The dispute in the main proceedings concerns an application by Ms Q for an immovable property which she owns and which is situated in England to be recognised as an 'estate' within the meaning of the Natuurschoonwet 1928. The reason behind the application is her intention to give the immovable property to her son, who resides in the United Kingdom. Since Q, however, resides in the Netherlands, that gift would be subject to Netherlands gift tax.

17. The Netherlands administration refused the application on the sole ground that the immovable property is not situated in the Netherlands, as required by Article 1(1)(a) of the Natuurschoonwet 1928. Q brought an action against that decision.

IV – **Procedure before the Court of Justice**

18. On 13 March 2013, the Raad van State (Council of State), before which the dispute is now pending, referred the following questions to the Court pursuant to Article 267 TFEU:

1. Does the importance of the conservation of national natural heritage and cultural and historical heritage, as addressed in the Natuurschoonwet 1928, constitute an overriding reason in the public interest which justifies a scheme whereby the application of an exemption from gift tax (tax benefit) is limited to estates situated in the Netherlands?

2a. May the authorities of a Member State, in the context of an investigation into whether an immovable property situated in another Member State may be designated as an estate for the purposes of the Natuurschoonwet 1928, rely on [Recovery Directive 2010/24] for assistance from the authorities of the Member State in which the immovable property is situated, when the designation as an estate pursuant to that law will result in an exemption being granted from the recovery of the gift tax which will be payable upon donation of that immovable property?

2b. If question 2(a) must be answered in the affirmative, must the concept of 'administrative enquiry' in Article 3(7) of [Cooperation Directive 2011/16] be interpreted as meaning that it also covers an on-site investigation?

2c. If question 2(b) must be answered in the affirmative, may clarification of the term 'administrative enquiries' in Article 5(1) of [Recovery Directive 2010/24] be sought in the definition of the term 'administrative enquiry' in Article 3(7) of [Cooperation Directive 2011/16]?

3. If question 2(a), question 2(b) or question 2(c) must be answered in the negative, should the principle of sincere cooperation, as laid down in Article 4(3) TEU, considered in conjunction with Article 167(2) TFEU, be interpreted as meaning that, when a Member State requests another Member State to provide assistance with the investigation of whether an immovable property situated in that other Member State may be designated as an estate for the purposes of a law which has as its aim the conservation and protection of national natural heritage and cultural and historical heritage, the requested Member State is obliged to provide that assistance?

4. Can a restriction on the free movement of capital be justified by invoking the need to guarantee effective fiscal controls, if it appears that the only risk to effectiveness of those controls is the need for national authorities to travel to another Member State for the period of 25 years referred to in Article 7(1) of the Natuurschoonwet 1928 in order to carry out the necessary controls there?

19. The present case was initially joined with Case C-87/13 for the purposes of the procedure and judgment. Written observations on the joined cases were submitted in July 2013 by Q, X (a party to the main proceedings in Case C-87/13), the Federal Republic of Germany, the Kingdom of Spain, the French Republic, the Italian Republic, the Kingdom of the Netherlands, the United Kingdom of Great Britain and Northern Ireland and the European Commission. The cases were subsequently disjoined.

20. Q, the Federal Republic of Germany, the Kingdom of Spain, the Kingdom of the Netherlands and the Commission participated in the hearing on 21 May 2014.

V – **Legal assessment**

21. By its questions, the referring court seeks, in essence, to ascertain whether a tax incentive scheme such as that in the present case is compatible with the free movement of capital under Article 63(1) TFEU. The referring court's questions regarding the interpretation of the directives on cooperation between Member States' tax authorities can also be clarified in the context of the investigation of an infringement of that fundamental freedom.

A – *Restriction*

22. A tax advantage in connection with gift tax, as in the present case, restricts the free movement of capital under Article 63(1) TFEU.

23. First, the tax treatment of gifts comes under the Treaty provisions on the movement of capital, provided that one of their constituent elements is not confined within a single Member State.[5] This is the case here, since the immovable property that is to be given as a gift is situated not in the Netherlands but in another Member State.

24. Secondly, a restriction on the movement of capital must be assumed if the gift of a foreign immovable property results in higher taxation than the gift of an immovable property situated on national territory. The Court has taken this view in the case of transfer through inheritance,[6] and that case-law can be applied to a gift *inter vivos*.[7] In the present case, Q's immovable property has been refused recognition as an 'estate' and, therefore, a tax advantage in respect of gift tax, on the sole ground that it is not situated in the Netherlands.

