JUDGMENT OF THE COURT (Seventh Chamber)

26 May 2016 (*)

(Failure of a Member State to fulfil obligations — Taxation — Free movement of capital — Article 63 TFEU — Article 40 of the EEA Agreement — Inheritance tax — Legislation of a Member State providing for an exemption from inheritance tax relating to the primary residence on condition that the heir is permanently resident in that Member State — Restriction — Justification)

In Case C?244/15,

ACTION under Article 258 TFEU for failure to fulfil obligations, brought on 27 May 2015,

European Commission, represented by D. Triantafyllou and W. Roels, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Hellenic Republic, represented by M. Tassopoulou and V. Karrá, acting as Agents,

defendant,

THE COURT (Seventh Chamber),

composed of C. Toader, President of the Chamber, A. Rosas and E. Jaraši?nas (Rapporteur), Judges,

Advocate General: M. Wathelet,

Registrar: A. Calot Escobar,

having regard to the written procedure,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 By its application the European Commission asks the Court to declare that, by enacting and maintaining in force legislation which provides for an exemption from inheritance tax relating to the primary residence, which is discriminatory given that it applies only to EU nationals who are resident in Greece, the Hellenic Republic 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 (OJ 1994 L 1, p. 3) (‘the EEA Agreement’).

Legal context

Greek Law

2 Article 26A of the Inheritance Tax Code, entitled ‘Exemption for Primary Residence’, provides, in paragraph 1:

‘A residence or a parcel of land obtained through inheritance by the spouse or child of the deceased, in full ownership or joint ownership, shall be exempted from inheritance tax on condition that the heir or legatee, or his spouse or one of his minor children, does not have a right to full ownership, usufruct, or residence in relation to a residence or a part of the residence meeting their family’s housing needs, or a right to full ownership over building land or over a share in land equal to the surface area of a building meeting their housing needs, and is situated in a commune with a population of more than 3 000 residents. The housing needs are considered to be satisfied if the total surface area of the abovementioned immovable property and the other immovable property of the inheritance is 70 m², increased by an additional 20 m² for each of the first two children and an additional 25 m² for the third child and each subsequent child for whom the beneficiary is responsible. Those capable of benefitting from the exemption are Greek nationals and nationals of the Member States of the European Union. The beneficiaries must be permanently resident in Greece.’

Pre-litigation procedure

3 Following unproductive discussions between the Commission and the Hellenic Republic within the framework of the ‘EU Pilot’ scheme, the Commission sent a letter of formal notice to that Member State on 25 January 2013 in which it brought to its attention a potential incompatibility of Article 26A(1) of the Inheritance Tax Code with Article 63 TFEU and Article 40 of the EEA Agreement.

4 In its response of 26 March 2013, the Hellenic Republic submitted that the national provision at issue was compatible with the articles mentioned by the Commission.

5 Since the Commission was not satisfied with that reply, it issued a reasoned opinion on 21 November 2013, to which the Hellenic Republic replied on 21 March 2014, reaffirming the compatibility of that provision with EU law and referring to its view as expressed in its response to the Commission’s letter of formal notice.

6 In those circumstances the Commission decided to bring the present action.

The action

Arguments of the parties

7 The Commission submits that Article 26A(1) of the Inheritance Tax Code is contrary to the free movement of capital as guaranteed by Article 63 TFEU and Article 40 of the EEA Agreement.

8 The Commission notes, first of all, that, according to the contested provision, two distinct categories of nationals from EU Member States or other States party to the EEA Agreement cannot benefit from the exemption from inheritance tax for primary residences, namely EU Member State nationals who are not permanently resident in Greece and nationals of other States party to the EEA Agreement, regardless of their place of residence. According to the Commission, it follows that the value of immovable property located in Greece and acquired through inheritance by those EU Member State nationals or nationals of other States party to the EEA Agreement is reduced, given that the heirs concerned are subject to a higher level of taxation. In the light of the settled case-law of the Court, according to which inheritance constitutes a movement of capital and measures reducing the value of an inheritance of a resident of a Member State other than that

in which the property concerned is located are considered to be prohibited restrictions on the movement of capital, that provision ought, in the Commission's view, to be regarded as being such a restriction.

