In this two-part article, the author provides a comprehensive analysis of 13 ECJ decisions on the discriminatory treatment of cross-border inheritances. Part 1 categorizes the cases, examines the most common EU freedom at stake and outlines the first step of the ECJ’s analysis of the concept of restriction, as well as “indirect discrimination”. Part 2, to be published in European Taxation 12 (2015), will discuss the requirement for a direct link between debts and immovable property, provide an overview of the justifications invoked by Member States and the possibility of such justifications being accepted by the ECJ in EU/EEA and third-country scenarios and explore the role of the proportionality principle. A comparison of ECJ case law on inheritance taxation with personal and corporate income tax cases is also given.

1. Introduction

The correlation between inheritance tax and international and European tax law may seem bizarre, at least at first glance. Contrary to the increasing EU intervention in the area of cross-border personal (PIT) and corporate income tax (CIT), the taxation of inheritances seems to be directly the purview of the Member States’ fiscal sovereignty. In other words, it appears to be a terra incognita with the effect that Member States are a priori allowed to adopt measures in this area relating to general economic and social policy and to define the objectives that they would like to pursue through these measures.

Nevertheless, certain policies have changed in the last 15 years, and the author maintains that now is the right time to conduct further research on inheritance taxation at the EU level, taking into account the fact that the Court of Justice of the European Union (ECJ) has already delivered more than 14 decisions on inheritance taxation. The disparities between the 28 private international and tax systems, and the subsequent taxation of inheritances, pose obstacles to cross-border transfers of property. The added problem of potential juridical double taxation of inheritances may also preclude such transfers. Furthermore, the author maintains that the ECJ decisions on discriminatory inheritance taxation are not sufficiently discussed in the literature, which focuses mainly on the elimination of double taxation and not on the discriminatory treatment of cross-border inheritances, something that requires a sound understanding of ECJ case law principles.

This article aims to provide an understanding of the ECJ case law on the discriminatory tax treatment of gifts and inheritances, examining, in particular, whether or not this case law is consistent. The author, in Part 1, examines this issue by providing a comparative analysis of the 13 ECJ decisions that deal with discriminatory treatment of cross-border inheritances, in the course of which such case law is categorized and comparisons are made with PIT and CIT cases. The second part of the article, to be published in European Taxation 12 (2015), will provide an overview of the justifications invoked by Member States and the possibility of such justifications being accepted by the ECJ in EU/EEA and third-country scenarios. Therefore, at the end of the article, the reader should be able to identify the legal concepts regarding inheritance taxation and understand how the ECJ treats cross-border inheritances. It is hoped that this analysis will also be a valuable guide for national governments and national legislators.

2. Taxes Applicable upon the Death of a Person/Gift

2.1. Inheritance taxes and death duties

The term “death duties” is a generic name given to a variety of taxes or duties imposed on a transfer of property upon death ("causa mortis"). Such taxes date back to ancient times and are encountered in many different forms and under a variety of names: (capital) accessions tax, bequest tax, capital acquisitions tax (for example, Ireland), capital transfer tax (for example, the United Kingdom), death duty, estate tax or duty, inheritance tax, legacy duty, probate duty, relief, succession duty, tax on transfers by death, transfer tax (for example, the United States), etc.

Death duties, however, may broadly be divided into two basic forms: “donor-based” taxes and “donee-based” taxes. Under the former (often referred to as an estate tax), the tax base and the rate are based on the amount transferred by the deceased (donor), i.e. by the size of the “estate”. In such instances, the taxpayer is generally the deceased (or, more typically, his estate, which, for these purposes, is treated as
a separate taxpayer). Such taxes may be considered a form of indirect tax on the beneficiaries. Under the latter (often referred to as an inheritance tax), the tax base and the rate are determined according to the amount received by the beneficiary (donee), as well as the relationship (i.e. consanguinity) between donor and donee.1

For domestic tax purposes, the jurisdictional scope of death duties is generally determined by the personal nexus rule. A personal nexus rule is the main connecting factor in all Member States with inheritance tax rules. Member States using these connecting factors tax on the basis of one or more nexuses between the deceased/heir and the territory of the state. Three main principles are applied by the Member States: the residence principle, which is the most common, the domicile principle and the nationality principle. Some Member States apply a combination of the three.2 The inheritance tax is generally imposed in respect of worldwide property.3

A source rule (situs rule) is the second connecting factor. According to this rule, a Member State levies taxes upon death on assets that are located within its jurisdiction, but not covered by its personal nexus rule. The source rule typically covers most assets, but is sometimes limited to a subset of assets, for example, real estate. Among the 18 Member States with an inheritance or estate tax, only the Netherlands does not apply a source rule.4 The inheritance tax is generally imposed only in respect of property located in the taxing jurisdiction.

A number of countries impose tax under the “territoriality principle”, i.e. only in respect of property located within their jurisdiction, irrespective of the residence, etc. of the donor or beneficiary.

In 1966, the OECD adopted a Model Tax Treaty in this respect, which has not been considered to be successful, given the different national laws.5 In 2011, however, the European Commission issued a Recommendation regarding relief from double taxation of inheritances, which is applicable in the European Union.

At present, Member States’ rules on the taxation of inheritances vary considerably. Eighteen levy specific taxes upon death, while nine (Austria, Cyprus, Estonia, Latvia, Malta, Portugal, Romania, Slovak Republic and Sweden) do not do so, but some of those nine tax inheritances under other headings, such as income tax. Member States applying inheritance taxes differ regarding whether they tax the estate or the heir, i.e. whether they tax on the basis of a personal link of the heir or the deceased, or both, to those Member States. They may treat, as a personal link, the residence, domicile or nationality of the deceased or of the heir and some Member States use more than one of these factors.6 The meaning of these terms may also differ from one Member State to the other, a finding that is very important and causes obstacles to the further harmonization of these taxes at the EU level.

Furthermore, the rates and the inheritance tax exemptions vary considerably. Many countries have reduced their rates and the tax base in recent years or have broadened the scope of subjective exemptions for spouses or descendants.