25. In accordance with settled case-law — despite the exemption for national tax law under Article 65(1)(a) TFEU — such a restriction is compatible with the free movement of capital only if the difference in treatment concerns situations which are not objectively comparable (see B below), or is justifiable by overriding reasons in the public interest[8] (see C below).

B – *Objective comparability of situations*

26. First of all, the question therefore arises as to whether the situation of a taxable person who gives as a gift an 'estate' situated in the Netherlands in a transaction that is subject to gift tax, and the situation of a taxable person who gives as a gift an immovable property situated in another Member State, but which otherwise satisfies the conditions of an 'estate', in a transaction that is subject to gift tax, are objectively comparable with each other.

27. In accordance with settled case-law, the objective comparability of situations must be examined having regard to the aim pursued by the provisions at issue.[9] According to the information given by the referring court, the objective of the tax incentive scheme at issue here is to conserve national natural heritage and cultural and historical heritage in the Netherlands.

5 — Judgment in *Mattner* (C-510/08, EU:C:2010:216, paragraph 20).

6 — See judgment in *Jäger* (C-256/06, EU:C:2008:20, paragraph 35).

7 — See, to this effect, judgment in *Mattner* (EU:C:2010:216, paragraphs 25 and 26).

8 — See, in particular, judgment in *Welte* (C-181/12, EU:C:2013:662, paragraph 44 and the case-law cited).

9 — See, in particular, judgments in *X Holding* (C-337/08, EU:C:2010:89, paragraph 22) and *SCA Group Holding and Others* (C-39/13, C-40/13 and C-41/13, EU:C:2014:1758, paragraph 28).

28. However, it does not follow from that objective, which is limited to a national aim, that the situations to be considered in the present case cannot be objectively comparable. For, as I have already stated in greater detail elsewhere, the aim of national rules granting a tax incentive cannot be defined purely domestically for the purpose of examining objective comparability. [10]

29. Therefore, the situations mentioned are objectively comparable if the immovable property situated in another Member State satisfies the conditions of the Netherlands legislation for recognition as natural heritage and cultural and historical heritage, except for that of being situated on national territory. This is the case here, since Q was refused recognition on the sole ground that her immovable property is not situated on national territory.

C – *Justification*

30. It remains to be examined whether a tax incentive scheme such as the one in the Netherlands is justified by an overriding reason in the public interest.

1. Conservation of national natural and cultural heritage

31. In the proceedings it was submitted that the conservation of national natural and cultural heritage constitutes such a justification.

32. First of all, there is no doubt that the Kingdom of the Netherlands may promote its natural and cultural heritage. That objective would also be achieved, however, if the tax advantage were extended to foreign immovable properties. The Kingdom of the Netherlands could not successfully oppose that extension of the tax advantage on the ground that it would lead to lower tax revenues. In accordance with settled case-law, the need to prevent the reduction of tax revenues is not an overriding reason in the public interest capable of justifying a restriction on a freedom instituted by the Treaty. [11]

33. The Netherlands scheme can therefore be justified only if, in a case such as the present, the Member States are able to *limit* the granting of tax advantages to immovable properties situated on national territory.

– Limits of the definition of the objective of an incentive

34. Case-law has not yet clarified the issue of the conditions under which the Member States may, in the context of a tax incentive, set an objective for an incentive that is limited to the national territory.

35. A number of judgments on Member State tax schemes have already been delivered which have provided for tax incentives to be limited to domestic activities or domestic subject-matters. In the majority of those cases, the objective *behind* the scheme was not, however, limited to the national territory. In such cases, the Court did not allow a domestic limitation on the tax incentive on the sole ground that the objective pursued by that incentive would have been achieved just as well with foreign assistance. Accordingly, in the judgment in *Petersen*, it was not clear to the Court why German development policy may be promoted only by domestic undertakings. [12] In the judgment concerning German subsidies for owner-occupied dwellings, the Court considered that the objective of satisfying

10 — See my Opinion in *X* (C-87/13, EU:C:2014:2164, point 31).

11 — Judgment in *Commission* v *Austria* (C-10/10, EU:C:2011:399, paragraph 40 and the case-law cited).