9 The Commission goes on to submit that the spouses or children of deceased persons who do not have any other immovable property find themselves in an objectively comparable situation, whether they are resident or non-resident. The Commission refers to the judgment of 22 April 2010 in *Mattner* (C?510/08, EU:C:2010:216, paragraph 36), in which the Court held that there was no objective difference between residents and non-residents justifying unequal tax treatment since the amount of tax on gifts is calculated on the basis of the value of immovable property and the family relationship between the donor and the donee, neither of those criteria being dependent on their place of residence. Similarly, according to the Commission, the inheritance tax provided for under the Greek legislation at issue is based on the value of the immovable property which is the subject-matter of the inheritance, and on the family relationship between the deceased person and the heirs, and on whether or not the heirs own other immovable property, without taking into consideration the question of whether the property at issue is or will in fact become the primary residence of the heirs.

10 Consequently, according to the Commission, the contested provision favours exclusively those heirs who are already resident in Greece, whether in the immovable property which is the subject matter of the inheritance or elsewhere in that Member State, those persons generally being Greek nationals. That provision places at a disadvantage heirs who are not resident in that Member State, persons who are generally foreign nationals or Greek nationals who have exercised the fundamental freedoms laid down by the FEU Treaty by working, studying or residing abroad.

11 In response to the argument put forward by the Hellenic Republic that the situation of residents and that of non-residents are not comparable as regards the needs of those concerned in terms of housing in Greece, the Commission submits that that argument is based on the erroneous premiss that Greek residents, in general, lack housing and that non-residents do not.

12 Finally, concerning the justification for the restriction on the free movement of capital put forward by the Hellenic Republic, the Commission takes the view that the exemption from inheritance tax at issue constitutes merely 'general tax relief' which is not justified on grounds of housing or social policy since it is not conditional on occupation by the heirs of the property received through inheritance.

13 The Hellenic Republic disputes the merits of the Commission's arguments and contends that the contested provision is compatible with the principle of the free movement of capital.

14 As an initial point, the Hellenic Republic argues that the nationals of other States party to the EEA Agreement are not excluded from the application of Article 26A(1) of the Inheritance Tax Code. They do, it submits, not feature in it due to an error which it has undertaken to correct, since there was no reason to exclude them or to treat them differently from nationals of EU Member States.

15 In the first place, the Hellenic Republic argues that the contested provision does not constitute a restriction of the free movement of capital.

16 In that regard, noting that Article 26A(1) of the Inheritance Tax Code relates to a very specific method of regulating inheritance and a very limited and specific exemption from inheritance tax, the Hellenic Republic submits, in essence, that an inheritance received by rightful heirs in application of the law does not imply, in the absence of a freedom to designate the heirs

and, consequently, regardless of the wishes of the deceased person and the recipient, a movement of capital. It takes the view that the concept of free movement of capital has more to do with the ability to invest than with inheritance of property by the close family of the deceased person governed by the law at issue.

17 The Hellenic Republic argues, in this regard, that, if the rightful heirs are not permanently resident in Greece, no other person will be able to benefit from the exemption from inheritance tax since the Greek tax system contains a single tax scale, applying both to Greek nationals and to nationals of other Member States, with the result that there is no discrimination in the calculation of inheritance tax or in the amount of the exemption at issue. It adds that the payment of inheritance tax without the exemption being applied does not represent 'over-taxation' but rather normal taxation; that, in order to benefit from this exemption, Greek nationals and nationals of other EU Member States must meet the same conditions; and that not granting the exemption to non-resident heirs is unlikely to deter a person from investing in immovable property in Greece.