2.2. Gift taxes
In many countries a gratuitous transfer of property during the lifetime of the donor (in contrast to transfers occurring upon the death of the owner) is subject to a gift tax. The tax is often levied at progressive rates that may vary according to the donor’s relationship with the donee. The tax is usually levied by reference to the value of a single gift or cumulative gifts during a certain period of time.

2.3. Interaction between inheritance and gift taxes
The primary function of a gift tax is often to support (or prevent the avoidance of) inheritance or estate taxes. As such, the two types of tax often have similar features (for example, as regards rates and exemptions) and are typically highly integrated, particularly when they are combined into an integrated or “unified” tax regime. Some countries, however, levy capital gains tax (on a donor) on gifts regardless of the relationship between donor and donee. The ECJ considers the inheritance and gift taxes imposed by Member States as the same, while EC Recommendation 2011/856/EU regarding relief from double taxation of inheritances “relates by analogy to gift taxes, where gifts are taxed under the same or similar rules as inheritances”.

3. From Divergent Inheritance Tax Laws to a Small Number of Tax Treaties

3.1. Divergent inheritance tax and private international law
Many scholars share the opinion that succession laws are not suitable to a legal comparative analysis because they contain a bundled mixture of rules, which range from ownership law (such as the identification of assets that are owned by the deceased upon his death) to matrimonial law (including same-sex marriage, the rights of couples outside marriage and pre-nuptial agreements) to contract law (such as succession pacts).7 Apart from national rules on inheritance taxation, most legal systems contain conflict of law provisions or principles that apply to international succession, and thus determine which private law governs the succession of the deceased in the absence of international conventions.8 Some states apply the nationality principle.

1. J. Rogers-Glabush, IBFD International Tax Glossary p. 112 (IBFD 2009), Online Books IBFD.
2. Copenhagen Economics. Study on Inheritance taxes in EU. Member States and Double Mechanisms to Resolve Problems on Double Inheritance Taxation in the EU p. 8 (Copenhagen Economics 2011).
3. Id.
5. See Rogers-Glabush, supra n. 1, at p. 113.
7. G. Maisto, General Report, Death as a taxable event and its international ramifications in Cahier de droit fiscal international, vol. 95b. p. 22 (Sdu Fiscale & Financiële Uitgevers 2010), Online Books IBFD.
8. Id., at p. 25.
while most use the residence or domicile of the deceased person as the most important criterion in applying the law of succession. It should be noted that, within the European Union, Regulation 650/2012 of 4 July 2012 (on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession)9 applies, under which a given succession can be treated coherently under a single law and by one single authority. The Regulation does not refer, however, to inheritance taxation, but to succession law, which is one step removed from inheritance taxation.

3.2. The need to define important terms
As a consequence of private international rules that are applicable to succession, the definitions of important terms fall within the competence of the Member States. The Member States’ private international laws do not define the terms, but merely indicate the applicable national law, which will provide the necessary definitions. Therefore, terms like "immovable property", "movable property", "residence", "resident", "domicile", "domiciled", "national", "nationality", "habitual abode" and "permanent home" are defined by national law and differ between countries. These differences pose obstacles to harmonization initiatives in the European Union because, due to the lack of common definitions, the tax jurisdiction allocation rules may not be effective.

3.3. Jurisdictional basis of inheritance and gift taxation
With regard to inheritance tax jurisdiction, on the one hand, most states have adopted a worldwide taxation system for inheritance and gift taxation. The system is similar to the worldwide system of income taxation adopted by most Member States.10 On the other hand, the levying of inheritance and gift taxes may also take place based on situs, i.e. the location of the property. The situs principle is important if the residence, domicile and/or nationality criteria do not or no longer apply, and if the deceased (or the heir or both parties) does not reside in the Member State where the asset is located.11 The conflict between the residence and situs principles is one of the three conflicts that can lead to juridical double taxation of inheritances in the absence of a tax treaty or effective unilateral relief granted by the applicable Member State.

3.4. Juridical double taxation
Due to the variety of criteria that constitute the jurisdictional basis of inheritance and gift taxes, as discussed in the previous section, inheritances may be subject to juridical double taxation. Juridical double taxation exists when the same income of the same person is taxed in more than one Member State. In the area of inheritance taxation, the differences between the tax systems and the divergent private international rules applicable to succession constitute serious obstacles to the functioning of the internal market and lead to double taxation of income. Consequently, double taxation appears as a Leviathan in the face of a transfer of property, especially due to the poor legal framework, also taking into consideration that article 293 of the EC Treaty12 has been repealed, which required Member States to enter into negotiations with each other with a view to the abolition of double taxation within the European Union. Nevertheless, this article was not carried over to the Lisbon Treaty. Member States must negotiate tax treaties for the elimination of double taxation in general, but also for the elimination of juridical double taxation of inheritances.

3.5. Small number of bilateral treaties and "soft law" instruments

3.5.1. OECD Model Double Tax Convention on Estates and Inheritances and on Gifts
With regard to inheritance taxes, the OECD approved the Estate and Inheritance Draft Model Convention in 1966.13 This Model was subsequently revisited in 1982 to consider recent trends in the Member States’ legislation and to extend the model to gift taxes (Model Double Taxation Convention on Estates and Inheritances and on Gifts).14 The Model Convention, however, has not had the boosting effect that its authors were hoping for.