12 — Judgment in *Petersen* (C-544/11, EU:C:2013:124, paragraph 61).

demand for housing is just as easily attained if the purchase of foreign owner-occupied dwellings is also subsidised. [13] In the judgment in *Persche*, the Court held that a Member State cannot exclude the deduction of gifts to foreign bodies if those bodies pursue objectives identical to those pursued by national bodies. [14]

36. In the present case, the objective of the tax incentive is the conservation of national natural and cultural heritage. A tax advantage for foreign immovable properties would not serve that objective because it would promote the cultural and natural heritage of another Member State. Therefore, in the present case, the Court must decide whether the objective behind the tax advantage, which is clearly limited to the national territory, constitutes a valid justification.

37. In this regard, case-law has confirmed on many occasions that the Member States essentially may themselves determine which interests of the general public they wish to promote using taxes. [15]

38. In addition, the Court has acknowledged in principle that a support measure in a Member State may have a national objective, provided that the field supported is not harmonised under EU law. [16] In accordance with settled case-law, the wish of a Member State to establish a connection between the society of the Member State concerned and the recipient of a benefit may also constitute an objective consideration of public interest. [17] Therefore it is also recognised that extending the circle of recipients may result in an unreasonable burden for the granting Member State and thus may have consequences for the overall level of support. [18] The same must apply if the subject-matter of the incentive is not a certain person with a connection to the society of the Member State, but an object which is part of that society, such as the national natural and cultural heritage in the present case. Moreover, there is no relevant difference whether a Member State pays an incentive directly or whether, as in the present case, it grants it in the form of a tax advantage, thus forgoing tax revenue.

39. Nevertheless, the Member States cannot be entirely free under EU law to determine the aim of the incentive, as I have already pointed out in the context of Case C-87/13. [19] This is because an objective could also be defined in terms that are clearly protectionist, for example if a tax incentive is intended to benefit only nationals and therefore significantly damage the internal market.

40. Against this background, it is necessary to make a distinction between the national objectives of an incentive which are permissible under EU law and those which are not. In *Tankreederei I* the Court has made a start in this respect by making a distinction as to whether the incentive is connected with a 'social objective'. [20] In *Laboratoires Fournier* the Court also considered that an objective of an incentive which was defined as being purely national was not allowed because it was directly contrary to the objective of the relevant Community policy set out in the Treaty. [21]

41. Therefore, I consider that in each individual case a balance must be found between the nationally-orientated objective pursued by the Member State through a tax incentive scheme, and the effects on the objectives of the European Union which are enshrined in the Treaties, in particular the fundamental freedom that is restricted. This applies in any event if the objective pursued by the Member State is, at least in general terms, also among the objectives of the European Union. Provided

13 — See judgment in *Commission* v *Germany* (C-152/05, EU:C:2008:17, paragraph 28).

14 — See judgment in *Persche* (C-318/07, EU:C:2009:33, paragraphs 47 to 49 and the case-law cited).

15 — See judgments in *Centro di Musicologia Walter Stauffer* (C-386/04, EU:C:2006:568, paragraph 39); *Persche* (EU:C:2009:33, paragraph 48); and *Tankreederei I* (C-287/10, EU:C:2010:827, paragraph 30).

16 — See, to this effect, judgment in *Ålands Vindkraft* (C-573/12, EU:C:2014:2037, paragraph 94).

17 — See, inter alia, judgments in *Tas-Hagen and Tas* (C-192/05, EU:C:2006:676, paragraph 34); *Gottwald* (C-103/08, EU:C:2009:597, paragraph 32); and *Thiele Meneses* (C-220/12, EU:C:2013:683, paragraph 34 and the case-law cited).

18 — See judgment in *Thiele Meneses* (EU:C:2013:683, paragraph 35 and the case-law cited).

19 — See my Opinion in *X* (EU:C:2014:2164, point 43).

20 — See judgment in *Tankreederei I* (EU:C:2010:827, paragraphs 30 to 33).

21 — See judgment in *Laboratoires Fournier* (C-39/04, EU:C:2005:161, paragraph 23).

that this does not affect the fundamental freedom in a disproportionate manner, the Member State is therefore allowed to use the resources available to it to promote an objective that has a link to its society, from which the resources used for that incentive are also derived. Moreover, this counters the risk of a Member State failing to use its resources to promote an EU objective solely because EU law allows it to offer that incentive throughout the European Union only.