18 In the second place, the Hellenic Republic argues, as regards Article 65(1)(a) TFEU and the case-law of the Court on direct taxation, particularly the judgments of 6 June 2000 in *Verkooijen* (C?35/98, EU:C:2000:294, paragraph 43), of 7 December 2004 in *Manninen* (C?319/02, EU:C:2004:484, paragraphs 28 and 29), and of 25 October 2012 in *Commission* v *Belgium* (C?387/11, EU:C:2012:670, paragraph 45), that, as regards the exemption from inheritance tax relating to immovable property considered to be the primary residence, the situation of heirs who are permanently resident in Greece is not objectively comparable to that of heirs who are not permanently resident in that Member State. Whereas resident heirs would not have adequate immovable property in Greece and would have housing needs in that Member State, which property acquired by inheritance could cover or supplement, non-resident heirs would, as a general rule, have a primary residence outside Greece and would not be relying on property received by inheritance and located in Greece in order to satisfy their housing needs.

19 According to the Hellenic Republic, the Commission, in taking the view that the situations of residents and of non-residents are comparable, fails to take into account the objectives pursued by the exemption at issue. The latter covers exhaustively the acquisition, by a permanent resident, of a primary residence in Greece by way of inheritance. Persons who are not resident in that Member State and who inherit property there would occupy that property for limited periods or would use it for purposes other than as a residence. The Commission, it contends, also disregards the argument that it is practically impossible to look after a property located abroad. Consequently, a non-resident who inherits property situated in Greece finds himself in a more favourable situation than a person who is resident there.

20 In the third place, the Hellenic Republic submits that any restriction on the free movement of capital is justified by overriding social and financial reasons in the public interest.

21 Accordingly, by the specific and limited exemption from inheritance tax in relation to the primary residence, provided for under Article 26A(1) of the Inheritance Tax Code and granted in the context of social policy implemented by the State, the legislature sought to assist members of a deceased person's close family who do not have suitable immovable property in Greece, where they are permanently resident at the time when the liability to pay the tax arises, to acquire, in that Member State, such property as a primary residence, by granting them tax relief. This, it submits, consequently involves a social advantage, entitlement to which depends on the connection with Greek society and the level of integration into that society.

22 Article 26A(1) of that Code does not, it contends, oblige the heir benefitting from the exemption in question to use the property received by inheritance as a primary residence, even though that is generally the case, since such an obligation constitutes a disproportionate restriction

on the beneficiary's freedom, contrary to the Greek Constitution, and the legislature preferred to adopt a realistic approach, taking into consideration any possible changes to the heir's professional or family situation.

23 Any restriction on the free movement of capital is also, it submits, justified by a second and overriding reason of general interest, seeking to avoid a reduction in tax revenue, since the extension of the exemption from inheritance tax for the acquisition of a primary residence to non-residents would have, as an inevitable consequence, such a reduction and would distort the objective behind that exemption.

24 Finally, the Hellenic Republic argues that Article 26A(1) of the Inheritance Tax Code does not go beyond what is necessary to maintain a balanced allocation of taxation powers between the Member States and to prevent contrived arrangements designed solely to obtain an unjustified tax advantage.

Findings of the Court

The freedom in question

25 According to the Court's settled case-law, the tax levied on inheritances, which consist of the transfer to one or more persons of assets left by a deceased person, comes within the scope of the FEU Treaty provisions on movements of capital, save where the constituent elements of inheritances are confined to a single Member State (judgments of 23 February 2006 in *van Hilten-van der Heijden*, C?513/03, EU:C:2006:131, paragraph 42; of 17 January 2008 in *Jäger*, C?256/06, EU:C:2008:20, paragraph 25; of 17 October 2013 in *Welte*, C?181/12, EU:C:2013:662, paragraph 20; and of 3 September 2014 in *Commission* v *Spain*, C?127/12, not published, EU:C:2014:2130, paragraph 53 and the case-law cited).

26 In the present case, Article 26A(1) of the Inheritance Tax Code provides for an exemption from inheritance tax in respect of immovable property received through inheritance by the spouse or child of a deceased person if they are Greek nationals or nationals of another EU Member State and are permanently resident in Greece.