3.5.2. EC Recommendation 2011/856/EU regarding relief from double taxation of inheritances
On 15 December 2011, the European Commission released a package dealing with issues of double taxation and discriminatory tax treatment in the area of inheritance and estate tax. Among other documents, this package consists of a Recommendation regarding relief for double taxation of inheritances (C(2011) 8819).15 Cognizant of the fact that full harmonization of tax legislation is not possible, the Commission decided to adopt a flexible approach that enables nations to promote the coordination of national legislation without infringing upon their choice of tax policy. If the Member States go along with the Recommendation and incorporate its provisions into their national legislation, some problems of juridical double taxation of inheritances will be resolved.16

10. Id., at p. 38.
13. OECD Estate and Inheritance Draft Model Convention (28 June 1966), Models IBFD.
4. The Applicable Freedom in Inheritance Tax Cases

4.1. The freedom of capital as the most applicable freedom

The free movement of capital, as enshrined in article 63 of the Treaty on the Functioning of the European Union (TFEU) (2007), is the most essential freedom in the area of inheritance taxation. This freedom is particularly important for inheritance taxation since ‘article 63 of the TFEU’ lays down a general prohibition on restrictions on the movement of capital between Member states and between Member States and third countries. Therefore, article 63 of the TFEU prohibits all restrictions on the movement of capital, as well as on payments, between Member States and third countries. This article is followed by article 64 of the TFEU, a ‘grandfather clause’ relating to third-country situations and article 65 of the TFEU, an exceptions clause. Generally, since specific provisions apply in respect of inheritance taxation issues (mainly articles 63 and 49 of the TFEU), thus constituting *lex specialis* to the fundamental freedoms, there is no need to use the general non-discrimination provision of article 18 of the TFEU. The same is true for article 21 of the TFEU, which refers, inter alia, to inactive populations, for example, pensioners, as mentioned in *Turpie v. Terpsichoros* (Case C-520/04). Therefore, in inheritance tax cases, despite the fact that pensioner status is very common to inheritance taxation, the ECJ applies the specific provisions of the fundamental freedoms and not the general TFEU anti-discrimination provisions (articles 18 and 21 of the TFEU).

4.1.1. Personal scope of capital rules in respect of inheritance taxation issues

The free movement of capital is, like the other EU freedoms, applicable throughout the entire territory of the Union, and those invoking it need not be nationals of a Member State, as can be seen from *Svensson and Gustavsson* (Case C-484/93) and *Bordessa* (Joined Cases C-358/93 and C-416/93), where third-country nationals invoked this freedom. Consequently, the scope of the free movement of capital rules is also extended to deceased non-EU nationals and their heirs. For example, in *Welte* (Case C-181/12), the ECJ concluded that the freedom of capital was applicable, despite the fact that the heir, Mrs Welte-Schekel, became a Swiss national after her marriage to Mr Welte. By contrast, all other EU freedoms explicitly refer to nationality.

4.2. Geographic scope of capital rules

4.2.1. Member States

The freedom of capital covers the territory of the 28 Member States, pursuant to articles 63 of the TFEU, 52 of the Treaty on European Union (TEU) (2007) and 355 of the TFEU. Therefore, the free movement of capital is like the other EU freedoms, applicable throughout the entire territory of the Union.

4.2.2. EU and EFTA countries

The freedom of capital, as enshrined in article 63 of the TFEU, has the same scope as the freedom of capital of article 40 of the EEA Agreement (1993) with regard to cross-border discrimination, as seen in the recent *Commission v. Spain* (Case C-127/12) case. EFTA countries, however, are treated as third countries when considering the justification of a restriction, as seen in *Rimbau* (Case C-72/09), although Liechtenstein is a member of the EEA, and article 40 of the EEA Agreement provides for an equivalent right of establishment as article 49 of the TFEU, France was entitled to refuse an exemption for real estate taxes since Liechtenstein did not provide information as to the beneficial owners of the shares in the entity at that time.

4.2.3. Third countries – Non-Member States

The freedom of capital is unique in comparison to other EU freedoms, as it is the only EU freedom that covers third-country transactions; treating capital movements into, out of, and within the Union in the same way. This is remarkable, since it represents a unilateral move by EU Member States in respect of the rest of the world, without requiring any liberalizations in return.

Up until now, the ECJ has made no distinction between the concept of discrimination in an intra-EU context or third-country context under EU law. Therefore, the same test is applied with regard to the determination of whether or not...
discrimination exists. Any external capital movements, i.e. between EU and third counties, however, are subject to specific restrictions, as enshrined in articles 64 and 66 of the TFEU. This means that Member States should apply the same tax treatment to an inheritance that involves an estate regardless of whether it is located in Cyprus or Russia. Russia, as a non-EU Member State, however, is not obliged to reciprocate by applying the same treatment to an estate located in its territory and in Cyprus, unless a bilateral agreement between Greece and Russia imposes a reciprocal obligation on Russia.

Despite the lack of reciprocity, the free movement of capital has the same meaning in a third-state context as it has in an intra-EU context, and the concept of a restriction is the same as it is in an intra-EU context. Broader justifications are, however, possible in third-state situations because of the “different legal context” of third-state operations, as seen in Haribo and Salinen (Joined Cases C-436/08 and C-437/08). Part 2 of this article examines the justification invoked by Member States in inheritance tax cases.

4.3. The interaction between the free movement of capital and free movement of persons

While the applicability of the free movement of capital is no longer in dispute, based on ECJ case law (for example, in Barbier (Case C-364/01), the first inheritance taxation case, the decision was based on article 63 of the TFEU), Member States have also invoked, at least in earlier inheritance tax cases, the free movement of workers, as set out in articles 45 and 49(2) of the TFEU. The ECJ rejected this argument without considering it in substance mentioning, for example, in Barbier that:

[...] the tax consequences in respect of inheritance rights are among the considerations which a national of a member state could reasonably take into account when deciding whether or not to make use of the freedom of movement provided for in the Treaty for persons.

Thus, the ECJ did not examine the freedom of workers, despite the fact that the Commission specifically invoked this freedom.

This does not mean, however, that the freedom of workers is considered a secondary freedom in comparison to the freedom of capital, as will be examined below: the ECJ simply does not examine it at all. As a result, in recent cases, the Commission and Member States have invoked only article 63 of the TFEU (or article 49(1) of the TFEU under the specific circumstances) when dealing with inheritance taxation.