– Significance of the objective of the incentive

42. Such a weighing up generally has a clear outcome if the objective pursued by the Member State is precisely respected by the Treaties in its national limitation, as is the case with regard to the conservation of national cultural heritage. In the context of Case C-87/13, I have therefore already stated that the conservation of national cultural heritage is an overriding reason in the public interest capable of justifying a restriction on freedom of establishment.[22] I see no reason to take a different view with regard to the scope of the free movement of capital which is restricted in the present case. In so far as the tax advantage at issue in the present case has the objective of conserving the national cultural heritage, it is therefore justified.

43. The same applies to the conservation of natural heritage where it only complements a building as part of the cultural heritage or where the natural heritage has a building-like structure. This is the case if buildings which belong to the national cultural heritage form a whole with the surrounding nature, or if nature has been configured in some way — for example a baroque garden — and must be considered akin to a building.

44. The question arises, however, as to whether in addition the conservation of national natural heritage can serve as justification for a restriction on the free movement of capital. This concerns cases in which the principal subject-matter of the protection provided for in Article 1(1)(a) of the Natuurschoonwet 1928, namely the 'immovable property …, wholly or partly covered by areas of nature, forests or other woodland' is granted a tax advantage without that immovable property also housing any national cultural heritage. Unlike cultural heritage, there are no indications in the Treaty that the natural heritage should also receive special protection at national level.

45. However, various parties to the proceedings have rightly referred to the settled case-law of the Court which generally recognises the protection of the environment as justification.[23] Although that case-law has focused to date on the protection of the environment against pollution or the careful use of natural resources, the first indent of Article 191(1) TFEU provides in very general terms for the EU objective of preserving and protecting the environment. This also includes the protection of the natural heritage,[24] and the conservation of existing contiguous areas of nature contributes towards this. The tax advantage at issue in the present case promotes the continued integrity of certain nature areas by reducing the tax burden on a transfer through inheritance or as a gift under conditions which serve the protection of nature; as a result, it also makes sales of part, which could endanger the continued existence of a nature area, less likely.

46. With regard to the conservation of the natural heritage, the contested scheme therefore also pursues an objective which is, if only in general terms, one of the objectives of the Treaties.

22 — See my Opinion in *X* (EU:C:2014:2164, points 35 to 46).

23 — See judgments in *ADBHU* (240/83, EU:C:1985:59, paragraph 13); *Commission* v *Denmark* (302/86, EU:C:1988:421, paragraph 9); *Commission* v *Belgium* (C-2/90, EU:C:1992:310, paragraph 32); *Commission* v *Germany* (C-463/01, EU:C:2004:797, paragraph 75); *Commission* v *Austria* (C-320/03, EU:C:2005:684, paragraph 70); *Commission* v *Austria* (C-524/07, EU:C:2008:717, paragraph 57); and *Mickelsson and Roos* (C-142/05, EU:C:2009:336, paragraph 32).

24 — See the fourth recital in the preamble to Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ 1992 L 206, p. 7), and judgment in *Commission* v *United Kingdom* (C-6/04, EU:C:2005:626, paragraph 25).

– Extent of the effect on the internal market

47. Whether or not a Member State is entitled to pursue an objective which is promoted only in general terms in the Treaties — such as the conservation of the natural heritage in the present case — also in a purely national objective depends in particular on the extent of the effect on the internal market, in this case the free movement of capital. However, in the present case, that effect does not seem to me to be sufficient to prohibit the Member State from limiting its tax incentive to the national natural heritage.

48. First of all, Article 65(1)(a) TFEU provides that taxpayers who are not in the same situation with regard to the place where their capital is invested may in principle also be subject to different treatment. Even though that exception is qualified strongly by Article 65(3) TFEU and in particular by case-law,[25] it can nevertheless be inferred from it that the free movement of capital must be attributed less weight than other fundamental freedoms when weighed against an objective pursued by an incentive in a Member State.

49. Next, the subject-matter of the tax advantage at issue in the present case is an immovable property. The tax incentive is intended to influence the state of that property. However, an immovable property situated abroad falls, in principle, within the competence of the Member State in whose territory it is located. If, in the present case, the Netherlands tax advantage were extended to an English immovable property, there could be a conflict with the objectives of nature protection policy in the United Kingdom. A tax advantage provided under certain conditions may have effects similar to obligations and prohibitions stipulated by a Member State. However, the Kingdom of the Netherlands does not have such powers with regard to an immovable property situated in the United Kingdom.