27 That provision relates to inheritance tax, covers situations in which not all of the constituent elements are confined to a single Member State, and consequently comes within the scope of the free movement of capital.

The existence of a restriction on the free movement of capital

28 It is apparent from the Court's settled case-law that, with regard to inheritances, the measures which Article 63 TFEU prohibits as constituting restrictions on the movement of capital include those the effect of which is to reduce the value of the inheritance of a resident of a Member State other than the Member State in which the assets concerned are situated and which taxes the transfer of those assets by way of inheritance (see, inter alia, judgments of 11 December 2003 in *Barbier*, C?364/01, EU:C:2003:665, paragraph 62, and of 17 October 2013 in *Welte*, C?181/12, EU:C:2013:662, paragraph 23 and the case-law cited).

29 The legislation of a Member State under which the application of an exemption from inheritance tax depends on the place of residence of the deceased person or of the beneficiary at the time of the death, in the case where it leads to inheritances involving non-residents being subject to a higher tax liability than those involving residents alone, constitutes a restriction on the free movement of capital (see, to that effect, judgments of 17 October 2013 in *Welte*, C?181/12, EU:C:2013:662, paragraphs 25 and 26, and of 3 September 2014 in *Commission* v *Spain*,

C?127/12, not published, EU:C:2014:2130, paragraph 58).

30 In the present case, Article 26A(1) of the Inheritance Tax Code exempts, from inheritance tax relating to a residence or a parcel of land up to a certain value, the spouse or child of the deceased person, provided that they do not have a right to full ownership, usufruct, or residence in relation to other immovable property meeting their family's housing needs, are nationals of an EU Member State, and are permanently resident in Greece.

31 That provision has the effect of reducing the value of the estate for the heir who fulfils all of those requirements, apart from the requirement of being permanently resident in Greece, by depriving the person concerned of the exemption from inheritance tax and thereby resulting in that person being subjected to a heavier tax burden than that borne by an heir who is permanently resident in Greece.

32 It follows that the legislation at issue constitutes a restriction on the free movement of capital that is prohibited, in principle, by Article 63 TFEU.

The justifications for a restriction on the free movement of capital

33 With regard to a possible justification for the restriction on the free movement of capital based on Article 65 TFEU, it should be noted that, pursuant to Article 65(1)(a) TFEU, '[t]he provisions of Article 63 [TFEU] shall be without prejudice to the right of Member States … to apply the relevant provisions of their tax law which distinguish between taxpayers who are not in the same situation with regard to their place of residence or with regard to the place where their capital is invested'.

34 That provision, in so far as it derogates from the fundamental principle of the free movement of capital, must be interpreted strictly. It cannot therefore be interpreted as meaning that all tax legislation which draws a distinction between taxpayers on the basis of their place of residence or the Member State in which they invest their capital is automatically compatible with the FEU Treaty. That derogation is itself circumscribed by Article 65(3) TFEU, which provides that the national provisions referred to in Article 65(1) TFEU 'shall not constitute a means of arbitrary discrimination or a disguised restriction on the free movement of capital and payments as defined in Article 63 [TFEU]'. A distinction must therefore be drawn between unequal treatment permitted under Article 65 TFEU and arbitrary discrimination prohibited under Article 65(3) TFEU (judgment of 3 September 2014 in *Commission* v *Spain*, C?127/12, not published, EU:C:2014:2130, paragraphs 71 to 73).