4.4. Right of establishment

These specific circumstances were present in Geurts (Case C-464/05) and Scheunemann (Case C-31/11). In the former case, Belgium, as the home state, refused to grant an exemption from inheritance tax for shares in a closely-held family undertaking, claiming that the required conditions were not satisfied since the family undertaking had not employed at least five workers in the three years preceding the date of death of the deceased. This meant that the Belgian legislation treated taxpayers differently depending on the place where the company, of which the taxpayers were shareholders, was located. Ultimately, however, this was considered contrary to article 49 of the TFEU because the Belgian legislation made the location of a closely-held family undertaking the focal point of granting the tax advantage. Furthermore, it should be noted that 100% of the shares were held by the family, whereas the legislation only provided for a shareholding threshold of at least 50%. The reference to holding percentages is useful with regard to the distinction between the free movement of capital and the freedom of establishment.

In Scheunemann, Germany denied both a deduction for the tax-free amount and a reduced valuation of the shares inherited, since neither the registered office nor the principal place of the company, where the deceased had a substantial shareholding, were in Germany. Like in Geurts, the associated shareholding threshold was high enough (i.e. 65%) that meeting it meant having full control of the company. Consequently, the ECJ ruled that “[t]he legislation at issue in the main proceeding primarily affects the freedom of establishment and that, in accordance with the case law of the Court, it falls solely within the scope of the Treaty provisions concerning that freedom.”

Also of note is paragraph 17 of Geurts, wherein the ECJ states, quoting Barbier, that “the tax consequences in respect of inheritance rights are among the considerations which a national of a member state could reasonably take into account when deciding whether or not to make use of the freedom of movement provided for in the Treaty”. In Barbier, however, this was stated in order to conclude that there was no need to examine the national tax scheme in light of the free movement of workers, while in Geurts the ECJ used this phrase in order to decide on the basis of the freedom of establishment.

The applicability of the freedom of establishment has two relevant consequences: (1) if a national tax measure has restrictive effects on the free movement of capital, those effects are, in most instances, the “unavoidable consequence of a restriction on freedom of establishment”. In other words, between the freedom of establishment and the freedom of capital, the latter freedom is considered secondary when substantial control is exerted. This is differ-

35. FR. ECJ, 10 May 2012, Cases C-338/11-C-347/11, FIM Santander and Others, ECJ Case Law IBFD.
36. See Terra & Wettle, supra n. 32, at p. 74.
37. AT. ECJ, 10 Feb. 2011, Joined Cases C-436/08 and C-437/08, Haribo Lakritzen Hans Regel BetriebsgmbH and Österreichische Salinen AG v. Finanzamt Linz, ECJ Case Law IBFD.
39. Barbier (C-364/01), para. 55.
40. BE. ECJ, 25 Oct. 2007, Case C-464/05, Maria Geurts and Dennis Vogten v. Administratie van de BTW, registratie en domeinen und Belgische Staat, para. 6, ECJ Case Law IBFD.
41. DE. ECJ, 19 July 2012, Case C-31/11, Marianne Scheunemann v. Finanzamt Bremerhaven, para. 30, ECJ Case Law IBFD.
42. Geurts (C-464/05), para. 17.
43. Scheunemann (C-31/11), para. 16.
ent from what the ECJ decided in *Barbier*, where it concluded that the free movement of capital was applicable without even considering the free movement of workers, as mentioned in section 4.3.44

Since the freedom of establishment does not apply to non-Member States, it has a restrictive scope. As a result, it does not eliminate discrimination where third states are involved. An example of this conclusion is found in *Scheunemann*, wherein the ECJ concluded that:45

[... ] article 49 TFEU does not apply in a situation such as that at issue [... ] and the freedom of establishment does not contain any provision which extends the scope of that chapter to cover situations concerning a shareholding in a company which has its registered office in a third country [... ] and, as it is the case before the referring court concerns a shareholding in a capital company which has its registered office in Canada.

The shareholding percentages in these two cases are important in deciding which freedom is applicable, i.e. the freedom of capital or the freedoms of establishment. This will be discussed in section 4.5.

4.5. Free movement of capital and freedom of establishment

The difference between the freedom of establishment (article 45 of the TFEU) and the free movement of capital (article 63 of the TFEU) is important, given the differing territorial scope of these articles. Since the free movement of capital provides for extensive protection, which even covers third-country situations, as discussed in section 4.2., taxpayers tend to invoke this freedom the most. The dividing line, however, between these two freedoms is not always crystal clear.

In short, the national provisions fall within the scope of the rules on establishment where they concern shareholdings giving rise to a certain level of control or influence over the decisions and activities of the company. The *Holbäck* (Case C-157/05)46 case provides an example of how the dividing line between capital movement and establishment is determined.52 When the *object of the law*, its *purpose*, clearly enables the relevant applicable freedom to be determined, the *in abstracto* *legal approach* should be followed exclusively (for example, it is designed to apply to holdings giving the holder a definite influence over the decisions of the company – it applies only to group companies, or intra-group dealings – or, in contrast, only to minority shareholdings). If it is not clear by the *in abstracto* *legal approach* which freedom is applicable, then the *in concreto* *factual approach* should be followed exclusively, meaning that one should take into account the concrete facts of the case to determine the applicable freedom (for example, if the company owns more than 50% of its subsidiary this leads to the conclusion that it falls within the freedom of establishment; a portfolio investment, however, implies that article 63 of the TFEU is applicable). Finally, where there is general legislation targeting all shareholders or participants, however big or small, a factual analysis is used. Therefore, if the facts of the case reveal definite shareholder influence, as in *Holbäck*, then only the freedom of establishment is at stake. In respect of a portfolio investment, however, the free movement of capital applies.48 This same factual analysis applies in a *third-state context*.49

4.6. Free movement of capital and Directive 88/361

The prohibition in article 63 of the TFEU is framed in a clear and imperative way, meaning that it has direct effect. This was established by the Court in *Bordessa* and in *Sanz de Lera* (Joined Cases C-163/94, C-165/94 and C-250/94) in respect of third-country situations.50 It is important, however, to keep in mind that the Treaty provisions on the free movement of capital were not initially normative enough to be directly invoked51 and secondary legislation was used to specify the regulatory framework for the term “freedom of capital”. Therefore, pursuant to settled ECJ case law, article 67(1) of the Treaty has been implemented by several directives, in particular Directive 88/361.52 Article 1(1) of Directive 88/361 provides that:

[... ] without prejudice to the following provisions, Member States shall abolish restrictions on movements of capital taking place between persons resident in Member States. To facilitate application of this directive, capital movement shall be classified in accordance with the nomenclature in Annex I.