50. Here, the Commission has objected by analogy that the Kingdom of the Netherlands is already moving outside its territorial jurisdiction by taxing the transfer of a foreign immovable property and therefore should also grant the tax advantage regardless of territorial jurisdiction. I, however, do not agree with that view. When taxing the transfer of assets of a national, a Member State only assesses the financial capacity of that person to contribute to the society in which he lives, and therefore does not overstep its territorial jurisdiction if the financial capacity of the national also includes foreign land.

51. Finally, I consider that the effects on the free movement of capital are very limited in the present case. The internal market will be affected as a result since, by offering incentives for immovable properties on national territory only, foreign immovable properties will become less attractive as capital investments to nationals. First, however, that incentive concerns only a relatively small number of immovable properties which satisfy the conditions of an ‘estate’. Secondly, among the many considerations taken into account by a capital investor when investing in an immovable property, the amount of any gift tax that may be payable should generally play only a minor role.

– Conclusion

52. Therefore, in conclusion, the restriction on the free movement of capital at issue in the present case, arising from the tax advantage in connection with gift tax, is justified by the scheme’s objectives of conserving the national natural and cultural heritage.

25 — See, in particular, judgment in *Commission* v *Germany* (C-211/13, EU:C:2014:2148, paragraphs 45 to 47 and the case-law cited).

2. Effectiveness of fiscal supervision

53. In addition, I shall examine whether the requirements of fiscal supervision may also justify the restriction at issue in the present case. The fourth question referred in particular focuses on this point. However, questions 2a, 2b, 2c and the third question referred, which concern the possibility of cross-border mutual assistance, are also raised in that context. The question behind all of this is whether the administrative supervision of compliance with the conditions of the tax advantage at issue in the present case would be sufficiently guaranteed in respect of a foreign immovable property.

54. In accordance with settled case-law, the fundamental freedoms may be restricted for reasons of the 'effectiveness of fiscal supervision'.[26] A Member State must in principle be able to establish correctly the tax liability of a taxable person.[27] In the case of facts that have to be determined in another Member State, this can be problematic.

55. Again in accordance with settled case-law, that justification cannot be accepted, however, if, either by means of mutual assistance through other Member States[28] or by means of information and supporting documents from the taxable person,[29] a Member State is able to carry out the necessary controls abroad. In that regard it is also reasonable for a Member State to expect it to be more difficult to carry out the controls abroad than on national territory.[30] Only if the information sources mentioned are inadequate for the supervision of matters abroad can a Member State rely on the justification of the 'effectiveness of fiscal supervision'.[31]

56. According to the referring court, the administrative decision as to whether an immovable property satisfies the conditions of an 'estate' within the meaning of Article 1(1)(a) of the Natuurschoonwet 1928 requires on-site investigations. The same is said to apply to the subsequent monitoring of whether the immovable property continues to satisfy the conditions of the tax advantage over a period of 25 years.

57. For that reason, self-certification by taxable persons as a means of fiscal supervision is precluded in the present case. The question arises, however, as to whether the necessary controls at the place where the immovable property is situated may be carried out by the authorities of other Member States by means of mutual assistance.

a) The applicable directive

58. In the light of the foregoing, by question 2a, the referring court first of all wishes to ascertain whether the Netherlands authorities may obtain mutual assistance under Recovery Directive 2010/24 from the authorities of the Member State in which the immovable property is situated.

26 — See, in particular, judgments in *Rewe 'Cassis de Dijon'* (120/78, EU:C:1979:42, paragraph 8); *A* (C-101/05, EU:C:2007:804, paragraph 55); and *Strojírny Prostějov and ACO Industries Tábor* (C-53/13 and C-80/13, EU:C:2014:2011, paragraph 55).

27 — See, to this effect, judgments in *Futura Participations and Singer* (C-250/95, EU:C:1997:239, paragraph 31); *Établissements Rimbaud* (C-72/09, EU:C:2010:645, paragraph 35); and *SIAT* (C-318/10, EU:C:2012:415, paragraph 44).