35 In that regard, it is clear from the case-law of the Court that, in order for national tax legislation which, for the purposes of calculating inheritance tax, discriminates between residents and non-residents to be capable of being regarded as compatible with the FEU Treaty provisions on the free movement of capital, that difference in treatment must relate to situations which are not objectively comparable or be justified by an overriding reason in the public interest. Such national legislation must be appropriate for securing the attainment of the objective pursued and must not go beyond what is necessary in order to attain it (see, to that effect, judgments of 17 October 2013 in *Welte*, C?181/12, EU:C:2013:662, paragraph 44 and the case-law cited, of 3 April 2014 in *Commission* v *Spain*, C?428/12, not published, EU:C:2014:218, paragraph 34, and of 4 September 2014 in *Commission* v *Germany*, C?211/13, not published, EU:C:2014:2148, paragraph 47). Furthermore, national legislation will be appropriate for guaranteeing attainment of the objective pursued only if it genuinely reflects a concern to attain it in a consistent and systematic manner (judgment of 4 September 2014 in *API and Others*, C?184/13 to C?187/13, C?194/13, C?195/13 and C?208/13, EU:C:2014:2147, paragraph 53 and the case-law cited).

36 As regards, first, the comparability of the situations at issue, it must be noted that where, for the purposes of taxing immovable property acquired by inheritance and located in the Member State concerned, national legislation places non-resident and resident heirs on the same footing, it cannot, without infringing the requirements of EU law, treat those heirs differently in connection with that tax in respect of that immovable property. By treating inheritances of those two classes of persons in the same way except in relation to the exemption which an heir may receive, the national legislature acknowledges that there is no objective difference between them as regards the detailed rules and conditions for charging inheritance tax such as to justify a difference in treatment (see, to that effect, judgment of 17 October 2013 in *Welte*, C?181/12, EU:C:2013:662, paragraph 51 and the case-law cited).

37 In the present case, the Hellenic Republic submits, relying on the argument set out in paragraphs 18 and 19 above, that there is an objective difference between the situation of heirs permanently resident in Greece and heirs not satisfying that condition as regards the exemption from inheritance tax relating to primary residence. However, the Hellenic Republic indicates that the Greek tax system contains a single tax scale, applying both to Greek nationals and to nationals from other Member states as regards the amount of inheritance tax relating to immovable property in Greece. It is only with regard to the exemption from inheritance tax relating to a primary residence that the contested legislation discriminates between inheritances concerning an heir permanently resident in Greece and those concerning a non-resident.

38 It follows that the situation of an heir permanently resident in Greece and that of a non-resident heir are comparable for the purposes of the granting of the exemption from inheritance tax here at issue.

39 It is therefore necessary to examine, second, whether the contested legislation can be objectively justified by an overriding interest in the public interest.

40 It must be stated, first of all, that, contrary to the requirements arising from the case-law cited in paragraph 35 above, Article 26A(1) of the Inheritance Tax Code is not appropriate for guaranteeing attainment, in a systematic and consistent manner, of the general social-interest objective of addressing housing needs in Greece advanced by the Hellenic Republic, since the exemption laid down by that provision is not subject to the obligation that the heir establish the inherited property as his primary residence or that he occupy that property at all.

41 In the absence of such an obligation, no relevance attaches to the argument of the Hellenic Republic that heirs who are not resident in that Member State would occupy a property acquired by inheritance only for limited periods or would use it for purposes other than as a residence. The Court is also unconvinced by the argument that the provision at issue is aimed at making the granting of that exemption dependent upon the heir maintaining a connection with Greek society and on his level of integration, since an heir who is not permanently resident in Greece at the time when the process for settling the inheritance commences and who does not have property may, just as much as an heir who is resident in that Member State, have a close link with Greek society and wish to acquire, in that State, the inherited property in order to establish his primary residence there.

42 In that regard, the Hellenic Republic’s arguments set out in paragraphs 19 and 22 of the present judgment must also be rejected. It must be borne in mind that the reasons that may be invoked by a Member State by way of justification must be accompanied by an analysis of the appropriateness and proportionality of the restrictive measure adopted by that State and by specific evidence substantiating its arguments (judgment of 21 January 2016 in *Commission* v *Cyprus*, C?515/14, EU:C:2016:30, paragraph 54 and the case-law cited). The Hellenic Republic

has not substantiated the arguments on which it relied, nor has it demonstrated that it would be impossible to check that the non-resident heir meets the conditions in order to be granted the exemption at issue.