The aforementioned Annex is entitled “Nomenclature of the capital movements referred to in article 1 of the Directive”. The second category thereof concerns investments in real estate and the eleventh category, entitled ‘personal capital movements’, includes inheritances and legacies. In all of its cases, the ECJ has referred to this Directive, despite the fact that the Directive has been repealed. Consequently, this Directive is referred to when the ECJ examines (and concludes) that national inheritance tax provisions should be decided upon on the basis of the free movement of capital.

4.7. Grandfathering clause, free movement of capital and the phrase “including real estate”

Finally, one important consideration should be mentioned stemming from article 64 of the TFEU and the *Welte* case. It is true that some provisions of the free movement of capital allow Member States to impose or, in practice, maintain restrictions on the free movement of capital in third-country situations through grandfathering clauses.53 Article 64 of the TFEU, for example, provides that Member States can maintain any restrictions that existed on 31 December 1993 in respect of movements of capital.

---

44. DE: ECJ, 27 Apr. 2010, Case C-310/08, Vera Mattner v Finanzamt Velbert, para. 20, ECJ Case Law IBFD.
45. Scheunemann, (C-31/11).
46. DE: ECJ, 24 May 2007, Case C-157/05, Winfried L Holbäck v Finanzamt Salzburg-Land, ECJ Case Law IBFD.
47. See Barnard & Peers, supra n. 20, at p. 451.
48. BE: ECJ, 4 June 2009, Joined Cases C-439/07 and C-499/07, Belgische Staat v KBC Bank NV and Beleggen, Risicokapitaal, Beheer NV.
49. A different approach seems to have been adopted by the Netherlands *Hoge Raad*. See NL HR, 26 Sept. 2008, No. 43339, BNB 2009/24.
50. See Barnard and Peers, supra n. 20, at p. 453.
51. Navez, supra n. 16, at p. 86.
53. See Terra & Wattel, supra n. 32, at p. 76.
to or from third countries, involving direct investment – including real estate. Does this mean that in respect of an estate in Switzerland, for example, the Member State at issue can maintain restrictions based on art. 64 of the TFEU, which includes the phrase “including real estate”? The first category of Annex I of Directive 88/361 refers to direct investments and the second to investments in real estate. In Welte, the ECJ agreed with Advocate General Mengozzi, who opined that the phrase “direct investment – including in real estate” concerns only investments in real estate that constitute direct investments falling under heading I of Annex I to Directive 88/361. As a result, and given that inheritances, legacies, gifts and endowments are mentioned in the fourth and second case of the eleventh category of Annex I, which is entitled “Personal capital movements”; article 64 of the TFEU is not applicable.

5. The Definition of the Term “Inheritance Tax”

5.1. Inheritance tax

Despite the fact that total revenue from inheritance taxes, including purely domestic cases and cross-border cases, amounts to less than 0.5% of total tax revenue, 15 Member States continue to impose an inheritance tax. Other states levy an estate tax or “de facto” inheritance tax the characteristics of which are similar to the estate tax. The European Commission Communication mentions that 18 Member States levy specific taxes upon death.

It is true that ECJ case law does not provide for a definition of “inheritance tax” and national provisions are examined on a case-by-case basis. The latter is based on the fact that ECJ case law represents the “negative harmonization” of taxes, meaning that any positive harmonization is, in principle, prohibited. As can be gleaned from section 4., the ECJ examines specific inheritance tax provisions in order to determine whether they fall under a fundamental freedom. The ECJ is not, however, allowed to interpret national law. Nevertheless, in most ECJ cases, the nature of the tax levied was not under dispute.

5.2. Inheritance and gift taxation

The lack of positive harmonization of inheritance tax laws has allowed inheritance tax laws to diverge in the Member States that do levy tax on inheritances. Due to the differences in these inheritance tax frameworks, several problems arise. As mentioned in section 4.1., the fundamental freedoms of the European Union, and especially the free movement of capital, provide, in most instances, effective solutions to problems arising from the parallel application of inheritance taxes. Furthermore, since fundamental freedoms are interpreted broadly, the ECJ’s interpretation of the nature of an “inheritance tax” is also very broad, allowing it to cover taxes that, under national legislation, are not classified as “inheritance taxes”.

For example, the ECJ applied the concepts of inheritance taxation to a discriminatory gift taxation in the Mattner case, stating that:

Like the tax charged on inheritances, which consist in the transfer to one or more persons of assets left by a deceased person and likewise fall under that heading of Annex I to the directive […], the tax treatment of gifts, whether they are gifts of money, immovable property or movable property, therefore comes under the Treaty provisions on the movement of capital, except where their constituent elements are confined within a single member state. This means that, according to ECJ case law, the term “inheritance tax” includes gift taxation. It is also mentioned in the Commission Staff Working Paper on non-discriminatory inheritance tax systems accompanying the Commission Recommendation that:

[…] [f]or reason of simplicity, the inheritance tax as used in this document also includes gift taxes […]. Furthermore, the jurisprudence of the Court of Justice of the European Union (Court) treats inheritance and gift taxes according to the same criteria.

Also relevant is the Commission v. Spain decision, which was decided on the basis of the freedom of capital, since Spain applied the same tax treatment to both inheritances and gifts, and Commission v. Germany ( Case C-211/13 ), which also dealt with inheritance and gift taxation. Of note is that while the Commission v. Germany case was decided only one year after the Welte case and the ECJ examined the same legislation, they looked not only at inheritance tax, but also at gift tax legislation.

The most recently decided gift taxation ECJ case is Q (Case C-133/13), wherein, following the above trend, the ECJ applied the same concepts and arguments of inheritance tax cases to gift taxation.