28 — See, to this effect, judgments in *Bachmann* (C-204/90, EU:C:1992:35, paragraph 18); *Centro di Musicologia Walter Stauffer* (EU:C:2006:568, paragraph 50); and *Commission* v *Belgium* (C-296/12, EU:C:2014:24, paragraph 43) with reference to Council Directive 77/799/EEC of 19 December 1977 concerning mutual assistance by the competent authorities of the Member States in the field of direct taxation (OJ 1977 L 336, p. 15).

29 — See, inter alia, judgments in *Bachmann* (EU:C:1992:35, paragraph 20); *Danner* (C-136/00, EU:C:2002:558, paragraph 50); *Persche* (EU:C:2009:33, paragraph 53); and *Emerging Markets Series of DFA Investment Trust Company* (C-190/12, EU:C:2014:249, paragraph 81).

30 — See, to this effect, judgments in *Centro di Musicologia Walter Stauffer* (EU:C:2006:568, paragraph 48) and *Commission* v *Belgium* (C-383/10, EU:C:2013:364, paragraph 53).

31 — See, to this effect, judgments in *Schmelz* (C-97/09, EU:C:2010:632, paragraph 67) and *Commission* v *Belgium* (EU:C:2013:364, paragraphs 55 to 60).

59. However, Recovery Directive 2010/24 does not offer any possibility of mutual assistance in respect of the decision at issue in the main proceedings as to whether an immovable property satisfies the conditions of an 'estate' within the meaning of Article 1(1)(a) of the Natuurschoonwet 1928, since it is evident from Article 2(1) thereof that it applies only to claims that already exist. In the present case, however, gift tax has not yet arisen.

60. Nevertheless, the Netherlands authorities may, in principle, rely on Cooperation Directive 2011/16 to that end.

61. According to Article 2(1) of that directive, it applies to all taxes. Gift tax is not among the taxes that are excluded from its scope in accordance with Article 2(2) of the directive.

62. I cannot share the view taken by the Federal Republic of Germany that Cooperation Directive 2011/16 nevertheless does not apply to administrative proceedings which precede taxation. The declaration at issue in the main proceedings as to whether an immovable property may be recognised as an estate within the meaning of the Natuurschoonwet 1928 is clearly a general administrative act which has various legal effects. According to the referring court, the declaration also has the consequence that a tax advantage in respect of gift tax is granted in the event of a gift. Pursuant to Article 1(1) of Cooperation Directive 2011/16, its scope is broad and includes all information that is 'foreseeably relevant' to the administration and enforcement of the domestic laws concerning taxes. If the binding declaration in accordance with national law can therefore affect the determination of a tax falling within the scope of Cooperation Directive 2011/16, information regarding that declaration is also foreseeably relevant to taxation.

63. However, recourse cannot be had to Cooperation Directive 2011/16 for the subsequent monitoring of compliance with the conditions for the tax advantage set out in the first sentence of Article 7(1) of the Natuurschoonwet 1928. The Kingdom of the Netherlands has rightly pointed out that Recovery Directive 2010/24 applies in that respect. In accordance with the Netherlands scheme, it is only a proportion of the full amount of tax determined that is not collected under certain conditions. In addition, as the Court has already indicated in its judgment in *National Grid Indus*, Recovery Directive 2010/24 forms the legal basis for mutual assistance with regard to taxes which have already been determined but the levying of which depends on further conditions. [32]

64. Consequently, in the present case, for the purposes of fiscal supervision, the Netherlands authorities may, in principle, have recourse to Cooperation Directive 2011/16 first of all, and then to Recovery Directive 2010/24.

b) The extent of the administrative enquiries by the requested Member State

65. By its questions 2b and 2c, the referring court also wishes to ascertain whether the authorities of the requested Member State are obliged to carry out the necessary on-site controls of the immovable property. Since both Cooperation Directive 2011/16 and then Recovery Directive 2010/24 would apply in the present case, the requested Member State's obligations resulting from those directives must be examined separately.

32 — See judgment in *National Grid Indus* (C-371/10, EU:C:2011:785, paragraph 78) in relation to Council Directive 2008/55/EC of 26 May 2008 on mutual assistance for the recovery of claims relating to certain levies, duties, taxes and other measures (OJ 2008 L 150, p. 28), which was replaced by Recovery Directive 2010/24.

i) Cooperation Directive 2011/16

66. Pursuant to Article 5 of Cooperation Directive 2011/16, the authorities of the requested Member State are to communicate the information that they have in their possession or 'that [they obtain] as a result of administrative enquiries'. The concept of administrative enquiries is defined in Article 3(7) of the directive. In accordance with that provision, administrative enquiry means 'all controls, checks and other action taken by Member States in the performance of their duties with a view to ensuring the proper application of tax legislation'.