43 Furthermore, contrary to the Hellenic Republic' submissions, the contested national legislation cannot be justified on grounds of a need to prevent a reduction in tax revenues which would, according to that Member State, occur if the exemption from inheritance tax at issue were extended to non-residents. It is clear from settled case-law that such a need is neither among the objectives stated in Article 65 TFEU nor an overriding reason in the public interest capable of justifying a restriction on a freedom instituted by the FEU Treaty (see, inter alia, judgments of 7 September 2004 in *Manninen*, C?319/02, EU:C:2004:484, paragraph 49, of 27 January 2009 in *Persche*, C?318/07, EU:C:2009:33, paragraph 46, and of 10 February 2011 in *Missionswerk Werner Heukelbach*, C?25/10, EU:C:2011:65, paragraph 31).

44 Finally, the Hellenic Republic has failed entirely to demonstrate that the exclusion of heirs who are not resident in Greece from the benefit of the exemption provided for under Article 26A(1) of the Inheritance Tax Code stems from the allocation of taxation powers between the Member States and is necessary to prevent abuses.

45 It follows that the Hellenic Republic has raised no overriding reason in the public interest before the Court which is capable of justifying, in the present case, a restriction on the free movement of capital within the meaning of Article 63 TFEU.

The failure to fulfil obligations under Article 40 of the EEA Agreement

46 As regards the adverse effect that the contested legislation has on Article 40 of the EEA Agreement, raised by the Commission, the Hellenic Republic submits that the nationals of other States party to the EEA Agreement were omitted from Article 26A(1) of the Inheritance Tax Code by reason of an error that it has undertaken to correct.

47 Suffice it in this regard to take note of the settled case-law of the Court, according to which the question whether a Member State has failed to fulfil obligations must be determined by reference to the situation prevailing in the Member State at the end of the period laid down in the reasoned opinion, and the Court cannot take account of any subsequent changes (see, inter alia, judgments of 4 September 2014 in *Commission* v *Greece*, C?351/13, not published, EU:C:2014:2150, paragraph 20, of 5 February 2015 in *Commission* v *Belgium*, C?317/14, EU:C:2015:63, paragraph 34, and of 14 January 2016 in *Commission* v *Greece*, C?66/15, not published, EU:C:2016:5, paragraph 36).

48 Irrespective of that omission, it must be noted that, in so far as the provisions of Article 40 of the EEA Agreement have the same legal scope as the substantially identical provisions of Article 63 TFEU, all of the foregoing considerations, concerning the existence of a restriction on the basis of Article 63 TFEU, may, in circumstances such as those in the present case, be transposed *mutatis mutandis* to Article 40 of the EEA Agreement (see, by analogy, judgment of 1 December 2011 in *Commission* v *Belgium*, C?250/08, EU:C:2011:793, paragraph 83 and the case-law cited).

49 It follows from all of the foregoing considerations that the Commission's action must be regarded as well founded.

50 Consequently, it must be held that, by enacting and maintaining in force legislation which provides for an exemption from inheritance tax relating to the primary residence, which applies solely to nationals of EU Member States who are resident in Greece, the Hellenic Republic has failed to fulfil its obligations under Article 63 TFEU and under Article 40 of the EEA Agreement.

Costs

51 Under Article 138(1) of the Rules of Procedure of the Court, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs and the Hellenic Republic has been unsuccessful, the latter must be ordered to pay the costs.

On those grounds, the Court (Seventh Chamber) hereby:

1. **Declares that, by enacting and maintaining in force legislation which provides for an exemption from inheritance tax relating to the primary residence, which applies solely to nationals of EU Member States who are resident in Greece, the Hellenic Republic has failed to fulfil its obligations under Article 63 TFEU and under Article 40 of the Agreement on the European Economic Area of 2 May 1992;**

2. **Orders the Hellenic Republic to pay the costs.**

[Signatures]

* Language of the case: Greek.