Therefore, gift taxation falls under the definition of the term “inheritance tax” and the same concepts, arguments and conclusions apply. Of note is that the EC Recommendation explicitly mentions in article 1.2. that “[t]his Recommendation relates by analogy to gift taxes, where gifts are taxed under the same or similar rules as inheritances”.

5.3. Inheritance and estate tax

While the comparison between inheritance and gift taxes is relatively straightforward, the issues surrounding estate taxation are more complicated, since both taxes are considerably different. Inheritance taxes are generally designed with the heirs as the reference point. In contrast, under estate taxes, in most instances, the deceased is the tax subject (although, in a few states, both the heirs and the estate are used as the tax subject to establish taxing jurisdiction). The taxable event of inheritance tax is the enrichment of the heir/beneficiary, while the taxable event in respect of estate tax is the mere transfer of property.

59. Mattner (C-510/08), para. 20.
60. Commission v. Spain (C-127/12).
61. DE: ECJ, 4 Sept. 2014, Case C-211/13, Commission v Germany, ECJ Case Law IBFD.
62. NL: ECJ, 18 Dec. 2014, Case C-133/13, Staatssecretaris van Economische Zaken and Staatssecretaris van Financiën v. Q, para. 18, ECJ Case Law IBFD.
63. See Copenhagen Economics, supra n. 2, at p. 17.
Nevertheless, the distinction between inheritance taxes and estate taxes is often not clear, as both direct taxes have some common characteristics, both look to the net value of the property that is transferred to the heir/estate recipient, which constitutes the taxable amount and both apply a progressive rate.

Three main reasons justify the inclusion of transfer taxes within the scope of the term “inheritance tax” for EU purposes. Firstly, discriminatory tax treatment may arise even when using the recipient of the property as the reference point. This means that it is possible for Member States to discriminate against estate beneficiaries, such as heirs.

Secondly, EU terms should be interpreted “autonomously”, i.e. not based on the particular characteristics of domestic laws. Given the differences between estate and inheritance taxes in Europe, estate taxes should fall within the meaning of the term “inheritance tax”, which, consequently, should not be literally interpreted based on national law concepts.

Finally, and most importantly, the Commission Recommendation regarding relief for double taxation of inheritances defines the term “inheritance tax” broadly, thus including estate tax. Specifically, article 2(a) of the Recommendation reads as follows:

[...] ‘inheritance tax’ means any tax levied at national, federal, regional, or local level upon death, irrespective of the name of the tax, of the manner in which the tax is levied and of the person to whom the tax is applied, including in particular estate tax, inheritance tax, transfer tax, transfer duty, stamp duty, income and capital gains tax.

Since it is irrelevant on whom and the manner in which the inheritance tax is levied and given that the estate tax is explicitly included in the definition of the aforementioned article, the estate tax legislation falls within the general EU definition of “inheritance tax”.

5.4. The requirement of a cross-border element

The final aspect to be addressed is the requirement of a cross-border element in order to trigger the EU Freedoms. The author considers this requirement as falling within the “inheritance tax” term, although it is true that this condition can also be considered independently. The Court noted in the very first case on inheritance taxation that “inheritance comes within the compass of the provisions on free movement of capital once its constituent elements are cross-border.”

This can be because:
- the deceased or heirs are non-resident taxpayers;
- the estate is located outside the territory of the Member State where the deceased or heirs were living;
- the estate is located outside the territory of the Member State and the deceased or heirs were living in the Member State where the estate is located; or
- only the heirs or deceased were living in the Member State where the estate was located.

For example, the fact that a Belgian resident in Geurts inherited the shares of the company of her husband, located in the Netherlands, was enough for the ECJ to consider the national tax scheme under the freedom of establishment. In Mattner (Case C-510/08) a non-resident taxpayer (living in the Netherlands) acquired, from his non-resident mother (also living in the Netherlands), an estate in Germany as a gift. From the German perspective, the residence of the beneficiary and the “gift giver” were the necessary cross-border elements. Consequently, the ECJ decided the case on the basis of the free movement of capital. The Welte case is similar to the Mattner case, but the deceased was living in a third country, i.e. in Switzerland and, therefore, the free movement of capital in the third-country context was applicable.

6. ECJ Analysis of Discrimination in Inheritance Tax Cases (First Step)

6.1. Key categorizations

6.1.1. Categorization based on the type of discriminatory treatment

The Copenhagen Economics study concluded that Member States’ inheritance tax rules are in conflict with the rules on the free movement of capital if they:

1. provide for requirements that are less favourable in respect of some assets that are part of the inheritance when these assets are situated abroad;
2. limit the deductibility of debts or liabilities relating to assets forming part of the inheritance in respect of non-residents;
3. apply a less favourable inheritance tax treatment to legacies made to a charity established in another Member State (rather than a domestic charity),
4. offer more important personal reductions to resident taxpayers.

Included in the first category are the Geurts, Jäger (Case C-256/06), Halley (Case C-132/10), Scheunemann, Commission v. Spain and Q decisions. The Barbier, Eckelkamp (Case C-11/07), and Arens-Sikken (Case C-43/07) decisions fall under the second category. In the third is the Werner (Case C-25/10) case, and in the fourth are the Matter, Welte, Commission v. Spain (though, as previously mentioned, it can also be considered to fall under the first category) and Commission v. Germany (Case C-211/13) decisions.

Therefore, the ECJ has definitively decided 13 inheritance and gift taxation cases. It is also of note that the European Commission has decided to refer Greece to the ECJ regarding its inheritance taxation of bequests to non-profit organizations in another Member State or EEA state.
seems that the Greek legislation resembles the German legislation in the Werner case, since the Greek legislation applies a less favourable inheritance tax treatment to bequests made to non-profit organizations established in another Member State (rather than domestic ones). Therefore, it could be considered as falling under the third type of discriminatory treatment.