67. That broad definition easily includes on-site controls. This is borne out by Article 6(1) of Cooperation Directive 2011/16, in accordance with which the requested authority is to carry out 'any … enquiries necessary to obtain the information …'. The Commission has also rightly referred to Article 11(1)(a) and (b) of the directive, from which it is apparent that administrative enquiries outside offices may be carried out in the whole territory of the requested Member State. This answers question 2b.

68. However, the Kingdom of the Netherlands has submitted that controls where the immovable property is situated should also be unannounced in order to be able to monitor the grant of public access in accordance with the second sentence of Article 7(1) of the Natuurschoonwet 1928. The United Kingdom takes the view in that regard that, in accordance with Article 17(2) and Article 6(3) of Cooperation Directive 2011/16, its authorities are not obliged to carry out unannounced controls. In accordance with United Kingdom procedural law, controls at the place where an immovable property is situated require prior notice to the owner of the immovable property.

69. Under Article 17(2) of Cooperation Directive 2011/16, the requested Member State is not obliged 'to carry out enquiries …, if it would be contrary to its legislation to conduct such enquiries … for its own purposes'. In addition, Article 6(3) of Cooperation Directive 2011/16 provides that the requested authority is to conduct the enquiry requested 'follow[ing] the same procedures as it would when acting on its own initiative …'.

70. The Court has already held with regard to the predecessor provision to Article 17(2) of Cooperation Directive 2011/16 that, as a derogating provision, it must be narrowly construed and, by virtue of the principle of sincere cooperation (now Article 4(3) TEU), the Member States are required truly to engage in the exchange of information provided for under the directive.[33] That case-law applies to the present case in two respects. First, on that basis, I agree with the submissions of the Federal Republic of Germany and the United Kingdom that the principle of sincere cooperation is specifically laid down in the present directives on cross-border mutual assistance and must be observed for the purposes of applying them, but does not itself establish mutual assistance obligations contrary to those provisions. This answers the third question referred.

71. Secondly, interpreting Article 17(2) of Cooperation Directive 2011/16 narrowly, I do not at present see any justification for the United Kingdom to refuse to monitor public access to an immovable property without prior notice. The information concerned is publicly available, and obtaining it does not require the exercise of sovereignty. On the contrary, the procedural rules invoked by the United Kingdom in these proceedings seem to concern the monitoring of immovable properties which are not accessible to the public.

33 — Judgment in *Établissements Rimbaud* (EU:C:2010:645, paragraph. 48), with regard to Article 8 of Council Directive 77/799/EEC of 19 December 1977 concerning mutual assistance by the competent authorities of the Member States in the field of direct taxation (OJ 1977 L 336, p. 15).

72. However, with regard to providing mutual assistance, should it transpire that, by reason of a corresponding prohibition in their procedural law, the United Kingdom authorities are in fact prevented from monitoring public access to an immovable property without prior notice, the Netherlands authorities could still carry out the necessary controls of public access to the immovable property sufficiently on the basis of pre-announced on-site checks and additional evidence, such as witness statements, for example.

ii) Recovery Directive 2010/24

73. In so far as ongoing controls of the immovable property over a period of 25 years are necessary following recognition of an immovable property as an 'estate' and the setting of gift tax, the Netherlands authorities may rely on requests for information under Article 5 of Recovery Directive 2010/24.

74. The 'administrative enquiries' that the requested authority carries out in accordance with the second subparagraph of Article 5(1) of Recovery Directive 2010/24 in order to obtain information also include investigations on site, for the directive does not restrict these to certain investigation measures only. Moreover, pursuant to the second subparagraph of Article 5(1), these should be any enquiries 'necessary' for the purpose of providing the information. Furthermore, it is clear from Article 7(1)(a) and (b) of Recovery Directive 2010/24 that enquiries may take place both within and outside the offices in the whole of the territory of the requested Member State. This also answers question 2c.

75. With regard to Article 5(2)(a) of Recovery Directive 2010/24, which precludes an obligation on the part of the requested authority to provide information 'which it would not be able to obtain for the purpose of recovering similar claims arising in the requested Member State', no objection arising out of national procedural law was raised by the United Kingdom in the present case. Moreover, my comments above with regard to the limits of the obligation to carry out enquiries under Cooperation Directive 2011/16 also apply. [34]

76. Finally, I cannot concur with the view taken by the Federal Republic of Germany that the ongoing controls by the requested Member State necessary for the tax advantage at issue in the present case are unreasonable on account of the expenditure associated with them. There may be exceptional cases in which the provision of information is disproportionate for the requested Member State. However, in principle, even extensive investigations are reasonable, because cooperation between Member States' tax administrations is on a reciprocal basis. In addition, unlike Article 54(1)(a) of Council Regulation (EC) No 904/2010 of 7 October 2010 on administrative cooperation and combating fraud in the field of value added tax, [35] Recovery Directive 2010/24 does not provide for a general restriction on the obligation to provide mutual assistance in the event of a disproportionate administrative burden. However, in the light of the principle of sincere cooperation pursuant to Article 4(3) TEU, the requesting Member State must not demand more frequent or intensive controls by the requested Member State than it would carry out itself.

34 — See points 70 to 72 above.

35 — OJ 2010 L 268, p. 1.

c) Conclusion

77. The restriction on the free movement of capital in the present case is therefore not justified by the need for effective fiscal supervision because, with the assistance of requests for information pursuant to Article 5 of Cooperation Directive 2011/16 or Article 5 of Recovery Directive 2010/24, the Netherlands authorities are able to carry out the necessary controls. The fourth question referred, which concerns the carrying out by the Netherlands authorities of their own controls abroad, therefore does not need to be answered.

3. Safeguarding of fiscal cohesion

78. Finally, the justification of safeguarding fiscal cohesion must also be examined; this was invoked by some interested parties in view of the fact that the tax advantage is intended to compensate for the burdens on the owner arising from the conservation obligation and the limitations on the use of an immovable property situated in the Netherlands.

79. In accordance with settled case-law, the need to maintain the coherence of a tax system can justify a restriction on a fundamental freedom. In that regard a direct link must be established between the tax advantage and the offsetting of that advantage by a particular tax levy.[36] The direct nature of that link must be examined in the light of the objective pursued by the tax scheme in question.[37]

80. Irrespective of the question as to whether that justification may also take account of burdens outside tax legislation, on the basis of the information provided by the referring court I am unable to see why the recognition of an immovable property situated in another Member State as an 'estate' should not also be linked to conservation obligations and restrictions on use in order to benefit from the tax advantage at issue in the present case. Moreover, the referring court has stated that the purpose of the tax advantage is to conserve the national natural and cultural heritage and not to compensate for burdens on the owner which do not have a direct link with the conditions of the tax advantage.

81. Accordingly, the restriction on the free movement of capital at issue in the present case cannot be justified by the safeguarding of fiscal cohesion.

D – *Conclusion*

82. In conclusion, it must be stated however that the Netherlands tax advantage for 'estates' on national territory, in connection with gift tax, does restrict the free movement of capital, but that restriction is justified on the grounds of the conservation of the national natural and cultural heritage.

VI – **Conclusion**

83. In view of the foregoing, I propose that the Court answer the questions referred to it by the Raad van State as follows:

1. A national scheme, such as that at issue in the present case, which limits the application of an exemption from gift tax to estates situated on national territory, is not contrary to the free movement of capital pursuant to Article 63(1) TFEU if it has the objective of conserving the national natural and cultural heritage.

36 — See, in particular, judgments in *Manninen* (C-319/02, EU:C:2004:484, paragraph 42); *Papillon* (C-418/07, EU:C:2008:659, paragraphs 43 and 44); *DI VI Finanziaria SAPA di Diego della Valle* (C-380/11, EU:C:2012:552, paragraph 46); and *Welte* (EU:C:2013:662, paragraph 59).

37 — See, in particular, judgments in *Papillon* (EU:C:2008:659, paragraph 43) and *Argenta Spaarbank* (C-350/11, EU:C:2013:447, paragraph 42).

2. ‘Administrative enquiries’ in accordance with Article 3(7) of Directive 2011/16/EU and within the meaning of the second subparagraph of Article 5(1) of Directive 2010/24/EU include controls at the place where an immovable property is situated.