While, as seen above, the Commission Staff Working Paper and Copenhagen Economics Study divide discrimination into four categories, a simpler approach might be to merge the fourth category of national inheritance rules (the granting of more significant personal reductions to resident taxpayers) with the first category of national tax rules (where requirements are less favourable in respect of some assets when those assets are situated abroad), since the granting of a tax-free allowance pursuant to ECJ case law has the same tax consequences as an exemption of part of the estate value from the tax base. Moreover, given that the treatment of allowances granted by the state of residence in personal taxation cases is similar to the neutrality argument raised in Amurta (Case C-379/05), as seen below, this category should not be distinguished from the first due to the limited scope of unilateral relief granted by the state of residence.

Furthermore, the third category is unnecessarily specific, given that only one ECJ decision refers to the tax treatment of legacies to foreign charitable institutions and that this category refers to arrangements in states that tax on a worldwide basis. From this, it appears that this category could be changed to “national tax schemes that apply a less favourable inheritance tax treatment for beneficiaries residing or established in another Member State”, in order to have a wider scope. Finally, when the cross-border element is the residence of the beneficiary and not the location of the estate, this category cannot be the same as the first category, since the point of reference of the latter category is the location of the immovable property. It should be mentioned that if the ECJ decides that Greece infringed EU law by applying its inheritance tax legislation to bequests to non-profit organizations in another EU or EFTA state, this type of discrimination could fall under the last category.

**6.1.2. Categorization based on which Member State discriminates**

Another useful distinction is to examine which state discriminates in a cross-border situation. This distinction can be used to examine the justifications presented by Member States, as seen in the following. Consequently, the discriminatory treatment by the state of residence (relevant link: the residence of the deceased/heirs) in the Geurts, Jäger, Werner, Halley, Scheunemann and Q cases could be included in this new category, which can be called “discriminatory treatment by the residence/home state”.

When this occurs in the Member State of the situs of the immovable property, as seen in the Barbier, Eckelkamp, Eckelkamp, Arens-Sikken, Werner, Mattner, Welte, Commission v. Spain and Commission v. Germany cases, it could be included in a category entitled “discriminatory treatment by the situs state”.

**6.2. The concepts of “restriction” of fundamental freedoms and “indirect discrimination”**

Legislative classifications on grounds of cross-border movement are, in theoretical terms, seen as a prima facie restriction on free movement. In addition, any legislative classification that has the effect of discouraging cross-border activity also qualifies as a prima facie restriction. It can be seen from this that the ECJ employs a broad interpretation of the concept of discrimination and the prohibition of obstacles to free movement. It should be noted, however, that with regard to the freedom of capital, direct discrimination is only rarely identified (i.e. on the basis of nationality). Therefore, the inheritance tax laws of the Member State most commonly restrict the EU freedom at stake. Hence, when national (tax) legislation constitutes such a restriction, it is considered to prohibit, impede or make less attractive the exercise of a fundamental freedom, as seen, for example, in the Deutsche Shell case.

The ECJ applies the restriction approach in Barbier and this concept was later confirmed in Jäger. Consequently, the ECJ held that the fact that “the grant of tax advantages in relation to inheritance tax is made subject to the condition that the asset acquired by inheritance be situated in the national territory constitutes a restriction on the free movement of capital prohibited, in principle, by Article 73b(1) of the Treaty”. The concept of restrictive national inheritance tax legislation was also confirmed in Eckelkamp, Arens Sikken, Mattner, Missionwerk, Halley and Welte.

The ECJ, however, accepted that there was indirect discrimination (based on the residence of the beneficiary) in Geurts, stating that: [...] that legislation introduces, for the purpose of granting a tax benefit, indirect discrimination between taxpayers on the basis of the place of employment of a certain number of workers in a
certain period, discrimination which is liable to hinder the exercise of freedom of establishment by those taxpayers.

This also means that, in Scheunemann, the ECJ could have accepted the indirect discrimination of the national tax provision had the protection of the freedom of establishment been extended to third countries.

In order to decide whether there is indirect discrimination or a restriction of a fundamental freedom, the ECJ compares the domestic result to the cross-border situation. This type of comparison, however, can be confusing and will be discussed further in section 6.3.

6.3. Comparable situations

6.3.1. The scope of the comparability assessment

In almost all of its inheritance taxation decisions, the ECJ identified comparable purely internal and cross-border situations. The clearest example of two situations placed on the same footing is Welte. The dispute in this case was about the granting of a tax-free allowance of EUR 500,000 in favour of a taxpayer’s spouse where the inheritance involved at least one German resident. Welte mirrors the Mattner decision, which refers to gift taxation, but in Mattner the disadvantage was the granting of a lower allowance (EUR 3,500 instead of EUR 27,929). In this case, the residency of the heir or the deceased, being in Germany, was the condition for the granting of the tax advantage.

The following observations should be taken into account when considering the comparability test.

First, the situations that should be compared should be clarified. In principle, the ECJ compares the internal with the cross-border situation. In Welte, however, the ECJ not only compared an internal situation to a cross-border situation, but also compared two cross-border situations. Germany provided for a tax allowance of EUR 500,000 where there was a resident heir acquiring the inheritance from a deceased non-resident or where there was a non-resident heir acquiring the inheritance from a deceased resident. This type of comparison is not new, since it was already applied in the Cadbury Schweppes case

Secondly, Welte can be applied to all types of allowances granted to taxpayers in respect of inheritance taxation. If the national legislation places the internal situation on the same footing as the cross-border situation, then a failure to grant an allowance or the granting of a lower advantage may constitute a disadvantage. The amount of the tax allowance should, however, be taken into consideration. In Welte, for example, the amount was the same regardless of the taxable value of the inheritance and, furthermore, the calculation of the inheritance was not dependent on the residence of the persons involved. Furthermore, the benefit can take the form of an exception (for example, an exception granted to the spouse who inherits from the deceased).

6.3.2. Criteria employed for the comparability assessment

6.3.2.1. The object and purpose of the tax legislation

In order, however, to determine whether the national legislation places the internal situation on the same footing as a cross-border one, the object and purpose of the tax legislation should be taken into account. These points of reference were mentioned, for example, in X Holding (Case C-337/08). Usually, inheritance tax legislation mentions criteria such as the relationship of the persons involved and the value of the property, but not the residence of the persons involved. This may indicate that cross-border and internal situations are comparable based on the legislation’s object and purpose.

It should be noted that the aforementioned observations were confirmed in the most recent ECJ case, Q, with the fact that the ECJ decided that the cross-border and internal situations were not comparable, having examined the object and purpose of the Netherlands gift legislation, which aimed to protect the integrity of estates that were typical of the traditional Netherlands landscape (“landgoed”). This decision is interesting, since it is the only one in which the ECJ decided that the cross-border and internal situations were not comparable in light of the object and purpose of the Netherlands legislation. Moreover, under Netherlands legislation, a gift tax is levied on the value of what is obtained as a gift from a person residing in the Netherlands at the time of the donation. The law on the protection of nature lists a set of conditions that a property must meet in order to be designated as “an estate” in the context of that law. Such an estate must, inter alia, be situated in the Netherlands and be desirable as an object for the conservation of natural heritage. Under this law, the estate’s value for gift tax purposes may be reduced (or set at zero), depending on the specific characteristics of the property.

In this case, the ECJ decided that the object of the Netherlands legislation was the protection of the “landgoed” against any parceling or fundamental changes in nature, and that this was enough for the ECJ to conclude that the ownership situation of an estate under the UK “landgoed” is objectively different from that of an estate in the Netherlands landscape. In contrast, while Q resembles Jäger, the ECJ accepted the existence of a comparable situation and rejected a justification based on social factors. These two cases are, however, quite different and their difference underlines the importance of the comparability test “in the light of the object and the purpose of the legislation”, since each time the ECJ had to identify the substance of the inheritance legislation. Finally, it should be noted that Jäger was decided in 2008 by the Third Chamber, while Q was decided six years later by the Second Chamber.

87. Welte (C-181/12), para. 53.
88. UK: ECJ, 12 Sept. 2006, Case C-196/04, Cadbury Schweppes plc and Cadbury Schweppes Overseas Ltd v. Commissioners of Inland Revenue, ECJ Case Law IBFD.
90. Q (Case C-133/13), para. 22.
91. Jäger (C-256/06), para. 47.
6.3.2.2. The method of calculation of the inheritance class and the applicable tax rate

The “method of calculation of the inheritance class” and "the tax rate" are two more indicators that should be taken into account, apart from the object and purpose of the legislation, in assessing the compatibility of the situations. Therefore, if the method of calculation of the class and the inheritance tax rate follow the same rules for cross-border and internal situations, then the non-granting of an allowance or the granting of a lower allowance may not be justified.

6.3.2.3. The taxation of the immovable property as such

When it comes to discrimination by the situs state, the taxation of the immovable property of the deceased in the situs state as such also seems to indicate that the two situations are comparable. For example, this was explicitly mentioned in Eckelkamp in paragraph 63 and Arens-Sikken in paragraph 57. Taxation based on the situs principle makes the domestic and cross-border situations comparable and, therefore, an advantage (for example, the deductibility of the relevant debt) should not be denied in respect of cross-border inheritance. This line of thought is similar to the Denkavit (Case C-170/05)92 case, which refers to discriminatory dividend taxation. Denkavit can literally be applied to inheritance taxation, since both situations (internal and cross-border) are subject to inheritance tax.

The taxation of inheritances and gifts, as such, was also mentioned in Welte and in Commission v. Spain.93 In Welte, Germany provided a tax-free allowance in favour of the spouse, where the inheritance involved at least one resident. In fact, Germany treated domestic and cross-border inheritances the same except in respect of granting the tax-free amount (presumably because if at least one of the persons involved was resident in Germany, Germany had the right to tax as the resident state). Since the calculation of the taxable amount and the (source) taxation was applied irrespective of criteria such as the residence of the persons involved, Germany should also have provided the tax-free allowance in respect of purely cross-border situations, i.e. when the heir and the deceased were living outside of Germany. A similar benefit is provided by the Netherlands Inheritance Tax Law, i.e. an exception (as well as the German tax-free allowance) it is not relevant if the property is effectively taxed. Since the calculation of the tax base does not change under the domestic and cross-border situations, the benefit (exception/tax-free allowance) should be granted. It is obvious, therefore, that such an exception is granted, it will be granted proportionately based on the value of the immovable property that is located in the Netherlands.95

7. Conclusion

In the first part of this article, the author comprehensively examined the first step of the ECJ analysis of the discriminatory treatment of cross-border inheritances. The most common EU fundamental freedom at stake and its personal and geographical scope, as well as its interaction with other EU freedoms was identified. The author commented on the 13 ECJ cases on inheritance taxation and provided a comprehensive review of the concept of restriction and “indirect discrimination”, as employed by the ECJ. Consequently, the first part examined the consistency of the ECJ comparability analysis for the purpose of the identification of comparable internal and cross-border situations.

The other two parts, i.e. the overview of justifications and the role of the proportionality principle will be examined in Part 2 of the article, to be published in European Taxation 12 (2015). In Part 2 an overview of the justifications invoked by Member States will be provided and the role of the proportionality principle will be examined and commented on. Part 2 also includes an analysis on the requirement for a direct link between debts and immovable property and comments on the non-application of the Schumacker doctrine in ECJ inheritance taxation cases.

The author considers that the comparison of ECJ inheritance taxation case law to PIT and CIT case law is useful in obtaining a better understanding of ECJ concepts and, therefore, several references to PIT and CIT cases are included in both parts.

93. Commission v. Spain (C-510/08).
94. For more see C. Martens & J von Straaten, Wegwijzer in de Successiewet en de Wet op belastingen van rechtsverkeer, p. 138 (Sdu Fiscale & Financiële Uitgevers 2004).
95. For more see H. Breda, 3 Jan. 2014, AWB-12_4836, para. 4.5; NL: HR Opinion of Advocate General Wattel, 27 June 2014, 14/00521, para. 9.7; and NL: HR, 9 Jan. 2015, 14/00521, BNB 2015/87.